

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

In Re: SRBA) Subcase Nos.
) 1-2064, et al.
Case No. 39576) (American Falls subcases)
) Subcase Nos.
) 1-2068, et al.
_____) (Palisades subcases)

DEPOSITION OF ANTHONY OLENICHAK

FEBRUARY 9, 2012

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

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THE DEPOSITION OF ANTHONY OLENICHAK was taken on behalf of the Ground Water Districts and American Falls Spaceholders at the offices of Idaho Department of Water Resources Southern Regional Office, 1341 Fillmore Street, Suite 200, Twin Falls, Idaho, commencing at 10:01 a.m. on February 9, 2012, before Jeff LaMar, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

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For American Falls Spaceholders:

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APPEARANCES (Continued):

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APPEARANCES (Continued):

Also Present:

Ray Williams

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EXHIBITS

1 - Joint Notice of Deposition of Tony Olenichak	7
2 - Idaho Department of Water Resources Recommended Water Rights Acquired Under State Law, Right No. 1-2064, dated 12/16/2006	13
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ANTHONY OLENICHAK,
first duly sworn to tell the truth relating to said
cause, testified as follows:

EXAMINATION

BY MS. McHUGH:

Q. Good morning, Tony. I'm Candice McHugh,
and I represent the Ground Water Districts in this
matter.

Is it fine if I call you "Tony"?

A. Yes, please.

Q. Okay. Can you please state your name and
spell your full name for the record.

A. Anthony Olenichak, A-n-t-h-o-n-y,
O-l-e-n-i-c-h-a-k.

Q. You understand you're here today to talk
about water-right claims in the SRBA for American Falls
and Palisades Reservoir? Is that your understanding?

A. As it pertains to the refill issue?

Q. Yes.

A. Yes.

Q. Okay. And the water rights at issue
specifically is water right 1-2064, and that's for
American Falls.

Do you understand that?

1 A. Yes.

2 Q. And 1-2068 for Palisades?

3 A. Yes.

4 MS. MCHUGH: And I'll have you mark this, Jeff.
5 (Exhibit 1 marked.)

6 Q. (BY MS. MCHUGH): I'm handing you what's
7 been marked as Exhibit 1.

8 Have you seen this document before?

9 A. Yes.

10 Q. And can you tell me what it is.

11 A. It's the request for the deposition.

12 Q. And for which you're here today?

13 A. Yes.

14 Q. Okay. Have you had your deposition taken
15 before?

16 A. Yes.

17 Q. And when was that?

18 A. I can't remember the exact dates, but I
19 think I've had one each year for the past three years.
20 And there was one back in 2005.

21 Q. Okay. And can you generally tell me what
22 matters they were in.

23 A. The last one was over water right 1-6, the
24 AFRD No. 2 right. One was concerning the Minidoka
25 power rights. The other was over the high-water right

1 issue. I can't remember what the fourth one was. The
2 earliest one was the A & B/Falls Irrigation issue.

3 Q. And just so I can understand that, so the
4 1-6 AFRD 2 water right, I think I attended that
5 deposition.

6 And was it taken by Tom Arkoosh?

7 A. Yes.

8 Q. Okay. On the Minidoka power rights, could
9 you elaborate who took that deposition?

10 A. That was at the Valley Bank in Twin Falls,
11 if I remember correctly.

12 Q. And do you recall --

13 A. I don't recall who it was that asked for
14 the deposition.

15 Q. Do you remember who asked the questions?

16 A. The common group. Jim Tucker was there.

17 Q. Okay.

18 A. John Simpson.

19 Q. Was that in an SRBA matter? Do you know?

20 A. Yes, I believe so.

21 Q. Okay. And the high-water right deposition?

22 A. Yes. That took place in the Idaho Falls
23 IDWR office.

24 Q. And if I'm remembering, was Randy Budge in
25 attendance or --

1 A. I think so.

2 Q. -- Rob Harris?

3 A. I can't remember if Rob was there or not.

4 Q. Okay. And then in 2005 the A & B and Falls
5 Irrigation District matter, was that an SRBA matter?

6 A. No, it wasn't.

7 Q. Okay. I probably should have gone over the
8 ground rules to begin with, but you understand you're
9 under oath and that this transcript can be used in
10 court?

11 A. Yes.

12 Q. And to answer the questions audibly so that
13 the court reporter can record them?

14 A. Yes.

15 Q. And if you need a break, you can just ask
16 me, and we can take a break.

17 Okay. When I refer to "the Director"
18 today, I'll be referring to Interim Director Gary
19 Spackman or his predecessors, but it means the Director
20 of the Department of Water Resources.

21 A. Okay.

22 Q. Can I have a brief background of your
23 education.

24 A. I have a bachelor of science degree in
25 watershed science from Utah State University. I

1 graduated in 1983.

2 Q. Have you had any subsequent training,
3 educational training?

4 A. Not educational, no.

5 Q. Any training within IDWR?

6 A. Well, through my experience there's several
7 miscellaneous trainings, but mostly it's through my
8 experience dealing with water rights and hydrology.

9 Q. Okay. And what is your current position
10 with IDWR?

11 A. Program manager for Water District No. 1.

12 Q. And since when have you held that position?

13 A. 2005. From 200- -- or I should say 1990 to
14 2005 I was a hydrologist for Water District 1. Prior
15 to that from 1988 to 1990 I was a senior water right
16 agent for the Department of Water Resources. From
17 19- -- 198- -- did I say 1988?

18 Q. Yeah.

19 A. From 1985 to 1988 I worked for the State of
20 Montana Water Rights Bureau as a water rights
21 specialist. From 1984 -- you want to go back?

22 Q. No, that's probably fine. Thank you.

23 A. Okay.

24 Q. Can you tell me, you're employed by Water
25 District 1. Can you explain the relationships between

1 Water District 1 and the Department of Water Resources,
2 as you understand it.

3 A. Water District 1 has a Memorandum of
4 Understanding with the Department of Water Resources.
5 We share their vehicles, their office equipment. We
6 are State employees. We get paid through their payroll
7 system, participate in their benefits, retirement,
8 health insurance.

9 We do that by collecting our assessments
10 from the water users, the water district does, and then
11 paying at least a portion of those assessments to the
12 Department of Water Resources for the use of their
13 equipment and also to reimburse our salaries.

14 Q. And the Attorney General's office
15 represents Water District 1, or is your attorney for
16 this deposition? Is that your understanding?

17 A. Yes.

18 Q. Does Water District 1 have any other
19 attorneys that represent it? Do you know?

20 A. Water District 1 has attorneys that
21 represent the Committee of Nine.

22 Q. In your current position as program
23 manager, can you briefly explain what your
24 responsibilities include.

25 A. My responsibilities are to see that the

1 daily accounting of water delivery is done properly,
2 that water measurements are -- are taken in a timely
3 manner and accurately.

4 So my responsibility extends to supervising
5 three positions in the Idaho Falls office and the 12
6 hydrographer-engaged reader positions that are spread
7 out over the district.

8 Q. What have you done to prepare for this
9 deposition?

10 A. I read my previous depositions. That's the
11 only preparation that I've done.

12 Q. Did you consult with any attorneys?

13 A. Yes. I -- Chris Bromley I met with briefly
14 two days ago, and he had some questions concerning the
15 refill issue.

16 Q. Did you review any documents besides your
17 depositions?

18 A. Yes. I reviewed the -- I'm not sure
19 whether you would call it an order or what type of
20 document it was from Judge Wildman concerning the
21 binding effect of the Eagle decree.

22 Q. Any other documents?

23 A. None that I can think of.

24 Q. Getting specifically to water right
25 No. 1-2064 and 1-2068, what work have you been asked to

1 do for those water rights?

2 A. Well, I've reviewed -- and I've explained
3 how those water rights are delivered in the Water
4 District 1 water right accounting. I've also reviewed
5 how the language in the Eagle decree has been used in
6 that delivery.

7 Q. Did you make the recommendations for those
8 water rights?

9 A. No, I did not.

10 MS. MCHUGH: Jeff, if I could have this document
11 marked as No. 2 and this document marked as No. 3.

12 (Exhibits 2 and 3 marked.)

13 Q. (BY MS. MCHUGH): I've handed you a
14 document that's been marked as Exhibit No. 2.

15 Could you identify that document.

16 A. Exhibit No. 2 is the recommended water
17 right from the Idaho Department of Water Resources for
18 right No. 1-2064, which is the 1921 water right for
19 American Falls Reservoir.

20 Q. Is it accurate to say that that's the
21 Director's Report?

22 A. Yes.

23 Q. Were you involved in preparing any portion
24 of this Director's Report?

25 A. No.

1 Q. Are you aware of whether this
2 recommendation in the Director's Report has been
3 altered or amended since it was issued?

4 A. I'm not sure if it's been amended, but I
5 know we were talking about separating out the portion
6 of winter-water-savings water out of this right that's
7 for the entire reservoir.

8 Q. And is that pursuant to a stipulation
9 between the parties? Are you aware?

10 A. I am not.

11 Q. Okay. And can you identify what's been
12 marked as Exhibit No. 3.

13 A. Exhibit No. 3 is the Department's
14 recommendation for 1-2068 for Palisades Reservoir.

15 Q. Were you involved in preparing any portion
16 of this Director's Report?

17 A. No.

18 Q. And do you know whether this recommendation
19 has been altered or amended since it was issued?

20 A. I think this right also may have been
21 amended to separate out the winter-water-savings water
22 from the total quantity of the right.

23 Q. Before I go into more depth on those two
24 water rights, I want you to keep those in mind when I
25 ask you some questions about Water District 1

1 operations. Now I want to talk to you a little bit
2 about Water District 1 operation regarding the issue of
3 refill.

4 Could you tell me what you understand
5 "refill" to mean as it pertains to these two water
6 rights.

7 A. Water District 1 accounts for the gains
8 that accrue to this priority date up to the amount of
9 the capacity of the right. Once that capacity is
10 reached, it's common for the physical contents not to
11 match the water that we've accrued on paper.

12 What that means is the storage that accrued
13 to the right was used either by an irrigation canal
14 downstream or the water was released for flood control
15 or any other type of usage.

16 When surplus water comes into the reservoir
17 after that time, that evacuated space can sometimes
18 refill physically. That's my definition of the refill.

19 Q. I'm going to break down a few of the terms
20 that you used. First of all, you said "the capacity of
21 the right."

22 Can you explain to me what you mean by "the
23 capacity of the right."

24 A. Well, the total amount of water we can
25 store into the American Falls storage right is the

1 1,672,590 acre-feet.

2 Q. And that refers on Exhibit 2 specifically
3 to the quantity element?

4 A. Correct.

5 Q. And so the capacity of the water right for
6 1-2068 for Exhibit No. 3 would be 1.2 million
7 acre-feet?

8 A. Correct.

9 Q. You also used the term "physical capacity."
10 Can you explain to me what you mean by
11 "physical capacity" as it relates to the capacity on
12 the water right.

13 A. Well, the active physical capacity should
14 be equal to the capacity on the water right.

15 Q. Is it fair to say that the physical
16 capacity is how big the reservoir is, how much water
17 the reservoir will hold?

18 A. Yes.

19 Q. You also used the term "surplus water."
20 Could you explain to me what you meant by
21 "surplus water."

22 A. After the water right has accrued its
23 volume of storage, the physical contents sometimes are
24 not the same as what we've accounted for on paper
25 that's accrued to the right because of the operations

1 undertaken by the Bureau of Reclamation, whether it be
2 to release the water for irrigation needs or for flow
3 augmentation or for flood control, whatever the
4 purpose, that would cause the physical contents not to
5 equal the amount that we've stored under the right.

6 Q. In other words, the physical contents would
7 be less than the actual content as recorded under the
8 right?

9 A. Or the same.

10 Q. So am I accurate in saying that what you
11 understand refill to be in these cases is to refill the
12 water right after there has been some releases from
13 storage?

14 A. The water right would remain filled,
15 regardless of whether or not we had refill.

16 Q. So you're using the term "refill" as a
17 physical refill of the reservoir, and the water rights,
18 the amount of water that is stored under the water
19 right or accounted for for the water right doesn't
20 change?

21 A. Correct.

22 Q. I also understand that "refill" can be used
23 as to refill the storage account.

24 Could you explain to me what you understand
25 that might mean if someone were to say that "Our

1 storage account was refilled."

2 A. Yes. Common situation is that the
3 irrigation season begins, we're -- let's assume that
4 the reservoirs are full physically and we've also
5 filled the water right on paper. There's some storage
6 use by a canal that occurs. And so the reservoirs are
7 physically drawn down because of that storage use.

8 And then we have a burst of runoff from
9 snowmelt or rain that exceeds the demand, the
10 irrigation demand. There's no water spilling out the
11 end of the system, so physically the contents of the
12 reservoir increase. That's an example of refill.

13 What that -- the effect of that is is that
14 it allows us to cancel some of the previous storage
15 that has -- storage usage that has occurred. In other
16 words, we started with a full reservoir, there were
17 some storage used, and then that physical space that
18 was evacuated subsequently refilled, so we now have a
19 full system again, which allows us to cancel the
20 previous storage use.

21 Q. When does the cancelling of the previous
22 storage use occur?

23 A. It occurs on the day of allocation, when
24 the watermaster allocates the amount of storage or the
25 amount of fill available to the spaceholders.

1 Q. So when we were discussing a refill of a
2 water right earlier -- and I understood your answer to
3 be that the right would remain the same, even if the
4 physical contents of the reservoir refilled -- explain
5 to me how that is consistent with what you just told me
6 about refilling a storage account.

7 A. We don't refill the storage account. We
8 refill the reservoir physically. The storage account
9 would -- would be 100 percent full under this
10 assumption. And then space is physically evacuated and
11 then subsequently refills. That's a physical change,
12 but the amount accrued in the storage right doesn't
13 change.

14 Q. If the storage water right was not
15 100 percent filled, could you explain what would happen
16 if there was a surge of water prior to the day of
17 allocation -- or after the day of allocation, what
18 would happen to a storage account that was not
19 100 percent full?

20 A. The storage account that's not 100 percent
21 full would then fill under priority. If natural flow
22 was sufficient to fill that priority, then it would
23 continue to accrue water under that storage account.

24 Q. And when would that occur?

25 A. It can occur any time during the season.

1 Q. In the answer to one of my questions, you
2 also said something about "the refill of the system."

3 Could you explain to me what you meant by
4 that.

5 A. We generally look at the reservoir -- the
6 reservoirs collectively as a system, because water that
7 may accrue to a storage account such as American Falls
8 might be physically held in Palisades.

9 The net system contents are -- would be
10 equivalent to the refill, where the refill is
11 occurring, whether it's credited towards storage that
12 had previously been used out of American Falls or
13 previously been used out of Palisades. The refill may
14 not occur in the reservoir where the storage use came
15 from.

16 Q. Could you list the reservoirs that are
17 included in your term "system."

18 A. Yes. Jackson Lake, Palisades Reservoir,
19 American Falls, Lake Walcott, Ririe, Henry's Lake,
20 Island Park, Grassy Lake. I think that's all of them.

21 Q. Does Water District 1 recognize refill of
22 storage water rights in priority?

23 A. No, it does not.

24 Q. Can you explain that.

25 A. Assuming the reservoir rights have filled

1 to 100 percent and then some refill occurs, that refill
2 does not occur in priority to the reservoirs. In other
3 words, a reservoir -- let's say the most senior
4 reservoir wouldn't have first right to refill.

5 Q. The senior reservoir would not have the
6 first right to refill?

7 A. Correct.

8 Q. Okay. What reservoir is the senior
9 reservoir?

10 A. I don't remember the priority dates of
11 every reservoir exactly, but certainly Lake Walcott
12 would be with their 1909, and then Jackson I believe
13 has a 1906 water right for a portion of its storage.
14 Those would be the senior reservoirs.

15 Q. And I know I'm belaboring the issue on
16 refill, but now we've introduced that Water District 1
17 does not refill storage water rights in priority. And
18 the explanation was that the senior reservoir would not
19 have first right to.

20 Refill. And I apologize if you've already
21 answered this question, but can you explain to me how
22 does Water District 1 recognize refill.

