

COLLOQUY

AFTERNOON SESSION

January 15, 1997

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3 MR. HAGENS: Does Your Honor have a copy of
4 Exhibit 194?

5 THE COURT: I don't, but I can in just a moment.

6 MR. HAGENS: Let me just tell you in substance
7 what it says. It's a declaration by Mr. Honeywell in
8 the Skagit County action 93-2-01050-6, and this was
9 given in connection with a court down the hall here in
10 front of Judge McKeeman to secure insurance coverage for
11 its defense in this case and possible coverage for any
12 judgment that might be rendered against it.

13 This declaration, it says in paragraph one, under
14 penalty of perjury, "I reviewed the documents produced
15 in discovery in the Halverson suit to determine whether
16 there was any documentary evidence that the county had,
17 directly or indirectly, participated alone or with Dike
18 District Number 12 and 17 in the modification, repair or
19 augmentation of the Skagit River dike system,
20 particularly in the areas of Mount Vernon and Burlington
21 for the period from 1955 through 1990."

22 Goes on to say, "I do not contend or believe my
23 review to be exhaustive, but I was able to identify many
24 documents which would arguably support such a
25 proposition. I've prepared a list of events, a true and

1 correct copy of which is attached as Exhibit 30. I
2 prepared a copy of the predecessor to Exhibit 30
3 (containing all activities but, missing only several of
4 the flooding events listed in the Kunzler book) to all
5 of the" blank, and I've redacted it to eliminate any
6 mention of any insurance.

7 He mentions he also turned over the Kunzler book,
8 and then in his attached Exhibit 30 he has some 60
9 improvement projects listed, many of which Mr. Regan
10 discussed, several of which are expert, Dr. Mutter
11 reviewed, as well as Dr. Mutter reviewed this exhibit as
12 well, so you have -- what we believe is an admission.

13 THE COURT: I don't have it. I'm reading
14 something that's not part of whatever it is, trying to
15 follow along and, obviously I can't --

16 MR. SMART: He wants the exhibit.

17 MR. HAGENS: Exhibit 194, Plaintiff's.

18 THE COURT: We're getting it right now.

19 All right, counsel. One second and we'll be back

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on track.

All right. And this is obviously a document I had reviewed before because there had been a previous motion with respect to --

MR. SMART: There was argument. Your Honor ruled that it wasn't admissible in the testimony of Mr.

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Regan.

THE COURT: All right.

MR. HAGENS: But it didn't prevent Mr. Regan from testifying about the existence of the declaration, and so -- or at least mentioning that he had reviewed it.

THE COURT: Right.

MR. HAGENS: So we got that far.

THE COURT: So, again, the gist of your use of -- your intended use of this?

MR. HAGENS: Would be to ask the witness, "Have you reviewed this? Have you seen this exhibit?" "Yes." "What does it say?" "It's a declaration under penalty of perjury made to a judge down the hall from here wherein an attorney for Skagit County states and attaches some 60 improvement projects that he states are documentary evidence that the county had, directly or indirectly, participated alone or with Dike District 12 and 17 in the modification, repair or augmentation of the Skagit River diking systems for the period from 1955 through 1990.

Now, they're telling this jury that Skagit County had nothing to do with these levees, that these are all the independent work of the dike districts, or they were compelled to do it by the State of Washington or the Army Corps of Engineers, and against their will

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these people -- they argue, you know -- giving the impression to the jury that these things -- they had no connection with these levees whatsoever. So on the one hand they're telling the jury Skagit County's not involved and the other hand they go down to Judge McKeeman when they need and want to obtain insurance coverage and, under penalty of perjury, submit a declaration.

Now, my point is, first of all, is this relevant? There's no question, under 401, that if it tends to prove a fact or disprove a fact, that it's going to -- an issue, that it's going to be relevant.

Two, is it hearsay? Well, it's not an out-of-court declaration so I argue that it's not hearsay, but even if it is hearsay, you go to Rule 703, and Rule 703 plainly says "The facts or data in the particular case upon which an expert bases an opinion or

18 inference may be those perceived by or made known to the
19 expert at or before the hearing. If the type of the --
20 if of the type reasonably relied upon by experts in the
21 particular field in forming opinions or inference upon
22 the subject, the facts or data need not be admissible in
23 evidence. " Meaning that the material seen by the expert
24 doesn't have to be admissible.

25 So, that being the case, I ought to be permitted

1 to ask this witness, well, did you -- you mentioned you
2 had seen the Mark Honeywell declaration, attorney for
3 Skagit County. What did you learn from that that
4 related -- that showed its -- Skagit County's
5 involvement and participation in the construction,
6 maintenance, modification, repair or augmentation of the
7 dikes, and that's what I'm being asked to -- permitted
8 to do and that's the evidence I would hereby offer this
9 Court as a formal offer of proof, and the witness I
10 think would then say, well, yeah, I've reviewed it, and
11 he reviewed many of the projects we did, and you see
12 that Skagit County is involved in many of those
13 projects, just as their own attorney did when he was
14 looking for insurance coverage, and that would be the
15 purpose of the testimony, Your Honor, because they stood
16 up here in front of this jury and said we're uninvolved,
17 we don't have anything to do with the dikes. You go
18 down the hall and tell a different story to Judge
19 McKeeman, so that would be the purpose of the evidence,
20 Your Honor.

21 And I would point out that there is a ALR -- I
22 was just handed a brief. I stood up here and I got
23 handed a brief now that's, I don't know, a quarter inch
24 thick. They must have their forces burning the midnight
25 oil on just about everything on this case, and it says

1 -- but I want to cite the Court to 63 ALR 2d, 412, at
2 417. "Generally it may be said that a pleading
3 containing an admission against the interest of a
4 pleader is admissible in evidence on behalf of a
5 stranger to the proceeding in which the pleading was
6 filed." That's 64 -- annotation -- excuse me, 63 ALR
7 2d. 412, 417, meaning that a stranger to that proceeding
8 can use the evidence, even though we weren't a party to
9 this coverage dispute, Your Honor.

10 And they have gotten up here and represented time
11 and time again that this thing is -- shouldn't be
12 admitted, and I can understand the box they're in but
13 they put themselves in it, Your Honor, so we don't think
14 they should be entitled to talk out of both sides of
15 their mouth is what it gets down to.

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THE COURT: Counsel.

MR. SMART: Yes. Thank you, Your Honor.

I think that Mr. Hagens' argument specifically identifies the danger of what he's proposing. He's asking the Court to specifically interject something that is related to insurance coverage into the case.

And a number of points need to be made with respect to this particular document. The first two points have already been addressed. Number one, Mr. Hagens has previously argued and the Court has ruled

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that no pleadings should come in from another case. This case not only is a pleading in another case, a coverage case between Skagit County and various insurers, but it's -- but that case and the date in which the pleading was filed referenced the federal court action, not the state court action and, as Your Honor is completely aware, the duty to defend and the duty -- particularly the duty to defend, which was the issue in that coverage case primarily, and the purpose for Mr. Honeywell's declaration is established when documents might be alleged or arguably be submitted to establish propositions which are not taken for the truth of the matter at the time but simply are related to allegations made in the complaint, so here we have the complaint in federal court making allegations by the plaintiff. And the purpose for Mr. Honeywell's declaration at the time was to tell the court that he had reviewed documents produced in discovery which might arguably support plaintiffs' contentions. He wasn't establishing that they proved any one thing or that he had any personal knowledge about them or anything in that regard, but it -- specifically on page two of his declaration it says that there were documents which might arguably support propositions asserted by the plaintiff.

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Now, that -- Mr. Honeywell doesn't have any personal information concerning those documents but is simply submitting them to the court for the court's evaluation of whether or not they might be used to assist the plaintiff in the case of proving a matter that might be covered. They couldn't -- Mr. Honeywell's opinion concerning those documents couldn't possibly have any relevance in this case.

Mr. Hagens admits in his argument that Mr. Mutter has reviewed some of these documents. In fact, we've had testimony of the documents that were included with respect to Mr. Honeywell's declaration, so he's already got that in. Mr. Mutter has already reviewed the

14 documents.

15 The sole purpose for offering to admit this
16 particular item or have Mr. Mutter testify about it is
17 to interject an insurance-related matter which Your
18 Honor has previously ruled on in motions in limine.
19 It's absolutely standard that you want to keep the fact
20 of insurance or insurance litigation out of this
21 particular matter.

22 So, number one, the argument violates the two
23 previous orders that the Court has ruled on, that it's a
24 pleading in another case, and, number two, that it's a
25 pleading related to insurance matters that shouldn't be

1 injected. Number three, there's no reason to have it in
2 this case because the same documents that apparently Mr.
3 Honeywell looked at the same documents that Mr. Mutter
4 and Mr. Regan said they reviewed independently.

5 The third factor, Your Honor, is that the Court
6 has to make a determination whether this kind of thing
7 is something that's reasonably relied by the experts.
8 They're not relying on Mark Honeywell, a lawyer who
9 doesn't have any independent knowledge on the dikes,
10 they're relying on their independent review of the
11 documents, so the risk, of course, is to interject
12 something that shouldn't be in the case which would be
13 at variance with the Court's --

14 THE COURT: And, Mr. Hagens?

15 MR. HAGENS: Yes, sir.

16 THE COURT: Refresh my recollection, to what
17 extent did Mr. -- Mr. Regan's testimony was what?

18 MR. HAGENS: About the Honeywell declaration?

19 THE COURT: How far did we get on that?

20 MR. HAGENS: Got that he had reviewed the
21 Honeywell declaration, and then you wouldn't allow
22 anymore testimony. That's correct, Your Honor.

23 THE COURT: That's it. That's where we ensued --
24 where the argument ensued about whether we got into the
25 contents of it.

1 MR. SMART: Exactly.

2 THE COURT: That was it.

3 MR. HAGENS: He said he relied on it in part.

4 THE COURT: It was nothing more than that.

5 MR. HAGENS: Nothing more than that at that
6 particular point, Your Honor.

7 MR. SMART: And the Court ruled that it couldn't
8 come in because it wasn't the kind of document that
9 he --

10 MR. HAGENS: Well, wait a second. On the
11 question of reasonable reliance, you mean an expert

12 can't rely on a declaration under penalty of perjury of
13 a lawyer making a statement in open court. That's the
14 aversion, apparently, of Skagit County.

15 THE COURT: His position is to formulate a
16 technical or expert opinion with respect to hydrological
17 issues and so forth, which is what he's a qualified
18 expert in. He's making the point he wouldn't rely on an
19 affidavit or declaration of an attorney, but, rather,
20 what is he's relying on is the same list or set of
21 documents that the attorney claims to have at least
22 perused and those form the basis of his expert opinion,
23 not the declaration of the attorney.

24 MR. SMART: That's right, but the testimony is
25 not being offered for hydrological opinion, it's being

1 offered on the basis of what is the relationship between
2 the county and the dike district. There's no
3 hydrological opinion there, and what the witness is
4 asked to do is to --

5 THE COURT: Okay.

6 MR. SMART: Well, in response to that, Your
7 Honor, he is asking that it be admitted --

8 MR. HAGENS: I'm not asking that it be admitted.
9 I want to disabuse counsel of the argument that I'm
10 asking that it be admitted. I have not asked that. We
11 had subpoenaed Mark Honeywell and maybe we'll try to get
12 it in through him.

13 THE COURT: You've have that?

14 MR. HAGENS: I don't know what I got. Did I get
15 served with something?

16 THE COURT: That's what you just got.

17 MR. HAGENS: Doesn't surprise me, Your Honor, but
18 the only point I would make, Your Honor --

19 MR. SMART: Let me know when you're done, Carl.

20 MR. HAGENS: We're not offering the exhibit. We
21 were asking the witness to review the same documents
22 that Mr. Honeywell did.

23 THE COURT: If you ask the witness did he review
24 the same document -- you're asking him if he reviewed
25 the same documents Mr. Honeywell reviewed. That -- that

1 isn't -- the essence of what I thought you were doing
2 here.

