

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI**

JAMES WHITTAKER, an individual, and
WHITTAKER TWO DOT RANCH LLC,
an Idaho limited liability company,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES, an administrative agency of
the State of Idaho,

Respondent.

Case No. CV30-21-0304

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 84441 IN THE
NAME OF BRUCE AND GLENDA
MCCONNELL

SETTLED AGENCY HEARING TRANSCRIPT ON APPEAL

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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Audio Transcription

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR) Docket No.
TRANSFER NO. 84441 IN THE NAME OF)
BRUCE AND GLENDA MCCONNELL)
_____)

TRANSCRIPT OF RECORDED HEARING
VOLUME I (Pages 1-409)

BEFORE

HEARING OFFICER: JAMES CEFALO

Date: April 21, 2021; 10:20 a.m.

Location: BLM/U.S. Forest Service Office
Salmon, Idaho

TRANSCRIBED BY:

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

Notary Public

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13 Also Present:

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E X H I B I T S

NO.	ADMITTED
1-20	10
22-24	10
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301-312	10

1 (Begin transcription at 0:20 of audio
2 file.)

3 THE HEARING OFFICER: Good morning. My name is
4 James Cefalo from the Eastern Regional Office of the
5 Idaho Department of Water Resources. I will serve as
6 the Hearing Officer today on behalf of the Department.

7 Cindy Yenter, who is an Analyst 4 with the
8 Department and works in the field office here in Salmon
9 is assisting me with the hearing. I wanted to make it
10 clear on the record that Ms. Yenter is assisting me
11 with the recording equipment and the logistics of the
12 hearing. She will not be involved in the
13 decision-making for the case. She has been identified
14 as a potential witness in this case and may be called
15 to testify during the hearing. Because she's a
16 potential witness, as I just -- I thought that it was
17 important on the record to confirm that her assistance
18 with me up here is really just to manage the recording
19 equipment.

20 So the purpose of this hearing is to
21 receive evidence and testimony in connection with
22 application for transfer 84441 filed in the name of
23 Bruce and Glenda McConnell, which has been protested.
24 The hearing will be conducted in compliance with the
25 application provisions of Chapter 2, Title 42, and

1 Chapter 52, Title 67 of the Idaho Code, and the
2 Department's Rules of Procedure.

3 The hearing is beginning on Wednesday,
4 April 21st, 2021, at 10:20 a.m. at the BLM/U.S. Forest
5 Service combined office in Salmon, Idaho.

6 Present at the hearing today we have the
7 applicants, Bruce and Glenda McConnell, and their
8 attorney, Chris Bromley, and Candice McHugh is on the
9 phone, and a consultant, Scott King.

10 We also have Protestants James Whittaker
11 and Whittaker Two Dot Ranch, who is also Jordan
12 Whittaker, James' son. And they're represented by
13 Attorney Rob Harris, and have a consultant, Bryce
14 Contor.

15 We also have protestant Dave Tomchak and
16 his wife, Laura, and their attorney, Kipp Manwaring, is
17 here also.

18 And we also have protestant Shanna Foster,
19 who is here on behalf of Smith --

20 MS. FOSTER: 2P Ranch.

21 THE HEARING OFFICER: -- 2P Ranch. Right?

22 Okay.

23 And we are missing currently one -- two of
24 our protestants. We are missing Protestant Rosalie
25 Ericsson and Steven Johnson. And by not being here at

1 the start of the hearing, and in fact 20 minutes after
2 the start of the hearing, they -- you know, what
3 they're doing is waiving their ability to cross-examine
4 witnesses and really participate in this hearing.

5 As Hearing Officer, I will take official
6 notice of the Department's file for Application for
7 Transfer 84441, any past decisions or orders of the
8 Department that may be relevant to this contested case,
9 the Department's water right records, and any reports,
10 measurements, or stream-flow records in the
11 Department's files that may be relevant. We haven't
12 identified any specific documents that way, though.
13 And the -- our rules of procedure require those to be
14 identified by the hearing.

15 And so prior to the hearing the parties
16 reviewed and proposed -- I'm sorry, reviewed the
17 proposed exhibits and stipulated that the following
18 exhibits should be admitted into the administrative
19 record for this case. And that would be Exhibits 1
20 through 20, 22, 23, and 24, and Exhibits 154 through
21 161, and Exhibits 301 through 312.

22 I'll open it up. Do any of the parties
23 have any concerns or did I misstate any of those
24 numbers?

25 Hearing none, then those -- those exhibits

1 are admitted into the administrative record at this
2 time.

3 (Exhibits 1-20, 22-24, 154-161, and 301-312
4 admitted.)

5 THE HEARING OFFICER: Prior to the hearing
6 McConnell filed a motion in limine requesting that the
7 Hearing Officer exclude a portion of Exhibit 151 and
8 all of Exhibits 152 and 153, and to prevent witnesses
9 from testifying about the substance of the portions
10 proposed to be excluded.

11 The motion contained McConnell's arguments
12 in support of the exclusion. The motion was joined in
13 part by protestant David Tomchak.

14 Whittaker and Whittaker Two Dot Ranch, who
15 identified those Exhibits 151, 152, and 153, prepared a
16 written response to the motion in limine. I will
17 provide the parties -- I have reviewed those motions
18 and the responses, and I will provide the parties an
19 opportunity, though, to provide any additional
20 arguments at this time related to those motions. But
21 with a caveat that you don't need to restate what's in
22 the motion. I -- you know, that's already on the
23 record through the motion.

24 So, Mr. Bromley, anything more to add?

25 MR. BROMLEY: Well, in looking at Rob's

1 response, the motions were properly filed, were filed
2 based on IDAPA.

3 THE HEARING OFFICER: Uh-huh.

4 MR. BROMLEY: Specifically cited Rule 600.

5 Mr. Harris in his response takes issue with citation to
6 Idaho Rules of Evidence.

7 But I will note that while not completely
8 routine the Department in nearly every of the major
9 delivery calls -- so Rangen, Surface Water Coalition,
10 Clear Springs, Blue Lakes, as well as more recently in
11 the Water District 63 administrative cases having to do
12 with fill and refill of the Boise reservoirs -- took in
13 motions in limine, and at times granted some and at
14 times denied some.

15 THE HEARING OFFICER: Uh-huh.

16 MR. BROMLEY: So the -- you know, the notion in
17 Mr. Harris' response at the beginning that they were
18 somehow not properly filed, I absolutely disagree with.
19 They certainly were properly filed. It is the type of
20 motion that the Department does take in cases, and
21 particularly with the delivery calls in the Water
22 District 63 matters when you have experts providing
23 expert testimony and expert reports.

24 And that was the concern with Exhibits 151,
25 152, 153 is that these are expert reports by an expert

1 witness who has been retained and paid to testify in
2 this matter. So those were the concerns. I find that
3 the -- you know, the reports were properly filed.

4 Mr. Harris also provided citation to some
5 other types of reports that the Department has taken
6 in, specifically --

7 THE HEARING OFFICER: Uh-huh.

8 MR. BROMLEY: -- some of the Basin 74 contested
9 matters. There was a -- I think a reference to a
10 Bureau report, and then a Cheryl Chapman report that
11 had to do with high flow.

12 Those are nice documents. You know,
13 they're documents that are in the public sphere that
14 were available for parties to go find, bring in. The
15 Exhibits 152, 153 are very different that way. These
16 are, again, reports that were authored by an expert
17 who's being paid to testify in this contested case.
18 They're not reports in the sense that you find them in
19 the public sphere.

20 You know, lastly, Exhibit 151, as we stated
21 in the memo, the transfer was not filed to correct a
22 clerical error. So pages 1 through 8 are -- are -- you
23 know, just completely irrelevant to the way the
24 transfer was filed. And I'll get into that, then, I
25 guess with Mr. Contor when he takes the stand to

1 explain what he was -- what he was thinking.

2 Two last points.

3 THE HEARING OFFICER: Uh-huh.

4 MR. BROMLEY: The Kauer Ditch is not part of
5 this transfer. It may be an interesting sidenote, but
6 I -- it's not how the transfer was filed.

7 And then the last point is this Whittaker
8 versus Kauer 1956 Idaho Supreme Court case that was a
9 decision involving the Whittakers and the Kauers, it
10 sure looks like a water rights decision to me, and was
11 not carried forward into the SRBA. I don't see
12 reference to it anywhere.

13 Mr. Harris gave a citation to the City of
14 Blackfoot case for the proposition that the Department
15 does not enforce private agreements. I agree with him.

16 But the difference that we have here is on
17 the City of Blackfoot right, which I believe it was --
18 was it 1-181C? There's specific language and other
19 conditions necessary for administration of a water
20 right to a -- you know, an agreement, a settlement
21 agreement, a private agreement, an agreement of some
22 sort, to which the Department was not party, which is
23 the reason, then, for, you know, both the Department
24 and then the courts on up on appeal to say that it's --
25 it's not something that the Department enforces.

1 And that's because there's language on the
2 face of that right directing parties to an agreement.
3 Very different than the water rights that we have here
4 in this case that have an absence of language directing
5 somebody to an agreement, you know, whether it's
6 binding on anyone, whether it's private, whether it's
7 public. We just simply don't have that on -- on any of
8 these water rights directing anyone to understand
9 anything about an agreement between private parties and
10 I think [unintelligible].

11 So that's -- you know, hopefully that's
12 responsive -- or my reply to Mr. Harris' response. I
13 understand your ruling. And again, didn't want to just
14 completely reiterate what was in the original motion.

15 THE HEARING OFFICER: Okay.

16 MR. BROMLEY: So thank you.

17 THE HEARING OFFICER: I appreciate that.

18 Mr. Manwaring, did you have anything more
19 to add?

20 MR. MANWARING: Just to make clarification on
21 the basis of our joinder in part.

22 THE HEARING OFFICER: Uh-huh.

23 MR. MANWARING: If you'd look at Whittakers'
24 Exhibit 151, which is an injury analysis document
25 provided by their expert witness, it, in our

1 estimation, unnecessarily focuses upon the Whittaker
2 versus Kauer decision that's on page 4 of that report,
3 and makes some express statements about some clear
4 direction regarding water rights in that decision, and
5 then also refers to the Kauer Ditch at -- and either is
6 an express statement or at least an inference from the
7 report that somehow the Kauer Ditch and the Whittaker
8 versus Kauer decision have some bearing upon the
9 hearing today.

10 We see that they don't have any bearing
11 upon this hearing. I can't understand how that can be
12 relevant in any aspect of what you are making a
13 determination on as relating to a change in diversion.

14 In addition, the Exhibit 153, which is the
15 Whittaker exhibit, also spends a good deal of time
16 making a hydrologist opinion determination as to the
17 location, construction, and flow of the Kauer Ditch,
18 which, again, isn't even at issue here.

19 THE HEARING OFFICER: Uh-huh.

20 MR. MANWARING: So I'm not sure why that's even
21 part of the discussion.

22 I know that in private conversations with
23 Mr. Harris before, it was explained that the Whittakers
24 were just hoping to show some historic nature of water
25 use here.

1 Well, this goes beyond just an historic
2 reference to what may have happened. This goes on to
3 an explanation of water flows, topography, and even the
4 analysis and flow measurements that would be suggested
5 by a kind of potentials with the Kauer Ditch.

6 I don't see that that's relevant in any
7 aspect. As you look in pages 4 through 8 of that
8 exhibit, it's again, Exhibit -- let me make sure we got
9 the right one -- Exhibit 153.

10 And then it also makes some conclusions on
11 page 10 of that exhibit. And again, the conclusion
12 that's found on page 10 under Kauer Ditch, it simply is
13 a conclusion that isn't pertinent to the facts before
14 this Hearing Officer today as it relates to this change
15 in a point of diversion, particularly where there's
16 some question about observations on the use and current
17 conditions, cross-sections, and the location and size
18 of the weir.

19 All of those have -- in my estimation, are
20 immaterial to what we're doing. And I think focusing
21 upon them is a red herring in this hearing and
22 shouldn't be.

23 THE HEARING OFFICER: Okay. Thank you,
24 Mr. Manwaring.

25 Mr. Harris?

1 MR. HARRIS: Yeah, briefly.

2 Mr. Bromley indicated that the motion --
3 the motion in limine was brought under Rule 600. And
4 while his motion cited, the memorandum didn't argue
5 from the standard.

6 So my point in my brief was that -- that
7 the evidence that we've -- that we are presenting in
8 those reports meet the standard under Rule 600. I was
9 not aware of the Rangen decision, District 63 decisions
10 that Mr. Bromley referenced. Had they been in his
11 memorandum, I could have responded. But I'm not
12 familiar with those.

13 In terms of just the Kauer Ditch in
14 general, we think that historic administration is
15 relevant. It provides a baseline so that the Hearing
16 Officer understands at least what was done on the
17 ground historically.

18 We do make it clear, however, that we're
19 not asking the Hearing Officer to enforce the
20 agreement, rule on it, declare easement rights,
21 anything of that nature.

22 Mr. Contor's report on page 4 states, "The
23 Whittaker versus Kauer decision issued in 1956 provides
24 a clear description of the operation of the Kauer Ditch
25 and its relationship to the Whittakers' water rights

1 and the rights conveyed through the Kauer Ditch."

2 So we're giving the Hearing Officer some
3 historic will context, which, again, we're at the
4 admissibility stage of evidence. It doesn't mean it's
5 going to go to your weight, to the weight of the
6 evidence, or be determinative. But certainly it meets,
7 I think, the initial standard of relevance.

8 We don't intend to spend a bunch of time on
9 it. But what Mr. Contor found is that -- that it at
10 least appeared that in the sometime recent past that
11 that ditch has been used, which will bolster the
12 testimony that my clients will provide for it.

13 But as we say in our brief, we think this
14 matter can be determined under the injury and local
15 public interest criteria in the -- outlined in the
16 code.

17 IDWR does not enforce private agreements.
18 I could get into the detail of the Blackfoot case, but
19 I also think in terms of the just relevance, one of the
20 e-mails that is included as an exhibit from McConnell
21 is an e-mail from Garrick Baxter citing that long case,
22 saying "We don't enforce private agreements,"
23 specifically referring to this Kauer decision. So
24 again, that -- it's relevant because it's in the
25 documentation.

1 And then the last thing I would say is
2 that -- that as far as the first eight pages of
3 Mr. Contor's report, just kind of getting some
4 background on whether this was a clerical correction or
5 an oversight, in Mr. King's report he offers -- in a
6 couple different locations he says, for example, on
7 page 1, "The point of diversion was inadvertently
8 omitted from the water right claims filed in the SRBA."

9 And so what Bryce was asked to do was
10 simply to verify whether it was inadvertent or not. We
11 have discovery responses indicating something
12 different. Whether or not that bears on your decision
13 is up to you. But we are just trying to be responsive
14 to what's contained in the expert reports.

15 So on that basis we think they all should
16 be admitted.

17 THE HEARING OFFICER: Okay. Thank you.

18 So I've reviewed the arguments raised in
19 the motion and the motion joining the motion in limine,
20 and also the response filed by Whittakers. I've also
21 reviewed Exhibits 151, 152, and 153, and find that they
22 do contain relevant information about the diversion
23 structures and the hydrology of the Stroud Creek
24 drainage. This information is relevant to the issues
25 presented in this contested case.

1 Therefore, I deny the motion in limine.
2 The documents in question were prepared by the
3 consultant, Bryce Contor. And so these exhibits will
4 need some foundation laid by Mr. Contor before they'll
5 be admitted, and there may be some -- some other
6 objections not related to relevance that could be
7 raised at that time.

8 So we'll save that for the time when
9 Protestants Whittakers present their evidence.

10 And I do want to note, though, for those
11 people that may not be familiar with the Department's
12 Rules of Procedure, that even if exhibits are admitted
13 into the record, it does not mean that I as the Hearing
14 Officer will find them persuasive in deciding the case.

15 And in fact, Rule 600 of the Department's
16 Rules of Procedure makes it clear that I can employ my
17 experience, technical competence, and specialized
18 knowledge in evaluating evidence -- in evaluating the
19 evidence admitted into the administrative record.

20 So with that, we will move on. Prior to
21 the hearing -- did we already talk about admitting all
22 the other? I think I did.

23 UNIDENTIFIED SPEAKER: The exhibits, we did,
24 yes.

25 THE HEARING OFFICER: On the record I think I

1 did talk about admitting all the other exhibits.

2 UNIDENTIFIED SPEAKER: Yeah.

3 THE HEARING OFFICER: Okay. So then we could
4 turn now to the presentation of evidence by the
5 applicant.

6 MR. HARRIS: I have --

7 THE HEARING OFFICER: That's fine, Mr. Harris.
8 What do you have?

9 MR. HARRIS: I just want to make sure the record
10 is clear. I think what I heard you say is because
11 Mr. Johnson wasn't here at the start of the meeting he
12 can't participate.

13 THE HEARING OFFICER: No.

14 MR. HARRIS: He's now here.

15 THE HEARING OFFICER: He's now here. That -- I
16 should note that on the record.

17 Thank you, Mr. Johnson. I apologize if
18 there was some miscommunication, the change in venue.
19 We'd sent an e-mail, but you may not be somebody who
20 checks an e-mail every five minutes like some other
21 people in this room. So I appreciate you being here.

22 We're also still missing, though,
23 Protestant Rosalie Ericsson.

24 MR. HARRIS: Right.

25 THE HEARING OFFICER: I had just noted that by

1 not being here in person, you waive that ability to
2 participate in the hearing. But now that you're here,
3 we'll let you cross-examine witnesses, as any of the
4 other parties may. And when we get to that part of the
5 hearing, you can make a statement on your own behalf,
6 too, Mr. Johnson. Thanks.

7 MR. BROMLEY: Just to make the record clear,
8 then, Mr. Cefalo, so at 10:20 you stated that both
9 Steven Johnson and Rosalie Ericsson, because they were
10 not present, had waived their ability to participate.

11 THE HEARING OFFICER: I apologize if I misstated
12 that. I just meant by not being here they effectively
13 are waiving their ability to participate in the
14 hearing. But now that Mr. Johnson is here, he can
15 participate in the hearing.

16 MR. BROMLEY: Okay. And I'm just making the
17 record clear, then --

18 THE HEARING OFFICER: I apologize, yeah.

19 MR. BROMLEY: -- that at 10:40, 20 minutes after
20 that the statement had been made, Mr. Johnson is now
21 present, and you're saying he is now allowed to
22 participate.

23 THE HEARING OFFICER: He can.

24 MR. BROMLEY: Okay.

25 THE HEARING OFFICER: Yes.

1 MR. BROMLEY: So then if Ms. Ericsson were to
2 come in at any point during today or potentially
3 tomorrow, if we're still here, would she then be able
4 to participate?

5 THE HEARING OFFICER: She would, yes.

6 MR. BROMLEY: Okay.

7 THE HEARING OFFICER: I'll let her come late. I
8 mean I don't know what her circumstances are. But of
9 course, during the time that she's not in this hearing,
10 there's testimony being given that is being given
11 without -- you know, without her participation in the
12 hearing.

13 MR. BROMLEY: Okay. I just want the record to
14 be clear.

15 THE HEARING OFFICER: And there is an
16 opportunity, too, I guess, for parties who do not show
17 up at the hearing, you know, the Department's Rules of
18 Procedure have a mechanism where those non-appearing
19 parties can be defaulted from a hearing. And if she
20 doesn't appear, I guess, from now until the end we can
21 discuss that at the end, if that's something that you
22 feel like is important that the Department take that
23 official step to default Ms. Ericsson from this case,
24 then, you know, I'm not opposed to that. So we can
25 discuss that, maybe at the end, see if she shows up.

1 MR. BROMLEY: Sure.

2 THE HEARING OFFICER: Thank you, Mr. Bromley. I
3 apologize for any misstatements.

4 So as you -- you're free, Mr. Bromley, to
5 provide an opening statement if you want to, to provide
6 a roadmap for kind of how you're going to present
7 evidence and what your witnesses may speak to, but you
8 don't have to.

9 MR. BROMLEY: You know, Mr. Cefalo, you are
10 certainly one of the better hearing officers that the
11 Department has.

12 Of course, Ms. Yenter, you are, too, when
13 you're serving in that capacity.

14 MS. YENTER: It's okay.

15 MR. BROMLEY: You know, I've found that the
16 Department, you know, really is -- you all are up to
17 speed on these things. You've looked at the exhibits
18 before. You understand what the issues are. I -- you
19 know, I think we'd all like to get out of here --

20 THE HEARING OFFICER: Great.

21 MR. BROMLEY: -- hopefully today. And, you
22 know, I just don't see a great need to do that.

23 THE HEARING OFFICER: Okay.

24 MR. BROMLEY: So I appreciate the opportunity,
25 but I -- I will waive that.

1 THE HEARING OFFICER: Okay.

2 MR. BROMLEY: We will be calling Bruce McConnell
3 first.

4 THE HEARING OFFICER: Great.

5 MR. BROMLEY: Scott King, who's our expert
6 second, and then Cindy Yenter in her capacity as
7 watermaster would be our third and final witness.

8 Of course, you know, reserve the right to
9 recall them if we decide we need to. But those are the
10 witnesses that we're intending to call, just to, you
11 know, Bruce will hopefully be able to lay some
12 foundation as to, you know, why we're here today, Scott
13 will provide some expert testimony, and then Cindy, her
14 observations as watermaster.

15 THE HEARING OFFICER: Excellent.

16 MR. BROMLEY: Great.

17 THE HEARING OFFICER: Okay.

18 MR. BROMLEY: So do you want to start, Bruce.

19 MR. McCONNELL: Yes.

20 MR. BROMLEY: Do you want to step up to the
21 witness stand.

22 MR. McCONNELL: Okay.

23 MR. BROMLEY: And then we've got -- this is our
24 book.

25 MR. McCONNELL: Okay.

1 BRUCE McCONNELL,
2 having been called as a witness by the Applicants, was
3 duly sworn and testified as follows:
4

5 THE HEARING OFFICER: Mr. McConnell, do you
6 solemnly affirm that the testimony you're about to give
7 is the truth, the whole truth, and nothing but the
8 truth.

9 THE WITNESS: I do.

10 THE HEARING OFFICER: Okay. Have a seat.

11 And, Mr. Bromley, you can proceed with
12 examination.

13 MR. BROMLEY: Great. Thank you.

14

15 DIRECT EXAMINATION

16 BY MR. BROMLEY:

17 Q. Hi, Bruce.

18 A. Hi, Chris.

19 Q. Bruce, would you please state and spell
20 your name for the record.

21 A. Bruce McConnell, B-r-u-c-e,
22 M-c-C-o-n-n-e-l-l.

23 Q. And, Bruce, when did you move to the
24 property on Lee Creek?

25 A. April 1993.

1 Q. Where did you move from?

2 A. Lincoln County, Montana.

3 Q. And how long have you been irrigating and
4 ranching?

5 A. I've been irrigating for 28 years. I've
6 been ranching for 40.

7 Q. Have you been on the Water District 74Z
8 board?

9 A. Yes.

10 Q. And what is Water District 74Z?

11 A. That is the Water District that administers
12 the Lee Creek, Big Eight Mile Creek water.

13 Q. Okay. So is that -- is that the drainage
14 you're in?

15 A. Yes.

16 Q. All right. And how long have you been on
17 that board for and what positions have you held?

18 A. I think from '94 to 2020 I believe I served
19 as the chairman.

20 Q. And are you currently on the board?

21 A. I don't know. I did not make the 2021
22 meeting.

23 Q. Is there a reason for that?

24 A. First Monday in March I didn't get back in
25 until three o'clock. So I was taking care of cows.

1 Q. Okay. Okay, Bruce, you understand that
2 we're here in a protested application for transfer.

3 Do you know the folks who have protested
4 your transfer?

5 A. Yes, I do.

6 Q. Okay. Looking at your property, Bruce, I'd
7 just like to talk about how you used water a little
8 bit.

9 So what do you use water for at your
10 property?

11 A. Irrigation for grazing and hay and
12 livestock water.

13 Q. Okay. And do you flood or sprinkler
14 irrigate?

15 A. I flood.

16 Q. 100 percent?

17 A. Yes.

18 Q. Okay. And what do you raise on the
19 property?

20 A. We're a cow-calf operation, beef cattle.

21 Q. Then you irrigate pasture?

22 A. Pasture and hay.

23 Q. Okay. And how many head of cattle?

24 A. We average about 200. Approximately we're
25 like 185 today.

1 Q. And, Bruce, based on your years of
2 experience, do you consider yourself an efficient
3 irrigator?

4 A. Yes, I do.

5 Q. Okay. When you bought the property, Bruce,
6 in 1993, did anyone explain to you where water was
7 diverted from?

8 A. Darrell Nef, who owned the property where
9 the lower diversion is located, took me for a pickup
10 truck ride, showed me the lower diversion, took me to
11 the upper diversion.

12 Q. And, Bruce, so the lower diversion, is that
13 the diversion that we're talking about the transfer --

14 A. Yes, it is.

15 Q. -- the section 20 diversion?

16 A. Yes.

17 Q. And then the upper diversion, that's the
18 section 30 diversion?

19 A. Yes.

20 Q. Okay. I just wanted to make that clear.

21 MR. HARRIS: Chris, could you just restate that
22 and make sure [unintelligible].

23 MR. BROMLEY: Sure thing, Rob. Yeah, I was just
24 asking just to make sure that the -- when Bruce is
25 talking about the lower diversion, that's the diversion

1 we're talking about in this transfer proceeding.

2 MR. HARRIS: When you say "lower," lower
3 downstream?

4 MR. BROMLEY: Correct. Yeah. Yeah.

5 MR. HARRIS: Thank you.

6 MR. BROMLEY: Further downgradient on Lee Creek,
7 yep.

8 Q. Okay. So Mr. Nef, then, was explaining
9 where water was diverted from.

10 And he was the -- you said he was the prior
11 property owner?

12 A. No. He owned the -- he owned the property
13 where the one diversion was at. And he had been there
14 since like 1949. He had irrigated it the previous
15 year, ran some cattle there, so...

16 Q. Okay. So Mr. Nef's knowledge, then, went
17 back to approximately 1949?

18 A. Yes, to my understanding.

19 Q. Okay. And based on what was explained to
20 you by Mr. Nef, how do you divert water from Lee Creek
21 today? And is it any different than what was explained
22 to you by Mr. Nef?

23 A. Today, no. It's -- we're -- we're not
24 using the lower diversion today. But no, we -- we had
25 used the water, diverted the water since 1993 through

1 August 2020 using both diversions.

2 Q. Okay. Thank you.

3 So do you need both ditches to irrigate
4 your property with?

5 A. Yes, I do.

6 Q. And so by not being able to use the lower
7 diversion acre, you would have -- or have you taken
8 acres out of production?

9 A. Yes.

10 Q. Okay. So, Bruce, let's talk a little bit
11 about this transfer. And if you wouldn't mind, you've
12 got that exhibit book in front of you, if you could
13 turn to Exhibit 4. Just look quickly at that, and then
14 also just have a quick look at Exhibit 5.

15 Do you recognize those letters, Bruce?

16 A. I do the first one. I don't recall the
17 second one.

18 Q. Okay. Well, let's talk about -- a little
19 bit about Exhibit 4. So you had mentioned you had
20 stopped using the lower diversion in August of 2020.

21 Why was that?

22 A. Letter -- I received an e-mail from Cindy
23 Yenter, and a letter following up days later.

24 Q. And Exhibit 4, is this letter --

25 A. Yes.

1 Q. -- that you were talking about?

2 Okay. And what does the letter explain in
3 Exhibit 4?

4 A. It came -- you know, that it's -- it was an
5 illegal diversion and we need to cease using it.

6 Q. Okay. Exhibit 5, do you see whose name is
7 at the top there on Exhibit 5?

8 A. Yes.

9 Q. And who is Merritt Udy?

10 A. He is the watermaster on 70 -- he was the
11 watermaster in 2020 on 74Z.

12 Q. Okay. And the date of that letter is what
13 up there at the very top?

14 A. August 6th, 2020.

15 Q. Okay. And if we look at Exhibit 4, what
16 was the date of that letter?

17 A. August 6th.

18 Q. Okay. And I see Merritt Udy was copied on
19 this Exhibit 4 letter.

20 Do you see that at the bottom?

21 A. Yes.

22 Q. Okay. So then Exhibit 5, this is a
23 letter -- I see Cindy's signature on the second page,
24 and I see it's addressed to Merritt.