23 A. Refill is not identified per individual
24 reservoir. It's systemwide refill. I guess that's a
25 better explanation as to why it's not done under

1 priority. It's just surplus water that's physically
2 stored in the reservoir system that wasn't assigned to
3 a specific storage right.

4 Q. Can you look at Exhibit No. 2, which is the
5 water right for American Falls Reservoir. And could
6 you walk me through an example of where systemwide --
7 there would be refill and how you would treat this
8 water right or how this water right would -- do you
9 understand my question?

10 A. I think so.

11 Assuming this water right was filled on
12 paper -- in other words, upstream from American Falls
13 there was enough water, natural flow, available to fill
14 the entire 1,672,590 acre-feet, and some of that water
15 was used, that American Falls storage, there was some
16 spaceholder in the system that diverted their storage,
17 that would be subtracted from their allocation from
18 this full storage account.

19 While that's happening, they're evacuating
20 space. It may not be physically from American Falls
21 Reservoir. It may be from some other reservoir. And
22 then we have a burst of snowmelt or rain refills that
23 space. It may not refill the space physically in
24 American Falls; it could refill the space anywhere
25 physically in the system, wherever that empty space

1 could be. If there's sufficient refill to cancel out
2 the storage use, then that refill, in a sense, is
3 credited towards the spaceholder of American Falls.

4 Q. Towards the spaceholder of American Falls
5 who already used their water?

6 A. Correct.

7 Q. And when that is credited to their storage
8 account, that could occur before the day of allocation?

9 A. No. It generally happens on the day of
10 allocation.

11 Q. On the day of allocation. And can you
12 explain to me why Water District 1 allows for or
13 accounts for the systemwide refill. Do you know the
14 reason?

15 A. Yes. There is no injury to any other water
16 user. Refill occurs when there's surplus water in the
17 system in excess to the amount of the demand by water
18 rights.

19 Q. Is there an interest in keeping the
20 reservoirs as full as possible throughout the season?

21 A. Yes.

22 Q. And do you know why?

23 A. It maximizes the amount of water available
24 above Milner Dam.

25 Q. And why is that important? Do you know?

1 A. The water users in Water District 1 depend
2 on the quantities above Milner Dam. If there weren't
3 any shortages, there wouldn't be any need for the
4 watermaster to curtail or regulate any water user. The
5 more water you hold upstream, the less people get
6 curtailed.

7 Q. I understand that refill can occur after
8 there's been a burst of late spring runoff, for
9 instance. I think that's what you've explained.

10 Can refill occur any time during the
11 irrigation season?

12 A. Typically, it doesn't happen after the day
13 of allocation until you get all the way towards the end
14 of the season, usually in the month of October.

15 Q. And why is that?

16 A. At that time the irrigation demand greatly
17 exceeds the amount of natural flow that's flowing down
18 through the system, and there are rights generally
19 senior to the reservoir rights.

20 Q. And when it occurs later in the season in
21 October, can you explain that process.

22 A. Yes. At that point any new fill -- or I
23 should say any additional reservoir fill that occurs in
24 October isn't considered refill of the storage that had
25 been used prior to that time, but it accounts as

1 accrual towards the next irrigation season.

2 Q. Okay. If I understand your answer, what
3 you're saying is when you answered earlier that there
4 can be a cancelling of storage use prior to the day of
5 allocation or on the day of allocation because there's
6 been a physical refill of the reservoir, any
7 cancellation of storage used from a storage account
8 would not occur based on late-season refill or refill
9 that occurs in October?

10 A. Correct.

11 Q. And why is that?

12 A. The irrigation season runs until
13 October 31st. We get some new accrual in the reservoir
14 accounts, both physically and on paper, in October
15 because irrigation demand is decreased to a point where
16 the natural flow coming into the system exceeds the
17 irrigation demand and is captured in the reservoirs.
18 And the storage practice was always to apply that
19 accrual in October, one month prior to the start of the
20 new irrigation season, to apply that new accrual
21 towards the capture of storage and the storage rights,
22 storage accounts for the following season.

23 Q. So to all the storage accounts and storage
24 rights equally?

25 A. According to priority.

1 Q. And how long has that been the practice?

2 Do you know?

3 A. I -- I'm sure it's always been the practice
4 since 1978 when computerized accounting was formalized.
5 I think the practice also occurred prior to that time.

6 Q. And the practice of refilling a storage
7 account on the day of allocation, do you know how long
8 that practice has occurred?

9 A. Could you ask the question again?

10 Q. Yes. The refilling of a storage account on
11 the day of allocation that we talked about a little
12 while ago, I understood that the storage accounts could
13 be refilled if there had been an evacuation prior to
14 the day of allocation and then there had been like a
15 late spring runoff.

16 How long has that practice occurred?

17 A. I think that's always been the practice.

18 MS. MCHUGH: I'd like to mark this document,
19 please.

20 (Exhibit 4 marked.)

21 Q. (BY MS. MCHUGH): You've been handed a
22 document marked Exhibit 4.

23 Have you seen this document before?

24 A. Yes, I have.

25 Q. Can you tell me what it is?

1 A. I think it is a petition to the Court to
2 make a judgment on three issues.

3 Q. And when did you see this document before?

4 A. Oh, I think it was a few weeks ago. Maybe
5 as much as a month ago.

6 Q. Do you recognize this document as being the
7 State of Idaho's Motion for Partial Summary Judgment?

8 A. Yes.

9 Q. And what's your understanding of who filed
10 the document, on behalf of what party?

11 A. My understanding is Michael Orr filed it on
12 behalf of the State of Idaho.

13 Q. Okay. And I'll have you turn to page 2 in
14 that document. And if we could look at issue No. 3.

15 And just for completeness of the record,
16 could you read into the record the entirety of issue
17 No. 3.

18 A. "The following 'refill' remark should be
19 included in the partial decrees for storage water
20 rights Nos. 1-2064 (American Falls Reservoir) and
21 1-2068 (Palisades Reservoir) because it is necessary to
22 define and/or efficiently administer the rights. This
23 right is filled for a given irrigation season when the
24 total quantity of water that has accumulated to storage
25 under this right equals the decreed quantity.

1 Additional water may be stored under this right but
2 such additional storage is incidental and subordinate
3 to all existing and future water rights."

4 Q. Thank you.

5 Have you seen the proposed remark in item
6 No. 3 before?

7 A. Prior to the issuance of this request? No,
8 I haven't.

9 Q. Okay. Did you help prepare this document?

10 A. I've talked to Michael Orr concerning the
11 refill issue and how it's been accounted for in Water
12 District 1.

13 Q. Okay. And on this remark, either in this
14 document or in any other document, have you seen this
15 remark before?

16 A. No.

17 Q. Did you help prepare this remark?

18 A. I helped prepare it in giving the
19 background information as to how the water's been
20 historically administered.

21 Q. So your understanding is that this remark
22 came from the document itself, from the Attorney
23 General's office in preparing the document?

24 A. Yes.

25 Q. Okay. Does this remark capture how refill

1 has been done in Water District 1 under these two water
2 rights?

3 A. Certainly since 1978. And prior to that
4 there's been a few exceptions.

5 Q. Would the inclusion of this remark on water
6 right 1-2064 or 1-2068 alter Water District 1
7 practices?

8 A. No, it wouldn't.

9 Q. How would this remark affect other water
10 rights in Water District 1?

11 A. Well, it wouldn't have any effect, because
12 we would continue the practice of how we've been
13 filling the storage right.

14 Q. Can you explain why this remark would be --
15 do you think this remark would be helpful on water
16 right 1-2064 and 1-2068?

17 A. Yes, I think it would.

18 Q. Can you explain.

19 A. There are some people that would argue that
20 the refill should occur under priority, which in some
21 cases would make the refill senior to existing rights.
22 And that's the change of what we've done historically.
23 This remark would help to clarify that issue.

24 Q. Under this remark, can you explain when
25 refill would occur?

1 A. Yes. As I've explained previously, refill
2 occurs after the reservoir rights have accrued their
3 volume limitation, but physically there's additional
4 storage captured in the system that hasn't been
5 assigned to any particular storage account.

6 Q. And I want to draw your attention
7 specifically to the second sentence in this remark.
8 And it reads, "Additional water may be stored under
9 this right but such additional storage is incidental
10 and subordinate to all existing and future water
11 rights."

12 Can you explain to me your understanding of
13 that sentence.

14 A. Yes. What that means is once the Water
15 District 1 records show that the storage right has been
16 full, that any additional water is allowed to be stored
17 under this right. However, the storage of that water
18 shall not come at the expense of any water right
19 holder.

20 Q. Any current water right holder?

21 A. Any current or future.

22 Q. And is that consistent with how refill
23 occurs currently in Water District 1?

24 A. Yes.

25 Q. Can you explain what the implication would

1 be if the additional stored water would not be
2 subordinate to future water uses.

3 A. There are several things that would change.
4 I'm not sure I have a handle on everything that would
5 occur.

6 The first thing you would have to do is
7 identify which space from which reservoir under which
8 priority is the evacuated space being filled under. I
9 should say refilled under.

10 If you did that, then potentially we would
11 be refilling the 1921 priority or the 1939 priority
12 throughout the entire peak runoff period, which could
13 prevent any water rights junior to those priorities
14 from diverting water for as long as we're refilling
15 previous evacuated space.

16 MS. MCHUGH: That's all the questions I have,
17 actually, at this time. I'm going to turn it over to
18 Jerry to continue.

19 Or do we want to take a quick break?

20 MR. RIGBY: Let me just chew my lozenge. Sorry.

21 MS. MCHUGH: Okay.

22 MR. RIGBY: Okay.

23 ///

24 ///

25 ///

EXAMINATION

1
2 BY MR. RIGBY:

3 Q. Tony my name is Jerry Rigby of Rigby,
4 Anderson & Rigby in Rexburg. And my firm represents
5 what is commonly known as the Upper Valley storage
6 holders in this particular action, which is basically
7 just, I guess, a few of the spaceholders that we
8 represent. Because we represent so many, we've always
9 classified ourselves as just naming a few as basically
10 the typical spaceholders.

11 Do you understand that?

12 A. Yes.

13 Q. And I will tell you my purpose in deposing
14 you today is to attempt to discover exactly how the
15 refill works. And that's strictly my focus. Secondly,
16 my focus is to determine what, if any, changes were to
17 occur, the impact that would cause to my clients or
18 even the seniors.

19 And generally speaking, my clients, for the
20 record, are the juniors. Not in every case, but let's
21 just assume that I'm, in essence, representing a junior
22 spaceholder.

23 Is that okay?

24 A. Yes.

25 Q. Okay. So I just want to make certain you

1 understood where I'm coming from, because we are
2 obviously in discussions at the moment of attempting to
3 find some language that will work. And in doing so, we
4 need to totally understand how this actual refill has
5 worked and how it would work if changes were made.

6 Is that clear?

7 A. Yes.

8 Q. Okay. So with that preface, then, let me
9 go back over -- and Candice did a good job of, I think,
10 addressing the particulars themselves. I want to go
11 over some scenarios and some changes that perhaps might
12 impact either seniors or juniors, and at least what
13 your understanding would be if those changes occurred.

14 But before I do that, let me make certain
15 to go back and address some of the actual mechanisms
16 that you use now and how it really does occur under
17 certain scenarios.

18 So with that, let's start with, as you
19 indicated, my understanding is that the fill on paper
20 is -- once that's done, your program or your
21 computerized model that has run since 1978 is done; is
22 that correct?

23 A. That's correct. After the storage rights
24 have filled, the natural flow that's coming down
25 through the system is not allocated to any of those

1 priorities, because they've met their maximum volume
2 accrual, and it would go to fill perhaps a junior
3 priority after that point.

4 Q. And just to be certain, so for this
5 particular record, although it's been discussed
6 ad nauseam in other depositions as to the program
7 itself, what are we talking about? What do you call
8 the program, the storage program?

9 A. Well, it's the daily water right accounting
10 program is one component.

11 Q. Okay.

12 A. And then the second component that the
13 watermaster uses when he makes his allocation on the
14 day of allocation is the storage report.

15 Q. Okay. So are those the programs when you
16 say these are used to determine when the full
17 allocation occurs?

18 A. Yes.

19 Q. Is there any other tweaking that is done by
20 the watermaster?

21 A. When there's water being spilled past
22 Milner Dam, the computerized water right accounting
23 program doesn't know the reason as to why that water's
24 being spilled past Milner Dam.

25 So there is some decision process by the

1 watermaster that has to essentially be input into the
2 water right accounting program so it knows whether that
3 water was being spilled for flood control or whether it
4 was being spilled for flow augmentation, Idaho Power
5 rental, whatever the purpose may be.

6 Q. Flow augmentation for fish?

7 A. Yes. The computerized accounting, it just
8 sees the storage going past Milner and doesn't
9 understand, you know, what storage that should be
10 charged to or which account.

11 Q. So is it fair to say that the tweaking that
12 would occur manually would be the watermaster
13 determining -- and we'll talk about how that
14 determination is actually made in a moment, but
15 determination of where that water came from, from whose
16 account or for what purpose?

17 A. We usually don't identify, except for flood
18 control, as to which storage account that it came from.
19 But it does also play a role in determining at what
20 point can we cancel irrigation storage that we -- was
21 used upstream from Milner.

22 Q. Okay.

23 A. So those are the two things that I can
24 think of.

25 Q. That's what I was just going to ask.

1 Those are the two major things; right?

2 A. Yes.

3 Q. There may be others, but they're incidental
4 or nominal?

5 A. Yes.

6 Q. Okay. So let's talk about, then, first of
7 all flood control, because if we had a perfect system
8 it would store during the season of storage, and once
9 it's filled, then obviously any drawdowns we wouldn't
10 even have to worry about this particular issue.

11 But because every single year is unique,
12 then we have to deal with scenarios of flood control
13 happening during the same time as storage, happening
14 after the full storage, and even happening after the
15 refill; correct?

16 A. Correct.

17 Q. So I'm going to ask a few scenarios on
18 that, then. Suppose for a moment under the present
19 situation or the present modeling that you run that on
20 paper the system is full, but before the date of
21 allocation there is flood control, which evacuates, as
22 a result of certain reservoirs under the flood control
23 rule curves.

24 And those particular reservoirs are
25 generally which reservoirs?

1 A. Jackson and Palisades are typically the
2 ones that get drawn down for flood control.

3 Q. Correct. And how does that impact -- I
4 know I'm getting off the question. But how does that
5 impact American Falls, then, by their evacuation of
6 flood control?

7 A. It shouldn't affect American Falls at all.

8 Q. Because it's a pass-through?

9 A. Well, not that it's a pass-through. But
10 any reduction to the allocation due to flood control
11 would not be deducted from the American Falls
12 allocation. It would only be deducted from Jackson and
13 Palisades.

14 Q. So American Falls still could be filled on
15 paper, but not physically filled, and the evacuation of
16 those two storages could actually be captured in
17 American Falls; is that correct?

18 A. That's correct.

19 Q. Okay. So now, that evacuation occurs and
20 it's missed the mark. By that I'm saying by missing
21 the mark is that the anticipated runoff doesn't quite
22 refill the evacuation.

23 Isn't it the intent of the evacuation
24 theoretically to still end up with a full reservoir,
25 just not the excess?

1 A. Yes.

2 Q. So it doesn't miss -- under this
3 scenario -- and isn't it true that that happens quite
4 often because it's impossible to make a perfect
5 calculation?

6 A. I don't know what the statistics are, but
7 yes, it's common to refill the evacuated flood-control
8 space.

9 Q. But does it always get filled?

10 A. No. There are some years where the
11 evacuated space does not get filled if it were spilled
12 past Milner.

13 Q. Okay. So now assuming that to be the case,
14 that scenario, how do you make an accounting for that,
15 as far as the evacuation is concerned, because your
16 model itself said the system's full; correct?

17 A. Correct.

18 Q. And now the system isn't physically filled.
19 Who gets the deduction, if you will? From
20 whose water right does that come?

21 A. If we never spilled any water past Milner
22 Dam, the physical contents in the system would be equal
23 to the physical accrual in our accounting. The problem
24 occurs is when storage that was credited towards the
25 storage account on the water right accounting flows

1 past Milner.

