

April 8,

1997

County's Motion for Directed Verdict

1 MORNING PROCEEDINGS

2 (The following occurred on
April 8, 1997 at 9:10 a.m.,
outside the presence of the jury).

3
4 THE COURT: Counsel, I'm assuming Mr. Hagens
is back there somewhere.

5
6 MR. HAGENS: Yes, I'm right here.
7 THE COURT: Okay.
8 MR. SMART: Your Honor, unless Your Honor

requests a different order, I thought perhaps we could go with
the motion for directed verdict.

10 THE COURT: All right. That's fine. I think
11 those were received first in time. My recollection they were
12 first part of the original packet of materials that we
13 received.

14 So that is fine. Thank you.
15 MR. SMART: All right, thank you, Your Honor.
16 Will Smart again for the county, Your Honor. This

is the county's motion for a directed verdict against
17 plaintiffs Ginger Hyman Hyatt. No. Ginger Hyatt Hyman. And Burl
18 Fox and Bertha Torgeson. There are really two issues. The
19 first issue applies to the Hyman case and the Fox case. The
20 second issue applies to Bertha Torgeson.

21 Taking the first issue with respect to Hyman and
22 Fox.

23 This motion is based on a strict rule of law, Your
24 Honor, that in the absence of severance, a cotenant who
has a

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liable
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chose in action against a party who arguably would be
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1 to all the cotenants for, in this case, damage to real
2 property, may not bring or prosecute that action against
a
3 third party without joinder of the other cotenants.
Now, we
4 have cited substantial authority, Washington case law
and
5 real property desk book law authorities for the
proposition.
6 And the rule of law that we cite and assert in this
matter,
7 referring the Court to Washington Real Property Desk
Book,
8 section 9.2, West vs. Knowles, 50 Wn.2d 313, and Mayo
vs.
9 Jones at 8 Washington Appellate, 140.
Honor,
10 I would like to review just very briefly, Your
11 the testimony with respect to Ginger Hyman because it is
some
12 concern. May remember that she testified that she and
her
13 former husband had bought the property and that they had
not
14 made any allocation formally of the real property
interests
15 and that Mr. DeLeon, I think his name was, was still
16 obligated on the loan. So that there had been no
removal of
17 his obligations on the property. He still was obligated
18 according to the lending institution on that property.
19 And the same issue would be true of any obligations
by
20 the county. One of the reasons why the cotenants cannot
21 bring separate actions is because of the potential
liability
22 of, in this case, the county, for multiple inconsistent
or
23 duplicative recoveries by cotenants when they have not
all

24 been joined in the action.

25 And I think that the Court will note the natural
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1 alignment of the rule on cotenancy with the rule on
joinder 2 of indispensable parties, because one of the purposes
for the 3 rules requiring joinder of indispensable parties is to
county 4 preclude the potential liability of, in this case, the
would be 5 or any defendant, from facing multiple inconsistent or
6 duplicative recoveries. And the very same analysis
7 applied to, for instance, the lending institution and to
the 8 county, because Mr. DeLeon has rights and/or interests
with 9 respect to the obligations on that property that could
be 10 asserted by or against the bank, for instance. And the
same 11 is true with the county. So in the absence of a formal
protected 12 partition, there is no way for the county to be
13 from the multiple inconsistent or duplicative results.
case 14 Now, if you look at the Mayo vs. Jones case, the
nature and 15 distinguishes between actions that are personal in
draws a 16 actions that are in the nature of real property and
And the 17 bright line test between those two types of actions.
tenant 18 case stands for the propositions that where there is a
that 19 in common with another or a member of a copartnership,
obligated 20 person may not maintain an action against a party
his 21 to the cotenants or the copartnership without joinder of
the 22 cotenants or partners. And I'm citing from page 145 of

23 case. And the court goes on to say that we believe that
that 24 rule is applicable in the case at bar, which means the
Mayo 25 case.

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1 But the purposes for the rule are precisely what
we're 2 talking about here. Because this is not a personal type
of 3 action. This is an action involving real property and
4 involving allegations of damage to real property that go
5 towards the whole of the cotenancy.

6 With respect to Mr. Fox, the testimony is different
but 7 the principles are identical. He testified that he
owned the 8 property with his three siblings and that there had
never 9 been any partition between them to separate out his
interests 10 from theirs, but rather he apparently called them and
they 11 said that they had the right -- that he had the right to
12 proceed, you know, without them. You may remember, Your
13 Honor, when the plaintiff was submitting his summary of
14 damages, the issue came up and the Court at that time

ruled 15 that Mr. Fox was not entitled to bring a claim on behalf
of 16 the others, and at that point his claim was reduced by a
17 fourth of the alleged total damages. So that what is
18 currently in the record is one-quarter of a total claim.

19 Again, the problem with that, Your Honor, is that
there 20 has been no formal partition of the tenancy. There is a
21 strict bright line rule of law saying that he may not
22 maintain a separate action as one of several cotenants

when 23 the issue -- goes to the real property, the nature of
the 24 damage to the real property, and the harm to the county
or

the
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25 the potential danger that is sought to be protected by
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Plaintiff's Argument re Directed Verdict

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1 rule is again that the county would face duplicative,
2 inconsistent or other claims that cannot be handled in
3 matter if in fact this action is allowed to go forward.
4 Now, turning, Your Honor, to the issue with respect
5 Miss Torgeson. This is simply a matter that no evidence
6 damage was submitted in the case on behalf of Miss
7 We have reviewed the testimony, or excerpt of the
8 for Your Honor in the motion and supporting papers. And
9 fact the testimony by Miss Torgeson was that she didn't
10 of any damage that had occurred to the property. She
11 think that the flood affected the price of the property
12 because people like to live at her place or in her
13 neighborhood, in any event, and she had no answer
14 to the question of whether or not she was making a claim
15 personal property or other items. So the record at this
16 point before the Court is that there is a complete
17 information on damages. If there aren't any damages,
18 can't be a taking and therefore the case should be
19 dismissed.
20 Thank you, Your Honor.
21 THE COURT: Counsel.
22 MR. HAGENS: Good morning, Your Honor. Carl
23 for the plaintiffs.
24 THE COURT: Good morning.
25 MR. HAGENS: First addressing the Hyatt,

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Plaintiff's Argument re Directed Verdict

1 Hyatt, now Hyman matter. Counsel seemed to gloss over a
2 couple of points. One of which, or in fact not
mentioned,
3 was that in Exhibit 1020 you will see that there has
been a
4 quit claim deed that is in evidence from Mr. Leon and
Ginger
5 Hyatt quit claiming their interest in the property prior
to
6 this suit. That is plain. I have that. Whatever joint
7 tenancy they have would be terminated. It may be that
there
8 are mortgagees, although I don't know that, we don't
know
9 that that mortgage has been paid off or refinanced or
10 something like that. And the court hasn't come in to
tell us
11 one way or other on that. I don't think they have a
12 continuing interest in the real property by reason of
Exhibit
13 1020, the mortgagee.
14 So the point I make there is that, first of all,
where
15 this is joint tenancy, does it exist any longer -- isn't
it
16 in fact the evidence to the contrary that it was
terminated?
17 The other point that Mr. Smart failed to disclose
or
18 maybe perhaps by oversight failed to mention was that
Ginger
19 Hyatt testified that in addition to the damages, that
the
20 decline in value of the real property was, and was real
a
21 tragic situation, if Your Honor will recall, they had to
let
22 their property essentially quit claim to somebody to
take
23 over payments on it, losing all their equity in the
24 property.

other
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25 But she also lost her T-shirt business and all her
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Plaintiff's Argument re Directed Verdict

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personal property. Something we mentioned in the
directed verdict was her personal property. And she has
right to make claims for personal property, even if you
that she is a joint tenant. And I don't know how you
find a joint tenantship in light of the termination of
She also testified that this DeLeon -- it's interesting
they had -- the only people here really have the
are Mr. Smart. We tried to get a portion of it, but if
had transcript, you would find, at least according to my
notes -- and you know lawyers' notes -- they write in
and whatnot -- but that there was some kind of an
understanding between her and Mr. DeLeon that she would
any rights in this lawsuit. And that she did testify
there was a power of attorney and in fact she has
subsequently provided us with a power of attorney, Your
Honor, that she was able to dig up someplace. And I'm
to hand that up. From Mr. DeLeon. So that even on this
matter, this is what she said she couldn't find at the
of trial. She looked for it and couldn't find it.
MR. SMART: Your Honor, I would object to an
attempt to supplement the record.
MR. HAGENS: One of the arguments I'm going to
is, if in fact we're going to follow this route, then I
we ought to be entitled to reopen and put in evidence on

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end on
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these matters. But I would like to save that for the
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Plaintiff's Argument re Directed Verdict

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these issues.
So, and lo' and behold, what do we have, a power of
attorney that she was able to come up with. In
with this case.
So there seems at least three good reasons why the
directed verdict can't be granted. One, there is no
tenancy, according to Exhibit 1020. Two, there was an
assignment or abandonment of the interest of the loan to
Ginger Hyatt. And three, we have her own testimony.
couldn't find the exhibit at the time of trial, but
a power of attorney from her former boyfriend to her
her the rights to sue.
Now, the county can be protected here against
claims by Mrs. Hyman -- and Mrs. Hyatt -- and that would
some kind of indemnity arrangement. But I don't think
that -- the Court can fashion -- This rule they call a
strict rule of law. The Court can fashion protection
county to protect it from duplicative or repetitive
Requiring her to indemnify the county or something along
these lines in -- event of any subsequent suit. I'm not
that that is really appropriate when they haven't
their burden about the existence of a joint tenancy, at
for Miss Hyman.
So much for Mrs. Hyman.
Now, like to move on to Mr. Fox. And there we have

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1 dammed-if-you-do, damned-if-you-don't scenario. The
2 pleadings he said he brought an action as an individual
and
3 then I think in his deposition he said he was suing on
his
4 own behalf. And then at trial he said he had authority
from
5 his other three siblings, each of whom had -- counsel is
6 correct -- had a quarter interest in the property -- to
sue
7 on their behalf. And we put in damages for the full
amount
8 of the decline in market value.
9 The Court said, you can't do that, pursuant to an
10 objection by counsel; you can only claim for one-
quarter,
11 protecting the county from duplicative claims. That
made
12 sense to me. That's what the Court had in mind. It was
a
13 practical solution to a problem we were confronted with
in
14 the course of the testimony.
15 The point I make with Mr. Fox is, he tried to
testify
16 that his brothers and sisters authorized him to proceed
with
17 this litigation. And they argued, well, that wasn't in
the
18 pleadings, even if they had authorized him to. I'm sure
I
19 could get you a letter or something that says that he
was
20 authorized to proceed, but they objected and, you know,
they
21 had the right to do that on the grounds of the
pleadings.
22 But the fact of the matter is, with respect to Mr. Fox,
that
23 the county is protected. He was only allowed to recover
24 one-quarter of the total damages that he claimed had
occurred
25 to the property, the entire property. So again, it's
not an

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Plaintiff's Argument re Directed Verdict

1 inflexible, wooden rule, as Skagit County would suggest.
We 2 do believe and have cited cases where the counties
exercise 3 some discretion, it being a right of equity, not a rule
of 4 law, and the Court can exercise some judgment to protect
the 5 parties in this -- from these recurring items.
6 Let's not just lose sight whether the purpose of
the 7 rule is going to be served by its blind enforcement.
This 8 rule about having all joint tenants or cotenants,
tenants in 9 common before the Court.
10 So that is about all I can say on Mr. Fox's behalf.
We 11 do have a letter from him, from his siblings, saying he
is 12 authorized to proceed on their behalf. But I understand
13 counsel and the Court's ruling that, look, the pleadings
are 14 the pleadings. That's the way it was when we started
the 15 case.
16 Coming to Mrs. Torgeson, this one is a little
17 distressing. Because counsel got up here and
represented 18 there was no damage testimony by Mrs. Torgeson. I'm
going to 19 read to you what we read to the jury, Your Honor, which
is 20 page 22 of her deposition. Question asked by Mr. Major.
21 QUESTION: All right. Were you damaged in
22 the 1990 flood?
23 ANSWER: Well, whenever you have a flood,
24 you're damaged. It doesn't matter if it's a
25 little flood or not. You've got all that

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Plaintiff's Argument re Directed Verdict

1 silt, and in the '90 flood, we had about six
2 inches of silt.
3 So she does identify some damages. It goes on to

say:

4 So even in the smaller --
5 Strike that. Page 22, line 12.
6 So even the smaller floods damage your
7 property?
8 ANSWER: Not the little ones so much. You
9 know, it -- it -- if it gets high, it does.
10 I mean it doesn't -- it just leaves silt.
11 Again, saying if it gets high she is damaged.
12 So it's the silt that you're referring to as
13 the damage?
14 "But when you have a big flood," she answered,

"like

15 1990, that's too much, too much water."
16 And again, remember, that this woman was 82 years

old

17 and was being evacuated from her premises in the '90

flood.

18 Never had water in this house before. She had it in

three

19 rooms in her house. One rug was thrown out, as we read

in

20 the deposition.

were

21 She's too infirm to come here. I guess counsel

put a

22 able to get her in her deposition to say she couldn't

She's

23 dollar amount on this. And that's true, she couldn't.

counsel

24 82 years old. And that may have been some feat for

that,

25 to have had accomplished that, but I really don't think

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Plaintiff's Argument re Directed Verdict

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you know, this woman at that age, it surprises me at
Let me tell you where I think the damages are.
you may have proven damage, but you haven't proven
First of all, there is the business about her rug in
being thrown out, which is personal property. But you
Your Honor, I think on that score this is what I'm
to do. I think I'm entitled to say, Your Honor, Ladies
Gentlemen of the Jury:
Right. Mrs. Torgeson is too infirm to come down
couldn't testify in front of you folks. But I'm going
tell you what the testimony has been from all the
in this case, going to tell you that the damage has
from a thousand dollars an acre to 1,500 bucks an acre.
there is Mrs. Torgeson. You're entitled to assume when
said she didn't know how much her property, the exact
of how much her property or the amount of how much her
property was, you are entitled to assume from that that
is in no different situation than any other human being
living at the bottom of this reservoir -- undeveloped
like she does, used for pasture purposes. Like other
who own pasture: Mr. Tewalt, Mr. DeVries, Mrs. DeVries.
ought to be entitled -- you ought to consider that
acres she owns at at least a thousand bucks an acre and
as 1,500 bucks an area.