3 MR. HAGENS: Did you see the -- you have to start
4 someplace.

5 THE COURT: How far do you want Mr. -- Dr. Mutter
6 to be able to go with the Honeywell exhibit?

7 MR. HAGENS: "Did you see the Honeywell
8 declaration?" "Yes." "And did you review the Honeywell
9 declaration?" "Yes." "Did you, in particular, review

10 some of the projects that were listed by Mr. Honeywell
11 in his declaration?" "Yes." "And what did you learn
12 from your review?" "I learned that -- from those
13 exhibits and others that" --

14 THE COURT: What did you learn from your review
15 of the document?

16 MR. HAGENS: Yes, of the exhibits listed by Mr.
17 Honeywell, what did you learn from those exhibits.

18 THE COURT: Referenced by them. They're not
19 listed.

20 MR. HAGENS: Right. "What did you learn from
21 those exhibits?" "I learned that the county was
22 designing the project. I learned that the county was
23 handling the estimation of the materials and labor. I
24 learned that the county was involved in all the other
25 aspects of these things."

1 THE COURT: I guess if that's the only place
2 you're going with it, how is the Honeywell document
3 important?

4 MR. HAGENS: Because it shows to me that he came
5 to the same conclusion that Mark Honeywell did.

6 THE COURT: But if you don't admit it, the jury's
7 not going to know what that conclusion was.

8 MR. HAGENS: We're going to call Mr. Honeywell
9 for that.

10 THE COURT: Right, I understand.

11 MR. HAGENS: I didn't know that this motion had
12 been granted, or something in my --

13 THE COURT: No, no, we haven't dealt with it
14 yet. It's coming up. It's noticed for the 23rd.

15 MR. SMART: Your Honor, let me point out that he
16 has already asked everyone of those questions with the
17 witnesses, with the documents, and got the testimony.

18 THE COURT: You have. And I'll make this short
19 and sweet. I'm going to stick with my same ruling I
20 made before because I believe, I believed at that time
21 and I believe now that unless there's some other legal
22 objection, and I haven't -- I just perused this, I
23 assumed at that point in my thinking if they want to get
24 this in, if it can be brought in at all, it has to be
25 done through Mr. Honeywell.

1 MR. HAGENS: Okay.

2 THE COURT: And, there again, I'm not prejudicing
3 any party. I haven't made a decision. I haven't looked
4 at this enough to know that.

5 MR. HAGENS: I understand that.

6 THE COURT: To be consistent with the other
7 ruling and what you're trying to do, I don't see it as

8 being all that prejudicial to the plaintiff at this
9 point absent the Honeywell situation.
10 Do you see what I'm saying?
11 MR. HAGENS: Exactly.
12 THE COURT: So we'll leave it where we are.
13 MR. HAGENS: What about the Skagit County raising
14 of levees? That's what one of our witnesses has already
15 been allowed to testify to.
16 THE COURT: Refresh me of what was said about
17 that.
18 MR. HAGENS: He was on the stand. I said, "Are
19 you familiar with what they did up here in terms of
20 lowering levees? Tell the jury what it is they did."
21 "Well, they had a levee war going on up here.
22 One was higher than the other and one was forcing water
23 over the other levee so they made them lower their
24 levee," and he -- and that's what he testified to, and
25 they did lower their levee, and it meant that the water

1 went more or less evenly to both sides, and it was a way
2 to protect, make certain that nobody got an unequal
3 amount of flood waters. That was the purpose of the
4 testimony, that responsible government do those sorts of
5 things.

6 THE COURT: We ran into trouble with that one.
7 Wasn't there an objection interposed about that
8 conclusion?

9 MR. SMART: You're darn right. You're darn
10 right.

11 THE COURT: I think I sustained an objection on
12 that particular -- to take that last step, that either
13 one of those witnesses can tell us what responsible
14 government do.

15 MR. HAGENS: That was in response to his
16 objection. Why do I want to offer this? I want to show
17 what can be done to reduce the amount of flooding to
18 people.

19 The next step is when you're making the closing
20 argument, which is, "Wait a second, look what happened
21 here."

22 THE COURT: Implicit in my statement, I guess, is
23 a question to you.

24 MR. HAGENS: Yes.

25 THE COURT: With the recitation of facts that

1 you've just given, what's the grabber that you want to
2 get out of that line of questioning?

3 MR. HAGENS: I just want him to say they just
4 lowered the levees up here.

5 THE COURT: Without the actual --

6 MR. HAGENS: The explanation comes in the closing
7 argument.

8 MR. SMART: Well, Your Honor, it's highly
9 improper for him to ask this person what -- anything
10 about what a responsible government would do.

11 THE COURT: I think that's what I just cleaned
12 up. We won't do that.

13 MR. SMART: Let me tie up, Your Honor. We've
14 already got testimony in the case that the diking
15 district system in Snohomish County is different than in
16 Skagit County because there's a different system of dike
17 districts and different system with regard to Snohomish
18 County and its relationship to those dike districts than
19 in Skagit County.

20 There's clearly no relevance concerning what
21 happened in Snohomish County to what has happened in
22 Skagit County. The only issues in this case are do the
23 Skagit County dikes owned by Dike District 12 and these
24 other dikes affect a taking, not what could be done to
25 them to change them relative to some Snohomish County

1 action, because the system's different, dikes are
2 different, the river's different, and if we get into
3 that, think what will happen to the case, Your Honor.
4 We're going to have to call in a whole bunch of
5 witnesses to talk about those differences in Snohomish
6 County, which is going to protract this trial on beyond
7 who knows when. It just interjects something that's not
8 relevant, it's not necessary, and the sole purpose is so
9 that he can argue an irrelevant and -- and a point that
10 is not relevant to the law of this case, which is
11 something that -- a responsible government might do in
12 Snohomish County.

13 MR. HAGENS: Your Honor, first of all, I'm
14 entitled to whatever inferences I can draw out of
15 whatever evidence that comes into court, Your Honor.
16 The business about this being a -- opening up some
17 Pandora's box for other witnesses to come testify,
18 that's nonsense. They can explore with him if there is
19 a significance.

20 The only point I'm trying to make is government
21 have, in the past, attended to reducing levees to spread
22 out the impact more equitably, and that's the point of
23 the testimony.

24 THE COURT: I thought you also suggested a moment
25 ago or some point in this argument that it also forms

1 some sort of a comparative analysis in terms of how
2 diking and levee systems are maintained. What I'm
3 saying, I'm still trying to get you away from what

4 governments may have done or should do.

5 MR. HAGENS: It does deal with the height of
6 levees that can be maintained. In other words, Skagit
7 County had a choice. They didn't have to strengthen
8 these levees. They could have left them in the
9 condition they were, which would not have caused,
10 according to the expert testimony, as much problems for
11 our clients as they currently do in their strengthened
12 condition, as an indication of that is what happened
13 here in Snohomish County.

14 The other thing that happened which is unusual,
15 we had one witness that's been allowed to testify about
16 this and one that hasn't been allowed to testify about
17 the details of it. I can spend maybe five seconds on it
18 with this witness. "What happened?" They had -- they
19 reduced the levees, and that's exactly what Mr. Regan
20 testified to.

21 Now, I do think it has to do with the height of
22 the levees you maintain. That's a governmental
23 decision, it seems to me, we should be entitled to
24 show.

25 They talked about Ross and Baker Dams, Your

1 Honor. Those are I don't know how many miles up the
2 Skagit River, if you're talking distances apart.

3 THE COURT: They're not -- from my recollection
4 of the testimony, they're not owned or maintained by any
5 parties to this action.

6 MR. HAGENS: They're not owned or maintained by
7 any party to this action either, but yet they're going
8 to talk about Ross and Baker Dams that they claim are
9 irrelevant and -- I still don't understand the relevance
10 of Ross and Baker Dam, but they've been allowed to
11 testify to it. Maybe they can tie up the significance
12 of it when it comes time for final argument or
13 something. Maybe I can, maybe I can't, but, in any
14 event, I should be entitled to this evidence.

15 THE COURT: Mr. Anderson.

16 MR. ANDERSON: Your Honor, Ross Lake and the
17 Baker Dam are relevant because they're on the same river
18 system. They provide flood storage on the Skagit River
19 which prevents the plaintiffs from being flooded, and
20 they provide it now when they didn't provide it in the
21 past, and that relates to all of the testimony that's
22 going into this case, since the plaintiff's theory is
23 that the levee system causes flooding on them now that
24 didn't occur in the past, and they want to show that by
25 establishing what flood levels would have been back in

1 the 1950's or back at the turn of the century, so that's

2 why that evidence is relevant.

3 The problem I see with bringing in the Snohomish
4 County stuff is the foundational problem, that he wants
5 to put the witness on the stand and say they lowered the
6 levees in Snohomish County without putting in any of the
7 evidence or establishing any basis of who made the
8 decisions, what decisions were made, and the implication
9 is going to be either that the county or the State came
10 along and said -- they lowered the levees in Snohomish
11 County so why can't you do it in Skagit County, and the
12 evidence isn't going to be relevant if the systems
13 aren't the same and you can't establish the foundation,
14 and it going to send us chasing off.

15 THE COURT: I'm with you on that. I understand
16 the point you're making, but let me try it to my mind
17 one other way.

18 Are you suggesting at some point in time those
19 same sorts of questions would be put to defense
20 witnesses or people involved in the flood planning and
21 so forth for the county or the State or whoever else is
22 called in this case so at some point in time you can tie
23 that back together?

24 MR. HAGENS: Yes. Yes. They blew levees. In
25 1990 they blew levees, took them down on the game

1 reserve, which is a little island adjacent to Fir Island
2 in the Skagit River, meaning they can take levees down
3 when it suits their interest, but when it comes to our
4 clients, they never do anything but strengthen the
5 levees.

6 THE COURT: I guess I was asking, are you talking
7 about -- and also talking to people in this county about
8 their understanding of what happened in Snohomish County
9 and how that relates to their thinking about dikes and
10 so forth?

11 MR. HAGENS: I was thinking of saying -- I think
12 I'm entitled to ask the witness, "Mr. so and so, you
13 knew these levees were causing our clients severe
14 flooding, did you not? Did you ever consider the
15 alternative of lowering them, doing overtopping levees,
16 things like that?" "No, we never considered it." "They
17 did down in Snohomish. It's well known up there in
18 Skagit County. Why didn't you -- learn a lesson from
19 what happened down in Snohomish County," Mr. Wolden or
20 Mr. Anderson?

21 I think I'm entitled to pursue that on
22 cross-examination, or am I handcuffed on that as well,
23 Your Honor?

24 THE COURT: Counsel?

25 MR. SMART: Isn't that something that comes up

1 when he has a witness that purportedly has some
2 information? He's made a lot of reference about all
3 kinds of things, including that there was a blown levee
4 on the game reserve, which counsel, if he investigated,
5 would know is false. That's not a fact that would come
6 into evidence. It was not blown.
7 MR. HAGENS: It was taken down.
8 MR. SMART: No, it was an overtopping failure,
9 Carl, and you make a lot of representations about things
10 and you're --
11 THE COURT: Counsel, hello, excuse me.
12 MR. SMART: You're right.
13 THE COURT: This is the judge here.
14 MR. SMART: But my point is this, Your Honor, if
15 he wants to make that suggestion with somebody in Skagit
16 County who has something to do with it and establish
17 that they know about the Snohomish County levees, then
18 maybe he can establish a foundation for this kind of
19 testimony, but right now --
20 THE COURT: Okay, I agree. I'll do this. I'm
21 looking at it as a foundational problem with this
22 witness, but you're free to try to establish that
23 foundation.
24 MR. HAGENS: With this witness?
25 THE COURT: Yeah, if you can fine. If you can't,

1 then I think their point's well taken. I'm going to
2 narrow my focus to one of a foundational, because I
3 think this witness is entitled to talk about levees,
4 design, construction, maintenance, the whole river flow
5 control system -- I'm using all the wrong words -- but
6 basically how the whole system is operated and designed,
7 whether it be here or somewhere else. He's considered
8 to be a national expert on that subject, but I don't
9 know that he knows a darn thing about the Snohomish
10 County system and how that works.
11 MR. SMART: But it's also got to have relevance
12 to the Skagit County system and, you know -- at this
13 point we don't have anything that's relevant. The
14 Snohomish River is a completely different eco system.
15 It's a completely different hydrological system, and if
16 we get into that, it's going to be a whole different set
17 of documents, because it's a complicated river system,
18 too, and he hasn't studied it.
19 THE COURT: All right.
20 Well, counsel, what we're going to do is get the
21 jury in here and go straight through to 4:30, but we're
22 going to take an a couple minutes before that, because
23 I've forgotten that I had lunch already.
24 MR. HAGENS: I can understand why. I got to tell

25 you, I don't know of a more patient judge that I've ever

1 been before.