25 Do you see that second paragraph on the

1 first page starting with "Mr. McConnell"?

2 A. Yes.

3 Q. Okay. It says, "Mr. McConnell has agreed
4 verbally to close the diversion and has been instructed
5 in writing to complete the closure no later than
6 Friday, August 7, 2020."

7 Do you see that?

8 A. Yes.

9 Q. Did you follow those instructions?

10 A. Yes.

11 Q. Okay. All right. So you then had
12 instructions from Cindy with letters, and then it
13 sounded like verbal instructions, to close the lower
14 diversion.

15 And you -- and you did that?

16 A. Yes.

17 Q. Okay. So then Exhibit 8, if you could turn
18 to that. This is the -- the exhibit of the transfer,
19 which, of course, is part of the Department's files.
20 But it just seemed helpful to have the document as a
21 specific document as an exhibit.

22 Do you -- do you recognize this application
23 for transfer, Bruce?

24 A. Yes.

25 Q. And it -- was this filed -- I mean, you

1 know, we can go to the second page.

2 Do you see your signature there?

3 A. Yes.

4 Q. As your understanding, was this filed to
5 help address the concerns that were raised by Cindy?

6 A. Yes.

7 Q. Okay. Okay. Bruce, we had some
8 pre-hearing rulings from the Hearing Officer that I
9 know you heard speaking to some of the contents of the
10 expert reports from the Whittakers' side. So I'm going
11 to ask you some questions, then, that have to do with a
12 little bit of the topics in those reports, if that's
13 okay.

14 All right. So you understand that the --
15 there were protests filed against you by the
16 Whittakers; correct?

17 A. Yes.

18 Q. And what did those protests explain, if you
19 remember?

20 A. You know, I really don't recall. You know,
21 I get -- you know, I'm not -- I'm not sure.

22 Q. Okay. And, you know, we could look at
23 them, but do you recall they wanted you to withdraw the
24 application and there were references to Kauer Ditch?

25 A. Yeah.

1 Q. Sound about right?

2 A. Yeah.

3 Q. Okay. Have you ever heard the Whittakers
4 discuss this 1956 Idaho Supreme Court case called
5 Whittaker versus Kauer?

6 A. Not that I can recall.

7 Q. Okay. Exhibit 22, if you could turn to
8 that.

9 What's Exhibit 22?

10 A. A warranty deed to the property we own on
11 Lee Creek.

12 Q. Okay. And do you see anything in
13 Exhibit 22 that references any sort of agreement or
14 encumbrance on the part of -- of anybody dealing with
15 an Idaho Supreme Court case or any kind of agreement?

16 A. No.

17 Q. Okay. Let's look at Exhibit 23, then.

18 What's Exhibit 23?

19 A. It's a copy of the title insurance received
20 when we purchased the property.

21 Q. Okay. And I -- now, turn, then, to the
22 second page, which is Schedule A.

23 It looks like you bought the property in
24 fee simple on line 2?

25 A. Yes.

1 Q. Okay. Anything on Schedule A that you see
2 that references an agreement with the Whittakers or a
3 reference to an Idaho Supreme Court case?

4 A. No.

5 Q. All right. Schedule B, which would then be
6 the third and fourth pages of that exhibit. These are
7 the exceptions to the title policy, the land that you
8 bought in fee simple absolute. And we have enumerated
9 exceptions 1 through 16.

10 In any of those exceptions, do you see
11 anything that would alert you to any prior agreements
12 or reference to an Idaho Supreme Court case dealing
13 with Whittakers or this Whittaker versus Kauer case?

14 A. No.

15 Q. Are you familiar with your water rights,
16 Bruce?

17 A. Yes.

18 Q. Okay. Are you familiar with anything on
19 the face of your water rights that would explain an
20 agreement with the Whittakers with reference to an
21 agreement or this Idaho Supreme Court case?

22 A. No.

23 Q. The transfer that you filed, Bruce, is to
24 add an Exhibit A, it shows it was to add this lower
25 diversion; is that correct?

1 A. Yes.

2 Q. Does it have anything to do with the Kauer
3 Ditch?

4 A. No.

5 Q. Let's look back at Exhibit 5.

6 And in the one, two, three -- the fourth
7 paragraph below the two bullets, starting "Based on the
8 investigation," do you see that paragraph?

9 A. Yes.

10 Q. Do you see a reference to a Water Right
11 74-157?

12 A. Yes.

13 Q. Okay. And there are a few other.

14 Do you see another reference to it in the
15 third bullet below that? Do you know anything about
16 this Water Right 74-157?

17 A. I was not aware of it until July of 2020
18 that it even existed.

19 Q. Okay.

20 A. All the records I have showed no 74-157.

21 Q. And so when you say "all the records," what
22 records are you talking about?

23 A. I was -- received from Cal Whittaker a copy
24 of all the water rights on Lee Creek and, you know, a
25 list of -- handwritten mostly of who they -- where they

1 were and who they were at the time. So it was, you
2 know, probably 1994, and this was -- you know, the
3 handwritten with priority dates and diversion points
4 and, you know, place of use.

5 Q. And was that in your capacity as chair of
6 Water District 74Z?

7 A. It was -- you know, I don't remember how
8 long I'd been in possession. You know, like I said, it
9 goes back to probably '93/'94.

10 Q. Okay. So those records, then, from '93/'94
11 until this August 6th of 2020, you're -- what you're
12 testifying to is that you hadn't seen a reference to
13 the --

14 A. Never knew it existed.

15 MR. BROMLEY: Okay. That is all I have.

16 THE HEARING OFFICER: Okay. So we can work our
17 way around the room.

18 Mr. Johnson, did you have any questions for
19 Mr. McConnell?

20 MR. JOHNSON: Not at this time, I don't.

21 THE HEARING OFFICER: Okay.

22 Mr. Manwaring?

23 MR. MANWARING: Yes.

24 THE HEARING OFFICER: Go ahead.

25 MR. MANWARING: Thank you.

CROSS-EXAMINATION

BY MR. MANWARING:

Q. Is it okay if I call you "Bruce"?

A. Yes.

Q. It's better than what your mom calls when you're in trouble; right?

A. Right. Right.

Q. Bruce, did you ever have a water right on Stroud Creek?

A. I had a water right on Lee Creek.

Q. So not on Stroud Creek?

A. Well, Stroud Creek is a tributary to Lee Creek. The old water rights refer to Left Fork Lee Creek, Right Fork Lee Creek.

Q. What may help us, Rob, if you have your Google Earth that you can illustrate, so we can kind of get a better sense where we're at.

MS. YENTER: I think you just turned the -- you may have shut the slider on the light too.

THE HEARING OFFICER: I pulled the slider too.

MS. YENTER: Yeah.

MR. MANWARING: Looks like the snow start so far.

MR. HARRIS: It's got to warm up. Sorry about that.

1 UNIDENTIFIED SPEAKER: May I turn off these
2 front lights?

3 THE HEARING OFFICER: Yeah. Sure.

4 MS. YENTER: Yeah, if you can figure them out.
5 Sure.

6 MR. HARRIS: So two programs. This is RGIS that
7 has some water right --

8 MR. MANWARING: I'm looking for the -- like a
9 Google Earth [unintelligible].

10 UNIDENTIFIED SPEAKER: [Unintelligible.]

11 UNIDENTIFIED SPEAKER: [Unintelligible.]

12 MR. HARRIS: And then here is -- here is Google.

13 THE HEARING OFFICER: There we go.

14 MS. YENTER: There we go.

15 MR. MANWARING: There we go.

16 THE HEARING OFFICER: That's good.

17 MS. YENTER: Yeah.

18 MR. HARRIS: Okay. So this is the -- I'm going
19 to forget her name.

20 THE WITNESS: Cal Whittaker, Rosalie Ericsson's.

21 MR. HARRIS: Ericssons.

22 MR. MANWARING: If you go out a little bit more.
23 Right. Yeah, right there is good.

24 MR. HARRIS: Okay.

25 MR. MANWARING: Now, Mr. Hearing Officer, I

1 don't know -- it may be more helpful for me to walk up
2 and point out places --

3 MS. YENTER: Do you have a pointer?

4 MR. MANWARING: -- just so we can orient
5 everybody to where we're at.

6 THE HEARING OFFICER: Feel free to come on up.
7 That's fine.

8 MR. MANWARING: Okay.

9 THE HEARING OFFICER: At one point we had a
10 laser pointer in here. I don't know if we still do.
11 We don't. That's okay. Come on up if you'd like.

12 MR. MANWARING: I have a finger pointer.

13 THE HEARING OFFICER: That's good.

14 UNIDENTIFIED SPEAKER: I might have a laser.

15 MS. YENTER: There you go.

16 Q. (BY MR. MANWARING): My intention, just to
17 make sure we're all oriented as what we're talking
18 about in this drainage up there with the different
19 creeks.

20 Okay?

21 A. Okay.

22 Q. The one creek over on this side, is that
23 Lee Creek? Would you agree with that?

24 A. Yes. That would be, I believe, what they
25 call the Right Fork of Lee Creek.

1 Q. And there's also a drainage here that's
2 Porcupine Creek?

3 A. Yes.

4 Q. And does that flow into Lee Creek?

5 A. It flows into the Right Fork of Lee Creek,
6 I believe they call it, yes.

7 Q. Okay. And it's roughly down through this
8 section?

9 A. Yeah.

10 Q. And then you have over on the -- this
11 illustration we're looking at the far right bottom
12 area, you have another creek that comes in that's known
13 as Everson Creek?

14 A. Yeah, I -- it's -- it's also referred to as
15 Lee Creek, because Everson and Stroud come together,
16 and I'm not sure what -- you know, whether they call it
17 Stroud Creek or whether they call it the Left Fork of
18 Lee Creek.

19 Q. Okay.

20 A. I'm not sure.

21 Q. You're not sure. But there is an Everson
22 Creek out here that comes --

23 A. No, I think it's farther up, but --

24 Q. Okay.

25 A. -- I was going to say, I'm not -- you know,

1 it's -- yeah.

2 Q. And it joins into Stroud Creek?

3 A. Yes, I believe so.

4 Q. And then Stroud Creek is the one that
5 continues on down and has a confluence with Lee Creek?

6 A. Yes.

7 Q. Okay. So those are the four main
8 tributaries that we're talking about?

9 A. Yes.

10 Q. And my earlier question to you was if
11 you've ever had a water right that said it was on
12 Stroud Creek.

13 I think your testimony was it was Lee Creek
14 or Right Fork Lee Creek?

15 A. I -- I believe that --

16 MR. BROMLEY: Objection. The water rights speak
17 for themselves.

18 THE HEARING OFFICER: Noted on the record.

19 You can answer that, Mr. McConnell.

20 THE WITNESS: I -- I believe they refer to
21 Everson, Stroud, mostly the Left Fork of Lee Creek.

22 Q. (BY MR. MANWARING): Okay.

23 A. Yeah.

24 Q. So while you're sitting here, do you know
25 your water rights that you're talking about that you

1 want to change the diversion on, does that say Right
2 Fork Lee Creek or just say Lee Creek?

3 A. Lee Creek.

4 Q. Lee Creek. Okay. And is it in your mind
5 that that Lee Creek constitutes all of this drainage?

6 A. Yes.

7 Q. Okay. That's what you're saying?

8 A. That's my understanding.

9 Q. That's your understanding. Okay. And your
10 diversion, what you talked about the upper diversion
11 and the lower diversion --

12 A. Yes.

13 Q. -- was that lower diversion upstream from
14 the confluence of Stroud Creek?

15 A. No.

16 Q. It was below Stroud Creek?

17 A. It would be downstream, yes. You know,
18 because those two converge somewhere, you know,
19 upstream from the lower diversion.

20 Q. Okay. And your current request, your
21 current application is to request a diversion further
22 below that lower diversion?

23 A. No, no, no, no, no. It's just the lower
24 diversion was not a legal diversion; it was not carried
25 through the SRBA. So we're trying to reinstate it.

1 Q. So you're trying to establish what you had
2 thought was a lower diversion that you had?

3 A. Right, right.

4 Q. Okay. And you're saying that is below the
5 confluence of Stroud Creek?

6 A. Yes.

7 Q. Okay.

8 A. At this time.

9 Q. Okay.

10 A. I don't know what's happened over the last
11 century, but...

12 MR. MANWARING: Can we enlarge it a little bit
13 up in this section up here, Rob?

14 MR. HARRIS: Are you wanting to see where the
15 diversion points are at?

16 MR. MANWARING: No.

17 MR. HARRIS: Okay.

18 MR. MANWARING: Just the general lay of --

19 Q. Can you identify, Bruce, looking at this
20 illustration, as to where your -- say let's say where
21 you're flood irrigating your pasture at, where would
22 that be?

23 A. Okay. It would be --

24 MR. HARRIS: We got to zoom out.

25 THE HEARING OFFICER: Way out.

1 THE WITNESS: We got to go out. Yeah, we're
2 probably -- okay. I would say we're right in there is
3 going to be where we start the pasture, I would say,
4 yes. That's -- yes. So yeah, this -- if you move the
5 pointer up to the left a little bit, right -- kind of
6 right in there, that's -- that's the -- you know, where
7 we start it, that's pasture we irrigate.

8 Q. (BY MR. MANWARING): Okay. And your
9 diversion comes down here and takes the water out of
10 Lee Creek, from our discussion today, what you're
11 saying is Lee Creek; right?

12 A. Right.

13 Q. And it runs that direction?

14 A. Yes.

15 Q. That's mostly like an east, northeast
16 direction?

17 A. Yeah. I'm not sure.

18 Q. Sufficiently it's not running west anyway,
19 we know that much?

20 A. No, no, no.

21 Q. Okay.

22 A. But it's just...

23 Q. Okay. And is this where your -- like your
24 hay would be?

25 A. Farther -- they need to go up.

1 Q. Further up?

2 A. Yes, yes.

3 Q. Okay.

4 A. You know, kind of up and over to the right,
5 I believe.

6 UNIDENTIFIED SPEAKER: Yes.

7 Q. (BY MR. MANWARING): Okay. Now, this --
8 this --

9 MR. HARRIS: Zoom back in?

10 Q. (BY MR. MANWARING): -- area right here,
11 right there, what -- is this part of your -- is that a
12 stream channel, or is that a ditch you -- that's on
13 your land? Do you know?

14 A. I believe that is a ditch.

15 UNIDENTIFIED SPEAKER: [Unintelligible.]

16 Q. (BY MR. MANWARING): And is this part of
17 the stream channel, this other looked like a channel
18 through there?

19 A. Can we zoom down a little bit?

20 Okay. I -- I -- I was -- okay. I believe
21 this is the lower ditch. I believe this is the stream.
22 I'm not sure. It's not -- it's not real clear.

23 Q. No, I agree with you on that. We're just
24 trying to get a fair idea where we're at. And I'm just
25 trying to help myself understand what you have in mind

1 when you're talking about where your property is and
2 where your water diversions are.

3 Is this -- is this land yours, too, this?

4 A. No. I believe that is -- I believe that is
5 the -- to the left there, I believe, is BLM, and then
6 to the right would be Darrell Nef's property, Steven
7 Johnson property.

8 MR. HARRIS: So just for the record, if this
9 helps: The red area, I believe, is your property;
10 right, Mr. McConnell? Does that look about right?

11 THE WITNESS: Yeah.

12 MR. HARRIS: I zoomed in way too far. There we
13 go.

14 So the red dot is the lower point of
15 diversion, the one you're trying to add.

16 The black line is the BLM property.

17 Mr. Johnson's property is outlined in
18 this -- this kind of light blue color.

19 Does that seem about right?

20 THE WITNESS: Yeah, yeah.

21 MR. HARRIS: Okay.

22 THE WITNESS: That's much clearer.

23 Q. (BY MR. MANWARING): Roughly where
24 everybody's at?

25 A. Yeah, yeah.

1 MR. BROMLEY: Mr. Hearing Officer, just to make
2 the record clear -- and I'm not wanting to cut anybody
3 off. I just want the record to be clear that -- I'm
4 all for efficiency, and so I don't have a problem with
5 Rob Harris, who was just making the verbal comments on
6 the screen trying to show property boundaries during
7 Mr. Manwaring's cross-examination of Bruce. I don't
8 have a problem with that.

9 I just -- since we have a recording going
10 and we've got a new voice that's come in, I just want
11 the recording to be clear that Rob Harris was asking
12 questions during Kipp Manwaring's cross of Bruce.

13 THE HEARING OFFICER: I appreciate that.
14 Thanks.

15 MR. BROMLEY: Thank you.

16 MR. MANWARING: We can go back to Google.

17 MR. HARRIS: Okay.

18 Q. (BY MR. MANWARING): And you came onto the
19 property in the 1990s I think you mentioned?

20 A. Yes, 1993.

21 Q. Is that when you were first familiar with
22 this whole area?

23 A. Yes.

24 Q. Okay. And did you have any prior
25 understanding of the historical water flow that would

1 have been experienced in the Lee Creek area?

2 A. Not really.

3 Q. Okay. Now, let's see. I'm going to show
4 you what's an exhibit that we have. Make sure we have
5 that [unintelligible]. 307 and 309.

6 MS. YENTER: 307 and 309. Okay.

7 MR. MANWARING: Now I'm distracted by a fish.
8 Where did that fish go?

9 MR. HARRIS: Sorry. It happens when I do
10 something new. We can close that up.

11 MS. YENTER: The humming's not bothering me too
12 bad. It's all right.

13 Q. (BY MR. MANWARING): Bruce, you've been
14 handed an exhibit that's Exhibit 307.

15 Do you recognize what that's showing?

16 A. Yes.

17 Q. What is -- what's being shown in
18 Exhibit 307?

19 A. Okay. It was November 9th water being
20 diverted through the lower diversion, which is not --
21 was not a legal diversion.

22 Q. But it -- but this is what you're
23 describing at the lower diversion, that's what I'm
24 trying to establish.

25 A. Right, right.

1 Q. I'm not really trying to establish that
2 you're diverting water. I'm just trying to establish
3 where that is.

4 A. Yes. That was -- yes, that was the lower
5 diversion. It was after the watermaster went off, and
6 so...

7 Q. Okay. And is that a weir that's being
8 depicted in there?

9 A. Yes.

10 Q. And that's on Lee Creek?

11 A. Yes. Well, no, it's not on -- it's -- it's
12 a weir on -- for Lee Creek water, yes.

13 Q. Oh, okay.

14 THE HEARING OFFICER: But, Mr. McConnell, it's a
15 weir on the lower ditch?

16 THE WITNESS: Right.

17 THE HEARING OFFICER: This -- this shows water
18 flowing in the lower ditch headed to the north?

19 THE WITNESS: Right.

20 THE HEARING OFFICER: Okay.

21 MR. MANWARING: Okay.

22 THE HEARING OFFICER: Go ahead.

23 Q. (BY MR. MANWARING): And Exhibit 309, do
24 you recognize what that's showing?

25 A. That's the diversion on the lower ditch.

1 Q. That's the headgate?

2 A. Yes.

3 Q. And is this the same point roughly we're
4 talking about, one's a weir, one's the headgate on that
5 lower area?

6 A. Can you repeat, please? Speak a little
7 clearer, louder.

8 Q. Be happy to. Thank you.

9 Exhibit 307 and 309, how close in proximity
10 are they to each other?

11 A. Oh, maybe 500 yards, something like that.
12 I'm guessing.

13 Q. Okay. And 309 being the headgate, what
14 does that headgate control?

15 A. That's the diversion on Lee Creek. So to
16 the right would be Lee Creek, to the left would be
17 ditch.

18 Q. Your ditch. Is this the ditch we were
19 looking at on the illustration that flows up through
20 your fields?

21 A. Now, run that by me again, please.

22 Q. Is this -- when you say "the ditch," is
23 that the ditch you were referring to that runs towards
24 your fields that we were looking at on the
25 illustrations?

1 A. It's one of the two, yes --

2 Q. One of the two?

3 A. -- that supply water to the -- supply
4 irrigation water to the property.

5 Q. Okay. Okay. The upper diversion you were
6 talking about earlier in your testimony, where is that
7 in relation to this lower diversion, this weir that's
8 in 307?

9 A. Oh, I'm guessing maybe a quarter of a mile
10 to the south and west. Guessing.

11 Q. Okay. And is it the upper diversion that
12 you've been mainly using to get water down your ditch
13 to your pasture, to your hayfields?

14 A. No. It -- prior to August of 2020, the
15 lower diversion carried the lion's share of the water.

16 Q. Okay. Did you use the upper diversion to
17 divert anything down that ditch?

18 A. We used -- we've -- yes, we've -- you know,
19 the upper ditch doesn't carry the water. Use it every
20 year, except in a couple of really super short water
21 years, we have shut that top diversion off to put
22 together enough water to try to have something to do
23 there. So we have used -- you know, historically
24 95 percent of the year we use both diversions, you
25 know, season long.

1 Q. Okay. When you say you shut the upper
2 diversion off, can you help me understand what you're
3 meaning by that?

4 A. We put the water back in the creek to catch
5 it at the lower diversion. So then some real short
6 water years, you split the water, you don't have enough
7 to do anything with.

8 Q. Okay. Now I understand what you're telling
9 us.

10 Have you tried using just the upper
11 diversion to get water down to your fields?

12 A. Well, we have since August of 2020, yes,
13 that's what we're using. But no, it doesn't -- you
14 know, it's through the last -- through the -- I think
15 we're maybe one-and-a-half cfs is about the most water
16 that was recorded through that upper diversion.

17 Q. Is there any way you can run a little ditch
18 from the upper diversion that goes into your -- the
19 lower one that's been used from the south diversion
20 point?

21 A. Well, the upper diversion won't carry the
22 water, no. It's just -- it's not -- there's something
23 happens with the -- no, there's just not -- a person
24 could -- yeah, you could catch -- you could catch -- we
25 can dump water from the top ditch down into the lower

1 ditch, yes.

2 Q. You could. Okay. What you're saying is
3 you haven't been experiencing enough head flow of water
4 from the upper diversion?

5 A. No, there's not the water there.

6 Q. I'm going to hand you Exhibit 306.

7 UNIDENTIFIED SPEAKER: [Unintelligible.]

8 MR. MANWARING: [Unintelligible] young
9 [unintelligible].

10 Q. So you've been handed Exhibit 306, Bruce.
11 Do you recognize what that's showing?

12 A. Yes. That's the measurement device on the
13 upper ditch.

14 Q. So this would be the weir on the upper
15 ditch?

16 A. Right.

17 Q. And this is what you've referred to as the
18 upper diversion?

19 A. Yes.

20 Q. And from your looking at Exhibit 306, what
21 you're saying is from that weir that you can't get
22 enough water flow through that upper diversion to get
23 down to your field; is that what you're saying?

24 A. Well, it's what -- it has historically not
25 carried enough water to -- no. Yeah, it's -- it's --

1 that was -- that upper diversion irrigates one part,
2 and then it goes over across the road. And, you
3 know -- you know, crosses the road into another piece
4 of property. But no, there's not enough -- in my
5 experience, you know, from basically I'm speaking from
6 August of 2020, you know, so it's a rather short period
7 of time.

8 Q. Okay. So you've got a limited experience
9 in seeing what you can transfer through that upper
10 diversion?

11 A. Right.

12 Q. And I think your testimony was before
13 August 2020 you were primarily, if not exclusively,
14 using the lower diversion?

15 A. Yes. In a -- in a couple different years
16 we used the lower diversion exclusively.

17 Q. Okay.

18 A. You know, later season.

19 MR. MANWARING: Okay. I don't have any other
20 questions of Bruce.

21 Thank you.

22 THE HEARING OFFICER: Okay. Mr. Harris. Wait.
23 Let me -- we're working around.

24 Ms. Foster, anything.

25 MS. FOSTER: I don't have anything.

1 THE HEARING OFFICER: Okay. Mr. Harris?

2 MR. HARRIS: Let me turn this back on.

3

4 CROSS-EXAMINATION

5 BY MR. HARRIS:

6 Q. Mr. McConnell, I've -- I've taken notes of
7 your testimony, so I apologize if I jump around a
8 little bit, but I just want to clarify some of your
9 testimony today.

10 A. Can you speak up a little bit, please?

11 Q. Yeah. Do you need me to get a little
12 closer?

13 A. No, no, just...

14 Q. Okay. I just want to clarify a little bit
15 of your -- or some of your testimony. And the first
16 thing I think we'll do is just kind of orient us around
17 your diversions.

18 Maybe we can -- how much water are you
19 entitled to divert to your property? Do you know?

20 A. 15.2 cfs, I believe.

21 Q. Okay. Does the lower ditch have the
22 capacity to carry all 15.2 cfs?

23 A. No. It will probably carry maybe 12, 13.
24 You know, this is -- this is a guesstimate. Yeah.

25 Q. And the upper ditch, any estimate on what

1 it could carry?

2 A. 4, 5, 6, maybe.

3 Q. You mentioned a Mr. Nef.

4 Is that spelled N-e-f?

5 A. I believe it was two -- I'm not sure if
6 there was two "f's" or one "f."

7 Q. Do you know when he owned what is now your
8 property?

9 A. He never owned our property.

10 Q. Okay. What -- how was he familiar with
11 water distribution in this location?

12 A. The lower diversion was on his place
13 approximately 3, 400 yards from his residence. And he
14 had -- when we looked at the place to purchase in 1992,
15 he was irrigating the place and running live -- his
16 livestock there.

17 Q. So did he own or operate what's now the
18 Steven Johnson property?

19 A. Yes.

20 Q. Okay. Could you just give me some more
21 detail on the conversations you had with him.

22 A. Just took a ride in his pickup truck,
23 showed me, "Okay, this is where the top diversion's at.
24 This is where the bottom diversion's at."

25 Q. So when you say "the top diversion," you're

1 talking with the upper -- your upper and lower
2 diversion; is that right?

3 A. Right. Right.

4 Q. Did he take you on a drive further up the
5 Stroud Creek drainage or anywhere else?

6 A. No.

7 Q. So it was pretty limited to just --

8 A. Took -- yeah, took it to this -- this
9 diversion right -- that's as far as we went was --
10 would have been this one right here, our well, yeah.
11 Yeah, that was...

12 THE HEARING OFFICER: The upper ditch?

13 THE WITNESS: Right.

14 Q. (BY MR. HARRIS): Okay. And when you
15 purchased the property, how did you find out about
16 Water District 74Z?

17 A. I was just handed -- the realtor give me a
18 copy of water rights, you know, showing what water was
19 deeded or came with the place.

20 Q. But you eventually became aware there was
21 an organized water district that elects a watermaster;
22 is that right?

23 A. Yes, sometime probably -- would have been
24 sometime in '94, probably.

25 Q. And you say you served on that advisory

1 committee or on the board of that water district?

2 A. Yes.

3 Q. Did you -- at that time did you meet
4 Mr. James Whittaker or anyone from his family?

5 A. I'm -- he attends every water meeting,
6 every -- yeah, he attended every 74Z water meeting, so
7 yes.

8 Q. Did you, as part of that role, did you try
9 to familiarize yourself with the water rights that were
10 delivered to that water district and how -- and how
11 historically they were administered?

12 A. No.

13 Q. What did you do, then, as -- in your role
14 on the board?

15 A. Basically, just ran the meeting as a
16 chairman, so...

17 Q. And so was it your understanding that on
18 this lower diversion, and the upper, that whatever
19 water was available at Lee Creek you would just divert?
20 Or were you aware there were potentially other sources
21 injecting water into Lee Creek?

22 A. Would you rephrase the question, please?
23 You're not --

24 Q. It wasn't very well worded, so I can do
25 that.

1 Was it your understanding of your water
2 rights that if there was water physically available at
3 your lower or upper diversions you would just divert
4 it, whatever was physically there?

5 A. No. No. Because it's -- it was
6 quantified. So no, I -- no, that was supposed to be
7 the watermaster's job. So no, no. I was aware that
8 no, that I was -- should be limited to the water right.