2 In the case of flood control, when it comes
3 to the day of allocation, we look at the physical
4 contents, compare that to the amount that was accrued
5 on paper, and the physical contents are less, then we
6 go to the Bureau of Reclamation and ask them to
7 identify which reservoirs that the water that spilled
8 past Milner came from.

9 Generally, in a flood control situation,
10 it's 75 percent of the shortage goes to Palisades,
11 25 percent goes to Jackson, because I believe that's
12 the way it's written into the contracts or that's the
13 Bureau of Reclamation's policy for flood control.

14 Q. And you would need to do that any year that
15 it doesn't physically refill; is that correct?

16 A. That's correct.

17 Q. And you've done that in the past?

18 A. Yes.

19 Q. So now, with that scenario, is it fair to
20 say that the system could be full in the end on date of
21 allocation with the deductions made for Jackson and
22 Palisades, therefore they wouldn't be full?

23 A. I don't understand your question.

24 Q. Okay. Physical fill versus fill on paper.
25 We've already said that even under the present

1 accounting that the system is full, and so therefore
2 your accounting models are done. Now, because of the
3 evacuation, even whatever that comes out, if it
4 actually spills past Milner, then we are actually less
5 in the system, and you're telling me you then contact
6 BOR to determine from whose space that comes, and
7 assuming it to be typical, 75 percent from Palisades
8 and 25 percent from Jackson, then in the end before any
9 diversions or other diversions -- and I'm only limiting
10 this to the evacuation for flood control, then they
11 would be that much less in their actual physical fill;
12 correct?

13 A. When we'd go to make the storage
14 allocations to the placeholders, the Palisades
15 placeholders would share in the shortage. That's
16 75 percent of that shortage.

17 Q. And when does that actual storage
18 allocation occur, again?

19 A. There are three things that have to happen
20 before the day of allocation occurs: One, we have to
21 stop spilling water past Milner. Two, we have to reach
22 our maximum day of storage accrual on paper; in other
23 words, we no longer -- we drop below the point below
24 the most senior priority of unfilled space. And three,
25 we've reached our maximum physical reservoir contents

1 in the system.

2 Once we're sure all three things -- all
3 three of those things have happened, at that point we
4 can make our day of allocation because we know at that
5 point what our shortage is between the amount of
6 accrual we have on paper to the storage accounts and
7 the amount that we have physically in the system above
8 Milner.

9 Q. Okay. So that storage allocation, then,
10 conceivably could end up with all other reservoirs
11 filled except for Jackson and Palisades?

12 A. Correct.

13 Q. Okay. And therefore that's -- and that's
14 the current system; is that correct?

15 A. Yes.

16 Q. Again, I'm going to ask this several times:
17 But the proposed refill remark given by or proposed by
18 the State of Idaho, would that be inconsistent with
19 that practice?

20 A. No, it wouldn't.

21 Q. Okay. Would it give you any additional
22 help in that practice?

23 A. Yes, it would. It would get rid of the
24 argument from others that the refill should occur under
25 priority.

1 Q. Okay. Now, let's continue with that
2 scenario, because we haven't talked about now what
3 happens afterwards when you get a hot, early summer and
4 you get the fresh shed coming down. Now that starts to
5 refill.

6 Where is it refilling, as far as what you
7 do presently?

8 A. It would be refilling in the system. I
9 assume that the scenario you're describing is we
10 initially think we're past the point of allocation, but
11 for some unexpected reason we get additional rain, the
12 diversions all shut off, we store some water physically
13 in the system, that's refill that's occurred in the
14 system, and it's credited towards either the
15 spaceholders of unfilled rights or it's credited
16 towards storage use that has occurred up to that point
17 in time.

18 Q. Okay. Is there any priority between those
19 two?

20 A. No. Only the unfilled rights would accrue
21 under priority. But assuming all the storage rights
22 had been filled, then the watermaster sits down and
23 decides whether that additional refill should be
24 credited towards cancelling previous irrigation storage
25 used by diversions or if it should be used by water

1 spilled for flow augmentation -- I shouldn't use the
2 word "spill." I should say delivered for flow
3 augmentation below Milner, or delivered as storage
4 rental from Idaho Power.

5 Q. But how is that actually done? By that I'm
6 saying you said the watermaster makes that
7 determination.

8 Is there any priority given to any of those
9 three? And you've just given three examples there.

10 A. I don't think there's any written policy as
11 to what the priority of those different examples would
12 be.

13 Q. In actuality, does he give any priority?

14 A. Probably the best thing to do is for me to
15 use an example. I think it was in 2010, we thought we
16 were past the point of any additional capture of
17 surplus water in the reservoir system. We were
18 prepared to make our day of allocation.

19 The Bureau started running water for flow
20 augmentation. They had some quantity available from
21 the rental pool. Let's say it was 150,000 acre-feet.
22 They started running that volume of water.

23 And then either towards the end of them
24 running that volume of water or after they had
25 finished, we got this unexpected runoff and surplus to

1 the water rights that were currently diverting water,
2 we gained some additional storage or refill in the
3 system, and so that enabled us to write off or cancel
4 all the storage used by irrigation diversions and all
5 but a small quantity of the water that had been
6 released for flow augmentation.

7 So in effect, the watermaster made the
8 decision then to cancel the irrigation storage used
9 ahead of the flow augmentation. And the Bureau was
10 okay with that decision, and that's what was done in
11 2010. But I suppose --

12 Q. But that's by policy, then?

13 A. Well, that was the watermaster and the
14 Bureau of Reclamation getting together and agreeing to
15 that procedure. But I suppose it could have been done
16 differently.

17 Q. Okay. So let's ask that same question as
18 to instead of BOR's diversions or releases, let's use
19 that same example for the scenario we use with Jackson
20 and Palisades, so flood control versus actual
21 irrigation diversions. Now you get that additional
22 fresh shed.

23 Does it go back in equally, priority with
24 flood control first, or priority with irrigation? Or
25 is there even a policy on that?

1 A. Well, there isn't a policy. The refill
2 would occur after some storage usage.

3 Q. That's my scenario, that you've used some
4 storage for irrigation and you've also had some flood
5 control diversion or releases. So you're literally
6 down on two different accounts.

7 Now you have an additional fresh shed come
8 in that allows the system to store water while all
9 other water rights are being filled, after all other
10 water rights are being filled, the question is, is
11 there a policy or is there anything that would sort
12 those by priority, or is it just fill them all
13 proportionately? Or do you know?

14 A. Well, it's really difficult because there's
15 so many different scenarios. What it comes down to is
16 when we get to the day of allocation, we look at the
17 balance between what storage has accrued on paper, and
18 we allocate to that first.

19 If there's additional water physically in
20 the system, at that point then you make your decision
21 as to which storage use you want to cancel.

22 Q. But again, I'm trying to get to the
23 decision. If you don't know, I understand. I'm just
24 asking you, you just said you make your decision. I'm
25 trying to get to how that decision is made.

1 A. Yeah, I -- I don't know what scenarios
2 could possibly happen. The ones in the past I
3 understand prior to flow augmentation it was a pretty
4 simple process. We would just simply cancel the
5 storage usage, wherever it may be. We didn't have to
6 decide whether it was flow augmentation, storage
7 diversion, through canals.

8 Q. Flood control?

9 A. Well, with flood control, the only time we
10 have to deduct for flood control is when the water is
11 going out past the system. At that point we'd be
12 spilling water past Milner. And so any irrigation
13 diversion that was diverting water at that time while
14 we were spilling, we automatically cancel that.

15 If you carry that through, you can say by
16 the cancelling of that it actually increases the burden
17 of refilling the flood-control space, but that's the
18 way it's worked.

19 Q. And again, just for clarity in the record,
20 flood control in those reservoirs are pursuant to their
21 contracts, is that not?

22 A. That's correct.

23 Q. So in essence, it comes with the water
24 right? I mean you could say priority dates,
25 flood-control curves, that all comes with each

1 particular contract; is that correct?

2 A. I think so. The contracts I've seen it's
3 written in there that the Bureau would try to maximize
4 the storage captured in the reservoirs. However,
5 because of flood control or whatever operations they
6 have, if that causes a shortage, then the spaceholders
7 share in that shortage.

8 Q. Okay. Now, I don't want to belabor it, and
9 I just have one more line of questions on this one and
10 then I'll move off of it.

11 The actual refilling, if you will,
12 recapturing in the system, is it -- and I used the word
13 even before when I had discussions with you -- share
14 and share alike? Is it based at all upon the source,
15 for example, American Falls perhaps has a different
16 source of recapturing some of the fresh shed versus
17 some of the other reservoirs, such as Ririe, that has a
18 very, you know, small area for a source? Or do you
19 just put it all on paper and then it goes equally out
20 to all the space users pursuant to their percentages?
21 Because physically it's going to be in a different
22 location, as you capture it.

23 A. Yes. Again, because water is held in
24 different reservoirs, we go back to the day of
25 allocation. When we know how much storage is filled on

1 paper, accrued on paper according to the water rights,
2 we know how much water is physically in the system, if
3 there's a difference, if there's a shortage of water
4 physically in the system, we try to identify what was
5 the cause of that shortage.

6 If it was flood control -- generally it's
7 Jackson and Palisades -- that shortage would be shared
8 by all spaceholders in Palisades. The way it's done in
9 the water right accounting and in the allocation is
10 that let's say due to flood control, even though that
11 the Palisades storage right filled to 100 percent on
12 paper, because of the evacuation of flood-control space
13 that didn't refill, let's say the -- we were able to
14 allocate 95 percent to Palisades spaceholders, then
15 each Palisades spaceholder gets allocated 95 percent.
16 Doesn't matter how much water they had carried over
17 from the previous year.

18 We've had a situation in one year where
19 someone carried over their full allocation in Palisades
20 from the previous year and were actually allocated less
21 water the following year because of a flood-control
22 operation that didn't refill completely.

23 Q. Okay. So now moving off then of this line
24 of questioning into if a change occurred, especially
25 the issue of priority given on the refill, because your

1 accounting system right now does not address the
2 evacuation, either for flood control, irrigation, or
3 fish flow augmentation, then if the priority system
4 continued and always was in effect, assume for a moment
5 the scenario that a flood control occurred prior to the
6 actual fill on paper -- so in other words, your model
7 is still up and running -- and your model is now
8 tweaked to say that it would have filled and your model
9 would have been done, but because of flood control it
10 hasn't filled, and therefore the priority date
11 continues. And let's say that as a result of an error
12 in calculation the evacuation was such that there never
13 is a refill of that space.

14 What would that do to the junior users and
15 their storage rights that would otherwise have occurred
16 under the present situation? Is that clear enough?

17 A. Yes. If we identified the storage that was
18 spilled out the end of the system and refilled that
19 under priority, and in the situation you described is
20 they've missed --

21 Q. Missed the mark.

22 A. -- the amount that they thought they could
23 refill.

24 So whatever that time period was between
25 the time that they cease -- or I should say they were

1 evacuating the space up until the time you reach your
2 maximum accrual, the priority date that we were
3 delivering would never jump above that priority date
4 for the space we were refilling.

5 Q. I.e., a 1921?

6 A. 1921.

7 So potentially if you were dumping water
8 out of American Falls Reservoir for whatever reason and
9 we were to refill that under the 1921 priority, you
10 could get yourself into a situation where if you knew
11 that we had a well above average snowpack and you
12 wouldn't have to refill American Falls Reservoir until
13 June, they could wait all the way until the month of
14 June to fill that.

15 And the net effect of that is we would only
16 be delivering the 1921 priority during the peak runoff
17 in a much -- much above average water year. During
18 that time period they were refilling the reservoir in
19 June.

20 Q. And so therefore, the obvious question for
21 the juniors is, is that a substantial impact to them,
22 or could it be?

23 A. Well, if you had a right that was junior to
24 1921 and where historically you had diverted water in
25 June during the peak runoff, if we changed the way we

1 did things and that situation occurred, then those
2 junior rights would be curtailed until the American
3 Falls Reservoir refilled completely under their
4 priority.

5 Q. And even if there was the snowpack that
6 substantiated the original evacuation for flood
7 control, even if it was there and it came off so late,
8 they would not be able to have diverted stored water
9 until the 1921 was completely filled again; is that
10 correct?

11 A. Well, they wouldn't be able to divert
12 natural flow under their junior priority --

13 Q. I'm sorry.

14 A. -- until American Falls Reservoir was
15 filled.

16 Q. That's right. So in addressing the issue
17 of priority on the second fill, do you know of any
18 scenario where a priority system would not -- I mean
19 would not injure the junior spaceholders from the way
20 it's being conducted pursuant to your modeling?

21 A. Can you ask the question again?

22 Q. Do you know of any way a priority system
23 that would continue or be used in a refill that would
24 not impact the juniors substantially?

25 A. Yes. In the situation -- let's assume that

1 we did allow refill under priority for water that was
2 dumped for whatever reason, flood control, whatever
3 reason, and the reservoir system did refill completely
4 100 percent, anyone that -- any junior user that used
5 storage instead of natural flow that otherwise would
6 have been available to them would have gotten cancelled
7 under that situation.

8 Q. Okay. So that's the case when it fills
9 completely.

10 But if it does not fill completely, would
11 they be impacted differently and substantially
12 differently than they are now?

13 A. Yes.

14 Q. Now, you indicated that although you didn't
15 write the actual proposed remark that you at least were
16 interviewed or discussed this with the State of Idaho.

17 Is there anything in here that doesn't go
18 far enough to address your particular concerns, like
19 you say you've heard comments of others that said they
20 would rather have the priority on the refill and this
21 would help to keep the present system in place, is
22 there anything in here that does not go far enough to
23 protect your present system, or do you have questions
24 in your present system that need to be answered still
25 and perhaps a remark could help there?

1 A. None that I can think of. I -- I don't
2 think I can improve this remark at all.

3 Q. And as asked by her, but I'll ask again, is
4 this necessary?

5 MR. BROMLEY: Excuse me, Tony, just for
6 clarification, did you say "approve" or "improve"?

7 THE WITNESS: "Improve."

8 MR. BROMLEY: Thank you.

9 MR. RIGBY: Thanks.

10 Q. And therefore, again, the question is, do
11 you think this is necessary and should be included
12 within the remarks and the water right of both the
13 water right No. 2064 and 2068?

14 A. Well, I don't think it's necessary, because
15 that's the way we've always done it under the existing
16 right, even without this remark.

17 Q. But if that present system that you've been
18 administering and managing is challenged, would this
19 help you in continuing to manage it the way you're
20 doing it now?

21 A. Yes.

22 Q. Okay. I just need a minute.

23 MS. MCHUGH: I was just going to say we need a
24 break.

25 Q. (BY MR. RIGBY): If the language were taken

1 out at the very end of the remark, the proposed remark,
2 quote, "and future water rights," end quote, what would
3 that do to change your present system? By that I'm
4 saying what would that do to any future water rights,
5 in your opinion?

6 A. Well, as long as the reservoir system
7 wasn't full, there would be the potential there that we
8 would always be filling the unfilled reservoir storage
9 rights ahead of any junior water rights.

10 Q. And as far as the storage itself is
11 concerned, you indicated that for the most part most of
12 the time the storage doesn't occur after the date of
13 allocation until the October season. Why? Because of
14 the high demand. But isn't that the real issue: It's
15 because of the high demand. Not because they couldn't
16 fill, but it's because they generally don't fill
17 because of the high demand for natural flow that has
18 priority?

19 A. That's correct. Even in the driest of
20 years, if the canals didn't divert any water through
21 July, we could still fill the reservoir system.

22 MR. RIGBY: Okay. I don't think I have any
23 further questions.

24 MS. McHUGH: Can we take a break?

25 MR. ORR: It's okay with me.

1 MR. BROMLEY: It's 11:15.

2 MS. MCHUGH: Keep going?

3 MR. BROMLEY: Tony, is that okay?

4 THE WITNESS: Yeah.

5 MS. MCHUGH: That's fine.

6 MR. ORR: I just have some clarification
7 questions to ask. I didn't want to open up anything
8 new here.

9

10 EXAMINATION

11 BY MR. ORR:

12 Q. So, Tony, just for the record, I'll state
13 it. I'm Michael Orr, the Attorney General's office. I
14 represent the State of Idaho in this subcase.

15 And looking at my notes here going back
16 over some of your answers, I believe you were asked if
17 the Attorney General represented you in this deposition
18 and in this matter. And I just want to clarify a point
19 there that I represent the State.