Let the jury make the decision whether that is the
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County's Rebuttal Argument for Directed Verdict

1 amount of damages she should be awarded.
2 So, yes, I think you can beat up a little old lady
like
3 this and get her to say she doesn't know an exact
amount.
4 They did it, effectively. I'm not sure it's entirely to
5 their credit, but that's what they have done, certainly.
And
6 yes, she does have a problem with the exact amount of
damages
7 and, yes, she couldn't come here because she was infirm.
But
8 I think for all of these reasons that none of these
motions
9 for directed verdict can be granted.
10 THE COURT: Thank you, counsel. Mr. Smart,
11 briefly.
12 MR. SMART: Yes, Your Honor. Thank you.
13 With respect to the Hyman case, Your Honor, first
of
14 all, the quit claim deed that counsel referred to was
15 executed in September of 1991, well after the floods.
So --
16 THE COURT: Before the filing of this lawsuit.
17 MR. SMART: Yes. That's true. But the issue
is
18 who owned it at the time of the flood.
19 THE COURT: I understand. I understand. I
want to
20 make sure that I'm right --
21 MR. SMART: You're correct.
22 THE COURT: This file, at least our cause
number,
23 is 90.
24 MR. SMART: You are correct. It was executed
25 before the filing of the action. But in our opinion,
that --

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County's Rebuttal Argument for Directed Verdict

1 completely -- I am because the issue is who owned it at
the
2 flood because that is the individual who will have
suffered
3 the damage. That is the ownership interest that we're
here
4 to talk about and that is why Your Honor has crafted the
5 various orders Your Honor has crafted with respect to
window
6 periods and measurements from the time of the flood and
7 limited those to claims that are pled which are the 1990
8 flood damages. So Mr. DeLeon owned that interest at
that
9 time, and that is the interest that we're talking about.
10 Counsel references a rule of equities. It's not a
rule
11 of equity, it's a bright line rule of law as set forth
in the
12 Mayo case. And again, quoting from the case, it says,
page
13 147:
14 Therefore on the basis of the authorities
15 indicated, we hold that in the absence of a
16 severance of the asset, a person who owns a
17 chose in action as a tenant in common with
18 another may not prosecute such actions
19 against a third party without the joinder of
20 all cotenants. The holding is consistent
21 with all previous language quoted in
22 Schneider vs. Biberger, B-I-B-E-R-G-E-R.
23 Our point, Your Honor, is that it's not an
equitable
24 matter for remedy fashioning as counsel suggests, it's a
25 bright line rule of law. There was no actions to sever
the

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1 real property interests at any time in either the Hyman
or

2 the Fox case. And so that neither the quit claim deed
nor 3 this 1992 power of attorney that counsel has just handed
up 4 would have any bearing on what the interests in real
property 5 was during the 1990 flood.

6 Similarly, with respect to Mr. Fox, he had an
option, as 7 did Ms. Hyman, to bring an action for severance that is
8 specifically the remedy identified in the Mayo case on

page 9 146 as to how you do it. They didn't do it, and
therefore we 10 have a cotenancy situation which has not been severed
11 according to the rule of law and the claims must fail.

12 With respect to Miss Torgeson, counsel suggests
that 13 this is something where the county is attempting to,
quote, 14 beat up a little old lady. That is clearly not the case
15 here. We did not choose to try the Torgeson case in the
16 fashion that the plaintiffs chose, that was purely up to
17 counsel and the plaintiffs. The testimony is that she

knows 18 of no damage that occurred.

19 With respect to argument by counsel that the jury
should 20 be invited to speculate as to what the damages are, that
21 would clearly be improper, for two reasons:

22 The first one is they can't speculate if there is
no 23 evidence in the record with respect to her property.

24 The second one is that he suggests that the other
25 plaintiffs who have been allowed to testify as to the

value
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Verdict Court's Oral Ruling Denying Motion for Directed

1 of their property, only, by Your Honor, because remember

Your 2 Honor, the argument we had with respect to the motion in
3 limine was that the exceptions that was invoked by

plaintiffs

4 to the lack of qualifications is that they were owners,
are
5 owners and because of being owners of their property
they had
6 the ability to testify as to value on that, based on
7 plaintiffs' reading of the case law. But they are not
8 entitled, those plaintiffs, would not be entitled to
testify
9 as to the value of someone else's property because they
are
10 not experts. They don't have qualifications in that
regard.
11 And so what the plaintiffs are attempting to do in
here
12 is to inject, number one, pure speculations as to
whether or
13 not plaintiffs' property is the same value as Mrs.
14 Torgeson's; and number two, have a plaintiff who would
not be
15 qualified as an expert submit evidence on the question
of
16 value for Miss Torgeson's property.

17 So for those reasons, Your Honor, counsel's
argument
18 should fail and the motions should be granted to dismiss
the
19 cases against Hyman, Fox and Torgeson.
20 Thank you.

21 THE COURT: I think given the totality of the
22 evidence in this case, the testimony, as I recall it,
and the
23 absence of something more compelling, and in light of
the
24 introduction this morning of the quit claim deed -- or,
I
25 should say, the power of attorney in this case -- and
the
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Court's Oral Ruling Denying Motion for Directed
Verdict

1 existence of the quit claim deed which -- by which Miss
--
2 now Mrs. Hyman relinquished all interest in the
property,

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3 that the motion for directed verdict against Mrs. Hyman
4 denied. That the failure to establish a joint tenancy
5 that particular case, I think the better inference from
6 evidence in this case is that there is no longer any
7 joint tenancy existing between the two of them

8 And in any event, I certainly cannot rule as a
9 law that there is no evidence or reasonable inference
10 the evidence that would sustain a verdict in favor of
11 plaintiff. And in this case, a directed verdict, that
12 what I need to be able to establish, and I can't do

13 Likewise, I cannot do the same with Mr. Fox's case.
14 I've reduced his potential award in this case to one-
15 of whatever his proof of damages was at the time of
16 The jury will be so instructed. Mr. Fox is able to
17 that claim on his own. And I think it's true. I mean,
18 can't maneuver someone into a position where, well, you
19 bring it in unless you do this; okay then, that's the
20 I'll do it; you can't bring it in that case because you
21 didn't do the other. He's been limited, the county is
22 protected. I don't see any exposure for him.

23 Mrs. Torgeson's claim, likewise, will stand and go
24 the jury. I think counsel is exactly right. You can
25 to the jury, look, she's an 82-year-old woman. She

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Witnesses

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Plaintiffs' Motion to Exclude Testimony of

1 come in here and testify on her own. She talked about
in her 2 deposition evidence that I have here there was silt all
over 3 the place. She had to bring a bulldozer in to move the
stuff 4 piled up around her property. She had water in her home
for 5 the first time in all those years. There is a
reasonable 6 inference to draw from that that her property was in
fact 7 damaged. Because she can't articulate it, so what? She
 8 articulated enough in the course of her deposition
testimony, 9 from my opinion, that she's maintained a viable claim in
this 10 case. The jury may not think so, but they are going to
get a 11 chance to decide it. I'm not going to.
 12 Those three are taken care.
 13 Counsel, you have your two motions with respect to
--
 14 I'm going to get to your motions for sanctions last.
That is 15 the last thing we're doing.
 16 The next thing I understand we have on the table is
your 17 Rausser --
 18 MR. HAGENS: Rausser and undisclosed witness
 19 situation. I think the undisclosed witness situation
can 20 probably be handled almost perfunctorily, Your Honor.
 21 THE COURT: That is a reserving kind of a
thing. 22 MR. HAGENS: Really it is. The problem we
have is, 23 we see witnesses be designated to testify that --
 24 THE COURT: I'm going to reserve ruling on
those as 25 they come along. That is fine. You suggest that as
remedy, STEPHANIE NORTON, OFFICIAL COURT REPORTER, NO-RT-OS-

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Witnesses

1 that's what I'm going to take. Unless you want to make
any 2 anything more on the record, I'm denying your motion
with 3 respect to Rausser. I don't really need a whole lot
more 4 argument on it. I read the materials, considered it.
5 Denying your motion.

6 MR. HAGENS: Your Honor, I guess I do need
some 7 guidance on that point because Dr. Rausser testifies
using 8 data in 1980 and comparing it with 1995.

9 THE COURT: Okay. You're right. We have a
10 two-pronged kind of a problem here.

11 MR. HAGENS: Right.

12 THE COURT: I do need some guidance on how to
flesh 13 that out. As to the excluded period, I'm not going to
do 14 that for the reasons the plaintiff has requested it,

15 be excluded, I don't see that there is any -- I don't
16 see the defense did anything wrong, particularly, you know, in
terms 17 of how that whole thing came together, which really
forms one 18 of the bases for your motion to exclude his testimony.

19 We do have the problem though with dates and
timing, I 20 agree. So we do need to talk that out.

21 MR. HAGENS: On that score, Your Honor, all
I'm 22 saying is, you know, we worked very hard for that order
23 limiting testimony to, you know, immediately after the

event 24 and reasonably proximate before. Your Honor said a year
25 before. And gone as much as a year after. And what is

very
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Plaintiffs' Motion to Exclude Testimony of

Witnesses

1 troubling to us is that Dr. Rausser, only testimony is
based 2 upon the 1980, '95 comparisons. It may be that they can

--

3 THE COURT: That's all he's established so
far. 4 That doesn't mean he gets up here and gets to talk about
that 5 time period.

6 MR. HAGENS: I understand that. That is my
next 7 point. My concern is we have been given no information
about 8 a subsequent opinion based upon something else. So that
is 9 the only thing left. All I'm trying to do is make it
clear 10 to Your Honor what our concern is as to the disclosure
of Dr. 11 Rausser.

12 I do want to say of record that the order crafted
by 13 counsel said that it would be limited to the issues of
14 mitigation. And plainly, his flood --

15 THE COURT: I'm accepting their position that
16 really substantially that is what it's about. And that
even 17 though it may not fit your definition of what you would
think 18 an appropriate witness within the meaning of that order
would 19 be, they are not necessarily limited to your view of the
20 case.

21 MR. HAGENS: I understand that, Your Honor.

22 THE COURT: And I think -- I believe that they
in 23 good faith have attempted to be responsive in that area.

And 24 it may be that Dr. Rausser's testimony isn't right on
point. 25 I don't know. I haven't heard it yet. But I think they
have

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Witnesses

1 attempted to establish something that is responsive to
that 2 development in the case. That is the only reason I'm
not 3 willing to grant you sort of automatic exclusion. I
just 4 don't think that would be appropriate in this case.
That is 5 a pretty Draconian sanction to tell someone they can't
have a 6 witness, period, end of deal.
7 We do have a problem I agree. I'm assume -- and I
have 8 been thinking about this, that you are going to jump up
and 9 say, wait a minute, what happened to this window; all of
a 10 sudden we have '80 to '95. And the reason the window
was 11 established in the first place in this case is that I'm
12 convinced that the law is very clear that someone can't
coast 13 on the coattails of the market as it changes over time
and 14 simply because there is natural development in the
market 15 say, well, there haven't been any damages. That is the
16 foundational principle upon which that ruling was made
months 17 ago. You can't do that. You have to talk about damage
18 taking 19 within a very limited period of time so that we're not
20 advantage, unfairly, of inflation, market inflation over
21 time. And so that is the reason.
22 I don't know, counsel, what, Mr. Hagens, what you
23 suggest is --
24 MR. HAGENS: Your Honor has put the thing, I
think, 25 correctly. He can get up here and testify, by gosh,
their 26 unfair warning. If he tries to break the window and his
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Witnesses

1 testimony is based upon that, there is going to be --
you 2 know, I'm going to object. And Your Honor has made
those 3 rulings consistently throughout the course of the trial.
I 4 understand exactly where you're coming from.
5 MR. MAJOR: Your Honor, Mr. Hagens' has
deposed 6 Rausser so he understands what his opinion is. His
opinion 7 has to do with the effect of the flood itself on
valuations. 8 We're well aware of the window rule. And I think the
only 9 way to handle that at this point is to go forward and do
it 10 on a case-by-case, question-by-question basis.
11 THE COURT: I agree. That is exactly my
approach 12 to it. Otherwise, I guess if I had been convinced
somehow 13 that there was something apparent in his testimony such
that 14 he could not testify without violating our understanding
of 15 what that time period is, obviously I would grant an
16 exclusion of his testimony. But no one has proposed
that to 17 me yet. Let's see what he says. May well be very
specific, 18 very limited and very right on point for that period of
19 time. And if it is, that is to the credit of the
defense in 20 having put that together. If it isn't, we'll take it
step by 21 step and see what happens. That's fine. I agree with
that 22 entirely.