9 Q. You're correct. But with that limitation
10 were you -- if water was physically available and your
11 water rights were in priority, then the watermaster
12 would say you could take water through those
13 diversions; correct?

14 A. Yeah, but the watermaster was pretty iffy.
15 So he would basically control -- because all the junior
16 rights are upstream, so...

17 Q. Was it your understanding that you could
18 file a delivery call against those junior users to
19 divert from your diversion points?

20 A. You know, I really wasn't aware of it, no,
21 because I thought -- I thought that was the
22 watermaster's job.

23 Q. Okay. Mr. Bromley asked you several
24 questions about Exhibits 4 and 5. And I want to ask
25 you a little bit about that.

1 What -- did you file a delivery call for
2 Water Right 74-157, which is Whittakers' rights in
3 2020?

4 A. No.

5 Q. Why then was there an administration
6 dispute in 2020?

7 A. That was between IDWR and them. No. I did
8 not file a call on that, no. I became aware of it when
9 about a third of my water wasn't there anymore. So I
10 made a contact to the watermaster. And no. No, I did
11 not make a call on that water.

12 Q. Well, and maybe we just have to define some
13 terms. But I think when you say you called the
14 watermaster, I would call that a deliver call. You --
15 you were trying to call out a junior to provide water
16 to your rights.

17 Is that what you did?

18 A. No. I called him and asked him, "Where did
19 my water go?"

20 Q. And when you say "Where did my water go?"
21 was that at both diversion points or just the upper or
22 the lower?

23 A. Yeah, a combination.

24 Q. Okay. And then do you know what that
25 watermaster did? And I'm sorry. Let me strike that.

1 Was that Merritt Udy that you called?

2 A. Yes.

3 Q. Okay. What happened after that?

4 A. I really don't know. He said there was
5 something going on between IDWR. And it took, oh,
6 two-and-a-half, three weeks to get reconciled.

7 Q. Since you've owned the property, do you
8 interact on a -- well, I'll ask it this way.

9 How often do you see or visit with either
10 James Whittaker or Jordan Whittaker?

11 A. Maybe once a year, twice a year.

12 Q. So not very frequently?

13 A. No.

14 Q. Okay. Have you ever had a discussion with
15 them about the water rights on the Stroud Creek
16 drainage?

17 A. Not really.

18 Q. Okay.

19 A. Not that I can recall.

20 Q. And in your discovery responses you
21 indicated that the first time you became aware of the
22 Kauer Ditch was in 2015; is that right?

23 A. I was aware of the Kauer Ditch. You know,
24 there was -- there was -- it was kind of one of those I
25 was never to the Kauer Ditch diversion until early July

1 of 2014. That was -- that was how they told me that's
2 how it worked.

3 Q. Okay. And who took you up there? Was it
4 the watermaster?

5 A. I believe I went up there with Tom Udy, the
6 watermaster, in 2014. Yes, in early July of 2014.

7 Q. And what did he tell you about that ditch?

8 A. That -- just that's where they had --
9 that -- that's where they were diverting some water.
10 You know, that's where they were turning the Everson
11 and Stroud water. And up to and including 2014, the
12 Everson Stroud water was sent across through that Kauer
13 Ditch --

14 Q. To then --

15 A. -- to intercept someplace down Porcupine,
16 Lee Creek.

17 Q. And then that water would go into Lee
18 Creek, which would make its way down to your
19 diversions; is that right?

20 A. Yes.

21 Q. Okay. In -- well, let me ask it this way.
22 You know who Scott King is; correct?

23 A. Yes.

24 Q. Okay. And he has prepared an expert report
25 in this matter.

1 Have you familiarized yourself with that
2 report?

3 A. I've looked through it.

4 Q. Okay. I'll have you turn to -- it's
5 Exhibit 1 in the binder.

6 A. This one? Okay. Here it is. I got it.

7 Q. I'll have you turn to page 13.

8 Turn on the lights.

9 A. Page 13 in Exhibit 1?

10 Q. Correct.

11 A. It is -- there's no --

12 THE HEARING OFFICER: Oh.

13 MR. BROMLEY: Oh, yeah, you have a spare copy.

14 THE WITNESS: Okay. Page 13?

15 Q. (BY MR. HARRIS): Correct. There's a map
16 represented on there from the 1970 Lemhi adjudication.
17 And the report, which has been admitted into evidence,
18 seems to indicate that originally there was just a
19 single point of diversion, which would have been your
20 upper diversion, and then the ditch bifurcated as it --
21 shortly after it was diverted from the lower diversion.

22 Do you see that?

23 A. Yeah, I -- I -- I -- yeah, I see. Yeah.

24 Q. In -- in your conversations with Mr. Nef,
25 did he ever describe this situation, that -- that the

1 ditch actually started from one point of diversion and
2 split into two?

3 A. No.

4 Q. So evidently at some point the decision was
5 made by a prior owner to then just add the lower
6 diversion point and hook into one of those branches; is
7 that --

8 A. I don't know.

9 Q. Okay. You don't have any knowledge of --

10 A. No.

11 Q. -- of that?

12 Okay. In your testimony you said you
13 received documents from Cal Whittaker on Lee Creek and
14 who they were.

15 Who is Cal Whittaker?

16 A. Cal Whittaker was the secretary of the 74Z
17 District from '94 through -- I don't know, maybe 2010.
18 I'm not sure. You know, he got old and wasn't able to,
19 so...

20 Q. And was it just water right records that he
21 gave you, or was there --

22 A. No.

23 Q. -- explanations of how they were
24 administered or anything like that?

25 A. It was just a list of water rights, owners,

1 place of use, quantity, point of diversion.

2 Q. Okay. Did he discuss with you at all any
3 of the Stroud Creek water rights, or did it include the
4 Stroud Creek water rights, to the best of your
5 recollection?

6 A. It -- it included Lee Creek water rights,
7 so yes. Stroud Creek, I think technically, is part of
8 Lee Creek.

9 Q. Okay. Part of the -- part of the drainage?

10 A. Right. Right.

11 Q. Yeah. In this expert report from Mr. King,
12 he indicates that the lower point of diversion was
13 inadvertently omitted from claims filed in the SRBA.

14 Is that -- did you tell him that? Do you
15 agree with that statement, that it was an omission?

16 A. Yes.

17 Q. Okay. In what way?

18 A. I just always assumed they were in the same
19 40. Been receiving water from five different
20 watermasters for 27 years, so...

21 Q. And you actually filed late claims in the
22 Snake River Basin Adjudication; correct?

23 A. Yes.

24 Q. Okay. And that was in 2014 --

25 A. Yes.

1 Q. -- shortly after they stopped taking
2 claims?

3 A. Yes.

4 Q. What -- how did you know that you needed to
5 now file claims in the SRBA water case?

6 A. Oh, I was contacted by IDWR Boise.

7 Q. And told that your rights were on record,
8 but no claims had been filed; is that right?

9 A. They -- well, they -- they, yeah, we had
10 to -- we had to file because we were never given second
11 notice from IDWR.

12 Q. And if I understand your testimony, you
13 just took the same descriptions from the Lemhi
14 adjudication and put them in the Snake River Basin
15 Adjudication claims; correct?

16 A. I think so, yeah. I'm not going to say
17 absolutely.

18 Q. Okay. So you didn't have direct
19 involvement.

20 Did you let your attorney, Mr. Bromley --

21 A. Yes.

22 Q. -- handle all that?

23 A. Yes.

24 Q. Okay. But at that point you acknowledge
25 you didn't include in your claims the lower diversion

1 point?

2 A. Right.

3 Q. Even though it has been in existence for --
4 do you have any idea how long it's been in existence?

5 A. I would -- probably goes back to 1880s, I'm
6 guessing. You know, it's been the primary source of
7 water coming to the place -- you know, and all I can
8 say, what I know is from 1993 on. You know, that's
9 what -- what I've talked to one of -- Steve -- one of
10 the previous people that lived there, you know, that
11 they were there from like through the '50s and early
12 '60s. And yes, that was -- that was the water --
13 that's what they had did prior to...

14 Q. I probably didn't ask my question very
15 well, so I apologize.

16 Do you -- there's a map from 1970 that
17 shows there was only one diversion point. At some
18 point there were two.

19 Do you have any idea when the second one
20 would have been added?

21 A. I would bet that it was added way on before
22 1970.

23 Q. So you think that map was inaccurate?

24 A. I don't know.

25 Q. Okay. In your -- the questioning from

1 Mr. Bromley, I believe I heard you say that Stroud
2 Creek comes into Lee Creek above both of your diversion
3 points.

4 Did I understand your testimony correctly?

5 A. I don't think -- Stroud Creek comes in kind
6 of in between them, you know, and -- at present day.
7 You know, what -- what -- I have never -- I had never
8 spent that much time in that creek until last summer.
9 So yeah, at the present time Stroud Creek comes in real
10 close, comes in below my upper diversion.

11 Q. And is that based upon your own
12 observation?

13 A. Yes, that's what -- yeah.

14 Q. So you would agree that right now it comes
15 in below your upper diversion point?

16 A. Yes.

17 Q. What is your understanding of the concerns
18 of the protestant with this transfer?

19 A. I don't know.

20 Q. But you've reviewed their protests?

21 A. Looked it over, yeah.

22 Q. Okay. If the transfer was granted and the
23 lower diversion point was an authorized point of
24 diversion, you would have a senior right to call out
25 juniors on Stroud Creek.

1 Do you understand that?

2 A. Well, you know, yeah, I -- no, you're --
3 you're -- you know, I'm going to -- you're
4 separating -- you're calling Stroud Creek a separate
5 drainage.

6 Q. No. It's a tributary. But physically if
7 it comes in below your upper diversion point, if you
8 move below that confluence, you improve your access to
9 water supply, and you're now in a position to call out
10 junior water rights up Stroud Creek and demand that
11 water come down to your lower diversion point.

12 Do you understand that?

13 A. Yeah.

14 Q. Is that your intent with this transfer, is
15 to do that?

16 A. My intent is to be able to capture my
17 senior water rights.

18 Q. But you would -- you would agree with me
19 you would improve your position by adding the lower
20 diversion point, because then you would now be below
21 the confluence of Stroud Creek and Lee Creek?

22 MR. BROMLEY: Objection. It's the ultimate
23 decision of the Hearing Officer to make that decision.

24 THE HEARING OFFICER: Sustained. Move on.

25 MR. HARRIS: Well, I'm asking if that's his

1 intent, to call for that water at the lower diversion
2 point. So I think it's a different question.

3 THE HEARING OFFICER: Do you intend to make a
4 call against upstream juniors on Stroud Creek moving
5 forward?

6 THE WITNESS: I want -- I'd like to have my
7 senior water rights filled. So if a call is what I
8 would need to do, yes.

9 THE HEARING OFFICER: Okay.

10 Q. (BY MR. HARRIS): In your testimony with
11 Mr. -- or your questions with Mr. Bromley, he referred
12 you to Exhibits 4 and 5.

13 And, Scott, do we need to give you back
14 your expert report?

15 MR. BROMLEY: Are you done with it?

16 MR. HARRIS: I am done with it for right now,
17 yeah. I just don't want to get it mixed up in all the
18 exhibits.

19 Q. On Exhibit 5 there was some instructions
20 that the watermaster received from Cindy Yenter.

21 Do you see those instructions at the bottom
22 of the first page of the letter?

23 A. Yes.

24 Q. Did you participate or receive a report of
25 any of those measurements that were called out in the

1 [unintelligible]?

2 A. No, not -- not that I recall, no.

3 Q. Okay. What -- what communication did you
4 have with Ms. Yenter during the course of this 2020
5 administration dispute?

6 A. I had a telephone conversation after I
7 spoke with Merritt Udy in June of what was going on
8 and --

9 Q. What did she tell you was going on?

10 A. They were checking into, you know, that
11 74-157 or that right. There was a spring right that
12 was in -- you know, they had concerns with or
13 something, so...

14 Q. Okay. And anything else in that phone
15 call?

16 A. Not that I recall, no.

17 Q. So that was one call.

18 Was there subsequent phone calls or
19 communications?

20 A. Possibly. I'm not sure.

21 Q. You're not sure or you don't recall?

22 A. I -- I don't recall.

23 Q. Okay. Well, I think that's all in there.

24 Do you have the ability to clean your upper
25 ditch? Have you gone in and cleaned it out?

1 A. No. We're in the process -- we were going
2 to do it last fall. But it's on BLM, and it took them
3 like 60 days to come take a look at it before the --
4 we -- they made the -- it was a [unintelligible] ditch
5 and that we could clean it. But no, it took us 60 days
6 or longer to get them to come visit the ditch. And so
7 we were going to do it last fall, but the weather got
8 issues with it.

9 Q. And sometimes different words mean
10 different things to different people. But when I use
11 the word "cleaning," that's just -- just restoring it
12 to what was there before.

13 Were you proposing to BLM to actually
14 enlarge the ditch and make it bigger than what was
15 originally there?

16 A. You know, I don't recall the conversation.
17 You know, it was out with Linda Price and Chad Zen
18 [phonetic] and -- on an afternoon. And so, you know,
19 there was just conversation back and forth, but...

20 Q. Okay. And -- but your intent was just to
21 go clean it out to approximately the same dimensions of
22 the ditch that's there now?

23 A. It's -- yeah, we've got to stay in the
24 footprint, so...

25 MR. HARRIS: Okay. Okay. I have no further

1 questions.

2 THE HEARING OFFICER: Okay.

3

4 EXAMINATION

5 BY THE HEARING OFFICER:

6 Q. Mr. McConnell, are there times during the
7 irrigation season at the upper ditch when you divert
8 all of the water in the creek?

9 A. All the water that's present, yes.

10 Q. There are times when you entirely divert
11 the creek at that upper diversion?

12 A. Yes. We did that basically after
13 August 6th, yes.

14 Q. What -- what does your diversion dam at the
15 upper ditch look like? Is it a tarp dam?

16 A. Yeah, it's -- was pretty much just rocks
17 and -- yeah, and -- and yeah. It's just -- yeah. It's
18 not -- it's not a, quote/unquote, "probably proper
19 diversion."

20 Q. Well, no, it's not a concrete structure?

21 A. No, no.

22 Q. It's rocks in the creek, and you put a
23 canvas or a tarp in front of that?

24 A. Right.

25 Q. Okay. You testified that there are times,

1 though, that you intentionally bypass that upper ditch
2 to allow water to flow in the creek down to the lower
3 ditch?

4 A. I think probably in the instances of -- in,
5 you know, like 2001 or '2 or '3, we had really, really
6 super short water years. And so you split nothing. So
7 yeah, there was -- there was -- as I recall, probably
8 two different years we shut the top diversion off to --
9 so we could have a semblance of water.

10 Q. So outside of those drought situations, in
11 an average water year you take all the water available
12 at that upper ditch?

13 A. You know, there's -- it's kind of one of
14 those things, as situations arise, as we get rain
15 events or there's -- those things can fluctuate. So
16 yeah, though -- if we get a three-quarter of an inch
17 thunderstorm in an hour and a half, there's probably
18 water goes over the top and down.

19 Q. Does the creek channel flow continuously
20 below that upper diversion dam? Is there always water
21 in Lee Creek immediately below the upper diversion dam,
22 or is the channel dry when you're diverting water?

23 A. No, no. There's always -- always some
24 water.

25 Q. Always some leakage water?

1 A. Yes. Well, yeah, yeah. Because the
2 confluence -- the confluence is not very far. I mean
3 they're not -- they're like maybe 50, 60 feet.

4 Q. So the creek remains active, Lee Creek
5 remains active between the upper ditch and the lower
6 ditch?

7 A. Yes.

8 Q. Okay. During the irrigation season -- and
9 I'm talking now prior to August 2020. During the
10 irrigation season do you divert all of the water
11 available at the lower ditch?

12 A. Not -- not per se. Not -- we have to allow
13 some stock water to go by. There's a 1918 stock water
14 right. So -- so there -- we need to pass some water
15 almost -- you know, so yeah. So no, not -- not all of
16 it is -- sometimes it dries up. But, you know, but for
17 the most part there is some water passing down Lee
18 Creek by the lower diversion.

19 Q. Are there times of the year during the
20 snowmelt runoff where there's so much water coming down
21 Lee Creek, whether it be the Right Fork or the Left
22 Fork or both, that the flow in the creek exceeds your
23 water rights, the 15.2 cfs of your water rights?

24 A. I think probably go back to 2009, we had
25 got 2 inches of rain in one weekend. And yeah, there

1 was -- there was all kinds of, you know, there was one
2 of those -- yeah, there was more water than -- yeah.

3 Q. More water than you can divert?

4 A. More water than I would even want to try to
5 divert.

6 Q. What happens to the water that bypasses --
7 you talk about a small amount of stock water. But if
8 there's a significant flow of water, what happens to
9 the water that bypasses or flows past your lower ditch?

10 A. Okay. It continues to run through Lee
11 Creek. And then Lee Creek kind of combines with some
12 springs that head out on the property. And there is
13 a -- a water right, beneficial use of springs, on --
14 for the ranch below us.

15 Q. Are you familiar with other ditches or
16 diversions downstream of your lower ditch?

17 A. Yeah. I -- there's -- there's no
18 diversions, no. Not that I -- no. I mean there's
19 sometimes when you get -- when you get a -- when you
20 get a lot of water, yeah, there's water that goes
21 places that's probably maybe not supposed to. But no,
22 there's -- the creek -- and the creek channel dries up,
23 you know, through -- through the summer, through June,
24 July, August, September, so...

25 Q. Are you personally familiar with the Lee

1 Creek channel between your lower diversion and the
2 river, the Lemhi River?

3 A. Most of it, yes.

4 Q. Does -- does the river -- does Lee Creek
5 flow through all the way to the Lemhi River at times?

6 A. Yes. Oh, yes. Yes.

7 Q. Okay. Describe the -- I notice one of the
8 issues of protest where it was location of your
9 measuring devices on your upper and lower ditch. Let's
10 see if there's a map that would be helpful. Possibly
11 in Exhibit 1. Maybe I -- you can just use this. I
12 think there's -- there's a map that gets kind of zoomed
13 in on those points of diversion. This page 8 might be
14 the best. Maybe page 11.

15 Can you identify -- I'll just hand you this
16 copy. Can you identify -- so I'm looking at page 11 on
17 Exhibit 1. It kind of shows the two upper and lower
18 points of diversion with green dots.

19 A. Right.

20 Q. Can you show me where approximately that
21 upper measuring device is? How far down the ditch?

22 A. Oh, it's probably -- I would guess it's in
23 here. It's, you know, with -- there was -- we
24 installed those in 2000. There was measuring devices
25 that the watermaster back when we came in '93/'94 said

1 they weren't acceptable. And so they -- I think at
2 that time they measured water up at the Kauer Ditch.

3 But -- so we put them there just for kind
4 of convenience of the watermaster. You know, they --
5 they're probably out of the distance of what they
6 should be.

7 MR. MANWARING: Mr. Hearing Officer, just to
8 make sure we're clear on the record, we couldn't tell
9 what he was pointing to.

10 THE HEARING OFFICER: No. I was going to --
11 that was -- once he was done speaking, I was going to
12 talk about where that is.

13 So Mr. McConnell had indicated a point on
14 the upper ditch that is farther north -- farther north
15 than the lower ditch.

16 Q. And would you say approximately by that
17 second black arrow down?

18 A. I would say between the two, I believe.

19 Q. Between the two black arrows --

20 A. Yeah.

21 Q. -- coming from the north down --

22 A. Yeah.

23 Q. -- on the upper ditch.

24 Can you tell me on the lower ditch where
25 the measuring device is located?

1 A. Oh, they're almost parallel. I would --
2 you know, they're probably between those two arrows
3 here.

4 Q. Between the top two black arrows on that
5 same --

6 A. Yeah.

7 Q. -- on that same map? Okay.

8 MR. BROMLEY: Just so everybody knows, you know,
9 those points were GPS'd by Scott King. And when Scott
10 testifies to his report --

11 THE HEARING OFFICER: He can speak a little bit
12 more to that.

13 MR. BROMLEY: Yeah.

14 THE HEARING OFFICER: Okay.

15 MR. BROMLEY: He can be a lot more precise.

16 THE HEARING OFFICER: That's great. I
17 appreciate that, Mr. Bromley. I -- that's just
18 something that I think is important to have in the
19 record. And if Mr. King can testify to that, that's
20 great.

21 Those are the questions that I had. I'll
22 turn it back to you, Mr. Bromley. If you have any
23 follow-up questions, go ahead.

24 MR. BROMLEY: Great. Thank you.

25 Rob, would you mind putting that Google

1 Earth image that you had up --

2 MR. HARRIS: Yeah.

3 MR. BROMLEY: -- when Kipp was asking questions.

4 That's great.

5 MR. HARRIS: So I always use this as a bit of a
6 landmark.

7 MR. BROMLEY: Okay.

8 MR. HARRIS: Here is -- so is that good?

9 MR. BROMLEY: Yeah, that's just fine.

10 MR. HARRIS: Okay.

11

12 REDIRECT EXAMINATION

13 BY MR. BROMLEY:

14 Q. So, Bruce, this Google Earth image, does
15 this look similar to what you were discussing with
16 Mr. Manwaring?

17 A. Yeah. Yeah. Yeah. The stuff -- you know,
18 the kind of the center part of it, you know. So yeah,
19 that -- that -- yeah.

20 Q. It's an image?

21 A. Right.

22 Q. Okay. It's an aerial, maybe it's from a
23 satellite, it's something.

24 Is Lee Creek at all written down on that,
25 like a map that you would see?

1 A. I -- you go back some of the maps, yeah, I
2 think they called it Lee Creek at all -- yeah, you
3 know.

4 Q. But I -- on this image I don't see
5 anything --

6 A. I don't see anything there, no.

7 Q. -- that's written down that shows --

8 A. I assume -- I'm just assuming -- I'm
9 assuming that's, you know...

10 Q. So would you agree there's some
11 interpretation going on when we're looking at this?

12 A. Yeah.

13 Q. Okay. I mean when I look at it, I see a
14 lot of trees, and even in the photos that Mr. Manwaring
15 was showing -- let's see. Which one was it? Oh, like
16 Exhibit 30 -- 309.

17 Do you have Exhibit 309 up there?

18 A. Yes, I do right here.

19 THE HEARING OFFICER: Yep, the loose papers.
20 Yep.

21 Q. (BY MR. BROMLEY): Mr. Manwaring told you
22 that this was the headgate for your lower point of
23 diversion that you're seeking to add through this
24 transfer?

25 A. Yes.

1 Q. Do you recall that?

2 A. Correct.

3 Q. Okay. And do you see a bunch of trees?

4 A. There's a lot of brush.

5 Q. Okay.

6 A. There's a lot of willows. Not so much --
7 not so much trees as willows.

8 Q. Vegetation?

9 A. Right.

10 Q. Stuff you'd normally see in the bottom of
11 a --

12 A. Right.

13 Q. -- of a channel?

14 Is that what then we see on this Google
15 Earth image is a whole bunch of vegetation?

16 A. Pretty -- yeah, there -- it's -- it's
17 pretty densely vegetated.

18 Q. Okay. So it's kind of less than clear,
19 then?

20 A. Yeah.

21 Q. Let's see. Bruce, if you wanted to, could
22 you go in and muck around and move the Lee Creek
23 channel around to benefit you?

24 A. Probably not legally.

25 Q. Okay. Might run into problems with -- with

1 who?

2 A. I -- the DEQ. I'm not sure. I've never
3 done it, but it's kind of accepted as not the right
4 thing to do.

5 Q. Okay. And you explained, Bruce, when you
6 were answering some questions from Mr. Harris about the
7 conversations that you had with Darrell Nef.

8 And do you recall that?

9 A. Yes.

10 Q. Who was the owner of the property at that
11 time?

12 A. The what property?

13 Q. Of your property.

14 A. I. Glenda and I, my wife.

15 Q. Okay. But prior to you buying it, who was
16 the owner of the property?

17 A. It was the estate of Parlee Arvee
18 [phonetic].

19 Q. Okay. And Parlee Arvee, if I'm recalling
20 correctly -- and maybe you recall, but do you recall
21 whether he was the one who was in the Lemhi
22 adjudication or should have been filing in the SRBA?

23 A. Yes. Yes, he would have been. Yes. I
24 think he owned the property from '68 to '93.

25 Q. Okay. And so Mr. Arvee, was he an active

1 owner of the water?

2 A. Parlee Arvee was deceased when we bought
3 the property. So from what I gather, he was an
4 absentee landowner, some -- I guess I was told,
5 sometimes he stayed there, leased it out. On occasion
6 in '92 I think he hired a guy to change water.

7 Q. And so at that point, then, Darrell Nef
8 was -- he was diverting water and using the place?

9 A. Yes, yes. He was -- I think -- I think
10 they'd worked out an agreement for him to graze some
11 cattle on the upper piece to irrigate the lower piece.
12 Or irrigate -- to irrigate the place. I'm not sure. I
13 wasn't really privy, but that was what -- that was what
14 my understanding was.

15 Q. Okay. And so Darrell Nef, I think you
16 said, had knowledge going back into the late 1940s?

17 A. I believe he told me that he bought that
18 place in 1949.

19 Q. And then your recollection was that that --
20 that lower diversion had been in place at least since
21 then, according to Mr. Nef?

22 A. Yes.

23 Q. And then you had mentioned Steven Kauer
24 during your back-and-forth with Mr. Harris.

25 Who was Steven Kauer?

1 A. Steven Kauer's parents owned the place, I
2 think, from early '50s through about '68. I'm not --
3 you know, that -- just -- just -- yeah, that's -- I
4 think '68 was when Parlee Arvee bought the property.
5 And I assume through the '50s and early '60s they owned
6 it. And I think when -- when Steven was there, I -- he
7 had an active role in irrigating it.

8 Q. What was your understanding from Steven
9 Kauer as to the diversion points?

10 A. They -- he told me they used -- always used
11 both of them.

12 Q. Okay. You were asked some questions by
13 Mr. Cefalo about downstream water users.

14 Have you ever had any complaints from water
15 users downstream about not receiving water?

16 A. No. In fact, I had one of the first owners
17 was there said that since we -- he had never had that
18 much water.

19 Q. Okay.

20 A. So we -- you know, when we -- if we take
21 care of the water right, we send a lot of water. We
22 put a lot of water back into the ground, in the
23 springs.

24 Q. The -- as currently configured and existing
25 on the ground, can you divert the entire 15.2 into

1 either the upper ditch or the lower ditch?

2 A. Probably not. Come closer with a lower
3 ditch, but probably not.

4 Q. Okay. And is there -- is there land that
5 can only be irrigated by the lower ditch?

6 A. Yes.

7 Q. Okay. Last question I have here, Bruce, is
8 you had a number of questions that were asked of you by
9 Mr. Harris about a filing a delivery call.

10 Do you recall those questions?

11 A. Yes.

12 Q. Do you know what a delivery call means?

13 A. I guess the first time I really became
14 aware of it was I was having some issues with my
15 water -- getting my water back in '14, '15, and I had a
16 conversation with Mr. Cefalo. And he said, "You need
17 to make -- you need to call for your water."

18 Q. And do you understand what that means, to
19 call for your water?

20 A. Yeah. It -- and I think it was in 2015,
21 Tom Udy was the watermaster. We -- I stopped him and
22 said, "I am calling for my water." You know, we had --
23 I don't remember the time. But we were way short of
24 water.

25 Because he said -- previously he said he

1 really didn't understand how the water rights on Lee
2 Creek worked. And then I brought him the copies, and
3 he said, "Well, I looked into it, and you're right."
4 So -- and so I -- in 20, I believe it was 2015 I
5 called. That was the call I made for the water.

