

January 14,

1997

MUTTER - Direct (Hagens)

1 (The following occurred in the
2 presence of the jury.)

3 THE COURT: Counsel, just before you begin, I've
4 been reminded to remind the jury that not only will they have
5 the jury view on Thursday, but this coming Monday is a court
6 holiday, Martin Luther King day, celebrated. I don't know, I
7 think actually his birthday is the 22nd of the month, I
8 thought. But anyway, that is neither here nor there. We are
9 celebrating it on Monday. So we'll have the jury view on
10 Thursday and then you will return on Tuesday of the following
11 week.

12 All right. Thank you.

13 DOUGLAS G. MUTTER, called as a witness by the
14 plaintiff, being previously
duly sworn on oath, testified
further as follows:

15
16 DIRECT EXAMINATION

17 BY MR. HAGENS:

18 Q Okay, Dr. Mutter, we were talking about the projects you had
19 reviewed, time period over which you had reviewed them, the
20 depositions you had reviewed. And I would like to, having
21 done that, I would like to move on a little bit to another
22 subject and come back to that subject momentarily.

23 Did you also review the history of failures of these
24 levees over time?

25 A Yes. ¶

1 Q And what did you find there? Did you find in the past there
2 had been failures or there were failures of the levee system?

3 A Well, there had been many, many failures over time.

4 Q Okay.

5 And what do you characterize as failure? Can you give
6 the jury some examples of some of these failures over time?

7 A Well, there are historical accounts of the levees, of their
8 turn-of-the-century condition, when they were pretty small
9 and not very substantial, being wiped out and rebuilt and
10 wiped out and rebuilt. They would disappear, essentially.
11 In the thirties, according to the deposition testimony, they
12 were breached. And flow went into Burlington again in '51.
13 That occurred in modern times, let's say since '75, anyway,
14 they haven't collapsed in the vicinity of Mount Vernon or

15 Burlington, but they have been on the verge of collapse.
16 They've been observed to have boils on their back side
17 and seepage -- seeping very badly.

18 Q Okay.

19 What is the effect of these failures, certainly in the
20 Burlington area, upon the water levels or flood levels in the
21 Nookachamps-Clear Lake area where our clients reside?

22 MR. SMART: I would like counsel to distinguish
23 between the seeping type of failures and the collapse so that
24 we don't lump them all in together, if we could, please.
25 Because he has distinguished two different types. ¶

1 THE COURT: I think we have identified a couple of
2 different types of failures there may be on --

3 Q (By Mr. Hagens) Is a difference there, without a
4 distinction, obviously, a distinction without a difference,
5 the effect the same whether it's a seepage failure or a
6 collapse? Can you explain one way or the other on that?

7 A I think the effect would be the same. Perhaps the
8 mechanism. We described a couple of different mechanisms
9 whereby failure might occur. But once failure occurs, the
10 net result is that the embankment is gone and flow can spread
11 out as I have described earlier all over the valley floor.
12 And lower flood levels as a result.

13 Q I was interested in the relief -- would it lower flood levels
14 in the plaintiffs' area as well over times past when it
15 broke?

16 A Depending on the location. Probably the ones that happened
17 in the vicinity of Burlington I would expect would have
18 lowered flood levels in the Nookachamps.

19 Q In fact, in historical documents by some of the plaintiffs
20 that that had occurred; is that correct or incorrect?

21 A That's correct.

22 Q There was also a failure on the 1990 down here on Fir Island,
23 was there not? I'm using Exhibit 199.

24 A Yes, that's correct.

25 Q Is that an example of a failure? ¶

1 A It is.

2 Q And did that provide -- that is an example of a failure --
3 would that failure constitute any relief on the plaintiffs,
4 it being that distant, so to speak?

5 A Perhaps. It would have provided the greatest relief to those
6 close to Fir Island, but could have extended to the
7 Nookachamps. Beyond.

8 MR. SMART: I'll move to strike his testimony, Your
9 Honor. It's not within the appropriate standard of expert
10 testimony.

11 MR. HAGENS: Wait a second. I'm using it as an
12 example, Your Honor, of the type of failures that --

13 MR. SMART: Excuse me -- go ahead.

14 MR. HAGENS: You through?

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MR. SMART: No.

MR. HAGENS: Okay.

I was using it as an example of a break that could result in some relief to the plaintiffs, Your Honor. And that is all I was using it for. I didn't preface the question, this is an example of a type of break that has occurred in years past.

MR. SMART: The record will reflect that the question was: Did the break at Fir Island cause relief to the residents in the Nookachamps area? And the answer was that it could. Thereby clearly not meeting the appropriate ¶

1 standard of more probably than not for expert testimony.

2 THE COURT: Go ahead.

3 MR. HAGENS: Okay.

4 Q (By Mr. Hagens) You didn't measure the effect of the Fir
5 Island break on plaintiffs, did you?

6 A I did not.

7 Q But if there was a break of singular magnitude in Burlington
8 such as occurred in '51 or other reaches through the river
9 bed area, would you expect that those would provide relief or
10 not?

11 A I would expect they would.

12 Q Are we saying here -- are you saying that the plaintiffs are
13 entitled to some kind of relief through breaks, or what?

14 A No. I'm simply pointing out that the levees have been
15 greatly strengthened and they don't function in the way they
16 did when they were first constructed. If there were a
17 collapse, that there would be a reduction in flood impact.
18 That's all I'm saying.

19 Q Okay.

20 And did you review the -- any documents that reflect the
21 condition of the levees in 1975 during that -- one of those
22 big events you charted out there?

23 A Pardon me?

24 Q Did you review the condition of the levees during the 1975
25 flood as part of your review in this case? What is that ¶

1 condition they were during the maximum flood that occurred in
2 that period of time?

3 A I saw reports about their condition, yes.

4 Q What did those tell you about the condition of the levees
5 back in 1975?

6 A Um, well, all indications were that they were stressed to the
7 maximum, that they were on the verge of failure. There were
8 numerous boils occurring on the back side of levees, which
9 indicates incipient failure. That is not a desirable
10 condition. And there was a lot of activity focused on
11 shoring those up with sandbags and building ring dikes.

12 Q You might stop there and tell the jury what a ring dike is.

13 A A ring dike is essentially construction of a new piece of
14 dike where there is a weak link. If there is a leak in the

15 dike, there is a new piece built around that from the strong
16 part to the strong part that kind of bridges the developing
17 gap in the levee.
18 Q Is that something the jury might better understand if you
19 were to diagram it?
20 A Perhaps I could give it a try, if you like.
21 Q Why don't you give a stab at that. Go ahead. And if you
22 just diagram that for the jury, please.
23 A Perhaps we could look at the back side of the levee. Here is
24 the riverside over here. The water is -- is very high. When
25 the water gets very high, we get flow in this direction. ¶

1 It's seepage through the levee, and we got boils developing
2 where the flow comes back out of the levee material back to
3 the surface.

4 And it's essentially lifting individual particles of
5 soil off the back side of the levee. Which means the
6 particles are weightless and can be displaced, so we get a
7 boil development of like quicksand, essentially. And the
8 back side turning to mush, and ultimately the whole section
9 can blow out.

10 So if we have a boil developing at the toe of the levee,
11 seepage coming out, all indications are it's about to fail.
12 Quite often there will be a structure built around that weak
13 spot so that the strength of the levee stays as integrated.
14 Even though we have a weak spot where the boil is, it's diked
15 off before the total failure occurs.

16 Water tends to pond up in here and reduces the
17 likelihood of failure through the levee, also.

18 Q Is that occurring in a number of places in 1975?

19 A I believe so.

20 Q Okay.

21 MR. HAGENS: I wonder if we might have this marked
22 as an exhibit and offer it for illustrative purposes, Your
23 Honor?

24 MR. SMART: No objection, Your Honor.

25 MR. ANDERSON: No objection, Your Honor. ¶

1 (Plaintiff's Exhibit No. 213
2 identified.)

3 THE COURT: All right.

4 Q (By Mr. Hagens) And Exhibit 213 is the exhibit that you just
5 drew in the presence of the jury describing the ring dike of
6 boilings, 1975?

7 A Yes.

8 THE COURT: That has been admitted.

9 (Plaintiff's Exhibit No. 213
10 admitted into evidence.)

11 Q (By Mr. Hagens) What other kind of activities did you notice
12 were being done on the levees in 1975 that reflected the

13 condition of those levees at that time?
14 A Well, I would say that the primary activities involved
15 sandbagging and ring dike construction and the adding of
16 ballast on the landward side of the levees.
17 Q You might explain what adding a ballast is to the jury.
18 A It's not dissimilar to what I have drawn there. It's just a
19 widening of the levee by adding material to the back side.
20 The purpose is to lengthen the seepage path and prevent a
21 seepage failure.
22 Q Okay.
23 And what locations of the levees was that done in 1975;
24 do you recall?
25 A Well, many, many locations, but there were some -- they were ¶

1 particularly problematic. And they included locations near
2 the Anacortes Water Treatment Plant intake. For example, the
3 big bend area.

