

April 7,

1997

Dike Districts' Motion for Protective Order

1 MORNING PROCEEDINGS

2 (The following occurred on
April 7, 1997, at 9:37 a.m.,
outside the presence of the jury.)

3 THE COURT: Back on the record in the matter
4 of Leonard and Jeanne Halverson, et al, vs. Skagit County.

5 93-2-05201-2. And we have a motion before the Court
6 today by the dike district. Counsel?

7 MS. VEDDER: Karen Vedder here this morning.
8 THE COURT: I actually had a chance to -- I

9 finally got a chance to actually read the substance of the
10 motion itself. And I had some concerns about timeliness and
11 notice and all these things, and obviously none of those are a
12 problem. While you're here and wanting to proceed.

13 MS. VEDDER: I'll hand up an order shortening
14 time.

15 THE COURT: For the record, any objections
16 with respect to the shortening time?

17 MR. HAGENS: No, Your Honor.

18 MR. ANDERSON: Your Honor.

19 MS. VEDDER: My name is Karen Vedder. I'm one
20 of the attorneys for Diking District 12.

21 We're seeking a protective order in connection with
22 a subpoena served on the dike district commissioner Chuck
23 Bennett by the plaintiffs in this case. Your Honor, has

24 a copy of the subpoena. It directs the dike district to
25 supply

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documents and correspondence from either the dike
Skagit County relating to any indemnity claims in this
The dike district has gone through its records,
providing documents in response to this subpoena with
after having conversations with Carl Hagens that those
documents will be produced at the time that Mr. Bennett
called again to the stand, which I think won't be until
tomorrow.
But in any case, in going through and collecting
documents in response to this subpoena, there is one
that the dike district believes is attorney work product
is entitled to protection by a protective order. This
agreement between the dike district and Skagit County.
believe that this agreement comes under the heading of
defense strategy, which is considered by the courts to
extension of the attorney-client privilege.
There are several cases, the 9th Circuit in Waller
Financials Corp, as well as two other cases cited in my
attorney affidavit are representative of a long line of
going back nearly a century that recognize the ability
co-defendants to share information and strategy and have
strategy and sharing of information be considered an
extension of what typically goes on between the client
the attorney without ever leaving the attorney-client

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office. Normally, of course, the rule is that once you
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Plaintiff's Argument re Protective Order

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beyond the attorney-client, you've waived the privilege.
the exception is, or at least one exception is, in the
of a joint defense strategy. We believe that this
comes under that extension and should be covered by a
protective order.
If the judge wishes to view the agreement in-
have copies.

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Hagens
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Your
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reading

THE COURT: All right, counsel. Thank you.
MR. HAGENS: Good morning, Your Honor. Carl
for plaintiffs. Hope you haven't forgotten my name,
Honor.
THE COURT: Actually, I spent yesterday
reminiscing about each and every one of you as I was
the pleadings and so forth of the case.

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any
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sure.

MR. HAGENS: Let me tell you --
THE COURT: I'll never forget any of you, in
event.
MR. HAGENS: I doubt it. And same here, I'm

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Let me tell you why we did what we did.
I got to thinking after all these intergovernmental
agreements came into evidence that have the indemnity
harmless provision in them saying the county -- whereby
dike districts agree to save and indemnify Skagit County
any liability, well, you know, if I'm the attorney, like
Vedder here, for the dike district, and I get a demand

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Plaintiff's Argument re Protective Order

1 Skagit County saying to come in and indemnify me in this
2 case, am I just going to roll over and say, sure, I'll
be in 3 to take care of you tomorrow morning, take you out of
the 4 case all together? Am I going to think a little bit
about 5 whether I should bite the bullet and think maybe the
county 6 is the one that supplied, engineered, funded these
projects 7 and was really the moving force behind many of these
isn't 8 projects. And say, wait a second, indemnity agreement
you 9 any good as to us because as a matter of public policy
10 can't seek to indemnity for your own fault, negligence,
here, 11 misconduct. Putting myself in the shoes of Miss Vedder
12 saying I better write them a letter, correspondence, to
13 something that will assure that I wasn't going to sign
off on 14 this unconditional indemnity or save-harmless provision.
And 15 so I got to thinking, well, the best way to get at that,
16 because they didn't produce the documents when
subpoenaed 17 back in the federal action when they were involved, is
to 18 send a subpoena to Mr. Bennett and see what existed on
this 19 subject matter. Because, you know, one of the central
20 issues, and it's critical, one of the central issues in
this 21 case is they are pointing at each other. Skagit County
is 22 pointing at the empty-chair dike district and the dike
23 district isn't here, of course, to point back in this
24 litigation. So it becomes one of the central issues in
the 25 case.

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Plaintiff's Argument re Protective Order

1 Now, their brief that I got seemed to focus more on
the
2 attorney-client privilege rather than work products. In
most
3 of the cases I've had experience with joint defense
4 agreements, Your Honor, what they are saying here is
it's not
5 the communications that they want to protect, they want
to
6 protect the joint defense agreement itself, which is the
7 foundation, the predicate for being able to assert any
8 privilege. That is, they have the burden here to assert
the
9 privilege. Typically have to come in and show the joint
10 defense agreement. In other cases I've been involved
in, I
11 can't think of one that was an exception, the defendants
12 invariably gave us the joint defense agreement so as to
set
13 the predicate, the foundation for claims of joint
defense
14 privilege. Whether it's a work product or attorney-
client
15 privilege matters.
16 Here they are saying that the agreement itself is
17 somehow protected. And I don't know why that would be.
I
18 don't know what's in the agreement that would justify
that.
19 There is no attorney -- no witness statements, no
20 confidential -- typically, the ones I've seen, no
21 confidential communications between the attorney and
client.
22 In the joint defense agreement itself, it says, really,
the
23 foundation for the assertion of the joint defense
privilege.
24 I'm perplexed as to why they will say the documents
aren't
25 protected but the agreement itself is, and it does have
a

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Plaintiff's Argument re Protective Order

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somewhat at

reservation of rights in it as well. And so I'm

2 a loss.

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make

4 I did a little research after I got their brief on
5 Friday and found one case that I thought was somewhat in
point. And although it was a packing case, it seemed to

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U.S.

7 the point pretty well. Graco Childrens' Products vs.
Dressler, Goldsmith Shore and Milnamow. And it's a 1995

8
this

District Court Lexis, 8157, 1995 decision. And I said,

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like.

10 can't be right. I grant they have the right to protect
confidential communications between the client and the

11
I've

12 But as to the agreement itself, I said, that can't make
13 since.

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got

15 If you turn to page 4 of the agreement, the portion
16 got underlined, Your Honor. Case -- the portion I've

17
that

18 underlined --

19 THE COURT: I'm sorry.

MR. HAGENS: Page 6 of the Lexis.

THE COURT: This document.

MR. HAGENS: Yes, Your Honor. You'll see in

20 recital that:

21 The community of interest extends only to
22 communications that relate to the
23 prosecution and litigation of the patents
24 and not to those communications related to
25 parties' rights among themselves.

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Plaintiff's Argument re Protective Order

1 In the patent. So what they are saying there is,
look, 2 yeah, joint defenses strategy, plaintiffs' damage case
3 doesn't fly. Joint defense strategy that the dikes
don't 4 divert water on to plaintiffs' property. Those sorts of
5 communications and exchanges of privileged documents
between 6 clients to lawyers and lawyers to other lawyers in the
case 7 would be privileged. But the underriding agreement
itself 8 relating to the parties' rights among themselves, that
9 typically wouldn't be privileged.
10 And I haven't seen the form of the agreement. And
I 11 think certainly Your Honor is going to want to take a
look at 12 it in-camera, if nothing else, to satisfy yourself that
if 13 there is some claimed work product or mental impressions
in 14 it, which I find a little bit difficult to believe,
because 15 typically those have just contractual recitals in them,
I'm 16 perplexed to some extent why it wouldn't be even public
17 discloses.
18 I ended up with the thought, Your Honor, that they
are 19 not saying that the communications that were generated
from 20 these indemnity agreements between the joint defense
21 agreement itself, which is kind of a foundational thing.
22 There is one other attribute that I think the Court
23 might want to consider for a moment. They don't claim,
I 24 guess, that the provisions are attorney-client
privilege. 25 They claim that the provision of this agreement are work
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Plaintiff's Argument re Protective Order

1 product. And again, I don't know how contractual
provisions 2 could be -- end up as work product, the strategy as such
3 anyway. But I think that there is --
4 THE COURT: Go ahead.
5 MR. HAGENS: I think there is another point
that I 6 wanted to make before I sit on down. And that is the
issue 7 in dispute, that is the direct -- the direct issue in
dispute 8 is the matter directly at issue, is the subject of the
client 9 claimed joint defense privilege, or even the attorney-
10 privilege.
11 I'll give you an example in a moment. The lawyers
have 12 always be entitled to get that. Let me give you an
example. 13 Insurances agent writes his superiors, who are lawyers,
some 14 lawyers, saying, look, we're going to deny coverage,
make 15 insured sue us and settle for a pittance. The insured
brings 16 a wrongful, bad-faith case against the insurance
company. 17 They can't keep that exhibit out because some agent had
18 written his boss, lawyer or not. Because that becomes
what 19 is known as an issue central to the case. And there are
all 20 kinds of cases. In re Sunrise Security Litigation, 130
FRD 21 560, Wright and Miller at section 2026, page 402, also
22 addresses this point and says, look, when it's an issue
23 directly in point, here the dike district is -- the
county 24 pointing at the dike district and the dike district
pointing 25 at the county -- they can't protect those kinds of
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Plaintiff's Argument re Protective Order

1 communications from discovery.
2 And so I don't know what's in this thing. I mean,
I'm 3 at a big disadvantage here. I have no idea what's in
this 4 document, to the extent it relates to the central issue
in 5 this case, which is Skagit County's relentless efforts
to 6 shift the responsibility to the dike districts, who
aren't 7 here in the empty chair. Plainly, to me, under the
direct 8 issue section, we would be entitled to it.
as 9 I make the point that I guess they are not claiming
10 confidential, they are claiming now that it's work
product.
11 And not having it, I'm hard pressed to see how
contractual 12 provision could be viewed as work product. They would
have 13 the burden on that. And not having it to look at and
argue 14 from puts us at no small disadvantage.
15 I get back to the point that is cited in the Graco
rights 16 Children's Products case. That agreements as to the
17 between the parties typically did not fall within the
say, 18 protection of the joint defense privilege. And as I
19 Your Honor, this is a first too for me. I have not been
in 20 an experience where the joint defense agreement itself
has 21 been sought to be excluded.
22 Thank you, Your Honor.
23 THE COURT: Counsel?
24 MR. SMART: Briefly, Your Honor.
25 MR. HAGENS: I don't know what he is doing

standing

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Skagit County's Argument re Protective Order

1 up on this motion. Unless they are in cahoots here
again. I 2 don't know what standing counsel has to make any, what -
- 3 with respect to this motion. It's not his motion. They
are 4 truly separate entities. I don't know why he is even
5 standing up here talking about it.
6 THE COURT: Counsel.
7 MR. SMART: Thank you, Your Honor. Obviously
we 8 are interested in this issue as well, Your Honor,
because the 9 county also is one-half of this joint defense agreement.
10 First of all, Your Honor may recollect that you had
11 earlier ruled even the allegations themselves in the
earlier 12 litigation, the federal case, are not admissible or
relevant 13 to any of the issues in this case. This document stems
from 14 strategy among the lawyers in the litigation of that
other 15 case. So that in addition to the good points that are
made 16 by Miss Vedder concerning attorney-client and
requirement to 17 produce, it's hard to say how it leads to this case.
Even 18 the documents to which this joint defense agreement is
19 directed would not be relevant and have been ruled to be
20 inadmissible in this case. It obviously didn't exist
prior 21 to the 1990 floods. It's not something that was in
existence 22 as a relationship between the county and the dike
districts 23 at a time that is material to the issues in this case.
24 And in addition to the case law that is cited by
Miss 25 Vedder, it seems that Mr. Hagens' has made simply an
argument