23 The motion for sanctions at this point in time. Go
24 ahead.

25 MR. HAGENS: I don't want to make a big point
of
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Plaintiffs' Motion for Sanctions

1 that. My biggest concern, Your Honor's ruled and you
didn't 2 grant the motion to exclude testimony about the
feasibility 3 of diking off the Nookachamps, but you did say in your
oral 4 ruling, I'm almost certain that that is what my notes
5 reflect, I wish I could get you the transcript, but we
6 didn't -- you said, look, they are going to have to make
some 7 foundation before witnesses get up here and say it's
feasible 8 from a political, regulatory, technical, natural and --
to 9 dike off the Nookachamps. It's easy to make
accusations: 10 You could have formed your own dike districts; you
should 11 have been required to raise all the levees downstream.
As 12 the fellow from -- Noel Gilbrough testified. If you're
going 13 to dike off the Nookachamps, you're going to have to
raise 14 all the levees downstream.
testify 15 It's easy for these people to get up here and
16 without laying any foundation the reason we didn't
compensate 17 them is they really want dike protection, they never
built 18 any dikes, fire all that answer off in ten seconds. And
you 19 cautioned counsel, if you are going to get people up
here 20 that are going to make that statement, you've got to lay
some 21 foundation. That is my recollection of what you said.
that 22 THE COURT: I didn't -- it makes sense that
23 would have been -- I don't remember the specific
exchange on 24 that point. But I'm sympathetic to your -- how you are
25 stating the issue at this point. I understand what you
are

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Plaintiffs' Motion for Sanctions

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saying.
MR. HAGENS: That is where I'm coming from.
Plainly, because we don't have an order, I don't think
sanctions are appropriate, but I do think that they have
come up, lay some foundation. All I'm asking is some
direction from the bench saying, okay, counsel, before
ask any witnesses, are going to lead to that answer, you
to lay some foundation, whether they have -- this can be
done. And bear in mind, Your Honor, Exhibit 33 says as
this day, 1993, the corps of engineers has not
that it's feasible to dike off the Nookachamps. So --
THE COURT: We also have testimony in the
don't we, fairly recently, there hasn't been a diking
district formed since 1900 or something?
MR. HAGENS: Something like that.
THE COURT: 1910, or whatever. So obviously
not something that people run around doing.
MR. HAGENS: All I'm asking is some protection
along those lines, Your Honor.
THE COURT: You're right. There is no order
existence that says anything about it. Sanctions are
obviously completely out the window. That is something
would not even consider. It has to be -- theory has
been that in order to impose sanctions, you have to have
gigantic stop sign with some guy's head sticking through
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Court's Oral Ruling re Sanctions

1 Really, that is just not the way -- not going to happen.
2 And I do think there is one other thing, too. And
Aaron brought it up this morning, and it's a very good point,
and
3 I've had a chance to reflect on it for a few minutes.
4 It also was very fertile ground for cross-
5 examination
6 when you have someone just blurt out they can just go
ahead
7 and build a dike and form a diking district. My
recollection
8 is I think you scored some points on that issue fairly
9 effectively by pointing out the fact, you don't just
build a
10 dike. There haven't been any new diking districts.
Only a
11 handful of people relative to the numbers required to
form a
12 diking districts. Costs are enormous. Almost
completely
13 prohibitive. There are poor districts and rich
districts.
14 It's very difficult to do that.
made
15 I really don't know what I can do other than be
you
16 aware of the fact that this is a hot button, an issue
to
17 think needs to be tread on lightly. And I think I tend
that
18 agree with you and that, I guess, is just warning enough
I'll
19 if there is an objection on the basis of foundation that
20 sustain that objection until I'm sure that there is some
21 adequate foundation that has been laid. On the other
hand,
22 you haven't been helpful in the face of this issue.
23 MR. HAGENS: No, no.
24 THE COURT: It's fertile ground for
25 cross-examination, and you have done a very good job of
doing
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Court's Oral Ruling re Sanctions

1 that, I think. So I don't know what there is I can do
to 2 help either one of you at this point.
3 MR. HAGENS: I understand.
4 THE COURT: Leave it alone.
5 MR. HAGENS: Let me just tell you -- maybe
that is 6 the best answer -- what concerns me.
7 THE COURT: Leaves it alone. Having been put
on 8 notice by you that you are concerned about the issue,
and I'm 9 telling you in a general sense I agree with you, that it
does 10 become a foundational point when you have had someone
11 randomly throwing out the point they can protect
themselves 12 by building their own dike. I want to hear, for the
benefit 13 of this jury, I want to hear how can they build that
dike. 14 Okay? Say, can you build a dike. We all have learned
over 15 the course of this trial that building a dike is a big
16 operation and maintaining these dikes is a tremendous
17 commitment of money, and improving them, if, in fact,
18 improvements, whatever that means, is a tremendous
commitment 19 of resources. And a very important commitment of
resources. 20 So it's not just something they can just put up a fence
if 21 they don't like a neighbor. I agree. A dike is another
22 thing, entirely. Your point is well made. It's not
lost on 23 me.
24 Let's move on.
25 MR. HAGENS: I understand.
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Colloquy

1 THE COURT: Nothing I can do, certainly, no
action 2 I would take at this point on anyone's behalf other than
to 3 let you know that I will be sympathetic to a foundation
4 objection if I think it were to come in in such a way
that 5 it's just sort of, well, just go build a dike. You
don't 6 just go build a dike. Okay.
7 MR. SMART: Your Honor, if we're done with
that, 8 one scheduling matter. I asked Mr. Hagens this morning
how 9 long he anticipated taking with Dr. Melone, and he gave
me an 10 answer to that. That was a lot shorter than I had
11 anticipated. We may end up this morning then finishing
with 12 Dr. Melone, not have another live witness until this
13 afternoon. If that occurs, I ask the Court for a brief
14 recess so that we can do a deposition and just take an
15 opportunity to get organized for that because we don't
know 16 that that is going to occur at this point. If we could
do it 17 in that fashion, if there is no objection from counsel.
18 THE COURT: All right. And again, there is a
point 19 made a couple weeks ago, and I'm sure it's not something
that 20 you maybe necessarily worked into your scheduling of
things. 21 But -- and this is completely out -- you're right. This
just 22 popped up. It's not a planning mistake that you made at
23 all.
24 Throughout the rest of the trial, I think I've
asked you 25 that if we can balance the use of depositions between
morning
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Colloquy

1 sessions and afternoon sessions. You end up with one
2 reporter, typically, who has been getting most, if not
almost 3 all, the deposition work, which makes her work twice as
hard 4 as the other court reporter's. I'm not trying to take
sides 5 between them. They are doing the very best they can.
But 6 you know, it needs to be balanced.
7 So if you're thinking about it down the line, there
is a 8 way, for example, you're looking a day or two ahead, you
9 think, we know, we have to get this depositions
testimony in 10 but we have a witness we could call in the morning or in
the 11 afternoon, you know, flip-flop it, so that you keep in
mind 12 the fact that we're trying to balance out this
deposition 13 stuff.
14 A deposition for a court reporter, as we talked
about 15 before, requires not only just coming back and
transcribing 16 what she's heard in court. Then you have to go to the
17 deposition, look through it entirely. And then lift all
the 18 things. So it's a tremendous burden on them to do
19 depositions as opposed to live testimony.
20 MR. HAGENS: I have a suggestion. I don't
know if 21 it's doable. But I want to make it for the court
reporter. 22 I wonder, both sides have been submitting designations,
23 written designations. If the parties agreed that those
24 designations could serve in lieu of having to transcribe
the 25 read-in, I believe that that would be an adequate
record. I 26

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Colloquy

1 want to say, I don't know. It's a suggestion. Where we
2 could just affix the deposition designations to the
record.
3 To the extent supplemental designations went along, she
would
4 have to transcribe those. But I don't know if that is
5 doable, Your Honor. I'm not in the business of court
6 reporter, as you point out many times. And I don't do a
very
7 good job of being sympathetic to their situation, and I
get
8 all excited.
9 THE COURT: I work with her all day, every day
and
10 I'm still completely oblivious to half of the things
that are
11 real concerns that are genuine to her and what it takes
to do
12 that job. We're in the same boat. I'm learning a lot
in
13 this particular case about what their needs are.
14 MR. SMART: I think the Court should reflect
on
15 that suggestion before we -- obviously there is some
merits
16 to the problems that would come up in terms of not
picking up
17 objections and colloquy of counsel. Whatever comes up
in the
18 record.
19 THE COURT: That is the explanation that I've
been
20 given by Stephanie before, is that those other
components all
21 need to be in there. That's the problem. In order to
have
22 an adequate record. And Stephanie is a perfectionist.
I can
23 guarantee you the record generated as a result of her
efforts
24 is the best you're going to get. I'm not going to dink
25 around with how she wants that taken care of.
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Colloquy

1 Think about it. In the meantime, if there is a
2 possibility that you can do one in the afternoon as
opposed
3 to doing it in the morning. Just takes a little bit of
4 thought ahead of time to make that happen. We would
really
5 appreciate it. There has been an inordinate disparity
in
6 this case between morning and afternoon use of
depositions.
7 And strategically, I can understand that. Who
wants to
8 read depositions to people in the afternoon? I
understand
9 that. But if we could just sort of try to balance that
10 somewhat as we go along, I'd appreciate it.
11 MR. SMART: I think that is, speak for
counseling,
12 it's not really a strategic thing, Your Honor. It's
that you
13 tend to finish up from witnesses.
14 THE COURT: I know. I'll telling you as you
look
15 ahead and you have an ability to formulate a little bit
of a
16 plan. For example, you know in the next two weeks we
need to
17 use X amount of deposition time. We need to get several
18 depositions in. Think about ways that perhaps you can
do
19 that in the afternoon as well as in the morning. That's
all
20 I'm suggesting. We'll do the best we can. At least --
these
21 things can't be controlled a hundred percent. I know
that.
22 I'm just asking for your assistance in trying to
organize it
23 as much as you can.
24 Plus, it makes you look really good that I asked
you, in
25 court.

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MELONE - Cross (Hagens)

it 1 Okay. I'm sincere. It would be nice if you have
2 balanced out. Okay.
worked 3 The jury will be ready to go at ten o'clock. So
4 out well. Thank you.

5 (The following occurred in
the presence of the jury.)

6
7 ANTHONY MELONE, called as a witness by the
8 county, being previously
testified 9 duly sworn on oath,
10 further as follows:

11 THE COURT: I'll remind you just because we've
had 12 an overnight break that you remain under oath in this
13 case.

14 A Okay. I understand.

FURTHER CROSS-EXAMINATION

15 BY MR. HAGENS:

Honor, 16 Q Good morning, Ladies and Gentlemen of the Jury, Your
17 counsel.
18 Doctor, good morning to you.
19 A Good morning, Mr. Hagens.

your 20 Q When we broke, we were talking about how the scope of
21 work has been developed with the lawyers. I'm going to
22 change subjects now and go back to Exhibit 1373. I
think you 23 should have it there in front of you. The top one.

in 24 And this is the exhibit by which you place the flow
Northern 25 1906, 1906 reached stage of 37 feet from the Great
Railway high water profile discharge at 180,000. And my
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MELONE - Cross (Hagens)

1 question to you is, looking at Defendant's Exhibit 978,
did

Vernon 2 you notice that there are no peak discharges at Mount
3 except for 1906. Did you notice that?
4 A Yes, I notice that.
5 Q And that even after 1906, you don't start to see a
gauging -- 6 actual gauging of the amount until you reach 1945; you
see 7 that?
8 A I see that on that graphic.
9 Q Okay.
10 And you've done your homework, so you know that
they 11 didn't even have a gauge at that -- riverside or
anywhere 12 else in Mount Vernon until, my understanding is, 1941;
is 13 that right?
14 A The USGS gauge installed at the Riverside bridge, I
believe, 15 was 1940.
16 Q Okay. So this 180,000 cfs figure that we see on Exhibit
17 1373, that would be -- there being no gauge, have to be
an 18 estimate, wouldn't it?
19 A It is an estimate that has been sanctioned by the USGS,
yes. 20 Q Okay.
21 And an estimate wouldn't be as reliable as a gauged
22 amount, would it?
23 A I would say an estimate can be equally as accurate as
gauges 24 record if someone had marked a very accurate high-water
mark. 25 Q Right. But you would have to know whether it was
180,000
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MELONE - Cross (Hagens)

1 -- you would have to know what the bed and profile of
the 2 river was and everything else, would you not?
3 A If 180,000 cfs was based on a hydraulic calculation
based on 4 the high-water mark, yes.

5 Q In any event, we know this much, that it wasn't a gauge
6 reading, it was somebody's estimate?
7 A Was not gauged with the USGS gauge. It's a number
published
8 by the USGS as their estimate for the 1906 flood.
9 Q Right. And if you are a hydraulic engineer, would you
rather
10 have gauge readings or somebody's estimate, Dr. Melone?
11 A I would like to have good data, wherever it comes from.
12 Q Okay.
13 So on that minor point then, there is some question
as
14 to whether or not that was an estimated figure or in
fact a
15 gauged figure. You would agree with that; isn't that
true?
16 A I don't think I agree with that.
17 Q Well, you've testified there was no gauge there, so it
must
18 be an estimate, correct?
19 A No, it was based on a recorded high-water mark.
20 Q Okay.
21 Let's move onto another aspect of some of your
22 testimony. And this Exhibit 1362 -- and I just wanted
to
23 touch on it briefly -- shows -- this is the Skagit River
--
24 A Do I have that here, Mr. Hagens?
25 Q Yes. 1362, I believe it is.
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MELONE - Cross (Hagens)

1 A Okay.
2 Q This is the levee profile, Dike District 12 levee
profile.
3 Claim. Actually it's only a portion of the levees, is
that
4 not correct?
5 A It's the entire two-mile section of the levee that was
6 reconstructed in 1955.
7 Q Right.
8 So when you did your elevations, you only did it
for
9 this two-mile section upriver of the Burlington Northern
10 bridge, about a mile or so; is that right?

11 A No, that's not correct. I had the entire levee surveyed
from
12 the Burlington Northern bridge. What I did not have is
any
13 information pre-1955 to compare to until I reach the
point
14 where the reconstruction occurred. I surveyed the
entire
15 levee.

16 Q From the Burlington Northern bridge down here then?
17 A I surveyed the entire levee, yes. I had it -- my
surveyor do
18 the entire survey. The area that I had information for
19 comparison started with the two-mile section where you
have
20 the arrow extending upstream for the completely
realigned
21 addition in 1955.

22 Q So these readings then on exhibit -- move to Exhibit
1362,
23 are elevations then from the Burlington -- I just to
want
24 understand it, under the Burlington Northern Bridge all
the
25 way to its terminus?

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MELONE - Cross (Hagens)

1 A No. This information is the realigned section.
2 Q Okay.
3 So the readings then on Exhibit 1362 had to do then
--
4 are limited then just to the realigned portion of the
dike?

5 A 1362 is the comparison of that segment of the levee, the
6 two-mile segment, approximately, that was realigned in
1955.

7 Q And I notice in going through 1362, that in every
instance
8 it's a positive except for two; is that correct?

9 A I believe --
10 Q The 37 elevation shootings you took just on the
realigned
11 section, a couple of miles, limited section of Dike
District

not 12 12, all but two of these elevations showed increases,
13 decreases; is that correct?
14 A Yes, that's what I testified to yesterday.
above 15 Q So you got 35 out of 37 shots show that the dikes were
16 their design elevation; is that correct?
17 A 35 out of 37 were between no change and up to one point
-- I 18 believe the last one was 1.5 feet. We're in that range.
19 Q Right.
there 20 And in fact, if you take a closer look at here,
21 are two or three in here. Zeros. Meaning no change?
22 A That is what it is.
back. 23 Q Two out of the two. I see one, two, three. Take that
24 Three. Show no design -- no change in design
elevations. 25 So over 30 of those shots then indicate that the
levees

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MELONE - Cross (Hagens)

a 1 in fact are higher than their design elevation. Is that
2 fair statement?
3 A Exactly as stated, higher, the average of these, plus .5
4 feet.
5 Q Right.
to 6 Leave this on the screen for a minute. I'm going
7 come back to this area here.
you are 8 Then what you've done here with Exhibit 1363, is
9 telling the jury, if I understand, this is Dike District
12 10 levee profile, but this isn't the entire levee profile,
11 again. It's just the -- if I understand what you're
saying, 12 it's just the reconstructed portion going north to its
13 terminus; is that right?
14 A It clearly states in the first column from start of 1955
15 levee realignment.