4 Q Why don't you come on down here, using Exhibit No. 199. This
5 pointer has a mind of its own. See if can you point it out
6 just where these areas were.

7 A It was located in this vicinity. Another was near the
8 Burlington Northern crossing, which isn't shown here, but
9 it's in this vicinity here. This entire piece of embankment,
10 including part of the railway embankment itself, seeping very
11 badly. And there were thousands of sandbags installed in the
12 back side of the levees there to keep them from blowing out.

13 In addition to that, I believe there were sandbagging
14 activities in the Sterling area along SR 20.

15 Q Let's stop for a moment and talk about the sandbagging. That
16 is in 1975 you are talking about?

17 A Um, I don't recall exactly whether there was sandbagging in
18 '75. There certainly was in '90.

19 Q Let's try to keep it '75 first. We'll get to '90.

20 Any other areas you can recollect where ring dikes or
21 significant sandbagging was done in the vicinity of
22 Burlington or Mount Vernon?

23 A Those were the primary locations. Right along this area of
24 the levee system. And I point out the Burlington Northern
25 embankment here, and there were many, many locations farther, ¶

1 further down.

2 Q After 1975, did you, in the project you reviewed and the
3 deposition testimony you reviewed, did you learn whether or
4 not any keyways were put in the areas that were identified as
5 having boils and close to having failed in 1975?

6 A Yes. I think the strategy seems to have been to go back
7 after flood had occurred and strengthen the areas that showed
8 weakness during flood. I believe that happened after '75,
9 again after '90.

10 Q Those areas were the areas that you told the jury on Exhibit
11 199?

12 A Yes.

13 Q Okay.
14 You may resume your seat now.
15 A (Witness complying.)
16 Q Now, did the -- doing these keyways and these other projects
17 after 1975 that you identified, what effect did those have on
18 the strength or the likelihood of failure, I guess, more
19 accurately, of the levees during 1990?
20 A Well, the effect of each of those projects I've described,
21 the keyways, the adding of ballast, the broadening of levees,
22 adding riprap, would have been to reduce the likelihood of
23 failure through erosion or collapse.
24 Q Okay.
25 And did you -- having reviewed all those documents and ¶

1 the testimony that you identified earlier of Mr. Brookings,
2 Mr. Mapes, Mr. Nelson and the others that you identified,
3 could you determine whether those projects were systematic
4 throughout the time period '75 and after?

5 MR. SMART: Object to the form of the question. I
6 don't know what he means by "systematic".

7 MR. HAGENS: That they were continuous after 1975.
8 That is, each year they had a budget and did some project or
9 another on the levee, like a keyway or a ballast project or
10 something of that nature.

11 MR. SMART: Object to the form of the question.
12 Unless he identifies who "they" is.

13 Q (By Mr. Hagens) Well, were projects done on a regular basis
14 on the river after 1975?

15 A Oh, I think so.

16 Q And did you see any years where some significant project --
17 Strike that.

18 Let's go on to the question of -- the question counsel
19 asked.

20 Were you able to determine from these project records
21 and depositions of Mr. Brookings and Mr. Nelson and Mr.
22 Mapes, Mapes being a commissioner of Dike District 12, who it
23 was that was actually doing these projects that you
24 identified?

25 A Yes. ¶

1 Q And who was involved in these projects? Tell the jury what
2 you were able to determine from these projects that you
3 described?

4 MR. SMART: Again, Your Honor, unless he identifies
5 which project we're talking about, I have an objection. He
6 has identified earlier. He reviewed projects from the early
7 eighties to the early nineties. As you recall from our
8 earlier objections and arguments, there have been -- there
9 has been testimony by his partner Mr. Regan --

10 THE COURT: Counsel, you're giving me more
11 information than I want to have on this point.

12 MR. SMART: All right.

13 THE COURT: But it's fair. You can -- he can ask
14 you to specify.

15 MR. HAGENS: Okay.

16 Q (By Mr. Hagens) Can you be a little more specific? The
17 project records you reviewed, maybe on an individual basis or
18 the deposition testimony you reviewed that allowed you to
19 determine one way or the other who was actually doing the
20 work on the levees.

21 MR. SMART: The question is which project.

22 Q (By Mr. Hagens) Start with the projects that were done in
23 the early eighties, for instance. Okay.

24 A Um, well, the nicest summary of -- of what the county did was
25 the deposition testimony. But to answer your last question, ¶

1 what I reviewed, primarily, was FCAAP grant applications,
2 applications to the State Department of Ecology for funding.
3 That seems to involve Skagit County for the most part.

4 Q Okay.

5 And how many of these grant applications did you in fact
6 review?

7 A Well, I didn't look at many in detail. That was Mr. Regan's
8 assignment. I probably looked at 10 or 12.

9 Q Okay.

10 Again, over what period of time?

11 A Early eighties through '93 or so, perhaps.

12 MR. SMART: Again, Your Honor --

13 THE COURT: Counsel, no, I'm satisfied. He has
14 specified. You get the opportunity to cross-examine the
15 witness.

16 Q (By Mr. Hagens) Could you tell from the deposition and the
17 grant applications that you reviewed who was actually doing
18 these projects?

19 A Well, I think so.

20 Q Would you tell the jury what you learned from those sources
21 of information about who was doing these projects in the
22 eighties.

23 A Well, my impression from, particularly, Mr. Nelson's
24 deposition, was that the diking districts primarily
25 identified the needs, identified where problems were, and ¶

1 beyond that the county was involved in virtually every aspect
2 of developing a project, from preparing grant applications to
3 setting priorities for which projects ought to be built.
4 Planning, the overall system of projects, doing the
5 engineering, design, surveying them, building some of them
6 with their own forces, contracting, arranging for others to
7 do them under contract on occasion. Making payments to
8 contractors, providing administrative services to the diking
9 districts, assisting with permit applications. Virtually
10 every aspect of developing improvement projects.

11 Q And that was consistent through the entire period of the
12 eighties and the early nineties; is that correct or

13 incorrect?
14 A I believe that's correct.
15 Q And you stated your opinion, had these improvements not be
16 done, the levees probably would have failed. Correct?
17 A Had the improvements not been made and had there not been any
18 flood fighting activity, yes.
19 Q Okay. And had those failures occurred, what would have been,
20 if anything, the effect of the people in Nookachamps?
21 A In 1990?
22 Q Yes, sir. And I'm talking about a failure, you know,
23 proximate to their residences that you have identified in one
24 of the earlier exhibits.
25 A Well, the effect would have been a significant decrease in ¶

1 flood levels associated with the 1990 flood.
2 Q Then let's go to -- I told you I was going to stop at the
3 Highway 20 project. Was there some kind of emergency flood
4 fighting or something that occurred on Highway 20 during 1990
5 that you found in the historical documents related to that
6 flood?
7 A Yes, there was.
8 Q Would you tell the jury what that was all about?
9 A During the 19 -- November 25th, event of 1990, the water
10 level began to rise up against the SR 20 -- first at the
11 railway embankment, Burlington Northern Railway embankment.
12 And SR 20 itself, threatening to flow to the north through
13 the Sterling area.
14 And to make a long story short, that path was blocked
15 off by adding fill to the top of SR 20 to raise it and
16 prevent flow from escaping, keeping it in the Skagit River.
17 Q Who put that fill there?
18 A The county, I believe.
19 Q Okay.
20 And this was on SR 20; is that correct?
21 A Yes.
22 Q And by the way, is Lafayette Road part of the -- a county
23 road, part of the levee system, or does the levee system tie
24 on into Lafayette Road, a county road at any part?
25 A It ties back into Lafayette Road. ¶

1 Q Would you come up here to 199 and show where that occurs? I
2 don't think it has a road on it. Would the other map help
3 you more?
4 A It probably would.
5 Q Lafayette parallels highway -- you have Lafayette Road.
6 Maybe you can explain to the jury where the levee ties into
7 Lafayette Road.
8 A Here is SR 20. Here is Lafayette Road. This dark brown line
9 indicates the levee. It ties into Lafayette Road at this
10 location here.
11 Q On the Highway 20, does it not?
12 A Yes.