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Dike Districts' Rebuttal Argument re Protective

1 based on a patent case, this one that he handed up, but
even
2 a cursory reading of that case indicates that it's
3 withholding 300 different documents under the guise of
some
4 sort of privilege that is not related to the one that is
5 being asserted here. And it involved the relationship
6 between parties when the specific litigated interest is
those
7 rights. So it seems that the very clear authority set
8 by Miss Vedder in her brief supports the motion for
9 protective order.
10 There is no legal authority or rule of law cited on
that
11 point on the other side. And beyond that, it couldn't
12 possibly lead to relevant or admissible evidence in this
13 case.
14 Thank you.
15 THE COURT: Thank you. Counsel.
16 MS. VEDDER: I believe, again, just in summary
of
17 my first argument, that the case law is clear in
18 establishing
19 that the creation of a joint defense is an extension of
20 the
21 attorney-client privilege and that this was created as a
22 confidential document and was created with the belief
that
23 such a document is part of the attorney-client
privilege, the
24 extent of attorney-client privilege that is available to
25 co-defendants, and should be protected.
THE COURT: All right. And Mr. Hagens, as you
analyzed it, the issue -- the central issue of this --
these
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Plaintiff's Rebuttal Argument re Protective Order

1 documents go to -- go to a central issue.
2 MR. HAGENS: Yes, that's correct.
3 THE COURT: Would you elaborate on that for me
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for a moment? I want to make sure that I really
your perspective on the connection between this document
that central issue.

MR. HAGENS: Certainly. As Your Honor has
witnessed through the last three months or so this case
gone on, and in opening statements and throughout the
of the litigation so far, Skagit County has got up here
said the dike districts did it, it was their idea, they
the moving force, they are the ones who built the dikes.
I think that is one of the central defenses, obviously,
the county -- you have sued the wrong party, we should
had dike districts here, even though we tried to sue

As you know, there are intergovernmental agreements
indemnity provisions in them. And I think in the course
correspondence back and forth, even the body of the
defense agreement itself, there may be claims from the
districts saying, well, wait a second, we didn't have
anything to do with these dikes, you guys engineered
you're the guys that built them, you're the guys that
them, we don't have the employees, we don't have any
equipment, we don't have any of these things I've been
talking about throughout the course of the trial, which

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Plaintiff's Rebuttal Argument re Protective Order

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3 in the joint defense agreement itself. I can tell you
4 if it's a true joint defense agreement it has factual
5 in it. If it does, then I think I'm entitled to get at
6 because they are the central issue in the case; namely,
7 have the right party in court here. That is what I see
8 one of the central issues of the defense.

9 Mr. Bennett starts testifying these were all our
10 decisions. I say, wait a second, Mr. Bennett, from this
11 indemnity provision, it says the dike districts say that
12 were forced to or required to do this by the county in
13 to increase all the protection level for everybody in
14 county. I don't know what's in the bloody thing. I
15 got the foggiest idea. How can you on one side of your
16 on the stand take the position that you did this
17 independently and on the other side of your mouth argue,
18 comes time for this indemnity agreement to surface and
19 joint defense agreement, say, well, we think you are the
20 that forced us to do it.

21 That's where I'm coming from on this. I do believe
22 a central issue in the case.

23 THE COURT: I need to look at the document
24 in-camera. Do you have it available with you?

25 The jurors will be delighted to know that our clock

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Plaintiff's Rebuttal Argument re Protective Order

1 it's only nine o'clock.

2 MR. SMART: We going by this clock here?

3 THE COURT: I'm tempted to. I'd probably have

4 mutiny on my hands before the end of the day.
5 And Mr. Hagens, while I'm looking through this, you
also
6 need to respond to Mr. Smart's position with respect to
the
7 irrelevancy of this document because it is apparently a
8 defense agreement fashioned between, first of all,
parties
9 that are not here in this litigation. We understand
that.

10 MR. HAGENS: True.
11 THE COURT: And number two, fashioned in
response
12 to and around the -- in response to another litigation
which
13 is not the same litigation.

14 MR. HAGENS: That's true.
15 THE COURT: I would like to have you respond
to
16 those.

17 MR. HAGENS: Certainly, Your Honor.
18 Of course, the underlying foundation for the civil
19 rights claim in the federal action, and you were there,
were
20 pending state claims. Same claims that were here in the
21 federal court, the court which declined jurisdiction of
those
22 claims. After dismissing the civil rights claim.

23 So what I'm saying is, these claims were before in
24 federal court. So to argue that they weren't relevant
when
25 precisely the same parties were there before the federal
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1 court, I mean, I don't know how we can argue it's
2 irrelevant. To some measure it depends on what the
exhibit
3 says. I haven't got any idea what the bloody thing
says.

4 One other point I make, Your Honor. If it's truly
a
5 contractual protection provision like most joint defense
6 agreements I've seen, it's not a straight recitation of

7 strategy, it's a recitation of contractual provisions.
Have
8 been my experience, that being the case, plainly,
contractual
9 provisions wouldn't fall within any strategy or work
product
10 or -- that I can think of, Your Honor. And as I say, my
11 experience has been that these agreements are typically
12 turned over at the outset as a foundation for either the
work
13 product or the attorney-client privilege.
14 So it's an unusual situation, the lawyer is
claiming
15 that it per se is work product or attorney-client
privilege.
16 THE COURT: Just a couple quick questions.
17 I've had a chance now to review the agreement
regarding
18 reservation of cross-claims which is dated -- signed by
all
19 parties on the 20th of August of 1992. The parties to
this
20 agreement being, for the record, Skagit County through
21 Leonard Barson, and John Moffat, and Mr. Sveran,
attorney for
22 Dike District 12, and Warren Gilbert, attorney for Dike
23 District 17. Those are the participants in the
agreement
24 itself.

25 We have one, two paragraphs of -- first we have
your
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1 basic preamble, and then we have the actual contractual
2 agreement, which constitutes two paragraphs. As counsel
3 suggested, pure contractual recitations involving the
rights,
4 recitations of rights, statutes of limitations, any
other
5 applicable bars to prosecution, such as laches or any
other
6 legal theory, talking about the various rights and
7 responsibilities of the parties amongst and against one

8 another. Then finally, a paragraph 3, a recitation
wherein 9 the document itself, in the body of the document itself,
10 claiming that this was prepared in anticipation of
litigation 11 and contains and reflects the mental impressions,
conclusions 12 opinions, and legal theories of the undersigned counsel.
13 This agreement is protected as joint work product and
14 constitutes joint contractual material as defined in the
15 joint defense agreement. This agreement shall only be
16 disclosed in accordance with the terms set out in the
joint 17 defense agreement.
18 Now, is the joint defense agreement, counsel, that
is 19 referred to in that final paragraph, a different
document? 20 MS. VEDDER: Yes, it is.
21 THE COURT: That is the overriding.
22 MS. VEDDER: Yes.
23 THE COURT: That's what I thought.
24 MR. HAGENS: Your Honor does not have the
joint 25 defense agreement before him.

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Colloquy re Protective Order

1 THE COURT: I have only the agreement
regarding 2 reservation of cross-claims.
3 MR. HAGENS: Well, I think -- I thought Your
Honor 4 asked for the entire ball of wax here. I guess she has
5 withheld some of the critical documents.
6 MS. VEDDER: In response to that, the joint
defense 7 agreement was not covered within the materials and
documents 8 requested by the subpoena. I have brought it here, and
you 9 are welcome to look at it in-camera.
10 THE COURT: I'll take a look at that.
11 MR. HAGENS: Wait a minute, Your Honor. We
asked

12 for all correspondence, all documents, any kind, nature
or
13 description whatsoever. Related to indemnity. This is
14 exactly the sort of problem that lawyers get themselves
in
15 when they take too narrow a reading of subpoenas and get
16 their clients in trouble for having done so.
17 THE COURT: I don't know if the subpoena says
in
18 the definition -- it talks about document. I suppose
you
19 could make -- I don't think you could -- even have a
20 hieroglyph excluded from that definition. It pretty
well
21 covers everything, as far as I'm concerned. It says:
22 ... bring to trial Monday all documents and
23 correspondence. That is, records,
24 memorandums, letters, to or from Dike
25 District 12 and Skagit County relating to
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1 any claims of indemnity under any interlocal
2 agreement or otherwise because of this or
3 any prior suit by the plaintiffs.
4 Is it your position that the joint defense
agreement
5 does not fall within that definition?
6 MS. VEDDER: Yes, it's our thinking that it
doesn't
7 relate to indemnity. It's certainly a document.
8 THE COURT: I understand. I should review
that
9 then. If only for the purpose of the fact there that
seems
10 to be a restriction or reservation contained in the
11 reservation or cross-claims that is related directly to
that
12 agreement.
13 MS. VEDDER: That's why I brought it.
14 THE COURT: I appreciate you making that
15 available. Take a look at it here.
16 I've had a chance now to review the joint defense
17 agreement covering the use of documents and other

18 applications for any and all joint confidential material
that
19 might be produced between the parties who are bound
together
20 by this agreement. It also covers the manner in which
that
21 documentation and material could be disclosed, if at
all.
22 And that, I would assume, is the language that we find
23 ourselves being referred to in the reservation of
24 cross-claims where it talks about it cannot be breached,
if
25 you will, by any methodology other than that included in
the

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1 joint defense agreement.
2 Then there are several provisions in the agreement
that
3 talk about how information can be disclosed, first of
all,
4 how it's communicated between and among the parties to
the
5 agreement, how it could be disclosed to other persons
outside
6 these specific entities; for example, consultants,
experts,
7 other people, paralegals, others who might be called
upon to
8 review or analyze or work on the material either during
of
9 the course of the agreement. And basically, it says
that's
10 really about all we can do. And beyond that you have
to
11 have the written consent of each and every one of the
other
12 parties before any further disclosure beyond that
circle, if
13 you will, will be allowed.
14 And there are provisions for enforcing that in and
15 between the parties.
16 So the question boils down to, in my analysis is,

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should say
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whether or not the actual agreement regarding -- I
that counsel -- the motion for protective order
covers the agreement regarding reservation of loss
Are we talking bias or prejudice and the joint defense
agreement?
MS. VEDDER: Well, it's the dike district's
position that the joint defense agreement is not
to the subpoena. If the Court believes otherwise after
having reviewed it, then we will amend the motion to

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Court's Oral Ruling re Protective Order

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THE COURT: All right. Okay.
THE COURT: Anything else?
The Court will rule as follows:
The subpoena issued by the plaintiffs in this case
regarding the materials that we've talked about this
which would include the joint defense agreement in this
particular case, I think that is clear, the agreement
regarding the reservation of cross-claims is clearly and
purely a contractual document, with no recitation of
regarding remotely involving anything that is
protected, as I understand the measure of the protection
it is extended currently by law.
That third paragraph in there notwithstanding, the
agreement regarding reservation of cross-claims would be
available to the plaintiff.
There will be no protective order issued with
it.
Now, the joint defense agreement, that is to my way
thinking a different animal, entirely. It is replete
discussions about how it is that the defenses' team can

22 strategize and plan for their mutual defense in this
case, 23 the procedures by which that will be effected, how those
24 materials are to be handled. And amongst the group
itself as 25 opposed to -- I guess what I'm saying is -- something
that is
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1 actually created as a document, something that is
published 2 out of this process and that is utilized or relied upon
for 3 some sort of contractual purpose. We're talking about a
4 contractual relationship of some sort between the diking
5 district and the county in this case. The bottom line
being 6 that once something like that is produced, I think it's
7 available and it's fair game.
8 This, however, is simply the skeleton review or the
9 outline, the recipe by which that sort of work product
would 10 eventually be generated. And so this particular
document 11 itself I think does fall within the privilege that
county or 12 the dike district in this case is claiming. And I will
13 protect that -- the order will be granted with respect
to --

14 MS. VEDDER: Is that with respect to the joint
15 defense agreement itself? I need to ask a question to
16 understand your order.