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jury
water
that
the

16 Q Shows that in the first column, but it doesn't show that
17 the actual caption. But in any event, what you say here
18 then, as to that realigned section, you're telling the
19 here that it's about, like, three feet above what the
20 level got to in 1990; is that right?
21 A That's correct.
22 Q That doesn't tell us or tell the jury -- take this off
23 screen -- what it was like -- this is Exhibit 199. It
24 doesn't tell the jury what it was like downriver from
25 realigned section, does it, during the floods of 1990?

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MELONE - Cross (Hagens)

1 A Which segment downstream?
2 Q Any segment.
3 A I'm not following. Dike District 12.
4 Q Dikes.
5 A Dike District 12 dikes starting about where?
6 Q Starting south of the realignment and going all the way
to
7 their terminus. I think it's about midway in this
Riverbend
8 area.
9 A The analysis that I've done for this project started at
the
10 USGS gauge.
11 Q I know. But the three feet that you're talking about
there,
12 that is only in the realigned section.
13 A It's in the Nookachamps area, the two-mile realigned
section
14 of 1955.
15 Q So when Mr. Brookings said that the levees were on the
verge
16 of failing in 1990, the water was lapping at the top of
them,
17 and that they did all this incredible amount of flood
18 fighting, that would have been in an area somewhere
south or

19 downriver from the realigned area; is that right?
Because 20 according to your calculation, you had three feet to go
in 21 the realigned area; isn't that right?
22 A I agree with you that we had three feet of freeboard on
the 23 realigned section of the -- of the Dike District 12
levee, 24 yes.
25 Q Okay.

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MELONE - Cross (Hagens)

1 And so that this flood fighting that took occurred,
is 2 -- in 1990. Putting all the sandbags out, that must
have 3 occurred downstream from the realigned section?
4 A I think you quoted Mr. Brookings. And I don't know --
5 Q Excuse me. Mr. Nelson.
6 A Or Mr. Nelson. I don't know where Mr. Nelson or Mr.
7 Brookings did their flood fight in 1990.
8 Q You knew there was flood fighting going on in 1990?
9 A I'm aware that flood fighting went on.
10 Q And you're aware it went on in 1975, aren't you?
11 A I have no direct evidence. I would suspect with every
major 12 flood that there are flood fighting efforts.
13 Q You may not have any direct evidence. But there is the
14 jury.
15 This is Exhibit 144. It's the Puget Sound,
Washington 16 Coastal, and Eastern Slope Cascade River Basins,
Washington, 17 report of floods of December 1975 and January 1976.
It's 18 Exhibit 144 in evidence. And I'm going to read to you a
19 section of it where it talks about flood damage. Skagit
20 River flood damage -- this is production number 4325.
21 Skagit River flood damage was 3,247,000.
22 Damage would have been much greater without
23 a successful flood-fighting effort on the
24 diking system along the lower Skagit River.

25
along
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And so plainly they were doing some flood fighting
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MELONE - Cross (Hagens)

I
were.
next

1 the lower Skagit River; isn't that correct, in 1975?
2 A Sounds like flood fighting was going in the lower. And
3 have no knowledge what those flood-fighting efforts
4 Nor where they occurred.
5 Q Then it goes on to describe those flood fights. On the

you

6 page it says:
7 The corps of engineers rented 60 items of
8 heavy equipment and used 170,000 sandbags
9 and 16,640 tons of rockfill. Seattle
10 District spent 397,000 in the flood fighting
11 effort.
12 Now, if there is three feet to go on the levees,

in

13 wouldn't be sandbagging them, would you?
14 A I think everybody I've referred to has been very clearly
15 our Nookachamps Creek area.

are

16 Q In the realignment area. Forget the Nookachamps. There
17 no dikes in the Nookachamps area.

been

18 A And I think I've had been clear that any analysis has

about

19 from the USGS gauge upstream for the reasons we talked

that is

20 yesterday. The second piece of information I had on

I

21 I tried to uncover any other surveyor information, which

dike

22 did not uncover, was the declarations of Mr. Walker, a

declaration,

23 commissioner.

24 MR. HAGENS: I didn't ask about that

25 Your Honor.

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MELONE - Cross (Hagens)

1 A You asked me about my source of information.
2 Q I did not --
3 A Source of information --
4 MR. HAGENS: Your Honor, I'm going to object
to
5 this as nonresponsive and object to it because I think
the
6 witness is going to volunteer a whole speech now about
dike
7 district -- Mr. Walker and others. And all I asked him
is we
8 wouldn't have to dike if those -- there would be no
reason to
9 dike, do that flood-fighting effort if they had three
feet to
10 go. Now he wants to give off a big story about what
dike
11 district commissioner Walker wants to tell us.
12 THE COURT: The answer has become
nonresponsive.
13 I'll sustain the objection.
14 Q (By Mr. Hagens) So my point is, Dr. Melone, that there
would
15 be no reason to flood fight in terms of all those
sandbags
16 that they put on here described in this Exhibit 144 if
there
17 was still three feet to go on the levees. Wouldn't that
be
18 correct?
19 A Are you referring to the Nookachamps levees that we had
three
20 feet of levee that was a flood fight there?
21 Q I'm talking about --
22 A Confused where you are talking about in the flood fight.
23 Where did we have the three feet --
24 Q I'm talking about south of there.
25 A South where?
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MELONE - Cross (Hagens)

1 Q Downstream.
2 A I'm just asking for some help here.
3 Q Downstream from the Nookachamps area.
4 A Downstream. I'm just asking. So I know where it is
we're
5 referring to.
6 Q I don't know exactly.
7 A And actually whether I have any information or not.
8 Q Okay.
9 So in response to my point, though, would you see
any
10 reason to put all these 170,000 sandbags if you had
three
11 feet to go?
12 A I couldn't read the minds of those people doing the
flood
13 fight.
14 Q Okay.
15 I guess that's an answer.
16 And I want to read to you something from Mr.
Gilbrough's
17 deposition about the condition of the levees in 1990.
Maybe
18 a little contrary to this three feet you're talking
about.
19 Did you read Mr. Gilbrough's deposition?
20 A I've read all the depositions. I don't have them all
21 committed to memory.
22 Q Okay.
23 One of the portions that I thought was of interest
24 -- this is a section here where he was asking:
25 So you don't know whether or not the levee
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MELONE - Cross (Hagens)

1 system has had failures in the past.
2 ANSWER: Oh, certainly the levee system has
3 had failures in the past. But the levee
4 system has been improved over the last 20

5 years fairly significantly, 20 to 40 years,
6 very significantly. So if you're talking
7 this levee system, I don't know. We had a
8 major break in Fir Island in 1990. So that
9 that certainly indicated a failure point and
10 the levee system, according to the corps
11 observations during the Thanksgiving 1990
12 flood, many of them were almost completely
13 saturated and very close to failure.

14 Do you see that in there?

15 A Yes, I see that.

16 Q They wouldn't -- have taken very much more water.

17 Now, I believe that that is consistent with Mr.

Nelson

18 testified to, that these levees were on the verge of
19 failure.

20 A Referring to the levees further downstream.

21 Q Yes, sir. Yes, sir.

22 A Nookachamps area.

23 Q You don't have any information to dispute that?

24 A I have not done any research downstream from the study
area.

25 Q Okay.

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MELONE - Cross (Hagens)

1 Take this off the screen.

2 Now, yesterday we talked a little bit about your
3 testimony about strengthening doesn't create increased
flood
4 elevations.

5 A That's correct. That's correct.

6 Q You recall that testimony? But it does -- strengthening
does

7 prevent failures and God forbid we don't want any
failures up

8 there. You would agree with that, that strengthening
does

9 prevent or protect against failures. Isn't that
correct?

10 A I would agree.

11 Q And that is the reason you strengthen with things like
12 keyways and fill and the like; isn't that right?

13 A Having built a levee, I'm certain that no one designs it
or

14 intends for it to fail.
15 Q Right. So the point -- only point I would make is you
don't
16 really dispute the notion that these levees have been
17 improved in the sense their strength has been increased
over
18 the years?
19 A I would agree that there have been maintenance
activities on
20 these levees that have increased their strength but not
21 anything that would affect flood levels. It would have
to be
22 increased in height to affect flood levels.
23 Q Okay.
24 But if they were increased in strength -- Well,
strike
25 that.

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MELONE - Cross (Hagens)

1 One point I wanted to get in the record. Did I
2 understand you to say that the left bank of the Skagit
River
3 at the Sterling area was 36 feet? I heard you say that
4 yesterday and I wrote it down. I said, hum, is that
right?
5 A If you recall yesterday, what I was shown was a topo map
that
6 had no elevation in that and I made an estimate from
memory.
7 Q So your memory is that it's 36 feet on the left side of -
-
8 A That was -- is my memory. I haven't gone back to check
9 whether my memory was correct or not. But if you had a
topo
10 map, that would be a good thing to check.
11 Q Why don't you come on down here?
12 A (Witness complying.)
13 Q Yesterday you talked about depressions and like that in
the
14 Nookachamps area. I want to talk to you a little bit
about
15 that. Where was this map that you had? I wanted to get
that
16 out. That showed the -- here it is. This shows --

over 17 Carrie, I wonder if you can come here and stand
few 18 here and hold this up so the jury -- I want to compare a
up. 19 things here for the jury. Maybe if you can hold this
20 Would you mind?
can't 21 Now, I notice that like these folks up here, I
believe 22 even tell you the names. I think Alice DeVries. I
up 23 her property. You have here around 30. And these folks
are, 24 here, I think Mrs. Howell is up here someplace. And Mr.
25 Mason and whatnot. Live up here. Mrs. Tonheim. There
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MELONE - Cross (Hagens)

1 like, 32, 33, even, like, 38 feet. See those numbers up
2 there?
3 A Yes.
Is 4 Q And Mr. Halverson is, like, in the 35, if I understand.
5 this Halverson?
record, 6 MR. SMART: I have an objection for the
7 Your Honor, because Mr. Hagens has not pointed to Mr.
8 Halverson's property.
I'm not 9 MR. HAGENS: I know it's in this vicinity.
10 sure which it is.
left. 11 MR. SMART: It's the purple one up to the
12 Q (By Mr. Hagens) This one here?
13 MR. SMART: Farther down. Closer, but lower.
14 MR. HAGENS: Getting close, tell me when I get
15 warmer.
16 MR. SMART: There you go.
here. 17 MR. HAGENS: That's not it. This part right
18 Hah.
going to 19 Q (By Mr. Hagens) So Mr. Halverson is up here. He is

his 20 be mad at me because I didn't get the right number of
21 elevation. It's 35 and 33. He is sitting over there.
He is 22 probably smoking a little bit. Says that lawyer didn't
do it 23 right. You see Mr. Halverson here at 35 and 33?
24 A Yes.
25 Q I want you to take a look at these pins I put up here.

Let's

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MELONE - Cross (Hagens)

1 go through some of those that we have our folks at 30
and 35 2 and 33. If you hold that like that. I wonder if you
can 3 tell the jury what the readings of some of these pins
are. 4 Down here. This is topocal elevation. Talking about
Exhibit 5 219 now. That shows what, 15 there?
6 A Yeah. I think to get oriented, I want to make sure this
7 drawing here corresponds to this area.
8 Q Right.
9 A Now we move downstream off of this.
10 Q Correct. This shows what, 15 here?
11 A Yes.
12 Q And this spot that I've got a blue pen in shows 20?
13 A That's correct.
14 Q Riverbend shows 20?
15 A That's correct.
16 Q And we have one a little bit north of the Riverbend area
that 17 shows 20?
18 A Correct.
19 Q This is 20, isn't it, right?
20 A Correct.
21 Q We have one in here at 15 back up further north?
22 A 15. Though 15 in the little depressional area.
23 Q And here is one at like 25; isn't that right? A little
north 24 of Burlington Northern bridge area; is that right?
25 A That is --

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MELONE - Cross (Hagens)

1 Q Say 25 right there?
2 A West of Burlington.
3 Q Okay.
4 Another one that is 25. And here is Gages Lake.
What
5 is the number there?
6 A Gages Lake has a 16.
7 Q Are elevation of 16. Barney Lake, what was the name of
that
8 lake? Down like 18 or something like that?
9 A I see Barney Lake on the chart as saying elevation 18.
10 Q Okay. And then here is -- yet up by the -- Olympia
Marsh,
11 read at 20 again; isn't that right?
12 A That's correct.
13 Q So if these people are, like, 30 and 33 and 35 up there
for
14 Mr. Halverson, 38 on one of his properties, they
shouldn't be
15 flooding. These folks down here would be flooding if
there
16 weren't any levees. Isn't that correct? They are
higher.
17 You said that water goes downhill.
18 A Water goes downhill.
19 Q You did say that, didn't you?
20 A I'm certain of that.
21 Q Okay.
22 They are at 20. Our folks up in this area are at
30,
23 35. So why is it they're getting flooded but these
folks,
24 10, 15 feet lower aren't, if water flows downhill? The
25 reason is these levees; isn't that right?
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MELONE - Cross (Hagens)

1 A I would not necessarily say it's these levees.
2 Q Levees --
3 A Levees that you pointed to were at the Nookachamps Creek
4 area.
5 Q I'm talking about the entire levee system.
6 A The entire levee system, without a doubt there was no
levee
7 system, you would have different flow paths than you
have
8 with levees.
9 Q You didn't do any computer models to determine flow
paths,
10 did you, because you didn't do it with or without
levees, did
11 you?
12 A My analysis started at this point at, you know, we did
no
13 analysis downstream. Our analysis proceeded downstream.
14 Q The only point I'm making, if you had no levees, there
would
15 be a different flow path. If you take your fundamental
rule
16 of hydraulics, same one than Dr. Mutter had, water goes
17 downhill, no levees, the water would go on to the lower
area?
18 A If there was no levees in this valley, there would be
19 distinctly different flow paths.
20 Q That's right. And you expect those flow paths to go
21 downhill?
22 A I would expect those flow paths -- more than expect them
to
23 go downhill.
24 Q Thank you.
25 You can resume your seat.
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MELONE - Cross (Hagens)

1 Thanks, Carrie.
2 A I did notice my elevation is there on this chart.
3 (Witness complying.)

4 Q Then I wanted to ask you another question about one of
your
5 exhibits. All I have to do is find it.
6 Yesterday we spoke a little bit about failures.
And one
7 of the exhibits you have in evidence is Exhibit 1371.
And
8 what I would like to kind of deal with for a moment, and
this
9 is based upon, if I understand it, measurements at the
10 Riverside gauge, which is, what, next to the Burlington
11 Northern bridge somewhere?
12 A It's the bridge downstream from the Burlington Northern
13 bridge.
14 Q Now, if you had a break down stream of the Riverside
gauge,
15 and I'm using Exhibit 219, would you expect the water
16 elevation to go up or go down, Dr. Melone?
17 A Any break downstream?
18 Q Yeah. Within a hundred yards of the Riverside gauge.
19 A With the flow being unchanged, I would expect the water
level
20 to go down.
level
21 Q Right. And so that 1371 tells us, no break, the water
22 continues to rise, doesn't it?
23 A Yes, it does.
24 Q But if there were a break, you would expect say again
within
25 a hundred, two hundred yards of the Riverside gauge,
that