13 Q You Can resume the stand.
14 A (Witness complying.)
15 Q Now, did that temporary levee have any kind of measurable
16 impact on the plaintiffs' properties?
17 A I believe so. It was very small, but there was some impact,
18 in my opinion.
19 Q But ultimately, they were overtopped on Highway 20?
20 A Yes.
21 Q In both events, the November 9 and 11, as well as the
22 November 24 and 25, 1990?
23 A I believe so.
24 Q Now, let's talk about the Burlington Northern Railroad.
25 There has been some discussion already in the course of this ¶

1 case about how debris might collect under the Burlington
2 Northern Railroad bridge and form an obstruction. First of
3 all, you did leave the Burlington Northern Railroad bridge in
4 your model, did you not?
5 A Yes.
6 Q And maybe in ten words or less, because we've been over this
7 with the jury once, if there is obstruction on the Burlington
8 Northern bridge, is there a way the river compensates for
9 that?
10 A Yes. The basic mechanism is for the river to rearrange its
11 boundary, its bed, by scouring it out and providing space,
12 essentially, for the water to get passed. Despite the
13 apparent obstruction. And this happened most recently in the
14 1995 flood in the Skagit River, where a pier actually failed,
15 Burlington Northern Railway bridge being scoured, sank and
16 tilted. So it's not an uncommon event.
17 Q So that is the way the river compensates then for any debris
18 or whatnot that might be snagged in the bridge?
19 A It is.
20 Q Are you aware of any situation up near Snohomish County where
21 they have in fact reduced the height of the levees?
22 A Yes.
23 Q Would you tell the jury what that is all about?
24 A Well, in the lower Snohomish River --
25 MR. SMART: Your Honor, I object on relevance ¶

1 grounds. What possible relevance has the Snohomish County --
2 THE COURT: Counsel?
3 MR. HAGENS: Well, Your Honor, I think it shows
4 that responsible governments sometimes will take
5 responsibility so that one person doesn't bear a
6 disproportionate burden of the flood, is the testimony, Your
7 Honor, and that is why I'm offering it.
8 MR. SMART: If you want to get into
9 responsibilities and the law --
10 MR. HAGENS: I'm not asking about the law.
11 MR. SMART: Outside the presence of the jury. Not
12 a duty -- the question is simply a question of what has

13 occurred in Skagit County, and by whom. We've been over that
14 to some extensive degree in the previous motions.
15 MR. HAGENS: Also point out, Your Honor, that Mr.
16 Regan was allowed to discuss this briefly in his direct
17 testimony.
18 MR. SMART: Then it would be cumulative. But it's
19 clearly not relevant.
20 MR. HAGENS: Maybe you ought to hear what the
21 witness has to say.
22 THE COURT: Well, counsel, actually there are some
23 issues associated, I suppose, with this argument that the
24 Court should flesh out probably outside the presence of
25 jury. ¶

1 Do you want to return to this line of questioning at
2 some point?
3 MR. HAGENS: Yes. Maybe after we discuss it with
4 the Court.
5 THE COURT: Move on and we'll take it up at another
6 time.
7 MR. HAGENS: Okay.
8 Q (By Mr. Hagens) By the way, did you also have an opportunity
9 to review the -- the question of the projects done on the
10 river, the FCAAP grants and the deposition testimony you read
11 about the various projects that reduced the likelihood of
12 failure that you have testified about, did you also have an
13 opportunity to review the declaration of Mark Honeywell, one
14 of the attorneys for Skagit County?
15 A Yes, I did.
16 Q And did that declaration also --
17 THE COURT: Was there an objection?
18 MR. SMART: There is an objection.
19 THE COURT: You need to speak up.
20 MR. SMART: There is an objection. And Your Honor,
21 it's the matter we took up outside the presence of jury the
22 other day. The Court has ruled on that matter. And I think
23 it's clearly an attempt to undermine the Court's ruling.
24 MR. HAGENS: Well, Your Honor, I'm not sure we're
25 through with that subject, as I told the Court the other ¶

1 day.
2 THE COURT: No.
3 MR. HAGENS: Maybe we should take that up outside
4 the presence of the jury as well.
5 THE COURT: I agree.
6 Q (By Mr. Hagens) Okay. Let's go on to one final topic then.
7 Having to do with Mr. Malone's -- the county's engineer. Did
8 you have an opportunity to review his deposition?
9 A Yes, I did.
10 Q And his opinions, as well, that were submitted in advance?
11 A Yes.
12 Q Okay.

13 And can you tell the jury basically what you understood
14 his opinions to be and tell us in what respects you disagree
15 or agree with Mr. Malone's opinions.
16 A It's my understanding that Mr. Malone's thinks that it floods
17 in the Nookachamps area all the time, little floods, big
18 floods, levees or no levees; if you live there, you should
19 expect to be flooded and damaged to about the same degree,
20 regardless of the conditions.
21 And I strongly disagree with that -- that position.
22 Certainly, there are areas of the Nookachamps which even
23 without the levees there would be flooding in low lying
24 areas, just as there were in Gages Slough on the other side
25 of the river if there were no levees. But there are also, ¶

1 because of the levee, areas in the Nookachamps which get wet
2 now that wouldn't otherwise. And in all of the areas, the
3 flood levels are higher than they would be without the
4 levees.

5 And Mr. Malone doesn't -- doesn't discuss that at all.
6 Doesn't seem to acknowledge the fact that it's more
7 troublesome for plaintiffs to have higher flood levels as a
8 result of the levees. And I think it makes a very important
9 difference to the plaintiffs whether the water is just in
10 their front yard or whether it's up to their ankles or their
11 chin.

12 Q Did you notice whether or not he focused any of his work on
13 the Burlington Northern Railroad bridge?

14 A Well, yes. He attempted to -- first he made the claim that
15 the bridge was partly responsible for the flood problems in
16 the Nookachamps, and then attempted to do some modeling to
17 support that argument.

18 Q And in fact, you leave the bridge in in your approach, isn't
19 that correct?

20 A Yes.

21 Q So any effect that the bridge might have is in fact taken
22 into account in your work; isn't that correct?

23 A Yes.

24 Are you still asking for my opinion?

25 Q Yeah. If there are some other differences between you and ¶

1 Mr. Malone.

2 A I can think of a couple of additional differences.

3 Mr. Malone has made the statement, I believe, that it's
4 not possible, or at least he is not able, to isolate the
5 effect of the levees on flood levels in the Nookachamps area,
6 which is the focus of the case, as I understand it. And I
7 disagree with that very strongly.

8 In fact, I've been able to do that. Our work has been
9 focused purely on that, what is the effect of the levees.
10 And I don't understand how he has not been able or willing to
11 do that.

12 It seems to be his claim, also, that there haven't been

13 substantial changes to the levee system in the last 25, 30,
14 35 years. And I can agree with that to the extent that
15 perhaps in the last 20 years the levees haven't been raised
16 significantly. But they certainly are changed from the
17 standpoint of their strength to withstand seepage and erosion
18 forces. They are not the same levees they were 20 years
19 ago.

20 Q Okay.

21 Based on your knowledge and experience and the study of
22 the Skagit River that you have done, over a thousand hours,
23 500 hours, whatever you put into your model, six months of
24 time, having reviewed the historical flooding in the area, is
25 it likely that the plaintiffs will suffer recurring flooding ¶

1 in years hence?

2 MR. SMART: That has been asked and answered, Your
3 Honor.

4 THE COURT: I believe it has.

5 MR. HAGENS: Okay.

6 Q (By Mr. Hagens) And let's put it this way: Will the
7 flooding that the plaintiffs experience in the years past
8 caused by the levees, will they experience that flooding in
9 the years in the future, Dr. Mutter?

10 MR. SMART: Same question.

11 MR. HAGENS: It's not the same question.

12 THE COURT: I'll allow it. That's final. You may
13 answer.

14 A Absolutely.

15 MR. HAGENS: We have nothing further.

16 Thank you, Your Honor.

17 THE COURT: Counsel?

18 CROSS-EXAMINATION

19 BY MR. SMART:

20 MR. SMART: Take me just a minute to get
21 organized.

22 THE COURT: All right.

23 Q (By Mr. Smart) Mr. Mutter, did you compute elevations of the
24 water, absolute elevations of the water shown in your Exhibit
25 210 for the 1990 flood? ¶

1 A I'm sorry. Would you repeat the question?

2 Q Yeah. Did you determine what the absolute elevations above
3 sea level were for the 1990 flood?

4 A Yes.

5 Q Did you prepare a map in that regard?

6 A Yes.

7 Q Did you bring it with you?

8 A Um, I have copies. That was furnished to you at my
9 deposition, but I have copies.

10 Q Could you get one, please?

11 A Surely.

12 Q These copies that we have used for the purposes of this

13 examination?
14 A Absolutely.
15 Q And do you have 17, 18 and 19 there?
16 A Yes.
17 MR. HAGENS: Will counsel speak up? I'm having
18 trouble hearing.
19 MR. SMART: I'm just asking if these were exhibits
20 17, 18 and 19 to his deposition. I would like to have them
21 marked.
22 THE CLERK: Exhibits 991, 992 and 993 marked.
23 Q (By Mr. Smart) Showing you Exhibit 991 to your deposition,
24 sir -- excuse me, Defendant's Exhibit 991, which is also
25 Exhibit 17 to your deposition, can you identify what that is, ¶

1 please, sir?
2 A Yes. This is a plot of water surface elevations for the
3 1990 -- November 25th, 1990 flood event for existing
4 conditions with levees in place.
5 Q And those are the existing conditions that existed in 1990;
6 is that correct?
7 A Yes.
8 Q All right.

9 (Defendant's Exhibit No. 991
identified.)

10
11 MR. SMART: I'd offer 991.
12 MR. HAGENS: No objection, Your Honor.
13 MR. ANDERSON: No objection, Your Honor.
14 THE COURT: 991 will enter.
15 (Defendant's Exhibit No. 991
admitted into evidence.)