17 THE COURT: All right.

18 MS. VEDDER: Did you rule that you believe the
19 joint defense agreement came under the purview of the
20 subpoena but was protected?

21 THE COURT: Yes.

22 MR. VEDDER: In which case, in order to be
fully

23 responsive, there was an addendum to the joint defense
24 agreement, and I would ask the Court rule on that as

well.
25 THE COURT: Let me take a look at that to make
sure

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1 we have all that.
2 This is what I'm talking about. I'm glad you
brought 3 this to my attention.
4 So this original document that is created through
the 5 process of the joint defense agreement, which I think
then 6 becomes a matter that can be explored by the plaintiff.
What 7 I'm saying, I don't think you have to lay bare in front
of 8 the plaintiff all the thought processes and the workings
and 9 so forth of the joint defense agreement that -- besides,
it 10 gets kind of murky as far as I'm concerned for the jury
to 11 really deal well with what that would mean. When a
contract 12 or some sort of specific agreement is the result of that
13 process, however you arrive at forming that coalition,
if you 14 will, between you, then that particular document is
15 admissible in this particular case.
16 So the addendum I will not sign a protective order
17 covering, but the joint defense agreement itself will be
18 protected.
19 MS. VEDDER: And to you -- are you also ruling
that 20 that joint defense agreement covers a subpoena requiring
21 documents relating to indemnity?
22 THE COURT: Absolutely. Indemnity is one of
the 23 issues in this case.
24 MS. VEDDER: This relates to indemnity --
25 THE COURT: Essentially one of the issues
which has

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1 developed in this case is that relationship. I think
2 indemnity is covered in that agreement. Absolutely.

3 MR. SMART: Just for the record, the county's
4 position is that indemnity is not an issue in the case.
5 Gross claim for indemnity in this case with respect to

the

6 diking districts. In fact, we did have motions in

limine

7 with respect to issues regarding payment and related
8 matters. Indemnity could include the concept of the
9 insurances which Your Honor previously ruled on. And we
10 would point that out to Your Honor, that the indemnity -

-

11 THE COURT: I think to be more specific and

more

12 responsive -- and I appreciate the comments counsel has

made

13 to the point -- maybe I'm wrong. This is a point for

someone

14 to straighten me out, if you will. That the

relationship

15 that exists between the dike districts and the county,

if

16 any, to the extent one exists, would be reflected

17 contractually between the parties through the medium of

and

18 the discussions of issues such as indemnity and so

forth.

19 Indemnity itself is not an issue in this case. I agree.

The

20 jury is not going to have to sit here and figure out who

pays

21 who for what. I agree.

22 But the essential relationship between the dike

23 districts and the county is an issue. It's been brought

into

24 this case and made repeatedly an issue in this case.

And

25 naturally so. I think that is the way this case would

play

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1 itself out. To the extent that there are documents in
2 existence which underlie the plaintiffs' theory of
3 relationship between these parties as has been addressed
4 numerous times in this case, that is why I'm finding
that
5 it's admissible. It goes to the essential relationship,
6 whether you call it a relationship by virtue of
indemnity
7 agreements or some other contractual relationship. And
there
8 are several others they could have. That is the essence
of
9 that, the importance of this relationship in this case.
10 I don't want anybody reviewing the record thinking
that
11 I'm somehow thinking indemnity is an issue in this case.
12 It's not, but the relationship between the parties is.
13 MR. SMART: Just for clarification, is Your
Honor
14 ruling on admissibility of documents? Motion was simply
15 whether or not --
16 THE COURT: No. I used that term. No, that
was an
17 overbroad -- no, I'm simply saying that there is no
18 protective order as it relates to those two. Their
19 admissibility on other grounds stands alone. That is
20 something else that has to be established.
21 MR. SMART: We certainly intend to address the
22 issue of their materiality, relevance and admissibility.
23 THE COURT: You're right to point that out. I
did
24 not mean to say that. I did say it. I think I was
wrong to
25 say they are admissible. There may be other objections
to
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1 their use, and those observations may very well prevail.

order
reservation
agreement"?

2 MS. VEDDER: May I then modify the proposed
3 to essentially cross out the "agreement regarding
4 of cross-claims" and substitute "joint defense

5 THE COURT: All right. That's fine.
6 Counsel, anything else we need to do before we get
the jury started?

8 MR. HAGENS: One point, Your Honor.
9 Go ahead.

10 MR. SMART: Just very quickly, Your Honor. We
did -- and I would like to do this on the record. We did
11 substitute Exhibit 1334 as we indicated we were going
12 to.

13 That was the original photograph from Gertrude Close
that she needed to have back. Sally has taken care of that.
14 The other thing, Your Honor, is that counsel have
15 agreed to allow us to call Dr. Melone this morning in place of
16 Mr. Bennett. And so we're going to have a slight schedule
17 change in that respect.

18 THE COURT: Think the schedule I saw I thought
19 it said you are doing depositions all day.

20 MR. SMART: Two quick depositions of experts
before that and then call Dr. Melone.

21 MR. HAGENS: One point we had.
22 THE COURT: Monday, depositions of Richard
23 Regan,
24 Gerald Mutter and Tony Melone.

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1 MR. SMART: Melone is live.

2 MR. HAGENS: Semicolon. Melone.

3 That is how I got confused. When I went back and
4 studied this, I think we had Regan on the stand and Dr.

5 Mutter on the stand. I said, why is he going to read
their 6 depositions in? He could have used it with them while
they 7 are here.

8 So yesterday, or Saturday, I should say, I had an
9 opportunity to go back and take a look at the rulings.
When 10 they were here, I don't understand why he would be
entitled 11 to read in their depositions. So -- and Rule CR 32
seems to 12 deal with precisely that situation. It says you can't
read 13 in the deposition unless there is an availability
problem. 14 And so I'm handing up CR 32 5 (A) on this point, Your
Honor. 15 And making formal objection.

16 And the other point I wanted to make, Your Honor,
was 17 this, and that is that there are some very limited
sections 18 they are going to be allowed to read in that we would
like to 19 read in. They have been very selective what they read
in and 20 we have one or two paragraphs we would like to read.

21 THE COURT: 32 5 (A) says:
22 The deposition of an expert witness may be
23 used as follows:
24 The discovery deposition of an opposing
25 party's Rule 26 (b)(5) expert witness, who
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1 resides outside the state of Washington, may
2 be used if reasonable notice before the
3 trial date is provided to all parties and
4 any party against whom the deposition is
5 intended to be used is given a reasonable
6 opportunity to depose the expert again.

7 And I'm sorry, counsel. So your objection based

upon 8 that is specifically related to what?

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MR. HAGENS: Obviously, Mr. Regan is not out
state, Your Honor. And they had him on the stand. I
know why they didn't use the deposition then. I don't
really why they would go back to the depositions when
had both of these guys here for days.
MR. SMART: Your Honor, this is very similar
point was already ruled in this case. We argued for the
availability of witnesses that they were going to be
counsel was given the opportunity and the Court ruled
they would be allowed -- all counsel would be allowed to
portions of deposition, and we wouldn't be getting in
of each other's case. Counsel read in portions of our
expert's depositions in the case pursuant to that
we're simply doing the same thing.

MR. HAGENS: We didn't call their experts.
we read in was Mr. Keenan. We didn't call him. He
the stand for three or four days. Besides which, they
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them.
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to

object under Rule 32 (5)(A). And we are saying we are.
MR. SMART: We did, Your Honor, originally to
procedure, but we had a long discussion about that and
Court ruled specifically with respect to how that was
to work. And we didn't call their experts, they called
THE COURT: I'll deny the motion with regard

7 it. I just feel that it's really important for me --
and I'm 8 sure you're all keenly aware of it more so even than I
am 9 -- that as we press on in this case we get into the
month of 10 April here, we're grinding along. Everybody runs the
risk of 11 boring this jury right out of their socks. We need to
be 12 very strategically aware of how the cumulative effect of
time 13 in this particular -- in any case, has that measure to
it, if 14 you will. And I don't know about you, but when we do
15 depositions, it's -- jurors are not -- put it this way.
16 Jurors are not thrilled by deposition testimony, to say
the 17 very least.
18 But I'll deny the motion. I think, counsel, you
are 19 right. Basically what you saying, you have the right to
try 20 your case the way you want to try it. We did have a
21 discussion earlier on about the proceedings whereby
22 depositions would be used and how to utilize them. I
think 23 that's basically where we landed. Plaintiff did more or
less 24 the same thing, and --
25 MR. HAGENS: Just for the record, Your Honor,
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1 was only one expert that we used and he wasn't here
live, 2 Your Honor. These experts were here live.
3 THE COURT: I understand that distinction.
Counsel 4 is entitled to try his case the way he feels is best.
I'll 5 certainly defer to his expertise in that area.
6 All right.

7 MR. ANDERSON: Your Honor, I did have one
thing.
8 Since we're talking about the deposition and this
scheduling
9 thing. I don't want to take a lot of the Court's time.
10 We have Mr. Hastings. Mr. Smart has done a video
11 deposition for perpetuation for trial. We have been
trying
12 to schedule that deposition to complete it for months
now.
13 And because of repeated health problems, Mr. Hastings is
14 unable to do it. We were supposed to complete it
Wednesday.
15 He was remitted to the hospital. Apparently he has been
16 diagnosed with cancer now. This is after having had a
heart
17 attack, a stroke and a blood infection.
18 My concern is I want to complete that deposition.
I'm
19 trying to -- I wanted to it did Saturday. His doctor
20 wouldn't allow me to do it. I had my office try to
contact
21 him. And I don't know how the court is receptive to the
22 idea, but we may have a small window of opportunity to
23 finish, and this -- if I find out -- I've talked to Mr.
Smart
24 and Mr. Hagens and told them both that I believe I am
willing
25 to give up one of my trial days in May if need be to
take a

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1 recess here to complete that deposition. I don't think
he is
2 going to die, but I think the doctor may decide he needs
an
3 operation at some point in time. And I just want to
alert
4 the Court to that. I don't know how the Court feels
about
5 that.

6 But -- its the thought that I have. And I will
bring it
7 to the attention of the Court when I find out what the

8 situation is.
9 THE COURT: Well, we'll cross that bridge when
we
10 get to it. I guess I would tell you that generally
speaking,
11 if you feel it's that important to your case to have
that
12 completed, I'd be inclined to go along with the
13 consideration. As you said, that there may be some
14 adjustment necessary, you know, down the line to
compensate
15 for that. We'll see.

16 MR. ANDERSON: Thank you.
17 THE COURT: All right.
18 We need to take a brief recess.
19 (The following occurred in
the
presence of the jury.)