20 Do you understand I do not represent you or
21 Water District 1 in this matter; correct?

22 A. Yes.

23 Q. A little earlier I believe you said, "When
24 surplus water comes into the reservoir the evacuated
25 space can sometimes refill physically. That's my

1 definition of refill."

2 So if I understand you correctly, when you
3 use the term "refill" you're talking about physically
4 refilling reservoir space?

5 A. Yes.

6 Q. And then also in response to some earlier
7 questions, I believe you referred to the "capacity,"
8 quote, of the water right. So what I'd like you to do
9 is look at Exhibits 2 and 3. I believe those are
10 recommended partial decrees for the two water rights at
11 issue here. I don't see an entry on these water rights
12 for capacity.

13 Can you clarify for me what you're talking
14 about when you use the term "capacity."

15 A. Well, rather than use the term "capacity,"
16 I should have said "quantity." But the quantity is
17 generally the active capacity of the reservoir.

18 Q. So when you referred to the capacity of the
19 water right earlier, what you really meant was the
20 quantity element of the water right?

21 A. Correct.

22 Q. And with that answer you just gave me,
23 would that also apply to your references to the volume
24 or maximum volume of a water right? When you made
25 reference to the maximum volume of these water rights,

1 were you referring to the quantity element of these
2 water rights?

3 A. Yes.

4 Q. One of the questions asked you was, quote,
5 "Does Water District 1 recognize refill of storage
6 water rights in priority?"

7 And your answer to that, I believe, per my
8 notes was "No, it does not."

9 So do I understand that to mean that you do
10 not allow reservoirs to refill ahead of the first fill
11 of junior water rights? If you don't understand how I
12 put it, I'll try it again.

13 A. Please.

14 Q. Okay. In Water District 1 you say you do
15 not recognize refill of storage water rights in
16 priority.

17 So if a storage water right has filled,
18 does Water District 1 allow any further accumulation
19 under that right before the fill of junior water
20 rights?

21 A. No.

22 Q. Another point of clarification. A couple
23 times earlier you referred to the, quote, "senior
24 reservoir," unquote.

25 My understanding of seniority is that it

1 applies to the water right, and granted water rights
2 often identify reservoirs. But when you refer to
3 senior reservoir, did you actually mean the reservoir
4 had a senior water right?

5 A. Yes.

6 Q. There was some discussion of your
7 familiarity with the remark that is identified in
8 Exhibit 1, the Notice of Deposition, and in Exhibit 4,
9 State's Motion for Partial Summary Judgment, the refill
10 remark.

11 Do you recall speaking to me regarding what
12 might be an appropriate refill remark I believe several
13 months ago? I believe we had some telephone calls.

14 A. Yes.

15 Q. And do you recall me proposing language to
16 you for a refill remark and asking you whether it would
17 be consistent with how the system is currently
18 administered and your understanding of the storage
19 water rights?

20 A. Yes.

21 Q. And this remark in Exhibit 1 and Exhibit 4,
22 does that appear to you to be the same remark, the same
23 language, based on your memory, that we discussed in
24 those telephone calls?

25 A. Yes. I can't remember if it was word for

1 word, but yes.

2 Q. In response to one question I believe you
3 said there are some people that would argue that refill
4 should occur under priority, which in some cases would
5 make the refill seem to existing rights.

6 Given that, if this remark in Exhibit 1 and
7 Exhibit 4 were included on the storage water rights,
8 would that remark facilitate administration for
9 purposes of resolving the argument some people had that
10 refill should occur under priority?

11 A. Yes.

12 Q. You also referred to spills past Milner Dam
13 and that the computerized water right accounting
14 program doesn't know the reason why that water is being
15 spilled past Milner.

16 Why is that important or why is the fact
17 that the computer program doesn't know why it's
18 spilling past Milner important?

19 A. Well, I don't think it's important to the
20 accounting program itself. It's important to the
21 administration and the ultimate allocation of how much
22 water is allocated to the storage rights and how much
23 water is cancelled by the storage usage that was
24 occurring during the time that storage is passing
25 Milner.

1 Q. So would I be correct in saying that the
2 reason it's important that the program doesn't know why
3 the water is being spilled past Milner Dam, what that
4 means is that the program doesn't allocate spills to
5 any given account or right --

6 A. That's --

7 Q. -- the watermaster has to do that himself?

8 A. Yes.

9 Q. Okay. Now, Tony, my understanding is --
10 going back to that same question -- the ultimate reason
11 that's important is that Water District 1 strives to or
12 has to account for all water in the system as either
13 natural flow or storage; is that correct?

14 A. Yes.

15 Q. I believe Mr. Rigby asked you that in the
16 scenario where all storage water rights had been filled
17 and you have refill in the reservoir system due to some
18 evacuation, I believe he asked you how does the
19 watermaster determine whether the cancelling should be
20 allocated to irrigation use or flow augmentation or
21 whatever.

22 And in that discussion Mr. Rigby asked is
23 there any priority given to those three, and the three
24 examples you've just given me, referring to flow
25 augmentation, prior irrigation use, et cetera. The use

1 of the word "priority" in that sense I understood to
2 mean preference or basis for a decision, not a priority
3 date.

4 Do you recall that discussion? Can you
5 enlighten me any on that?

6 A. Yes. It's -- I understood the question as
7 being the sequence at which we distribute the refill.

8 Q. In other words, the criteria for that
9 distribution?

10 A. Yes.

11 Q. But not a reference to the priority date
12 element of a water right?

13 A. Yes.

14 Q. And there was another point that I think
15 Mr. Bromley clarified, but I just want to touch on it
16 again. My notes say that at one point, "I don't think
17 I can approve this remark at all," that you made that
18 statement in regards to the remark in Exhibit 1 and
19 Exhibit 4.

20 So I'll just ask you, can you approve of
21 the remark proposed in Exhibit 1 and Exhibit 4, the
22 refill remark?

23 A. Yes, I think I -- if someone misunderstood,
24 I said -- used the word "improve," not "approve." But
25 yes, I would approve the remarks.

1 Q. Sure. And I understand that. It's just an
2 important point. I want to make sure the record's
3 clear on that.

4 And I believe you also said that you don't
5 think this remark is necessary in the water rights, but
6 then Mr. Rigby asked you if the present system
7 management and administration is challenged, would this
8 remark help you in continuing to manage it the way you
9 do now. And I believe you answered yes.

10 The question I had was, although you don't
11 think this remark is necessary in one sense to allow
12 you to continue past administration, what is your
13 understanding of the legal authority for storing water
14 when the storage rights had already been filled
15 previously? And I'll try to rephrase that question if
16 it came out funny.

17 A. Yes. And that's probably another reason
18 for the remark that I haven't discussed in the other
19 questioning is that there are some people that believe
20 that once we have filled the storage right on paper
21 that perhaps the reservoirs above Milner don't have a
22 right to capture this surplus storage or refill or
23 whatever words that you tack onto it.

24 So that would be the other purpose of this
25 remark, to clarify that we would have the right to

1 store water in addition to the amount that we
2 previously stored.

3 Q. I believe Mr. Rigby asked you that if the
4 remark language that was proposed here in Exhibit 1 and
5 Exhibit 4, if the second sentence was taken out, the
6 sentence that says, "Additional water may be stored
7 under this right, but such additional storage is
8 incidental and subordinate to existing and future water
9 rights," if that sentence was taken out, I believe
10 Mr. Rigby asked you, "What would that do to change your
11 present system?"

12 Now, my notes say that your answer to that
13 was, "As long as the reservoir system wasn't full,
14 there would be the potential that we'd always be
15 filling the unfilled reservoir storage rights ahead of
16 any junior water rights."

17 Now, just to be clear on this, a senior
18 reservoir storage right should be filled ahead of the
19 junior water right, should it not?

20 A. Yes.

21 Q. So if we took this second sentence out, as
22 Mr. Rigby postulated, would I be correct in thinking
23 that what would be the potential was that you would be
24 refilling the reservoir or the storage rights ahead of
25 junior water rights rather than filling?

1 A. Yes.

2 MR. ORR: That's all I have at the moment.
3 Thank you.

4 MS. MCHUGH: I do have some questions, and I
5 don't know if it makes sense for me to do it because I
6 can imagine me getting different things than maybe you
7 would want, and have those of us that are on board with
8 the condition go first and you go second, or I can wait
9 until the very end. It doesn't matter.

10 MR. SIMPSON: So I'm not on board with the
11 condition; is that what you're saying?

12 MS. MCHUGH: Well, anyway, there you go. Those
13 of us that called for the deposition today and the
14 person on there. So I guess what I'm asking is --

15 MR. SIMPSON: Sure, if you'd like to go again,
16 that's fine.

17 MS. MCHUGH: I just had a couple.

18

19 FURTHER EXAMINATION

20 BY MS. MCHUGH:

21 Q. Tony, this is Candice again. And I think
22 after hearing the different questions, I think I have
23 four scenarios that I need to clarify in order to
24 understand the refill. And hopefully this will help
25 clarify my understanding.

1 And the first scenario is when we refill
2 after the day of allocation and there had not been a
3 full system prior to the day of allocation, so some
4 water rights had gone unfilled.

5 Do you understand that scenario so far?
6 Are you following my example?

7 A. I might stop you before you go any further
8 because --

9 Q. Okay.

10 A. -- there wouldn't be any refill after the
11 day of allocation because the definition of the "day of
12 allocation" is that it happens after all refill has
13 already happened.

14 Q. Good point of clarification. So I
15 understood that there were times when there could be
16 refill of the reservoir physically after the day of
17 allocation had occurred.

18 A. Well, when that's happened, we've -- we've
19 underestimated how much water was going to come down.
20 And the decision we made, we thought that it was the
21 day of allocation, but it turned out that it was some
22 point later in time after an additional amount of water
23 came down through the system.

24 Q. Okay. That's helpful. Thank you.

25 And is it fair to say that the only refill

1 after the day of allocation would be in late October?

2 A. No. I wouldn't characterize it as refill
3 in October. I would characterize it as new fill for
4 the next irrigation season.

5 MS. MCHUGH: Okay. That's the clarification I
6 wanted. Thank you.

7 MR. RIGBY: John, do you want to come up here?

8 MR. SIMPSON: No. I think I'm okay from way
9 back here. That way I won't impart the cold that I got
10 from someone.

11

12 EXAMINATION

13 BY MR. SIMPSON:

14 Q. Good morning, Tony. My name is John
15 Simpson, and I represent a number of entities which
16 have, as you know, American Falls space, Palisades
17 space, and Jackson space. So I'll try to be brief, but
18 I don't know if I can after what I'm enduring.

19 You made a comment or testified that
20 generally the intent is to maximize the amount of water
21 above Milner to make it available for the water users
22 within Water District 1.

23 Do you recall that comment? Is that a fair
24 statement of your testimony?

25 A. Yes.

1 Q. And likewise, would it be then the intent
2 of the water district to maximize the amount of storage
3 that occurs within the reservoirs in any one season and
4 in order to make that available to the spaceholders?

5 A. Could you repeat that question?

6 Q. Likewise, in continuing your statement
7 regarding maximizing the amount of water available for
8 the water users above Milner, is it also the intent to
9 maximize the amount of storage that is retained in the
10 reservoirs above Milner in any one irrigation season?

11 A. Yeah, that's not Water District 1's goal.
12 I always assumed that was the Bureau of Reclamation's
13 goal.

14 Q. Okay. And so Water District 1's goal is to
15 then what, with respect to the storing of water within
16 the reservoirs?

17 A. Yes. We're responsible for accounting for
18 the accrual into those reservoirs.

19 Q. Okay. And so the more water we can store
20 in the reservoirs above Milner, then the more water we
21 have available for the spaceholders; correct?

22 A. Correct.

23 Q. And would it be fair to say that in your
24 view that's one reason that refill needs to be
25 recognized?

1 A. Yes, that's a benefit to the water users
2 above Milner Dam.

3 Q. And so if water is -- we've used the
4 concept of evacuating space, and you may not have
5 identified the different types of evacuation that have
6 occurred and distinguished between those. And I think
7 we've talked about flood control and we've talked about
8 irrigation use and we've talked about water that's
9 delivered for flow augmentation. And I guess in
10 addition we've talked about water that's rented for
11 other uses below Milner as well.

12 Are there any other uses of water that
13 would be included in your definition of "evacuation of
14 space"?

15 A. For the release of water past Milner, I
16 think those are the only reasons I can think of.

17 Q. Okay. And so if water's released for flood
18 control, would it be fair to say that that water was
19 not available to the spaceholder?

20 A. No, it's available to the spaceholder until
21 that water passes Milner Dam.

22 Q. So it's available to them as storage or as
23 natural flow?

24 A. As storage.

25 Q. And so if that water is released at

1 American Falls, would it be available to a spaceholder
2 above American Falls?

3 A. As long as it doesn't pass Milner Dam, yes.

4 Q. So they could call for it as it's being
5 released out of American Falls? Or I guess are you
6 describing the occurrence where if a diversion above
7 American Falls needed water, even though there was a
8 flood-control release occurring, they could call for
9 that water?

10 A. Yes.

11 Q. Okay. And it would be delivered to them in
12 the form of storage?

13 A. Well, it depends on the water right of the
14 person calling for the water. If they were in
15 priority, it would be natural flow. If they were out
16 of priority, then it would be storage water.

17 Q. Okay. And so if in the event that there
18 wasn't demand for water at the time of the flood
19 control event, then it wouldn't be charged as natural
20 flow to anyone because they didn't call for it, but it
21 would still be charged as storage to certain accounts
22 because of it being called storage and allocated
23 storage?

24 A. And what's your question?

25 Q. Is that right?

1 A. Yes. Under the assumption that you don't
2 have any irrigation diversions going on and there's
3 natural flow coming down the system and there's no
4 release past Milner, all of that water would be accrued
5 to an unfilled storage account.

6 Q. Okay. And at the time that flood control
7 event occurs, you have no way of knowing what account
8 it's being charged to because the date of allocation
9 hasn't occurred?

10 A. That's correct.

11 Q. And so likewise, if there's a diversion
12 above Milner, they don't know if at that particular
13 point in time of a flood-control release, they don't
14 know if that's their water that's being charged to them
15 that's being released or not?

16 A. That's correct.

17 Q. So with respect to after a flood-control
18 event has occurred, then there's space available to
19 receive additional water for storage; correct?

20 A. Only if the water left the system.

21 Q. If it wasn't stored in a lower reservoir
22 from which it was released?

23 A. Correct.

24 Q. Okay. And if it left the system, then
25 there would be space available; correct?

1 A. Correct.

2 Q. And if it left the system, then under what
3 priority would that space refill?

4 A. It doesn't refill under a priority. What
5 it does is that it reduces the difference between the
6 paper storage that was stored into the storage accounts
7 and the physical storage in the system at the time.

8 Q. Understand. Are there any conditions to
9 that water then being -- then additional water being
10 stored in the space that was previously evacuated?

11 A. No.

12 Q. So if the water's in the river, it can be
13 stored?

14 A. Well, we allocate to whichever water rights
15 are diverting water. And if the natural-flow supply
16 exceeds the amount of demand by the water rights, the
17 net effect is the physical storage in the reservoir
18 increases.

19 Q. And is that a written policy that the water
20 district has?

21 A. No. It's a physical occurrence. It's
22 just -- it's what happens. You receive additional
23 storage, but under the scenario where all the storage
24 accounts have been filled, there's nowhere for that
25 additional storage to have accrued to any storage

1 account. It simply offsets the amount that has been
2 spilled out the end of the system.

3 Q. I understand. Again, when you say
4 "accrual" in that answer, you're talking about paper
5 accrual?

6 A. Correct.

7 Q. Okay. Does the water district have a
8 manual or any written policy on how water is accounted
9 for or how refill occurs?

10 A. There's the FORTRAN code in the accounting
11 program itself. And there are different various memos,
12 manuals that have been written over time. But I don't
13 believe there's a one manual that describes every
14 policy and procedure contained in the water right
15 accounting program.

16 Q. Okay. And those manuals or procedures that
17 you just described, do you have copies of those?

18 A. Most of those were compiled by Bob Sutter,
19 who was the main author of the computerized accounting
20 program. And I have some of those. I'm not sure if I
21 have all of them.