16
17 Q (By Mr. Smart) And if you could step down here.
18 A (Witness complying.)
19 Q Basically, show the jury if you would, please, where the
20 Johnson property is on 991.
21 THE COURT: Counsel, apparently you need to
22 separate yourself.
23 MR. SMART: Sure. That is all right.
24 Q (By Mr. Smart) Show us where the Johnson property is, sir.
25 A To do that I would have to refer to a list. ¶

1 Q Please do so.
2 A It's in another file.
3 THE COURT: Actually, Mr. Hagens, maybe you can
4 provide him with Exhibit 211. That is what he is looking
5 for.
6 MR. HAGENS: Dr. Mutter, would Exhibit 211 help
7 you, the one that is already in evidence?
8 A Sorry. I don't recall. No. I'm sorry. That is -- talking
9 about Kenneth Johnson?
10 Q (By Mr. Smart) Yes.

11 A He is not on the list, I don't believe, any longer.
12 Q That's true. This is just a current list.
13 A Mr. Johnson was marked as No. 37 off Francis Road.
14 Q All right.
15 So that is kind of right in the heart of the
16 Nookachamps, is it not?
17 A Sure.
18 Q Okay.
19 What I would like you to do, sir, take Exhibit 991 and
20 draw in Mr. Johnson's property, if you would, please, sir,
21 just general location. Let me give you a marker to do that
22 with. If you could draw in where Mr. Johnson's property is
23 with a circle around it and then label it with this other
24 pen, please. No. 41, I think you said?
25 A 37. Is there a difference between those two exhibits? ¶

1 Q No. They are identical.
2 A (Witness complying.)
3 Q And label it out there "Johnson".
4 A (Witness complying.)
5 Q Okay. Now -- and then also if you would do so, please, sir,
6 would you label 1990 and then the flood water surface
7 elevation at the peak of the flood in 1990 at the Johnson
8 property?
9 A For existing conditions?
10 Q Yes. As it actually happened in 1990. That's what this
11 document shows, right?
12 A That's our computer prediction of the 1990 flood levels,
13 right.
14 Q All right.
15 Then so what is the elevation?
16 A I would need to interpolate. Would be on the order of
17 elevation 40.8.
18 Q All right.
19 So based on your model and the work that you did, in
20 November of 1990 at the peak of the flood, Mr. Johnson's farm
21 experienced a water surface elevation, in other words, the
22 height of the top of the water of 40.8 feet above sea level;
23 is that correct?
24 A No. I'm saying that that is what our model predicted. That
25 might or might not be what Mr. Johnson experienced. ¶

1 Q Okay.
2 But as close as you can determine, that is what was
3 experienced at this location based on work that you did,
4 correct?
5 A Um, I wouldn't accept the way you have stated that. If we
6 set out to make our model predict the flood level at Mr.
7 Johnson's property, we could have calibrated it right on the
8 nose. But we are calibrating to high watermarks throughout
9 the area, so it might well have been different than Mr.
10 Johnson observed in 1990, but awful close.

11 Q What you're saying is that by calibration you can alter the
12 model and in some cases it will be at variance with what
13 actually was observed in the area; is that right?
14 A That's correct.
15 Q I thought the purpose of calibration was to specifically make
16 the model fit existing conditions. And in fact, this
17 document that you produced is water surface elevations at
18 existing conditions, isn't it?
19 A That's correct.
20 Q Well, didn't you have specific water surface elevations that
21 you worked with?
22 A Yes, we did.
23 Q Okay.
24 But what you are telling us is that these elevations
25 that are generated by your computer model are in some respect ¶

1 inaccurate and they vary from what observed levels might be?
2 A It's normal practice to calibrate a model such that you fit
3 the majority of the most reliable high watermarks that you
4 observe. One has to use engineering judgment to decide which
5 are the more -- most reliable high watermarks and which ones
6 do you use to force your model to fit the mold. High
7 watermarks can vary considerably from one place to another,
8 and the reliability can vary. That's what engineering
9 judgment is all about.
10 Q Well, did you have an observed level at the Johnson farm in
11 1990 to compare your model with?
12 A I don't recall if we had one specifically at that property.
13 We might have.
14 Q I take it that from your testimony here you are not confident
15 that this 40.8 is what Mr. Johnson would have observed.
16 A I don't know whether it was or not. But I wouldn't be
17 surprised if it were different.
18 Q And you never went and determined whether or not a model fit
19 the observed level at Mr. Johnson's property; is that
20 correct?
21 A I don't recall whether we did or not. For the most part, we
22 put the greatest emphasis, the most reliability on high
23 watermarks that were observed by the Corps of Engineers, and
24 a lesser level of importance on high watermarks observed at
25 plaintiffs' properties. ¶

1 Q So the Corps of Engineers, then, was the source of most of
2 the information that you put into the actual observed level;
3 is that correct?
4 A That's probably true.
5 Q All right.
6 Well, we're in luck, because we have some Army Corps of
7 Engineers' documents here.
8 What I would like you to do, sir, is take Exhibit No.
9 990, if you would, please. And would you agree, sir, that
10 that is an early Corps of Engineers' document which is

11 Exhibit 990 identifies that the high water elevations for the
12 Johnson property in the 1951 flood that was 41.7 feet? And
13 then I would like you to write that in.
14 A Appears to be the report.
15 Q Would you put in there "1951" then?
16 A (Witness complying.)
17 Q 41.7 feet.
18 A (Witness complying.)
19 MR. HAGENS: That was the 1951 flood; is that
20 correct?
21 MR. SMART: That's correct.
22 Q (By Mr. Smart) Now, you just finished testifying that there
23 was a levee break in the Burlington area in 1991, correct?
24 A Yes.
25 Q And your testimony was that that would lower water surface ¶

1 elevations in the Nookachamps and cause those residents to
2 have a smaller water surface elevation than the ones in 1990,
3 correct? That was your testimony?
4 A No, that wasn't my testimony. I said that the tendency would
5 be for flood levels to be reduced in the Nookachamps area.
6 Q Well, actually, you usually don't get failure until the water
7 gets up high on the dike, correct?
8 A Not necessarily. That is often the case.
9 Q Wasn't that the case in 1951, the last break anywhere in the
10 --
11 A Might well have been.
12 Q Did you study it to determine how high the water got prior to
13 the time the levee broke?
14 A I don't know what the circumstances were at the time of the
15 breach, no.
16 Q Would you agree that whatever break in the levee occurred in
17 1951 didn't lower the water level substantially at the
18 Johnson property?
19 MR. HAGENS: Objection.
20 Q (By Mr Smart) Based on the army corps reported elevation?
21 MR. HAGENS: Objection. Measured when? Measure it
22 before the break, obviously it may not. If you measure it
23 after the break, you might get --
24 THE COURT: You can specify.
25 Q (By Mr Smart) You can go ahead and answer the question. ¶

1 THE COURT: I'm saying you should specify.
2 Q (By Mr. Smart) Oh.
3 THE COURT: Just rephrase it.
4 MR. SMART: I'm not sure what the objection was.
5 Let me ask it this way.
6 Q (By Mr. Smart) I take it that if the levee doesn't break
7 until the water surface gets high on the levee, then these
8 properties are all flooded at that time, correct; so the
9 water surface -- so the break in the dike isn't going to
10 affect how much water gets into anybody's house because the

11 dike doesn't break until after it's already up there. Isn't
12 that the way it usually works?
13 A Well, I've already answered your question with regard to
14 whether it needs to be high to fail. It doesn't need to be
15 high. It often happens when the water surface is at peak.
16 MR. HAGENS: Let the witness finish his answer.
17 MR. SMART: I think he did.
18 MR. HAGENS: Did you have more you wanted to say?
19 A No.
20 Q (By Mr. Smart) Wouldn't you agree, sir, that the higher the
21 water gets, the greater the probability for failure of any
22 levee system?
23 A Yes.
24 Q Okay.
25 And wouldn't you agree that most of the failures occur ¶

1 when the water gets high on the levee in the Skagit?
2 A Um, doesn't necessarily have to be at its highest point
3 during the flood event to fail. After the failure, the flow
4 -- water level be reduced somewhat.
5 Q Did you ever study what the water surface elevation was when
6 the levee failed in 1951?
7 A No.
8 Q Did you ever study what the water surface elevation was for
9 any of the levee failures that you talked about with counsel?
10 A Not the historical ones, no.
11 Q Well, there hasn't been a failure since 1951 in -- along Dike
12 District 12, isn't that correct?
13 A Not that resulted in a total failure of the levee system,
14 that's correct.
15 Q Okay.
16 And there hasn't been a failure that has resulted in a
17 lower water surface elevation since 1951, has there?
18 A I don't believe so.
19 Q And in fact, the failure in 1991 didn't result in any
20 lowering of water surface elevation, did it?
21 A We don't know that.
22 Q You don't know that; is that right? Because you didn't study
23 it.
24 A No one knows that.
25 Q Did you talk to everyone? ¶