20
21 THE COURT: Ladies and Gentlemen of the Jury,
we've
22 been busy this morning with a couple of preliminary
matters
23 that are related to this case. Some motions and so
forth
24 that we needed to deal with. And I apologize for that,
25 making your entry out here late. But these things come
up

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1 from time to time in the course of the case.
2 I haven't been here all week to address some of the
3 things that counsel needed to have taken care of this
4 morning. So I apologize for the delay that that took.
5 Should probably have anticipated that at the end of last
week
6 or the week before and let you know that.
7 But in any event, we're ready to proceed at this
point.

8 MR. SMART: Your Honor, as indicated, we have
9 agreed among counsel to interrupt the testimony of Mr.
10 Bennett and call Dr. Melone. Prior to Dr. Melone, we're
11 going to have two short, brief experts from deposition.

12 And in a rare event, I'm going to play myself
today.
13 THE COURT: All right.
14 MR. SMART: First will be brief excerpts from
the
15 deposition of Richard Regan, one of the plaintiffs'
experts,
16 starting on page 9, line 8. Question by me of Mr.
Regan.
17 QUESTION: Your current occupation is what,
18 sir?
19 ANSWER: I'm a hydraulic engineer.
20 QUESTION: With what organization?
21 ANSWER: Northwest Hydraulic Consultants,
22 Incorporated.
23 QUESTION: Is that the same organization
24 with which Mr. Mutter is affiliated?
25 ANSWER: Yes.

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Deposition of Richard Regan

1 QUESTION: Is Mr. Mutter the president of
2 Northwest Hydraulic?
3 ANSWER: I believe he is.
4 QUESTION: You have both been identified as
5 expert witnesses in this case, is that
6 correct?
7 ANSWER: I believe so.
8 QUESTION: I looked at the designation of
9 expert opinions that were given to us by the
10 plaintiffs' attorney, and it appeared to me
11 that essentially the same topics fell
12 beneath the opinions of both you and Mr.
13 Mutter. Is there some division of
14 responsibility that you have internally
15 allocated for this case, or how have you
16 approached that?
17 ANSWER: Yes, there is some.
18 QUESTION: What is it that you are supposed
19 to do and what is it that Mr. Mutter was
20 supposed to do?
21 ANSWER: Mr. Mutter will testify as to
22 hydraulic modeling, the ongoing modeling
23 that we're doing now, which is numerical
24 modeling. Procedures, models used, et

25

cetera. I will be testifying to my
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Deposition of Richard Regan

1 knowledge of the Skagit River as it pertains
2 particularly with my past employment with
3 the corps of engineers.

4 Turning to page 88, line 4.

5 QUESTION: So as you sit here today you
6 don't know of any changes that existed after
7 1975 in the Dike District 12 dike above the
8 bridge that would have affected flood levels
9 in the Nookachamps during the 1990 flood; is
10 that right?

11 ANSWER: That's correct.

12 That completes the excerpts from --

13 MR. HAGENS: Your Honor, are we going to be
allowed

14 to read in one short section of Dr. Regan's depositions?

15 MR. SMART: I thought we handled that in the
order.

16 THE COURT: Counsel, no. I think we had

decided

17 that would be --

18 MR. HAGENS: I understand. But there was a
reason

19 for the Court's ruling with respect to our contextual
20 readings, and I didn't know that we had precipitated.

21 THE COURT: You may proceed, counsel.

22 MR. SMART: Thank you, Your Honor.

23 Turning to the deposition of Gerald Mutter from
October

24 12th, 1995. Starting at page 4, line 7.

25 QUESTION: Mr. Mutter, my name is William
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Deposition of Gerald Mutter

1 Smart, you and I have just been introduced.
2 We're here to take your pretrial deposition
3 testimony in the case of Halverson versus
4 Skagit County. Could you state your full
5 name and address for the record, please,
6 sir?
7 ANSWER: Yes. Douglas Gerald Mutter, 336
8 Southwest 293rd Street, Federal Way,
9 Washington.
10 QUESTION: Your occupation is what, sir?
11 ANSWER: I'm a civil engineer.
12 QUESTION: How long have you been a civil
13 engineer?
14 ANSWER: 26 years.
15 QUESTION: And your assignment in this case
16 was what?
17 ANSWER: I was retained by plaintiffs'
18 attorneys to give them a technical opinion
19 as to the potential impact on occupants of
20 the Nookachamps area of levee construction
21 along the Skagit River.
22 Then turning to page 61, line 21.
23 QUESTION: Would it be correct to state,
24 then, that according to your computer model
25 and its generation of flood levels, that if

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Deposition of Gerald Mutter

1 you had a flow of 152,000 cubic feet per
2 second in 1975, you would have seen the
3 identical flood levels as are shown in
4 Exhibit 4G, the graphic depiction of the
5 1990 flood?
6 ANSWER: I think that's a fair assessment.
7 I'd like you to keep in mind that the 1975
8 simulation we did do was kind of a quick
9 check, was our intention. But I think in
10 overall terms I would agree with your
11 assessment.
12 QUESTION: Would another way to put it be
13 this, that if the 1990 flow rates had been
14 experienced in 1975, the water would have
15 been the same depth in 1975 as it was in
16 1990?

17 ANSWER: I think so.
18 Then turning to page 85, line 23.
19 QUESTION: Did you investigate whether or
20 not the levees as they currently exist were
21 in essentially the same configuration before
22 or after those dams were built?
23 Go ahead and answer the question.
24 ANSWER: We sought information about when it
25 was that the existing levees reached their

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Deposition of Gerald Mutter

1 present state, and how they changed
2 incrementally before that, but the record is
3 not very clear. At least I don't have that
4 information.
5 QUESTION: Would it be correct to state that
6 the best that you determined was that they
7 reached their present state, at least the
8 state that you used for the purpose of your
9 computer model, sometime before 1975?
10 ANSWER: In terms of their height, yes.
11 QUESTION: Okay. And your computer model
12 doesn't have in it any topographical or
13 geographical information that measures
14 anything other than their height and
15 location, does it?
16 ANSWER: That's essentially correct, yes.
17 QUESTION: So for answering my question, you
18 have assumed that the levees that existed
19 when you did your work in 1993 on this
20 system were essentially the same as the
21 levees that existed prior to 1975?
22 ANSWER: No, I knew that in 1975, I knew
23 with some confidence that the levee was more
24 or less the same as it was modern day, with
25 respect to its profile. I had no

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Deposition of Gerald Mutter

1 information predating 1975 or at least the
2 early seventies, so I didn't know what to
3 simulate.
4 QUESTION: So you used the condition as it
5 existed in 1990; is that right?
6 ANSWER: For what purpose?
7 QUESTION: For any purpose related to your
8 computer model.
9 ANSWER: I used the 1990 condition to
10 simulate 1990.
11 QUESTION: You also used it to simulate
12 1975, correct?
13 ANSWER: As a rough check to see if changing
14 the hydrology affected the results
15 dramatically. In other words, how robust
16 the model was.
17 QUESTION: And you never put any other
18 topographical or geographical information
19 into your model concerning the location and
20 height of the levee, is that --
21 ANSWER: That's correct.
22 Turning to page 89, line 10.
23 QUESTION: What is a rating curve?
24 ANSWER: Rating curve is a mathematical
25 relationship between discharge rate and

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1 water surface elevation that corresponds to
2 it.
3 Turning to page 98, line 15.
4 QUESTION: Is it part of your concept in
5 this case that the dikes should fail?
6 ANSWER: No.
7 QUESTION: To you agree with the proposition
8 that if you're going to have a dike, it
9 ought to work?
10 ANSWER: That would be sensible, I think.
11 QUESTION: And have you ever advocated
12 having a dike that failed?
13 ANSWER: On occasion, one actually does

14 design levees that to fail at a certain
15 point in their operation, and at certain
16 place which are at least prone to damage.
17 And the corps of engineers has developed a
18 systematic process to do that.
19 QUESTION: Is it your contention in this
20 case that because of repair work that on the
21 dikes that occurred after 1975, that caused
22 them to be less likely to fail, that Skagit
23 County in some way raised water levels in
24 the Nookachamps?
25 ANSWER: No, I haven't stated that.

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Deposition of Gerald Mutter

1 QUESTION: And in fact, your model, your
2 computer model and the opinions that you
3 have given today are premised upon dikes
4 that actually work as opposed to dikes that
5 fail, are they not?
6 ANSWER: I'm not sure what you mean by
7 premised upon. We've made the assumption
8 that the dikes are there.
9 QUESTION: And the topographical information
10 that you inputted into your computer model
11 is topographical information based on the
12 dikes actually being there as opposed to
13 failing, correct?
14 ANSWER: That's correct.
15 Turning to page 118, line 18. Actually, line 15

would

16 be the question.
17 QUESTION: Showing you Exhibit No. 10, can
18 you tell me what that is?
19 ANSWER: Exhibit No. 10 is a discharge
20 rating curve for the Skagit River at Mount
21 Vernon.
22 QUESTION: Okay. And what does the
23 discharge rating curve that's the top page
24 of Exhibit No. 10 show?
25 ANSWER: It indicates the water surface

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Deposition of Gerald Mutter

1 elevation or stage which would be reached by
2 the river for a given flow rate.
3 Your answer continues on. Mr. Hagens says, "But
where?
4 Stage where?"
5 ANSWER: At the gauging station, Mount
6 Vernon gauging station.
7 QUESTION: On the river side of the bridge?
8 ANSWER: Close to 150 feet downstream or
9 so.
10 QUESTION: Okay. Would this rating curve
11 which is the top page of Exhibit 10,
12 indicate that there had been no change in
13 the ability of the river at the location to
14 pass water between the 1975 and 1990
15 floods?
16 ANSWER: It illustrates somewhat indirectly
17 that no significant change in water surface
18 elevation as a function of discharge.
19 QUESTION: Between the 1975 and the 1990
20 floods?
21 ANSWER: Well, over any time frame. Time is
22 not indicated explicitly in this plot, but
23 the fact that there's not a lot of scatter
24 around the fit indicates that it's been
25 relatively stable over time.

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1 Page 125, line 7.
2 QUESTION: All right. So that we're in
3 agreement, I'll leave out 1951 and ask my
4 question. Isn't it true that Exhibit No.
5 10, the top page, shows that because of the
6 similarity of position of the data points on
7 the rating curve, that the ability of the
8 river to pass water at the gauge just

9 downstream from the Burlington Northern
10 bridge hasn't changed significantly between
11 1975 and 1990?
12 MR. HAGENS: There is an objection there, Your
13 Honor's. As to use of the word "significantly".
14 THE COURT: I'm sorry.
15 MR. HAGENS: As to the use of the word
16 "significantly". Without definition.
17 THE COURT: You may proceed.
18 ANSWER: Given that I know that the levee
19 configurations were similar, at least for my
20 purposes, during the time period '75 and
21 '90, I can accept that statement.
22 MR. SMART: Turn to page 129, line 23.
23 QUESTION: What analyses did you perform of
24 the USGS documents to make the determination
25 that there had been no material change in
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Deposition of Gerald Mutter

1 the river that affected flood levels in the
2 Nookachamps between 1975 and the present?
3 ANSWER: I described it earlier, but I'll
4 repeat it. As I recall, we looked for
5 occasions when USGS is actually measured in
6 the field at the Mount Vernon gauge, stream
7 flow at a certain range, say 100,000 cfs.
8 We looked at those records for a period of
9 several years and plotted those up to see if
10 there was any fluctuation in water surface
11 elevation for those measured flows at say
12 100,000 cfs. As I recall, it was relatively
13 constant over that period of time.
14 Turning to page 136, line 8.
15 QUESTION: Whether you use the rating curve
16 or the actual value from the USGS observed
17 level, you still came up with the same
18 conclusion that there had been no change
19 between 1975 and 1990 that would have
20 affected water levels of the Nookachamps for
21 given flow?
22 ANSWER: I don't mean to seem dense, but
23 would you repeat that, please?
24 The question was then read back.
25 ANSWER: I agree.