2 THE COURT: I appreciate that. Before we're done
3 you may have reason to change --

4 MR. HAGENS: I've already gotten one or two, so I
5 expect more, Your Honor.

6 THE COURT: So, with your permission, I think
7 we'll bring -- I had Aaron, while we were doing this, to
8 tell the jury to come back at quarter after two, so
9 they've been only been waiting a couple of minutes.
10 I'll have them wait another five minutes or so. We'll
11 come back out and go straight through to 4:30. That
12 will give us a good two hours shot.

13 MR. SMART: What time?

14 THE COURT: 2:30. We'll have two solid hours as
15 opposed to what we usually get. It ends up being more
16 or less the same thing.

17 (Recess was taken.)

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

21 THE COURT: Dr. Mutter, have a seat, please.

22 MR. SMART: Thank you, Your Honor.

23 CONTINUED CROSS EXAMINATION

24 BY MR. SMART:

25 Q Mr. Mutter, it's my understanding that the only two

1 floods, then, that you have used your model to recreate
2 are the 1990 flood and the 1975 flood; is that correct?

3 A Yes, that's correct.

4 Q But you could have used it to recreate or calculate the
5 water surface elevations for any flood that pre-existed
6 the 1975 flood, correct?

7 A I suppose.

8 Q And you chose not to do that, correct?

9 A Yes.

10 Q You don't know of any failures that have occurred in the
11 last 50 years that would have resulted in a lowering of
12 the water surface elevation in the Nookachamps, do you?

13 A Well, I've read testimony from Mr. Miller that seemed to
14 indicate that the 1951 failure in the Burlington area
15 lowered water levels in the Nookachamps, but I don't
16 recall any others.

17 Q Well, let me refer you to your deposition, sir, Volume
18 2, Page 231.

19 MR. HAGENS: 231, counsel?

20 MR. SMART: Yes, 231.

21 Q Did I ask you at that time, sir, whether or not you had

22 any information concerning any levee failures that had
23 existed that lowered water surface elevation in the
24 Nookachamps?
25 And I asked you, "All right, let me ask it this

1 way. Are you aware of any levee failures that occurred
2 in the last 50 years along the Skagit River that
3 resulted in lower water surface profile on the river
4 side of the dike that did not occur when the dike was
5 overtopped or close to being overtopped?"

6 Answer: "I'm not sure I could cite specific
7 examples that would meet those criteria, no."

8 "How many levee failures are you aware of that
9 resulted in the lowering of the water surface profile on
10 the river side of the dike in the last 50 years?"

11 Answer: "I can't cite any today."

12 Did I ask you those questions and did you give me
13 those answers in December of 1995?

14 A Yes, I did.

15 Q We've earlier talked about the 1951 elevation of 41.7
16 feet at the Johnson residence, have we not?

17 A Yes.

18 Q And if, in fact, a levee failure had existed on the Dike
19 District 12 levee that reduced water surface elevations
20 in 1951, it didn't do it until after the water surface
21 elevation had gotten to at least 41.7 feet at the
22 Johnson residence, correct?

23 A We don't know that.

24 Q You didn't investigate it, correct?

25 A That's correct.

1 Q All you know is the Army Corps record water surface
2 elevation of 41.7 at that location, correct?

3 A Yes.

4 Q That elevation is almost a foot higher than your highest
5 recorded elevation in 1990 at the same place, right?

6 A Yes.

7 Q So to the extent that any failure in 1951 lowered water
8 surface elevation, it wasn't 'til after the water at
9 this location became one foot higher than 1990.

10 A We don't know that. We don't know whether the failure
11 occurred before or after the peak.

12 Q Well, that's my point. Is that whenever the failure
13 occurred and whatever effect it had, it didn't operate
14 to reduce the water surface level below 41.7 feet,
15 correct?

16 A We don't know what the water surface elevation might
17 have been in the absence of a levee failure.

18 Q That's right. It could have been higher, couldn't it?

19 A It's possible.

20 Q Could have been substantially higher in 1951, right?
21 A It's possible.
22 Q So what you're saying, then, is in 1990, you could have
23 had a substantially -- excuse me. In 1990 you had a
24 water surface elevation of 40.8 feet, with a higher flow
25 than in 1951, and based on the anomalies of the

1 situation, you could have had an even higher elevation
2 than another foot higher in 1951, correct?
3 A Let me point out that the channel alignment topography
4 in 1951 at that location was quite different than it is
5 today, so I don't think we're comparing apples and
6 oranges -- apples and apples.
7 Q You didn't perform any analysis of the topography and
8 channel alignment in 1951, did you?
9 A I reviewed what they were.
10 Q Okay, but you made no calculations as to what the
11 changes might have been or might have meant to any flood
12 elevations in 1951, correct?
13 A That's correct.
14 Q So whatever the changes were, they weren't significant
15 enough for you to go back and see if there -- they would
16 have made a difference in water surface elevation,
17 correct?
18 A I didn't study the 1951 water surface elevations because
19 they weren't relevant to what I was working on.
20 Q Now, let's -- showing you Exhibit 212, which has already
21 been introduced in evidence. This is the chart that Mr.
22 Hagens had you create that shows the various flood flows
23 in the Skagit River that exceed 80,000 cubic feet per
24 second since 1945, correct?
25 A Yes.

1 Q Okay. I'd like to show you copies of this particular
2 document which I marked as separate exhibits, 212A
3 through I, and ask you if you can compare them and,
4 except for the labeling in the upper right-hand corner,
5 are they the same?
6 A They appear to be.
7 Q Now, what I'm going to ask you to do is take these other
8 exhibits, 991A, 994, 995 and 997, which are the charts
9 that you created earlier, and what I'd to ask you to do
10 is, for the various individuals and locations listed on
11 these documents, just mark in the peak flood surface
12 elevation for those points that are known on the
13 documents, please.
14 MR. HAGENS: Well, Your Honor, I don't think he
15 should be marking up our exhibits, if that's what he's
16 doing. Did you make --
17 MR. SMART: I'm not. They're copies. They're

18 separately marked and they're identified as -- what I
19 said, 212A through I.
20 MR. HAGENS: I see. You just made copies of them.
21 MR. SMART: I'm not touching your exhibit.
22 MR. HAGENS: All right.
23 Q If you'll go ahead and mark in the water surface
24 elevation, if you would, please, sir.
25 A So for the first one that's indicated is Mount Vernon

1 gauge.
2 Q Mount Vernon gauge you've got a figure for 1975 and
3 1990, correct?
4 A Okay. You're asking me to annotate the 1975 event which
5 had a discharge of 130,000 cfs with the water surface
6 elevation that I computed with the 1990 discharge, which
7 is 152,000 cfs?
8 Q No.
9 MR. HAGENS: We'll object to that.
10 Q All I'm asking you to do is mark in on Mr. Hagens' chart
11 here what the peak elevation was that was computed by
12 your model.
13 A I understand that with respect to 1990. What I don't
14 understand, what you're asking me to do with respect to
15 1975.
16 Q Well, you indicated that you could determine what the
17 water surface elevations were in each of the areas,
18 correct, for 1975 given the flows that existed then?
19 MR. HAGENS: That's fine for 1975, but you're
20 asking him to use a 1990 flood cfs computation of
21 152,000.
22 MR. SMART: No.
23 MR. HAGENS: And put it on a 1975 event.
24 MR. SMART: No, I'm not. I'm asking him to use
25 the 130,000 that he computed with this is computer

1 model.
2 Q Do you need any further --
3 A You handed me an exhibit that reads Water Surface
4 Elevation if 1990 Flow Happened in 1975.
5 Q I've handed you all of the exhibits that we talked about
6 before. Is there anything else that you need in order
7 to carry out the task? Would you like 979?
8 A I've indicated before that I don't have computed 1975
9 water surface elevations for the 130,000 cfs discharge.
10 Q Well, but you didn't have exact computed ones for here
11 either and you could interpolate based on where the
12 properties existed; is that correct? That's what you've
13 done for most of your figures is to take them from the
14 numbers that are identified here.
15 A Those are high water marks, not my calculations

16 themselves.
17 Q In your notes today, did you bring the high water marks
18 that you computed for the 1975 flood?
19 A I don't know if I did or not. I brought my work files,
20 but I don't know. It's been three years since we did
21 that work. I could rummage through there if you'd like.
22 Q Sure. Would you take a look, please?
23 A I'm sorry, I don't believe I have it.
24 Q Let's do it a different way then. Why don't you draw a
25 dotted line on each of the -- on each of the exhibits

1 for 1975 and show us what water surface elevation would
2 be shown if you had the 1990 flow in 1975, all right,
3 so that you can take it directly off of Exhibit 997, all
4 right?
5 A I'm sorry, would you repeat the instructions?
6 Q Sure. Why don't you show for 1975 what elevation would
7 exist, what water surface elevation would exist if you
8 had the 150,000 cubic foot per second flow in 1975, and
9 draw a little dotted line to extend the bar up to
10 whatever flow it is that you say you would have had if
11 you had 150,000 cubic foot per second flow in 1975.
12 MR. HAGENS: And assuming no failure.
13 MR. SMART: Right.
14 Q Which we've established now for the umpteenth time.
15 A Very well. I've extended the bar to 152,000.
16 Q And water surface elevation would be what?
17 A 36.7, which I've indicated.
18 Q Okay. Now, can you do it for the other documents,
19 please.
20 You need to do both 1990 and 1975 for each
21 document.
22 A They're the same numbers.
23 Q Yes. If you would write that in, please, I'd appreciate
24 it.
25 A I'm just come back and hand them to you.

1 Q That's fine. And then, sir, we have one high water mark
2 for 1951 for the Johnson property for the Johnson
3 exhibit. Would you put that elevation of 41.7 feet in
4 for the 1951 flood?
5 Okay. Complete?
6 A Yes.
7 Q Thank you very much.
8 MR. SMART: Your Honor, I'd offer 212A through I.
9 MR. HAGENS: Can I see it?
10 MR. SMART: You bet.
11 MR. HAGENS: We have no objection, Your Honor.
12 MR. ANDERSON: No objection.
13 THE COURT: All right. And the numbers again are?

14 MR. SMART: 212A through 212I, Your Honor.
15 THE COURT: Thank you.
16 (Whereupon, Defendant's
17 Exhibit No. 212A to I were
18 admitted into evidence.)

19 Q So, now, what we have created here, sir, is the chart
20 that's exactly a copy of Mr. Hagens' chart, but what we
21 have done is we have put in flows -- excuse me, the
22 water surface elevation from 1990, the water surface
23 elevation from 1975 if you had had the 1990 flow in
24 1975, correct?
25 A Yes.

1 Q And then also for the one example of where we have a
2 water surface elevation from the Johnson property in the
3 heart of the Nookachamps, we have 1990 elevation, we
4 have the 1975 elevation assuming a 1990 flow, and we
5 have a 1951 elevation with the observed level, correct?

6 A That's correct.

7 Q Now, sir, I think we earlier established that you don't
8 know of any failures that resulted in the lowering of
9 water surface elevation in the last 50 years. My next
10 question is, do you have an opinion that the levees
11 would have failed in 1975 if the water surface -- excuse
12 me, if the flow was 154,000 cubic feet per second.