22 Q. If you didn't have copies of all those, who
23 would?

24 A. They would be in the Department of Water
25 Resources stored in the -- probably the hydrology

1 section in the State office in Boise.

2 MR. SIMPSON: Chris, do you have copies of
3 those, or do you have that storage box?

4 MR. BROMLEY: Storage in storage box?

5 MR. SIMPSON: Yeah. What Tony's describing, do
6 you have those?

7 MR. BROMLEY: John, I don't know. And Tony
8 wasn't asked to bring documents.

9 MR. SIMPSON: I know. I understand.

10 MR. BROMLEY: John, I haven't --

11 MR. SIMPSON: But you can make those available
12 if we requested, though?

13 MR. BROMLEY: If you're interested, John, we can
14 certainly look around and see what we got.

15 Q. (BY MR. SIMPSON): And otherwise, Tony, you
16 do have some of those at your office in Idaho Falls?

17 A. Yes.

18 Q. Okay. Tony, with respect to flood control,
19 you made a couple statements that flood control
20 typically occurs at Palisades and Jackson; correct?

21 A. Correct.

22 Q. Under those priorities; correct?

23 A. I don't understand the question.

24 Q. Well, those reservoirs have a priority for
25 storage; correct?

1 A. Yes.

2 Q. Okay. And flood control is authorized at
3 Palisades; correct?

4 A. I think flood control is a requirement that
5 the Bureau of Reclamation has.

6 Q. Okay. At Palisades?

7 A. At Palisades.

8 Q. And at Jackson?

9 A. And at Jackson.

10 Q. Does American Falls Reservoir have a flood
11 control rule curve?

12 A. No, I don't believe it does.

13 Q. So to the best of your understanding, is
14 American Falls operated for flood control?

15 A. It depends on how you define "flood
16 control." Not in the same way that it's regulated for
17 flood control in Palisades and Jackson. But for
18 example, this year the Bureau's releasing water out of
19 American Falls in order to keep the level of the
20 reservoir below the new riprap work.

21 Q. Right.

22 A. And whether you consider that a flood
23 control or reservoir operation, I don't know what
24 definition it would fall under.

25 Q. Okay. But to the best of your

1 understanding, that flood control, the water that's
2 being released out of American Falls, that's not being
3 done pursuant to a flood control rule curve at American
4 Falls; is that correct?

5 A. Correct.

6 Q. Okay. And so under typical operations
7 American Falls wouldn't by itself be operated for flood
8 control.

9 Would it be fair to say that it's operated
10 as a part of the entire system above Milner?

11 A. Yes.

12 Q. So if Jackson or Palisades dictated a
13 flood-control operation or release, there may be
14 circumstances where that water is released out of
15 American Falls instead of releasing it out of Palisades
16 or Jackson?

17 A. Physically, no. The purpose of a
18 flood-control operation at Palisades and Jackson is to
19 physically draw down the contents to a certain level
20 based on the snowpack that's above it.

21 Q. Okay. So water that on paper is allocated
22 to American Falls spaceholders may be contained in
23 Palisades or Jackson and then may be released because
24 of a flood control rule curve at either Palisades or
25 Jackson?

1 A. Yes.

2 Q. Okay. In response to some questions by
3 Mr. Rigby, he was, I believe, working through a
4 scenario that referenced a refill priority of 1921.

5 That would be the priority from American
6 Falls; correct?

7 A. Yes.

8 Q. Do you recall that line of questioning by
9 Mr. Rigby?

10 A. Yes.

11 Q. Okay. Do you recall that, again, that was
12 following a flood-control release scenario that
13 Mr. Rigby was talking to you about?

14 A. No. If I remember correctly, I was
15 thinking that it could be a release for any reason.

16 Q. "For any reason" being flow augmentation or
17 irrigation use or flood control?

18 A. Best example I can use is the current
19 situation where there's currently 3,000 cfs going past
20 Milner, but there's currently no flood-control
21 operation going on in either Jackson or Palisades. And
22 so I suppose someone could identify that storage going
23 past Milner as coming out of American Falls.

24 And if we allowed for the refill of that
25 evacuated space under priority, then the refill would

1 come under the 1921 priority, which is the example that
2 I was addressing with Mr. Rigby's question.

3 Q. Even if on paper there's American Falls
4 space has filled in Palisades or Jackson?

5 A. Well, he was -- he was asking me if we
6 allowed refill under priority. We're assuming that for
7 some reason the storage in American Falls has been
8 released and we're refilling under the 1921 priority.

9 Q. Except for an irrigation use at American
10 Falls, can you identify for me how a refill would occur
11 under a 1921 priority?

12 A. Yes. Apparently, again using the current
13 situation that we have, we're on paper -- if you looked
14 at paper, we're -- every -- all the natural flow that
15 arises above American Falls under the 1921 priority is
16 accruing or adding to the American Falls storage
17 account in our paper accounting.

18 Physically however, the Bureau has decided
19 to keep the level at American Falls Reservoir at a
20 constant rate, so essentially they're passing through
21 that water and it's going out the end of the system
22 that currently is accruing to our 1921 space in
23 American Falls.

24 Mr. Rigby's question, I thought, was what
25 if we were to refill that space that's being currently

1 evacuated under the 1921 priority, what would be the
2 effect of that.

3 Q. I guess I'm a little confused, Tony,
4 because right now is the '21 right filled on paper?

5 A. I don't -- I don't know. I don't think so.
6 We don't start running our computerized accounting
7 until around the 1st of April.

8 Q. I mean if you added up the priorities prior
9 to '21 and included the '21 priority at American Falls,
10 is there, on paper, fill in excess to that number, just
11 roughly speaking?

12 A. No. I would say potentially there's a good
13 chance that American Falls' storage right is full
14 100 percent on paper at this time or in the near
15 future.

16 Q. Okay. So then I'll add to Mr. Rigby's
17 scenario, because I'm just trying to understand.

18 If today on paper the '21 right is filled,
19 even though water is being released out of American
20 Falls and there's no flood control, you said, so then
21 under what priority date would American Falls be
22 filling?

23 A. If the storage right were full --

24 Q. On paper.

25 A. -- on paper. And you're asking under what

1 right would the physical water in American Falls --

2 Q. Be retained.

3 A. -- be retained?

4 Q. Uh-huh.

5 A. It would either be retained by some other
6 unfilled storage account --

7 Q. 1939, for example.

8 A. Yes.

9 Q. The Palisades right.

10 A. Yes. But the natural flow that arises
11 below Palisades and Island Park can't go to fill those
12 rights on paper. And so what you would have, I think,
13 in the scenario you're describing is that American
14 Falls' contents increase. That is what we call
15 unallocated or unaccounted-for storage physically
16 captured in the system but not under any priority.

17 Q. Okay. And so unallocated storage that is
18 captured is temporarily given the priority of the
19 reservoir that it's captured in; is that fair?

20 A. No. It's not getting any priority.

21 Q. Well, it's got to be stored under some
22 priority, though. Maybe I'm making this too
23 complicated. But I understand what you just said with
24 respect to unallocated storage. It's called
25 unallocated storage because American Falls storage is

1 already filled on paper, so you can't give that storage
2 a home.

3 But would it be fair to say you're still
4 storing it under some priority?

5 A. No. And that's -- that's the purpose of
6 the second sentence in this refill remark. It allows
7 you to refill that storage above and beyond what the
8 amount was described in the water right.

9 Q. So under that second remark when it says
10 "Additional water may be stored under this right," so
11 it's being stored under the '21 right? If this remark
12 were to attach to 2064, it would be being stored under
13 the '21 priority?

14 A. My take on it is it would be stored in
15 American Falls Reservoir, but not necessarily under the
16 1921 priority.

17 Q. Well, again, you're using this remark, the
18 second sentence, as the basis for storing unallocated
19 storage?

20 A. That's right.

21 Q. Right. And so when it says under this
22 right, whatever this remark attaches to, it will be
23 attached to a right with a priority date, correct, as
24 one of the elements of the water right?

25 A. I think the purpose of the remark was to

1 allow for the additional storage of water beyond the
2 quantity described in the right. What you described as
3 far as priority, I don't -- I don't think that was
4 taken into consideration.

5 Q. By you as looking at this, or by the State
6 in your discussions with them?

7 A. I was under the impression that this remark
8 described the additional storage that was captured
9 physically in the reservoir system beyond the quantity
10 that was previously stored under the right.

11 Q. So in this remark where it says "Additional
12 water may be stored under this right," are you then
13 saying that this right has a different priority under a
14 first fill than a second fill, in your view?

15 A. Yes. The priority would be subordinate to
16 all other existing and future rights.

17 Q. And if that's the case, would that maximize
18 the fill of the reservoir system?

19 A. No. The effect would be it would maximize
20 the total amount of water available to water users, not
21 just storage users above Milner.

22 Q. And is it correct to say that it's your
23 view that that's how it's been done since 1978, since
24 the accounting program identified this as the protocol
25 for storing additional water?

1 A. Yes.

2 Q. Okay. And prior to 1978, is it your
3 testimony that that was not always the case?

4 A. Yes.

5 Q. Okay. So prior to 1978, prior to the
6 accounting program making that change, the protocol
7 that we just described, refill did occur in the system;
8 correct?

9 A. Yes.

10 Q. Okay. And how did refill occur in the
11 system prior to 1978?

12 A. I think it occurred very similar to how we
13 currently account for the water. It's difficult to
14 tell because I don't think the watermaster began his
15 administration until they had reached the point of
16 maximum reservoir contents in many of the years, so it
17 would be difficult to tell.

18 The one main difference is that both Lynn
19 Crandall and Henry Eagle --

20 Q. And they're the watermasters prior to --

21 A. They were the watermasters prior to around
22 1969, 1968.

23 Q. Okay.

24 A. They allowed -- when Palisades was built,
25 they allowed for the refill of American Falls storage

1 ahead of the initial fill of the Palisades storage
2 right. I think that's the only exception.

3 And then that practice was stopped by Art
4 Larsen, the watermaster after Henry Eagle, prior to the
5 time the water right accounting was developed.

6 Q. So at that time, to the best of your
7 understanding, was the fill of space following a
8 flood-control release handled differently than the
9 refill of space following an irrigation use?

10 A. Which time period are you talking about?

11 Q. Prior to '78.

12 A. And what was the question?

13 Q. Was the fill of space previously evacuated
14 for flood control handled differently than the refill
15 of space following an irrigation use?

16 A. I don't think so.

17 Q. That is, prior to '78 there were times
18 where it was just done by priority?

19 A. Prior to 1978, I -- it appears to me that
20 most of the time they would wait until they reached the
21 day of maximum reservoir contents and would simply
22 allocate based on that. How they distributed the flood
23 control, I'm not sure.

24 But as they were spilling water past Milner
25 for flood control or whatever reason, storage usage was

1 cancelled, just as it is today.

2 Q. And the irrigation use as it is today?

3 A. And the irrigation use also.

4 Q. Tony, in your view, is there a difference
5 between flood control and the availability of water to
6 the spaceholder as opposed to an irrigation use and the
7 water being available to the spaceholder? Let me
8 rephrase that.

9 I mean if a spaceholder needs water and
10 makes a demand or calls for that water for irrigation,
11 that water is then made available to them if that
12 water's in their space; correct?

13 A. Yes.

14 Q. Okay. If you have a flood-control event
15 occur and it occurs at a time of the year when it's not
16 needed, then the spaceholder arguably wouldn't call for
17 it; correct? If it's not needed, they're not going to
18 call for the water; is that common sense or is that
19 agreed?

20 A. Water District 1 doesn't require the water
21 users to call for their water. We do an after-the-fact
22 accounting. So we look at what's been diverted this
23 past day, then we calculate the natural flow available,
24 we look at the water rights for the diversion that's
25 diverting water.

1 If there's sufficient natural flow to fill
2 their water right, then they're using natural flow. If
3 there isn't sufficient natural flow to fill their water
4 right, then it's charged as storage.

5 Q. All right. So in terms of then a
6 flood-control event, if a spaceholder, a diverter,
7 diverts the water, if there's natural flow going over
8 Milner, sufficient natural flow going over Milner, is
9 that diverter charged with natural flow if they have a
10 natural-flow right?

11 A. I think I see what you're getting to. We
12 account for whether the diversion is diverting natural
13 flow or storage. If there's water spilling out past
14 Milner because of a flood-control operation, that
15 storage diversion is cancelled.

16 If there isn't water spilling past Milner,
17 the storage diversion is not cancelled, even though
18 they may be releasing flood-control water out of
19 Jackson or Palisades, if it's physically being caught
20 in a downstream reservoir, there's no loss to the
21 system; and therefore, we would charge for the storage
22 diverted by the irrigation diversion.

23 Q. I understand that. I guess the point I'm
24 trying to get to is a question for you that if a
25 spaceholder's space is eventually at the date of

1 allocation short because of a flood-control release
2 that has occurred, in your view, is that a different
3 circumstance than if that spaceholder had diverted
4 water for storage use for irrigation?

5 A. The shortage from flood control dictates
6 how much storage we can allocate to each of the
7 spaceholders. And the spaceholders can use that amount
8 of allocated storage regardless of what time of the
9 year. They can divert it whenever they want to divert
10 it.

11 Q. All right. And so if a flood-control event
12 occurs and an individual entity's space doesn't fill
13 because of that event, that water that was released may
14 not have ever been available to them at the time of the
15 year they needed it; correct?

16 A. Correct.

17 Q. Whereas if that entity had called for
18 storage or had diverted storage, they had the ability
19 to utilize that storage; correct?

20 A. Correct.

21 Q. Okay. Two different circumstances;
22 correct?

23 A. Yes.

24 Q. Okay. But the accounting program, as it's
25 set up now, doesn't distinguish between the filling of

1 that space?

2 A. I don't understand the question.

3 Q. Well, if you have a flood-control event and
4 an entity had used storage, at the time of that
5 flood-control event the slate is wiped clean in terms
6 of that irrigation diversion that had occurred?

7 A. If the flood-control storage released went
8 past Milner.

9 Q. Okay. I guess with all my questions that's
10 what I'm presuming, is that if you have that
11 circumstance occurring, it's not captured, because in
12 most cases the Bureau in recent years releases water --
13 well, strike that last part.

14 But in that event do you understand what
15 I'm saying, is that would you agree that the
16 circumstances are different for that individual entity
17 in terms of the availability of water and the
18 differences between a flood-control event and an
19 irrigation use and the availability of that water?

20 A. Well, you're describing two different
21 scenarios. The first scenario, I think, is that
22 there's not a flood-control event so the reservoir
23 would fill. The diversion -- the spaceholder then
24 would be allocated 100 percent allocation.

25 If a flood-control event occurred and they

1 didn't refill that evacuated space, you would be
2 allocated less than 100 percent. It has no bearing on
3 what he's diverted up until that time.

4 Q. But the difference between that individual
5 entity and someone who hadn't diverted storage, they
6 would take the same hit if they're in the same
7 reservoir?

8 A. They would both have the same storage
9 allocation. One would have used storage and one would
10 not.

11 Q. Right. With respect to the allocation of
12 unfilled space following a flood-control event, I think
13 you said it's 75 percent is allocated to Palisades and
14 25 to Jackson.

15 Do you recall that?

16 A. That's correct.

17 Q. Okay. And with respect to Palisades, it's
18 apportioned equally across all the spaceholders in
19 Palisades?

20 A. The best way to describe it, when there's a
21 shortage due to flood control, everyone's carryover
22 gets wiped out and every spaceholder in that reservoir
23 gets the same percentage allocation.

24 Q. And is that the same methodology that's
25 utilized at Jackson?

1 A. Yes.

2 Q. So for example, if you're 100,000 acre-feet
3 short of a full reservoir on the date of allocation,
4 75,000 of that unfilled space would be allocated to
5 Palisades, 25,000 would be allocated to Jackson?

6 A. If the failure to fill was due to flood
7 control, yes.

8 Q. And then that 75,000 acre-feet that would
9 be allocated to the Palisades spaceholders would be
10 proportioned out to them without reference to priority
11 date of their space?

12 A. Correct.

13 Q. And the 25,000 allocated to Jackson would
14 be allocated out without referencing their priority
15 date in Jackson?