1 A The --
2 Q Question is: Who did you talk to?
3 MR. HAGENS: He should be allowed to finish his
4 answer.
5 MR. SMART: He wasn't going to answer my question,
6 Your Honor.
7 THE COURT: Go ahead.
8 A What we don't know is the timing of the failure with respect
9 to the timing of the high watermark at the Johnson property.
10 Q (By Mr Smart) Okay. But we do know that we had a lower flow

11 in 1951 than when had in 1990, don't we?
12 A Yes.
13 Q 1951, we only had a -- at Mount Vernon we had 144,000,
14 correct?
15 A That's correct.
16 Q In 1990 we had 152,000. So if your model were correct, you
17 would expect, number one, with the failure, and number two,
18 with your model, you would expect to have a substantially
19 higher water surface elevation in 1990 than you did in 1951
20 at the Johnson property; wouldn't that be correct?
21 A Well, as I've already indicated --
22 Q Isn't that correct, sir?
23 MR. HAGENS: Allow him to --
24 MR. SMART: I'm entitled to have my question
25 answered. ¶

1 THE COURT: You may answer.
2 A Engineering experience tells us that there could be great
3 variability in high watermarks. And that is why we rely on a
4 collection of high watermarks so we don't get into these very
5 problems where we try and draw conclusions from one which
6 might be an anomaly.
7 Q Your document here, sir, doesn't show great variability over
8 this entire area. Your document shows that it's evenly two
9 feet above.
10 A That's correct.
11 Q Water surface elevation that you expect without levees,
12 right?
13 A Yes.
14 Q So this whole area would have an even water surface
15 elevation, correct?
16 MR. HAGENS: Object as to form.
17 THE COURT: No.
18 Q (By Mr. Smart) Isn't that what your document shows?
19 A You are pointing at -- excuse me. You're asking me about
20 high watermarks while you are asking me a question about this
21 graphic, and I'm not sure I understand the connection between
22 the two.
23 Q Well, this graphic shows you how much more water evenly
24 distributed throughout this entire area that you would expect
25 with the levees and without, right? ¶

1 A Absolutely.
2 Q And what this number shows is that in fact there was a higher
3 elevation in 1951 when you had a lesser flow, correct?
4 A Yes.
5 Q So to the extent that anything was going on with the dike
6 between 1951 and 1990, it actually lessened the water surface
7 elevation; wouldn't that be correct?
8 A I'll repeat my comment, that we're trying to draw -- trying
9 to infer many conclusions about one high watermark, which
10 might be anomaly. That is why we relied on several over the

11 entire surface. And having relied on a number of them in our
12 hydraulic model, that is what allows us to generalize in
13 this. In fact, that is exactly what the model is for.
14 Q How many other water surface elevations did you go back and
15 plug in for 1951?
16 A For 1951?
17 Q Yes.
18 A We didn't analyze 1951.
19 Q Oh. So, when you say that this might be anomalous, you don't
20 know whether it is or isn't because you never analyzed any
21 water surface elevation for 1951; isn't that correct?
22 A I know from experience that high watermarks are variable and
23 have to be taken with a grain of salt.
24 Q Including your own?
25 A Including our own. ¶

1 Q Let's answer the question, if you would please, because I
2 want the record to be complete.
3 MR. HAGENS: Well, Your Honor, he did answer the
4 question.
5 THE COURT: Counsel, I do not want
6 characterizations of that sort. Just ask the question.
7 MR. SMART: I'm just going to re-ask the question.
8 THE COURT: Please do so.
9 Q (By Mr Smart) Isn't it correct that you did not analyze any
10 high watermarks marks in 1951 for the purpose of determining
11 whether a dike failure lowered water surface elevations in
12 the Nookachamps, or not?
13 A That's correct.
14 THE COURT: Actually, counsel at this point we're
15 going to move on to a new chart. Obviously Dr. Mutter is
16 going to be back with us in the morning. We would be
17 finished in fifteen minutes one way or the other.
18 There are a couple of issues that we need to take up and
19 we need to shore up our plans with respect to our jury view
20 that will be happening Thursday.
21 So I will just excuse you, Ladies and Gentlemen, for the
22 evening at this point. Ask that you be back tomorrow morning
23 at -- I don't know why I even look. I know we have things
24 every morning. Be back at 9:25 in the jury room ready to
25 proceed. ¶

1 And again, please do not discuss the case with
2 yourselves or with anyone else. Do not remain within hearing
3 of anyone so discussing. The concept of a fair trial
4 includes as its very central point the fact that none of us
5 make any decisions based on anything other than the evidence,
6 first of all, that has been admitted in court, and second,
7 that we don't form any conclusions until we've heard all the
8 evidence in this case.
9 So with that, I'll see you tomorrow morning.
10 Thank you.

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(The following occurred outside
the presence of the jury.)

THE COURT: Be seated, please.

All right counsel, with respect to the jury view issues,
where do we find ourselves?

MR. HAGENS: There is one stop that the county
wants to make. It is grossly misleading, that I'm going to
complain about, and I want to put it of record. And that
they want to stop at what is called the maintenance yard.
And I wanted to -- it's down around Highway 99 bridge. What
item is it -- is it on your new list, and if so, what
paragraph number is it?

MR. MAJOR: I haven't looked for it, counsel. I
didn't find it. How about 43?

MR. HAGENS: It's 41 under his old list. And I ¶

1 just got his new list. I don't know. I don't know -- it
2 says turn around and head west along Rio Vista Road, along
3 Anacortes Street and turn left. Continue south along
4 Anacortes Street and stop at the District 12 maintenance
5 yard.

6 Do you see that?

7 MR. MAJOR: I think it's in 42, now, actually,
8 now. This current one.

9 MR. HAGENS: Whatever.

10 And our objection to that is, Your Honor, this
11 maintenance yard has apparently been built in the last six
12 months or something. The sign isn't even in the ground when
13 I went by it on Sunday, Your Honor. It was leaning up
14 against the fence. Has a huge bays in it that are used, as I
15 understand it, by the Burlington Fire Department to park
16 their fire trucks in. So it's a joint, collaborative use.

17 Why the sign shows only Dike District 12 Maintenance
18 activity, there is no indication. We can't see inside the
19 bloody thing to see if Dike District 12 has anything in it or
20 not. And looks to me like this is something they put
21 together in the last six months, knowing that there was going
22 to be a jury view.

23 So this is essentially salting the mine, as we say on
24 occasion, Your Honor. And I don't think -- we drive by it, I
25 don't think anything ought to be said about it. Skip ¶

1 that. They cover up the sign on this newly completed
2 building. The sign is not even in the dirt yet. Because I
3 think that this is grossly misleading. It happened in '96 if
4 it happened at all, and we have no idea what this thing is.
5 But it was changed in the deck after the hand has been
6 dealt. So that is our objection to stopping and mentioning
7 anything about that maintenance yard.

8 Now, I would say they ought to put something over the
9 sign, except I know counsel is going to say, Well, we don't

10 control the dike districts, give them all the money in the
11 world, design and engineering, we can't control them, we
12 can't do anything about the bloody sign. I can say it for
13 them, and I am. I just did.

14 We ask that nothing be said about the Dike District
15 12 --

16 THE COURT: Mr. Anderson, before the county.

17 MR. ANDERSON: Your Honor, you know, Mr. Hagens has
18 made the point that dike districts don't exist, virtually.
19 He said -- he is having the witnesses testify to that
20 statement. They have no equipment, no furniture, no
21 letterhead. Any of those things. This, as far as I know,
22 this thing hasn't magically appeared in the last six months.
23 Last year in December of '95 when I was up there driving
24 around looking around, because I was up there for a
25 deposition, I saw this building. As far as I know, it's ¶

1 existed prior to this time. It's not manufactured.

2 And I think that if counsel is going to take the
3 approach that the dike district doesn't exist, then it's
4 appropriate for them, the jury, to see if they do have a
5 maintenance shed. If there is some indication that they
6 actually exist.

7 MR. MAJOR: Your Honor, Mr. Hagens' argument is
8 totally inconsistent. On the one hand he has been arguing to
9 the jury that Dike District 12 has all money in the world to
10 do whatever they want, because they are so big, and beating
11 up on the poor people in Nookachamps. Now when he finally
12 discovers that maybe they do have an office and an equipment
13 yard, he wants that whole issue to be eliminated from the
14 scene.

15 He suggests that we have done something to rig this. He
16 doesn't have any foundation for that. He has no facts to
17 look to other than his emotion. And in fact, I can represent
18 to the Court that nothing like that has happened. If it has,
19 he could talk to all the witnesses that he is going to call
20 in the future to point that out. But there is no such
21 evidence.

22 MR. HAGENS: Well, Your Honor, it doesn't mean you
23 should comment about something that has been done after the
24 '95 floods. Nobody here disputes, even counsel didn't see
25 him disputing, that this thing has been put up since the '95 ¶

1 flood. It's a fire hall, joint use. He doesn't dispute the
2 sign says "Dike District 12." Nothing about the fire
3 district. So we don't know if the dike district has a
4 quarter of an office up there or has anything in that
5 building as things sit here today.