13 MR. HAGENS: Your Honor, I'm going to object to
14 his characterizing the witness's testimony as saying he
15 didn't have any testimony that a failure occurred that
16 reduced water levels in the Nookachamps. He prefaced
17 his question with that. The witness has clearly
18 testified he has knowledge of that.

19 THE COURT: I'll sustain that.

20 MR. SMART: I'll rephrase the question.

21 Q You didn't study if there was any effect in 1951 and, if
22 so, what effect it had on the water surface levels in
23 1951, correct?

24 A That's correct.

25 Q Now, you don't have a opinion that the levees would have

1 failed in 1975 if the flow had been 154,000 cubic feet
2 per second, do you?

3 A Well, depends what conditions you place on the question.

4 Q Well, I'm just asking you if you ever developed an
5 opinion that they would fail at 154,000 cubic feet per
6 second in 1975.

7 A Well, that question's partly hypothetical and partly
8 historical. If I don't know what flood fighting
9 activities would have taken place in 1975 corresponding
10 to that flood, then I can't know whether levees would

11 have failed or not.
12 Q So the answer to the question is you never developed an
13 opinion that they would have failed at a flow of 154,000
14 cubic feet per second in 1975, correct?
15 MR. HAGENS: What condition?
16 MR. SMART: In the 1975 condition.
17 A I have an opinion that, given certain circumstances,
18 that they would have failed.
19 Q Well -- and your opinion if there wasn't any flood fight
20 in 1975, they might have had a failure, correct?
21 A Given the discharge of 150 some thousand cfs, yes.
22 Q But you know by studying the history and by your
23 experience with the Army Corps that there's always a
24 flood fight in Skagit County when you have a substantial
25 flooding event, don't you?

1 A That might be the case.
2 Q Well, doesn't the Army Corps have specific standards for
3 leading the flood fight?
4 A I have no idea what their flood fight standards are.
5 Q Is that because you haven't investigated that?
6 A I haven't investigated it.
7 Q But you do know that there is always a flood fight. I
8 mean it's common sense when you have a huge flood like
9 these 1975 and 1990 floods, there are going to be people
10 out sandbagging and inspecting the levees for blow out
11 and making sure that emergency personnel are on hand to
12 protect life and property. Don't you know that?
13 A I believe that's probably the case.
14 Q And that's the flood fight, correct?
15 A Yeah.
16 Q So this assumption that they might fail assuming there's
17 no flood fight is an assumption of a condition that you
18 know not to be correct.
19 A Well, it's the magnitude of the effort involved.
20 Q There's always a big effort in Skagit County to fight
21 the floods, isn't there?
22 A There has, and at least in '75 and '90, in both cases,
23 Skagit County's own staff have concluded that they made
24 it through by the skin of their teeth.
25 Q It's not just Skagit County that fights the flood, it's

1 the dike districts, it's volunteers from the local area,
2 it's the Army Corps of Engineers, it's the State
3 Department of Emergency Management, it's all those
4 people, isn't it?
5 A Probably.
6 Q And so when you have a natural disaster like this,
7 people pull together to try to protect each other from
8 the dangerousness of the flood, don't they?

9 MR. HAGENS: The natural disaster for who?
10 MR. SMART: It's a natural disaster for
11 everybody.
12 MR. HAGENS: It was not entirely a natural
13 disaster for everybody. I object to the form of the
14 question.
15 MR. SMART: It's a speech.
16 MR. HAGENS: The testimony is it's not entirely a
17 natural disaster for our clients, Your Honor, so I
18 object to the form of the question.
19 MR. SMART: The question was simply don't people
20 pull together to help each other.
21 MR. HAGENS: That was a different question.
22 MR. SMART: That was the question, Your Honor.
23 THE COURT: If that's the question, you may
24 answer.
25 A I think that's true.

1 Q That's the purpose why these governmental agencies exist
2 is to fight floods and fight natural disasters, right?
3 A That's one of the reasons.
4 Q Well, it's your understanding of the reason that it
5 exists, isn't it?
6 A Which agency are we talking about?
7 Q The agencies that fight the flood.
8 A Well, they have many other roles.
9 Q But during times of flood that's their governmental
10 purpose, isn't it?
11 MR. HAGENS: Could he be a little more specific
12 about what agency he's talking about? He's lumping all
13 agencies together without differentiation, and I don't
14 think that's a fair-minded question Your Honor.
15 Q The Army Corps of Engineers, FEMA, the State Emergency
16 Management people, the county, the dike districts and
17 the cities, the citizens, all of those people ban
18 together to help each other out and to fight the flood
19 when there's a big flood in Skagit County, don't they?
20 A I'm sure that's right true.
21 Q Now, your earlier indicated that the flood fight would
22 raise the level of the water because the flood fight
23 might add, for instance, sandbags or something along the
24 highway or the dike and that that flood fighting effort
25 itself might have an effect on flood levels in the

1 Nookachamps, correct?
2 A Yes.
3 Q And if you had two feet of sandbags on top of a road or
4 on top of a levee, you might experience a two-foot rise
5 in the water level, might you not?
6 A At that location, sure.

7 Q And so if you had, for instance, sandbagging that went
8 on just behind this group of plaintiffs' properties and
9 along Highway 20 in this area, you might raise the water
10 level two feet right in the vicinity of their
11 households, correct?
12 A That's a possibility.
13 Q Just by the emergency activities of the government
14 agencies.
15 MR. HAGENS: I'm going to object to the emergency
16 activities. That's a legal conclusion, Your Honor, and
17 there's going to be testimony on this, much testimony.
18 That's a conclusion by counsel.
19 MR. SMART: Well --
20 THE COURT: I'll sustain the objection. I
21 believe it is.
22 Q All right. Let me ask it this way. You might have a --
23 if you had a two-foot sandbag wall along a road, for
24 instance, like Highway 20 here behind this group of
25 plaintiffs properties, you might have a two-foot rise in

1 the water exerted on the levels, the water surface
2 elevation in this area, just by virtue of the activities
3 of those governmental agencies during the emergency,
4 correct?
5 A I don't know if it would --
6 MR. HAGENS: Your Honor --
7 MR. ANDERSON: Your Honor, I object to the form
8 of the question.
9 THE COURT: I'm sorry. Mr. Anderson.
10 MR. ANDERSON: I object to the use of the term
11 "those governmental agencies" unless they're going to be
12 identified.
13 MR. HAGENS: And I object to the use of the word
14 "emergency." That's a hotly contested issue in this
15 lawsuit, and I don't want to go into it in front of the
16 jury, and I think that's a characterization by counsel
17 yet to be proved.
18 MR. SMART: The testimony from the witness, Your
19 Honor, was that it constitutes an emergency and that
20 there are emergency governmental agencies that respond
21 to it.
22 MR. HAGENS: I must say, I must have not heard
23 that testimony, Your Honor, but, in any event, he's not
24 entitled to characterize the event, Your Honor.
25 MR. SMART: Well, Your Honor, it's common

1 knowledge if you have a big flood it's a emergency.
2 MR. HAGENS: Well, Your Honor --
3 THE COURT: But that is an issue in this case,
4 and the question as phrased presupposes that we've all

5 accepted that definition of it, and I think that's what
6 counsel is raising an objection to. We need to talk
7 about what the event is without characterizing it.
8 MR. SMART: I can do it that way, Your Honor.
9 THE COURT: Your objection along with that?
10 MR. ANDERSON: He's referring specifically now to
11 sandbagging that's going along on Highway 20 and he's
12 referred to those governmental agencies. There's no
13 foundation that he has any knowledge as to what those
14 governmental agencies are or who is out there.
15 MR. SMART: I'll rephrase the question, Your
16 Honor. It's not something to get in an argument over.
17 I think it's common knowledge and a simple proposition.
18 Q Wouldn't you agree, sir, that whatever the entities are
19 that are fighting the flood during a big flood event, if
20 a sandbag wall or some sort of emergency activities are
21 done to try to prevent the flood from coming over
22 Highway 20 and if it was two feet high, you might have a
23 two-foot rise --
24 THE COURT: I'll do something judges aren't
25 supposed to do. I'll anticipate your objection and

1 sustain it. I really don't want you to use the word
2 "emergency" under any circumstances, because that is an
3 issue in this case, as to whether or not it truly is or
4 not. It's yet to be established.
5 MR. SMART: I was trying not to.
6 THE COURT: I did hear the word, so --
7 MR. SMART: Let me try again.
8 THE COURT: All right.
9 Q If you have these entities that are out there fighting
10 the flood during a flood event, whoever they are, but
11 they happen to raise a sandbag wall, or maybe it's made
12 out of dirt or rocks or something else, to a height of
13 two feet in the back of these -- this group of
14 residents, you might have a two-foot rise in water as a
15 result of those sandbagging activities in this immediate
16 vicinity, correct?
17 A I don't know if it would reach the same two feet, but it
18 would -- it would be effective to some degree.
19 Q And you didn't measure or study what effect the
20 temporary sandbag or diking activity along Highway 20
21 had on the water surface elevation in 1990, did you?
22 A Actually we did make some analysis of the effects in the
23 Nookachamps area.
24 Q Well, did you measure what activities took place along
25 Highway 20 in terms of how high the sandbagging went?

1 A No. The primary effect on the Nookachamps area would be
2 the loss of flow across SR 20, so there would be less

3 flow going downstream in the Skagit River, thus lowering
4 water levels in the Nookachamps area.
5 Q So what you're saying is that if there are temporary
6 activities during the flood itself along Highway 20,
7 they would have -- they would, like a dike, block the
8 water from coming over into the Samish River Basin and
9 cause more water to remain in the Nookachamps, correct?
10 A I think I said that exactly backwards. You're right.
11 Rather than flow being allowed to escape across SR 20,
12 that discharge was maintained in the main stem Skagit
13 River and causing higher flood levels in the
14 Nookachamps. Pardon me.
15 Q That's just common sense. That's why you have the
16 sandbags there is to prevent the water from going over
17 the road and interrupting things, correct?
18 A That's right.
19 Q And, similarly, the road itself, if it's higher than the
20 surrounding territory, would act in the same fashion,
21 would it not?
22 A Yes.
23 Q Same with the railroad bridge, it would act in the same
24 fashion, if it's higher than the surrounding area. All
25 of those things would prevent the flow of water in the

1 Nookachamps to the Samish River Basin, correct?
2 A Yes.
3 Q Now, counsel has repeatedly raised this question of dike
4 failures. You don't advocate dike failures during time
5 of flood event, do you?
6 A Advocate?
7 Q Yes.
8 A Could you expand on your question a little bit?
9 Q Do you think it's a good idea that a dike fail during a
10 flood event?
11 A In general, no.
12 Q And the reason that it's not a good idea, because it can
13 be extremely dangerous, can't it?
14 A Yes.
15 Q And, in fact, there are instances in the Skagit County
16 along the Skagit River where dike failures have killed
17 people, isn't that true?
18 A I have no knowledge of that.
19 Q Is that something that you didn't investigate?
20 A That's correct.
21 Q Okay. But the reason that it's dangerous is because
22 when you have water built up to a certain level, there's
23 stored energy in that buildup of water, correct, and
24 when a dike fails in a catastrophic manner, that energy
25 is released in a very powerful and localized way which

1 can endanger individuals who live in the area or driving
2 along the area, or just happen to be there; isn't that
3 right?
4 A That can happen.
5 Q And especially if there are people fighting the flood,
6 if the dike fails those people could get washed away and
7 drown?
8 A I suppose.
9 Q That has occurred, has it not, in the United States?
10 A I imagine so.
11 THE CLERK: Exhibit 998 marked.
12 Q I'd like to show you Exhibit 998, sir, which is also
13 Exhibit 10 to your deposition. Can you identify that
14 for me, sir?
15 A This is a staged discharge curve for the Skagit River at
16 Mount Vernon, and it is a relationship, a mathematical
17 relationship between the amount of flow going downstream
18 at that point and the water surface elevation.
19 Q Okay. This staged discharge curve also called a rating
20 curve?
21 A Yes, it is.
22 Q And is the purpose of the curve to measure the
23 relationship between the amount of flow in cubic feet
24 per second versus the water surface elevation that you
25 get for any particular flow?