16 A. Correct.

17 Q. If you know, Tony, why was refill not given
18 the same priority as the original storage in that
19 reservoir? You referenced earlier that Henry Eagle and
20 Lynn Crandall did it a certain way, and then when
21 Mr. Larsen came on it was your perspective that the way
22 refill was handled was changed. Do you have an
23 understanding of why that occurred?

24 A. When I was reviewing the records over the
25 past year reading through the annual books and how the

1 accounting was done, I noticed during the time that Art
2 Larsen was watermaster, most of those years the
3 reservoir system filled completely. They were good
4 water years. It wasn't an issue, except there was one
5 particular year -- and I don't remember what year it
6 was, but under those conditions I noticed that Art
7 Larsen didn't give credit of refill to the American
8 Falls spaceholders as Henry Eagle and Lynn Crandall
9 would have under the same conditions.

10 I've been told that there was some
11 correspondence with the Director as to whether or not
12 the refill should occur ahead of the initial fill of
13 junior rights. And the answer to that was no, it
14 shouldn't.

15 Q. And do you recall what correspondence that
16 was?

17 A. I think it was between the watermaster and
18 the Director of the Department at the time.

19 Q. And by "junior rights," are you referring
20 to junior storage rights, the first fill of Palisades,
21 or are you talking about junior storage and
22 natural-flow rights?

23 A. I'm not sure what the question was geared
24 to, whether or not it was just storage or pertained to
25 everybody.

1 Q. But what you recall in the documents you
2 reviewed, do you recall if that refill was then
3 secondary or junior to the first fill of all storage
4 space, or was it junior to all storage and natural flow
5 within the water district?

6 A. When the watermaster made his allocations,
7 he credited the refill to American Falls spaceholders,
8 only that it used storage up until that time. During
9 the time or prior to the time new accrual occurred
10 in -- I should say new physical contents increased in
11 Palisades as the American Falls Reservoir contents were
12 dropping.

13 Q. So it was relative to the junior/senior
14 spaceholders in the system above Milner when you talk
15 about allocation?

16 A. Well, no, it wasn't done for everyone. It
17 was done for only the American Falls spaceholders and
18 only ahead of Palisades. Or the way it was calculated
19 was the new accrual in Palisades went towards the
20 refill of spaceholders in American Falls that had used
21 storage.

22 Q. Yeah. I was talking more in that
23 circumstance that you mentioned about with Mr. Larsen
24 the year in which Mr. Larsen sought input from the
25 Director of Water Resources and whether or not from

1 your understanding that discussion pertained to junior
2 storage rights and senior storage rights in the system
3 above Milner or all storage and natural-flow rights
4 above Milner.

5 A. I don't know. I haven't seen the
6 correspondence.

7 Q. Okay.

8 MR. BROMLEY: John, it's about 20 after noon.

9 MR. SIMPSON: Do you want to break? We can
10 break for lunch.

11 MR. BROMLEY: Maybe we can just go off the
12 record real fast.

13 (Lunch recess.)

14 Q. (BY MR. SIMPSON): Tony, I just have a few
15 more questions.

16 And one question would be I think you
17 identified that the provision that is contained in the
18 Notice of Deposition, Exhibit 1, and in the State's
19 motion for summary judgment is a fair representation of
20 the status quo of basically how refill is considered
21 today --

22 A. Yes.

23 Q. -- is that fair?

24 Would it also be fair to say that there is
25 at least the potential that if this recommendation or

1 this remark were included that the ability to refill
2 may be substantially less in the future if new rights
3 are licensed or decreed?

4 A. The potential there is to reduce the refill
5 with future allocations, yes.

6 Q. Okay. So every new right that is decreed
7 within the system above Milner has the direct potential
8 to reduce the refill of storage rights in Water
9 District 1?

10 A. Yes.

11 Q. So for example, any right that was licensed
12 after or permitted after 1979, for example, would have
13 the ability to take water that otherwise might be
14 available for refill of storage above Milner?

15 A. Yes.

16 Q. And in those circumstances, if those were
17 to occur, then we wouldn't necessarily be maximizing
18 the fill in the system?

19 MR. BROMLEY: Objection. Calls for speculation.

20 Q. (BY MR. SIMPSON): You can answer if you
21 can.

22 A. No, I would disagree with that, because if
23 there's, let's say, a 1970 priority and they divert as
24 a result of taking water away from refill, that water
25 we can say was definitely used for that 1970 water

1 right.

2 But there's the chance that if it hadn't
3 been allowed to divert the water and instead went to
4 refill, there's no guarantee that that refilled
5 quantity would be used above Milner because you could
6 get into the situation where there's water that came
7 down later in excess of what was needed to physically
8 fill the reservoir, and as a result the water went out
9 into the system, and you've curtailed that 1970 from
10 diverting water when it otherwise could have.

11 Q. Because of the timing of the flows?

12 A. Yes.

13 Q. But if that water came down later, then the
14 1970 could still divert it; correct?

15 A. Only after the senior water rights were
16 filled.

17 Q. And if the senior water rights were filled,
18 then the 1970 right under your speculation could divert
19 it?

20 A. Yes.

21 Q. In your testimony this morning you
22 referenced that you had some communications with
23 Mr. Orr from the Attorney General's office; is that
24 correct?

25 A. Yes.

1 Q. Regarding a refill remark or how refill
2 occurred; is that correct?

3 A. Yes.

4 Q. And I think you referenced that there were
5 some telephone conversations?

6 A. Yes.

7 Q. Were there any e-mails or written
8 correspondence?

9 A. Specifically to this issue, I don't recall
10 any e-mails.

11 Q. Any other written documents?

12 A. None that I can recall.

13 Q. Tony, let me just ask you a couple
14 questions on your perspective regarding fill versus
15 refill.

16 That is, if water is filled in space and
17 has not been utilized by the spaceholder, is that a
18 different circumstance than if water has filled in
19 space, is available for the spaceholder, and is
20 utilized and then that space refills?

21 A. Can you repeat the question?

22 Q. Well, I'm trying to identify whether or
23 not, in your view, there's a difference between fill
24 and refill. That is, when space has filled and is
25 subsequently evacuated, is that a different

1 circumstance than if the space is filled and at that
2 point is available for the spaceholder?

3 A. Well, the difference between fill and
4 refill is mostly just timing. Fill is that water that
5 fills the reservoir that goes also towards filling the
6 storage account in the water right accounting program.

7 Refill is the same thing where water could
8 accrue to a reservoir, but it doesn't necessarily go to
9 any storage right.

10 Q. So let me ask this hypothetical: If you
11 were creating an accounting program for accounting for
12 the fill of a reservoir, in your view, should there be
13 any consideration about whether or not that water that
14 filled space was actually available for a spaceholder
15 to utilize in identifying it either as fill or refill?

16 A. Well, the way the accounting program works
17 is as long as you don't spill water out the end of the
18 system, everything that accrues to the storage account
19 is available.

20 After that storage account fills completely
21 and you get additional storage, that's also available,
22 but what the unknown is who it's available to.

23 Q. And so that helps me. And so then do you
24 think it would be wise to consider not only that it's
25 available, whether it's needed?

1 A. The water district doesn't make the
2 determination of need. We simply account for the water
3 and distribute it to the appropriate water rights or
4 storage rights.

5 Q. Understand. Then how about in determining
6 whether or not that water was available, whether it was
7 actually used by that spaceholder or by a spaceholder
8 in the district, do you think it would be wise to
9 consider that fact?

10 A. You'll have to repeat that.

11 Q. Well, we've talked about water being
12 available. And you said that the water district
13 doesn't consider whether it's needed, just accounting
14 for it and whether it's available.

15 And my question goes to when you consider
16 whether it's available to the spaceholder, do you think
17 it would be prudent to consider whether it was actually
18 used by a spaceholder within the district?

19 A. No. The water district doesn't make that
20 determination. We simply allocate what's available.
21 And whether or not they choose to use it or not, it's
22 not our decision. They can choose to carry it over to
23 the next irrigation season, or they can choose to use
24 it all in the current irrigation season.

25 Q. Okay. But if that water was evacuated from

1 space and then subsequently that space didn't fill
2 after the evacuation, was that water available then to
3 that spaceholder?

4 A. No, it would be deducted from the
5 allocation.

6 MR. SIMPSON: Right. Okay. That's all the
7 questions I have.

8 MR. TUCKER: Tony, I've got a couple questions.
9 I don't really have a big interest in this. I'll set
10 that forth right off the bat. But I am confused.
11 Okay. And I've got just a couple questions that you
12 might be able to help me with my confusion. And if you
13 can't, I'll go to lunch with these guys again and ask
14 them sometime.

15 MR. SIMPSON: Not to the same place.

16

17

EXAMINATION

18 BY MR. TUCKER:

19 Q. For the record, my name is Jim Tucker. I'm
20 with Idaho Power Company.

21 You testified that when you refill the
22 reservoirs you don't do it in any particular priority,
23 but I took that as in one way you were saying you
24 didn't take a preference, in other words, you didn't
25 fill one reservoir over another; is that right? You

1 didn't refill the reservoir over another?

2 A. The refill is just a matter of physical
3 storage -- additional physical storage occurring in the
4 reservoir system after the rights have been filled.

5 Q. So it's just somewhat opportunistic, then?

6 A. Yes.

7 Q. Okay. That refill -- what I'm a little
8 confused about, that refill that occurs, is that then
9 reallocated back to storage accounts?

10 A. Not necessarily.

11 Q. All right. When would it be and when
12 wouldn't it be? That's what I'm confused about.

13 A. There are lots of different scenarios. And
14 I'll throw out just a few, and I may be excluding some.

15 Let's assume we had 50,000 acre-feet of
16 unallocated storage that we captured in the reservoir
17 system as refill, it's in the system, hasn't been
18 allocated to anyone. What do we do with that? If it
19 was a year in which we released water, storage water
20 for flood control, and we failed to refill that -- I
21 should say, let's say that space that was evacuated and
22 went past Milner is less than this unallocated storage
23 that we refilled with, we first refill that water that
24 was released for flood control. Now we have a chunk of
25 water that still doesn't belong to anybody.

1 Then what we can do at that time is we can
2 credit it with the storage use that had already
3 occurred. It allows us to allocate to everyone
4 100 percent, but we still have some extra water. And
5 we take the storage usage from canals from the
6 beginning of the irrigation season and just work our
7 way forward until we run out of water. And that way we
8 allocate every acre-foot of water in the system. We
9 don't have any left over that we don't allocate.

10 So the answer is sometimes it goes to
11 offset the flood-control release, sometimes it will go
12 to cancel storage that was diverted early in the
13 irrigation season, and sometimes it will go to unfilled
14 storage accounts. And that's the last option that I
15 haven't talked about.

16 And that's the situation of where American
17 Falls Reservoir, the storage right is filled to
18 100 percent, but we've captured the water physically up
19 high in the system in Palisades, or even Island Park,
20 and that allows for any surplus gains that come in
21 below those reservoirs to physically accrue and are
22 captured in American Falls Reservoir. But since their
23 right is 100 percent full, there's no way to allocate
24 that storage.

25 And one of the things we've done in the

1 past, depending on the circumstances, we take that
2 additional storage and we add it to the unfilled junior
3 storage accounts when we make their allocation.

4 Q. Which are higher in the system?

5 A. Which are higher in the system.

6 Q. Okay.

7 A. And the basis for that is that the only
8 reason that additional storage occurred in American
9 Falls was because of the benefit of the upper
10 reservoirs that held the water up higher, you've
11 maximized your water capture.

12 Q. Okay. So are those processes or procedures
13 that you just went through, are they memorialized
14 anyplace, are they written down anyplace where you
15 would know how to follow that? Say if you were sick
16 one day, somebody else would know how to follow that
17 situation?

18 A. No. It's always been at the watermaster's
19 discretion.

20 Q. Okay. So it's something that you learned
21 and I suspect Lyle learned just from kind of being on
22 the job and seeing how the system worked and learning
23 that as you go?

24 A. Yes.

25 Q. Okay. Now, I was a little confused. This

1 also confused me: You said when flood-control releases
2 are made, if they don't leave the system, if they don't
3 go past Milner, and then you made -- excuse me if I've
4 got this wrong, but then you made a statement that in
5 those situations there's no space available for refill
6 if you had -- I took it if the storage accounts were
7 full -- do you recall saying that or --

8 A. Yes.

9 Q. Okay. Can you explain what you mean by
10 that?

11 A. Yes.

12 Q. Okay. Okay.

13 A. The way the water right accounting works is
14 that it keeps track of every water, distributes it to
15 natural flow, storage accounts. If we never spilled a
16 drop of water past Milner, the physical contents in the
17 system would always equal the physical fill in the
18 storage water rights.

19 Q. Okay.

20 A. And so if we're not spilling water past
21 Milner and they release water for flood control out of
22 Jackson and Palisades and it's physically caught in
23 American Falls, we still have the same amount of water
24 that we can allocate to what we've accrued on paper.

25 So what that means, since we haven't

1 spilled water out the end of the system, there's some
2 unfilled account in the system. And so there wouldn't
3 be any refill.

4 Q. Okay. So if you captured water in a higher
5 reservoir, then, that would go to fill that account, it
6 wouldn't be refill, it would be filling that account,
7 that unfilled account?

8 A. It would be the initial fill instead of the
9 refill.

10 MR. TUCKER: Okay. I got you. All right. All
11 right. That makes sense. Okay. All right. Well,
12 maybe that answers my other questions I've got here.
13 Okay. That may be all I have. Thanks. Appreciate it.

14 MS. McHUGH: I think I just have a couple
15 clarifying questions.

16

17

FURTHER EXAMINATION

18 BY MS. McHUGH:

19 Q. And I think this was John's question, but I
20 think he asked if every new right -- when looking under
21 the remark, every new right has the potential to reduce
22 storage rights in Water District 1 under this remark.
23 And I think you agreed with that statement.

24 Do you recall that?

25 A. Yes.

1 Q. Do you mean that every new right has the
2 potential to reduce storage rights or every new right
3 would have the potential to reduce physical fill or
4 refill?

5 A. We're talking potentially. It doesn't
6 necessarily mean it could happen. But potentially if
7 you allow a junior appropriator future right to divert
8 water that otherwise would have been captured in the
9 reservoir, the potential there is to effect a
10 spaceholder from additional storage he otherwise would
11 have received.

12 Q. And the reason a junior future right could
13 do that is because the -- is why? Explain how that
14 would happen. I don't follow.

15 A. The filling under priority is limited to
16 the quantity described in the right. American Falls,
17 it's this 1.67 million acre-feet. Once we've stored
18 that amount --

19 Q. Maybe I need to stop you right there.

20 Once you've stored the full quantity under
21 the American Falls water right 1-2064, once that full
22 quantity's been stored, can a junior future right
23 impact the amount of water stored under that water
24 right?

25 A. It could only impact the refill --

1 Q. Okay.

2 A. -- of that right.

3 Q. That's what my question was. So just to
4 recap, then.

5 Once water under 1-2064, once that water
6 right has been totally filled up to the quantity on the
7 water right, a future junior use could not impact that
8 water right storage?

9 A. Not the initial fill of 1.67 million.

10 Q. Okay. That was my question. John also
11 asked you one other question relating to water right
12 1-2064. And I wasn't sure I understood your answer.

13 And it was along the lines of if a 1921
14 right is filled but the physical fill is unallocated
15 storage, not under any priority, what happens. And I
16 didn't understand your answer. So could you repeat
17 your answer.

18 A. Well, that scenario, I think, was when
19 American Falls isn't physically full but their water
20 right is filled to the 1.67 million, but we have
21 additional storage that's captured in the reservoir
22 that's surplus water that wasn't distributed to any
23 senior water right, that becomes available to someone.

24 And as I described to Mr. Tucker, several
25 things can happen. At that point the watermaster can

1 decide to offset any reductions to flood-control
2 releases by that additional storage, or you can use it
3 to cancel storage that had been previously used by a
4 canal, or you can add it to unfilled storage accounts.