6 Of course, no discovery was conducted on it because they
7 never bothered to supplement their answer to interrogatories
8 and tell us anything about this bloody thing. So we're
9 supposed to go up there and they get a right to comment on

10 the existence of this thing, leaving this misleading
11 impression that there is some big maintenance building up
12 there, when in fact, it's a joint project with the Burlington
13 Fire Department.

14 Counsel didn't contradict me on that, Your Honor.

15 MR. MAJOR: Your Honor, he dismissed the dike
16 districts. If he wanted discovery, he could have taken it.
17 I don't know when it went up. I certainly don't know that it
18 went up in the last year. I don't know if it was there
19 before 1990 or not. He can ask people about it.

20 MR. HAGENS: Wait a second. Are you representing
21 you don't -- you think.

22 MR. MAJOR: I don't know, Carl, exactly what I
23 said, and you don't know, either.

24 MR. HAGENS: I know it's been since '90. I know
25 that for a fact. ¶

1 MR. MAJOR: We'll find out if that is true, that's
2 true.

3 THE COURT: Okay. So the intention is to -- when
4 we stop at the dike district maintenance yard, what is it
5 we're doing there?

6 MR. HAGENS: You are supposed to call out to the
7 jurors, This is Dike District 12 maintenance yard. And there
8 has been no testimony or opportunity --

9 THE COURT: I don't have -- what I've been given, I
10 don't have a script. So I don't know what it is we're
11 supposedly saying at these locations.

12 MR. HAGENS: What do you have in mind that he is
13 supposed to say?

14 THE COURT: Do you have a script of some sort?

15 MR. MAJOR: This is a route. And as I understood
16 it, the point was that we would point out residences and we
17 would point out features. And I don't think the script has
18 to be anything more than, This is Ken Johnson's place, or
19 this is Mr. Albee's place or this is the Burlington Northern
20 Railroad bridge.

21 THE COURT: Mr. Hagens was suggested that somehow
22 you had communicated that you wanted something special said
23 about, oh, this is Dike District 12's yard.

24 MR. HAGENS: That's what I thought. Now all of a
25 sudden the judge is putting his imprimatur on the fact that ¶

1 this is Dike District 12's yard. And we know it's a joint
2 use.

3 MR. MAJOR: Say it's a joint use. I don't care.

4 MR. HAGENS: There is no sign up there, as you
5 point out, to suggest that. And I just think it's a
6 dangerous thing for the Court to be putting its imprimatur
7 what this building is or isn't.

8 THE COURT: Well, it's a little dicey.

9 Anything else?

10 MR. ANDERSON: Not particularly, Your Honor. I
11 mean, you know, it so happens I was going through documents
12 from dike district -- designated as Dike District A last
13 night from Dike District 12. And I can recall seeing
14 references in there to the fact that they were trying to
15 build this yard and trying to build this building. I can
16 make no representation to the Court as to when those
17 documents establish that. I certainly think Mr. Hagens has
18 had access to them in the discovery and we can put that in
19 evidence. If he wants to establish that the thing wasn't
20 built until 1993 and Dike District 12 only uses one corner of
21 it, if that is what the evidence supports, that is what the
22 evidence supports.

23 MR. HAGENS: First of all, one of the things I see
24 developing here is ganging up against the plaintiffs, the
25 State and the county. As if they don't have enough money in ¶

1 these pictures to take care of these people, now they want to
2 gang up against the plaintiff.

3 THE COURT: Don't try to feign surprise on that.

4 MR. HAGENS: I'm not feigning surprise. I'm not at
5 all surprised. This is the business we're in and we welcome
6 the challenge because they are going to lose this case.
7 Ganging up or not. All right.

8 THE COURT: I understand all that.

9 MR. HAGENS: So let me say one other thing about
10 this --

11 MR. MAJOR: Before you do that, Your Honor, I think
12 that we've come awful close to the line we established in
13 motions in limine that that would not be presented to the
14 jury. And we've had one offhand comment that no one objected
15 to about the money, the county has more than the plaintiffs.
16 I think we have to be very careful about that because it's
17 going to come up more and more.

18 THE COURT: That did pass without objection, and I
19 made note of it. That happened. Nothing was said.

20 MR. SMART: What are we going to do, Your Honor?
21 We jump up and object, it just calls attention to it. Better
22 dealt with outside the presence of the jury.

23 THE COURT: I think that is a fair point. And we
24 do need to stay away from that. On the other hand, I can
25 honestly say that there have been some examples where other ¶

1 attorneys have interjected commentary into their arguing of
2 motions and that sort of thing. No one is without --
3 something to be called to their attention in terms -- those
4 kind of specific things, I agree. You can't talk about how
5 much money they have and how you're getting beat up.

6 MR. HAGENS: No. And I haven't been, I don't
7 think, Your Honor.

8 THE COURT: There was a comment that was fairly
9 suggestive of that. This dike district shed, yard, whatever

10 it is -- and it exists, apparently --
11 MR. HAGENS: Now.
12 THE COURT: Yeah. I mean it's in existence now.
13 We are going up to see the place now.
14 MR. HAGENS: And it's not evidence.
15 THE COURT: No, it's not evidence. The jury will
16 be told that, have been and will be again. We can certainly
17 drive by it. And when you say "stop there," do you mean
18 like -- pull in? How is it configured? Pull in the
19 driveway?
20 MR. HAGENS: I have no idea.
21 MR. MAJOR: There is a driveway you can pull into.
22 And if Mr. Hagens is concerned that there is a joint use, you
23 can even let people get out of the bus if you want and
24 identify that there are fire trucks in the bays.
25 MR. HAGENS: I don't know anything about this thing ¶

1 because it's been built in the last couple of years if it's
2 built at all. Counsel indicates he saw they were considering
3 building and it didn't exist. Now they build this and salt
4 the mine, Your Honor. And the judge is supposed to comment
5 that it is in fact Dike District 12 maintenance facility when
6 we don't really know that.

7 THE COURT: No. One thing we can do to sort of
8 take the sting out of it a little bit, if you're concerned
9 about that, is that we can simply drive by it and the people
10 can observe that we've driven by that location. I won't
11 announce -- actually, I won't announce, This is Dike District
12 12 maintenance yard. I don't have to say that. There is a
13 sign there, isn't there? I'm sure it will be up by Thursday.

14 MR. HAGENS: But it's not your property. He says
15 it is not his property. He is saying they should have their
16 property pointed out, but in the same token they contest the
17 claim in this case that it's not their property.

18 THE COURT: It's not. That's exactly right. It's
19 not the property of any party in this action.

20 MR. MAJOR: Nor is the Burlington Northern Railroad
21 bridge.

22 THE COURT: I understand that, and the Burlington
23 Northern Railroad bridge --

24 MR. HAGENS: Been there for decades.

25 THE COURT: That's so long in existence and so ¶

1 integrally a part of that community, even I know that.

2 MR. MAJOR: The dike district has been there since
3 1895 as well. And Carl has put this into play because he has
4 made a representations to the jury that that --

5 MR. HAGENS: That doesn't mean the judge gets to
6 comment on it, Your Honor. And I haven't put it -- I put it
7 into play because I didn't know the bloody thing was there,
8 for obvious reasons. But the fact of the matter is, they are
9 asking the Court to comment on an existing fact or kind of

10 the terrain. And all I'm saying, Your Honor, that goes well
11 beyond any evidence that is in the record.

12 We can drive by it, they can see it, and that ought to
13 be sufficient. And then let them put a witness up here and
14 we can start examining about this new-fangled maintenance
15 facility they have, whether it's shared. What portion of it
16 is the dike districts'? But for the Court to put its
17 imprimatur on this, that is the sting. And I think the Court
18 was right to say, just drive by it and make no mention of it.

19 MR. MAJOR: He admitted that he put it into play.
20 Trying to make allegation that we jury-rigged the situation
21 and created this for an advantage in this litigation, which
22 is preposterous, and I take strong exception to. He admits
23 he hasn't seen it because he hasn't been up there because he
24 doesn't go up there very often.

25 It's a feature of part of the dike district. Been there ¶

1 since 1895. Complained that they got too much money, this is
2 consistent with their independence and ability to do things
3 by themselves.

4 MR. HAGENS: It's not owned by the county.

5 MR. MAJOR: I think we should give the jury an
6 opportunity to see that it is there.

7 THE COURT: The jury can see that it's there. That
8 is a reasonable compromise. It's there.

9 MR. HAGENS: All right, Your Honor. Then on the
10 other point --

11 THE COURT: There will be no comment made about it.

12 MR. HAGENS: Then on the other point.

13 MR. SMART: So the record is complete, Your Honor,
14 not even then for identifying it is?

15 MR. HAGENS: That's right. It has a sign on it.
16 You saw it, or somebody saw to that. Let them see that.

17 THE COURT: I'm assuming if it's signed and the
18 sign can be seen from the road.

19 MR. SMART: Every one of in the properties other
20 than this one is going to be identified.

21 MR. HAGENS: This isn't a property.

22 THE COURT: Because by virtue of the fact they have
23 to be, there is no other way to do it.

24 MR. SMART: There is no other way to have the jury
25 know what it is. ¶

1 MR. HAGENS: It's got a sign on it.

2 MR. SMART: Well -- if you just drive by it, how do
3 you know the jury is looking at it? The whole purpose of
4 pointing it out is to show what is there.