1 A Yes.
2 MR. SMART: Offer -- what was the number, sir?
3 A 998.
4 MR. SMART: 998.
5 MR. HAGENS: No objection, Your Honor.
6 MR. ANDERSON: No objection, Your Honor.
7 THE COURT: 998 is admitted.
8 (Whereupon, Defendant's
9 Exhibit No. 998 was admitted
10 into evidence.)
11 Q All right. Now, showing the jury on the screen the
12 rating curve. How are we doing on the sun here?
13 Could you adjust that blind?
14 So what we have is we have a rating curve, and
15 this rating curve is for flows and water surface
16 elevations at the Mount Vernon gauge, correct?
17 A Yes.
18 Q And the Mount Vernon gauge is located right in this area
19 here, is it not, just downstream from the Burlington
20 Northern Bridge?
21 A Just downstream from Riverside Bridge, actually.
22 Q You're got the Burlington Northern Bridge and the
23 Riverside Bridge, and the Mount Vernon gauge is right
24 here; is that correct?

25 A Yes.

1 Q And how does the gauge measure the flow of water and
2 then, correspondingly, how does the gauge measure the
3 water surface elevation?

4 A The gauge itself does not measure the flow of water. It
5 records water surface elevation by some kind of
6 instrument, and that instrument has probably changed
7 over the years, but essentially it's a float device
8 which tracks -- floats on the surface of the water and
9 tracks the water surface elevation continuously.

10 Q Okay. And this gauging station is maintained by whom,
11 sir?

12 A U.S. Geological Survey.

13 Q The U.S. Geological Survey is the same agency that you
14 relied on for securing your information concerning the
15 observed levels, correct?

16 A Some of them, yes.

17 Q And I think we've been over this before, but the USGS is
18 one of the two agencies, along with the Army Corps, that
19 you rely on and hydraulic engineers rely on for keeping
20 track of this kind of data; is that correct?

21 A Primarily.

22 Q Now, what Exhibit 998 shows is various points which
23 represent different floods through history, correct?

24 A The peak discharges at those events, yes.

25 Q Yeah. That's correct. It shows how -- it shows a point

1 in time, which is the peak discharge point, which is
2 also the point that you have measured for these -- these
3 water surface elevations in the Nookachamps, correct?

4 A Essentially, yes.

5 Q Okay. All right, and that's also -- you also assumed
6 the peak discharge for inputting into your computer
7 model, right?

8 A For that simulation, yes.

9 Q And it's also the peak discharge that is shown in this
10 bar graph, Exhibit 212, which we've also got on 212A
11 through I, correct?

12 A That's correct.

13 Q So we're talking about discharge, because it's the peak
14 discharge, in other words, the discharge at the height
15 of the flood, that determines how high the water gets,
16 right?

17 A Yes.

18 Q So this rating curve keeps track of peak discharges and
19 water surface elevations in a particular spot where
20 there's a sensitive instrument maintained by a
21 government agency, the U.S. Geological Survey, and it
22 records these things over time, correct?

23 A Yes.
24 Q Now, what we have on Exhibit 998 is we have points along
25 this curve which represent different floods; is that

1 right?

2 A Yes.

3 Q And so, for instance, we have the 1990 flood here,
4 which I'm coloring in. Why do we have three points for
5 1990?

6 A I don't recall perfectly, but one of them is marked NWS.
7 And I believe the National Weather Service had estimated
8 the peak discharge to be a different number than the GS
9 and the Corps did at the time I did this work.

10 Q So there's some variation between agencies as to how
11 they might estimate the flow?

12 A Sure.

13 Q But for the USGS numbers, they're the two in the upper
14 right-hand corner, correct?

15 A I believe that's correct, yes.

16 Q And then we also have the 1951 flood marked on the
17 rating curve, correct?

18 A Yes.

19 Q And we have the 1975 flood marked on the rating curve,
20 correct?

21 A Yes.

22 Q All right. And then other floods for different years
23 are marked all the way up and down the curve, correct?

24 A Yes.

25 Q Now, the purpose of the rating curve, among other

1 things, is to determine whether or not there has been
2 any change in the ability of the river or the river
3 system to pass water at the point of the gauge; isn't
4 that correct?

5 A Yes, essentially that's correct.

6 Q In other words, if there had been a change in the cross
7 section of the river in this location between -- between
8 years marked on the chart, you would have expected to
9 see a difference -- in other words, a difference in
10 location of the point of the flood from the rating
11 curve, correct?

12 A If there were a difference, I would expect that the
13 point would plot off the curve, yes.

14 Q And the fact that all of these points are on the rating
15 curve between 1951 and 1990 indicates that at the point
16 of the gauge there has been no change between 1951 and
17 1990 of this piece of the river to pass water. Wouldn't
18 that be correct?

19 A That's substantially correct, yes.

20 Q So, for instance, if there had been a big change in the

21 cross section of the river near the gauge, you'd have
22 got a point on the rating curve that was substantially
23 above or below where the points are on this smooth
24 curve, correct?
25 A Yes. You have to be a little cautious in that you

1 recognize that we're dealing with a logarithmic scale
2 here, so a small deviation from the line might not look
3 very significant on this plot, but it could still
4 represent a considerable difference in the discharge
5 number.

6 Q Okay. Well, the log -- the log scale is the scale
7 chosen by the USGS to represent the findings, correct?

8 A No, that was a selection that I made.

9 Q Oh, you made that one?

10 A Yes.

11 Q So wouldn't you say that a fair representation of the
12 spot of this plot is that all the plots between 1951 and
13 1990 are essentially the same rating curve?

14 A Yes, but I'm -- again indicating that what appears to be
15 a small deviation can be significant in terms of
16 discharge. When we start talking about 10,000 cfs
17 deviation perhaps, it doesn't look very big on this
18 plot. But it's close, I grant you that.

19 Q Did you make any determination that there was any change
20 in the cross section of the river at the U.S. gauge
21 between 1951 and 1990 that would have altered the
22 ability of the river at that point to pass water?

23 A No, I did not.

24 Q So would it be a fair statement then that within
25 reasonable tolerance the river at the U.S. gauging

1 station below the Riverside Bridge has -- had the same
2 ability to pass water at that location in 1959 -- excuse
3 me, 1951 as it does in 1990?

4 MR. HAGENS: Again, assumes no breaks?

5 MR. SMART: I'm going to ask the question.

6 A I think, again, that's substantially correct. Also
7 point out that this reach of the river is subject to
8 tidal effects. We have one point on here representing
9 1951, and I don't know if we had taken a sample of
10 measurements during that event if there had been more
11 variability, but I think what you say is essentially
12 correct.

13 Q Okay. Now, one more point, Mr. Mutter, and that's
14 this. You have testified according to your computer
15 model all of these areas in the Nookachamps received two
16 feet more water -- excuse me -- in this blue area here
17 they received two feet more water with the levees in
18 existence than with the levees gone; is that correct?

19 A Oh, I believe what I said, what I intended to say is
20 that within that two-foot zone, two feet is a
21 representative amount of rise. In fact, the numbers
22 would have varied from a foot and a half to two and a
23 half feet.
24 Q In this area with the "two" marked in it?
25 A Yes.

1 Q Okay. And you earlier indicated in answer to my
2 question that the model itself has a variability up to,
3 say, one and a half feet, correct?
4 A Not in terms of the results displayed on that graph, no.
5 Q I agree they're not displayed on this graph.
6 Now, wouldn't it also depend, though, sir, in
7 terms of an individual experiencing water in a building
8 or in his house, where the house was located on the
9 topography of a particular piece of property, whether or
10 not he saw any additional water in his house?
11 A Would you ask the question again, please? I'm sorry.
12 I'm still thinking about your comment that seems to tie
13 the one foot tolerance to that graph, and I'd like to
14 make it clear that there is no connection, that the
15 accuracy of those results is not plus or minus a foot,
16 as you seem to characterize it.
17 Q Well, I'll agree that what we talked about in terms of
18 the variation between your actual water surface
19 elevations and the observed levels is not reflected on
20 Exhibit 210. You agree with that, don't you?
21 A Pardon me?
22 Q You agree that the variation between your computer model
23 that we talked about earlier and the absolute water
24 surface elevations that you've computed and the
25 difference between those absolute elevations and the

1 elevations that you computed in your model is not shown
2 on Exhibit 210, correct?
3 A There's no link there.
4 Q Right. But it was my understanding from -- it was my
5 understanding from your testimony yesterday, sir, from
6 Exhibit 211, that you said that an individual -- for
7 instance, let's take the top one, Mr. Albee, would have
8 a 3 -- 3.3 foot rise in flood elevation at his property
9 as a result of the operation of the levees; is that
10 right?
11 A Yes.
12 Q And do you know whether or not Mr. Albee's property --
13 do you know whether or not Mr. Albee's house ever
14 flooded?
15 A I have no direct knowledge of his flooding.
16 Q So you didn't compare the information on Exhibit 211 to

17 any particular plaintiff's properties to see whether or
18 not this was, in fact, correct; is that right?
19 A I didn't need to. That would not prove or disprove my
20 numbers.
21 Q Okay. Well --
22 A Again, there's no link there.
23 Q Let's say the house didn't flood for a particular
24 plaintiff and the house sat on a piece of high ground
25 and, in fact, it sat -- let's, say, Mr. Albee's property

1 sat four feet above the flood level that would exist in
2 any event. The additional rise of 3.3 feet wouldn't
3 cause Mr. Albee's house to flood, would it?
4 A He'd be unaffected.
5 Q And, in fact, there are a number of plaintiffs in this
6 area whose houses have never flooded, aren't there?
7 MR. HAGENS: There's been -- well. Withdraw the
8 objection.
9 Q Isn't that true?
10 A I'm not sure how you define that. There might be
11 plaintiff's buildings, living levels have never been
12 reached. I'm not sure what you mean.
13 Q My point is simply that you can't determine from Exhibit
14 211 whether or not a particular individual's buildings
15 flooded, correct?
16 A That's correct, and that's not the intention of this
17 information.
18 Q And, for instance, if the -- if the building -- let's
19 take Mr. Albee's situation again. If the building were
20 1.5 feet above the level that would have flooded anyway,
21 then instead of 3.3 feet of water added by the dike to
22 the building, only 1.8 feet would be added, according to
23 your computer calculations; is that correct?
24 A That's correct. The numbers that I've presented in the
25 table represent essentially the upper limit in terms of

1 the potential effect of the levees on property.
2 Q So you've got the upper limit as opposed to the average
3 shown on 210 in 211; is that right?
4 A I think we're -- we're confused here. The numbers in
5 the table are picked off directly from our computer
6 results at the locations of the plaintiff's property and
7 the same information is presented on the graphic
8 summary, but in order to make it understandable from a
9 distance, we've indicated whole zones in one foot
10 increments, so as you can tell at a glance whether a
11 person is subject to a foot of rise or four feet of
12 rise.
13 Q Let's do it this way. In 211 you have said that each of
14 these property owners has been subject to these various

15 levels, and let's take Mr. Albee. You've said it's 3.3
16 foot difference, correct?
17 A Let me correct you. I didn't indicate anywhere that
18 plaintiffs were subject to that much flooding. I
19 indicated that I had computed that change in water
20 surface elevation as a result of the presence of the
21 Skagit County levee system.
22 Q That's exactly the point that I'm trying to make,
23 because the topography throughout this area varies
24 substantially, does it not?
25 A Yes.