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MELONE - Cross (Hagens)

1 this elevation chart, stage and feet chart, you would
expect
2 to see a drop in it, wouldn't it?
3 A It would depend on the size of the break, the amount of
flow
4 and the distance from the gauge.
5 Q I'm talking about a material. I'm not talking about
6 immaterial break. I'm talking about one that is
material in
7 size. You would expect to see a significant decline?
8 A Again, it would depend on the size.

in 9 Q Right. But the larger the size, the larger the drop-off
10 elevation, wouldn't you agree?
11 A Yes.
12 Q Okay.
13 A Depends on location.
14 Q Right.
15 So with that -- what you just told the jury then is
you 16 have a break within a hundred yards downstream the
Burlington 17 Northern bridge you would expect water upstream to go
down. 18 In that area?
19 A I don't know if a hundred yards is the right distance,
but 20 conceptually, if it was close enough and large enough or
a 21 combination thereof, yes, I would expect the water level
to 22 go down.
23 Q All right.
24 And indeed, did you read the deposition testimony
of 25 Howard Miller where he discussed what happened in the
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MELONE - Cross (Hagens)

1 Nookachamps in the flood of 1951 when it broke through?
2 A I don't recall reading that deposition.
3 Q Okay.
4 Then I wanted to ask you a question about another
area. 5 Yesterday you talked about you turned your computers on,
help 6 tell the jury about what the effect of the logjam might
have 7 been at the Burlington Northern bridge according to your
8 computer analysis. But one thing you didn't tell the
jurors 9 that even you recognize, the concept of the scour,
correct? 10 A Yes, I understand river scour.
11 Q And in fact, indeed, when you reduced the flow area, I

12 think -- may be wrong here, I'm not a hydraulic
engineer.
13 You increased, as you described yesterday -- I thought
you
14 did a good job. You increased the velocity of the water
15 going through a small area; isn't that right?
16 A That is correct.
17 Q And what happens is -- I have a chart around here
18 somewhere -- Can you see this? Can you see this a
little bit
19 from where you're at, Dr. Mutter?
20 A Melone.
21 Q Oh. Dr. Melone. Of course.
22 A No, I can't see it very well.
23 Q You're so close to Dr. Mutter, I don't know why I would

--
24 Taking a look at this diagram. You want to come
down
25 here?

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MELONE - Cross (Hagens)

1 A I would like to come down.
2 Q Help you out a little bit. I don't want you not to be
able
3 to see.
4 Mr. Regan got up and designed just a, you know,
5 schematic, conceptually, of what happened in the river
when
6 we had scour. And this would be the normal riverbed
here and
7 then some obstructions. And he said you would get some
8 scouring out effect here. This was a way he showed
folks how
9 you can measure. Put a chain in the ground when it's
not
10 scoured and when it scours out, you can see the distance
of
11 the scour where the chain sits in the bottom of the
river.
12 A This is a river cross-section?
13 Q Yes.
14 A This is the water level?
15 Q Yes, sir.
16 A And this is the bed of the river?

17 Q Right.
18 A This is the bed of the river after the scour?
19 Q After the scour. That is conceptually how a scour would
20 work, and how you might measure it?
21 A Yes, it is.
22 Q Okay.
23 And nobody really knows the depth of this scour, do
24 they, Mr. Melone?
25 A The depth --
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MELONE - Cross (Hagens)

1 MR. SMART: Objection. Which scour? Talking
2 hypothetical or talking about actual?
3 MR. HAGENS: Good point. Good point.
4 Q (By Mr. Hagens) Did a bad job with that question.
5 Nobody knows in 1990 what the depth of the scour
was at
6 the Burlington Northern bridge?
7 A I have not seen any numbers on the depth of the scour.
8 Q What you do know, like a doctor knows when a leg is
broken or
9 not, he knows that it occurs?
10 A I would believe a scour would occur.
11 Q Right. And one of the graphic evidences we have of that
is
12 1995 when one of the piers on that bridge collapsed
because,
13 as your counsel has pointed out many times, there was a
big
14 logjam, almost like this. I don't know if this is '95
15 event. I think it maybe might have been. And this
increases
16 this scour effect up here, isn't that right?
17 A Contributes to the scour effect, yes.
18 Q Right.
19 So, and that is the way the river has of
compensating
20 for the fact that there is obstructions in the river
21 floodway, is it scours, as portrayed on exhibit --
22 A As the area is obstructed and the water needs to pass
through
23 that, it will pass under the debris and scour.
24 Q And that failing pier in 1995 is good graphic evidence
of

25 what it can do; isn't that right?
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MELONE - Cross (Hagens)

1 A I would believe that that was a scour with the pier.
2 Q Let's get this marked. I've never had this marked. We
might
3 even get marked. Do you have a number I could use?
4 Thank you.
5 So 3086 would be a graphic depiction of how scour
might
6 work; isn't that a fair statement?
7 A Very conceptual, but a conceptual depiction of a scour
8 riverbed.
9 MR. HAGENS: We offer 3086.
10 MR. SMART: For illustrative purposes, I don't
have
11 any objection.
12 MR. HAGENS: I don't know why it would be
13 necessarily limited to illustrative purposes.
Conceptual in
14 nature.
15 MR. SMART: The reason is because it's
counsel's
16 representation as to what it was. He said what somebody
else
17 said, a graphic demonstration that is only theoretical
in
18 nature, so it would be illustrative. The testimony also
is
19 that we don't know whether or not it actually replicates
any
20 incidents that occurred in 1990 or any other year.
21 MR. ANDERSON: I have no objection for
illustrative
22 purposes, Your Honor.
23 MR. HAGENS: Your Honor, I still think --
we're not
24 purporting to say that it scales anything. Just that it
25 depicts conceptually the operation of scour. I think
the
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MELONE - Cross (Hagens)

1 jury should have it. Mr. Regan prepared it, he agrees
with 2 it, so I think it ought to go in for all relevant
purposes. 3

4 THE COURT: 3086 will be admitted for all
5 purposes. (Plaintiff's Exhibit No.
3086 identified and admitted
into evidence.)

6 MR. HAGENS: I think we can move it.
7 Q (By Mr. Hagens) Another area. You told us what our own
8 experts have told the jury on that score.
9

10 The rating curve, now, am I correct that you have
some exhibit here -- I'll put one up on the stand here. It
says 11 1364. The rating curve --

12 A Do I have a copy of that here?

13 Q I hope so.

14 A What's the number?

15 Q 1364.

16 A I have 1361. Looks familiar. Or similar.

17 Q Sorry. All I really want to do with this exhibit is get
you 18 to tell me whether I'm right or not that these rating

curves 19 don't tell you anything about the actual strength or

levee 20 protection level that the levees provide. They just

show you 21 what the flow rate is, the elevation versus flow rate;

isn't 22 that right, at a measured point?

23 A Absolutely no relationship between that curve and levees
in 24 any way.

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MELONE - Cross (Hagens)

1 Q Okay.
2 So we can take this off the screen. Been through
that.
3 Okay.
4 I want to return to a couple of areas, and I'm
about
5 done, Dr. Melone. Now, if I understand your testimony.
I
6 want you to correct me if I'm wrong -- you say that the
base
7 case makes no sense because it never was that way. And
you
8 think you ought to do a base case that would entail
putting
9 the forests back on plaintiffs' property, taking out the
10 effect of the reservoir areas, Baker and Ross Dam;
taking out
11 the Burlington Northern, taking out I-5, taking out
Highway
12 20 and all civil works that might, I guess, materially
affect
13 that. And you say that that would be the only sensible
thing
14 to do here. But what I want to ask you, if your
interested
15 in measuring the effect of the levees, that is what the
16 effect on the plaintiffs' properties is with and without
17 levees, which is what this lawsuit is about, wouldn't
you
18 agree, Dr. Melone, that it might be a good idea to take
out
19 all these levees and see what the effect was of doing
that
20 using these fancy computer models?
21 MR. SMART: I object to the portion of the
question
22 where Mr. Hagens has instructed the witness what the
lawsuit
23 is about.
24 MR. HAGENS: I can tell him what our claims
are
25 about. I don't know what yours are about, but I can
tell him
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MELONE - Cross (Hagens)

1 what our claims are.
2 THE COURT: Overruled.
3 Q (By Mr. Hagens) If you're interested in finding out
what the
4 levees are causing by way of flooding, one way you would
go
5 about that is to take all the levees out, Dr. Melone?
6 A My understanding of the lawsuit is that flood levels are
7 higher with the levees than they were without the
levees.
8 Q Right.
9 A Which is a different question than what you have
answered.
10 You answered the question: The levees are there today,
if I
11 took them out tomorrow with nothing being changed, would
I
12 have lower flood, less levels?
13 Q Right.
14 A To which we have agreed with you, and I have agreed with
you
15 that nothing being changed, no concept of the time, a
16 different question than the question that we have
addressed.
17 The question that we have addressed is the one, given
the
18 flood elevation today with the levees, how does that
compare
19 to some point in time when the levees did not exist?
And
20 onto that is there anything that the county has
constructed
21 that has affected this through time. That is the
question
22 that we have addressed.
23 Q Okay.
24 What I'm trying to do is, though, trying to get an
25 answer to my question. You are trying to figure out --

I got

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MELONE - Cross (Hagens)

1 your speech a couple of times here in my examination --
you 2 are interested in finding out how much these levees are
3 causing by way of damages, wouldn't one way to be, this:
4 Remove the levees and see what the consequences were,
5 wouldn't you agree?
6 Maybe it's not the question you think we're asking
this 7 jury. It's the one I think we're asking this jury. If
that 8 was the question on your mind, wouldn't you think this
would 9 be one way to do it?
10 A It's not the only method for analysis. Another analysis
is 11 to look at the actual recorded data. The actual
recorded 12 data is another approach to look at the effects of the
levee, 13 data that predates the levees.
14 Q But you would agree the one way to do it would be the
way the 15 plaintiffs did, if you're interested in chancing the
question 16 that I posed, and I think the jury might be interested
in, is 17 to do what plaintiffs' expert does; isn't that correct?
18 A If you're answering the question of the levees there are
19 today and if I took them out tomorrow, with no changes
to 20 the -- or not accounting for the flood protection that
has 21 been provided through the years, not accounting for any
other 22 structures, the cumulative effect of our structures, if
that 23 is the question you're trying to answer.
24 Q Right.
25 A That is one method. And as we have shown, certainly

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1 method shows for the last 40 years that there certainly
2 been no change. Whatever those changes are would
3 something greater than 40 years ago.
4 Q So the answer to my question is, yes, this would be one
5 to do it?
6 A In answer to the question, specifically, if you were
7 I'm trying to answer that question, that is one way, not
8 only way of addressing that question.
9 Q You didn't do it either way, did you?
10 A I certainly did.
11 Q Okay.
12 Let me go on and ask you another question here
13 You didn't do it -- didn't use your computer model to
14 take out all the levees up and down the Skagit valley, you
15 didn't use your computer model to take out Ross and Baker Dam.
16 You didn't use your computer model to reinsert the forest
17 and do all those things. You didn't do that approach, did you?
18 Did you or didn't you?
19 A We did not adopt that approach to addressing our issue.
20 Q Right.
21 And we do know that your approach tells us nothing
22 about -- well, it tells us about the Burlington Northern
23 bridge. It makes no effort to quantify the magnitude of flooding
24 the plaintiffs experienced.
25 A What part of my analysis are you referring to?
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1 Q Well --

2 A Let me say that the analysis definitely addressed that.
It 3 addressed the exact same concern or issue of the effect
of 4 flooding. We did it by an analysis of the actual
recorded 5 data, the actual recorded information that represents a
6 situation that predates levees in effect at the time
7 accounted for the lack of flood storage. That was a
very 8 definite analysis. It is not a model analysis. Model
is not 9 the only analytical tool.
10 Q Your analysis doesn't answer the question of how much
the 11 levees are causing. It tells us about the collective
effect 12 of all the structures in the floodway, does it not, or
13 floodplain, does it not?
14 A We answered a question of were flood levels higher or
lower 15 in a time period when the levees were not in place.
That 16 we've asked -- we've addressed a different question.
17 Q That's right. And you haven't tried to answer the
question 18 of whether the levees are causing any flooding.
19 A We have agreed with you that if you took the levees out
the 20 tomorrow, you would have a different flow path through
21 Skagit Valley than you have today.
22 Q Okay.
23 A And that flood levels were lower.
24 Q Let's go on to another area.
25 By the way, you're being compensated for your time

and
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MELONE - Cross (Hagens)

1 efforts in this case have been substantial, Dr. Melone,
by 2 Skagit County?
3 A Yes, I am.
4 Q Anybody else?
5 A No.

County; 6 Q Nobody else is paying any of your bill, just Skagit
7 is that your testimony?
8 A That's correct.
9 Q And that is true since the beginning of your engagement?
10 A As far as I know, we get paid directly by Skagit County.
11 Q I didn't ask you if you're paid directly. I asked if
anybody
12 else is sharing in the expense of your bills.
13 A I wouldn't know. All I know is who pays the bills.
14 Q Okay.
15 And your hourly rate is about 115 or 120, at least
when
16 I last took your deposition.
17 A I believe that's correct.
18 Q And you have how many thousand hours in this thing, Mr.
19 Melone?
20 A I don't know.
21 Q Can you give the jury an estimate?
22 A I don't know. We've been on this for four years. I do
not
23 know the cumulative number of hours over that period.
24 Q The last thing I wanted to turn to -- get Carrie up here
to
25 help me out a little bit.
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MELONE - Cross (Hagens)

of 1 I want to talk to you about -- hold those in front
them as 2 the jury so they can see them and Dr. Melone can see
3 well.
4 This is Ross Dam over here, and this is Baker Lake
--
5 excuse me -- Baker Lake, also Baker Dam; is that right?
6 A I believe those are the names of the dams.
7 Q Um-hum. And these are, if I understand it, reservoir
areas
8 behind them; is that right?
9 A Yes, they are.
10 Q And certainly this is -- you will agree -- is artificial
11 flooding; wouldn't you?
12 A I can't say whether that is a flood occurring in that
13 photograph or not. It is stored water.