5 THE COURT: They'll see that.

6 MR. MAJOR: Only half the people on the bus will
7 see it.

8 MR. HAGENS: That's not true. They are going to
9 come back the same way.

10 MR. SMART: Only once.
11 MR. HAGENS: That's what they want. They want to
12 try to get in a piece of evidence as part of the terrain when
13 there is no real evidence from their own witness, never
14 supplemented their answers to the interrogatories.
15 By the way, I don't have to argue both of them. I get
16 to argue one at a time. So Mr. Smart doesn't get to get up
17 here and argue multiple times.
18 THE COURT: Whatever it is, whatever it is,
19 counsel, don't do that again. Simple as that. Only person
20 who gets to slam anything in this courtroom is me. Paid for
21 the privilege and the public said I got to.
22 MR. SMART: I apologize, Your Honor.
23 THE COURT: All right.
24 We'll drive by it. I'll not make a comment, is the
25 ruling. ¶

1 MR. HAGENS: Point number two, Your Honor.
2 THE COURT: However, provided that, provided that
3 when we get there if -- with this reservation: If I don't
4 believe -- if I don't believe that by simply looking at this
5 it is obvious to me, my own power of observation, this is
6 where the discretion comes in in these jury view things, I
7 reserve the right after having discussed it briefly out of
8 the presence of the jurors with the attorneys on the bus to
9 change my decision.
10 MR. HAGENS: Fair, Your Honor.
11 THE COURT: And to simply make a comment -- you
12 know what I'm saying. I haven't been there. I don't know.
13 You are talking about a sign that is there. This big or this
14 big?
15 MR. MAJOR: If I can alert the Court to how it's
16 going to appear. It is not a sign that you can see from a
17 distance because the sign is on a fence.
18 THE COURT: Right.
19 MR. HAGENS: Right in front.
20 MR. MAJOR: Out by the road. You don't see it --
21 THE COURT: That's what I'm saying.
22 MR. MAJOR: That is important.
23 THE COURT: I'm also thinking that the look of the
24 building itself, the way it's configured and so forth in
25 conjunction with that sign, may be so obvious -- ¶

1 MR. MAJOR: It's not.
2 THE COURT: If it isn't, then what I'm telling you
3 is my preliminary instinct is to not mention it. But if we
4 got there and I think that is unfair --
5 MR. MAJOR: You're going to miss it.
6 THE COURT: The way it presents itself, I'm
7 reserving the right to change my mind, is all I'm saying. I
8 haven't seen it. Shooting in the dark to make an absolute
9 decision without having at least some exposure to it.

10 MR. HAGENS: I wanted to talk about the Mark
11 Honeywell declaration.
12 THE COURT: Wait. You know what we're going to do
13 tonight, because I have an appointment at five o'clock I
14 cannot miss. Five minutes away. Let's finish the jury view
15 stuff tonight so tomorrow we can tell the jury. Tomorrow
16 morning we can go back to the other issues of the Honeywell
17 thing and also Mr. Smart's another issue. You made an
18 objection and I reserved ruling on that.
19 MR. ANDERSON: That was a Snohomish County issue,
20 Your Honor.
21 THE COURT: Snohomish County. If you want to get
22 to that now or later. It won't be right now. You can bring
23 that up whenever you feel like it.
24 MR. HAGENS: Then we do have stops we would like to
25 make on the trip. I don't know if they are going to object ¶

1 or not. The pump station down a ways, down the levee a ways,
2 further than they go with their tour or route. We would like
3 to go down past the pump station another quarter mile to the
4 Gages Lake, which is the end of Gages Slough, and have the
5 jury view that. That is the terminus of Gage Slough, which
6 would be a natural drainage area for this. Would be a
7 drainage area but for the fact that the county plugged it.
8 So we would like to have the court point that out as well,
9 Your Honor.

10 And then there are other stops on the road, including
11 one at Holt Camp Road.

12 I'm not saying they disagree with any of these.

13 THE COURT: One at a time.

14 MR. HAGENS: I haven't had a chance to discuss it
15 with counsel.

16 MR. MAJOR: I'm not sure what pump station he is
17 talking about. Probably the City of Anacortes inlet for
18 their water system. As long as we describe it accurately, I
19 don't have a problem with it.

20 MR. HAGENS: It's the pump station that's on the --

21 MR. MAJOR: On the Avon bend there.

22 MR. HAGENS: Yes.

23 MR. MAJOR: City of Anacortes.

24 MR. HAGENS: Do you have any objection with going
25 there? ¶

1 MR. MAJOR: No. If you can tell us what route.

2 MR. HAGENS: Route that down another half mile and
3 turn right, turn around at Gages Lake and come back.

4 MR. MAJOR: My understanding is that we come across
5 the Highway 99 bridge and instead of turning left as we
6 described, turn right and go down the river that way.

7 MR. HAGENS: Here is where I get a little bit
8 -- Mr. Halverson.

9 MR. HALVERSON: Sir, it's on the other side of the

10 river. The pump station on the end of Gages Slough where it
11 pumps through a culvert.
12 MR. MAJOR: On the north side.
13 MR. HALVERSON: North side.
14 MR. MAJOR: Stay on the road along the river.
15 MR. HALVERSON: Yes.
16 THE COURT: Distance of what --
17 MR. HALVERSON: Probably a half a mile down and a
18 half a mile back.
19 THE COURT: Is that a good enough bus? That is
20 almost the length of the bus. I'm envisioning this
21 incredible vehicle that is going to take us up there.
22 MR. MAJOR: Let's get both pump stations in that is
23 the Gages Slough.
24 MR. HAGENS: That's fine. We would like to stop at
25 Holt Camp (phonetic). ¶

1 MR. HALVERSON: Holt Camp Road. And it's right
2 along Highway 20. Bus just pull in and turn out and go out.
3 A hundred foot up the road.
4 MR. HAGENS: It's the beginning point of Gages
5 Slough. We would like the Court -- definitely an objection
6 with that.
7 MR. MAJOR: What is the purpose of stopping there
8 or going up there, just to see the beginning of Gages
9 Slough?
10 MR. HAGENS: The other side of Highway 20.
11 MR. MAJOR: Where is it in proximity to District
12 Line Road?
13 MR. HALVERSON: In between Sterling Road and Sedro
14 Woolley. It's in between the Colval (phonetic) Residence
15 Center and the hospital.
16 MR. MAJOR: The Highway 99 bridge and that road
17 before we go down to Sterling.
18 MR. HALVERSON: Yes, that's true. You only have to
19 go for like the length of this courtroom.
20 MR. MAJOR: That would be the logical progression.
21 MR. HALVERSON: Yes.
22 MR. HAGENS: Any objection with that?
23 MR. MAJOR: No objection.
24 MR. HAGENS: We would like the Court to comment
25 about the beginning of Gage Slough while on Lafayette Road. ¶

1 The area where it was plugged, that this is the beginning
2 area of -- the other side. You know, we got Highway 20 on
3 this side, the Holt Camp. The other side of the road where
4 it is plugged would be the intake area for Gages Slough.
5 MR. HALVERSON: Two intakes. One in Sterling at
6 that point and the other at Holt Camp Road.
7 MR. HAGENS: I'm saying this would be the intake
8 portion of Gages Slough at this point.
9 MR. MAJOR: That is characterizing the physical

10 evidence. The physical evidence is there. They are going to
11 have testimony on it. They can explain it with all the
12 charts and diagrams. The purpose now is to give the jury a
13 feel for the area. Now they want to do a whole litigation of
14 Gages Slough.

15 MR. HAGENS: I do want to stop where it's blocked
16 and obstructed and say this is the beginning point of Gages
17 Slough on the easterly side, on the westerly side, southerly
18 side. Where Lafayette Road is, Holt Camp on one side and
19 this is on the other.

20 MR. HALVERSON: Holt Camp would be the most
21 easterly spot. And then as you continue down through it, the
22 Gage Slough runs in generally a westerly direction.

23 MR. HAGENS: I'm talking about Lafayette Road where
24 it's obstructed.

25 MR. HALVERSON: It would be to the west side of the ¶

1 road. Northwest side of the road.

2 MR. MAJOR: Gages Slough, Your Honor, is observable
3 all through that Lafayette Road area. And I think to
4 continue to make stops along Gages Slough puts too much
5 emphasis on that one feature and becomes evidence as opposed
6 to simply give them a feel for the area. In so, we would
7 object.

8 MR. HAGENS: I think the jury should be told -- in
9 fact, Mr. Regan already testified to it -- that the levee had
10 been obstructed at Gages Slough, in the vicinity of Lafayette
11 Road. That is what Mr. Johnson -- evidence Mr. Johnson
12 wanted to plug it up, and did. That's what Mr. Regan
13 testified to. County engineer.