1 Q And the topography isn't shown on 210, is it?
2 A Which is 210? I'm sorry.
3 Q This one.
4 A No, there's no topography there.
5 Q No topography whatsoever on the exhibit Mr. Hagens
6 introduced to you, but if you have a variation in
7 topography like this throughout the area, a plaintiff's
8 buildings or house could be located at any point on
9 them, correct?
10 A That's correct.
11 Q And so for some plaintiffs a 3.3 foot rise or two foot
12 rise as a result of Dike District 12's dike might not
13 even get to the level that would flood their buildings,
14 correct?
15 A That's a possibility.
16 Q So they would be unaffected in the sense that the
17 flooding would not occupy the house, correct?
18 A That's a possibility.
19 Q And for some people's property the distance might be
20 only a foot difference, correct?
21 A That's a possibility.
22 Q And it's only if they're located at or below this line
23 that they have the full effect of flooding as a result
24 of those dike district dikes as shown on Exhibit 211,
25 correct?

1 A That's absolutely right. Whatever the flood level was
2 in 1990 at a particular plaintiff's property, I've
3 indicated how much lower the level would have been had
4 the levees not been present. I think it's about that
5 simple.
6 MR. SMART: Sally, I'd like to mark this for
7 illustrative purposes.
8 MR. HAGENS: No objection, Your Honor.
9 MR. ANDERSON: No objection, Your Honor.
10 THE CLERK: 999.
11 THE COURT: 999 is admitted for illustrative
12 purposes.

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(Whereupon, Defendant's Exhibit No. 999 was admitted into evidence.)

MR. SMART: Thank you, Your Honor. I don't have any further questions of Mr. Mutter at this time.

THE COURT: Counsel, we had talked about going straight through to 4:30, but we're going to have a five minute stretch break, just to get up.

Jurors, if you feel like going out in the hall, five minutes only, we'll come right back, and that will give us the better part of another hour.

(Recess was taken.)

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

MR. MAJORS: Before we bring the jury in, Commissioner Anderson was in attendance today. He explained that there are three meetings taking place simultaneously this afternoon with the regional transit system, Skagit County Council of Government and SKAT, which is the bus service up in Skagit County. He needs to be there.

One of the commissioners has tried to be here each day. We would request that the Court instruct the jury that although they would like to be here every day, business of Skagit County indicates that they can't always be here, and may be here from time to time from this point on.

MR. HAGENS: That should be for all clients. Our clients are busy people, too.

MR. ANDERSON: I'd request that for the State, too.

THE COURT: Thank you.

One of the jurors, apparently, at least one of them, asked Aaron whether or not they could bring binoculars and so forth tomorrow. My instruction to them is going to be no. We're not -- no. We're just going -- they're just going to see what we all see and

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that sort of thing.

Okay. So just to let you know that conversation was had with Aaron and not with me, obviously, but I have instructed him to tell them no aids to be brought along of any kind, such as binoculars or anything like that.

MR. MAJORS: That related to just tomorrow.

THE COURT: Right.

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MR. MAJORS: We're not talking about just the testimony here.

THE COURT: No. They had been talking about cotton or something. I'm not sure if that was what that was related to.

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

THE COURT: Be seated, please. Counsel, just before you begin with Dr. Mutter, please be seated.

It's probably obvious to the jurors that I probably shouldn't even have to mention it but I've been asked to do so, that obviously all the plaintiffs are not here and haven't been here attending this trial. There are some 68 of them or so all put together, and from time to time I've been informed that the business of Skagit County itself also requires that their

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commissioners, who -- one or more of whom have tried to be here in attendance every day, are called away for meetings and so forth in the afternoon, and the State also, as a party in this case, has a right to have representatives of the State here along with Mr. Anderson. Some have been here already and some will be here periodically throughout the trial.

I just don't want you to read any inference of any kind into the presence or absence of any of the parties in this case. It's just simply peripheral to the actual evidence in the case, and should you see them coming and going, please do not draw any inference that they've left the courtroom for some reason or other or aren't here because of something that was said or might be said during the day. That would be an improper inference to be drawn in this case.

All right, counsel, are you satisfied with the record on that?

MR. MAJORS: Yes. Thank you, Your Honor.

THE COURT: Mr. Anderson.

MR. ANDERSON: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ANDERSON:

Q Afternoon, Mr. Mutter.

A Good afternoon.

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Q Just so I make sure I understand what you've done here with this model, if I understand correctly, you created a model which shows the flood levels, the absolute water surface elevations in the Nookachamps area in this area with the 1990 flood discharge and the 1990 levels in

6 place; is that correct?
7 A Yes, that's correct.
8 Q And then you took that same model and you took the
9 levees out and then you got a water surface elevation
10 below that with the 1990 discharge level.
11 A That's correct.
12 Q And this chart reflects the difference between those two
13 levels?
14 A Yes, sir.
15 Q And the point of doing that was to get back to some
16 point in time where before the levees were there where
17 we'd be able to see what the 1990 flood level or
18 discharge would be, how much lower it would be on the
19 plaintiffs' property?
20 MR. HAGENS: I'll object to the form of the
21 question, "before some point in time." I don't know
22 what you mean. We did leave in the civil works, so I
23 think it's --
24 Q Okay. Before the levees got substantially to where they
25 are now, which -- can we agree that in 1951 the levees

1 were in significantly the same location, same profile,
2 same height that -- as they were in 1990?
3 A There was a substantial levee system in place in 1951,
4 is my understanding.
5 Q That's the kind of thing you were trying to get back
6 before when you removed the levees?
7 A I really gave no consideration to time at all. My
8 charge, as I understood it, was to determine what the
9 effect of removing the levees would be, if they didn't
10 exist how much worse would flood levels or how much
11 lower would they have been in 1990 as a result.
12 Q And the idea was, you wanted to see how much lower they
13 would be if the levees weren't there?
14 A That's correct.
15 Q And the idea being that you could duplicate some kind of
16 condition as to what flooding the plaintiffs might
17 experience if the levees weren't there?
18 A That's correct.
19 Q Now, when you did this, did you take out the dams that
20 were upriver at the Ross Lake and the Upper Baker River
21 storage?
22 A They weren't a factor in our analysis at all.
23 Q But my question is, sir, did you take out the upriver
24 storage that is provided by those damages dams?
25 A They weren't in there to take out.

1 Q The dams were not in the model to take out?
2 A That's correct.
3 Q Did you take out the water that was stored in the

4 reservoir and held out of the discharge in the 1990
5 flood?
6 A Let me answer the question this way. The peak discharge
7 of 152,000 cfs for responding to November 25, 1990, was
8 that which resulted after flood control storage had
9 taken effect. It's what was passed downstream from the
10 storage projects.
11 Q Okay. The peak discharge is measured downstream?
12 A Yes.
13 Q Okay. But the upstream storage has an effect on that
14 peak discharge, doesn't it?
15 A Well, let's say that had the upstream projects not been
16 there, the discharge would have been a great deal larger
17 than 152,000 cfs.
18 Q Exactly. You didn't take that into account when you
19 went to the before levee condition, did you?
20 A Well, again, I wasn't trying to simulate any point in
21 time.
22 Well, I take that back. I was simulating a
23 hypothetical situation in 1990 with the storage projects
24 there, and the only change was the removal of the levee
25 system.

1 Q But that conditions never existed, has it, because the
2 levees pre-existed the storage condition?
3 A I don't contend that that condition has existed.
4 Q Okay. And, in fact, the storage that was provided by
5 the upriver storage is almost -- puts us back to where
6 we are, doesn't it?
7 MR. HAGENS: I don't understand that question.
8 Back to where we are in terms -- let me finish -- in
9 terms of what?
10 MR. ANDERSON: I'll rephrase the question.
11 THE COURT: All right.
12 MR. ANDERSON: I have no problem with that.
13 Q I've left in front of you the exhibit book. Could you
14 turn to Exhibit 145, sir.
15 MR. HAGENS: Mr. Anderson, are these your
16 exhibits?
17 MR. ANDERSON: No, those are your exhibits.
18 Q And this is the flood summary report from the -- all
19 right -- technology's a scary thing.
20 This is the flood summary report from the U.S.
21 Army Corps of Engineers on the November, 1990 events,
22 is that correct?
23 A That's correct.
24 Q And this has previously been admitted as Plaintiff's
25 Exhibit 145. What I'd like you to do, sir, is turn to

2 A Okay.
3 Q And at the bottom of the page it indicates Flood Control
4 Regulation, do you see that?
5 A I do.
6 Q And that's section c, and if you continue over to the
7 next page and look at section d, it discusses the
8 Effects of Flood Control Regulation. Do you see that?
9 A I do.
10 Q And you can see at the end of that where it discusses --
11 the last sentence says, "This represents a theoretical
12 reduction in stage of three and a half feet at Concrete
13 and four and a half feet at Mount Vernon." Do you see
14 that?
15 A I do.
16 Q Okay. And that's what the Army Corps of Engineers
17 concluded was the result of their flood storage on the
18 Upper Baker Dam and the Ross reservoir?
19 A Okay.
20 Q Okay. Now, if we take out the levees we're down five
21 feet here, and what you're representing is that the
22 water surface level at Mount Vernon would be five feet
23 lower than it was with the levees in place in 1990?
24 A That's correct.
25 Q And what the Corps of Engineers is saying is if you take

1 out the dams, it's going to raise it right back up
2 another four and a half feet, isn't it?
3 A If that were to occur, I suppose.
4 Q That's what the Corps of Engineers is saying is the
5 effect of their flood control by storing water in the
6 upriver reservoirs, isn't it, is that the water surface
7 level is going to be raised four and a half feet at
8 Mount Vernon?
9 A They made that analysis, I presume, on the assumption
10 that the levee system was in place. Hydraulics would be
11 different if the levees were gone, but I understand your
12 point.

13 MR. ANDERSON: Those are all the questions I
14 have, Your Honor.

15 THE COURT: Counsel.

16 REDIRECT EXAMINATION

17 BY MR. HAGENS:

18 Q This is Exhibit 998 that -- my copy of 998 -- counsel
19 for Skagit County offered you, and this is what is
20 called a rating curve. It has to do with if you have
21 "x" amount of water you're going to have "x" elevation.
22 I think you went over that. Have I basically described
23 it?

24 A Yes.

25 Q Does this exhibit, this rating curve, measure the

1 strength of levees?
2 A No, it has nothing to do with that.
3 Q So, for instance, you can't tell -- so when you earlier
4 testified that the levees in '75 here -- I'm going to
5 circle it, it's on my copy -- were different than the
6 levees in 1990, this doesn't disprove that at all, does
7 it?
8 MR. SMART: Object to the form of the question,
9 Your Honor.
10 THE COURT: Overruled.
11 A Not at all.
12 Q It has nothing to do with the strength of the levees,
13 does it?
14 A That's correct.
15 Q Alls it tells you is if you have that much water going
16 out, by that point that's how high it's going to be, is
17 that correct or incorrect?
18 A That's exactly right.
19 Q So this doesn't relate at all then or bear at all on
20 your opinion that improvements to the levee system have
21 increased its strength and reduced the likelihood of
22 levee failures. Had these improvements not been made,
23 the levees probably would have failed in 1990. Such
24 failure would have provided flood relief for the
25 Nookachamps area.

1 That was your original opinion; isn't that
2 correct?
3 MR. SMART: My objection is they're highly
4 leading questions and this is direct examination.
5 MR. HAGENS: I don't believe it was leading.
6 THE COURT: I don't believe it was.
7 That's fine. You may proceed.
8 Q This doesn't alter your opinion one bit, this rating
9 curve, does it, Mr. Mutter?
10 A Not with respect to collapse or erosion of the levee
11 system, no. It has nothing to do with that issue.
12 Q Let's talk about another -- can we have exhibit -- here
13 it is. I found it. Thanks, Sally.
14 Okay. Dr. Mutter, I wonder if you'd come down --
15 MR. HAGENS: Your Honor, I'm going to have to
16 move this forward so the jury can see it, if it's all
17 right.
18 THE COURT: That's fine.
19 Q I know these numbers are small, folks, and I'll have Dr.
20 Mutter read them off to you.
21 Now, counsel focused on a couple of points where
22 there was a difference in the observed elevations from
23 what your computer predicted the elevations would be,
24 and this is Exhibit 991A. Do you recall those

questions?