6 Q. Do you know why you were short in 2015?

7 A. Something upstream.

8 Q. It wasn't ever explained to you what that
9 something was?

10 A. Yeah. We had water -- we had it -- within
11 a couple days we had -- we had the water.

12 Q. Do you know what happened to bring the
13 water down to you?

14 A. Don't know what went on.

15 Q. Okay. So watermaster went upstream, is
16 what you're saying, and --

17 A. Yes.

18 Q. -- did something and --

19 A. We had water.

20 Q. -- you had water?

21 A. And I was happy.

22 MR. BROMLEY: Okay. That's all I have. Thank
23 you.

24 THE HEARING OFFICER: Okay. From the group of
25 protestants, any other follow-up questions?

1 Mr. Harris?

2 MR. HARRIS: Yeah, I do.

3 THE HEARING OFFICER: Mr. Manwaring, did you
4 have anything else?

5 MR. MANWARING: I think I'm going to cover mine
6 with some other witnesses.

7 THE HEARING OFFICER: That's fine.

8 Okay. Go ahead, Mr. Harris.

9

10 RE CROSS-EXAMINATION

11 BY MR. HARRIS:

12 Q. Just a couple clarifications. And I'll
13 just pick up right where Mr. Bromley ended up.

14 You were short in 2015, there was something
15 upstream.

16 What stream was there something going on?

17 A. Lee Creek. You know, that was what -- you
18 know, water rights Lee Creek, you know, total water --
19 yeah, watermaster. So yeah, I'm not sure -- it was --
20 probably would have been the Left Fork of Lee Creek
21 that...

22 Q. Okay. But as far as you know, did he make
23 any changes in Stroud Creek?

24 A. Well, Stroud Creek kind of is Lee Creek,
25 you know.

1 Q. They're in the same drainage, but there's
2 different channels.

3 So do you know what channel? Were they up
4 the Left Fork or Stroud Creek or --

5 A. They would have been up probably the Left
6 Fork -- I don't know. I didn't go up there.

7 Q. And if you don't know, that's okay. That
8 can be an answer.

9 A. Yeah.

10 Q. Is that what you're saying, you don't know?

11 A. That -- well, like I say, there was
12 water -- the water -- the water got there.

13 Q. Got it. You testified before you're not
14 aware of any diversions that are downstream of your
15 diversions.

16 Did I understand that testimony correctly?

17 A. Well, there is -- there is a -- there is a
18 diversion that on the lower end of the property that
19 catches the water and takes it to the property below
20 me. So, you know, we've had various different owners.
21 Kelly Thomas, Rand Robinson [phonetic], Nature's
22 Conservancy, and now it's Beeler [phonetic], so...

23 Q. Okay. On this map up here, these are dots
24 that we obtained from the Department of Water
25 Resources. Here is your upper diversion. Here is your

1 lower diversion. But there is a diversion in between
2 that's owned by, I believe, Mr. Johnson.

3 Are you familiar with that ditch heading at
4 all?

5 A. Yeah, it's -- yeah, it's right below the
6 hiwary [phonetic]. You know, it's likes a 1957 right,
7 something like that. So when there's lots of water,
8 when there's water passing by, it gets caught, yeah.
9 So...

10 Q. Yeah. I'm not asking about the water
11 right.

12 I'm just saying you're familiar, there is a
13 ditch heading at that location, you've seen that; is
14 that right?

15 A. Yeah, there's -- there -- yeah, it's --
16 there's ditches that -- that intercept the creek.

17 Q. Okay.

18 THE HEARING OFFICER: Between your upper ditch
19 and lower ditch, there's a ditch there?

20 THE WITNESS: No, no, no, no. No. It's below
21 the lower diversion, and I think --

22 THE HEARING OFFICER: Yeah, he's not
23 understanding what you're asking.

24 THE WITNESS: -- the place you're talking to is
25 like that 1831.

1 Q. (BY MR. HARRIS): So --

2 A. Is that -- is that the one you're referring
3 to?

4 Q. No. So see this dot right here? These are
5 your water rights.

6 MR. BROMLEY: Mr. Cefalo, I'm going to object.
7 I mean this is -- the Department's water right records,
8 which you've said you will take notice of, speak for
9 themselves. Mr. McConnell said he's aware of the
10 Johnson diversion. Mr. Johnson's here.

11 THE HEARING OFFICER: Uh-huh.

12 MR. BROMLEY: I think that's frankly the better
13 place to do it. He's a protestant. He can speak to
14 his own issues.

15 THE HEARING OFFICER: Mr. McConnell, have you
16 seen a ditch on the creek between your upper and lower
17 diversion? Are you familiar with a ditch there?

18 THE WITNESS: There's supposed to be one there
19 but I'm not familiar with one.

20 THE HEARING OFFICER: You haven't seen one
21 yourself?

22 THE WITNESS: Not -- no, I've never. No.

23 THE HEARING OFFICER: That's good enough.

24 Move on --

25 MR. HARRIS: I think that was my question.

1 THE HEARING OFFICER: -- Mr. Harris. Yeah.

2 Q. (BY MR. HARRIS): So now below the red dot,
3 there are other diversions.

4 Have you seen these diversions? That's all
5 I'm asking, is if you're aware that they're there or
6 have seen them.

7 A. Yes, yes. That would be 15-200 and 15-201.
8 Yes. Yes.

9 Q. Okay. I believe your testimony before was
10 you weren't familiar with diversions below your lower
11 diversion, but I think you're saying you actually are
12 familiar with some further down Lee Creek?

13 A. Yeah. There -- they're kind of -- yeah,
14 there so remotely, they're so late. You know, so yeah.

15 Q. Okay.

16 A. It's kind of one of these I don't go there.
17 But yeah, they -- that was -- I just re- --
18 misremembered, yeah. They're -- they're there. So
19 yeah, I mean [unintelligible].

20 THE HEARING OFFICER: And we can ask Mr. Johnson
21 about those too --

22 MR. HARRIS: Correct. I just --

23 THE HEARING OFFICER: -- as he takes the stand.

24 MR. HARRIS: -- wanted to make sure I understood
25 your testimony.

1 THE HEARING OFFICER: Okay.

2 MR. HARRIS: So I don't have any further
3 questions.

4 THE HEARING OFFICER: Okay. Thank you,
5 Mr. McConnell.

6 THE WITNESS: Okay. Leave this sitting right
7 here?

8 THE HEARING OFFICER: Leave all that right
9 there.

10 MR. BROMLEY: Yeah, leave everything there,
11 Bruce. Thank you.

12 MS. YENTER: Do you want to pause?

13 THE HEARING OFFICER: Okay.

14 (Lunch recess.)

15 THE HEARING OFFICER: We are back on the record,
16 returned from a lunch break.

17 While we were off the record here just a
18 moment ago, we had a discussion.

19 Protestant Jordan Whittaker had been
20 running a video camera during the first part of the
21 hearing. After we had a discussion it was decided that
22 we would stop that video recording. It had not been
23 consented to by the applicant, Bruce and Glenda
24 McConnell. And so -- and it wouldn't have been the
25 official recording anyway. This audio recording that

1 we're making up here at my table is going to be the
2 official recording of the hearing.

3 So with that, we will move forward with
4 your witnesses, Mr. Bromley.

5 MR. BROMLEY: Okay. And just to be clear, then,
6 we didn't understand that this video recording was not
7 the Department's and, as you said, did not consent.
8 And to the extent that it's ever used in the future,
9 McConnells did not consent to this being turned on.

10 THE HEARING OFFICER: That's fine. Thank you.

11 MR. BROMLEY: Thank you.

12 THE HEARING OFFICER: Mr. Bromley, go ahead.

13 MR. BROMLEY: Okay. We call Scott King.

14 THE HEARING OFFICER: Okay.

15 MR. KING: Can I take it? I need to take this
16 up there [unintelligible].

17 MR. BROMLEY: Yeah.

18

19 SCOTT KING,
20 having been called as a witness by the Applicants, was
21 duly sworn and testified as follows:

22

23 THE HEARING OFFICER: Mr. King, do you solemnly
24 affirm that the testimony you're about to give will be
25 the truth, the whole truth, and nothing but the truth?

1 THE WITNESS: I do affirm.

2 THE HEARING OFFICER: Okay. Have a seat.

3

4 DIRECT EXAMINATION

5 BY MR. BROMLEY:

6 Q. Okay, Scott. Please state and spell your
7 name.

8 A. Scott King, S-c-o-t-t, K-i-n-g.

9 Q. And who are you employed by?

10 A. SPF Water Engineering.

11 Q. And what is your position with SPF?

12 A. I'm a project manager with SPF Water
13 Engineering.

14 Q. And --

15 A. This has to be my water also. I forgot to
16 take that with me.

17 Q. Scott, if you can turn to Exhibit 2 there.

18 A. Okay.

19 Q. Is that an accurate summary of your
20 professional experience?

21 A. Yes, it is.

22 Q. And have you previously been qualified as
23 an expert witness in water right matters in Idaho by
24 IDWR?

25 A. Yes, I have.

1 MR. BROMLEY: And so, Mr. Hearing Officer, prior
2 to hearing we both -- Mr. Harris and Mr. Manwaring and
3 myself had agreed that we would stipulate to both Scott
4 King and Bryce Contor being expert witnesses. I hope
5 that's still the case.

6 THE HEARING OFFICER: Mr. Harris?

7 MR. HARRIS: I want him to go through every line
8 of his CV. No.

9 MR. BROMLEY: And we can do that, Mr. Harris.

10 MR. HARRIS: That's a bad joke. No objection.

11 THE HEARING OFFICER: Okay. Great.

12 MR. BROMLEY: Yeah. Okay. Thanks.

13 THE HEARING OFFICER: You can proceed.

14 MR. MANWARING: I want it on the record, I don't
15 want to do every line [unintelligible].

16 MR. BROMLEY: Okay. So we then have a
17 stipulation as to Scott King being an expert?

18 THE HEARING OFFICER: He can testify as an
19 expert witness. You bet.

20 MR. BROMLEY: Great. Thank you.

21 Q. So, Scott, are you familiar with the Lemhi
22 Basin?

23 A. Yes, I am.

24 Q. And if you could please explain your
25 familiarity.

1 A. Well, I was working on my master's degree
2 going back to the early -- let's see, late 1990s. I
3 was working in the Upper Salmon River Basin, and
4 working on kind of fisheries and restoration-type
5 issues and water supply. And so first of all, I became
6 familiar with the Lemhi during my work in the Upper
7 Salmon area.

8 Later on while employed with the Danish
9 Hydraulic Institute, the DHI group, I worked on a basin
10 model, which is a water distribution model of the
11 Pahsimoroi Basin, and was using the Lemhi River Basin's
12 model as a template for that. So I became familiar
13 with some of the diversions and the operations up
14 there.

15 Other water distribution things while
16 working at Water Resources, but more recently at SPF
17 Water Engineering, we are doing a number of gauging
18 station operations. Have a contract from the
19 Department of Water Resources. And I think we have
20 about a dozen different gauges in the Lemhi River
21 Basin, so I'm kind of familiar with the name of the
22 tributaries and the mainstem.

23 Q. Okay. And you've been retained by Bruce
24 and Glenda McConnell in this matter; correct?

25 A. Yes, I have.

1 Q. And have you visited the property?

2 A. Yes. In March --

3 Q. Okay.

4 A. -- this year.

5 Q. So Exhibit 1, you've got that in front of;
6 you; right?

7 A. That's my report; is that correct?

8 Q. Yep.

9 A. Yeah. Okay.

10 Q. So what were you asked to do?

11 A. I was asked to review the transfer
12 application that was submitted by McConnells and the
13 other water rights on the Lee Creek watershed system,
14 and to provide an opinion about whether that transfer
15 application meets the standards of IDWR, whether it's
16 an approvable transfer.

17 Q. Okay. And so then in your report as
18 Attachment A, and then we've also got them in there as
19 Exhibit 9, those are the McConnell water rights.

20 If you could just please briefly explain
21 what the water rights are that are owned by the
22 McConnells?

23 A. McConnell has a series of water rights from
24 Lee Creek and one from spring. But the Lee Creek water
25 rights have a variety of priority dates, different

1 places of use within their area that they generally use
2 the water. And they list one point of diversion, which
3 we've talked about earlier being the upper point of
4 diversion.

5 Q. Great.

6 A. And then there's a spring right here. And
7 that, I understand, serves domestic and stock water
8 use. It's not part of this transfer application.

9 Q. Okay. And the priority dates range from
10 sort of what to what?

11 A. I see priority dates ranging as old as
12 May 12th, 1883, to as junior as November 5th, 1909.

13 Q. And which part of that report are you
14 looking at?

15 A. This part of my report is Appendix A. It's
16 a Summary of Water Rights Owned by Applicants and
17 Protestants. It's the very first page. There's a
18 summary page of McConnells' water rights, and there's
19 also summaries of the other protestants' water rights.

20 Q. Great. Thanks, Scott.

21 So Exhibit 24, which is in the binder, but
22 then we've also got a blown-up version of it behind you
23 on the easel there.

24 A. Yeah, I'm...

25 Q. Using that map, you know, whether you want

1 to use the big, blown-up one or the one in your
2 report --

3 A. I'll use both, to make it simple for
4 everybody.

5 Q. Okay. Even better. Could you just please
6 briefly explain where the McConnells divert water from
7 Lee Creek and how they irrigate.

8 A. On this map, about centered vertically in
9 section 20, there's a little red circle that I've
10 placed on this map. And this map is the USGS
11 quadrangle, dated 18 -- or 1989.

12 So that red dot represents the lower point
13 of diversion. And you can see that on this Exhibit 24
14 also.

15 You can also see from there the ditches
16 depicted as a blue line from that lower point of
17 diversion. Upstream of that, in the far northeast
18 corner of section 30, is the upper point of -- well,
19 no. No. I think I'll take that back. Is it 29? I'm
20 trying to remember which one it is. I'd have to go
21 look and see.

22 But there's a little spring depiction
23 there, a little circle with a little squiggly blue
24 line. And their upper point of diversion is fairly
25 close to that, but otherwise it wouldn't be shown on

1 the USGS quad, but that lower diversion is shown on
2 that quad.

3 Q. Okay. So in terms of the upper diversion,
4 is that the diversion that appears on the SRBA water
5 rights that we were just talking about?

6 A. Yes.

7 Q. Okay. So if we turn, then, to Exhibit 6.

8 Can you please explain what actions were
9 taken by the McConnells and the Department to correct
10 the legal description for the upper point of diversion.

11 A. Yes. There was a water right transfer
12 No. 84367 that was filed previously to correct the
13 Department's record regarding the location of the upper
14 point of diversion. And so the Department's record
15 showed it in one location further upstream through the
16 decreed rights.

17 McConnells were able to show no, it's
18 actually in a different quarter-quarter. It's in a
19 another location further downstream. And we have not
20 changed it. It was just decreed incorrectly. And so
21 we are correcting the record.

22 Q. Okay. And then if you'd turn to Exhibit 7.
23 This is a document dated October 5, 2020.

24 And is that transfer number, is that the
25 same transfer number that appears on the transfer you

1 were looking at, Exhibit 6?

2 A. No. 84367 is the same transfer number, yes.

3 Q. Okay. And so what is this memorandum
4 explaining?

5 A. This memorandum is a review of the
6 application for transfer and determining if -- and
7 providing a review of -- if the information that was
8 provided was sufficient to make that transfer
9 approvable.

10 Q. Okay. The third paragraph, what does that
11 say?

12 A. The third paragraph, "Water right validity:
13 Water rights were decreed in 2014. Aerial photos show
14 consistent irrigation of the respective places of use
15 since 2014."

16 So that's saying it looks like these water
17 rights are valid. The water rights have been used.
18 The place of use has been irrigated.

19 Q. Okay. And then the paragraph right below
20 that, what does that say?

21 A. "Injury to other water rights: No issues
22 identified. Applicant provided persuasive evidence
23 that the SRBA points of diversion were in error. There
24 will be no physical change in the point of diversion.
25 Water has been diverted from the ditch headgate in the

1 northeast northeast of section 30 since at least 2014."

2 Q. Great. So then, you know, is it your
3 opinion, then, that this transfer 84367 resulted in
4 correctly identifying the legal description of the
5 upper point of diversion?

6 A. Correct.

7 Q. Okay. Let's look at Exhibit 4, Scott. And
8 we talked about this exhibit with Bruce.

9 But what does this document explain to you?

10 A. This was a letter dated August 6th, 2020,
11 to Bruce and Glenda McConnell from Cindy Yenter
12 explaining that the lower diversion is not listed and
13 that water rights, that it must be closed, and that
14 lower diversion must let the water pass. And then it
15 also talks that the upper diversion needs to have a
16 controllable, lockable headgate in compliance with
17 regulations.

18 Q. Okay. And then Exhibit 5, also a letter
19 dated the same date from Cindy to Merritt Udy.

20 And are those -- I mean what do you
21 interpret those as? Directions to the watermaster?

22 A. Yeah, consistent with the prior letter,
23 that the watermaster is to stop the McConnells from
24 taking water from the lower diversion.

25 Q. Okay. So now we kind of understand what

1 was happening in August of 2020.

2 So does -- if you can turn to Exhibit 8.

3 What is -- what's Exhibit 8?

4 A. Exhibit 8 is the application for transfer
5 that's in front of us today. Transfer No. 84441.
6 Looks like it was received by the Department on
7 October 5th of 2020.

8 Q. Okay. And so then, Scott, from what you
9 understand from Exhibits 4 and 5, was this transfer
10 that we're looking at in Exhibit 8, was it filed to
11 address the concerns?

12 A. Specifically to address those concerns, to
13 include the lower diversion as a point of diversion on
14 these water rights.

15 Q. Okay. All right. Let's go -- before we go
16 back to your report, Scott, if you look on page 2 of
17 the transfer.

18 All the way there at the bottom, what was
19 the fee paid?

20 A. The fee paid was \$1,700.

21 Q. Okay. And do you know what the basis of
22 that fee was?

23 A. The basis of that fee is based on the cfs,
24 cubic feet per second, of the water rights that were
25 being transferred. There's a fee schedule that the

1 Department has for transfers based on flow rate or
2 volume.

3 Q. And how many water rights were the subject
4 of this transfer?

5 A. Seven.

6 Q. Okay. In the fee box, page 2, line No. 9,
7 do you see there a discussion of a \$50 per water right
8 fee if it's filed pursuant to 42-221.0.8?

9 A. Correct.

10 Q. And that -- that fee, if it was \$50 per
11 water right with seven water rights would be something
12 less than \$1,700?

13 A. That would be \$350, if my math is correct.

14 Q. Okay. Thanks.

15 So let's turn to Exhibit 1. Back to your
16 report, Scott.

17 So section 1, who protested the transfer?

18 A. Protests were filed by Ericsson, Johnson,
19 Smith 2P Ranch, Tomchak, Whittaker Two Dot Ranch, and
20 Whittaker.

21 Q. Okay. And as to Ericsson, is your
22 understanding that she's not present in the room today?

23 A. Correct.

24 Q. All right. As to Johnson, I believe he's
25 still present in the room today? Yeah, he is.

1 What was the basis of Mr. Johnson's
2 protest?

3 A. Quotes in there, "Bruce filing for a new
4 point of diversion, so my water should come before the
5 water that goes into that new point of diversion."

6 Q. Okay. And then it was protested by Smith
7 2P Ranch?

8 A. Yes.

9 Q. And what was the basis of that protest?

10 A. "By changing the point of diversion on
11 these water rights, it will alter the way the water has
12 been historically administered based on priority dates.

13 THE HEARING OFFICER: Mr. Bromley, you can jump
14 forward. I -- I can go back and read the protests to
15 refresh.

16 MR. BROMLEY: Okay. Fair enough.

17 Q. As to Smith 2P Ranch, do you know if a
18 Power of Attorney was included with the protest?

19 A. I do not know. I have not seen one.

20 Q. Okay. Okay. As to Whittaker Two Dot
21 Ranch, do you know if a Power of Attorney was included
22 with that protest?

23 A. No, I don't. I have not seen one.

24 Q. Okay. So let's jump forward, then, to
25 section 2.

1 So would you please explain your findings
2 and opinions in section 2.

3 A. So first of all, I talk about McConnells'
4 water rights here. They have these seven water rights
5 diverted from Lee Creek for irrigating 547.4 acres.

6 And then I list them and I describe a
7 number of these are combined between a senior water
8 right and a junior right providing water for so many
9 acres there. There's these different sets with them,
10 that the -- were recently subject to this correction
11 transfer that we talked about earlier on the upper
12 point of diversion.

13 And I also discuss the spring right that's
14 not part of this transfer.

15 Then there's the Ericsson water rights.
16 Ericsson has a number of water rights there from Left
17 Fork of Lee Creek and from Stroud Creek. There's two
18 of them. Those ones have 1883 and 1912 priority dates.

19 It's interesting that Water Right
20 No. 74-370, the first one I list of Ericsson, has a
21 condition on the water rights describing a prorating
22 between other -- another 1883 water right. Then
23 Ericsson also has three other water rights from
24 springs. Those ones look like they don't have anything
25 to do with this transfer application.

1 It says, "Ericsson's point of diversion
2 from the Left Fork Lee Creek, also known as Stroud
3 Creek, and sometimes maybe also known as Everson
4 Creek," although those might be separate. It's
5 downstream from the Tomchak and Foster diversions. So
6 Ericsson's somewhere in between.

7 Then I talk about the Johnson water rights.
8 Johnson owns a number of water rights in the Lemhi
9 River drainage, listing sources of Big Eight Mile
10 Creek, Lee Creek, Mill Creek, and springs. The ones I
11 list here are the ones from Lee Creek and those ones
12 from Big Eight Mile Creek that might have something to
13 do with the Lee Creek water rights, meaning that they
14 might overlap on some of them.

15 There's this first one here, 74-949. It's
16 a 1918 -- 1918 priority water right for 1 acre. And
17 74-1831 is .24 cfs for irrigation of 12 acres. And
18 those two places of use don't appear to be overlapped.
19 And it looks like they have individual points of
20 diversion.

21 And then there's a 74-15201, 0.34 cfs of
22 1990 priority water right from Lee Creek for irrigation
23 of 17 acres. And the place of use there is overlapped
24 with water rights diverted from Big Eight Mile Creek.

25 And then I discuss those two water rights

1 from Big Eight Mile Creek, 74-15720 and 75 -- 74-15721.

2 And I list some other water rights from Big
3 Eight Mile Creek and conclude that they don't look like
4 they have a direct connection with Lee Creek or this
5 application.

6 Smith 2P Ranch water rights, there's one
7 for a spring for domestic use, 74-1616.

8 74-1615 provides 2.43 cfs of 1919 priority
9 water from Everson Creek for irrigation of 121 acres.

10 THE HEARING OFFICER: Mr. King, I'm going to
11 stop you. I can read through this too.

12 THE WITNESS: Okay.

13 THE HEARING OFFICER: Maybe in the interest of
14 time, so --

15 THE WITNESS: So in the interest of time --

16 THE HEARING OFFICER: If there's something
17 you -- something important that you're wanting to draw
18 out of these kind of summaries of water rights, then we
19 can do that. But otherwise, I can -- I can read
20 through the specifics.

21 MR. BROMLEY: Okay. Yeah.

22 THE WITNESS: One thing I want to -- there's 2P
23 Ranch, that's Foster or Tomchak, look like they share a
24 point of diversion for some water rights there.

25 And there's one of these, this 74-2351,

1 that doesn't look like it's been used. There's no
2 indication on the aerial imagery.

3 Q. (BY MR. BROMLEY): On the Smith 2P Ranch
4 water rights --

5 A. Yes.

6 Q. -- who's -- who's the owner of the rights?

7 A. Foster, from what I recall in pulling up
8 what I could find for those water rights.

9 Q. Yet the protest was filed by whom?

10 A. Smith 2P Ranch.

11 Q. You didn't see a Power of Attorney?

12 A. No.

13 Q. Or any explanation?

14 A. I'm not sure who Smith 2P Ranch was. I
15 looked on the Secretary of State's site, and I couldn't
16 find anything for that.

17 Q. Okay. On the Whittaker water rights, 2.6,
18 and you had mentioned it in relation to the Rosalie
19 Ericsson, I see on the second bullet of page 7
20 reference to 74-369.

21 A. Yes.

22 Q. And --

23 A. That is a water right with this May 12th,
24 1883 priority, a senior water right on Lee Creek
25 system. And that -- I believe if that's right, that

1 one shares that same pro rata condition that the other
2 one that we discussed earlier does.

3 Q. And how do you know about this prorated
4 condition?

5 A. It's on both of those two water rights. It
6 spells out right in the water right that these water
7 rights essentially shouldn't be cut off to divert any
8 other 1883 water rights, those with the same priority.
9 These two water rights get to be used first. And if
10 there's not enough between the two, then they get to
11 get their share of water pro rata.

12 Q. And is that pro rata language on the face
13 of the McConnell rights?

14 A. No.

15 Q. Okay. But it's -- it is documented, then,
16 you were able to see it on the face of this 74-369 and
17 74-370?

18 A. Yes.

19 Q. Okay. So that's how you know about it,
20 because it's written down?

21 A. Yes.

22 MR. BROMLEY: Okay. And, Mr. Cefalo, I
23 appreciate you asking me to speed up. You know, we
24 never know how fast or slow we need to move, and I
25 never know --

1 THE HEARING OFFICER: That's okay.

2 MR. BROMLEY: -- what counsel's going to say and
3 lay foundation for something. So I'm happy to go a
4 little bit faster also.

5 THE HEARING OFFICER: I think we're good to jump
6 over the summary of the water rights. Thanks.

7 MR. BROMLEY: That's great. Thank you, then.

8 Q. So, Scott, if you can look at section 3 of
9 your report.

10 Could you just please explain your findings
11 and opinions.

12 A. McConnell diverts water from two points of
13 diversion. There's an upper one and a lower one. I
14 visited both of those, and I provided an estimate as to
15 how much water those might divert. And this was just
16 kind of a rough estimate from looking at the size of
17 the ditch, that the upper one may take two-and-a-half
18 to 4 cfs, and the lower one maybe around 12 cfs. So
19 the lower one is clearly larger, visually, looking at
20 it.

21 At the upper diversion there was a channel
22 that was feeding the lower diversion. And that other
23 channel was about 50 feet away from the headgate at
24 that upper diversion. So there were two channels there
25 and about 50 feet distant at that location.

1 Figure 1 provides a description of the
2 place of use and the points of diversion. And then
3 there's some following figures that show photos of the
4 ditch and the diversion works.

5 Q. You were in the room, Scott, when the
6 Hearing Officer asked about location of measuring
7 devices.

8 Do you recall that?

9 A. Yes, I do.

10 Q. And we had stated, you know, once we get to
11 Scott King's report, there's some information on that
12 subject.

13 If you could just show the Hearing Officer
14 where that is located.

15 A. On all of these figures --

16 THE HEARING OFFICER: Oh, yeah.

17 THE WITNESS: -- Figure 2 through 5, this was
18 using an app on the phone. It a provides a location.
19 And then the app I also took a screenshot of, if we
20 needed to show that earlier to show that, what it looks
21 like on the map and what those distances are, we can
22 see that.

23 MR. BROMLEY: Mr. Cefalo, does that help answer
24 that question you had?

25 THE HEARING OFFICER: It does. I appreciate you

1 pointing that out.

2 Q. (BY MR. BROMLEY): Proceed.

3 A. Continuing on, so I GPS'd those points of
4 diversion. And on Figure 6 I present those. And so it
5 shows the little green dots of the locations where I
6 GPS'd the points of diversion.

7 And then we can also see on the aerial
8 imagery the ditch supplying the irrigated place of use,
9 the ditches from the upper and lower points of
10 diversion. And I put some arrows along those ditches,
11 because what I wanted to do is compare this imagery,
12 this current imagery -- I think this was 2019, and to
13 other imagery.

14 So then on Figure 7 -- and Figure 7 is the
15 1986 imagery that was used in the SRBA adjudication for
16 preparing recommendations and doing analysis on those.
17 And that shows the same points that I GPS'd and the
18 same arrows.

19 So on my GIS using the RGS, like Rob was
20 showing earlier, those arrows are in the same exact
21 location. We can see, looks from here to me, that
22 those diversions are in the same location and the
23 ditches are in the same location.

24 Figure 8 is a little different. This is
25 maps that were drawn by Department of Water Resources

1 staff, I believe using aerial imagery, but they were
2 hand drawn and have been scanned and made available.
3 Now, you'll see a difference here between the north
4 half of Figure 8 and the south half of Figure 8.