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1 Turning to page 169, line 23.
2 QUESTION: Would it be correct, then, that
3 under the conditions imposed by you on the
4 computer model, if you had the same flow of
5 water in 1975 as you had in 1990, you would
6 expect to have the same water surface
7 elevations, is that right?
8 ANSWER: Would you repeat that question,
9 please?
10 QUESTION: Would it be correct to say that
11 under the computer model that under the
12 computer model that you have generated and
13 the boundaries conditions that you have
14 determined to be material, that if you had
15 the same flow of water as occurred during
16 the 1990 flood in 1975, you would get the
17 same water surface elevations at each of the
18 geographical points identified on Exhibit
19 No. 11?
20 ANSWER: I think they would have been very
21 close under those circumstances, yes.
22 QUESTION: Would you agree that they would
23 not have been materially different?
24 ANSWER: I don't know what that phrase
25 means.

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1 QUESTION: Well, to you? The way you
2 understand it.
3 ANSWER: I think they would have been, for
4 engineering purposes, the same.
5 Page 184, line 14.

6 QUESTION: I'll rephrase the question. You
7 never compared the water surface elevation
8 at any geographical point during 1990 versus
9 the water surface elevations that would have
10 existed during any previous year with the
11 levees that existed in that year, did you?

12 ANSWER: Well, again, I had no reason to do
13 that. The question I thought I was
14 answering was what was the effect of the
15 levees in 1990. So I had no reason to look
16 at the earlier years. That provided no
17 additional information for me.

18 QUESTION: The answer to my question is you
19 didn't do it, correct?

20 ANSWER: That's correct.

21 Page 193, line 13.

22 QUESTION: And what was the discharge that
23 would have gone over Highway 20 if it hadn't
24 been temporarily sandbagged during the 1990
25 flood?

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1 ANSWER: I don't recall.

2 QUESTION: Okay. Do you have an estimate?
3 What order of magnitude? How many cfs?

4 ANSWER: I really don't know.

5 QUESTION: Do you know at what level
6 discharge water starts flowing over Highway
7 20?

8 ANSWER: Maybe I could answer your question
9 this way. I would expect that the loss of
10 flow across SR 20 from the Skagit River
11 system would very likely be less than a
12 percent of the total discharge. So perhaps
13 less than 1,500 cfs.

14 QUESTION: And that's based on what
15 assumptions or what analysis?

16 ANSWER: It's based on my engineering
17 judgment as we sit here today. But I'm sure
18 we did make a calculation that's
19 considerably more refined than that.

20 QUESTION: Okay. So your opinion is that
21 the amount of water that would escape across
22 Highway 20 during a 150,000 cubic feet per

23 second flood such as occurred in 1990 would
24 be less than 1,500 cfs, is that your
25 testimony?

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Deposition of Gerald Mutter

1 ANSWER: I think that is a reasonable
2 number. It certainly wouldn't be more than
3 a percent or two of the total Skagit River
4 discharge.

5 Page 270, line 11.

6 QUESTION: Did you perform any analysis on
7 the effect of upriver storage facilities on
8 the 1990 flood?

9 ANSWER: No.

10 QUESTION: You would agree, would you not,
11 that upriver storage facilities did have an
12 effect on the amount and timing of the water
13 coming downstream, wouldn't you?

14 ANSWER: Yes.

15 QUESTION: And you would also agree that the
16 less water that came downstream during the
17 peak of the flood, the better off everybody
18 who was exposed to flooding would be?

19 ANSWER: Yes.

20 QUESTION: Did you ever analyze what the
21 flood levels would be at any point along the
22 river in the upstream storage facilities
23 such as Ross Dam were not there?

24 ANSWER: No.

25 QUESTION: So when you say in Exhibit No. 12

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MELONE - Direct (Smart)

1 that you removed all the public works, you
2 didn't remove the dams, did you?

3 ANSWER: That's correct.
4 That concludes the excerpts of the Regan and Mutter
5 depositions, Your Honor.
6 And would call Dr. Tony Melone.
7 MR. HAGENS: Just for the record, we would
like to
8 read in pages 226, 47 and 48 of the Mutter. I
understand the
9 Court's ruling on this subject, but I think the history
10 should reflect that the reason that the defendants were
11 stopped from reading counterdesignations was because
they
12 were quoting material out of context. That was not a
mistake
13 of plaintiffs, Your Honor. And so we would like to read
14 these, but we understand the Court's ruling in this
regard.

15 THE COURT: All right. You may proceed,
counsel.

16 MR. SMART: Thank you, Your Honor. I'll get
Dr.

17 Melone
18 ANTHONY MELONE, called as a witness by the
county, being duly sworn
19 on oath, testified as

follows:

20 DIRECT EXAMINATION

21 BY MR. SMART:

22 Q Good morning, Dr. Melone.

23 A Good morning.

24 Q Would you, sir, please state your full name, spelling
your
25 last name and give your address for the court reporter?

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1 A Name is Anthony Melone. Spelled M-E-L-O-N-E. The
address is
2 11913 Northeast 168th Street, in Bothell, Washington.
3 98011.

4 THE COURT: Sir, if you will grab the
microphone by
5 the goose neck there. Okay. And bring it over by you
to

6 make it so everybody can hear you. Speak as directly
into 7 that as you can. And pull it back as far as you need to
to 8 be comfortable. You don't have to perch over it.
9 Q (By Mr. Smart) Your occupation is what, sir?
10 A I'm a civil engineer.
11 Q Okay.
12 And do you have a specialty?
13 A I specialize in the area within civil engineering known
as 14 hydraulics and hydrology.
15 Q All right.
16 And who do you work for, sir?
17 A I work for the engineering consulting firm KCM in
Seattle. 18 KCM is a firm with a staff of about 110. We've been
leaders 19 in the Pacific Northwest for the past 53 years dealing
with 20 drainage and flood problems throughout the northwest.
21 Q And how long have you worked in the field of hydraulics,
and 22 hydraulic engineering as a civil engineer?
23 A I have worked as an -- practiced as a consulting
engineer for 24 22 years.
25 Q Okay.

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MELONE - Direct (Smart)

1 And during what period of that time have you
2 concentrated in hydraulics and hydraulic engineering?
3 A My entire career I've worked in the area of hydraulics
and 4 hydrology.
5 Q All right.
6 Could you give the jury a summary of your
education, 7 sir?
8 A Okay. I have a Ph.D. in civil engineering. I started
with a 9 bachelor's degree from the University of Illinois.
Followed

10 by a master's degree at Colorado State, and my Ph.D from
the 11 University of British Columbia.
12 Q All right.
13 And could you give the jury some idea as to what
types 14 of projects you have worked on in the area of hydraulics
and 15 hydraulic engineering?
16 A Okay. In general, the area of expertise spans hydraulic
17 modeling, flood analyses, floodplain matching,
floodplain 18 delineation, flood warning, flood hazard management.
Mostly 19 anything to do with the hydrologic cycle that leads to
the 20 runoff, surface runoff into streams and river.
21 Some of the specific projects I've worked on just
to 22 name a few in recent years that are here in the
northwest, a 23 number of flood hazard management plans, comprehensive
river 24 plans, to the north on the Nooksak River in Whatcom
County, 25 Mason County, the Skykomish River a comprehensive flood
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1 hazard management plan. In Louis county, a flood hazard
2 management plan, and for the City of Ellensburg.
3 Q Have you familiarized yourself or do you work with
during 4 your -- in the course of your practice various
computerized 5 models that have been developed for predicting flood
flows on 6 various rivers?
7 A Yes. Using computer models is a day-to-day exercise for
8 myself and the staff that I supervise at KCM.
9 Q All right.
10 And how do you use those computerized models in
your 11 work, sir?

12 A Okay. We have within KCM a watershed management
department
13 which I am the manager. I have a staff of twelve. With
the
14 staff of twelve, ten are registered professional
engineers,
15 nine have advanced university degrees.
16 What we do as consultants is to work on hydrology
and
17 hydraulic problems. The tools that we use are computer
18 models. And we regularly, on a day-to-day basis, use
19 computer modeling as an analytical tool for our work.

20 Q Okay.
21 Dr. Melone, what did you do in this case, the
Skagit
22 River case, involving the dikes and claims that the
23 plaintiffs have brought before this jury?

24 A For this case, what I've done is analyzed the river. By
that
25 I mean I have reviewed a number of the reports prepared
in
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MELONE - Direct (Smart)

1 the past by corps of engineers, U.S. Geological Survey,
2 FEMA. In particular, I've looked at the flood analysis
by
3 the corps of engineers on the 1951 flood and the 1975
flood.
4 I've also gone to the field and collected some of
my own
5 information. I have been in the field and identified
high
6 watermarks from the November 25th, 1990, flood and have
had
7 them surveyed. I have been to the field and have
surveyed
8 the crest elevations of Dike District 12's dikes on the
north
9 side of the river. I have surveyed the crest elevations
of
10 Dike District 17 on 17's levee that runs from Riverside
dike
11 up to the Burlington Northern Railroad and have surveyed
the

12 railroad embankments, Burlington Northern Railroad as it
13 approaches the Burlington Northern Bridge and the
railroad
14 alignment that parallels State Route 20.
15 In addition, in recent days in addition to this
work,
16 I've also compared flood levels from 1990 to Dike
District 17
17 crest elevations from their levee. I've observed some
18 differences between FEMA flood levels in 1990. And I've
seen
19 a photograph from 1909 in the Clear Lake area. And
surveyed
20 in those flood levels off of which photograph back in
1909,
21 the more -- some of the analytical work has been using
the
22 historical information that is available and published
by the
23 USGS.
24 I've prepared a number of graphics and tables that
25 describe depths of flooding, areas of flooding. I have
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1 crated a hydraulic model. It's called a two-dimensional
2 hydraulic model, acronym FESWMS. Using the 1990 flood
3 elevations surveyed, I calibrated this model or
effectively
4 worked with the model to reproduce this actual event in
5 November 1990.
6 I used the model in investigating the effect of
debris
7 blockage on the Burlington Northern Bridge and what
effect
8 that has on the plaintiffs upstream.
9 And lastly, I reviewed the work of the plaintiffs
with
10 their hydraulic model.
11 Q Dr. Melone, based on work that you have done in this
case,
12 and based on your expertise and your experience, have
you
13 come to any opinions with respect to any issues in this
case?

14 A Yes, I have.
15 Q And what are those opinions, sir?
16 MR. HAGENS: May I voir dire to the timing of
these
17 things, whether they have all been turned over to us at
this
18 point?

19 VOIR DIRE EXAMINATION

20 BY MR. HAGENS:
21 Q Have all your opinions been provided to the plaintiffs
in
22 this case, including the recent ones you said you just
23 developed?
24 A To the best of my knowledge, they have been turned over.
25 Q Including your recent opinions; that is your
representation?