- 1 A Yes, I do.
2 Q But are there not points on here that are very close, if
3 not identical, to the amounts that your computer
4 predicted the levels would be in both '90 and '75?
5 A To be sure, it's an excellent calibration. There are a
6 number of points that are within half a foot or less.
7 We predicted 42 and a half as opposed to 42.
8 Q At what point there? Can you help the jury out a little
9 bit?
10 A That's Sedro Wooley Bridge. Back in the Clear Lake area
11 we predicted 41.2. 41 was observed. Another 41, 41.3.
12 These are right on the --
13 THE COURT: Actually, counsel, we have suggested
14 we switch places.
15 A We observed high water marks downstream of I-5 was 35.93
16 feet. We predicted 36. At the Riverside gauge, we
17 observed level was 36.99, we predicted 37. Couldn't get
18 any better than that, so I think it's clear that --
19 particularly where the plaintiffs' properties are, the
20 vast majority of the points are very close, and I would
21 characterize this as an excellent calibration.
22 Q And what counsel did was take the one or two where there
23 was a variation between observed elevations and your
24 computer-generated results and then tried to suggest
25 that your entire report was inaccurate. Do you recall

- 1 those questions?
2 MR. SMART: This is argumentative, Your Honor.
3 THE COURT: I'll sustain that.
4 Q Well, let's put it this way. Is there any relationship
5 or correlation between the one or two results that you
6 have here that were observed signs were a foot or foot
7 and a half different than your computer results and your
8 exhibit -- your computer-generated Exhibit 210?
9 A Not at all. I tried to make that point. I think the
10 one or two points that were -- that I was asked about
11 happened to be points that fit least well to the
12 computer model, and that's an acceptable number of
13 exceptions of outliers, in my opinion.
14 Q What's an outlier. You better tell the jury what an
15 outlier is.
16 A Simply a point that doesn't fit as well as you might
17 like it to, but providing there's not a large number of
18 points like that, and especially if you have
19 explanations for what are the dev -- what caused the
20 deviation, they're not a problem.
21 Q Do you expect outliers in this kind of work?
22 A It's inevitable, sure.

23 Q In some instances you don't have observed levels to work
24 with; is that correct or incorrect?
25 A That's correct.

1 Q Can you explain to the jury in some kind of diagram form
2 why it is there's no link between, as counsel tried to
3 portray, between these variations between observed
4 elevations and your computer elevation? Can you portray
5 that in a diagram of some kind?

6 A I'll try.

7 Q Let's make an effort at that.

8 A The results that are shown on Exhibit 210 are the
9 differences in water surface elevation that I've
10 computed with and without levees. And I've stated that
11 I consider those results to be very accurate, within a
12 tenth or two-tenths of a foot. The question is, if we
13 look at the calibration results, there are deviations as
14 large as a foot, does that reflect on the accuracy of
15 the results of 210. They don't, and I'll attempt to
16 explain why.

17 Let me give you an example of a modeling exercise
18 where we have a river and the water surface elevation
19 corresponding to a discharge of, say, 1,000 cfs. We'd
20 have a known water surface elevation at a discharge of
21 1,000 cfs. Let's say we reduce the discharge to 800 cfs
22 and the water level falls some amount, less flow,
23 doesn't have to be as deep, and we have a different
24 observed water surface elevation, if you will. The
25 bottom of the stream is down here somewhere.

1 Let's say I modeled this situation, and to do
2 that I start off with a calibration and my computer
3 model predicts at 1,000 cfs the water surface elevation
4 ought to be up there. Let's say it's a foot high,
5 higher than the actual observed number. And now if I
6 use that same computer model with no other changes, just
7 change the discharge and see what it says, it's going to
8 be consistently high. If it was high at this condition,
9 it will be high relative to the 800 discharge and it
10 will predict something like that. 800 cfs by computer.
11 And it might be on the order of a foot high there also,
12 but it's consistent. I've made no changes in my model,
13 it behaves the same way. It's high on both occasions.

14 If I'm interested in predicting exact level
15 corresponding to 1,000 cfs, my model's not doing a
16 perfect job. It's off by a foot. However, if I want to
17 know the difference in water surface elevations between
18 the levels for 100 cfs and 800 cfs, this would be
19 observed difference, that difference corresponds almost
20 directly to the difference I compute with my model. The

21 error involved in that calculation is very small.
22 Q That would be one-tenth to two-tenths of your model; is
23 that correct?
24 A That's correct. So let me label "computed difference."
25 The key to my opinion about the accuracy of

1 Exhibit 210 is that we were computing these differences,
2 which my model can determine very reliably whether or
3 not it's calibrated exactly to the discharges that were
4 observed, and this applies at every point, everyone of
5 4,800 points in the model, the model behaved in this
6 fashion, so I remain very confident that difference are
7 highly accurate and directly usable to determine how
8 much lower water surface levels would have been in
9 November, '90, at each plaintiff's property.

10 MR. HAGENS: I'm going to have to ask that this
11 be marked as an exhibit, Your Honor, for illustrative
12 purposes.

13 THE COURT: Counsel?

14 MR. SMART: I don't have any objection, Your
15 Honor --.

16 MR. ANDERSON: No objection.

17 THE CLERK: Exhibit 214.

18 THE COURT: I'm sorry, what?

19 MR. HAGENS: 214, Your Honor. We'll offer 214.

20 THE COURT: It's been admitted.

21 (Whereupon, Plaintiff's
22 Exhibit No. 214 was admitted
23 into evidence.)

24 Q Okay. Let me ask you a few more questions about -- what
25 was the exhibit number that did not take out all of the

1 -- Dr. Mutter, I wonder if you could tell me which one
2 of these was the totally unimproved condition.

3 A It would be Exhibit 993.

4 Q Okay. Let's put that up on the board.

5 Now, your model, Dr. Mutter, did not take out --
6 I can do this from afar but better not risk it with this
7 thing again -- did not take out such things as Highway
8 20 or the I-5 or the Burlington Northern Railroad
9 Bridge, did it?

10 MR. SMART: I object to the form of the
11 question. It misstates the earlier testimony. He did
12 it both ways. The model did it.

13 MR. HAGENS: He may be technically correct.

14 Q 210, that computed the difference, you didn't take out
15 Highway 20, Burlington Northern or I-5, isn't that
16 correct?

17 A That is correct.

18 THE COURT: That's my recollection as well.
19 Q And you also didn't take out the Burlington Northern
20 Bridge, isn't that correct?
21 A That's correct.
22 Q You didn't take out any civil works insofar as the
23 preparation of 210, the big exhibit that shows the
24 difference with or without levees; is that correct?
25 A Except for levees, nothing else was removed.

1 Q And had you not taken out I-5, Highway 20, the
2 Burlington Northern Railroad Bridge, then the county
3 would have a legitimate argument, would they not, that
4 our clients were being flooded in part by other civil
5 works over which they had no responsibility; is that
6 correct?

7 MR. SMART: Objection, Your Honor. What a
8 legitimate and a illegitimate argument is is clearly
9 improper.

10 MR. HAGENS: From a hydrological perspective,
11 Your Honor.

12 THE COURT: I'll allow it.

13 A I suppose that's correct. It seems to me that the issue
14 is the effect of the levee, so any other factor that
15 muddied up the water would seem to put me in trouble.

16 Q So that if you took out I-5, Burlington Northern Bridge
17 and Highway 20, then you would not have taken those into
18 account in terms of how they may have contributed to the
19 flooding on plaintiffs' property, that is if you took
20 those items out; is that correct?

21 A That's right. It could be alleged that those effects
22 were mixed in somehow with the effects of the levee and
23 not separated.

24 Q And what you've done is you've left all those effects in
25 in Exhibit 210, which shows the differences, isn't that

1 right?

2 A That's correct.

3 Q And then I had a question about whether or not, in your
4 review of the documents or exhibits, Dr. Mutter, you saw
5 any historical documents of any kind, nature or
6 description whatsoever that reflected that Skagit County
7 or any entity up there, the dike districts or Skagit
8 County, that reflected that any of the purchasers who
9 bought in this area were cautioned or warned that the
10 levees were causing some or a portion of their flooding
11 problems.

12 MR. SMART: Objection.

13 Q Did you ever see such a document in any of the materials
14 you reviewed in preparing for your testimony?

15 MR. SMART: Objection, Your Honor. This isn't a

16 warnings case. This is not a warnings case. It's not a
17 public duty doctrine case. It's irrelevant to the --
18 MR. HAGENS: Wait a second. He argues our people
19 knew.
20 THE COURT: Overruled.
21 A No, I saw nothing like that.
22 Q Okay. And you say in response to one of counsel's
23 questions, he was talking to you about improvements, and
24 you've spoken about improvements and maintenance in the
25 course of your testimony. As a hydraulic engineer, do

1 you have a view one way or the other as to whether the
2 installation of a keyway is maintenance as opposed to a
3 change in the condition of the levee?
4 A Well, I don't consider that to be maintenance. I
5 consider maintenance to be taking necessary action to
6 restore the levee to its as built condition, so if the
7 face of it has eroded away, you replace what's being
8 been eroded, but it doesn't change the way the levee
9 functioned when it was first built.
10 Maintenance also includes mowing the grass, not
11 allowing trees to grow on it, dealing with burrow holes
12 and so on, but nothing that would change the way the
13 levee works.
14 Q Okay. And would a keyway change the way the levee works?
15 A Fundamentally.
16 Q What about fill of one type or -- fill on the levee,
17 either side, riverside or non-riverside, additional
18 ballast?
19 A That would change its behavior also, yes.
20 Q And how would that fill change its behavior?
21 A It would act somewhat like a keyway does in that it
22 would limit seepage through the levee and tend to
23 prevent a collapse as a result of saturation of the
24 levee.
25 Q Okay. And then you indicated in response to one of

1 counsel's questions, he asked if you knew the
2 relationship between the dike districts and the county,
3 and you said yes, you did have some knowledge of the
4 relationship between the county and the dike districts.
5 What is that knowledge, Dr. Mutter?
6 A Well, the only knowledge I have is from a review of
7 projects that were funded and built and the roles that
8 each of them played in the development of these
9 projects, which is that they work closely together.
10 As I think I indicated the other day, it appears
11 to me that the primary role of the diking district was
12 to identify problems and, beyond that, the county seems
13 to have been directly involved in all -- every aspect of

14 designing and building the projects. That's really all
15 I know about how they've worked together.

16 MR. HAGENS: That's all we have, Your Honor.

17 RE-CROSS EXAMINATION

18 BY MR. SMART:

19 Q Am I correct in understanding that the before condition,
20 in other words the condition without levees, that you
21 have identified in Exhibit 210 -- let me do it this
22 way. Here's 210, correct?

23 A That's correct.

24 Q And this document doesn't show anything other than a
25 comparison between 1990 as it existed and 1990 without

1 the levees, correct?

2 A That's correct.

3 Q And as I understand your testimony in response to Mr.
4 Anderson's question, the 1990 condition without levees
5 was a condition that never existed, correct?

6 A The levees were there in 1990.

7 Q So 1990 without levees never existed at all.

8 MR. HAGENS: That's repetitious then, Your
9 Honor.

10 THE COURT: It is.

11 Q All right. And your testimony with regard to 214 was it
12 did a highly accurate job of depicting a condition that
13 never existed, is that your testimony?

14 A That's essentially correct.

15 Q And so if this case isn't about conditions that never
16 existed, but, rather, is about a comparison between
17 conditions that existed in 1990 with conditions that
18 existed at an earlier point in time, this document would
19 serve no useful purpose, isn't that right?

20 MR. HAGENS: I will object to the form of that
21 question.

22 THE COURT: I'll sustain it.

23 MR. HAGENS: If I understood it.

24 THE COURT: I'll sustain the objection. It's
25 been sustained. Objection sustained.

1 Q If this case is about comparing a condition that existed
2 in 1990 with a condition that existed at some point in
3 time, we can't use Exhibit 210 for determining what
4 comparison between 1990 and the condition that existed
5 at an earlier point in time, could we?