5 They're different colors because if you
6 pull up the Department's part of this, the south half
7 of Figure 8 is completely incorrect. It's some
8 different section or township. And they made a mistake
9 when they were putting these together. So I had asked
10 Craig Saxon with Water Resources "Can you send me the
11 image of the south half?" And so I geo-referenced that
12 in. Still it's showing the same points of diversion
13 and the arrows marking that.

14 And what we can see here is the 1970 point
15 of diversion looks like it's a ways upstream of that
16 southern green dot. It looks like it's in another
17 quarter-quarter. Which makes sense, because it was
18 decreed in that quarter-quarter in the earlier
19 adjudication, and then comes along the SRBA
20 adjudication, and it's in a different quarter-quarter.
21 So it had moved in the meantime.

22 MR. HARRIS: I'm sorry. Did you say "had" or
23 "hadn't"?

24 THE WITNESS: It had.

25 MR. HARRIS: "Had."

1 THE WITNESS: Based on these maps. And I wasn't
2 there in the field, but based on review of the maps, it
3 looks like it's moved.

4 MR. HARRIS: Thank you.

5 THE WITNESS: We can also see from this, it
6 appears to me, the way they've mapped this, is the
7 upper diversion was diverted into one ditch, and
8 then -- what? -- 500 feet downstream about that ditch
9 bifurcated, and it served an upper ditch and a lower
10 ditch.

11 If we go further on the north half of the
12 map where we see "8" circled, we can see that the
13 location of that lower ditch is kind of close to where
14 some of the arrows are pointing to. So to me it looks
15 like sometime between 1970 and 1986 things had changed
16 on the ground.

17 It also looks to me that this -- this Lemhi
18 mapping should be shifted just a little bit to the
19 east, based on arrows and the location of the upper
20 ditch and the location of the field. But you can kind
21 of see that in the map if it makes any -- if it's
22 important.

23 Q. (BY MR. BROMLEY): All right. So
24 section 4.1 of your report, Scott, if you could please
25 explain your findings and opinions.

1 A. So in section 4.1 I'm describing --
2 Figure 9 is showing the different systems, the
3 different reaches that are in here. And this --
4 Mr. Manwaring was asking earlier, he was talking about
5 things such as Everson Creek, Stroud Creek, Porcupine
6 Creek, and Lee Creek, also known locally as Right Fork
7 of Lee Creek. And so I kind of name some of these and
8 put nice, dark blue lines on here so we have a
9 reference as to what these look like here.

10 And see on this, Stroud Creek, locally
11 known as the Left Fork of Lee Creek, joins the Right
12 Fork of Lee Creek or Lee Creek well upstream of both
13 the upper and lower points of diversion.

14 Q. And this underlying base map, is that USGS?

15 A. That's the USGS quad map.

16 And the blue lines on here are IDWR's
17 hydrography layer that I -- I believe that I pulled off
18 of their website and checked against the blue lines on
19 the map, and it matched fairly closely.

20 Q. Okay. So your overlay with blue lines,
21 you're just making it more visible?

22 A. Yes. Those were not blue lines that I drew
23 myself. They were something I pulled from another
24 layer that I'm pretty sure came from Idaho Department
25 of Water Resources' website.

1 Q. Thanks.

2 A. On the next figure, Figure 10, just kind of
3 lay out the locations of the different points of
4 diversion. And so the very south of the map, we have
5 Tomchak and Foster's points of diversion. Another
6 water right of Tomchak and an Ericssons.

7 Downstream we have Whittakers' rights.
8 There's three of them there from that Left Fork of Lee
9 Creek or Stroud Creek or whatever it's called. And
10 then there's the Whittaker Springs, 74-157.

11 Then further downstream we can see
12 McConnells' two green dots, two points of diversion.
13 In between those is the Johnson point of diversion for
14 74-1831, and then further downstream two more water
15 right -- or points of diversion from Johnson's.

16 All of those locations are based on IDWR
17 .shp file for the location of the point of diversion,
18 not my interpretation.

19 Next is what's called the 1954 engineer's
20 map, which was something that I believe that maybe
21 Bryce found. It came to me from other information.
22 And I used the version of that, and it shows different
23 water systems.

24 And in here you'll see on the northwest
25 part, there's a circle "30," and to the east of that we

1 can see where the east Left and Right Forks join on
2 that engineer's map. And again, we can see that
3 McConnells' points of diversion, as I GPS'd them and
4 played them -- and overlaid them on this map, are well
5 downstream of the confluence of those two forks.

6 Q. Scott, can you please explain the paragraph
7 that is immediately above Figure 11 and what you wrote
8 there.

9 A. Okay. So the protestants allege that the
10 lower point of diversion is taking water from a fork of
11 Lee Creek, and not Lee Creek, that this Left Fork of
12 Lee Creek continues downstream past McConnells' upper
13 point of diversion between it joins Lee Creek, so to
14 say that these reaches are separate until between those
15 two points of diversion.

16 And everything that I've looked at from
17 this 1954 engineer's map to the USGS quadrangle map
18 and -- I'm not sure that I showed it -- the Lemhi
19 adjudication map, but all of those were consistent.
20 They show those forks joining well above McConnells'
21 upper point of diversion and not continuing downstream.

22 And I think that's important, because it's
23 clear that Lee Creek is formed as -- where McConnell
24 can take and it's not separate forks, well above his
25 upper point of diversion.

1 Okay. There you go. Figure 12. That's
2 the Lemhi adjudication map, and it also shows -- this
3 is on page 17. It also shows the confluence of the Lee
4 Creek Right and Left Forks.

5 Q. So all the mapping that was available to
6 you is consistently showing where this confluence was
7 located above --

8 A. Above. Some of them moving up or
9 downstream a little bit. The engineer's map is a
10 little different based on their drawing. They probably
11 didn't have as good of imagery what they were using.
12 But yes, all clearly above.

13 Q. And "above" meaning above --

14 A. Above McConnells' upper point of diversion.

15 Q. Thank you.

16 Okay. 4.2, let's look at that.

17 And please briefly explain your findings
18 and opinions.

19 A. Yeah, so there's some springs listed in the
20 various water rights. There's some of these owned by
21 some parties that don't appear to have anything to do
22 with the Lee Creek system; Ericsson and Foster, for
23 example.

24 And also, those springs list a tributary of
25 sinks or don't list a tributary at all, whereas

1 Whittakers' Water Right 74-157 authorizes diversion
2 from two springs, and it clearly lists a tributary of
3 Lee Creek.

4 Q. Okay. And so then the significance of --
5 of that is what?

6 A. That those springs are tributary to the Lee
7 Creek system, as opposed to the other springs that
8 don't list a tributary. If it lists a tributary -- if
9 one lists a tributary of sinks or no tributary at all,
10 it would be hard to call on that spring. We would not
11 expect it to flow downstream into a named system,
12 whereas the Whittakers' spring right clearly does list
13 a named tributary.

14 Q. So that's why you differentiated the two is
15 because of the tributary?

16 A. Correct.

17 Q. Okay. If you recall, Scott -- and, you
18 know, you've got 74-157 in your report; is that right?

19 A. Yes.

20 Q. Are there any administrative conditions on
21 the face of 74-157 that explain it's to be administered
22 differently than its decreed source tributary and
23 priority date?

24 A. No.

25 Q. Okay. And that -- you can contrast that,

1 then, with the spring rights that you were just
2 describing for Ericsson and Foster?

3 A. Correct.

4 Q. And then --

5 A. [Unintelligible] that tributary that's not
6 a named source.

7 Q. And then you'd also mentioned that 74-369
8 and 74-370 with the pro rata --

9 A. Yes.

10 Q. -- language --

11 A. It's very clear to instruct the Department
12 or a watermaster how those should be administered.

13 Q. Okay. So section 4.3, then, Scott, if you
14 could please explain your findings and condition -- and
15 opinions.

16 A. Some of the water rights upstream of
17 McConnells are senior and some are junior. And we talk
18 about those two with the 1883 priority date that are
19 with the pro rata language that could be called on by
20 McConnell.

21 We have a place of use for Whittakers'
22 right that's also covered by some Big Eight Mile water.

23 November of 2020, Whittaker had filed an
24 application for transfer No. 84508 proposing to list
25 the tributary listed under Water Right 74-157. So we

1 wanted to -- the applicant, Whittaker, wanted to remove
2 Lee Creek as a tributary -- named tributary.

3 There was recommendations from watermaster
4 Cindy Yenter on that. And Yenter described an east
5 spring and a west spring, and one seems to be more
6 tributary to the Big Eight Mile system and the other to
7 the Lee Creek system. And she provided some additional
8 details to those spring diversions and the use and
9 recommendations for conditional approval of that
10 transfer.

11 Subsequently, that transfer was withdrawn
12 by Whittaker. So as a result we have 74-157 unchanged,
13 still listing a source of springs tributary to Lee
14 Creek.

15 We have three water rights by Johnson, two
16 of them are downstream of the lower McConnell point of
17 diversion. One of them was -- 74-1831 was transferred
18 to its current place of use by one of Johnson's
19 predecessors. And it lists that point of diversion
20 between the upper and lower McConnell point of
21 diversion, and a place of use that's kind of between
22 the two ditches.

23 I don't see any evidence that that ditch is
24 in place, the diversion's in place, that there's been
25 any irrigation on that field through the review of any

1 of my -- any of the imagery or anything else that's in
2 place. So to me, it looks like the water right was
3 transferred there, and then that transfer was never
4 accomplished by putting in a point of diversion and
5 irrigating.

6 And as I mentioned, one of these goes to a
7 1-acre place of use. Doesn't really look like that
8 one's being used either, that 74-949.

9 And then 74-15201 has a 17-acre place of
10 use in amongst water and place of use from Big Eight
11 Mile Creek, and I can't tell whether or not that water
12 right's diverted or it isn't diverted. It's fairly
13 junior. And the water right -- or the place of use is
14 clearly irrigated, mostly from what I would expect to
15 be the Big Eight Mile Creek water.

16 Q. All right. Scott, then looking at
17 section 5 of your report, if you'd please explain your
18 findings and opinions.

19 A. I looked through the Water District 74Z
20 watermaster reports. Some of these were fairly clear,
21 and it looks like the watermaster is reporting
22 delivering McConnells' water, and it might it be clear
23 to the full 15 cfs, or close to it. Maybe that most
24 junior water right wasn't completely delivered. But
25 there's records of that water right being delivered and

1 recorded in the watermaster records.

2 Most of these were fairly detailed on the
3 watermaster reports in providing diversions for all of
4 the different water rights there.

5 1919 -- or the 2019 watermaster report
6 doesn't include those details. So I think there was a
7 different watermaster that year, and the deliveries
8 aren't quite as clear.

9 Whittakers' right 74-157 was not included
10 in any of the watermaster records that I reviewed on
11 their watermaster reports.

12 And so it shows to me that the McConnells
13 have exercised the full beneficial use of their suite
14 of Lee Creek water rights. The records establish use.
15 It's recorded there.

16 Q. Okay. And that's then consistent with that
17 Exhibit 7 that we looked at previously.

18 If you look at Exhibit 7 just quickly,
19 Scott, is that -- are your opinions, then, consistent
20 with Exhibit 7?

21 A. Yes, they are.

22 Q. Okay. All right. Section 6, if you can
23 please explain what you see there.

24 And let me know, does that section, then,
25 apply the standards that are located in Idaho Code

1 42-222?

2 A. Yes, they are. This is an analysis of the
3 different elements that the Department is expected to
4 use in analyzing a transfer and making a determination
5 if this is an acceptable transfer that can be approved.
6 And in my analysis, under all of these items, it can be
7 approved.

8 MR. BROMLEY: Okay. And, Mr. Hearing Officer,
9 would you like me to go through each of the paragraphs,
10 or not?

11 THE HEARING OFFICER: No.

12 MR. BROMLEY: Okay.

13 Q. Okay. So, Scott, then let's jump to
14 section 7, which is your conclusions and
15 recommendations.

16 And would you please summarize those.

17 A. The transfer is structured to prevent
18 enlargement and injury, and it should be approved. The
19 point of diversion, the lower point of diversion, the
20 one being added by this transfer, is one that has been
21 there for decades. It's clearly being used.

22 That the -- we discussed earlier that Lemhi
23 adjudication map shows something a little different,
24 and it looks like something has happened between 1970
25 and 1986. So there was a difference in the location of

1 the ditch.

2 And I talk here that the Lee Creek channel
3 and its point of diversions has a bed that consists of
4 sandy and gravelly sediments. And it's heavily
5 vegetated. As Bruce was talking, there's lots of
6 willows there. There's lots of downfall. I remember
7 walking around there, it was really thick.

8 We expect channels like that to move
9 around, that they wouldn't necessarily stay in a
10 consistent location. There's some width to it. So if
11 there's grading or bifurcation and that the channel
12 kind of diverges at places, that's not unexpected.

13 And then the last point here, No. 4,
14 there's been talk of this Whittaker versus Kauer in
15 1956 Supreme Court decision. And as I say here, I'm
16 not an attorney; I can't make a legal conclusion. But
17 in my experience, if the -- if that prior decision was
18 not carried forward on future decrees, both the 1970
19 Lemhi and the SRBA, then that's not to be administered
20 that way. I don't see how the Department would know or
21 a watermaster would know how to administer that,
22 because it wasn't included in the future decrees.

23 Q. Okay. So in summary, Scott, is it your
24 opinion that this is an approvable transfer?

25 A. Yes.

1 Q. And it's your opinion that there will be no
2 injury if the transfer is approved?

3 A. Correct.

4 MR. BROMLEY: Okay. That's all I have on
5 direct.

6 THE HEARING OFFICER: Okay. Great.

7 Moving this way again, we'll start with
8 you, Mr. Manwaring, if you're prepared.

9 Do you want to break, or are you good to go
10 with cross?

11 MR. MANWARING: No, we can go.

12 THE HEARING OFFICER: Okay. Go ahead.

13 MR. MANWARING: I had lunch. I'm ready.

14

15 CROSS-EXAMINATION

16 BY MR. MANWARING:

17 Q. Scott, first question is, have you been out
18 in the field to examine actual points of diversion
19 where they're located on these streams?

20 A. Yes. In my report on Figures -- and I'll
21 just go back so that we can -- on Figures 2 through 5,
22 I visited the McConnell points of diversion and their
23 [unintelligible].

24 But besides being on McConnells' report and
25 around their location of the points of diversion, I

1 haven't been to any others. So just the McConnell
2 ones.

3 Q. Just the McConnells?

4 A. Yes.

5 Q. And is it your testimony here today that
6 the McConnells' upper point of diversion is downstream
7 of the confluence of Stroud Creek into Lee Creek?

8 A. Yes.

9 Q. You saw that when you went out in the
10 field?

11 A. What I saw were two different channels at
12 that upper point of diversion. But my opinion is that
13 the confluence of that is further upstream. It's where
14 it's been mapped before. And because of whatever
15 changes have happened in the meantime, that those might
16 not be in the same channel on the day that I was there,
17 my opinion is -- means that that confluence is not
18 necessarily moved downstream to where it can't be
19 called on anymore for delivery.

20 Q. Did you walk upstream from that upper
21 diversion point to see the confluence of Stroud Creek?

22 A. No, I did not.

23 Q. Did you walk downstream to see the
24 confluence of Stroud Creek?

25 A. I did not walk downstream to the

1 confluence. I walked downstream to -- or went to the
2 other lower point of diversion.

3 Q. And did you come across Stroud Creek
4 confluence in that walk?

5 A. I don't know which one is Stroud Creek
6 there. I know that there were different channels. And
7 so my opinion is that's Lee Creek there.

8 Q. Okay.

9 THE HEARING OFFICER: "There" meaning the
10 lower --

11 THE WITNESS: There at the upper point of
12 diversion and the lower point of diversion.

13 THE HEARING OFFICER: Okay.

14 MR. MANWARING: Rob, can we play with Google
15 Map? Is that doable? I can ask him some questions
16 while we're going through that.

17 Q. Just going back to your Exhibit 1, which is
18 your opinion on section 6, your transfer analysis, 6.1
19 in particular.

20 It is true that your premise that there's
21 no reduction in quantity to existing water rights is
22 based on the determination that the upper diversion is
23 downstream from the confluence of Stroud Creek?

24 A. Say that again, please.

25 Q. Maybe.

1 THE HEARING OFFICER: That's a good question.

2 Q. (BY MR. MANWARING): It's true that your
3 premise that there's no reduction in quantity to
4 existing water rights is based upon your belief that
5 the upper diversion the McConnells have is downstream
6 from the confluence of Stroud Creek into Lee Creek?

7 A. Correct.

8 Q. Okay. Just wanted to make sure I'm clear
9 on that.

10 A. No, you're correct. I wanted to make sure
11 you asked that correct, so we're both clear.

12 Q. You're just making sure I could ask it
13 twice.

14 Now, we have displayed up here a Google
15 image. And that Google image shows Lee Creek and
16 Stroud Creek.

17 You'd agree those are two different streams
18 until they merge; right?

19 A. Yes.

20 Q. And you're familiar also with upper area is
21 Porcupine Creek and Everson Creek?

22 A. Yes.

23 Q. Now, the Department of Water Resources in
24 making a grant of a water right, a decree through the
25 SRBA, they have to identify the tributary or the stream

1 that you're actually using the water right from?

2 A. Correct.

3 Q. Okay. So in your report, Exhibit 1, you've
4 gone through all of these water rights that apply to
5 McConnells as well as all the protesters?

6 A. Correct.

7 Q. And you have, in fact, a list -- a copy of
8 all those water rights that you provided as part of
9 your report?

10 A. Yes.

11 Q. Okay. And in McConnells' water rights that
12 you have listed here, the source is always listed as
13 Lee Creek; is that correct?

14 A. Except for the water rights that were
15 springs that weren't part of this transfer, yes, all of
16 the water rights, seven of them, listed as having a
17 source of Lee Creek.

18 Q. And you would agree that's their source,
19 Lee Creek?

20 A. Yes.

21 Q. And I think the last one you did show is
22 that source is a springs?

23 A. Correct.

24 Q. Whatever that is?

25 A. Yeah.

1 Q. Okay.

2 A. I believe that spring is down below these
3 points of diversion by their ranch. Like I said, it's
4 used for stock and domestic. It's not associated with
5 these transfers.

6 Q. It's not associated with Lee Creek, except
7 for further down, downstream?

8 A. It's downstream of their points of
9 diversion from Lee Creek.

10 Q. I think the tributaries of the springs is
11 listed as Lee Creek.

12 A. Yes, you're correct. It says springs
13 that's tributary to Lee Creek.

14 Q. Okay. And this is further downstream than
15 their lower diversion has been?

16 A. Correct.

17 Q. Okay. All right. Then the next sets of
18 water rights, you looked at Ericsson's.

19 Those water rights talk about -- one of
20 them talks about the Left Fork of Lee Creek as the
21 source?

22 A. Yes.

23 Q. And the tributary is Lee Creek?

24 A. Correct.

25 Q. And then the rest of them are groundwater

1 springs combined together, except for one for Ericsson
2 that's a -- the source is Stroud Creek. That's Water
3 Right 74-1855.

4 A. Yes, I see that.

5 Q. And so the source of that one is actually
6 Stroud Creek; correct?

7 A. Correct.

8 Q. All right. Now, it would be so much fun to
9 go through every one of these. But in the interest of
10 time, we're going to jump back to Appendix F, which is
11 Tomchak's water right.

12 And their Water Right 74-1057 is -- the
13 source is Stroud Creek; correct?

14 A. Correct.

15 Q. And Water Right 74-2195A is Everson Creek?

16 A. That's correct.

17 Q. And Water Right 74-2261A is Everson Creek?

18 A. Yes.

19 Q. And 74-2339A is Everson Creek?

20 A. Yes.

21 Q. So would you agree with me that the
22 Department of Water Resources recognizes those water
23 rights as being actual streams different than what
24 you've been talking about as Lee Creek?

25 A. Yes.

1 MR. MANWARING: Okay. All right. Now, Rob, you
2 got rid of Stroud Creek.

3 What happened to my map?

4 MR. HARRIS: Oh, no, this is --

5 MR. MANWARING: Oh, there it is. Okay. Now, if
6 you'll go -- keep going down. There -- now we can see
7 Stroud.

8 MS. YENTER: There's Everson.

9 MR. MANWARING: Why don't you go back.

10 UNIDENTIFIED SPEAKER: Everson.

11 MR. MANWARING: Everson, yeah.

12 Q. Everson, Stroud. Those are two streams;
13 correct?

14 A. Correct.

15 Q. And so Tomchaks have water rights on both?

16 A. Yes.

17 MR. MANWARING: Okay. Go further downstream
18 now.

19 MR. HARRIS: Downstream?

20 MR. MANWARING: Downstream. That might be the
21 best way to do this, downstream, upstream. Downstream,
22 right there.

23 Q. Okay. We notice that Stroud Creek keeps
24 moving in its course.

25 It's been joined now by Everson; is that

1 correct?

2 A. Correct.

3 Q. And then you see Porcupine Creek off to the
4 left there?

5 A. Yes.

6 Q. Right. Keep going downstream. Right
7 there.

8 Porcupine Creek, would you agree has a
9 confluence with Lee Creek?

10 A. Correct.

11 Q. Is that confluence above or below the upper
12 point of diversion?

13 A. Upstream. Above.

14 Q. Upstream?

15 A. Yes.

16 Q. Okay. Now go downstream. Right there.

17 Now, can you tell from that map or do you
18 know where Stroud Creek actually has a confluence with
19 Lee Creek? Can you see from that map at all? Can you
20 tell?

21 A. I can see from that map what would appear
22 to me, what this would likely be the Stroud Creek
23 system, although there is something else that's flowing
24 along on this side.

25 And so what I can see from this map, the

1 imagery, is it's not exactly clear what's happening
2 with Stroud Creek as it's flowing down towards the
3 confluence with the Right Fork or Lee Creek.

4 Q. Is there a big springs, swampy kind of area
5 down in that confluence area?

6 A. It's been described to me as possibly so,
7 but I've not been there myself, so I can't speak to it
8 personally.

9 Q. Okay. So based on that map that you see up
10 there, where do you believe the actual point of
11 diversion is, the upper point of diversion for
12 McConnells? Can you tell from that location?

13 A. I don't believe it's on this map. I think
14 we need to go further north.

15 Q. Downstream?

16 A. Yes.

17 Q. Okay.

18 A. Now, it's in the trees. What I can
19 certainly see here is there's a ditch. And I believe
20 it's approximately right there. I know I GPS'd it. We
21 could put it right on the map if we pulled in that
22 point.

23 Q. Okay. And that, you believe, was the upper
24 diversion point?

25 A. Yes.

1 Q. Okay. And if in fact it's different than
2 that, would you have a reason to contest somebody that
3 would say it's different than that location?

4 A. Well, what I would not contest is what I
5 GPS'd.

6 Q. Okay.

7 A. And the place that I visited.

8 Q. Okay.

9 A. So if I pinpointed it correctly on the map
10 or not, I don't know. But I think I got close.

11 Q. Okay. That takes us back to your Exhibit 2
12 again.

13 MR. BROMLEY: Exhibit 1?

14 MR. MANWARING: Or 1, yeah. Sorry. Exhibit 2
15 was fascinating, by the way.

16 MR. BROMLEY: You can read all of it. It has a
17 nice headshot.

18 Q. (BY MR. MANWARING): We want to go to
19 page 14, Figure No. 9.

20 A. Okay.

21 Q. Now, page 14, that's your -- your
22 quadrangle map; right?

23 A. Correct.

24 Q. And this is the highlighted streams that we
25 just actually looked at here.

1 And again, on that one you are indicating
2 that the McConnells' upper diversion is below the
3 confluence of Stroud Creek into Lee Creek; correct?
4 It's downstream from there?

5 A. Correct.

6 Q. Okay. And if in fact it's not, if in fact
7 it's upstream from the confluence of Stroud Creek,
8 would you be able to contest that while you're here
9 today or...

10 A. What I can say is this is what this map
11 shows. So I can testify to what I see on this map.

12 Q. Right. That's why we're asking you these
13 questions.

14 A. If Stroud Creek actually joins Lee Creek
15 downstream? Again, I will go back to what I've said
16 earlier. There were two channels at this upper point
17 of diversion. Streams do meander. And if the water
18 that's coming in from the east side now joins the main
19 channel at the flows that I observed when I was there,
20 that wouldn't necessarily surprise me.

21 Q. Okay.

22 A. But I still would say that that is the
23 confluence. All the maps said that, at least at the
24 time that they were done. If that confluence moved
25 downstream in the meantime during certain flow regimes,

1 it's still -- in my opinion, that's what was described
2 and anticipated by the water rights as being the
3 confluence.

4 Q. I understand the map look at it.

5 But you were here for Bruce McConnell's
6 testimony; correct?

7 A. Yes.

8 Q. And his testimony, if I recall correctly,
9 was that that upper diversion has never been changed,
10 the location of it?

11 A. And -- yes. And I agree that he said that.
12 I disagree that that's true.

13 Q. You think the upper diversion location has
14 actually changed?

15 A. Yes.

16 Q. Is that based upon your determination that
17 there was some change from 1970 to 1980-something?

18 A. Yes, if -- providing that that mapping was
19 correct in the 1970 Lemhi adjudication map, maybe
20 earlier adjudication we don't have any depiction of
21 that. The '54 engineer's map doesn't show anything
22 either. We don't have those diversions there.

23 So going from the 1970 to the 1986, looking
24 at the maps and the ditches, I would say, yeah, if
25 those are right, it has changed locations, the upper

1 diversion.

2 Q. So according to Bruce's testimony, since
3 he's taken possession of the property in 1993, that
4 point of diversion has not changed, physical location
5 has not changed?

6 A. I don't see any evidence to suggest that
7 the upper diversion has changed locations since '93.

8 Q. Okay. So wherever that physically is, that
9 hasn't changed since 1993?

10 A. Not that I can tell.

11 Q. Okay. And if that actual physical location
12 is shown to be different, like upstream from the actual
13 confluence of Stroud Creek into Lee Creek, would you be
14 able to challenge that based on your testimony today?
15 Do you have reason to contest that?

16 A. Ask your question again, please.

17 Q. Well, maybe. If in fact the evidence
18 that's presented shows that the actual confluence of
19 Stroud Creek into Lee Creek is downstream from the
20 physical location of the McConnells' upper diversion,
21 would you be able to challenge that from what you've
22 testified or have [unintelligible]?

23 A. No, I think I have agreed that those
24 channels might be separate now, but at one time they
25 were together.

1 Q. Okay.

2 A. And so perhaps under the flow regimes and
3 what we saw that there might be a difference in the
4 location where those channels are joining today.

5 Q. Okay. So if in fact the confluence of
6 Stroud Creek is downstream from McConnells' upper
7 diversion, then having that diversion change to the
8 lower diversion would affect people that -- like
9 Tomchaks that have a right on Everson and Stroud Creek?

10 A. I don't see that that change in the channel
11 how it moves downstream should change water rights'
12 administration.

13 Q. I would grant you that.

14 But if the water rights' administration has
15 always been based upon what flows into Lee Creek from
16 known diversion points and what flows from Stroud Creek
17 or Everson Creek down to Lee Creek, if -- the actual
18 upper diversion is the water right for McConnells;
19 correct? That's their water right?

20 A. It's one of them.

21 Q. That's their diversion point for that
22 water; right?

23 A. The upper diversion is their point of
24 diversion for --

25 Q. Their water rights, except for this spring

1 that you had?

2 A. Yes.

3 Q. Because they don't have the lower one yet?

4 A. No, not listed on the water rights.

5 Q. Yeah.

6 A. Yes.

7 Q. There hasn't ever been decreed a lower
8 diversion right?

9 A. Correct.

10 Q. That's the one that the Department of Water
11 Resources went out and told the watermaster, "Solve
12 that problem"?