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MELONE - Direct (Smart)

1 A I'm not aware of recent opinions and what your
discussions
2 have been.
3 Q You said that currently you did some elevation, shooting
for
4 dike district --
5 MR. SMART: I don't believe that we have given
you
6 the elevation of this photograph, but this photograph
has
7 been entered into evidence just last week or week
before. I
8 think that is the only thing you don't have.
9 MR. HAGENS: We don't have any objections that
they
10 have provided us in the past. When the gentleman
mentioned
11 something about current opinions based upon current
elevation
12 shooting such as the one at Clear Lake, I would like to
know
13 a little bit more about that.
14 THE COURT: No, if you think something that
comes
15 up is appropriate, bring it up at that time.
16 You may proceed.

FURTHER DIRECT EXAMINATION

17
18
19
20
21
22
23
24
25

BY MR. SMART:

Q Dr. Melone, could you state what the opinions are you

have

come to in this case?

A Okay. I have ten opinions. The first one being the Nookachamps Creek area has always been a natural storage area. And it's been flooded historically even before development occurred along the Skagit River. That is

number

one.

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MELONE - Direct (Smart)

1 Number two, there has been no changes since 1955;
2 is, more than 40 years ago. And I mean by no changes,
3 changes in the Burlington Northern Railroad's bridge, no
4 changes to the Burlington Northern Railroad's track
5 approach to the bridge, no change to the railroad fill
6 parallels State Route 20, no change at Dike District
7 dike to the north of river. By that I mean no change in
8 location, alignment or crest elevation. There has been
9 changes at least since 1955, over 40 years ago, that
10 affect flood levels in the Nookachamps Creek area.

that

no

alignment

that

12's

no

would

mentioned,

go

operated by

of

placed

flood

11 Number three, all topographic features and man-made
12 structures. And by this I mean the ones I've just

13 Burlington Northern Railroad, dikes, highways. We can

14 upstream, two major flood control reservoirs, one

15 Puget Power and another by Seattle City Light. Of all

16 these entities, all of these structures that have been

17 throughout time cumulatively and collectively impact

18 levels in the Nookachamps Creek and along the river.

one, 19 Number four, which is almost an extension of number
Skagit 20 floodwaters enter the Nookachamps Creek area as the
goes 21 River overtops its bank. We've got the Skagit River
22 overbank and in the depressional area of the
23 Nookachamps-Clear Lake area, the flood levels rise
together. 24 Flood levels in the Nookachamps Creek area will be
directly 25 related to flood levels on the Skagit River. The bigger
the
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MELONE - Direct (Smart)

will 1 flood on the Skagit River, the higher the flood levels
2 be both in the river and in the Nookachamps Creek area.
3 Number five, levee breaches at Fir Island that
occurred 4 during the second November 1990 flood, some distance
5 downstream, had no impact or no effect. Did not lower
flood 6 levels in the Nookachamps Creek area.
7 Number six, the hydraulic model that I developed
shows 8 that observed flood levels, flood levels that I surveyed
in 9 the November 25 flood, could not be achieved with an
10 unobstructed Burlington Northern bridge opening. I had
to 11 simulate debris blockage, log debris blockages on the
bridge 12 in order to fully reproduce the flood levels that I
surveyed 13 for that flood. This does lead to an increase in flood
14 levels on plaintiffs' properties.
15 Number seven, again the hydraulic model that I
16 developed, the different depths that were observed in
the 17 upper Nookachamps, some of the other levee depths as
great as 18 twelve feet. In the Nookachamps areas, the bigger

19 depressional areas flood depth as great as 22 feet, but
a
20 portion of this, four or five inches, can be attributed
to
21 debris buildup on the Burlington Northern bridge.
22 Number eight, strengthening of levees; this is,
23 strengthening by itself does not raise flood levels.
24 Number nine, the plaintiffs' approach, I want to
make
25 this clear, the approach to comparing a dike and no-dike
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MELONE - Direct (Smart)

1 scenario does not make any sense. It does not make any
sense
2 because we are comparing an actual event that occurred
in
3 November 1990 with a condition that has never existed in
the
4 Skagit River for its entire history.
5 Final opinion, aside from my opinion or concern are
the
6 approach that the plaintiffs' hydraulic model has some
flaws
7 in my opinion.
8 And these are the essence of my ten opinions based
on
9 the work that I have done.
10 Q Thank you, Doctor.
11 Now, let's go back, if we could, to your first
opinion.
12 Which is that the Nookachamps Creek has always been a
natural
13 storage area and has historically flooded even before
the
14 Skagit River has been developed.
15 First of all, did you at my request develop an
exhibit
16 which is now identified as Exhibit 1351, which is simply
a
17 map of the properties which are the plaintiffs'
properties,
18 and then provide an overlay to that?
19 A Yes, that's true.
20 Q Okay.

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MELONE - Direct (Smart)

1 Q 985; is that right?
2 A That is true.
3 Q So to the extent it would then be misleading to the
extent
4 you represented that this showed flood year flood levels
of
5 985, as counsel earlier indicated you had.
6 A You lost me.
7 Q Counsel indicated this a straight layover?
8 A It is an identical layover.
9 Q Not of all of 985, is it?
10 A It's an identical layover for that portion of the
graphic
11 shown on that exhibit.
12 Q Right. But only the plaintiffs' property, right?
13 A For the area that is shown on that graphic.
14 Q So there is area north of here that --
15 A I agreed with you, that area north is not on that
graphic.
16 MR. HAGENS: Your Honor, this isn't then --
what it
17 is is an effort to portray that only the plaintiffs --
would
18 have flooded in the 50-year flood. Exhibit 985, the
19 so-called layover, shows that significant regions of
20 Burlington, all of Mount Vernon, or most of Mount
Vernon,
21 would have also flooded during that period of time. So
I do
22 not think it's an accurate representation. It gives the
23 impression to the jury that the only people who flood in
the
24 50-year event are the plaintiffs. Clearly not based
25 according to 985, which is supposed to be the map
derived for

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MELONE - Direct (Smart)

1 the overlay.
2 MR. SMART: Mr. Hagens' argument completely
believes 3 the testimony we have prepared, and this is our Exhibit
985 4 that shows the entirety, and this is simply a subset of
what 5 is shown on 985.
6 THE COURT: With that understanding, that it -
- it 7 is a good way to put it -- a subset, if you will, of
985, not 8 the entire document of 985, with a layover only of the
9 portion that you directed his attention to.
10 MR. ANDERSON: No objection.
11 THE COURT: 1351 will be admitted.
12 (Defendant's Exhibit No.
1351 admitted into evidence.)
13
14 MR. SMART: Thank you, Your Honor.
15 FURTHER DIRECT EXAMINATION
16 BY MR. SMART:
17 Q Dr. Melone, could you step down here, please, just
briefly,
18 and point out the area that is shown in Exhibit 1351 and
19 where that relates to the corresponding area on 985.
And
20 there is a pointer now hiding -- I have to make sure to
stand
21 away from the jury. In fact, if you stand over next to
me,
22 that would probably be easier.
23 A (Witness complying.)
24 Q I just want you to point out on 985 where 1351 is.
25 A This line here represents this green-white line at that
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MELONE - Direct (Smart)

1 location.
2 Q All right.
3 So this location orients you into that location.
Sedro

4 Woolley, for example, is here, and in this general area
on
5 our chart. All right.
6 I'm going to leave both of these on here.
7 Before you step back, let's talk about other things
that
8 you did.
9 Did you at my request take certain aerial

photographs
10 and identify on them where the boundaries of the flooded
11 areas would be for floods of different years?

12 A Yes, I did.
13 Q And were those flood years 1815, 1856, 1921, 1951, 1955,
1975
14 and 1990?

15 A Yes, they were.
16 Q Okay.

17 And are Exhibits 1352 through 1358, those overlaid
18 aerial photographs with your markings on them?

19 A Yes.
20 (Defendant's Exhibit Nos.
1352 - 1358 identified.)

21
22 MR. SMART: Offer 1352 through 1358.
23 VOIR DIRE EXAMINATION

24 BY MR. HAGENS:
25 Q When were these prepared, Dr. Melone?
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1 A These were prepared a couple years ago.
2 Q So these have been produced to plaintiffs; is that

right?
3 A What?
4 Q These have been produced?

5 MR. SMART: You have those as depositions.
6 MR. HAGENS: I just wanted to make certain,
but I
7 do think I've seen these.

8 Q (By Mr. Hagens) Again, it's only showing flood areas
south
9 of -- southeast, I guess, of Burlington; is that

correct?
10 A That is correct. That's correct.

11 Q So you have haven't undertaken to depict, for instance,
how
12 Burlington might flood in these magnitude of events; is
that
13 a fair statement?
14 A It's unfair statement. In the earliest days, as we
said, a
15 couple of years ago when we started discussing this, our
16 focus was on the Nookachamps Creek area, so that is why
I
17 prepared this graphic, because it focused on the
Nookachamps
18 area.
19 MR. HAGENS: We understand what they were,
Your
20 Honor.
21 MR. ANDERSON: No objection, Your Honor.
22 THE COURT: The numbers again?
23 MR. SMART: 1352 through 1358, Your Honor.
24 All right.
25 (Defendant's Exhibit Nos.

1352 -
evidence.)
1358 admitted into

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FURTHER DIRECT EXAMINATION

1
2 BY MR. SMART:
3 Q I don't want to spend a long time --
4 MR. HAGENS: For illustrative purposes.
5 MR. SMART: No, Your Honor.
6 THE COURT: I didn't hear that qualification.
7 MR. HAGENS: All right.
8 THE COURT: They are admitted for general
purposes.
9 Q (By Mr. Smart) Let's bring this board up just a little
10 closer to the jury.
11 What I would like you to do is to refer to the
board,
12 and I'll put them up here fairly quickly. But refer to
the
13 date of the flood and the area of flooding that you have
14 identified occurred during the flood.

15 A Okay. A lead-in to that or a comment to that, fresh in
my
16 mind. We have the November 25th, 1990, flood fresh in
our
17 mind, it being a large flood, probably think of it as
being a
18 large flood because it's fresh in our mind. The biggest
19 flood we've had since the flood control reservoirs went
in.

20 But the Skagit River is a very large and dynamic
21 system. The 1990 flood is not the largest flood we're
going
22 to see on the river, and we have seen much larger
floods.

23 What I've done here is looked at again, we're
focusing
24 on this Nookachamps Creek area and its historical
flooding,
25 it has always flooded. Flood levels in this area in the
past

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MELONE - Direct (Smart)

1 have been much higher than what we've observed in 1990.
2 So what this is, the black and white aerial
photograph,
3 got Mount Vernon, Burlington, Sedro Woolley, the Skagit
4 River, channel itself to the Burlington Northern bridge.
5 What I outlined, the crosshatching shows the limit of
6 flooding for each of these events. The area that is not
7 crosshatched is under water for the south part of this
8 graphic. So for example, this would be above water,

this
9 would be above water, all this would be under water.

10 What we see as the water level rises, and you will
see
11 in the sequence of graphics, the water level rises,
filling
12 into the Nookachamps Creek area, fills into the Clear
Lake
13 area, fairly flat, actually depressional areas. These
areas
14 are even lower than what we have over here, and the
water

15 will spread out, essentially, until it hits the hills.
So
16 the area that is covered by water, you will see is quite
17 similar.
18 What we have, a big flood will have a bigger water
level
19 and the depths will change. But the area that we'll
see,
20 because it's quite flat, and I said in some cases even
lower
21 than some of these elevation adjacent to the river, will
be
22 under water, have always been under water, and in fact
have
23 been under considerably more water than what occurred in
24 1990.
25 Q All right.