14 Q Storing water like any reservoir would?
15 A Yes, it's storing water as any reservoir would.
16 Q That's right. And that is a benefit, you testified, of
three
17 to four feet for people of Skagit County; didn't you
say?
18 A I have quoted what the corps of engineers has been
assessing
19 the benefit in Mount Vernon. Yes.
20 Q Okay.
21 And nobody lives in these reservoirs, do they?
22 A I have no idea who lives along those reservoirs.
23 Q Do you know anybody who does, for heaven's sake?
24 A I hope not. I have no idea who lives around the
reservoir.
25 Q Okay.
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MELONE - Cross (Hagens)

1 So we have Baker Lake reservoir area, right; is
that yes
2 or no?
3 A Yes.
4 Q We have Ross Lake reservoir area, right? Beneficial to
the
5 county, right?
6 A Yes.
7 Q And we have Nookachamps reservoir, do we not, Dr.
Melone?
8 A I'm not aware of any Nookachamps reservoir.
9 Q You don't know that this is a reservoir and operates as
such?
10 A I would definitely not call that a reservoir.
11 Q You wouldn't call -- and this is of no benefit to Skagit
12 County; is that your testimony?
13 A It is not a reservoir.
14 Q You don't think that stores water during significant
flood
15 events, Dr. Melone?
16 A Floodplains on all rivers store water during flood
events.
17 That's why they are called a floodplain.
18 Q And indeed, I think you told me, if I'm not mistaken,
one of
19 these -- is it Baker or Ross -- starts to store water at

20 90,000 cfs?
21 A No. What I said was the dams begin to be operated for
flood
22 control or flood reduction when the flow in the Skagit
River
23 gets to 90,000 cfs.
24 Q Which I think we have an exhibit here, our expert said
that
25 begins to impact, is that levees begin to impact the
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MELONE - Cross (Hagens)

1 Nookachamps area at 80,000 cfs. Is not something you
2 disagree with, would you?
3 A I don't agree or disagree. I don't know the basis for
your
4 expert saying 80,000 cfs.
5 Q So there we have what our clients believe are in fact
three
6 reservoir areas. And interestingly enough, these people
also
7 had -- from, I think the testimony of the plaintiffs
was,
8 from one-and-a-half to approximately four feet of
floodwater,
9 just as Ross and Baker Lake took off, what did you say,
three
10 or four feet of water during the floods of 1990?
11 A Corps of engineers has reported on the order of four,
four
12 and a half feet, is the number I recall.
13 Q Now, say it doesn't constitute a reservoir area?
14 A Pardon me? I said what? What doesn't constitute?
15 Q The Nookachamps.
16 A The Nookachamps is definitely not a reservoir.
17 Q We'll, let's see what the county's engineer said then.
Okay?
18 I think that might be helpful.
19 A Sure.
20 Q This is Gene Sampley in Exhibit 57, the jury has seen
this
21 several times. Show it one more time.
22 Here is Mr. Sampley, the county's engineer, like
23 yourself, saying how when all is said and done, the
system

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Nookachamps,
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needs the Nookachamps. If the dikes go to the
the storage capability that has been traditionally there
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MELONE - Cross (Hagens)

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1 would be no longer available.
2 Do you see that, in the minutes of the Skagit
3 commissioners in 19 -- on January 2nd, 1979? Do you see
4 there?
5 A I think that is totally consistent with what you have
6 said and I have said, that the Nookachamps Creek is not
7 reservoir. It is part of the floodplain and floodwaters
8 into that area and are stored on the floodplain, as they
9 in all floodplains.
10 Q Let's ask you one more question about -- and I'm about
11 here. As a matter of fact, I will be done before long.
12 I've heard you use the word through the course of
13 testimony on direct examination, the word "natural"
14 flooding. You used that term rather indiscriminately in
15 course of your direct testimony; isn't that right?
16 A I'm not aware that I used it indiscriminately. I can
17 certainly expand on any instance.
18 Q This is what you consider -- this in Baker and Ross
19 Take a look at the Nookachamps. This is the area our
20 calculated of the flooding caused by the levees. That
21 and Ross Dams, this is all what you consider to be
22 flooding?
23 A I think I've been very clear that since the late 1800s
24 is a large, complex network of civil works that have

effect
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25 built up and down the river, all of which have had an
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MELONE - Cross (Hagens)

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1 on flow paths.
2 Q So you would agree this is not natural flooding. I'm
3 referring to Exhibit 210.
4 A Natural flooding, as I would say, would be that that was
5 instituted by rainfall and snow melt, is what initiated
6 flood.
7 Q I'm trying to get a simple answer to my question. Would
8 agree that this is not natural flooding but is in fact
9 artificial flooding caused by levees, Exhibit 210, the
10 that Dr. Mutter did?
11 A I would say that that is natural flooding, is the flow
12 through the years and the amount of water that has been
13 reduced in the upper basin has affected the flow paths
14 the rate of water that comes down the river.
15 Q Okay.
16 I'm going to ask you, now, you see I'm going to
17 you what doctor -- Noel Gilbrough. He is with the corps
18 engineers. We read this into the jury. Let's see what
19 said about the use of the word "natural." Somebody who
20 not on either side. All right. This is a question by,
21 all people, Mr. Major sitting over there.
22 So that the Nookachamps comprises a natural
23 storage area.
24 Mr. Gilbrough, the corps of engineers, was asked on
25 24, 1993, page 237 of his deposition. And his answer
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1997

MELONE - Cross (Hagens)

1 follows. I hope you can see it.
2 ANSWER: I believe the Nookachamps area acts
3 as a storage area. The word "natural" in
4 this condition, in the levee condition of
5 the lower Skagit, is probably misleading.

6 QUESTION: And in what way is it
7 misleading?

8 ANSWER: Well, if you talked about a natural
9 condition, I think you should look at how
10 the valley operated without any levees at
11 all, and then we have an altered condition
12 that is, if you will, unnatural right now,
13 and that affects, you know, the whole
14 system, including what goes in -- the water
15 which does or does not go into the
16 Nookachamps.

17 You would disagree with this impartial third party
that

18 came and testified in connection with this case about

whether
19 or not Exhibit 210 portrays natural versus artificial
20 flooding? Isn't that correct?

21 A I think that paragraph is consistent with what I've
said,

22 that the depressional area on the floodplain of the
23 Nookachamps is a natural storage area and has always had
24 floodwaters flow into it in the past as it does today.

25 Q Fact of the matter is, Dr. Melone, that the flooding our
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MELONE - Cross (Anderson)

1 clients experience is anything but natural when you look

at
2 it in terms of Exhibit 210, and indeed, that's why our

3 clients are here. And in fact, you have done no
studies, to 4 kind of summarize it in a word, you have done no studies
to 5 tell this jury otherwise. Have you?

6 A That's not correct.

7 MR. HAGENS: Thank you. We have no further
8 questions.

9 THE COURT: Ladies and Gentlemen, we'll take
10 a ten-minute recess at this point. Thank you.

11 (Subsequent to morning
recess,

the following occurred in

12 presence of the jury.)
13 ANTHONY MELONE, called as a witness by the
14 county, being previously
testified duly sworn on oath,

further as follows:

15

16

CROSS-EXAMINATION

17 BY MR. ANDERSON:

18 Q Good morning, Dr. Melone.

19 A Good morning.

20 Q My name is Glen Anderson. I represent the State of
21 Washington. You and I have not met, have we?

22 A No, we have not.

23 Q I just wanted to ask you a few questions about your

24 testimony. I believe yesterday you testified that there
had

25 been no changes since 1955 in the levee system that have
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MELONE - Cross (Anderson)

1 affected flood levels in the Nookachamps; is that
correct?

2 A That's correct.

3 MR. HAGENS: Object. He is talking about the
4 realigned area, Your Honor. And that is what he

studied.

5 Not the entire system.

6 THE COURT: You may proceed.

7 A I stated that there have been no changes since 1955 that
8 would affect flood levels in the Nookachamps Creek area.

9 Q (By Mr. Anderson) Okay. And at least part of the
foundation
10 for your testimony on that relates to the flood rating
curve;
11 is that correct? Or the rating curve that has been
entered
12 into evidence here.
13 A Part of it is the rating curve, yes.
14 Q Okay.
15 And is it my understanding, and I've got Exhibits
1364
16 is the rating curve that was put in yesterday by Mr.
Smart --
17 and the basis of that conclusion is that the 1990 flood
is on
18 the same curve as the 1951, 1975, 1955; is that correct?
19 A That is part of the assessment that went into that
20 conclusion, yes.
21 Q Okay.
22 And it's my understanding that if there had been
some
23 significant change in the levee system that would have
24 affected flooding in the Nookachamps we see -- a point
off
25 the rating curve or the 1990 flood would not fall on the
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MELONE - Cross (Anderson)

1 curve.
2 A Yes. Clarify that and say there would be nothing
downstream
3 that would affect the rating curve, and therefore not
affect
4 in the Nookachamps area.
5 Q Is it my understanding that part of the reason for this
is
6 that any flood on the river has to go through the bridge
area
7 here, which functions as kind of a choke point of the
river?
8 A That's correct.
9 Q Okay.
10 And isn't it true that based on the rating curve,
the

11 fact that the 1951 flood is on the same rating curve as
the
12 1975 and 1990, we can conclude that at least since 1951
there
13 have been no significant changes that have affected
flood
14 levels in the Nookachamps?
15 MR. HAGENS: Your Honor, look, this witness is
16 plainly favorable to the attorney on these points, Your
17 Honor. I don't think he should be entitled to lead him.
He
18 is almost like his own expert, I guess, on this point.
19 Essentially getting him to retestify as to the same
matter.
20 And in a leading fashion. I don't think that is
appropriate,
21 Your Honor.
22 MR. ANDERSON: I don't think that is true at
all,
23 Your Honor. Certainly not my expert. He is certainly
not
24 being paid by me. He hasn't met me before today. I'm
asking
25 the witness these questions as a foundation for an issue
that
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1997

MELONE - Cross (Anderson)

1 is important to the state, which it may be separate one
from
2 the county.
3 THE COURT: You may proceed. Overruled.
4 A Okay. The fact that the floods that you mentioned, '51,
'55,
5 being on the rating curve tells me that there is nothing
that
6 has occurred on the river system downstream from the
USGS
7 gauge that has affected flood levels at the gauge or
upstream
8 from the gauge.
9 Q (By Mr. Anderson) Okay. So is it fair to say that the
1955
10 levee realignment did not affect flood levels
significantly?

11 A I can say with certainty that since 1955 there have not
been
12 any changes.
13 Q What about since 1951, rating curve?
14 A The 1951 -- the rating curve tells me that nothing has
15 occurred downstream from the USGS gauge to affect flood
16 levels.
17 Q Okay.
18 How about -- in terms of the flood curve and the
19 realignment of the levee in 1955, can you testify that
the
20 1955 levee realignment has not had any significant
affect on
21 flood levels in the Nookachamps Valley?
22 A The evidence I have for the 1951, '55 period relates
more to
23 the observations of Mr. Johnson being slightly, as I
believe,
24 three and a half inches lower, and it was a lower flood
and
25 that was consistent with what I would expect to happen.
If
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MELONE - Cross (Anderson)

1 there were no changes.
2 Q Okay.
3 So is it your opinion that the 1955 realignment did
or
4 did not have any significant affect on flood levels in
the
5 Nookachamps?
6 A I have not detected any significant effects over that
7 additional four-year period.
8 Q Okay.
9 So if someone decided in 1955 when the realignment
effect
10 project was proposed that it would not have an adverse
history
11 on the flood, on flood levels, in the Nookachamps,
12 has borne them out; is that correct?
13 A If someone came to that conclusion, the information I
have
14 seemed to support that.
15 Q Okay.

16 One other question along that line. The modeling
that
17 you and Mr. Mutter have done using the -- I think you
called
18 it FESWMS.
19 A That's correct.
20 Q Those types of computer programs weren't available back
in
21 the 1950s, I take it.
22 A No, they were not.
23 Q Now, you also testified about the 37 feet that Dr.
Mutter
24 used to measure the -- or the 37 feet, that was the
25 measurement at Mount Vernon in the 1906 flood.
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MELONE - Cross (Anderson)

1 A It was a measurement that what is now the Burlington
Northern
2 Railroad bridge in 1906.
3 Q And why has that no relation to Dr. Mutter's use of the
31
4 feet.
5 A Because it tells us that at least 90 years ago that
flood
6 levels were higher at that location than Dr. Mutter --
that
7 the plaintiffs' model predicted for, off their table,
what
8 they call the turn of the century, that shows that the
flood
9 level was higher at that location. And if the flood
level
10 was higher at that location, that means the flood level
was
11 higher everywhere upstream from that location.
12 Q Okay.
13 And what significance does that have in relation to
14 Exhibit 210?
15 A The significance is, if we are trying to evaluate
changes, if
16 the flood level downstream is higher, then any change
would
17 be much less. And certainly this is something that is
over

18 '90 years ago and it would certainly be much less. In
19 addition, on that 1906 flood, the flood levels, the
flood 20 elevations, were actually higher than the 1990 flood.
21 Q The actual flood --
22 A At the plaintiffs' properties.
23 Q Okay.
24 If Dr. Mutter used a number closer to 37 feet as
opposed 25 to 31 feet, as the number at the Riverside bridge for
his 26
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MELONE - Redirect (Smart)

1 model in the no-levee condition, would you expect that
the 2 numbers on this chart would be smaller?
3 A Yes.
4 Q And was that because the no-levee condition flood levels
5 would be higher if you used a number higher than 31
feet? 6 A If he had had 37 at the Burlington Northern for his
7 turn-of-the-century simulation, he would have higher
flood 8 levels in this area and those numbers that represent
9 differences on the chart would be less.
10 Q Okay.
11 MR. ANDERSON: Those are all the questions I
have, 12 Your Honor.
13 REDIRECT EXAMINATION
14 BY MR. SMART:
15 Q Good morning, Dr. Melone.
16 A Couple of points.
17 Mr. Hagens suggested on several occasions that you
had 18 not studied the turn-of-the-century condition because
you did 19 not run a computer model attempting to simulate what the
20 conditions were way back then. Do you recall those
questions 21 in that vein?
22 A Yes, I recall that.
23 Q All right.