13 A. To shut that diversion off until it's
14 included as -- on a water right, yeah.

15 Q. All right. Okay. So if -- if the
16 McConnells' upper diversion is basis for their
17 diversion of their water rights on Lee Creek and that
18 diversion has been upstream from where Stroud Creek has
19 a confluence with Lee Creek, then changing that
20 diversion to be below the confluence would now impact
21 the Tomchaks, whose water right comes from Stroud Creek
22 and Everson Creek; wouldn't you agree?

23 A. Partially. I don't believe that that upper
24 diversion has always been below the confluence of
25 Stroud Creek and Lee Creek. I think that the earlier

1 maps show that those streams came together before
2 there. And then there was an upper point of diversion.
3 And then the upper diversion got moved downstream for
4 some reason.

5 And maybe under the current flow regime
6 there's a separate stream right there. But I don't
7 agree that that upper diversion didn't take water from
8 Stroud Creek. I believe that it certainly did.

9 Q. You're basing that on maps that you've
10 reviewed?

11 A. Yes. And the water right decrees
12 themselves.

13 Q. Right. But not -- and then you don't have
14 in-field knowledge of what was going on in 1970, for
15 example?

16 A. No. I rely on other folks that were in
17 stream and field and made the maps.

18 Q. Right. You don't know what was happening
19 from the SRBA adjudication in 1980s to 1993, for
20 example?

21 A. I -- I see what I see on the imagery and
22 the maps, correct.

23 Q. Okay.

24 A. My first time there on site was in March.

25 Q. All right. And would you agree that

1 imagery on maps is at best an estimation?

2 A. No.

3 Q. On a 1970 map?

4 A. I would not say "at best an estimation." I
5 would say that in my experience imagery that has been
6 used for mapping can often be very, very accurate.
7 Yes, there can be sometimes adjustments in the imagery,
8 misinterpretations. But I wouldn't agree at all it's
9 at best an estimate.

10 Q. If we're talking about the location of a
11 point of diversion and we didn't -- this is pre GPS
12 days, how would you know that that was accurate?

13 A. I would expect that there were people in
14 the field that potentially reviewed the points of
15 diversion and mapped them. But there was some kind of
16 basis for location -- locating a point of diversion on
17 a stream at some place, whether that be aerial imagery
18 or whether that be in-field surveys.

19 I can tell you in my experience working for
20 the Department of Water Resources, I very frequently
21 relied on interpreting aerial imagery to accurately
22 place a point of diversion, for example.

23 Q. I'm sure you do. But can you tell from
24 aerial imagery, can you see the actual point of
25 diversion without going on the field and determining

1 that?

2 A. In the case in this situation, you can get
3 close. But because of the thick, dense willow cover,
4 there might be a little bit of confusion as to the
5 exact location, yes.

6 Q. Yeah. We could probably take this
7 satellite image all the way to the ground.

8 And would that help us know where it's at?

9 A. If it was -- if the imagery was of
10 sufficient detail, yes, it would.

11 Q. Yeah. Do you have imagery that's of that
12 sufficient detail that you've seen?

13 A. No.

14 Q. Okay.

15 A. We would get the NSA or somebody for that.
16 One of those federal agencies; right?

17 Q. That would be fun.

18 And there hasn't been such detailed imagery
19 for the basis of Figure 8 in your report?

20 A. I assume that Figure 8 was using aerial
21 imagery for that work, but I'm not sure about this
22 particular area, because I wasn't there and didn't
23 review their work.

24 Q. And it's hard to tell how detailed the
25 imagery was from that figure; correct?

1 A. You're -- you're giving a scale that it's
2 hard for me to comment on.

3 Q. That imagery isn't detailed enough to tell
4 you the exact point of diversion?

5 A. It -- Figure 8 is not imagery.

6 Q. Right.

7 A. It's -- it's a drawing that was based on
8 either in-field work, supplemented with imagery, maybe
9 with the USGS quad. Can we tell exactly where that
10 point of diversion was? Well, we can say that they
11 drew it in a certain location.

12 Q. And that's what we can say?

13 A. Yes.

14 Q. Okay. Same for Figure 9?

15 A. Well, what I can say on Figure 9 is the two
16 green dots where my GPS acquired location for those
17 points of diversion, which should be accurate to within
18 20 or 30 feet.

19 Q. Okay. And if in fact the upper diversion
20 is actually upstream from the confluence of Stroud
21 Creek, despite your mapping here, from what you're
22 telling me you weren't out in the field to be able to
23 verify one way or the other the location in respect to
24 those confluences?

25 A. I was there and looked at the points of

1 diversion and looked at the other channel that was
2 approximately 50 feet to the east of the upper point of
3 diversion. I was not there specifically to try to make
4 a determination to where these two channels joined. As
5 I've said before, I think that that might change
6 depending on flow regimes and channel movement and
7 erosion and deposition.

8 Q. Okay. I think that's sufficient for what I
9 need to have you tell me.

10 A. Okay.

11 Q. Go to the section 3 of your report, that
12 fourth paragraph on page 7 of Exhibit 1.

13 A. Yes.

14 Q. Can you explain to me what you're talking
15 about when you're mentioning "channels feeding the two
16 diversions appear to be separated"?

17 A. That's consistent with what I was just
18 talking about, that at that upper point of diversion
19 there was a channel that was supplying water to that
20 upper point of diversion. And then I walked through
21 the willows and stepped over a bunch of stuff. And
22 there was another channel that had some water in it
23 that was about 50 feet east of that.

24 Now, there might have even been another
25 channel that was beyond that. I don't know. What I

1 saw were those two channels right there.

2 So at that location of the upper point of
3 diversion, the location of that other channel was not
4 flowing to that upper point of diversion. They were
5 separate.

6 Q. Okay. I just want to make sure I
7 understood what you were talking about when you
8 referenced those two channels.

9 You also mentioned in respect to section 3
10 some historic flows that you were -- had been
11 examining.

12 Could you tell me about -- what you meant
13 by "historic flows" through that area.

14 A. Could you point to me where I said that.

15 Q. I don't think you wrote it here. You were
16 testifying that you examined -- or that you'd looked at
17 some historic flows and you mentioned that.

18 A. Well, although it's not in my report right
19 here, I have looked at a USGS system called
20 StreamStats, which is a program that's commonly used in
21 the Northwest, and maybe elsewhere, to provide
22 estimates of annual flows, the 20-year flood, the
23 50-year flood, the 100-year flood, those types of
24 things that you might have heard commonly used before.

25 Q. So that's what you're referring to is just

1 some tabulations of information about what the historic
2 flows may have been?

3 A. Well, okay, that's -- that's one example.

4 Q. Okay.

5 A. But being an engineer working in the water
6 field for a long time and this being part of my career,
7 I know that flows historically have been -- we've had
8 very big flows before, and so things move around in --
9 in those flows. We have meandering and, like I said,
10 erosion and deposition and channel bifurcation, things
11 happen under these different flow regimes.

12 Q. And does the information you're familiar
13 with with those historic flows also give some
14 description about, for example, historic flows in the
15 1880s when some of these decrees were initially begun,
16 as opposed to flows since even the '90s or 2000s, if
17 there's been a shift in the measurable flow of a
18 stream?

19 A. I think there's various evidence out there
20 to support that maybe flows might be different than
21 they are historically, but I have not looked at that.

22 Q. Okay. Different in what way?

23 A. That there are areas where -- and times.
24 We -- we go through seasons, we go through periods
25 where we have low flows and we have higher flows. The

1 '80s, for example, were a period, 1980s, where we had
2 higher flows than we had in the 1930s where we had some
3 pretty serious droughts.

4 So if -- I can't speak to a long-term
5 change in the flow regime here, but I can certainly
6 speak that -- that other scientists that study this
7 tell us that flows change over time based on our
8 hydrologic cycles and atmospheric conditions.

9 MR. MANWARING: Okay. I don't have any other
10 questions. Thank you.

11 THE HEARING OFFICER: Okay.

12
13 EXAMINATION

14 BY THE HEARING OFFICER:

15 Q. I'm going to jump in and ask kind of a
16 question along the lines of what Mr. Manwaring was
17 asking.

18 And I want you to set aside junior water
19 rights. I want you to set aside the issues of this
20 case. We do have a number of streams within the state
21 that you -- like you mentioned, that move, that move
22 over time, change.

23 If you were dealing with a client -- and
24 I'm sure you have -- who has a point of diversion that
25 is downstream of a confluence of two creeks and

1 there's, you know, a thunderstorm event, a high-flow
2 event and all of a sudden the tributary stream gets
3 bumped out and comes in downstream of their ditch
4 heading --

5 A. Yes.

6 Q. -- what options does that client have to
7 remedy the situation?

8 A. The client might have two options. One
9 might be to alter the stream upstream of their point of
10 diversion to try to get water back to their point of
11 diversion.

12 The other option could be to go to a lower
13 point of -- a lower point below that confluence and
14 change their point of diversion. They might have to do
15 another change to try to get water from that other
16 channel over to their point of diversion. So I could
17 see perhaps three different remedies. But it's -- it's
18 their responsibility to do that.

19 And I think that's what's happened here in
20 this case, and that's why we have the change from just
21 one upper point of diversion to a system where there's
22 two points of diversion, is because there was a need
23 with streams that have changed for them to go put in
24 that lower point of diversion to access their water.

25 Q. To -- if the first option were used and you

1 were -- and the client was to try to reconnect at the
2 old point of confluence, at the old confluence
3 location, that would require, I guess, a stream channel
4 alteration permit possibly?

5 A. Possibly could, yes.

6 Q. Okay. Okay. You don't -- you haven't
7 investigated the stream channels, it sounds like,
8 enough to know whether that would even be a possibility
9 to reconnect the streams at some location upstream on
10 Lee Creek?

11 A. No, I haven't. But we also have the issue
12 that that upper point of diversion in that upper ditch
13 cannot convey the 15 cfs water rights that they have.
14 So even if all the water was available at that upper
15 one, because those ditch systems have changed somewhere
16 between 1970 and '86, I don't think if the water was
17 available at the upper one under the current ditch
18 systems that he has, that he could make use of it.

19 Q. Uh-huh.

20 A. It would require a bit of ditch work to
21 take all the water at one point and then take it down
22 to that lower ditch.

23 THE HEARING OFFICER: Okay. Thank you.

24 We'll continue on -- oh, did you have
25 anything more? I kind of jumped in and piggybacked on

1 some of your questions, Mr. Manwaring.

2 MR. MANWARING: I quit.

3 THE HEARING OFFICER: Okay. Moving along,
4 Ms. Foster, do you have any?

5 MS. FOSTER: I don't have anything. Thank you.

6 THE HEARING OFFICER: Mr. Johnson, any
7 questions?

8 Okay. We'll come, then, to you,
9 Mr. Harris, if you've got cross-examination questions.

10 MR. HARRIS: I do.

11

12 CROSS-EXAMINATION

13 BY MR. HARRIS:

14 Q. Scott, you had testified before that -- you
15 have testified as an expert witness in other water
16 right matters?

17 A. Yes, I have.

18 Q. Have you represented both applicants and
19 protestants?

20 A. Yes, I have.

21 Q. And you testified that you are familiar
22 with the standards under Idaho Code 42-222; correct?

23 A. Yes.

24 Q. And that would include injury to other
25 water rights?

1 A. Correct.

2 Q. What issues do you review for in your
3 injury analyses? What do you look for to determine if
4 there's injury to other water rights?

5 A. I look to see -- that could be broad. That
6 explanation could go on for a while. But simply it
7 could be put I look to see if the change proposed by
8 the transfer will cause an impact to other water rights
9 that could injure them.

10 Q. Right. So there's kind of a base
11 expectation, and then you evaluate how the change would
12 change those expectations; is that fair?

13 A. Yes.

14 Q. Okay. And would administrative access to a
15 watershed or a source of water that wasn't there
16 previous, could that be a form of injury.

17 A. Yes.

18 Q. Okay. I want to just kind of walk through
19 your report. I -- in order, just because I have -- I
20 just have several questions. So we'll start on page 1.

21 There's a statement under section 1.2 that
22 says, "The point of diversion was inadvertently
23 admitted from water right claims."

24 Do you see that statement?

25 A. Yes, I do.

1 Q. Was that what the McConnells told you, or
2 was that your own independent conclusion?

3 A. I think that it goes to both. I think I
4 first heard that from McConnells, and I think I would
5 agree with the same thing, because it certainly appears
6 to me that that lower ditch and the lower point of
7 diversion was apparent on the imagery used for the
8 Snake River Basin Adjudication, and it should have been
9 claimed.

10 Q. Okay. But you agree that that lower point
11 of diversion was not on any of the prior decrees, the
12 Lemhi decrees or even the original decree back in 1911;
13 correct?

14 A. And the Snake River Basin Adjudication.

15 Q. Right.

16 A. The lower diversion was never decreed, that
17 I can tell.

18 Q. Okay. Let's go to section 3 of your
19 report. It's on page 7. Well, I'll actually start
20 with this question.

21 Do you know how USGS maps are created?

22 A. My understanding is that USGS maps are
23 created using aerial imagery with on the ground
24 investigation. There might be other information that
25 goes into it too. But it does often say on a USGS map

1 that it's based on aerial photography from a certain
2 date.

3 Now, how that was done historically back in
4 the 1880s, I doubt that they were using aerial imagery
5 at that time. I'm really not sure. So a lot of it was
6 probably done from hand-drawn survey. So I believe
7 that the USGS uses a variety of methods to prepare
8 their maps, but aerial imagery being one.

9 Q. Correct. And I think right on your map
10 right there it says that it was initially developed
11 from an aerial image; right?

12 A. Correct.

13 Q. You did say there's some ground-truthing.
14 I don't see any indication on there that there is
15 ground-truthing.

16 But where does your understanding come from
17 that there is some ground-truthing on what's depicted
18 on the USGS map?

19 A. I think this goes back to my history with
20 the earliest mapping that surveyors were doing before,
21 that there are locations on the maps where survey marks
22 are placed where they're actually locating pins --

23 Q. Uh-huh.

24 A. -- or monuments. And so there is
25 ground-truthing going on to locate certain monuments.

1 And those get placed in the map also.

2 Q. And I agree with you, there are some images
3 or there's things you can see in an aerial image that
4 are pretty clear.

5 Are stream channels covered by dense
6 vegetation easy to see from an aerial photo?

7 A. Depends on the aerial photo. Sometimes it
8 can be taken during a time of year where it's fairly
9 easy to see because the leaves are gone and there's not
10 as much vegetative cover. So that's an "it depends"
11 answer.

12 Q. So I'm going to have -- even though James
13 just moved it over, I'm going to have it moved back.

14 THE HEARING OFFICER: That's fine. I thought we
15 were going to look at the notes on the bottom of this
16 map.

17 MR. HARRIS: No, you're fine.

18 THE HEARING OFFICER: That's all right.

19 Q. (BY MR. HARRIS): In this photo, though,
20 during the summertime, is it easy to depict the precise
21 location of the channels that goes through those trees?

22 A. There are places that there are and places
23 that there aren't. So when I've looked at the Google
24 imagery and I've zoomed in on locations, there are
25 places in there where you can clearly see a channel.

1 Q. Uh-huh.

2 A. And it's been pointed out there's these
3 places where it crosses through culverts under this
4 area that looks like a little road there, and there's
5 other places up and down where you can zoom in and you
6 can actually see what appears to be a stream channel.

7 Q. Right.

8 A. But maybe it's where you're getting.

9 Can I exactly pinpoint where a stream
10 channel is going through all of that? It might be
11 difficult. It looks like there's one that's coming
12 through here, and it looks like there's another one
13 coming through here, and it looks like there's another
14 one that's coming through here.

15 Q. Yeah. In your experience with some of the
16 USGS maps, have you ever come across an error in the
17 USGS maps?

18 A. I can't think of one specifically. But I
19 won't argue that they are never in error.

20 MR. BROMLEY: That's a nice fish, Rob.

21 MR. HARRIS: Sorry. I always do that.

22 MR. BROMLEY: Every time I see it.

23 MR. HARRIS: I know. I really need to change
24 that.

25 MS. YENTER: You're just boasting.

1 MR. BROMLEY: He's showing off.

2 MS. YENTER: Yeah.

3 Q. (BY MR. HARRIS): Are you aware of --
4 there's actually a couple websites where individuals
5 are able to report changes or discrepancies on USGS
6 maps to the U.S. Geological Survey?

7 A. No, I wasn't. That's good to know. Thank
8 you.

9 Q. Okay. And this -- the Department of Water
10 Resources even talks about this dataset where they --
11 they're actively updating [unintelligible] --

12 A. This, I have seen, yes.

13 Q. Okay. So you are aware of this?

14 A. Yeah.

15 Q. So you would agree maps aren't always
16 perfect?

17 A. Correct.

18 Q. Okay. And even though the USGS map showed
19 the confluence of Stroud Creek coming in above both
20 diversion points, you don't have any aerial photos or
21 other independent verification of that, other than the
22 USGS maps, the Lemhi adjudication maps we've talked
23 about; correct?

24 A. And that 1954 engineer's map.

25 Q. And the '54. And did you happen to see the

1 legend, on the legend, that that map was prepared from
2 an aerial photo as well?

3 A. I believe so, yes.

4 Q. Okay. So most of them are taken from
5 aerial photos. I'm going to -- and just to confirm --

6 Well, let me -- sorry, James, I'm going to
7 have you move the USGS map.

8 THE HEARING OFFICER: No. That's good.

9 Q. (BY MR. HARRIS): Can you give me the
10 approximate quarter-quarter location for where that map
11 shows the confluence of Stroud Creek and Lee Creek?

12 A. That would be in section 30. It would be
13 in the southeast of the northeast.

14 Q. Okay. I'm not going to have James move --
15 I keep having him move, but -- so --

16 MR. BROMLEY: Rob, would it help if he just puts
17 a mark on that map? It doesn't bother me at all.

18 MR. HARRIS: It's totally up to you, if you
19 want.

20 MR. BROMLEY: Yeah. Scott, why don't you put a
21 mark. I --

22 Sorry, Rob, to jump in.

23 THE WITNESS: Yeah. Sure.

24 MR. BROMLEY: Why don't you throw a mark in.

25 THE WITNESS: Make sure my old eyes are put

1 together right. So I am going to circle that right
2 there. So there's a big mark.

3 Q. (BY MR. HARRIS): Okay. So southeast of
4 the northeast. Now, up on my GIS map I've got the
5 southeast of the northeast up on there. And looking at
6 that -- and I can zoom in -- it appears that we've got
7 a channel here.

8 Did you go visit this quarter-quarter in
9 any of your field visits?

10 A. No, I don't believe so, because I -- I
11 think that the -- the furthest up that I went on the
12 system was at McConnells' upper point of diversion,
13 maybe slightly above there, but not much.

14 Q. And this is where I maybe misunderstood
15 your testimony, so I apologize if I'm rehashing old
16 ground. You said you saw two channels at the upper
17 diversion point.

18 Were those -- was one of those channels Lee
19 Creek and the other Stroud Creek, or are you saying
20 there were two channels of Stroud Creek?

21 A. I'm saying there are two channels of Lee
22 Creek.

23 Q. That are split?

24 A. Yes.

25 Q. So you're saying that the channel that was

1 50-foot distant is another Lee Creek channel?

2 A. Correct.

3 Q. Based on what?

4 A. Based on this mapping and all the rest of
5 it that shows that that confluence is in this area.
6 And yes, there is another system that's coming in here.
7 But I'd maintain if you went back historically, that
8 Stroud Creek is tributary in this area, that this flow
9 here has artificially been constructed by manipulating
10 this stream over to the east.

11 Q. Okay. But that's -- that's based on what
12 evidence? Just your looking through the maps?

13 A. Looking through the -- looking through the
14 engineer's map and looking through series of aerial
15 imagery.

16 Q. Okay. Are you saying today, then, that --
17 because I think -- I think what we're all dancing
18 around is this is where the Stroud Creek water is
19 coming from.

20 Are you saying that's not the Stroud Creek
21 channel or that's a Lee Creek channel?

22 A. What I'm saying is that's where some of the
23 water comes down through now. We do know that there's
24 been -- from what I understand, through listening to
25 what watermaster said and otherwise, a lot of

1 manipulation with the Stroud Creek channel through the
2 Whittaker place of use. It's not clearly defined as it
3 used to be. There was at one point where there clearly
4 was probably a channel going through there. But it's
5 not clearly defined now.

6 And so my contention is that if we looked
7 historically before the channel was manipulated through
8 the property that it would come in in this location,
9 but that the water has been pushed off to the east, and
10 now that water tends to flow down much more in this
11 channel. And that can come, I think, because Bryce
12 said he saw water at this location but not this
13 location and in this location.

14 Q. Yeah, that's not what he said, but we'll
15 have him clarify that.

16 A. Okay. Thank you.

17 Q. But that channel, that southeast northeast,
18 that's BLM property.

19 So are you saying that there has been
20 manipulation of the channel on that property?

21 A. No.

22 Q. Okay. Then I misunderstood you.

23 A. Not that I know of.

24 Q. Not that you know of?

25 A. Yes.

1 Q. So if a stream channel just naturally
2 move -- and you agree that they do that?

3 A. I think naturally and unnaturally move.

4 Q. Yep. Where would you say the natural
5 channel of Stroud Creek is today?

6 A. I would say that it's nearly impossible, if
7 not impossible, to tell because of the manipulations
8 that have happened with the natural channel through the
9 Whittaker property. I can't tell you where it is.

10 Q. You were not asked to do that in your
11 evaluation?

12 A. No.

13 Q. Okay. So you're not testifying today about
14 where you think the confluence is? Mr. McConnell
15 testified it came in below his upper diversion point,
16 and you're not here disputing that?

17 A. I won't dispute that there was another
18 channel that was west of the upper point of diversion
19 that joined another one downstream. No disagreement
20 there at all.

21 Q. Yeah. When you say "channel," channel of
22 Lee Creek or Stroud Creek? Don't know?

23 A. I'm saying that the confluence before
24 manipulations would have been upstream. So I would
25 still call that Lee Creek. Because it had been pushed

1 off to the side doesn't mean that it's Stroud Creek
2 pushed off down there.

3 Q. When you say it's still Lee Creek, you
4 would agree with me, the USGS map calls it Lee Creek
5 all the way up? It doesn't call it Right or Left Fork?

6 A. That's correct.

7 Q. Okay. So there's just one Lee Creek, based
8 on that map?

9 A. Yes.

10 Q. Okay. Setting aside this issue, because I
11 think I understand your legal position, but assuming
12 there was no dispute over where either the historic
13 confluence of a creek came in or the current one is, is
14 moving a diversion below that confluence to gain
15 administrative access, in your opinion, would that
16 cause injury to other water rights?

17 A. Potentially so, yes.

18 Q. Okay. How so?

19 A. If you're gaining a new stream that you did
20 not have access to previously. But I believe that
21 these water rights had access to that stream
22 historically when they were developed.

23 Q. [Unintelligible.]

24 A. And whether naturally or unnaturally, that
25 moved downstream that confluence, they have moved their

1 point of diversion to capture it.

2 Q. Right. And I'm saying assuming there's no
3 dispute. I understand your position in this matter.

4 But again, no dispute over the confluence,
5 you would say that would be grounds for an injury
6 determination?

7 A. If it was water that was not available to
8 the water rights before, potentially so, because they
9 would be able to call on water rights that they had not
10 historically been able to call.

11 Q. Thank you.

12 On page 13 of your report -- actually, let
13 me ask you this question.

14 In all of your experience with the
15 Department, have you ever been a watermaster?

16 A. No.

17 Q. Okay. But you would say you're an expert
18 on water right interpretation and --

19 A. Yes. And part of my job while at Water
20 Resources was advising watermasters on water
21 distribution --

22 Q. Okay.

23 A. -- and working with them in the field,
24 providing instructions to them.

25 Q. So if this transfer was approved without

1 any subordination condition and Mr. McConnell called
2 for water out of Stroud Creek, do you believe he would
3 have the ability to do that?

4 A. I think Mr. -- do what?

5 Q. Well, right now if this transfer were
6 approved and his senior right is now downstream of the
7 confluence of Stroud Creek, do you think
8 administratively he would be entitled to call for water
9 out of Stroud Creek?

10 A. I think Mr. McConnell's points of
11 diversion, as historically developed, were always
12 downstream of Stroud Creek. And then the lower one was
13 put in, because the streams had moved around. So I
14 think he's always been able to call on Stroud Creek. I
15 don't see that there's a difference in the sources of
16 water that's available.

17 Q. So --

18 A. And I think that's also -- go ahead.

19 Q. No, no. I interrupted you. Go ahead.

20 A. I think that the -- the water rights that
21 are 1883 --

22 Q. Uh-huh.

23 A. -- that are downstream, very -- they very
24 much imply that, because we have -- McConnell having
25 three water rights that are 1883 downstream, and we

1 have the other ones upstream that are 1883. And these
2 upstream ones say we're special. You don't have to
3 send us downstream to deliver water.

4 And I think that's implicit, because
5 there's no other reason that language would have been
6 put on those rights if it wasn't for 1883 water rights
7 that were developed downstream that could have called
8 on that or been shared equally amongst them.

9 Q. Well, when you -- I'm not sure I track what
10 you're saying.

11 When you say something "implicit," what do
12 you mean?

13 A. We have the two water rights upstream --
14 369 and 370. I forget get their numbers.

15 Q. Uh-huh.

16 A. But they have the pro rata language in the
17 conditions that say between the other 1883 water rights
18 you can't call on us.

19 Q. Uh-huh.

20 A. We're uncuttable. But between ourselves,
21 we got to be prorated.

22 Now, why would that language be applied to
23 those water rights if there weren't but for other 1883
24 water rights somewhere else in the system downstream.

25 Q. Wasn't that -- wasn't that in the original

1 1911 decree, that language?

2 A. It probably was.

3 Q. Right.

4 A. And that's why I say that's very clear
5 going back historically. That language wouldn't have
6 been placed on those water rights if it wasn't for
7 downstream 1883 that could call on them.

8 Q. Okay. Referring to page 13, you say at the
9 bottom there under 4.1, "The lower portion of Stroud
10 Creek may locally be referred to as the Left Fork of
11 Lee Creek."

12 When you say "the lower portion," I'm not
13 sure I understand what you're saying there.

14 A. Yeah. Maybe I should just say Stroud Creek
15 altogether.

16 Q. Okay.

17 A. I think there's been a local call of Stroud
18 Creek, perhaps to the Left Fork. I'm not sure if that
19 goes to Everson Creek also.

20 Q. In -- on page 15 -- well, actually, I'll
21 hold that.

22 Let's go to page 18, the very, very top
23 sentence.

24 MR. BROMLEY: Rob, did you say "18"?

25 MR. HARRIS: Correct. Yeah.

1 MR. BROMLEY: Thanks.

2 Q. (BY MR. HARRIS): You say, "Because the
3 McConnell points of diversion are downstream."

4 Are you saying downstream of the confluence
5 as shown on the maps or on the [unintelligible] --

6 A. Let me read the paragraph before that, so I
7 can put it into context, please.

8 Q. It's just that first sentence.

9 A. Yeah. Correct. Except for perhaps the
10 Johnson water right, there's no what we call
11 leapfrogging of points of diversion. McConnell points
12 of diversion historically have been, and in the future
13 will be, downstream of all of the protestants, except
14 for potentially that one Johnson point of diversion.

15 Q. But if McConnell were to call for water out
16 of Stroud Creek right now, could he physically get it
17 to his upper diversion point?

18 A. Under the flow regime --

19 Q. Okay.

20 A. -- and conditions that I saw when I was
21 there, I don't think so, but I'm not positive, because
22 I don't know that those are separate channels all the
23 way up to there. We can make an assumption they are,
24 but I don't know of anybody that's walked those
25 channels down.

1 Q. I'm going to have you look at your
2 Exhibit 4. Sorry, not your Exhibit 4, but Exhibit 4 in
3 the binder. These are the letters, 4 and 5, the
4 letters between the watermaster --

5 A. Okay.

6 Q. -- and Mr. McConnell -- Mr. and
7 Ms. McConnell and Mr. Udy.

8 Are you familiar with those letters?

9 A. I am.

10 Q. Have -- how many conversations have you had
11 with Ms. Yenter prior to this hearing?

12 A. Two.

13 Q. Okay. When were those?

14 A. I don't recall the exact dates. But one
15 was, I think, a couple of weeks ago within the last
16 couple of weeks. And the other one was maybe two
17 months ago.