5 Q. Thank you. That helped me.

6 I think that in the first answer to that
7 question you referred to storing water rather than
8 capturing water.

9 And do you see a difference in those two
10 words?

11 A. Yes.

12 Q. Okay. And could you explain the difference
13 between those two words to me.

14 A. Yeah. Storing the water would be assuming
15 to store it under the water right.

16 Q. Uh-huh.

17 A. Capturing the water would be physically
18 capturing the water in the reservoir that doesn't
19 necessarily -- is assigned to any water right.

20 Q. Okay. And one more clarifying question.
21 And I may have misunderstood the answer or the
22 question.

23 But there was something along the lines of
24 if a storage water right or a storage reservoir is
25 physically refilled after the day of allocation and

1 there were previously unfilled storage rights, can you
2 tell me what would happen?

3 A. Refill can't occur after the day of
4 allocation.

5 Q. Okay. Physical refill cannot occur. I'm
6 not talking about physical refill of the reservoir.

7 A. That would be correct.

8 Q. Okay.

9 A. And I should say physical refill of the
10 reservoir system. The way they operate the reservoirs,
11 you may see an increase in contents in one reservoir,
12 but it would be offset by the decrease in contents by
13 another reservoir. So after the day of allocation, the
14 net system contents are always going down. They're
15 never going up.

16 MS. MCHUGH: That helps me. Thank you. Okay.
17 That's all. Thank you.

18

19 FURTHER EXAMINATION

20 BY MR. RIGBY:

21 Q. Even if they have to adjust the date of
22 allocation because they incorrectly described it?
23 Isn't that what you said earlier?

24 A. Correct. The final day, after you get to
25 the end of the year and you look back at the day of

1 allocation, it comes after the last day of physical
2 increases.

3 Q. And that's why your statement that it
4 cannot occur will always be a fact because that's what
5 you'll look back to and say once it started going down,
6 that's the date of allocation?

7 A. Yes.

8 Q. It's more complicated than that, but that's
9 why you can make that bold statement, is it not?

10 A. Yeah. We have had years where we thought
11 we were at the day of allocation, and then -- that's in
12 realtime, and then eventually we found out that we had
13 this unexpected supply of water that came through the
14 system, and so the day of allocation moved to that
15 date. But we never have two days of allocation in any
16 one year.

17 Q. Right. Okay. Just a couple other
18 clarifications that were raised as a result of
19 counsel's questions.

20 First of all, assume for a moment -- and of
21 course, I represent a group called Mitigation, Inc.,
22 owning interest in Ririe Reservoir. And quite
23 candidly, it's the toughest reservoir to fill for one
24 main reason, and that's source of water in the sense
25 that not only is it low on the priority table, its

1 source itself is difficult some years to actually fill
2 that reservoir.

3 The question I would have is assume for a
4 moment, then, that all these reservoirs have filled to
5 their capacity, the two that we're talking about
6 particularly here that they filled on paper to those
7 capacities, isn't it a fact that Ririe, generally
8 speaking, will hold some of that water that made that
9 fill possible for American Falls?

10 A. Yes.

11 Q. And in fact, that's the intent, keep it in
12 Ririe if you can; right?

13 A. Yes.

14 Q. Okay. So getting to Mr. Tucker's question,
15 where we're not completely full in the system, because
16 let's say everything's filled but Ririe -- and that can
17 happen; correct?

18 A. Yeah.

19 Q. Because of its bad source and low priority.
20 Until it is filled the priority for Ririe
21 still is on; correct?

22 A. If American Falls is filled and there's
23 sufficient natural flow, yes.

24 Q. Yes. And so in this conversion of water
25 that occurs, so to speak, we've always viewed it and

1 treated it like for every acre-foot, once it's filled
2 like that, American Falls is filled, for every
3 acre-foot of water that is then captured in American
4 Falls beyond its paper fill puts one more acre-foot of
5 water conversion that was owed to Ririe -- excuse me,
6 owed to American Falls by Ririe, now not owed? Does
7 that make sense?

8 A. Yes.

9 Q. Is that correct?

10 A. Yes.

11 Q. I'm using the scenario where there's no
12 others that -- all the others are filled.

13 A. Yes.

14 MR. TUCKER: Yeah, you're kind of testifying
15 too.

16 THE WITNESS: It's the situation I described to
17 Mr. Tucker where Ririe is physically holding American
18 Falls storage, and because of that there's some empty
19 space in American Falls, even though it's filled on
20 paper, and we have this surplus water come down that
21 we're able to physically capture in American Falls
22 Reservoir.

23 And at that time we look to Ririe
24 Reservoir. And that American Falls water held is no
25 longer needed. That unallocated-for storage, in a

1 sense, replaces the water that was held upstream. And
2 therefore, American Falls can get full allocation
3 allocated to it, and Ririe then gets the physical
4 contents allocated to it.

5 Q. (BY MR. RIGBY): Very good. Now, but is
6 that a different scenario than what you've been
7 testifying as to the refill?

8 A. Yeah, the potential is there. If we -- if
9 we assigned a priority date to the refill of that water
10 coming into American Falls, you may find yourself in a
11 situation where you're not able to do that swap of
12 unallocated-for storage with Ririe Reservoir, and
13 they're stuck with only the amount that they accrue on
14 paper, which is usually a smaller amount than they hold
15 physically in the reservoir.

16 Q. So that would be if the change occurred as
17 to a priority refill?

18 A. Yes. The potential there is reduce the
19 benefit that Ririe gets from holding American Falls
20 water in it on those years where the system nearly
21 fills.

22 Q. As to the discretion of allocation of the
23 captured water in the refill, I guess I'm still a
24 little unclear, then, as a result of your answer of a
25 moment ago.

1 And that is, if it's the discretion of the
2 watermaster, then when I was talking about -- and I
3 shouldn't have said "priority," because someone pointed
4 that out. I used the wrong word. And it wasn't a
5 priority in the sense of water priority. I think
6 that's what was asked. It's not a priority issue.
7 It's you've captured this extra water, and the reason
8 you're able to capture it, even though the system
9 filled on paper or completely filled, you've had
10 releases. And we've talked about them. Releases as a
11 result of flood control, releases as a result of
12 diversions for irrigation, and releases for fish
13 augmentation.

14 There could be others, but basically those
15 are the big three; is that correct?

16 A. Yes.

17 Q. Okay. So are you saying, then, that the
18 capturing, wherever it's captured in the system
19 thereafter, goes first to flood control, or is that
20 still part of this discretion of the watermaster?

21 A. In my experience, assuming you have all
22 three situations, you have a situation where the amount
23 of water physically available in the system is less
24 than the amount that we've accrued on paper, and people
25 have already been diverting storage water after Milner

1 spill ceases, we have this surplus of storage water in
2 the system that we have to allocate to someone,
3 generally the first thing it does -- or the watermaster
4 has done is apply that unallocated storage to fill the
5 flood-control evacuated space so that the paper
6 contents will match the physical contents, so we're
7 able to allocate what's on paper.

8 If we're able to do that entirely, we still
9 have a surplus of this storage water in the system.
10 Then we can use it to offset either previous storage
11 diversions or we can use it to fill unfilled storage
12 rights or add to their fill.

13 Q. But let me stop you right there. The
14 reason they're unfilled is for what reason? Is it
15 because of like Ririe, it just didn't fill from its
16 source, or is it because of diversions for irrigation
17 as you've talked about in the other two scenarios?

18 A. It depends on the timing and the location
19 of the runoff. The reason they didn't fill is for
20 whatever reason. The physical contents don't match the
21 amount that we've stored on paper.

22 Q. Okay. But again, then I'll ask you the
23 question, as others have asked.

24 That's just discretionary, according to
25 your testimony? You don't have anything else that you

1 know of that would give the watermaster that right
2 to -- and I don't want to say prioritize, but to
3 allocate according to the way you've just described?

4 A. Yes. The unallocated-for storage for this
5 refill doesn't belong to anyone, according to the water
6 rights. And so it's at the watermaster's discretion as
7 to how he should distribute that water. And that's the
8 way it's been operated in the past.

9 Q. Do you know why? Why would refilling of
10 the flood control be first as opposed to third?

11 A. I think that's just how it's been done in
12 most years. But I suppose a watermaster with a
13 different philosophy could do it differently.

14 MR. RIGBY: Okay. I have nothing more.

15 MR. ORR: I do have a few more, again, just
16 clarifications.

17

18 FURTHER EXAMINATION

19 BY MR. ORR:

20 Q. Tony, I think a bit earlier -- I think
21 before lunch -- Mr. Simpson asked you if this remark in
22 Exhibits 4 and 1, which authorizes or seeks to
23 authorize storage of additional water even after a
24 right fills, if it was included as a remark in the
25 decree, I think Mr. Simpson asked you "Wouldn't the

1 priority of the remark also attach to storing the
2 additional water?"

3 And the reason I'm asking for clarification
4 on this is I think there might have been some confusion
5 over the distinction between a water right and a
6 priority date. Sometimes they're used interchangeably.

7 Is your understanding that a priority date
8 is simply one element of a water right?

9 A. Yes.

10 Q. Okay. And this remark to which I referred
11 in Exhibits 1 and 4, particularly the second sentence,
12 making the storage of additional water subordinate to
13 existing and future rights, do you understand that
14 as -- I'm searching for the word, but I'm going to try
15 this one -- negating the priority element as to the
16 storage of additional water?

17 A. Yes. And I thought that was clarified in
18 one of John's last questions when he was asking about
19 this issue, is that in the initial fill we store under
20 the 1921 priority. And then once we've reached the
21 quantity of that right under that priority, then the
22 priority becomes junior to all existing and future
23 rights.

24 Q. So under this remark, although the refill
25 storage of additional water would be authorized by the

1 remark under this water right, it doesn't mean that
2 priority attaches to it?

3 A. Correct.

4 Q. Okay. Bear with me for just a moment here,
5 please.

6 Now, I believe you've testified here that
7 this remark to which I referred would be consistent
8 with how refill, quote, "is done in Water District 1
9 now."

10 Does that mean that storage of additional
11 water beyond the first fill or refill is done using
12 excess or surplus water?

13 A. Can you ask the question again?

14 Q. I think you've testified -- and correct me
15 if I'm wrong -- that the remark in Exhibits 1 and 4, if
16 it was included in the water rights in question here,
17 would recognize and authorize the type of refill that
18 Water District 1 has been doing while you've been
19 there, and it's consistent with how Water District 1
20 has operated, quote, "refill"?

21 A. Yes.

22 Q. So am I correct in concluding that that
23 means the way Water District 1 has operated refill in
24 your experience has been that refill is done using
25 excess or surplus water?

1 A. Yes, that's correct.

2 Q. Can you define for me what "excess or
3 surplus water" means in that context?

4 A. Excess or surplus water would be any amount
5 of water in the system each day that's in excess to the
6 demand by water right users.

7 Q. So under the remark in Exhibits 1 and 4,
8 specifically the provision subordinating refill to
9 future water rights, the only thing we'd be talking
10 about reducing is the supply of excess or surplus water
11 in the future, potentially?

12 A. Yes.

13 Q. It would not diminish the priority of any
14 existing right?

15 A. That's correct.

16 Q. I think in response to the question by
17 Mr. Rigby or Ms. McHugh you said something to the
18 effect of physical reefer -- refill cannot occur --

19 A. Reefer madness.

20 MR. BROMLEY: Never thought you'd see that in a
21 transcript.

22 MR. ORR: With my name on it.

23 Q. Let me start over.

24 After the date of allocation, I believe
25 that you said or agreed to the statement that physical

1 reefer -- refill -- there it is again -- cannot occur.

2 Do you remember saying something like that?

3 A. Yes.

4 Q. So when water accumulates to the system
5 after the date of allocation, is that the, quote,
6 "first fill" of the next year's supply?

7 A. Yes. And October is the exception. There
8 is increase to the system after the day of allocation.
9 But prior to that time, the day of allocation, there
10 isn't any additional increase in the net reservoir
11 system contents until you reach that time period,
12 usually in October, when the demand drops and we're
13 able to capture additional water under priority towards
14 the initial fill the following irrigation season.

15 Q. Okay. And related to that -- just because
16 I'm struggling with understanding the statement you
17 made there -- I have read in some documents where
18 people or where the document refers to the first fill
19 of a reservoir during a given season or water year as a
20 refill. Usually that's in the sense of power
21 operations or fish flow augmentations. I've seen
22 documents documenting, well, this reservoir will be
23 able to refill every year.

24 Why I'm leading into that is, would you
25 agree that sometimes the term "refill" is applied to

1 what is not the type of in-season refill we're
2 referring to here?

3 A. Yes.

4 Q. And all I'm getting at here is, in my
5 opinion "refill" is a little bit of an ambiguous term,
6 you have to be careful how you're using it.

7 Would you agree with that?

8 A. Yes.

9 Q. And I think this is my last question: The
10 watermaster's exercise of discretion in connection with
11 some of the decisions you've referred to here -- and I
12 think you also referred to watermaster philosophy
13 regarding exercise of that discretion.

14 And sometimes the word "discretion" is
15 understood to mean arbitrary or capricious, for
16 instance, the watermaster's exercise of discretion is
17 being arbitrary or capricious.

18 Is that what you mean, or is it discretion
19 within some parameters or guidelines or policy
20 objectives?

21 A. The goal distributing this unaccounted-for
22 storage is to try to match the physical contents to
23 what has been accrued on paper. That's the primary
24 goal. Because of that, that's generally the order as
25 to which we credit that unaccounted-for storage where

1 it goes first to refilling that evacuated space for
2 flood control to match what we have on paper accrued to
3 the storage accounts.

4 Secondly, the other two possibilities are
5 filling unfilled storage accounts or cancelling
6 previously used storage.

7 Where the watermaster's discretion comes in
8 between those two choices is generally where the
9 unaccounted-for storage occurred. And I think if you
10 have two different watermasters, they may make two
11 different decisions. And I'm not sure which would be
12 correct.

13 MR. ORR: I think that's all I have.

14 MR. SIMPSON: Okay. I got a few follow-up,
15 then.

16
17 FURTHER EXAMINATION

18 BY MR. SIMPSON:

19 Q. Tony, just in reference to your last
20 testimony about where you have two different
21 watermasters making two different decisions and the
22 discretion.

23 Do you recall that testimony just now?

24 A. Yes.

25 Q. And that being discretionary, in your view,

1 is that --

2 A. Yes.

3 Q. Would that be similar to how a refill
4 occurred and under what priority in terms of how
5 Mr. Crandall handled it versus Mr. Larsen, in those
6 terms it was discretionary on their part as well;
7 correct?

8 A. Well, that's the decision they made. And
9 the Director determined that that was the incorrect way
10 of doing things. And so the watermaster no longer had
11 discretion to do that.

12 Q. So it became the Director's discretion to
13 make that decision?

14 A. Yes.

15 Q. You know, right after lunch I asked you a
16 couple questions about the potential if this remark
17 were implemented on the effect of refilling storage.
18 And the remark I'm referring to is the remark in the
19 Exhibit 1 and in the State's motion.

20 Do you recall that testimony?

21 A. Yes.

22 Q. Could the implementation of this remark
23 also affect a spaceholder's water supply?

24 A. Yes.

25 Q. Because if fill didn't occur after a

1 flood-control release, that would affect the
2 allocation, then, to a particular spaceholder?

3 A. Correct.

4 Q. Okay. And so we just talked about the
5 potential to affect the water supply with respect to
6 future rights.

7 Would it also be the case that rights
8 issued say after 1978 also would have the potential to
9 affect the water supply of a spaceholder?

10 A. Yes.

11 Q. Based upon the implementation of this
12 remark; correct?

13 A. Correct.

14 Q. And, Tony, just if you could refer back to
15 that remark.

16 Since we've had a lot of time to discuss it
17 today, what does "incidental," as it's identified in
18 the second sentence of the remark, mean to you? And
19 what does it mean to you, and how has the word
20 "incidental" been utilized in how you've allocated or
21 accounted for water to date in Water District 1?

22 A. Well, I suppose the best way would be to
23 look up the definition of "incidental" in the
24 dictionary, but what that means to me is is that --

25 MR. SIMPSON: The lights are out.

1 MS. McHUGH: Can you continue, Jeff?

2 THE COURT REPORTER: I can run on battery for a
3 little while.

4 Q. (BY MR. SIMPSON): Go ahead and finish your
5 sentence.

6 A. Incidental and subordinate, what that means
7 to me is that the storage rights can't make a call
8 against any other existing or future water rights to
9 refill that space.