6 A You couldn't use it directly.

7 Q And if we wanted to compare what existed in 1990 with
8 what existed at an earlier point in time, we would have
9 to go back and actually find out what the topographical
10 conditions were at an earlier time, wouldn't we?

11 A I think so.

12 Q And in order to have a computer model that assisted us
13 in making that comparison, we'd have to have a computer
14 model that inputted topographical conditions back at the
15 earlier time we wanted to study, correct?

16 A That's correct.

17 MR. SMART: No further questions.

18 MR. HAGENS: Your Honor, just one question.

19 THE COURT: All right.

20 REDIRECT EXAMINATION

21 BY MR. HAGENS:

22 Q Dr. Mutter, do hydrological engineers have any other
23 way available to them to attempt to measure the amount
24 of flooding that our plaintiffs suffered in 1990, other
25 than the approach you took in Exhibit 210?

1 A Well, during the first week of my work on this case I
2 made a manual estimate on the back of an envelope that I
3 indicated the impact could be up to four feet, and
4 that's been borne out by more sophisticated work since
5 then.

6 Q Is there any other way you can think of to do this
7 except 210 and your more sophisticated work?

8 A Pardon me?

9 Q Is there any other way you can think to measure the
10 impact, other than 210 and the way you've done this
11 exhibit, that took you six months and 500 hours to put
12 together?

13 A I think not.

14 Q Did the county even attempt to measure, to your
15 knowledge, the amount of flooding that the plaintiffs
16 were suffering? Did they hire an engineer to even
17 attempt or undertake this exercise, that you know of?

18 A Well, they had an expert, but if he did work like this
19 I'm not aware of it.

20 MR. HAGENS: Thank you.

21 THE COURT: Mr. Anderson.

22 MR. ANDERSON: I have no questions, Your Honor.

23 RECROSS EXAMINATION

24 BY MR. SMART:

25 Q You say this is the only way to do it, other than

1 working on the back of an envelope, correct?

2 A I don't think I made that statement. There's no better
3 way.

4 Q Well, in answer to Mr. Hagens' question, your testimony
5 was you knew of no other way to measure the effects of
6 the dikes between various points in time, other than as
7 shown in Exhibit 210. That's your testimony, correct?

8 A If it was I should correct it.

9 Q Yeah, you should correct it to reflect that you could go

10 back and measure the observed levels of flooding during
11 an earlier point in time and compare those with what
12 actually occurred in 1990. That would be a good way to
13 do it, wouldn't it?
14 A No, actually that's not very useful, because we don't
15 have observed levels that cover the entire study area,
16 including plaintiffs' property. That was one of the
17 reasons we developed a numerical model, so that we could
18 bridge the gap between places where we had known
19 information and apply it to each plaintiff's property.
20 Q But as in the 1951 example, even when you had observed
21 levels, you didn't even use them for the purpose of
22 determining what happened in 1951, did you?
23 A It served no purpose for my study.
24 Q That's right, because you were interested in comparing a
25 situation that existed in 1990 with a situation that

1 never existed, correct? That was what your study
2 showed.
3 A I guess that's correct.
4 MR. SMART: No further questions, Your Honor.
5 MR. HAGENS: We have no further questions, Your
6 Honor.
7 MR. ANDERSON: No questions, Your Honor.
8 THE COURT: All right, Dr. Mutter, you may step
9 down.
10 THE COURT: Counsel?
11 MR. HAGENS: Nothing further today.
12 THE COURT: All right.
13 All right, then, ladies and gentlemen, tomorrow
14 morning I'll have you show up -- what do you think would
15 be a good time, counsel? We're planning to leave at
16 9:30.
17 MR. MAJORS: The bus will be here at 9:30.
18 THE COURT: Why don't we try to be in the jury
19 room by 9:15. That will give us plenty of time to make
20 sure we've coordinated everything properly with the bus
21 and we know exactly where we're headed and that sort of
22 thing.
23 And, again, please do you not discuss the case
24 this evening with anyone or remain within hearing of
25 anyone so discussing it. The earlier discussion we had

1 today, I hope no one misinterpreted that I was trying to
2 scold you or something like that or I felt something
3 wrong had been done. That's not it at all. The
4 possibility just existed that someone could read an
5 innocent conversation between a juror and some -- and a
6 party or an attorney the wrong way and we could end up
7 getting in trouble as a result of that misperception. I

8 just want to make sure we avoid that. A lot of time,
9 energy, so forth certainly put into this case. I'd hate
10 to have it founder against something that simple, that
11 someone blows their stack that they think something has
12 happened when it hasn't.

13 Along those lines, tomorrow, again, as I've told
14 you before -- do you have the actual instruction that I
15 can read one more time?

16 As we talked about, we'll be taking a jury view.
17 There are some questions about could we bring along
18 binoculars. We're not going to do that because I don't
19 want any one juror or group of jurors to have some sort
20 of perceived advantage over the rest in terms of how
21 they observed where we're going and anything like that.
22 Obviously we can't bring along a camera or anything
23 because we can't record this. This is not evidence, so
24 we'll just go up there with whatever God has left us
25 with by tomorrow morning in terms of our ability to see

1 and hear and do, and we'll do the best we can with it.

2 And I want to review the instruction that I had
3 read to you before, that this is a situation where
4 you'll be taken to view the scene or area involved in
5 this case. You'll be under the supervision of the
6 bailiff at all times. You will remain together until
7 you are returned to the courtroom or are otherwise
8 excused by the Court.

9 The lawyers are permitted to accompany you and,
10 in fact, will be accompanying us tomorrow, but they are
11 not to discuss this case or demonstrate anything
12 relating to it.

13 Now, on that point, by statute, the Court, in its
14 discretion, may designate individuals who may make
15 statements to the jurors about what they're seeing, and
16 I have designated the attorneys in this case as being
17 capable of doing that. So what I'm saying is, as we
18 drive along and someone points out a certain location or
19 another location, don't misconstrue that the attorneys
20 are doing something improper by doing that because
21 they've been allowed to. We've discussed that. I don't
22 know where all these places are so if I were to tell you
23 every place, they'd have to say, "Judge, there's the
24 Halverson home," and I'd have to say, "There's the
25 Halverson home," so the attorneys will be allowed to

1 discuss where we are with you.

2 Please, as I say in a moment here -- we'll finish
3 the instruction and I have one more comment to make.

4 Lawyers are not permitted generally to discuss
5 the case with you. However, tomorrow they will be at

6 least pointing out where we are. Again, you are
7 reminded not to discuss the case among yourselves or
8 with anyone else. In other words, we're not going to
9 chat among ourselves tomorrow about this is what we
10 thought or what we saw or what did you think we saw.
11 There will be time for you to discuss with each other
12 what you thought you saw up there if you think that's
13 important to you. Again, it won't be evidence but it
14 will be background for you.

15 Do not ask any questions during the view. That's
16 most important tomorrow because we won't answer them,
17 other than I suppose some very simple perfunctory
18 questions. "I'm sorry, did you say that was the Johnson
19 house," you know what I mean, something like that. I
20 don't have any problem with that. But any question that
21 I think approaches a substantive question on any issue
22 in this, case I'm just going to have to let you know
23 that we can't answer that question for you at that
24 point, because, again, that would be a form of obtaining
25 evidence outside the courtroom. That's not what we're

1 supposed to be doing tomorrow. You have to appreciate.

2 I need to walk a thin line here because we could
3 stray over that line. It's my job to make sure that we
4 try to keep this on a straight and narrow as we possibly
5 can and not get evidence mixed up with our background
6 view.

7 JUROR NO. 14: Will we be able to take notes?

8 THE COURT: No, it's not an evidentiary phase of
9 the case. What you will see at the scene is not
10 evidence. There may or may not have been changes in the
11 physical features and there may or may not be
12 differences in the conditions that prevailed at the time
13 of the occurrence or times that are relevant in this
14 trial. The evidence as to the physical appearance of
15 the scene must come to you from the testimony of the
16 witnesses and through the exhibits that are admitted in
17 this trial. The sole purpose of this view is to help
18 you understand the evidence as it is presented to you.

19 With all that having been said, as I say, my only
20 other caution is that it's only human nature -- I'm sure
21 I'm going to have a dozen questions that are going to
22 come to my mind that I'd just love to ask the attorneys
23 in this case about where we are, because they know where
24 we are up there and they know the importance that these
25 points and locations have to their case, but we're going

1 to have to be patient and wait for them to bring that
2 out through the witnesses.

3 So, please do the best we can do not to ask

4 questions about where we are. We just sort of drive
5 around and look at things and come back and go, "Hmm,
6 okay. That was interesting." I'm not exactly sure what
7 we do with it, but it will help you with your background
8 as far as understanding the case.

9 Lunch has been taken care of. There will also be
10 a facilities break, I don't know when, I suppose
11 whenever we all -- whenever a majority of people think
12 it's a good time to do that, one of which I know is
13 going to be at the Mitzel's.

14 Did we call them?

15 MR. HAGENS: We put a call through. I don't know
16 that we've got an answer, but I'll certainly have one
17 tomorrow morning.

18 THE COURT: One thought, we were going to stop at
19 Mitzel's. We're going to have a sack lunch type of
20 thing, but we're going to make a stop to get a cup of
21 coffee, a hot cocoa, a pop. When we're done with the
22 view the day will be over. We're not going to have any
23 testimony or anything here afterwards. It will be the
24 majority of the day, I'm sure, to do the tour. It will
25 be early afternoon probably, midafternoon when we get

1 back.

2 We will leave from the Wall Street side of the
3 courthouse. You'll be taken out there tomorrow when
4 it's time to get on the bus and be brought back there.
5 You can come back to the jury room if you like.

6 There will be no -- obviously there's no trial on
7 Friday in this case, as is our newly evolving custom in
8 this case. There may be some exceptions. That's why I
9 say there won't be any this Friday, and there will be no
10 trial on Monday, it being Martin Luther king day.

11 So we will reconvene as far as the evidentiary phase of
12 this case is concerned Tuesday morning, and I haven't
13 looked at my calendar for next week but I'll bet you
14 dollars to donuts I've got something to do at nine
15 o'clock, so probably 9:30, and I'll tell you that
16 tomorrow for sure.

17 Basic outline, we go for the view tomorrow.
18 Please no questions, no enhanced visual aids of any
19 kind. Please do not, as I said, ask a lot of questions
20 or any, really, while we're out there. The attorneys
21 will be allowed to speak to you about what's going on
22 and where we are. Other than that, there will be no
23 interchange between you and the attorneys, and my
24 bailiff and I will be along to sort of make sure that
25 those things are observed as best we can possibly do

1 it.

2 There will be a lunch break. There will be at
3 least one other break during the day. We'll be back
4 here. You can leave things here if you want. No trial
5 Friday. No trial Monday. You'll be back on Tuesday.
6 That's the basic outline as I understand it.

7 Counsel, anything else you think needs to be
8 covered?

9 MR. HAGENS: Not in plaintiffs, Your Honor.

10 JUROR NO. 16: Are we're going to get out of the
11 bus and walk around?

12 THE COURT: No, generally speaking now. -- I'm
13 being scowled at already.

14 MR. HAGENS: I don't know --

15 THE COURT: I should say -- well, start over
16 again. You asked me whether or not we'll be getting out
17 of the bus and walking around. It might happen?

18 JUROR NO. 16: Should we wear hike boots or
19 anything?

20 MR. HAGENS: I don't. I don't think it would be
21 necessary.

22 THE COURT: It's not going to be anything
23 extended. That's not the purpose of the visit.

24 All right. Anything else, counsel?

25 MR. HAGENS: I have nothing further.

1 MR. ANDERSON: Nothing from the State, Your
2 Honor.

3 MR. SMART: Nothing here, Your Honor.

4 THE COURT: All right, 9:15 in the jury room
5 tomorrow morning and we'll all go on our field trip
6 together at 9:30. Great.

7 Thank you.

8 (Court was adjourned at 4:30.)

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