18 Q. Okay.

19 A. Month and a half.

20 Q. On Exhibit 6 -- I'm sorry, Exhibit 5, at
21 the bottom of that page there were instructions given
22 to the watermaster to take certain measurements.

23 Are you familiar with that -- that part of
24 the letter?

25 A. Yes, I am.

1 Q. Did -- did you discuss any of those
2 measurements with Ms. Yenter?

3 A. I remember them being briefly discussed. I
4 don't remember a conclusion, whether --

5 Q. Okay.

6 A. -- whether there was -- what the results of
7 the measurements were.

8 Q. Okay. And that's really what I was going
9 to ask, is did you discuss any conclusion reached on
10 that? I think your testimony is no?

11 A. I'm going to say no. And if we did, I
12 don't recall it.

13 Q. Okay. Do you understand why she would have
14 asked the watermaster to do this?

15 A. Yes.

16 Q. Why do you think?

17 A. That if the diversions in Stroud Creek,
18 ones in particular -- no, excuse me, that spring
19 diversion 74-157, whether that water would flow
20 downstream and become available to McConnells' points
21 of diversion. And I'd have to look at this again to
22 see if it was just one of them or both of them.

23 Q. Okay. And if those measurements were that
24 it didn't show any water yielding to the upper
25 diversion point, that would indicate that Stroud Creek

1 is joining below the upper diversion?

2 A. Or that that water wasn't making it down
3 there in the first place. So it could be that that
4 diversion was curtailed at that location.

5 Q. Uh-huh.

6 A. But it still might not have flown
7 downstream to that point at all.

8 Q. Right.

9 A. So I can't necessarily say to the upper
10 one, to the lower one, or to anywhere down there.

11 Q. But at least curtailing 74-157 out of west
12 springs didn't yield any water to the upper diversion
13 point?

14 A. I don't know that, because I'm not sure I
15 see the conclusions.

16 Q. You're right. I didn't ask that very well.
17 That's okay. You're right.

18 That's all the questions I have.

19 THE HEARING OFFICER: Okay. Mr. Bromley, do you
20 want to take a break and then come back with any -- any
21 redirect, or are you --

22 MR. BROMLEY: Sure. Yeah. Let's do that.
23 Yeah.

24 THE HEARING OFFICER: Let's take a five-minute
25 break. We've been at it for a while.

1 MR. BROMLEY: I could use the bathroom.

2 MS. YENTER: Do you want me to stop it?

3 THE HEARING OFFICER: That's all right. Go
4 ahead.

5 (Recess.)

6 THE HEARING OFFICER: Okay. We're back on the
7 record.

8 Mr. Bromley, did you have any follow-up
9 questions for Mr. King?

10 MR. BROMLEY: I do. Not -- not very many. Just
11 a couple.

12

13 REDIRECT EXAMINATION

14 BY MR. BROMLEY:

15 Q. Okay. Scott, what pieces of evidence did
16 you look at to form your knowledge of where the
17 confluence is located?

18 A. We've discussed these -- the most recent,
19 being this USGS quadrangle, there was the 1986 imagery
20 used for the Lemhi adjudication. There was the 1970
21 map that was drawn -- excuse me, '86 map used for the
22 SRBA adjudication. The 1970 map used for the Lemhi
23 adjudication. And then there's the 1954 map that
24 was -- we call the engineer's map from '54.

25 Q. Okay. And that -- that '54 map, I think

1 coincidentally, might actually be Exhibit 154, if you
2 look in the Whittaker book.

3 Is that right?

4 THE HEARING OFFICER: It is.

5 MR. BROMLEY: Yeah. Rob. I don't know if you
6 coincidentally did that or not, but your 1954
7 engineer's map is Exhibit 154.

8 UNIDENTIFIED SPEAKER: Well done.

9 MR. BROMLEY: It's kind of fun.

10 MR. HARRIS: I'm going to say I did that on
11 purpose, but --

12 MR. BROMLEY: It doesn't surprise me in the
13 least.

14 THE HEARING OFFICER: It is.

15 Q. (BY MR. BROMLEY): Okay. So with the
16 documented evidence that you've just summarized again
17 in those three maps, and then I think, Scott, you --
18 you drew on the big Exhibit 24 where you -- where the
19 confluence, as you understand it to be, is located.

20 Is that what you drew? I'm far back here
21 and I can't --

22 A. Yeah, that's a long ways away, isn't it?

23 Q. Yeah.

24 A. And kind of pointing with big sweeps. We
25 have -- we have Porcupine Creek coming here. We

1 have -- I'll get in front of the Hearing Officer, too,
2 to make this fair.

3 I was talking about the systems over here.
4 We have Porcupine Creek coming in. We have Lee Creek,
5 sometimes called the Right Fork, somewhere up there
6 coming together. We have Stroud Creek and Everson
7 Creek coming together.

8 And between this Stroud Creek and the Lee
9 Creek, they come together and join where I've made a
10 circle. It's about, oh, three-eighths of an inch in
11 diameter. And this is in the southwest corner of the
12 south southwest corner -- quarter of the southeast
13 quarter of the northeast quarter of section 30.

14 Q. Could you just put your initials on that
15 circle, Scott, so we know that that's what you drew.

16 Is there anything -- so you've -- you've
17 been out there. Is there anything physical on the
18 ground in that location that helps you understand where
19 this is on planet earth?

20 A. Well, I have not been to that location.
21 I've been downstream at the McConnells' points. But in
22 looking at the imagery and things there, there's
23 these -- this road, which I've not been on, but I
24 understand that there's some culverts, this road right
25 here, trail, and some culvert pipes that are close to

1 that location.

2 Q. And that's upstream, is that correct,
3 [unintelligible]?

4 A. Yes. In looking at this and looking at the
5 rest of it, I would call the location of the confluence
6 of those systems right here.

7 Q. Okay. And that's upstream of the points of
8 diversion?

9 A. Yes.

10 Q. The point of diversion that's on the
11 McConnell right and the point of diversion that we are
12 talking about in the transfer at the [unintelligible]?

13 A. Well up -- well upstream of those.

14 Q. Okay. By "well upstream," meaning by how
15 far?

16 A. What's our scale here? That's almost
17 500 feet -- or about 500 feet. So there's 500 feet, a
18 thousand feet, 1,500 feet. Somewhere between
19 1,500 feet and 2,000 feet.

20 Q. Okay. So quarter to -- quarter to half a
21 mile, somewhere less than half a mile?

22 A. Yeah.

23 Q. I grew up in Colorado, so 5,280 feet is a
24 very near and dear number to my heart. Mile High City.
25 Love of Denver Broncos.

1 Okay. The other question that I want to
2 ask, Scott, is just to follow up again on we had talked
3 about the presence of this pro rata language on 74-369
4 and 74-370.

5 A. Correct.

6 Q. And you had been asked some questions by
7 Mr. Harris about your prior testimony, and then you had
8 mentioned again the pro rata language.

9 Why again is that significant to you that
10 the upstream Left Fork of Lee Creek rights are
11 administered together with the downstream Lee Creek
12 proper McConnell rights?

13 A. So the McConnell has three 1883 water
14 rights. They're very far downstream -- four?

15 UNIDENTIFIED SPEAKER: I think --

16 THE WITNESS: Three or four.

17 UNIDENTIFIED SPEAKER: Yeah.

18 THE WITNESS: Sorry. You shouldn't have done
19 that, and I shouldn't be watching.

20 Needless to say, there are several 1883
21 water rights that McConnell owns that are downstream
22 that do not include any language about the pro rata
23 distribution of those water rights. Same exact
24 priority date.

25 And then we have these two water rights far

1 upstream that are a bit smaller, and they include this
2 pro rata language. So I look at this and say the
3 decree at that time and the judge that's putting that
4 decree together says we have several 1883 water rights
5 on this system. We have a couple of smaller ones
6 upstream and some bigger ones downstream.

7 And what makes the most sense, for some
8 reason or the other, is these 1883 water rights get
9 administered amongst themselves and can't be called
10 downstream to distribute to deliver water to the other
11 1883 water rights.

12 Is it because there would have been a
13 futile call? Too much losses? Were there some other
14 reasons that that decision-maker decided that those
15 ones were special? I don't know. But the language is
16 there. It was there certainly from the earlier decree
17 and got carried forward.

18 So it clearly says between these there's no
19 other 1883 water rights along there. There's a bunch
20 of junior priority ones, but nothing else until you get
21 to McConnells' place.

22 So to me that's obvious that there was a
23 realization that those water rights could have been
24 called on by the other 1883 water rights if it wasn't
25 for that language.

1 Q. (BY MR. BROMLEY): And so if the -- because
2 we -- presently there's a point of diversion on the
3 McConnell rights.

4 If the confluence truly were coming in down
5 below that point of diversion that is on the water
6 rights, what would the purpose of the language be?

7 A. I don't see any purpose for that language.
8 Because if that diversion point were upstream of that
9 confluence, those other water rights could never call
10 on the upstream ones to be delivered.

11 And as far as I can tell, between 1970 and
12 '86, in '70 the water -- the point of diversion was
13 even further upstream. So if that confluence goes
14 downstream, it was even a further upstream point of
15 diversion, which is contrary to that language there in
16 a combined administration of those water rights, and
17 the importance of these ones not being delivered to the
18 downstream ones.

19 Q. So in your experience, Scott, the
20 conditions that are put on the water rights are
21 intended to be administered?

22 A. Yes.

23 Q. And if the confluence was somewhere else,
24 if the confluence was coming in below that upper point
25 of diversion that is on the face of the rights, it

1 would be meaningless language?

2 A. Those water rights would have been
3 administered pro rata anyway. Yes, it would be a
4 meaningless condition.

5 MR. BROMLEY: Okay. I have nothing further.

6 THE HEARING OFFICER: Okay. Coming around.
7 Mr. Manwaring, anything more?

8 MR. MANWARING: Yes.

9 THE HEARING OFFICER: Go ahead.

10

11 RE CROSS-EXAMINATION

12 BY MR. MANWARING:

13 Q. If you'll -- on that point, if you'll look
14 at your Exhibit 1. We're in Rosalie Ericsson's water
15 right.

16 A. Which page, please?

17 Q. Well, it doesn't have a page number. But
18 it's in the actual water right section. There's an
19 Appendix --

20 A. Oh, one of the appendices. Okay.

21 Q. -- C. I'm looking at Water Right
22 No. 74-370.

23 A. Yeah, just a second. I got to get to
24 Appendix C. Oh, there's 74-370.

25 THE HEARING OFFICER: Uh-huh.

1 THE WITNESS: Rosalie Ericsson, yes.

2 Q. (BY MR. MANWARING): And the language
3 you're talking about is on that next page, page 2 of 3.
4 Under paragraph 1 it says -- I'm going to read this. I
5 want to make sure I read it correctly, if you'll follow
6 along.

7 A. Yes.

8 Q. "When the flow of water in Lee Creek is
9 insufficient to supply all water rights under the
10 5/12/1883 date of priority, Right 74-369 and Right
11 74-370 shall not be prorated with any rights on Lee
12 Creek with that priority date."

13 Did I read that correctly so far?

14 A. Yes.

15 Q. And what are we talking about with Water
16 Rights 369 and 370? Whose are those?

17 A. Rosalie Ericsson, and I believe Whittaker
18 owns the other one.

19 Q. Okay. So we're talking about the same
20 people? We're talking about those two people, that's
21 all we're talking about?

22 A. Correct.

23 Q. Okay. Then it goes on to say, "When the
24 flow in the Left Fork of Lee Creek falls below amounts
25 decreed in Rights 369 and 370, the two rights shall be

1 prorated, according to the respective amounts of water
2 decreed."

3 Did I read that correctly?

4 A. Yes.

5 Q. And so that language isn't talking about
6 McConnells' water right, is it?

7 A. Which language?

8 Q. No. 1. It's not referring to that? What I
9 just read to you isn't referring to McConnells' water
10 right?

11 A. Yeah, I believe it is.

12 Q. You're basing that on why else would they
13 put it in there? Let me just ask you.

14 Does that water right show up on there?

15 A. No. But --

16 Q. Okay.

17 A. -- the source is Left Fork Lee Creek,
18 tributary to Lee Creek. And so that condition is
19 specifically saying the water in Lee Creek is
20 insufficient to satisfy the McConnell water rights, the
21 other 1883 water rights under the 5 dash 12 dash 1883
22 water rights, then these should not be prorated with
23 the rights on Lee Creek.

24 Q. Okay. Whose water right is 74-369?

25 A. That's Whittaker.

1 Q. And whose water right is 74-370?

2 A. Rosalie Ericsson.

3 Q. Okay. It says there when it's
4 insufficient -- when the water flow is insufficient on
5 Lee Creek to supply all water rights under the 1883
6 date of priority, those two water rights, Ericsson and
7 Whittakers' will not be prorated with any rights on Lee
8 Creek with that priority date; right?

9 A. Correct.

10 Q. Okay. But there isn't an actual reference
11 to the water right number of McConnells' on there, it's
12 just talking about Lee Creek with a priority date?

13 A. Correct.

14 Q. Okay. And then in the second part of that,
15 it's just talking about water flows in the Left Fork of
16 Lee Creek; correct?

17 A. Yes.

18 Q. And from what we can gather, Left Fork may
19 have been Stroud, may have been Everson, may have been
20 both?

21 A. I'm not sure, yes. Maybe Everson, but
22 certainly there's a common local name of Left Fork and
23 Stroud Creek on the same system.

24 Q. Okay. At least -- at least Stroud Creek?
25 Not necessarily Everson, but at least Stroud?

1 A. Yes.

2 Q. And again, it's talking about the Ericsson
3 and the Whittaker right having this prorating going
4 on --

5 A. Uh-huh.

6 Q. -- is that correct?

7 A. Yes.

8 Q. But again, there's no reference to a
9 specific water right?

10 A. And that doesn't -- that does not surprise
11 me.

12 Q. Okay. I understand it may not surprise
13 you.

14 But there's no reference to one?

15 A. Not -- not a reference to it. But it
16 certainly is acknowledging that there are other water
17 rights with an 1883 priority date.

18 Q. On --

19 A. The only others are this 369 and 370. So
20 clearly in this decree there was an acknowledgment that
21 there were other 1883 water rights.

22 Q. On Lee Creek?

23 A. Yes.

24 Q. But not Left Fork?

25 A. Correct.

1 MR. MANWARING: Okay. I don't have anything
2 further.

3 THE HEARING OFFICER: Okay. Mr. Johnson, I
4 jumped over you.

5 Any?

6 MR. JOHNSON: I'm good.

7 THE HEARING OFFICER: Ms. Foster?

8 MS. FOSTER: I'm good.

9 THE HEARING OFFICER: Okay. Mr. Harris,
10 anything more?

11 MR. HARRIS: Just one clarification.

12

13 RECROSS-EXAMINATION

14 BY MR. HARRIS:

15 Q. I believe Mr. Bromley said what evidence
16 did you look for -- look at for where the confluence is
17 located.

18 And you said the 1986 imagery for the Lemhi
19 adjudication?

20 A. Yes. And I meant 1986 for the SRBA
21 adjudication. I did say Lemhi at first and then
22 corrected myself.

23 Q. But I don't see that image of the BLM
24 property in this report.

25 Are you saying you looked at the image to

1 determine where the confluence was, or were you doing
2 that to look at the points of diversion, McConnells'
3 points of diversion?

4 A. Yeah, you're correct that Figure 7 shows
5 the 1986, does not show the location of that
6 confluence. But that was one that I was also looking
7 at to see if it appeared consistent with the others.
8 But I don't have that in a figure here.

9 MR. HARRIS: Okay. No further questions.

10 THE HEARING OFFICER: Okay. Thank you,
11 Mr. King.

12 Mr. Bromley, you had mentioned that you
13 wanted to call one more witness. You can go ahead.

14 MR. BROMLEY: Yes. We'd call Cindy Yenter.

15 THE HEARING OFFICER: I think this can all just
16 run.

17 MS. YENTER: Let me just get my -- get us logged
18 in.

19 THE HEARING OFFICER: Okay.

20

21 CINDY YENTER,
22 having been called as a witness by the Applicants, was
23 duly sworn and testified as follows:

24

25 THE HEARING OFFICER: Ms. Yenter, will you

1 affirm that the testimony you're about to give is the
2 truth, the whole truth, and nothing but the truth?

3 THE WITNESS: I do.

4 THE HEARING OFFICER: Okay. Go ahead.

5 MR. BROMLEY: Thank you.

6

7 DIRECT EXAMINATION

8 BY MR. BROMLEY:

9 Q. Cindy, would you please state and spell
10 your name for the record.

11 A. Cindy Yenter, C-i-n-d-y, Y-e-n-t-e-r.

12 Q. And, Cindy, since I've known you for kind
13 of a long time, I'm just going to continue to call you
14 "Cindy," if that's okay.

15 A. That would be dandy.

16 Q. Thanks.

17 Who are you employed by?

18 A. I'm employed by the Idaho Department of
19 Water Resources.

20 Q. And what is your current position?

21 A. Classified as an Analyst 4. I staff and
22 manage the Salmon field office, and I'm also
23 watermaster for Water District 170.

24 Q. Have you been a watermaster before prior to
25 being watermaster for 170?

1 A. I have. Off and on since the start of my
2 career, but pretty much full time since 2003 when I was
3 appointed watermaster of Water District 130 in the
4 Eastern Snake Plain.

5 Q. Okay. How long have you been the
6 watermaster for 170?

7 A. I was appointed in 2015.

8 Q. And being the watermaster for 170, do
9 you -- do you have super- -- would it be right to say
10 you have supervisory -- you have a supervisory role
11 over some of the other districts? Or quite how does
12 that work? Because we've talked about Water District
13 74Z, and then you've discussed being watermaster for
14 170. And --

15 A. Right.

16 Q. -- I'm just kind of curious how that works.

17 A. Water District 170 was established as an
18 oversight district. And within the oversight -- and
19 the oversight district is meant -- is intended to
20 eventually encompass all of the Upper Salmon basins,
21 from Galena Summit all the way down to the Middle Fork.
22 We, as you know, are not quite finished with that
23 expansion, but we have included the Lemhi Basin in
24 Water District 170.

25 And so all of the existing water districts

1 in the Lemhi Basin, including Water District 74D, were
2 put into Water District 170 as subdistricts. And so
3 each subdistrict continues to operate autonomously.
4 They elect their own watermasters. They adopt their
5 own budgets.

6 But then yeah, I kind of take on a
7 supervisory role for those subdistrict watermasters,
8 and I provide technical support, compliance support,
9 general guidance, and handholding, and -- and anything
10 really that they need to -- to make their job easier
11 and to allow them to just basically go about their
12 daily duties and deliver the water.

13 Q. And --

14 A. So it is supervisor of sorts.

15 Q. Okay. And I think you said 74D.

16 A. Or I meant "Z," if I said "D."

17 Q. That's what I think you meant.

18 A. I meant Z.

19 Q. Yeah, that's what I thought.

20 A. There's like 12 of them.

21 Q. I know. How long have you been the
22 watermaster of Water District 170?

23 A. As I said just a minute ago, I got -- I was
24 appointed in 2015.

25 Q. 2015. Okay. And so then you're familiar

1 with Lee Creek drainage?

2 A. I am.

3 Q. Great. And are you familiar with the water
4 rights, then, that defer from -- I should say within
5 the Lee Creek drainage, which would be Lee Creek
6 proper, Right Fork Lee Creek, Porcupine Creek, Stroud
7 Creek, Everson Creek?

8 A. I am.

9 Q. Okay. So if you could turn to Exhibit 4,
10 Cindy. I'm assuming you're familiar with this letter.
11 You signed it.

12 A. I am.

13 Q. Could you just please describe it.

14 A. This is a letter that I sent to Bruce and
15 Glenda McConnell on August 6th, 2020, after it had come
16 to my attention that they had been using an
17 unauthorized diversion on Lee Creek. And I had asked
18 them to please make arrangements to close that
19 diversion and cease using it.

20 Q. Okay. Then Exhibit 8, which is this
21 transfer that we've been talking about, are you
22 familiar with this document?

23 A. I'm -- yeah, I'm familiar with it.

24 Q. Okay.

25 A. I have not -- yeah, I've reviewed it. Yes.

1 Q. And so as to the McConnell diversion, is
2 this transfer addressing the concern that you raised in
3 Exhibit 4?

4 A. Yes. The intent of this transfer appears
5 to me to be to add that lower diversion as an
6 authorized point of diversion on the McConnell water
7 rights.

8 Q. Separate question as to whether it's
9 approved or not --

10 A. Exactly.

11 Q. -- but it's at least a paper attempt to
12 correct --

13 A. It's the -- yeah, that's what the intent of
14 the transfer appears to me.

15 Q. Right. Could you turn to Exhibit 10.

16 And what is this document?

17 A. These are my watermaster comments that I
18 made and sent back to the region after -- as -- when
19 this transfer -- it was during the period this transfer
20 was in advertising. And like all watermasters, I got
21 the opportunity to make comments on this proposal.

22 Q. Okay. So let's -- let's talk a little bit
23 about what you wrote, then.

24 What did you write in this first paragraph?

25 A. That was just to say that I -- that I was

1 aware that the second diversion had been in use for
2 some time, and then that that alone did not justify the
3 approval of the transfer, of course, but that everyone
4 in the general area seemed to be aware that that
5 diversion was there, including the watermaster and many
6 of the adjacent water users, although I didn't ask all
7 of them.

8 Q. Okay. And then in this -- this second
9 paragraph, Cindy, I see some reference again to these
10 Water Rights 74-369 and 74-370.

11 How do you understand that those are
12 administered with the McConnell downstream 1883 rights?

13 A. Well, effectively the conditions on 369 and
14 370 causes subordination of McConnells' rights at the
15 time that there's no longer water in the system. And
16 of course, everybody's talking individual drainages. I
17 don't necessarily look at it that way. It's a system.
18 It's the Lee Creek system. I don't care what you call
19 the creeks.

20 When there's no longer water in the system
21 to fill all the 1883 rights, then I think the net
22 effect of those two -- of that -- of those conditions
23 on 369 and 370 is that the McConnell rights are
24 subordinated, and they no longer get water sent down to
25 them. And the upper -- the upper two 1883 water rights

1 can use that water, and then they will continue to
2 proportionately reduce their use until there is no more
3 water.

4 Q. Do you know where the pro rata language
5 came from?

6 A. No clue.

7 Q. Let me ask you to turn to Exhibit 151.

8 A. 151.

9 Q. That's in the Whittaker --

10 A. This one.

11 Q. -- book.

12 A. Okay.

13 MR. HARRIS: Are you now stipulating to its
14 admission?

15 MR. BROMLEY: I was looking at one of the
16 attachments, Rob.

17 MR. HARRIS: Yeah. I know.

18 MR. BROMLEY: He's already said that it's coming
19 in.

20 Q. I'd like you to look at Exhibit A.

21 A. You may have to help me find it here.

22 Q. You're almost there.

23 A. Is this it?

24 Q. Yeah. What's that document?

25 A. It appears to be a water decree of some

1 sort.

2 Q. Okay. And who are the parties?

3 A. Looks like Reddington [phonetic] are the
4 plaintiffs. And Bohannan [phonetic], Mulky [phonetic],
5 and Schoonover [phonetic] are the defendants.

6 Q. Okay. And it says "Decreed"?

7 A. It does -- it is -- it does say "Decreed,"
8 uh-huh.

9 Q. Does this look familiar to you? Just -- I
10 mean not this particular decree, but I see water right
11 numbers stamped on the decree.

12 A. Yeah, this is a general -- it's a pretty
13 general format for -- for a court -- a court-decreed
14 water case.

15 Q. Okay. And do you know -- so the McConnells
16 have water with 1883, they've got -- let me look at
17 Scott King's table here.

18 A. Yeah.

19 Q. They have 1883 water rights that are
20 74-361.

21 So do you see that in the decree here?

22 A. Yes.

23 Q. Do you see 74-363 in this decree?

24 A. Yes.

25 Q. 365?

1 A. Yes.

2 Q. 367?

3 A. Yes.

4 Q. Okay. And then if you flip to the next
5 page, do you see stamps for 74-369 and 370?

6 A. Right.

7 Q. Okay. And then in paragraph 7, what's
8 written there about prorating?

9 A. Well, part of it is language that's
10 directly reflected in that condition. The rest of it I
11 get a little off in the weeds, because I lose track of
12 who -- you know, who now owns those lands.

13 Q. Sure.

14 A. The Bohannon and Mulky, but -- yeah.
15 The part -- at least part of that is what is currently
16 reflected in the SRBA partial decrees for 369 and 70.

17 Q. So that prorating concept, then, goes
18 back --

19 A. It goes clear back to this.

20 Q. Yeah. And what was the date of this?

21 A. 1911. I can look. No. '12, July 1912.

22 Q. Yeah. So over a century.

23 Okay. Okay. And because, then, that that
24 condition appears on the SRBA rights, are you then able
25 to administer them as the watermaster?

1 A. Yes. And to the best of my knowledge,
2 that -- bear in mind that I don't do day-to-day
3 administration on Lee Creek. There is a local
4 watermaster there. But, you know, I had discussions
5 with that watermaster. And to the best of my
6 knowledge, that condition is administered.

7 Q. Okay. And you can administer conditions
8 that you're aware of that are on the face of the right?

9 A. That are on the face of the right, yes.

10 Q. And if you don't have something that's on a
11 water right, how do you administer it?

12 A. Many times we are -- don't have any
13 authority to administer anything that is not appearing
14 on the right.

15 Q. Yeah. Okay. Cindy, looking back again at
16 Exhibit 10, what did you write in the third paragraph?

17 A. I was writing there about the historic
18 confluence of Stroud Creek and Lee Creek. And this
19 kind of goes back to Mr. King's testimony where all --
20 every map in existence that any -- you know, anybody's
21 ever looked at shows that historic or the drawn -- you
22 know, the drawn point of confluence in a place that
23 might not be accurate in the present day.

24 But I refer to that as the historic
25 diversion. And I believe that that was -- or the

1 historic confluence, I'm sorry. And I believe that it
2 was -- well, I don't even -- I don't even -- I can't
3 even say that. But I -- I refer to that as the
4 historic confluence.

5 And -- and in that paragraph I also
6 acknowledge that there is a channel coming in to Lee
7 Creek further down. I'm not prepared to say I know
8 where that channel is coming from, because I don't. It
9 is just a channel, and it seemed to be carrying most of
10 the water on the day I was out there looking at it.
11 And it was coming in below McConnells' upper diversion.

12 Q. Okay. Then in the final paragraph, Cindy,
13 what do you -- what do you say there?

14 A. Well, ultimately, I mean my recommendation
15 is that I felt that the transfer could be approvable
16 and be administered without injury. Now, I did not
17 suggest conditions. But that was kind of my
18 implication, is that there would probably be some
19 conditions involved in order for the administration to
20 occur without injuries.

21 And I didn't speculate as to what those
22 conditions might be. I left -- I'm leaving that up to
23 the Department. But that with proper conditions and
24 proper controlling works on all the diversions, both
25 McConnell and the upstream diversions, that I felt it

1 would be proper to administer -- I mean I felt it would
2 be possible to administer all the rights in that
3 drainage in that system with that second point of
4 diversion place.

5 Q. Okay. And previously you described this as
6 a system --

7 A. Uh-huh.

8 Q. -- the Lee Creek system. And various
9 people are calling different pieces of it different
10 things.

11 But you see it as a system is what you
12 said?

13 A. It is truly a system. It is -- it is
14 administered together. Under Idaho water law systems
15 are administered together. And even in the Lemhi, Lee
16 Creek and tributaries are in one of these separate --
17 you know, is one of the streams listed in the
18 separately administered list of streams in the Lemhi
19 general provisions.