24
computer
25
levee
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What are the reasons that you did not run a
model attempting to simulate turn-of-the-century or no-
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MELONE - Redirect (Smart)

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conditions?
A A model is just a tool, and it's just one of the tools
available to us as engineers and analysts. A model,
particularly when we do not have information, sometimes
you information. If you have information, if you have
data, I find the use of the actual data to be a more
representative approach than using a hydraulic model.
Q Okay.
Is one of the hazards of using a hydraulic model
fact that you might come up with a result that
varies from an actual observed measurement such as the
measurement of 37 feet on the Burlington Northern bridge
the USGS in 1906?
A A model is only as good as the modeler makes it to be.
the evidence of how good the model is is how well does
reproduce actual occurrence.
Q Okay.
And the model that was used by Dr. Mutter produced
the turn-of-the-century condition, an elevation at the
Burlington Northern bridge in the turn of the century of
feet, correct?
MR. HAGENS: I'm going to object. Dr. Mutter
didn't use this model. Didn't use turn-of-the-century
he has here in this model at all. So he is certainly
mischaracterizing the testimony.
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MELONE - Redirect (Smart)

1 MR. SMART: Just --
2 THE COURT: Counsel.
3 MR. SMART: First of all, Your Honor, we have
an
4 exhibit which we looked at yesterday which is the Mutter
5 turn-of-the-century number of 31 feet.
6 MR. HAGENS: But the question was, did he use
it in
7 his model. His testimony was he didn't use this number
in
8 his modeling. I'm not sure it could have been used.
9 MR. SMART: That's just an attempt to confuse
the
10 question. I'm not suggesting that Dr. Mutter used the
11 37-foot number. I suggested that he used the 31-foot
number
12 which we saw the exhibit on the testimony yesterday.
13 THE COURT: Right.
14 MR. SMART: Okay.
15 THE COURT: Agree that apparently is the
number --
16 used.
17 MR. SMART: All right.
18 Q (By Mr. Smart) And if he had used a model that
correctly
19 replicated the turn-of-the-century conditions or at
least
20 those conditions that existed in 1906, you would have
21 expected that he would come up with the same number, 37
feet,
22 at the Burlington Northern bridge that was actually
recorded
23 in the USGS records; isn't that correct?
24 A That's correct.
25 Q Okay.
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MELONE - Redirect (Smart)

1 Now, you studied the way in which Dr. Mutter came
up 2 with the 31-foot number, did you not?
 3 A Yes, I did.
 4 Q And would you explain to the jury how that's done by
computer 5 a modeler such as Dr. Mutter?
 6 A My understanding of the modeling exercise is that Dr.
Mutter, 7 the plaintiffs' modeler, went far downstream from our
study 8 area. These are called boundary conditions that you
have to 9 input a water level. And based on that input the model
then 10 calculates other water levels in other areas of the
model. 11 The modeler only gives the model essentially one number
at 12 one location. Based on that, the model calculates the
flood 13 level at all other locations.
 14 Q So is it correct to say then that Dr. Mutter's model
using 15 the downstream boundary conditions that he imposed on it
 16 calculated a 31-foot level at the Burlington Northern
bridge 17 for the turn-of-the-century conditions?
 18 A Yes, it did.
 19 Q And okay.
Water 20 And that is shown in Exhibit 995 entitled Mutter
 21 Surface Elevation Turn-of-the-century Condition,
correct? 22 A That's correct.
 23 Q Okay.
 24 All right. And then just to complete the picture,
which 25 Mr. Anderson addressed, if you have an error in the
computed STEPHANIE NORTON, OFFICIAL COURT REPORTER, NO-RT-OS-

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1 number based on a modeling condition at a particular
point 2 like the Burlington Northern bridge, then that is going
to be 3 translated into errors in the computed difference
between the 4 levee versus no-levee numbers that are shown on Exhibit
No. 5 210, correct?
6 MR. HAGENS: Your Honor, I'm going to object.
This 7 is repetitious. It's been asked and answered multiple
times 8 now, Your Honor.
9 THE COURT: It seems to me we did cover this
in 10 direct yesterday.
11 MR. SMART: It's responsive to what Mr.
Anderson 12 and Mr. Hagens raised in cross-examination.
13 THE COURT: No. They discussed it again
because it 14 had already been discussed. That doesn't mean you get
to do 15 it again. So I'll sustain the objection. We've talked
about 16 that yesterday.
17 Q (By Mr. Smart) You indicated with respect to questions
by 18 Mr. Hagens that the comparisons that you actually
surveyed 19 for the Dike District 12 levee were for the portion of
the 20 levee upstream from this point labeled beginning of 1995
21 levee realignment on Exhibit 1362, correct?
22 A That's correct.
23 Q Okay.
24 And the problem with comparing your survey results
for 25 the portion of the levee between the Burlington Northern
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1 bridge, which looks to me like about a quarter as long
as the 2 upstream section, that the problem with comparing your
survey 3 results with this section of the bridge from the
Burlington 4 Northern bridge up to the beginning of the 1955
realignment 5 is that there wasn't actual preexisting sets of numbers
or 6 design specifications to which you could compare; is
that 7 right?

8 A None that I was able to locate.

9 Q Okay.

10 But what you did do is you reviewed the testimony
of the

11 Dike District 12 commissioners, correct?

12 A Yes, I did.

13 Q Okay.

14 And that was Mr. Walker; is that right?

15 A Yes, it was.

16 Q And what did Mr. Walker say from Dike District 12 with
17 respect to that section of levee above the Burlington
18 Northern bridge?

19 A For that segment of levee, as I read his declaration,
that 20 there was no raising of levees along that segment.
21 Q Okay.

22 So would it be correct to say that you looked for
the 23 information with respect to that section of levee, used
24 best information that was available?

25 A That's correct.

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MELONE - Redirect (Smart)

1 Q Okay.

2 Now, Mr. Hagens addressed this document, Exhibit
199 3 yesterday. Exhibit 199 -- make sure I've got the right
4 exhibit. Let's take 144. Actually 207 shows it as

well.

5 Mr. Hagens took these army corps' maps which showed

6 potential break points along the river. And yesterday
asked 7 you questions whether or not the army corps predicted
that 8 there would be a failure of Dike District 12's dike
above the 9 bridge at point 11 at 149 to 150,000 cubic feet per
second. 10 You recall those questions?
11 A Yes, I recall those questions.
12 Q All right.
13 Now, the flow in 1990 was 152,000 cubic feet per
second, 14 correct?
15 A Yes, 152,000 in November 25, 1990.
16 Q Okay.
17 And if the army corps was predicting back in 1979
that 18 there would be a failure at 149 to 150,000 cubic feet
per 19 second, what was the condition of the dike at that point
20 above the Burlington Northern bridge?
21 A I don't understand what you mean by the condition of the
22 levee.
23 Q Well, how high was it relative to the predicted failure
point 24 of the army corps of engineers? Was it sufficient to
carry 25 148,000 cubic feet per second?

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MELONE - Redirect (Smart)

1 A Yes, it was.
2 Q All right.
3 And if it was sufficient to carry 148,000 cubic
feet per 4 second and you have margins of error with respect to
5 predictions and analyses, would you agree that the --
the 6 failure on Fir Island at 152,000 cubic feet per second
and 7 the potential failures that Mr. Hagens has talked about
8 without a flood fight in this area along the Burlington
-- 9 Northern right of way, would be consistent with the army

back 10 corps' prediction as to what the levee would withstand
11 in 1979?
12 A I would find that to be consistent, the table saying
that it 13 would not fail for flows less than 149,000. And the
fact we 14 got 152,000 seems totally consistent to me. And if you
add 15 to that some flood-fighting efforts, I have no problem
if 16 that did exactly what it was supposed to do.
17 Q Would it also be consistent with your determination that
18 there had been no changes over this time period that
have 19 raised water surface elevations in the Nookachamps?
20 A I have uncovered nothing that has indicated any changes
since 21 1955 that would cause any changes over 40 years that
would 22 cause any changes in the study area you are referring to
as 23 Nookachamps Creek.
24 Q Okay.
25 Now, Mr. Hagens didn't mention this. But he did

refer
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MELONE - Redirect (Smart)

1 to Mr. Regan's testimony with respect to this Exhibit
207.
2 And it was my recollection that Mr. Regan said that
without a 3 flood fight these failures would be predicted. In your
4 research of the Skagit River and its history, did you
5 discover any large flood that occurred over the last,
50, 70,
6 a hundred years where there was no flood fight?
7 A I'm not aware of the exact details of flood-fighting
8 exercises other than the reference made to flood
fighting 9 during major floods.
10 Q You're aware that the army corps of engineers has a
preset 11 plan for flood fighting?

12 A Yes, I'm aware of it.
13 Q All right.
14 And you're aware that there is a response team that
goes
15 into effect when high water is predicted along the
Skagit to
16 fight the flood?
17 A Yes, I'm aware of that.
18 Q All right.
19 So you would expect that there would be a flood
fight
20 for any large flood?
21 A I would actually expect to be a flood fight on the
Skagit
22 River during a major flood.
23 Q All right.
24 With respect to Exhibit 1366, which is the
comparison of
25 the 1951 versus 1990 floods, did the flood at the
Highway 9
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MELONE - Redirect (Smart)

1 bridge in 1951, did that record higher water surface
2 elevation in 1990?
3 A Yes, it was a lower flow but recorded a higher flood
4 elevation at Highway 9 near Sedro Woolley.
5 Q Okay.
6 But there were inconsistencies in the hydrograph
with
7 respect to 1951 and 1990; is that correct?
8 A Excuse me?
9 Q Inconsistencies. In other words, the flows did not
exactly
10 replicate one another, did they?
11 A Help me out here. You mean by replicate.
12 Q They are not exactly the same. In other words, water
surface
13 elevation for the 1951 flood at each point were not
exactly
14 the same as 1990, in relation to 1990, right?
15 A That's correct. In 1990 or 1951 the flood levels were a
16 little higher upstream. And downstream were a little
lower.
17 I think as we look at this again, we've talked about

18 accuracy, and I think the difference we're looking at
here is
19 a couple tenths of a foot. But it does show for a lower
flow
20 being marginally lower than 1990.
21 Q Okay.
22 And you would expect that, would you not, if there
had
23 been no changes in condition, that you would expect a
24 marginally lower flood elevation for a marginally lower
flow?
25 A Yes, I would.

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MELONE - Redirect (Smart)

1 Q Okay.
2 And you also expect to have inconsistencies in
respect
3 to each different flood because each different flood is
4 generated in a different fashion; wouldn't that be
correct?
5 A Each flood is a little different. And again, the
accuracy of
6 how we record this information is a little different,
too.
7 Q Okay.
8 But taking into account those inconsistencies and
9 potential inaccuracies, would you agree or disagree
that
10 the -- in the area of the plaintiffs' properties, which
is
11 this area in here, that the 1990 flood was almost
identical
12 with the 1951 flood?
13 A Based on that profile, very similar.
14 Q Now, Mr. Hagens has talked to you about the concept of
the
15 scour. Turn to the diagram. I don't think I need it
for the
16 purpose of my question. Did you take into account the
17 concept of the scour when you made your determination
that
18 the logjam on the Burlington Northern bridge actually
19 increased the water surface elevation in the Nookachamps
20 during the 1990 flood?

energy 21 A Yes, I did. Scour -- we talked yesterday about the
debris 22 that is required to go through a major blockage like a
23 -- a log debris map like that, and through the narrow
24 bridges or the narrow openings through the bridge. That
the 25 more it's blocked, the more energy it takes to get
through.
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MELONE - Redirect (Smart)

1 As we talked about this morning, part of that energy
goes 2 into scouring the river. Even with that occurring, that
does 3 not change the fact that upstream from that log boom you
have 4 an increased water level. You have an increased water
level, 5 that is how we got our energy, we got an increased water
6 level to go through this log debris to cause some of the
7 scour. And what we see, that increase in energy level
is a 8 higher flood level upstream. So the scour is totally
9 consistent with a higher flood level upstream of the log
10 debris.
11 Q Mr. Hagens also asked you some questions concerning
natural 12 versus unnatural flooding. Okay. And I understood your
13 testimony that all of these floods start with a natural
14 phenomenon of rain and snow melt, warm weather, extra-
big 15 snowpack?
16 A Certainly initiation of the floods, what causes the
floods is 17 a natural, meteorologic event.
18 Q Okay.
19 Then engaged in the semantics about whether it was
20 natural or unnatural to have the current topographical
21 conditions given the fact that there were -- civil
works, I 22 think is what your term was -- that had been built since
the 23 turn of the century. You recall those questions?

24 A Yes.
25 Q All right.
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MELONE - Redirect (Smart)

1 Now, from the standpoint of civil works or
structures,
2 as long as man has been operating or building or living
in
3 the Skagit River, Skagit River valley, have the
preexisting
4 natural conditions been altered?
5 A I'm not aware of any wholesale changes to the natural
6 topography of this basin. As we've talked about, civil
works
7 have gone in and altered the landscape. I'm not aware
of any
8 wholesale changes of the natural topography.
9 Q But each of the civil works, for instance, a road like
10 Highway 20 or I-5 or the Burlington Northern bridge or
the
11 upriver storage dams or Highway 9, any one of those
items
12 that have been built by man would have the potential
effect
13 of altering the topographic conditions against which
water
14 would flow; isn't that correct?
15 A Absolutely. Each one of the civil works that we have
talked
16 about has altered the landscape, altered the topography
in
17 this region.
18 Q Okay.
19 And that has been going on ever since man has lived
in
20 the valley; isn't that correct?
21 A Certainly the history I have seen, that is true.
22 Q All right.
23 So the concept of whether there is a natural or an
24 unnatural flooding in the Nookachamps which disregards
the
25 effect of man's building house and bridges and roads and
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MELONE - Redirect (Smart)

to
the
flood
have
the
flood
I
the
natural
this

1 railroads, would that make any senses if you are trying
2 answer the question of whether or not there is anything
3 county had done within the last 40 or 50 years to alter
4 levels in the Nookachamps?
5 A There are a few questions. Certainly we agreed, or I
6 the opinion of, there has been nothing that is done by
7 county or anyone else in the last 40 years to alter
8 levels in the Nookachamps area. And as you've comment,
9 agree, natural, unnatural is a bit of a semantics. And
10 use and storage of flood flows on a floodplain is a
11 phenomenon, has always occurred, has always occurred in
12 basin.

determine
reduce
and

13 Q Okay.
14 And in comparing actual flood level results in 1990
15 versus actual flood level results in 1906, did you
16 that the net effect of the man-made structures was to
17 actual flood levels between those two time periods, 1906
18 1990?

the

19 A An analysis of the actual data that is published said --
20 indicates that there is a benefit from 1906 and 1990 for
21 same meteorologic event.

about
per

22 Q Okay.
23 And the same meteorologic event that we're talking
24 is a storm that produced 180,000 cubic feet per second
25 second's worth of rainfall, correct?