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MELONE - Direct (Smart)

1 And --
2 A I was going to say -- this one when I say larger, this
one is
3 two and a half times larger in 1815, two and a half
times
4 larger than 1990. There are bigger floods on this
river.
5 Q Okay.
6 And the flow for the 1815 flood was what Dr. Mutter
7 (sic)?
8 A 400,000 cfs estimated by the USGS at the gauge near
Sedro
9 Woolley. 400,000.
10 Q During the course of your review of the Skagit River and
its
11 documents, did you learn how the army corps of engineers
or
12 the USGS determined the size of the flood and how high
the
13 water surface elevations got?
14 A This was published in a report by the U.S. Geographical
15 Survey. They used historical markings of how high was
the
16 flood, what evidence can they find that would show how
high

17 that flood was in 1815, using formulas, hydraulic
formulas
18 for the flow of water with a certain cross-sections and
a
19 certain depths near Sedro Woolley, what would be the
rate of
20 flow. That is the estimate that the USGS puts forward.
But
21 they did their homework to come up with estimations of
that
22 high-water mark back in 1815.
23 Q Okay.
24 And was it the historical work of the USGS then
that led
25 you to the information from which you -- that you took
and
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1 then put on this particular chart concerning the
elevation
2 and the area of flooding?
3 A Yes, it is a published record, public record by the U.S.
4 Geological Survey.
5 Q Let's look at 1353. , and could you explain this board
for
6 the jury as well.
7 A The series of boards are very similar. Now we go 1856.
Two
8 times, two times what we experienced in 1990. And I
know
9 your eye can't pick up subtleties here of differences.
But
10 certainly the area of inundation is very similar, the
11 phenomenon is similar. Straight out over flat area
until it
12 hits the big hill. Unquestionably, the bigger the
flood, the
13 deeper the water put in the area of inundation. And
this is
14 very similar.
15 Q And we have another flood -- historical flood in 1921,
of
16 210,000 cubic feet per second.

17 A Again, I think my point remains the same. This is meant
to
18 be a range of floods that we wanted to depict to stress
this
19 point for large floods and naturally and historically
this
20 area has been under water.
21 Q Okay.
22 And how about for similar flood in 1951? Talked
quite a
23 bit in this case about the flood in 1951. Is 1355 a
24 depiction of the areas that were covered by water in
1951?
25 A Yes, very similar. And then we also have a smaller
flood of
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MELONE - Direct (Smart)

1 113,000 cubic feet per second from 1955. We also have a
2 similar area of inundation shown by the 1955 chart.
Similar
3 area, smaller flood. It went into the scale, maybe some
4 areas here that are under water are the larger floods
that
5 are not under water now. But the general area,
Nookachamps
6 Creek, still the flat low-lying areas were under water
up
7 against the hills.
8 Q All right.
9 Now, two more. One is 1975 look at a flood of
130,000
10 cubic feet per second. Again, have you depicted the
area of
11 flooding on that chart?
12 A This is the same process, making the same point.
13 Q Finally, 1990. Exhibit 1358. Represents 1990; is that
14 correct?
15 A That's correct.
16 Q All right.
17 And again a similar area of inundation, for
instance,
18 1951 and 1975?
19 A That's correct.
20 Q All right.

21 Thank you, Dr. Melone. I think you can resume your
seat
22 for -- well, before we get there.
23 Just one other item.
24 We've also had admitted into evidence in this case
25 Exhibit 978. And 978 shows the historical flood flows
in
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1 cubic feet per second and deals with the flows that are
on
2 the upper left-hand side of your charts. I guess my
question
3 is, if you were trying to match up the area that was
flooded
4 with a particular flow, would you be able to take 1351
and
5 1358 and match them up to get flood flow and the area?
6 A Yes.
7 Q Thank you, sir. You can resume your seat.
8 A (Witness complying.)
9 Q Now, sir, you mentioned that the Skagit River begins to
flood
10 the Nookachamps area at a relatively low flow; is that
11 correct?
12 A That's true.
13 Q Can you give us an estimation of the flow at which the
Skagit
14 River begins to leave its bank and flood the
Nookachamps?
15 A My observation, or my look at the numbers, at about
65,000
16 cfs we've got some water just going overbank, flowing
down
17 then into the depressional area, Nookachamps Creek
18 depressional area, with about 65,000 cfs.
19 Q Is the depressional area, as you call it, depicted on
Exhibit
20 974, this topographical map?
21 A Can you bring it closer?
22 Q Sure.
23 A The depressional area on that map is the same area that
we've

24 been showing on our exhibits, being this area. Part of
this
25 area in here.
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MELONE - Direct (Smart)

1 Q Okay.
2 And can you, given the elevation as shown on the
3 topographical map of the left bank of the Skagit River
in the
4 Sterling area?
5 A Off the topo map.
6 Q If it's not on this one, can you tell me what it is from
your
7 study?
8 A From the work I've done, the last bank is about at
elevation
9 36.
10 Q All right. And the elevation of Barney Lake is what
11 elevation?
12 A I believe it's down around 22, is what I recall from
memory.
13 Q This topographical map has an indication of elevation 18
on
14 it; do you see that?
15 A Okay. Eighteen.
16 Q But Barney Lake, of course, would fluctuate?
17 A That's true.
18 Q Wildly with the rainfall, would it not?
19 A That's correct.
20 Q All right.
21 When the river leaves its bank at this 35- or 36-
foot
22 elevation, I think you said, in the Sterling area on the
left
23 bank, is there any impediment to the flow of that water
down
24 to the 18-foot elevation at Barney Lake?
25 A No, it's a totally natural flow path from a higher
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MELONE - Direct (Smart)

1 elevation. Water will run down hill to a lower
elevation.
2 Q If it exceeds the bank then on the left bank, is there
any --
3 is it a matter of simple physics, that it has to flow
4 downhill in that direction?
5 A That's absolutely true. Water will run down hill.
We've got
6 natural depressional areas that are lower in elevation
than
7 along the bank, and water will flow into those areas.
8 Q Now, you also indicated, sir, that you surveyed the
actual
9 ground elevations of the -- various properties in the
area;
10 is that correct?
11 A That's correct.
12 Q Okay.
13 And based on those surveys, have you prepared a
chart
14 taking the numbers from the various and places, placing
them
15 again on the plaintiffs' properties, similar to what you
did
16 with the overlays on Exhibit 1351?
17 A That's correct.
18 THE CLERK: Exhibit had 1359.
19 Q (By Mr. Smart) Is 1359 the chart that you prepared
showing
20 the flood elevations at specific plaintiffs' parcels?
I'm
21 sorry. Not flood elevation, but the ground elevations.
22 A That's correct.
1359 (Defendant's Exhibit No.
identified.)

24
25 VOIR DIRE EXAMINATION
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MELONE - Direct (Smart)

1 BY MR. HAGENS:
2 Q Dr. Melone, when were these surveys done?
3 A They were done in the fall of 1996.
4 Q And have those survey results been turned over to us, to
your
5 knowledge?
6 A Yes, they have.
7 Q And did you personally do the surveys?
8 A I contracted to have a professional land surveyor do the
9 survey.
10 Q So do you have the survey, the results with you?
11 A No, I do not.
12 MR. SMART: But I do.
13 Q (By Mr. Hagens) So this is a summary based upon a
summary,
14 then; is that right?
15 A No, that is a transfer of survey information onto a
graphic.
16 Q Well, a graphic summary of the summary, isn't that
right?
17 A I wouldn't refer to it as a summary of a summary. I
would
18 call it a representation of surveyed ground elevations.
19 Q This was all done in the fall of last year; is that
right?
20 A That's correct.
21 MR. HAGENS: May we have the survey results,
Your
22 Honor? I'm not sure that --
23 MR. SMART: Here. They have all been produced
in
24 the past, but I'll -- Let's mark this. I can -- got
them in
25 a different tabular form here as well.
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MELONE - Direct (Smart)

1 Q (By Mr. Hagens) Just one other question, Dr. Melone.
No
2 plaintiffs' property, for instance, is entirely -- I'm
3 sorry. Holding it this way, folks. You are not
supposed to
4 see it until it's admitted in evidence.

5 No plaintiffs' property is entirely like a pool
table,
6 is it? It's not entirely flat; is that correct?
7 A Depends on location. I would imagine some of the
plaintiffs'
8 properties are extremely flat and that some are not.
9 Q All right.
10 And did you go out and determine which ones were
11 entirely flat and which ones were not?
12 A The spot elevations, no. The spot elevation that are on
13 there are at the location of the survey point.
14 Q Did you pick the lowest point for grounds level or the
15 highest point?
16 A We picked the location where there was a home.
home?
17 Q Is this to the ground level or the first floor of the
18 A What is on that graphic is the ground elevation.
19 Q Of where the home is, if one is there; is that what
you're
20 telling me?
21 A That is correct.
22 MR. SMART: Your Honor, it seems to me at this
23 point we're getting into cross-examination.
24 MR. HAGENS: I've been trying to find out how
he
25 did the graphic.
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MELONE - Direct (Smart)

1 THE COURT: That's fine.
2 MR. HAGENS: If you provide a summary of the
survey
3 results, we have no objection.
4 MR. ANDERSON: No objection, Your Honor.
5 THE COURT: 1359 will be admitted.
6 (Defendant's Exhibit No.
1359 admitted into evidence.)

7
8 FURTHER DIRECT EXAMINATION

9 BY MR. SMART:
10 Q Showing you 1360, Dr. Melone, is this a tabular summary
of
11 the surveys that were performed, based on your contract
that

12 did give not only the ground elevation but the first-
13 floor elevation and then the 100-year flood level as shown in
14 the various FEMA maps?
15 A That is correct. For the parcels where we conducted a
16 survey; that is true.
17 (Defendant's Exhibit No.

1361 identified.)

18 MR. SMART: Often 1361, Your Honor.
19 VOIR DIRE EXAMINATION

20 BY MR. HAGENS:
21 Q When was this document actually created, Mr. Melone?
22 A In the fall of 1996.
23 Q And was it promptly given to us then on what date, do

you recall?

24
25 A A variation of this information, I believe you saw, on
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MELONE - Direct (Smart)

1 December -- mid-December. 1996.
2 Q Shortly before jury selection in this case?
3 MR. HAGENS: Your Honor, I object to this.
4 This is what troubles me. This is a later disclosure, so he
5 talks about a variation of this being provided to us. What is
6 the difference between this and the one given to us? This
7 is a late disclosure.

8 MR. SMART: The only difference, as I
9 understand it, is it's taken all of the various pieces of survey
10 information and put them together on one document.

Whereas they came out -- separately before.

11
12 THE COURT: No. He said the -- because you
13 have all the information on that document. I think Dr.
14 Melone's testimony was that a variation of this.

15 Is this exactly what was shown to the plaintiff?
16 A That is not exactly. It's the exact information in a
17 different format.
18 THE COURT: I guess that is what counsel is
19 asking. What was the format?
20 A I think the paper was turned this way instead of this
way.
21 And I believe that we might have also on that original
one
22 had a 1990 -- a column for 1990 flood elevation. That
is my
23 recollection.
24 THE COURT: So your testimony is it would have
been
25 at least as much information given them as there was on
that,
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MELONE - Direct (Smart)

1 and perhaps even more?
2 A Yes.
3 THE COURT: I'll overrule the objection. That
is
4 fine.
5 (Defendant's Exhibit No.
1361 admitted into evidence.)
6
7 MR. SMART: Thank you, Your Honor.
8 FURTHER DIRECT EXAMINATION
9 BY MR. SMART:
10 Q Let me put this up on the screen.
11 THE COURT: That is 1360?
12 MR. SMART: Yes.
13 Q (By Mr. Smart) Why don't you come down, Dr. Melone.
And now
14 for the jury's benefit, explain what the information is
and I
15 will put on the screen at the same time this tabular
form.
16 And I'll only blow it up to a portion because it's small
gives
17 enough so that it's hard to read. But basically, it
18 the -- does it give the plaintiffs' property and name --

19 we're talking now about 1360. Does it give the
plaintiff on
20 the left, then the ground elevation in the first column,
21 first floor elevation in the second column and then the
FEMA
22 100-year flood elevation and the source map in the third
and
23 fourth column?
24 A That's correct.
25 Q All right.