14 MR. MAJOR: That's what the trial is all about, to
15 get that testimony in. That is what it is.

16 MR. HAGENS: It was in.

17 MR. MAJOR: It's not what the jury view is for.

18 THE COURT: I agree with you. That is a little --
19 kind of starting to micromanage this.

20 MR. HAGENS: Will the Court reserve its ruling
21 until it gets out there if it's not obvious?

22 THE COURT: I suppose I can do that.

23 So that we're clear about this, Mr. Hagens, what my
24 concern is is not -- there is no way we can go out and
25 observe every natural feature and undulation and depression ¶

1 and that sort of thing, even if it's the most obvious thing
2 in the world. We want to limit these things -- My theory of
3 what this jury view is is simply a way of getting some
4 background. And so I need to see how that is situated and
5 make a decision, I guess, whether or not I think that is
6 elemental to our discussion and their understanding of how
7 things would work.

8 Okay.

9 MR. HAGENS: Fine.

10 THE COURT: You characterized it nicely. We'll
11 reserve on that. Probably not, is what I'm saying, leaning
12 that way. Let's just see where we go.

13 Also, we had talked about some dietary concerns and so
14 forth. There aren't any. And other than several -- we had
15 one request for prime rib sandwich. And several jurors made
16 sure that I told you they wanted several sandwiches in each
17 lunch.

18 MR. MAJOR: I'm sure Mr. Hagens can take care of
19 that at Mitzel's.

20 MR. HAGENS: If you will lend me the County's
21 credit card, I will be happy to take care of it.

22 THE COURT: So logistically, our anticipation is
23 the bus will be here at 9:30.

24 MR. MAJOR: 9:30. Sufficient to handle at least 25
25 people. And hopefully it won't go too big, because we can't ¶

1 get around some of those streets in Clear Lake. It's a rapid
2 transit bus, a small one. We want to be able to maneuver up
3 there in some tight places.

4 MR. HAGENS: Okay.

5 THE COURT: So my vision of this transcontinental
6 streamliner is fading.

7 MR. HAGENS: I'm afraid you're not going to get the
8 rock stars' equivalent to do a jury view bus.

9 MR. SMART: May I raise one other issue not related
10 to any contested motion? I don't think -- unless counsel
11 wanted to argue about lunch.

12 MR. HAGENS: And I probably do, Your Honor. That
13 is just a joke, of course.

14 MR. SMART: And that is, I've got -- requested
15 lunches for sixteen jurors, three lawyers, Your Honor. Are
16 there any other people -- okay. Aaron.

17 THE COURT: Aaron will be coming along. We'll make
18 a determination as to whether he is actually going to point
19 out the features or I will.

20 MR. SMART: So if I had two extras, Aaron would be
21 one. So we should be covered.

22 MR. MAJOR: Your Honor, just to give you a preview,
23 I think, of how this is going to have to be coordinated.

24 THE COURT: That is where I want to get to.

25 MR. MAJOR: I appreciate if either yourself or ¶

1 Aaron is going to call it out, I think I'm going to have to
2 be at your heel to tell you which house is coming up and
3 which plaintiff. Some of it is going to come pretty quick.

4 THE COURT: Let's back off. I'll back off a couple
5 of steps. The attorneys can do the pointing out of things.
6 And obviously, if we get to a point where anyone feels that
7 they have done something that is outside the pale of what we
8 think is proper, we can take care of that later. And the
9 jury is going to know that. They are going to be told on the

10 bus, this isn't evidence and you may inadvertently hear
11 something or someone among you may make a comment to someone
12 else. You're to disregard that entirely. Simply to get the
13 lay of the land.

14 MR. HAGENS: I think Mr. Major and I can work that
15 out, frankly. And ask that the Court formally appoint us for
16 that task and then I don't worry with the statutory mandate.

17 THE COURT: I'll put that on the record. The Court
18 or a designee. And for the purposes of this jury view, so
19 there isn't any sort of issue about it later on, the
20 attorneys in this case, all four of the attorneys in this
21 case, are designated for that purpose.

22 MR. HAGENS: In the event of dispute, you resolve
23 it.

24 The only other question we had is this Mark Honeywell
25 declaration. I guess maybe now is not time. ¶

1 THE COURT: Can we take that up, please, first
2 thing in the morning? Sorry. I'm in a crunch here.

3 MR. SMART: Just one point on that, Your Honor.
4 That is, we have a date for noting a motion with respect to
5 Honeywell and testimony and his declaration and all that.
6 It's going to require briefing, I believe.

7 THE COURT: When did we set that, Aaron?

8 MR. SHIELDS: A week from Thursday.

9 MR. HAGENS: I don't want to call my experts back.
10 This gentleman is here. He has read the Honeywell
11 declaration. It's declaration under penalty of perjury.
12 It's an admission by a party, as far as we're concerned.
13 These guys have got unlimited resources back in Seattle.
14 They can waste me with this kind of briefing schedule, Your
15 Honor. I don't want any more briefs on this. This is a
16 straightforward motion. What is this? They can put things
17 on paper, as they have done in this courtroom, Your Honor.
18 So I don't want to get involved in any briefing battles.
19 I've got to put witnesses on here, Your Honor.

20 I'm one guy against these guys. And these are just the
21 tip of the iceberg. Nobody knows how many they got working
22 back in their offices on this case.

23 So I vigorously oppose any briefing schedule, Your
24 Honor. Pick out the rules and argue from those.

25 MR. SMART: Your Honor already had the motion then ¶

1 and already ruled on the issue because it came up in Mr.
2 Regan's testimony. It's identical issue, and Mr. Hagens was
3 not allowed to introduce it.

4 MR. HAGENS: He was allowed to testify about it,
5 though.

6 MR. SMART: No, he wasn't.

7 MR. HAGENS: He mentioned he had reviewed them.

8 MR. SMART: We then had an argument and he ruled
9 against you.

10 MR. HAGENS: On the admissibility of the
11 declaration, not on the admissibility of having said he saw
12 it.

13 THE COURT: Well, don't we already have testimony
14 that -- from Dr. Mutter that he saw it?

15 MR. HAGENS: Yes. That's what he said. And I
16 said, Well, what did it say? And you said we'll take that up
17 in the afternoon.

18 MR. SMART: The ruling was that the witness could
19 testify to the documents that were contained -- that were
20 referenced in the declaration.

21 THE COURT: Not the actual declaration.

22 MR. SMART: Right. And he already testified about
23 the documents that he reviewed.

24 MR. HAGENS: No.

25 MR. SMART: Yeah, he did. ¶

1 MR. HAGENS: Not as to the documents identified in
2 the Mark Honeywell declaration, he didn't.

3 MR. SMART: Well, if he didn't review those, then
4 he is not entitled to talk about what Mr. Honeywell might
5 have said in a declaration in another case relating to
6 insurance coverage.

7 THE COURT: Let's do this: Can we start the
8 morning's testimony with this issue still just sort of
9 floating out there or just somehow --

10 MR. HAGENS: We can do the issue. But the
11 engineering gentlemen, I'm -- a little expensive for the
12 plaintiffs and was on the one before. And so I don't want to
13 have to call them back for that particular purpose.

14 THE COURT: How long do you anticipate your cross
15 will take?

16 MR. SMART: An hour and a half, two hours, Your
17 Honor.

18 THE COURT: That is the morning, basically.

19 MR. SMART: Might not be that long, but it will be
20 in that neighborhood.

21 THE COURT: We could let the jury go a bit early
22 for lunch tomorrow, is what I'm suggesting, and take this
23 issue up again at that point. I'm kind of crunched.

24 MR. SMART: I don't think there is an issue, that
25 Your Honor hasn't already ruled on it. ¶

1 THE COURT: Let's come back to it. You may be
2 right. That will give me a better opportunity to focus on
3 what that issue means to all of us.

4 Anything else, Mr. Major, since you're really sort of
5 lucky you inherited this bus trip thing, is kind of a
6 priority to what you're doing, you feel comfortable setting
7 it up, everything is okay?

8 MR. MAJOR: I think it's great. Going to be fun.

9 THE COURT: Any other details that you potentially

10 want to deal with, flesh out here?
11 MR. MAJOR: No. I think we've got an
12 understanding. I think it will be a good break for the jury.
13 THE COURT: Good for all of us who haven't been
14 there to get some background.
15 MR. HAGENS: One thing, Your Honor. I'm assuming
16 it's going to take the whole day, so I'm not planning any
17 witnesses for -- if we should get back. And I will tell
18 you --
19 THE COURT: That's fine. We will bring the jurors
20 back. When we are done, we're done. That is fine. That
21 will give them a chance -- their holiday will be just a
22 little bit longer.
23 MR. HAGENS: Maybe. You haven't been on this trip,
24 Your Honor. I tried it on Sunday and I was jetting around
25 pretty good and it took a while. ¶

1 MR. SMART: Ought to see the driver we got.
2 THE COURT: All right. Great. That even peaks my
3 interest further.
4 (Court recessed at 5:50 p.m.)
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