10 Q. So the word "incidental" and the word
11 "subordinate" have the same meaning to you in the
12 context of that remark?

13 A. Well, if you took out the word
14 "incidental," I don't see any problem with that. I
15 think it would be just fine if it said, "This right --
16 under this right with such additional storage is
17 subordinate to all existing future rights," that would
18 be fine also.

19 Q. But as you look at that remark and in terms
20 of how you've, in your duties in Water District 1 have
21 accounted for water, the word "incidental" has no
22 meaning to you?

23 A. Yes.

24 MR. SIMPSON: That better be all the questions I
25 have, based on battery life.

1 MS. McHUGH: Well --

2 MR. TUCKER: I have just a couple more.

3 MS. McHUGH: That's fine.

4 MR. TUCKER: Can I do that?

5 MR. SIMPSON: Hurry.

6

7 FURTHER EXAMINATION

8 BY MR. TUCKER:

9 Q. This kind of traffic's off some of
10 Candice's questions.

11 Can you give me an example of when you
12 store water and when you capture water, the difference
13 again. I'm not clear on that difference.

14 A. Storing -- the accounting program, it keeps
15 track of the reach gains in every reach of the Snake
16 River. And then we distribute those gains based on the
17 priorities of the water rights for diversions in those
18 reaches or in downstream reaches.

19 Every drop of water, assuming we're not
20 spilling water past Milner, is distributed to those
21 storage accounts according to priority, according to
22 the amount of natural flow in the river each day.

23 But the physical reservoir contents, the
24 actual capturing of storage, may be different than
25 what's showing as accruing on paper.

1 One of the reasons could be that you have
2 storage users, canals, using storage at the same time
3 we're accruing new storage to a senior reservoir
4 priority.

5 So what you would see physically is
6 reservoir contents could be remaining steady. We
7 aren't really capturing any water, but we're accruing
8 water on paper at the same time it's being used by the
9 canal diversion.

10 So the difference being capturing and
11 accruing water in the paper accounting is that accruing
12 paper -- accruing water in the paper accounting is
13 what's accruing to the water right itself. Capturing
14 is the determination of the increase in reservoir
15 contents.

16 Q. Okay. Okay. All right. Just let me see
17 if I can simplify it for me, then.

18 So when you're refilling, are you capturing
19 water or storing water or both?

20 A. In refilling we're only capturing water,
21 we're not storing water, because the assumption is is
22 that the only time you can refill is when the storage
23 right is 100 percent full.

24 Q. So when you're refilling, you're not
25 storing water under any water right? You're capturing

1 water, but not under a water right --

2 A. Correct.

3 Q. -- or are you; correct?

4 A. Correct.

5 MS. MCHUGH: Oh, good.

6 THE WITNESS: I thought I was going home.

7 Q. (BY MR. TUCKER): So let me again express
8 my ignorance some more.

9 So in this remark where it says "Additional
10 water may be stored under this water right," that's not
11 applicable to when you're capturing water under refill?

12 A. Yeah, I suppose the word "storage" would
13 apply on the day of allocation when we actually
14 allocate the storage. But it's based on the water that
15 was captured up until that time.

16 Q. Okay. I'm really confused now. Probably
17 mixing apples and oranges.

18 MS. MCHUGH: Maybe I can help.

19 MR. TUCKER: Anyway.

20 Q. Okay. I guess I know as much about that as
21 I'm going to learn from it.

22 Mr. Orr asked you a couple questions
23 about -- and this again gets back to the discretionary
24 decisions or the decisions the watermaster makes about
25 how to assign or allocate unallocated storage that you

1 went through before. And you said there were
2 certain -- you mentioned certain goals that you believe
3 or you testified the watermaster might have in mind.

4 But again, I guess my question goes back
5 to, is there anyplace that those goals or guidelines
6 are memorialized where they're either in a Departmental
7 memorandum or a guideline or something like that, or
8 again, is it simply historical knowledge that that
9 watermaster has on how the system works?

10 A. I think it's mostly based on historical
11 practice. There may be some documentation out there
12 somewhere that has documented what was historically
13 done. But I don't know where that would be or what
14 that would be.

15 MR. TUCKER: Okay. Okay. That's all I have.
16 Thanks.

17 MR. BROMLEY: Candice, I've got three, since
18 we're going to come back around, and you'll start
19 again.

20 MS. MCHUGH: Okay.

21

22 EXAMINATION

23 BY MR. BROMLEY:

24 Q. Tony, John was asking you some questions
25 about speculative issues of injury based on future

1 appropriations.

2 And I guess my question is, any new
3 appropriation would have to be applied for, a permit
4 issued, and then ultimately, I suppose, a license
5 issued by the Director.

6 There are administrative remedies for any
7 water user that believes they're going to be injured by
8 a new appropriation, aren't there?

9 A. Yes.

10 Q. So they could file a protest?

11 A. Yes.

12 Q. Okay. Jim was asking you some questions
13 about refill and capture. Right now it's a historic
14 practice, is my understanding, that the water district
15 even allows refill or capture of water in a reservoir
16 once the contents have gone down.

17 There isn't a water right that authorizes
18 it, is there?

19 A. Yes, it's -- it's just something that's
20 happened. The water district doesn't make the decision
21 as to whether the Bureau should hold the water or not.
22 It's just what has happened in the past. We have this
23 chunk of water that we allocate, and that's that refill
24 or unallocated water.

25 Q. So this remark would actually authorize the

1 ability to store water after the water right has been
2 fully satisfied?

3 A. Yes.

4 Q. And that would be consistent with
5 historical practice?

6 A. Correct.

7 Q. But then there would actually be a right
8 that would authorize the ability to do it?

9 A. Yes.

10 Q. And then lastly on this issue of
11 watermaster discretion, you talked about the
12 Crandall-Eagle method maybe in a couple select years
13 where only American Falls was filled ahead of
14 Palisades, and then when Mr. Larsen became the
15 watermaster -- what was that, around 1970?

16 A. Yes.

17 Q. -- there was a change in that practice.

18 This remark would limit discretionary
19 practice changes by the watermaster; is that correct?

20 A. That's correct.

21 MR. BROMLEY: Thank you.

22 MS. MCHUGH: Thank you.

23 ///

24 ///

25 ///

1 FURTHER EXAMINATION

2 BY MS. McHUGH:

3 Q. Okay. And, Tony, I'm sorry to have to go
4 back and ask some questions, but I think it's important
5 for me to understand how this remark works in
6 relationship to how the Water District 1 storage system
7 has operated. And I at one point thought I was clear,
8 and I'm now sure I'm clear now so I have to do some
9 follow-up questions.

10 And I understand your answer to be that
11 there is no net increase to storage after the day of
12 allocation.

13 Is that right? Is that what you said?

14 A. With the exception of late in the year
15 towards October.

16 Q. Okay. And that the no net increase to
17 storage after the day of allocation is due to the
18 accounting program, there's no net increase to storage
19 in the accounting program?

20 A. Both the accounting and physically, because
21 what's happening is is that water rights senior to the
22 reservoirs are using all the natural flow.

23 Q. Okay. That brings me to my question. I
24 need to make a couple of assumptions so I can get this
25 clear in my mind.

1 Water District 1 and the watermaster have
2 determined that their estimated day of allocation is
3 May 28th. As of that date, though, the entire system
4 is not filled. On June 20th there's a lot of rain that
5 happens, and canals stop demanding natural flow, they
6 stop taking water because they don't need it because
7 it's raining.

8 Are you with me?

9 A. Yes.

10 Q. Okay. Does refill happen in reservoirs
11 physically under that scenario? Can it?

12 A. Both new fill and refill could both occur.

13 Q. Okay. And the new fill -- explain to me
14 who gets the new fill.

15 A. The new fill would have been the unfilled
16 water rights at the time of the first attempted
17 allocation.

18 Q. Right. Okay. So we now have the initial
19 day of allocation was May 28th.

20 After that initial allocation date, a bunch
21 of rain happened, demand went down, but the system
22 hadn't filled before and the system hadn't filled on
23 paper or physically before the May 28th estimated day
24 of allocation, and what you're telling me is when you
25 have that rain event and demand drops, the reservoirs

1 actually are -- refilling is occurring, and now those
2 folks who didn't have any storage in their system prior
3 to May 28th could now suddenly have storage accounts
4 that get bigger on paper?

5 A. The way I would describe it is fill
6 continues --

7 Q. Okay.

8 A. -- in June. It's not a refill. Still the
9 fill, because we really haven't reached the actual day
10 of allocation. Our first attempt in May was incorrect.
11 And the day of allocation would move until after you
12 got past that period of rain and the reservoir system
13 again began to drop.

14 Q. Okay. How do you decide which fill
15 continues?

16 A. It's based on the daily accounting. We
17 measure the natural flow available in the system, and
18 we distribute that to the earliest right first.

19 Q. Stop there. The earliest --

20 A. The earliest right, the earliest right
21 that's diverting water.

22 Q. Okay.

23 A. Regardless of whether it's natural-flow
24 right for irrigation or it's a storage right.
25 According to the priority, you fill those in sequence

1 until we've exhausted the total amount of natural flow
2 on that day. And that determines whether or not or
3 which account that natural flow goes into.

4 Q. And if you use all of that to do the first
5 fill in sequence of those water rights and rain is
6 still happening and there's low demand, then what
7 happens?

8 A. At that point we show all the storage
9 accounts being full, we show some canals that have used
10 storage, but because of the rain we see the reservoirs
11 are all physically 100 percent full, so what that means
12 is now we have that unallocated-for storage or refill
13 storage physically in the system, and it needs to be
14 allocated to someone on the day of allocation.

15 Q. And so then you move the day of allocation
16 now from the May 28th original one to a different date?

17 A. Correct.

18 Q. And then you're going to now adjust
19 people's storage accounts and essentially credit them
20 back storage that they may have used prior to May 28th?

21 A. Correct.

22 Q. Okay. And it still rains. What would
23 happen next?

24 A. Same situation. If the rain was sufficient
25 to fill all water rights, the reservoir started

1 increasing in storage, now the day of allocation gets
2 moved further forward.

3 MS. MCHUGH: Okay. Thank you. That's helpful.
4 That's all for me. I think I'm now more clear.

5 MR. RIGBY: Good. I won't ask any questions
6 that create any more confusion, so...

7 MR. ORR: I have only one question I'd like to
8 ask you, Tony.

9

10 FURTHER EXAMINATION

11 BY MR. ORR:

12 Q. I believe earlier Mr. Simpson asked you if
13 the remark we've been referring to were implemented or
14 included in the decrees would it potentially have
15 effect on the water supply for a spaceholder.

16 Do you recall that?

17 A. Yes.

18 Q. I think you said yes. I was wondering if
19 you could explain to me what you meant by "yes." What
20 kind of effect? What were you referring to?

21 A. I was assuming the water supply meant the
22 total amount of water that would be available to the
23 spaceholder during the irrigation season. If the
24 spaceholder is limited to simply 100 percent of the
25 space that he owns in the reservoir, he would be

1 allocated that amount, and he would be limited to using
2 that amount.

3 If we allow refill to occur, potentially
4 that spaceholder would have not only his 100 percent
5 allocated space to use, assuming he had already used
6 that, he would have additional water to use under the
7 additional refill.

8 And when John Simpson used the word
9 "potential," potentially that could happen.

10 Q. So I'm still not sure I got to the point I
11 wanted to. Let me try this again.

12 If this remark is implemented or put in the
13 decrees, would it prevent a spaceholder's storage
14 account from filling under the applicable storage right
15 or reduce the chances of their filling of their space
16 under the storage right?

17 A. It would only reduce the chances of the
18 amount of water they got under refill.

19 Q. So it would only reduce the excess or
20 surplus that might be available to them in the future?

21 A. Correct.

22 Q. And that's all?

23 A. Correct.

24 MR. ORR: Okay. That was the only point I had.

25 ///

1 FURTHER EXAMINATION

2 BY MR. SIMPSON:

3 Q. Well, Tony, when we talk about refill,
4 we're talking about not only filling that could occur
5 after you have 100 percent of your space filled and
6 available to you, but also a refill, as it's been used
7 in this deposition, that occurs after a flood-control
8 release; correct? So it could be an amount that is not
9 in addition to the 100 percent of what you're entitled
10 to, but also up to 100 percent?

11 A. The refill in that situation would just be
12 used to offset the storage that had previously filled
13 but was released by the Bureau of Reclamation for flood
14 control.

15 Q. That's right. Correct. And if the
16 spaceholder did not utilize that water when it was
17 released for flood control, then if the refill, as it's
18 been used in this context, did not fill that space back
19 up, it would affect the water supply available to them
20 after the date of allocation -- or it could
21 potentially? Excuse me.

22 A. Yes.

23 MR. SIMPSON: That's all I have.

24 MR. TUCKER: Could I ask one more question?

25 MR. SIMPSON: No. Get that on the record.

1 FURTHER EXAMINATION

2 BY MR. TUCKER:

3 Q. Is there anyplace where the day of
4 allocation is defined?5 A. It's difficult to determine. There's not a
6 common procedure the watermaster uses to publish that,
7 other than through our weekly water reports that we
8 distribute to water users.9 Q. So if I Googled it, I probably wouldn't
10 find it?

11 A. Probably not.

12 Q. All right. Thanks.

13 A. But I could look back in any year and
14 determine that for you if you called the office.

15 MR. TUCKER: Yeah. Okay.

16 MS. MCHUGH: Is there any more questions?

17 Okay. And, Jim, I do believe there might
18 be, but I can help you on that.

19 THE COURT REPORTER: Are we off?

20 MS. MCHUGH: But before we go off the record, I
21 do just want to mention a couple things.22 Are we concluding today's deposition for
23 the purposes of what the notice was for, with the
24 understanding that you can notice other depositions?
25 Or did you want it, John, to be a continuing

1 deposition?

2 MR. SIMPSON: Well, I think it has to be
3 continuing, because I don't know what Kent or others
4 may have wanted to ask.

5 MS. MCHUGH: Okay. So I guess we're going to
6 continue the deposition.

7 And I think, Tony, Chris will make an
8 arrangement with whoever may need to do some follow-up
9 questions or additional questions on that.

10 As to what you've said here today, the
11 procedure, I guess, I would expect that you'd want to
12 review the transcript up to this point and make any
13 corrections to that?

14 THE WITNESS: Yes.

15 MS. MCHUGH: Because the other continuing
16 deposition may not occur for a while.

17 So is there a way to arrange that on a
18 continuing deposition, Jeff?

19 THE COURT REPORTER: Yeah. He can review this
20 volume.

21 MS. MCHUGH: Okay. And then we can just sign
22 this volume. So we'll have that sent to you guys to do
23 that, then. All right.

24 MR. BROMLEY: Thanks.

25 MS. MCHUGH: Nothing further. Thanks.

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MR. BROMLEY: Thanks.

(Deposition adjourned at 2:22 p.m.)

(Signature requested.)

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CERTIFICATE OF ANTHONY OLENICHAK

I, ANTHONY OLENICHAK, being first duly sworn,
depose and say:

That I am the witness named in the foregoing
deposition; that I have read said deposition and know
the contents thereof; that the questions contained
therein were propounded to me; and that the answers
contained therein are true and correct, except for any
changes that I may have listed on the Errata Sheet
attached hereto.

DATED this ____ day of _____ 20__.

CHANGES ON ERRATA SHEET YES___ NO ___

ANTHONY OLENICHAK

SUBSCRIBED AND SWORN to before me this
____ day of _____ 20__.

NAME OF NOTARY PUBLIC
RESIDING AT _____

MY COMMISSION EXPIRES _____

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ERRATA SHEET FOR ANTHONY OLENICHAK

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REPORTER'S CERTIFICATE

I, JEFF LaMAR, CSR No. 640, Certified Shorthand Reporter, certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me.

That the testimony and all objections made were recorded stenographically by me and transcribed by me or under my direction.

That the foregoing is a true and correct record of all testimony given, to the best of my ability.

I further certify that I am not a relative or employee of any attorney or party, nor am I financially interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this 17th day of February, 2012.



JEFF LaMAR, CSR NO. 640
Notary Public
Eagle, Idaho 83616

My commission expires December 30, 2017