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MELONE - Direct (Smart)

1 Now, could you point out where the ground elevation
was
2 surveyed on Exhibit 1359? And explain that to the
jury.
3 A Okay. Properties that had homes we were given direction
to
4 survey the ground elevation. Whenever you see a little
5 asterisk, it's location that we sent surveyor, which was
6 adjacent to a home and said, bring us the ground
elevation.
7 One clarification, where there was a home, we
surveyed
8 the ground elevation. On a property where there was not
a
9 home, that elevation is taken from 1972 army corps of
10 engineers topographic map. A little clarification, the
11 surveys are done on properties that have homes. If it's
a
12 property without the home, we took the ground elevation
from
13 a topographic map prepared by the corps of engineers.
14 Q All right.
15 And then these numbers then would be -- are the
numbers
16 with the decimal points after them -- are those the
survey's
17 numbers?
18 A That's correct. The one that if you look, for example,
we
19 have a 27 without a decimal. Means it came off the
20 topographic map. If you see on 42.8, with a decimal,
more

21 accuracy, means that we surveyed that point.
22 Q Okay.
23 Now, as long as we're performing the -- doing some
24 examination with respect to the survey elevations, did
you
25 also survey the flood elevation of the clubhouse shown
in
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MELONE - Direct (Smart)

1 Exhibit 1332, which is already in evidence, which was a
2 photograph produced in the testimony of Gertrude Close?
3 A That's correct. That is a clubhouse in the Clear Lake
area.
4 It's a building that still exists today. We surveyed
the
5 ground elevation of that property.
6 Q Ground or the flood elevation?
7 A We surveyed the current ground elevation and the flood
8 elevation off of this photo.
9 Q Okay. And we'll come back to this in a second.
10 But what was the flood elevations that you
determined
11 for the clubhouse in Clear Lake off of this photograph?
12 MR. HAGENS: Your Honor, interpose an
objection.
13 This information hasn't been provided to us so far; is
that
14 right, Dr. Melone?
15 MR. SMART: You have the photo.
16 MR. HAGENS: The photo, but not the elevation.
So
17 perhaps he can ask it after lunch. If he could just
give us
18 the number here so we can check into it during the lunch
19 break.
20 MR. SMART: I'm not sure what the procedure
is. Is
21 this -- counsel asking that we give him the number so
that he
22 can go and verify it?
23 MR. HAGENS: Yeah. I would like to see the
24 numbers. We haven't seen them before.
25 Not in front of the jury.

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MELONE - Direct (Smart)

1
allowed to
2
3
down.

THE COURT: He is asking that he not be
answer that question.

4
5
in

MR. SMART: I'm not sure that it's written
It's just the survey results.

6
7
8
9

THE COURT: He is saying that the information
that answer has not been disclosed to him prior to this
point. He would like to just have a chance to kick that
around before Dr. Melone gives us that number.

Proceed
10
11
if

I will sustain the objection. That's fine.

around it and come back to it.

Q (By Mr. Smart) Dr. Melone, would you retake your seat,
you would, please, sir?

12
13
14
15
flooded

A (Witness complying.)
Q Your second -- now, we've dealt with your first opinion,
which is that the Nookachamps Creek area has always

16
17
that

and been flooded in past events.

Turning to your second opinion, could you restate

18
19
bases

for me, please? And then I'm going to ask you what the
for that opinion are.

20
21
been
say

A The second opinion had to do with the issue of there has
no change since 1955, that is over 40 years ago. When I

22
23
Nookachamps
Burlington

no change that has affected flood levels in the
Creek area, and that is no change in the bridge,

24
25
alignments,
20,

Northern bridge, no change in the railroad track
both approaching the bridge and parallel to State Route

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side of
in
that

1 no change in the dike districts' levees on the north
2 the river. That is no change in alignment, no changes
3 location, no change in the height or crest elevation of
4 levee for more than 40 years dating back to 1955.

5 Q That would have affected --

6 A No changes have occurred that would affect flood levels.

7 Q Okay.

not?

8 Now, there had been some minor changes, have there

settling

9 For instance, in the Dike District 12 profile and

to

10 dikes and maintenance work to bring those dikes back up

gone

11 where they have been originally, that kind of work has

would

12 on and would constitute changes in the absolute sense,

13 they not?

14 MR. HAGENS: Your Honor, that is a grossly
15 misleading question. Object to the form of it.

16 THE COURT: Sustained.

saying

17 Q (By Mr. Smart) Let me ask it this way. You're not

18 that there has been no change, no rock moved, no pebble
19 unturned, no grass has been cut?

the

20 A I'm not saying that human hands have not touched any of

would

21 structures of the Burlington Northern Railroad, the dike
22 district. I'm saying there have been no changes that

23 affect flood levels.

24 Q Okay.

this

25 Now, what have you done to verify this and to base

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1 opinion on that there have been no changes that affect
flood 2 levels?
3 A Particularly the dike districts' levee on the north side
of 4 the river that was extended and realigned in 1955 to its
5 current location. So we know the location hasn't
changed. 6 In addition, the question is, has the height of that
levee 7 changed through this period. I again sent a surveyor
out to 8 survey the crest elevations of Dike District 12's
levees. 9 For comparison, I have what we call the design drawings
from 10 1955 on what the crest elevation was supposed to be or
what 11 the design elevation -- what it was supposed to have
been 12 built to in 1955.
13 The question, is there any differences. Surveyed
along 14 that entire new levee. From that I found that some of
the 15 current elevations are actually a little bit lower. I
say 16 current, 1993 survey. Some of them are actually lower
than 17 the 1955 design elevation. Some were higher. The
range, I 18 believe, was -- the lowest point I saw, or lowest point
I 19 surveyed, was about 1.2 feet lower existing than what it
was 20 meant to be in 1955.
21 The highest I saw was a point that was 1.5 feet
higher 22 than the design elevation. The average of all the
points 23 that I took was about six inches, I believe -- on
average, 24 about six inches higher than the design elevation.
summary 25 Q Showing you Exhibit 1362, is this in tabular form, a

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above
survey

1 of your review of the Dike District 12 levee profile
2 the Burlington Northern bridge that you made from the
3 and from the design specifications that you reviewed?
4 A That's true. It's tabular format for each of the survey
5 points, just as you described them.

discussed

6 Q Exact tabular form of the same information that you
7 with Mr. Hagens in your deposition, correct?

1362

8 A Yes.
9 (Defendant's Exhibit No.
identified.)

10
11

MR. SMART: Offer 1362, Your Honor.
VOIR DIRE EXAMINATION

you

12
13

BY MR. HAGENS:
Q Well, Dr. Melone, this summary sheet isn't something

and we

14
15
16

provided in your deposition. This is something that you
prepared in the last couple of --
A No, I had that information available at my deposition

talking

17
18

talked about it.
Q I understand you had the information available. I'm

this

19
20
21
22

about the actual summary sheet.
A We had that at the depositions, yes, we did.
Q Okay.
And the survey data are the points to be located on

from

23
24
25

map here, as I understand.
A That's correct.
Q And this only looks at the levees from the I-5 upstream

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1 the I-5 bridge; am I correct in that? Only covers
survey 2 points I-5 bridge upstream?
3 A That's correct.
4 MR. HAGENS: We have no objection, Your Honor.
5 THE COURT: Mr. Anderson.
6 VOIR DIRE EXAMINATION
7 BY MR. ANDERSON:
8 Q Mr. Melone, is that from the I-5 bridge or the
Burlington 9 Northern bridge?
10 A The information on this table starts at the beginning of
the 11 1955 levee realignment.
12 Q So it's above the Burlington --
13 A Burlington Northern bridge.
14 MR. ANDERSON: Good. No objection.
15 MR. HAGENS: I think I'm not understanding of
the 16 -- I want to understand what the data points on here
mean. 17 Was it above the Burlington Northern bridge or from the
I-5 18 bridge?
19 A The date on here is exactly as it's depicted on the
figure, 20 and that is upstream from the Burlington Northern
bridge. 21 There is a mark on the figure that says "beginning of
1955 22 levee alignment" is the beginning of the survey
information 23 presented on this table.
24 MR. HAGENS: I see. Thank you.
25 THE COURT: All right. 1362 will be admitted.
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1362 1 (Defendant's Exhibit No.
admitted into evidence.)

2

3

FURTHER DIRECT EXAMINATION

4 BY MR. SMART:

5 on the
6 identify
7 says"

Q First for the jury's benefit, I'm going to put the map
screen so that we can refer to it but just so we can
this mark is that you're talking about. The mark that

8 "beginning of 1955 levee realignment." And you've got a
9 line drawn through the dike; is that correct?

10 A That's true.

11 Q And that is the place where the levee realignment took
12 place?

12 A Yes.

13 Q Prior to 1955, did this portion of the dike, between the
14 Burlington Northern bridge and the point labeled

"beginning,"
15 exist in its then location, its current location?

16 A Yes, it existed prior to 1955.

17 Q Okay.
18 And then what happened in 1955 was that the dike

19 was
20 jurors
21 house

extended and realigned up to this point, which the
have heard testimony is approximately where Earl Jones'

22 is; is that correct?

23 A That's correct.

24 Q Okay.

25 So that all of this piece of dike was new in 1955,
correct?

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MELONE - Direct (Smart)

1 A Yes.

2 Q All right.

3 Then what you did is took the design specifications
4 for

that new pieces of dike and you went out and checked to

5 see

whether or not by survey they were the same as the

6 design

7 specifications for 1955 or were they different; is that
correct?

that 8 A That's correct. I compared them to the design drawings
9 were prepared in 1955.
10 Q So the -- you have three columns, four columns, rather.
11 You've got a station in the first column which tells you
12 where on the exhibit -- excuse me -- on the dike the
13 particular survey point is being taken, correct?
14 A That's correct.
15 Q You have a 1993 surveyed elevation which is the actual
16 elevation above sea level in 1993; is that correct?
17 A That's correct.
18 Q Then you have a 1955 design elevation?
19 A That's correct.
20 Q Then a difference plus or minus in the fourth column?
21 A That's correct.
22 Q Some were higher and some were lower. The average was
23 approximately six inches higher?
24 A Average with some points being lower and some points
being 25 higher.
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MELONE - Direct (Smart)

1 THE COURT: Counsel. With that, we're going
to 2 take our break for the noon recess. We didn't have a
break. 3 We started later. I figured we would break a few
minutes 4 before twelve.
5 Apparently our one-o'clock matter has gone away,
though, 6 and we can start again at one o'clock. Why don't we do
that 7 today to make up a little bit of time. So we'll do
that. If 8 you would be back in the jury room at about five minutes
to 9 one, or thereabouts. We'll try to start approximately
at one 10 o'clock.
11 I'm assuming that we're still -- still correct that
the 12 other matter has gone away. If it hasn't, it will be
13 gone away, so we can start again at one o'clock.

11:48

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(Noon recess was taken at
a.m.)

STEPHANIE NORTON, OFFICIAL COURT REPORTER, NO-RT-OS-

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