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MELONE - Redirect (Smart)

1 A That's correct.
2 Q All right.
3 But in 1906, we didn't have the upriver storage of
Ross
4 and Baker Lake Dams, correct?
5 A That's correct.
6 Q All right.
7 And the army corps on Exhibit 145 that we looked at
8 yesterday, stated that the upriver storage effect took
off
9 30,000 cubic feet per second per second from that flood,
10 correct?
11 A I think the number was higher than 30,000, but it was
12 significant.
13 Q Okay.
14 And that is translated into a four-and-a-half foot
15 elevation difference of water coming down the river,
correct?
half
16 A At Mount Vernon was their estimate, yes. Four and a
17 feet.
18 Q And the difference in four and a half feet benefits
everybody
19 downstream, including the Nookachamps residents?
20 A That's true.
21 MR. HAGENS: That is repetitious. Not covered
by
22 the subject of cross-examinations.
23 MR. SMART: It certainly did. We're talking
about
24 natural versus unnatural conditions.
25 THE COURT: You may proceed.
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MELONE - Redirect (Smart)

1 Q (By Mr. Smart) All right.
2 And if you actually went back and measured -- let
me ask
3 you another question first. In order to compare two
points
4 in time, and the effect of these man-made structures,
would
5 you have to compare all of the man-made structures,
those
6 that caused a benefit and those that caused a potential
7 detriment, in order to determine what the actual effect
was
8 over time?
9 A That is my opinion. We must return to a time period.
10 Q And you chose to compare the actual flood elevation that
11 occurred during a similar storm in 1906 with the actual
flood
12 elevation that occurred in the storm of 1990, correct?
13 A Yes, I did.
14 Q And in the instances where you had data and measured the
15 results at the plaintiffs' properties, what was the
result?
16 A The 1906 flood levels, saying a comparable meteorologic
17 event, the 1906 flood levels were higher on the
plaintiffs'
18 property than what the flood levels were in November 25,
19 1990.
20 Q Now, there was a question that I think -- maybe Mr.
Hagens
21 misspoke himself. I'm not sure. He tried to equate
during
22 one question concerning this 1906 level with the USGS
gauge.
23 And he said there wasn't a gauge there during 1906; you
24 remember that question?
25 A I do.
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MELONE - Recross (Hagens)

1 Q All right.
2 The measurement and the recorded data from the army
3 corps of engineers, is that at the gauge or is that at
4 Burlington Northern bridge?
5 A That is at the Burlington Northern Railroad bridge.

his 6 Q And okay. And it's at the bridge that Dr. Mutter used
7 31-foot elevation for the turn-of-the-century condition,
8 correct?
9 A On that exhibit, yes, that's true.
10 Q All right. Dr. Melone, I don't have any further
questions.
11 Thank you.

12 THE COURT: Thank you.
13 RECROSS-EXAMINATION

14 BY MR. HAGENS:
15 Q Just a few questions, Dr. Melone.
16 This is the 995 with Dr. Mutter's 31 feet at the
17 Burlington Northern Railroad bridge. First of all --
18 A If you could make it a little larger.
19 Q Oh, sure.
20 A Okay. That's fine, thank you.
21 Q 995. I've misplaced my copy.
22 First of all, do you understand that in arriving at
31 feet, Dr. Mutter used 152,000, not the estimated
180,000, as
23 shown on Exhibit 9 --
24 Yes, I understand that.
25 A
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MELONE - Recross (Hagens)

from 37 1 Q So that would be one reason for reducing it somewhat
2 feet. Would you agree?
3 A Yes, that's what we did yesterday.
4 Q And you also know that 1990 there were the Ross and
Baker
5 Dams that didn't exist in 1906 when you had the 180,000
feet;
6 isn't that right?
7 A That's correct.
8 Q And that would be a further reason for reducing that 37-
foot
9 number, would it not?
10 A No. I don't believe so.
11 Q You don't think in that 1990 if you used -- 1990 flood
12 conditions at 152,000 cfs, keeping in Baker and Ross
Dam,
13 that that might affect this --

14 A Maybe I missed the question. Let me try and answer it.
It 15 would be reduced from 37, which is an estimate for the
16 180,000, reduced down as we did yesterday to represent a
17 152,000.
18 Q Okay.
19 But the point I'm trying to make is that there were
no 20 factors that affected, made this, using 37, not
appropriate, 21 perhaps, and I'm trying to get you to acknowledge that.
One 22 of them it was 152,000, not 180, and that was one reason
to 23 reduce it, right?
24 A That's the adjustment I made, yes.
25 Q Okay.

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MELONE - Recross (Hagens)

1 And another reason would be the presence of Ross
and 2 Baker Dams, wouldn't it? They didn't exist --
3 A I think that is the same adjustment.
4 Q Okay.
5 Let me ask you this: What would happen if Dr.
Mutter, 6 using the 37-foot number that you say you should have
used 7 for the 1906 condition, couldn't calibrate his computer
model 8 using the '75 data. What does he refer to, the '75 data
that 9 was gauged, not estimated, or does he say, oh, I've got
to 10 comply with 1906 regardless of whether it's all
accurate, 11 estimation of this 180,000.
12 MR. SMART: Object to the form of the
question, 13 Your Honor. Because it confuses the 1906 time frame
with 14 1975 calibration data.
15 THE COURT: Overruled. You can proceed.
16 A Okay.

17 Let's clarify a couple of terms. The plaintiffs
used a 18 model -- want to clarify the model term. The plaintiffs
used 19 a model called FESWMS. You have -- remember yesterday I
20 mentioned you have to input information to the model.
You 21 input 1975 information into the model for the '75 flood.
22 That is the use of the FESWMS model, the 1975 model.
The 23 1975 depiction.
24 When the plaintiffs or anyone would do a different
25 situation, we're still using the FESWMS model but we
create a
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MELONE - Recross (Hagens)

1 new representation of information within that model.
There 2 is no connection between the '75 and the -- some other
1906. 3 And that is what is confusing on models, two models.
Maybe 4 the same FESWMS model but two different models. So the
1975 5 has no connection. The calibration of the '75 model is
for 6 the '75 model. Will create a new model and then must
7 calibrate the new model.
8 Q That's right.
9 A For that period.
10 Q What he did is, he used data where there were gauge
readings 11 in 1975, as you understand, to calibrate his model.
12 A His 1975 model.
13 Q '75 model. Then he used adjustments to his '75 model to
show 14 the without-levee condition in Exhibit 210, right?
15 A No. He created a new model.
16 Q New model using --
17 A He created a new model that would then be required to
have 18 another calibration.
19 Q Okay.

'75 20 But he started out by calibrating his model using
21 data; isn't that right?
22 A He calibrated the '75 model with '75 data.
23 Q Okay.
24 All right. And the question I had is, how could he
--
25 if he had to calibrate to the 1906 figures, estimates as
they
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MELONE - Recross (Hagens)

1 were, wouldn't that create some kind of a major problem
for
2 him if he had '75 data to comply with and now you are
telling
3 him he has to calibrate the 1906 to prove --
4 A That was the point of my explanation. They are two
different
5 models. For his earlier models he would have to
calibrate to
6 earlier flood levels.
7 Q Just a couple more questions.
8 The rating curve that you talk about doesn't tell
us
9 whether or not the levees are made out of steel,
concrete,
10 sand or wood; isn't that right?
11 A That's correct.
12 Q Okay.
13 And then you said there is always a flood fight, if
I
14 understood your testimony.
15 A I said my understanding that they mobilize for flood
fights.
16 Q So you're not suggesting then that they are all up and
down
17 the levees, the water is three feet from the crest,
because
18 obviously they wouldn't flood fight if there was three
or
19 four feet under the crest; isn't that right?
20 A I've only given an opinion for the area of the Dike
District
21 12 that I'm familiar with.

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22 Q The last question I wanted to ask you about is one that
23 think is going to be a little trouble to our clients.
24 say it's a semantic debate of whether it's natural
25 unnatural. I'm going to show you Exhibit 456E, which is
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MELONE - Recross (Hagens)

his
debate,
the
you
that
you're
we

1 DeVries standing in a couple, three feet of water, in
2 front room.
3 A Right.
4 Q You think that that is nothing more than a semantic
5 Dr. Melone?
6 A Excuse me. Semantic, I don't see the connection between
7 photograph and the definition of natural and unnatural.
8 Q Well, if this three and a half feet were caused by the
9 levees, you think that is nothing more than a semantic
10 debate; is that your testimony, Dr. Melone?
11 A I have made no testimony to that effect. I think what
12 have shown me is a photograph of someone in a floodplain
13 is standing in water.
14 Q And you don't care whether or not that is caused by the
15 levees or whether it's naturally caused; is that what
16 telling this jury?
17 A I don't think what I care has come into any of this
18 discussion. I've had professional opinions and I think
19 have just covered an area in 1906, for example, for
20 comparable meteorologic event that the flood levels were
21 higher.
22 Q Sure. At 180,000 cubic feet per second with no levees
23 whatsoever.
24 A At a comparable meteorologic event. Yes.
25 MR. HAGENS: Thank you, Dr. Melone.
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MELONE - Rerredirect (Smart)

1 REREDIRECT EXAMINATION

2 BY MR. SMART:

3 Q Dr. Melone, you don't wish flooding on anybody, do you?

4 A I don't wish flooding on anybody. I fully support all
the efforts we made for flood hazard management.

5 MR. SMART: I don't have any further

6 questions.

7 Your Honor.

8 MR. HAGENS: Thank you, Dr. Melone.

9 MR. SMART: I'm sorry. I apologize.

10 MR. ANDERSON: One brief follow-up.

11

12

13

14

15

16

17

18

19

20

21

22

23

RECROSS-EXAMINATION

24 BY MR. ANDERSON:

25 Q Counsel, I guess, has suggested that we had 180,000 feet

in

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MELONE - Rerredirect (Smart)

1 1906 and we had 152,000 in 1990. Right?

2 A That's correct.

3 Q And his suggestion is that maybe that's why we had 31

feet in

4 Dr. Mutter's model for no levees and when in actuality
in 5 1906 we had 37 feet.
6 MR. HAGENS: Your Honor, he didn't have 31
feet in 7 his model, as such. I think he was saying that, but I
don't 8 think that is accurate.
9 MR. ANDERSON: Well, Mr. Mutter,
10 turn-of-the-century condition B&RR bridge, 31 feet. All
11 right?
12 Q (By Mr. Anderson) And counsel's suggestion is that one
13 reason for reducing that from 37 feet to 31 feet is that
we 14 have a lower flow of 152,000 feet cubic feet per second,
15 right?
16 A We agreed to 152,000 flow, there would be an adjustment
to 17 the 37.
18 Q And apparently Dr. Mutter's adjustment is six feet.
19 A I don't know what his adjustment was.
20 Q Well, if we take the --
21 A Right, right.
22 Q I had adjustment is about six feet. The army corps of
23 engineer's adjustment isn't six feet, is it?
24 A For observed -- --
25 Q The army corps of engineers took the 30,000 cubic feet
per
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MELONE - Recross (Anderson)

1 second out that stored in the upriver storage, and their
2 conclusion was we were talking about three and a half to
four 3 feet at Mount Vernon.
4 A That's correct.
5 Q Not six feet. Is that correct?
6 A That's correct.
7 MR. ANDERSON: Those are all the questions I
have, 8 Your Honor.
9 MR. SMART: One very brief follow-up based on
that, 10 Your Honor.
11

REDIRECT EXAMINATION

12 BY MR. SMART:
13 Q The way Dr. Mutter calculated the 31 feet wasn't to take
37 and make an adjustment, was it?
14
15 A No, it's not. It's result of his computer modeling
exercise.
16 Q He took downstream boundary conditions and then adjusted
them
17 to whatever number he determined was appropriate, worked
back
18 upstream and the model computed 31 feet at the
Burlington
19 Northern bridge, correct?
20 A That's correct.
21 Q When in fact, at the Burlington Northern bridge we had a
22 measurement in 1906 of 31 feet for 180,000?
23 A 37 feet.
24 Q 37 feet and 180,000 cubic feet per second?
25 MR. HAGENS: Objection. We didn't have a
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MELONE - Rerredirect (Smart)

1 measurement. We had an estimated 180,000.
2 MR. SMART: That is your statement, Mr.
Hagens.
3 Q (By Mr. Smart) The recorded data from the army corps of
4 engineers is 37 feet. Correct?
5 A Yes.
6 Q And there is a bridge there, correct?
7 A Yes.
8 Q And the way most of these historical flood measurements
are
9 made is somebody went out and marked on the bridge where
the
10 flood level was, correct?
11 A Someone made a mark.
12 Q And then that was measured?
13 A By the USGS, right. That's not an estimate, it's a
14 measurement.
15 MR. HAGENS: I object. Lack of foundation as
to
16 whether he has the measurement with him. If in fact
it's a
17 measurement, he should have it with him.

18 THE COURT: I'll sustain that. That it is
claimed
19 to be a measurement of something that I don't know what
data
20 there is to support at this point.
21 Q (By Mr. Smart) In your experience, Dr. Melone, isn't
that
22 the way the USGS --
23 A In my experience, the USGS would not publish that data
point
24 unless they felt it had a high level confidence.
25 Q Okay.

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MELONE - Rerredirect (Smart)

1 And isn't it your experience that the way they
record
2 those measurements is to find specific points that have
been
3 marked by individuals capable and experienced in making
those
4 marks and just measure them?
5 A Yes, it was certainly sufficient quality for the USGS to
have
6 confidence in it and publish it as a record flood level.

RE-CROSS-EXAMINATION

8 BY MR. HAGENS:
9 Q It was a measurement without a gauge, though, in 1906,
isn't
10 that also true?

11 A It was a measurement without the USGS gauge at the
Riverside
12 Drive --

13 MR. HAGENS: Thank you, Your Honor. That's
all we
14 have.

15 MR. SMART: I don't have anything further,
Your
16 Honor.

17 MR. ANDERSON: Nothing further, Your Honor.
18 THE COURT: Sir, thank you. You may step

down.
19 All right, we'll take our recess. Just one moment
20 before we do that.

our 21 In terms of your witnesses and so forth, apparently
22 one o'clock has gone away for today.
next 23 MR. SMART: I'm told, Your Honor, that our
24 witness will be here by 1:15.
Be in 25 THE COURT: We'll start at 1:30 again then.
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MELONE - Rerecross (Hagens)

1 the jury room at 1:25 then.
2 Great. Thank you.
3 (Noon recess was taken at
11:56 a.m.)

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

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