20 And that doesn't mean that each tributary
21 gets to be administered as a stand-alone tributary. It
22 means that Lee Creek and all of its tributaries are
23 administered as one. So if -- you know, and so barring
24 any special conditions like the ones that appear on 369
25 and 370, every water right in that drainage -- or

1 unless there's some extenuating circumstance like a
2 futile -- a futile delivery call, every single right in
3 that drainage is -- is administered at the same
4 priority at any given time, depending on how much water
5 is there.

6 Q. So the separateness, then, you mentioned
7 the general provision, is to the mainstem of the --

8 A. Is at the mainstem of the Lemhi only.
9 Not -- not to the -- yeah.

10 Q. Okay. Let's look at Exhibit 5.
11 Do you recognize this letter?

12 A. Yes.

13 Q. Okay. And what are you describing in here?
14 There's a piece about the McConnells, and then there's
15 a piece about the 74-157 right.

16 A. Yeah. I'm going to have to remind myself
17 what --

18 Q. Absolutely.

19 A. -- what this says.

20 I was trying to determine futile call. I
21 mean I -- you know, futile call, even though you didn't
22 ask, I'm going to give you the definition. A futile
23 call is when an upstream junior water right is
24 curtailed and there is no resulting increase in
25 beneficial use to the downstream senior.

1 And this can happen because of channel
2 losses and the water just doesn't get there. Or I mean
3 it can happen for a variety of reasons. But usually
4 it's one of those things that happens, or maybe there's
5 been some kind of weird disconnect in the channel. And
6 like I said, I -- I -- we don't know what's happening
7 with that channel right now. We're still doing an
8 investigation, as a matter of fact.

9 But in this case, you know, I wanted to see
10 if -- I wanted to see if -- if resumption of delivery
11 under that spring right, which we currently had
12 curtailed, really gave any usable water back to
13 McConnells. And so I had sent this set of instructions
14 to the watermaster so he could, you know, run through a
15 series of tests, as it were.

16 A futile call is something that -- that
17 unless it's defined -- I mean, you know, unless it's
18 defined specifically in some document, futile call is
19 something that has to be determined every single year,
20 every single place.

21 Q. And so the conditions that are in 74-369
22 and 74-370 Scott King said, you know, could -- may have
23 been akin to a legal determination of futile call
24 written down in this old Reddington decree that we
25 looked at.

1 A. Uh-huh. I'd agree with that.

2 Q. Okay.

3 A. And though -- I mean, you know, and if --
4 those would make water -- you know, those would make
5 our life a lot easier if we had those marching orders.
6 In a lot of cases we do not. And so we have to make
7 these determinations -- we basically have to deal with
8 these things as they come up.

9 And every year is different, because the
10 flow every year is different. The channel may have
11 moved. Different people may be calling for water. So
12 the futile call determination is rarely set in stone.
13 It has to be made every year. But last year we were
14 looking at one.

15 Q. Case-by-case, unless it's --

16 A. Case-by-case, year-by-year --

17 Q. Yeah.

18 A. -- day-by-day.

19 Q. So let's look at Exhibit 14.

20 And that letter that we were just looking
21 at was referencing Water Right 74-157?

22 A. Correct.

23 Q. So what is Exhibit 14?

24 A. It is a proof reports of -- it's a partial
25 decree. It's a proof report of the partial decree

1 issued in 2012 in the Snake River adjudication for
2 Water Right No. 74-157.

3 Q. It's not actually a proof report. It's
4 actually the partial decree itself.

5 A. It's the partial decree.

6 Q. Yeah.

7 A. It's a copy of the partial decree.

8 Q. Yeah. Okay. And the source tributary and
9 priority date for 74-157?

10 A. Source is springs tributary to Lee Creek.
11 Priority date is 4/1/1916.

12 Q. Okay. Nothing on the face of this right
13 that would cause you to administer it any differently
14 than any other water right within the Lee Creek system
15 based on priority, based on source, based on tributary?

16 A. No.

17 Q. Okay. No special conditions?

18 A. No.

19 Q. Let's look at Exhibit 11.

20 Do you recognize what Exhibit 11 is?

21 A. This appears to be a water right proof
22 report or an abstract of -- there it is. Actually, it
23 looks like a page out of either a recommendation book
24 or a -- or a decree book. I don't know, because it's
25 out of context. But it does include a summary report

1 of 74-157.

2 Q. Yeah. And I would just represent to you,
3 Cindy, this -- it comes out of what's called the Green
4 Book.

5 Do you know what the Green Book is?

6 A. I do.

7 Q. Okay. What's the Green Book?

8 A. The Green Book is the printed report of
9 final decrees in the Lemhi Basin adjudication. And I
10 forget the year, but I think it was in the '80s.

11 Q. Okay. And the source and tributary for
12 this right is what?

13 A. Springs tributary to Lee Creek.

14 Q. And I see there's some other springs
15 tributary to Lee Creek on there as well.

16 MR. HARRIS: Could I -- could I get a
17 clarification really quick?

18 MR. BROMLEY: Sure.

19 MR. HARRIS: I've actually seen a Blue Book --

20 THE HEARING OFFICER: Go ahead.

21 MR. HARRIS: -- and a Green Book.

22 MR. BROMLEY: Sure.

23 MR. HARRIS: Do you know which one --

24 MR. BROMLEY: My understanding --

25 MR. HARRIS: And they're a little different.

1 MR. BROMLEY: Sure.

2 MR. HARRIS: So --

3 MR. BROMLEY: My understanding, Rob, is this
4 came out of the Green Book. And if you want me to,
5 Rob, I can just withdraw the whole line of questioning
6 on this particular exhibit. I completely agree with
7 you the cover page of this is not included. I'm just
8 making a representation to Cindy it came from the Green
9 Book. I'm happy to withdraw the questions.

10 MR. HARRIS: No, I'm just -- I'm just wanting to
11 make sure, because there is another Lemhi document
12 where it's the source of springs, but not tributary to
13 Lee Creek.

14 UNIDENTIFIED SPEAKER: Yeah, [unintelligible]
15 e-mail --

16 MR. HARRIS: Yeah.

17 UNIDENTIFIED SPEAKER: -- showing that it's
18 listed as springs.

19 MR. HARRIS: So I don't know which one this one
20 is.

21 MR. BROMLEY: Yeah. So, Rob, let me just --
22 I'll withdraw the questions, then, on Exhibit 11.

23 MR. HARRIS: Okay.

24 THE HEARING OFFICER: Okay.

25 MR. BROMLEY: I don't want to make this

1 confusing.

2 Q. So, Cindy, I'm just going to withdraw the
3 questions about Exhibit 11.

4 So let's just look at Exhibit 12.

5 A. Okay.

6 Q. What's this?

7 A. Some kind of an abstract report showing
8 three different water rights that appear --

9 THE HEARING OFFICER: No.

10 Q. (BY MR. BROMLEY): Let's go on --

11 THE HEARING OFFICER: Exhibit 12.

12 Q. (BY MR. BROMLEY): Exhibit 12.

13 A. Oh, Exhibit 12. I'm sorry.

14 Q. Yeah. Let's go to Exhibit 12.

15 A. Need to have my good listening ears on.

16 Q. No problem.

17 A. All right.

18 Q. What's Exhibit 12?

19 A. Exhibit 12 appears to be a notice of claim
20 to a water right which was filed in the Snake River
21 Basin Adjudication in 1990 by Floyd J. Whittaker
22 representing a claim to Water Right No. 74-157.

23 Q. Okay. And the source tributary and
24 priority are?

25 A. Springs tributary to Lee Creek, priority

1 April 1, 1916.

2 Q. Okay. Turn to page 3. It looks like it
3 was signed -- I don't know whether you recognize the
4 signature or not. I'm not sure that I do either,
5 but...

6 A. It looks like F. James Whittaker.

7 Q. Okay. So then let's look at Exhibit 13.
8 What's this?

9 A. This is a notice of error. Notices of
10 error were sent out -- well, if this is -- based on the
11 date, I would -- of 2004, I would say this is a notice
12 of error. These were sent out after recommendations
13 had been made in the Snake River Basin Adjudication to
14 individual water right owners so that they could review
15 the recommendations that were going to be made by the
16 Department and the Court.

17 Q. And in your experience, you know, what
18 would -- what was the purpose of this notice of error
19 document?

20 A. I didn't work directly in the adjudication.
21 But my understanding was that the notice of error was
22 to give each water right holder the chance to dispute
23 the recommendation that was being made to the Court.

24 Q. Okay. And so then on this form, what are
25 you seeing that was accomplished on the form?

1 A. Mr. Whittaker checked the line that says "I
2 agree with this proposed recommendation and no changes
3 need to be made."

4 Q. Okay. And "Mr. Whittaker" being?

5 A. James Whittaker signed it.

6 Q. Okay. And that then references back to
7 Exhibit 12, which was the -- I'm sorry. That's the --
8 that's the claim.

9 A. Yeah.

10 Q. So then we look at Exhibit 14.
11 And that ultimately is the SRBA decree;
12 correct?

13 A. Yes, that is the partial decree.

14 Q. Okay. So all of this informs you, looking
15 at Exhibit 14, that this 74-157 is a spring right
16 that's tributary to Lee Creek?

17 A. Correct.

18 Q. With a priority date --

19 A. Of 4/1/1916.

20 Q. And no special other provisions necessary
21 or administrative [unintelligible]?

22 A. No. None appearing on the face of the
23 right, no.

24 Q. Okay. Thank you.

25 Let's look at Exhibit 3.

1 Are you familiar with this e-mail? It may
2 take you a second to --

3 A. It's really tiny. But yes, I am familiar
4 with -- I am familiar with this e-mail.

5 Q. It came out real small.

6 A. Well, wait a minute.

7 Q. I've got a much bigger version of it if you
8 want to look at mine.

9 A. Okay. It is what I thought it is.

10 Yes, I am familiar with this.

11 Q. Okay. So what do you -- what does
12 Exhibit 3 say?

13 A. Would you turn on the other light?

14 Q. Yeah.

15 A. That helps.

16 Well, I had forwarded this to the
17 McConnells, but it is a copy of an e-mail string
18 between Rob Harris and IDWR's deputy attorney general
19 Garrick Baxter discussing a Supreme Court decision from
20 back in the 1950s.

21 Q. Okay. And if you recall, Cindy, do you
22 agree or disagree with this -- this e-mail, or have no
23 opinion?

24 A. Well, I -- in this Mr. Baxter states that
25 the Department has reviewed the case, the Whittaker

1 versus Kauer, and disagrees with Whittakers'
2 interpretation of the case.

3 And I would have to say that I agree with
4 that, because I was the one that brought it to
5 Mr. Baxter's attention, because I disagreed with
6 Mr. Whittaker's interpretation of the case.

7 Q. And what was Mr. Whittaker's
8 interpretation?

9 A. As -- as told to me by Jordan and James
10 Whittaker simultaneously, that they believed that this
11 court action, which was a Supreme Court -- actually a
12 Supreme Court decision, had given them -- had given the
13 Whittakers exclusive right and title to a pair of
14 springs that are located on their land adjacent to what
15 is marked on the maps as Stroud Creek, and that
16 therefore that right was not administrable within Water
17 District 74Z.

18 Q. Okay. So then as -- as a watermaster,
19 would you have expected -- I mean had -- had there been
20 anything in your mind to this Whittaker versus Kauer
21 case, would you have expected to see something
22 documented somewhere in the SRBA?

23 A. Most certainly. In fact, that's one of the
24 first things I did was to go out and look for just that
25 sort of thing. But it didn't take long to determine

1 that there was nothing on the face of the right. The
2 Lemhi general provisions didn't mention it. The claims
3 didn't mention it.

4 So for some reason -- and I'm not saying it
5 was right or wrong, but the way it was claimed, it came
6 forward through apparently both the Lemhi and the Snake
7 River Basin decrees without any reference at all to
8 this 1956 court case. And so consequently my job was
9 to administer the right [unintelligible].

10 Q. Okay. So you're watermaster of 170.

11 Water District 74Z is a -- it's a water
12 district; correct?

13 A. It is.

14 Q. And does it have a measurement requirement,
15 a, you know, lockable, controllable --

16 A. Uh-huh.

17 Q. -- requirement?

18 A. It does. In 2018, shortly after the
19 entirety of Basin 74 was added to Water District 170,
20 the Department issued a general measurement order,
21 which applied to all of Basin 74, including Water
22 District 74Z.

23 That did require lockable, controllable
24 headgates and measuring devices on all administered
25 diversions.

1 And it also -- the order -- taking a step
2 back. The order that actually modified Water
3 District 170 to include Basin 74 had further identified
4 the rights that were to be administered by Water
5 District 170 and its subdistricts. And that spring is
6 squarely among them.

7 Q. Okay. And so then within the Lee Creek
8 system, how are -- how are water users doing with their
9 installation of measurement devices?

10 A. From what I could see, most of them were
11 already in place, you know, even at the time of the
12 order. There's a few discrepancies that we continue to
13 work on. But notably these springs, because they had
14 been largely -- they had been unadministered by the
15 District forever. You know, I don't think they've ever
16 been actively administered by the District.

17 And I don't know why, but this happens from
18 time to time, that districts just decide or, you know,
19 they're not going to administer something. And the
20 Department sometimes has to come back in and say, you
21 know, "We're sorry. This is in your district. You
22 need to start administering it."

23 So that spring was both -- there's two
24 springs. I say that spring. There's two springs. In
25 my mind the east spring needs a whole lot more

1 investigation and may not in fact be tributary to
2 Stroud Creek. And so I don't consider that really that
3 important to this conversation. But the west spring is
4 clearly tributary to Stroud Creek.

5 And so when I first went up to investigate
6 that, there was no controls. There was a sort of a
7 measuring device that was not working real well, but
8 there had been an attempt to put some measuring device
9 on it, but there was no controls. And so there was
10 really no way that the watermaster would have had
11 control over the flow of that spring.

12 Q. Okay. Do you know, then, Cindy -- let me
13 ask it this way.

14 Have you been up to these springs?

15 A. I've been very, very near them. I mean
16 they -- it does get very boggy in there. But I -- yes,
17 I have been up there. I've looked at -- I've seen
18 the -- at least the tail end of the collection ditches
19 that have -- that was -- that was -- that was
20 constructed to collect the springs.

21 The west spring is a complex. It's not a
22 spring. It appears to be a complex of springs. And
23 this, again, is very common. And so a ditch was -- was
24 dug, was constructed to collect that spring flow and
25 bring it out to where it could be put in one of the

1 Whittakers' ditches. And so I was kind of there at
2 that junction.

3 But, you know, and we went back into the --
4 into that area a little bit. But it is very boggy, so
5 yeah, we didn't go very far. But yeah, I've been up
6 there.

7 Q. From what you saw, are these springs able
8 to flow into Left Fork of Lee Creek, which has also
9 been called Stroud Creek?

10 A. They can get there. But again, I mean I
11 have to reiterate what Mr. King said. That channel has
12 obviously been manipulated. And I -- I don't know
13 when, because remember, I've only been around since --
14 you know, I was appointed in 2015. I moved up to the
15 area in 2016. I first visited this location last year,
16 because I'm in charge of a really big area.

17 And so I don't know when this channel was
18 manipulated, but it's clearly been manipulated to where
19 the springs are being kept from flowing into Stroud
20 Creek. Now, they can be turned into the creek because
21 there's been some bypass channels built to where they
22 can be turned into the creek. But again, there's no
23 controls on them.

24 So, you know, they could be adjusted and
25 everybody could walk away and they could be put right

1 back in the ditch because there's no -- there's no
2 controls. There's no -- there's no security for the
3 watermaster to be in charge of that water and send it
4 where they want it, send it where it needs to go.

5 Q. And the way these rights are -- this right,
6 74-157, was decreed, it's tributary to Lee Creek?

7 A. Lee Creek, which I -- you know, okay. You
8 have to interpret that as the Lee Creek system, you
9 know.

10 Q. Right.

11 A. It's -- it's -- these names on these creeks
12 are just labels. The Department tries to get the
13 correct label on the source. Sometimes we miss.

14 So at the end of the day, rights are
15 administered based on where they're at and how much
16 water is flowing there. So when it says "springs
17 tributary to Lee Creek," and I say, well, that spring
18 really is the first named tributary to Stroud Creek,
19 but Stroud Creek goes into Lee Creek, so at some point
20 so -- I -- I just interpret that as that spring is
21 tributary to the Lee Creek system.

22 My observation was that clearly there is
23 enough flow that -- that if the spring was not
24 developed it would naturally go into that system. So
25 yeah, my call was that should be administered as part

1 of Lee Creek, Lee Creek water rights.

2 Q. Do you know if Left Fork Lee Creek or
3 Stroud Creek is still channelized in those upper
4 reaches through the Whittaker property, or is it not?

5 A. Well, the last time I was up there was
6 August 3rd, I believe, 2020. And at that time there
7 was still what appeared to be some constructed channels
8 kind of feeding this water pretty much into the
9 Whittaker system, except for, you know, what was being
10 bypassed and -- and so, you know, yeah, it could
11 conceivably be controlled and administered properly and
12 sent downstream. There would just have to be some
13 more -- some additional controls installed.

14 MR. BROMLEY: Okay. Thank you, Cindy. I have
15 nothing further.

16 THE HEARING OFFICER: Okay. Mr. Johnson, any
17 questions?

18 Okay. Mr. Manwaring?

19 MR. MANWARING: Yes. Thank you.

20 THE HEARING OFFICER: Yep.

21

22 CROSS-EXAMINATION

23 BY MR. MANWARING:

24 Q. Cindy, if I understand your familiarity
25 with the area that we're talking about is from 2016 to

1 the present?

2 A. Yes.

3 Q. And more specifically, maybe just within
4 the last year?

5 A. Well, my site visits didn't occur until
6 2020.

7 Q. Okay.

8 A. I do a lot of map reconnaissance in the
9 course of my daily work and had gone through the water
10 rights previously, but hadn't been to the area until
11 2020.

12 Q. Your first visit was last year?

13 A. Yes.

14 Q. What we call a field visit?

15 A. Site -- site visit, yeah.

16 Q. Site visit. Thank you.

17 Okay. And any knowledge you have about
18 historic flows or stream channels would be based upon
19 using maps or information from someone else?

20 A. Yeah, that's a fair statement.

21 Q. Okay. If you'd look at Exhibit 10, which
22 you were asked to examine.

23 Your first sentence on Exhibit 10 is "The
24 second diversion proposed by the applicant has been in
25 use for at least several decades, as evidenced by

1 aerial images and even the USGS topo map."

2 Did I read that correctly?

3 A. Yep, that's what it says.

4 Q. Okay. Is this based upon your review of
5 just maps in general, mapping that the Department has
6 or -- and USGS maps?

7 A. The Department has a series of aerial
8 imaging that we use with our ArcMap licensing. And --
9 and some people also use Google Earth. I don't so
10 much. I -- but -- but with ArcMap we have a series of
11 aerial images from early 2000s up to 2019, and then we
12 also have access to the USGS topo maps.

13 And yeah, so in my review of just various
14 years of images, I can see that ditch in images going
15 back for, you know, at least 20 years.

16 Q. Okay. And what you're looking at then is
17 generally, if I understand, is the ditch that comes
18 from that diversion point?

19 A. The --

20 Q. You're looking at the evidence of the
21 ditch?

22 A. Yeah, the evidence of the ditch coming from
23 really both diversion points, both the upper and the
24 lower.

25 Q. Right. And I was going to ask you about

1 that.

2 The upper division point has a ditch that
3 runs from it as well; correct?

4 A. Yes.

5 Q. And that's pretty visible?

6 A. That's also visible on the images, yes.

7 Q. Okay.

8 A. And as Mr. King testified, some images more
9 so than others. You know, some images it depends on
10 the cloud cover and the vegetation cover and what time
11 of year the photo was taken. But yes, it appeared in
12 multiple images.

13 Q. Okay. The presence of a diversion doesn't
14 actually mean that there's a right to divert; is that
15 correct?

16 A. Absolutely.

17 Q. As in this case?

18 A. As in this case.

19 Q. Okay. You mentioned in the last sentence
20 of the first paragraph, "The protestants upstream on
21 Stroud Creek seem to be well aware of the ongoing use
22 of the unauthorized diversion but were not concerned
23 about it until McConnell made call for water during
24 2020."

25 Did I read that correctly?

1 A. Correct.

2 Q. Do you have knowledge as to whether or not
3 the upstream protestants were aware that that diversion
4 was an unauthorized use?

5 A. I don't have any firsthand knowledge about
6 the upstream protestants.

7 Q. Okay.

8 A. Specifically it was -- it was the
9 Whittakers who seemed to be aware that that had always
10 been there and -- and the watermaster was aware -- you
11 know, was aware of the existence of that diversion.

12 Q. Okay. So it wasn't Tomchaks that was aware
13 of it and said it was okay with them or something?

14 A. No. Maybe perhaps that sentence was made a
15 little too generally. You know, in specific it was the
16 Whittakers that appeared to be aware that that
17 diversion had been there.

18 Q. Okay. And were they aware that it was
19 unauthorized?

20 A. I don't know if they were or not until
21 August when it -- they alleged to me that it was
22 unauthorized.

23 Q. Okay. All right. Now, you talk about how
24 you view a system, I think you used the word that this
25 would be the entire Lee Creek system; right?

1 A. Right.

2 Q. And in your approach to using that system,
3 that would include all of the tributaries that would
4 drain into Lee Creek that would then drain into Lemhi
5 River?

6 A. Correct.

7 Q. Okay. The Department of Water Resources
8 gets more specific when it comes to the source of
9 someone's water right it applied to; is that correct?
10 The Department doesn't say the Tomchaks have a water
11 right on the source of Lee Creek, they talk about
12 Everson Creek or Stroud Creek; correct?

13 A. The Department is required by our rules to
14 assign a source name to every water right. Again, we
15 try to get it right. We use as our guide the USGS --
16 the names on the USGS map. That's usually what we
17 defer to in source names. But sometimes people will
18 read those wrong.

19 I mean Whittakers themselves have two
20 rights that divert at that diversion there by Rosalie
21 Ericsson's house, and one of them reads -- one of them
22 says "Stroud Creek" and one of them says "Left Fork Lee
23 Creek." As far as I'm concerned, it's the same water
24 source with two different names diverted at the very
25 same point of diversion.

1 So -- and this happens all the time. It's
2 not really that uncommon that the incorrect -- that an
3 incorrect source name gets applied to a right.

4 Q. Okay. What I'm referring to, though, is
5 more specifically with the Tomchaks.

6 They have water rights that the source are
7 Everson Creek and Stroud Creek; correct?

8 A. Well, I know that they have rights. I -- I
9 think -- I'm not sure which -- which source is named on
10 their rights.

11 Q. Okay.

12 A. I thought they were both Everson, but I
13 could be wrong.

14 Q. Yeah. But so whatever the water right says
15 the source is, that's the source the Department focuses
16 on?

17 A. No. Where the point of diversion is is
18 where that water right's administered.

19 Q. Right. And so if that's Everson Creek,
20 that's not Lee Creek, is it?

21 A. But it's in the Lee Creek system.

22 Q. I get that.

23 A. Yeah.

24 Q. But it's not Lee Creek; it's Everson Creek?

25 A. No -- well, technically, no.

1 Q. Okay.

2 A. But it is tributary to Lee Creek, and
3 therefore it could be subject to calls from senior
4 rights further downstream.

5 Q. Depending on where that senior right source
6 of diversion was decreed?

7 A. Depending on -- well, yeah, if it's in the
8 system. So anything in the system is subject to a
9 call, anybody at any point in this system is subject to
10 a call from a senior right holder who is positioned
11 really either downstream or upstream in the system.

12 But since he's at the very top, mostly, you
13 know, his calls are going to be coming from -- from
14 down below. But a call can actually even be made
15 from -- from upstream, because if a watermaster is in
16 control and they've got too much delivered to a junior
17 downstream user, the upper senior can still say, you
18 know, "There's water flowing past that diversion, and
19 I'm entitled to it," and the watermaster would need to
20 go up and -- to the extent the water is available at
21 that upper diversion would -- would deliver the water
22 to that senior.

23 And so there's -- you know, there's place
24 and there's flow. And so there's all these judgments
25 that have to be made, because not only does the water

1 have to be in priority, it also has to be available.

2 Q. Sure.

3 A. And if you -- you may have an early senior
4 right at the top of the drainage, and if there's no
5 water up there to deliver to you, you still don't get
6 it. And that's another form of futile call, where you
7 can't call on water that's below you if there's no way
8 to get it up to you.

9 Q. So if you have a water right on Lee Creek
10 that is upstream from Stroud Creek, for example, can
11 you actually call for water from Stroud Creek?

12 A. Well, you know, that really isn't how calls
13 is made. Maybe we better -- maybe we should clarify
14 that.

15 When a water user calls for water, they
16 don't say "I want that guy's water." They say,
17 "Watermaster, I don't have my water. Please deliver it
18 to the extent it's available."

19 And that's the watermaster's job to figure
20 out who, if anybody, is diverting out of priority,
21 where the water is available, and can they get water to
22 the calling diversion.

23 So water --

24 Q. Yeah.

25 A. -- calls are -- are not specific as to

1 source or water user. They -- they are just -- "I am
2 calling for my water. Please, to the extent you can
3 get it to me, please deliver it."

4 Q. I can understand that.

5 A. Yeah.

6 Q. And I don't have any dispute with that.

7 What I'm saying, Cindy, is, if your water
8 right is on Lee Creek and your point of diversion
9 that's decreed is on Lee Creek and downstream from Lee
10 Creek is the actual confluence of Stroud Creek and you
11 make a call and say "I want my priority water right,"
12 but you can't get water from the downstream up, how are
13 you going to get it out of Stroud Creek?

14 A. Well, in some cases you cannot. And that
15 is the watermaster's unique and sometimes burdensome
16 job is to evaluate all those factors and can that water
17 be delivered, you know, in priority or without waste.
18 And that's part of the exercise we were going through
19 last year when we realized that was -- that may be --
20 that may have been occurring.

21 Q. Okay. All right. So if the water can't be
22 brought upstream, you can't call on that water?

23 A. You can't. Well, you can make a call, but
24 the watermaster just simply can't deliver it. It's --
25 it's futile. And so then sometimes you have options to

1 turn those juniors back on if you cannot get the water
2 delivered to the senior.

3 Q. Sure. Okay. Great. You talk about what
4 you've seen as the historic channel of Stroud Creek. I
5 think you mentioned several times that it looked like
6 there has been a diversion in the channel or some
7 changes in the channel of Stroud Creek?

8 A. Well, I --

9 Q. I shouldn't say diversion.

10 A. Right. Yeah.

11 Q. I should say there's been --

12 A. Yeah, that did throw me off.

13 Q. Yeah, that will throw you off. That's a
14 bad term.

15 Is -- did you notice that there was a shift
16 perhaps in the channel of Stroud Creek?

17 A. Well, where I don't have a -- I don't have
18 a lot of history, but -- but I think I observed the
19 same thing Mr. King did when he was up there, is that
20 this is a channel that is moving. You know, this is a
21 channel that has moved. It has -- it has -- it has
22 made side channels. It has bifurcated. It has maybe
23 gone back and forth from channel to channel. We don't
24 know. We honestly have not investigated it enough to
25 know where it's happened or when.

1 And yeah, I observed, very similar to what
2 Mr. King observed, is that this is a -- this is an area
3 of this particular system where the channel is braided.

4 Q. And you haven't had yourself an opportunity
5 to walk Stroud Creek from Everson Creek down to its
6 confluence?

7 A. I probably wouldn't do it. I don't know --
8 I mean it's -- I don't know that it's -- it would be a
9 very difficult hike. I know that some people have
10 walked a lot of it, and you'll probably hear from them
11 later. And I have walked -- I -- I am -- the
12 underbrush is so dense that I was having trouble
13 getting through it.

14 So I -- I admit that I only went into the
15 creek where it was easy to get there. But, you know, I
16 did go in at several different vantage points where I
17 could to see what I could see. But no, I never walked
18 the channel, because the underbrush was just so dense
19 that walking was almost impossible.

20 Q. Okay. And the topography in that area, do
21 you agree that Stroud Creek kind of curves along on
22 that ridge and comes down through that channel before
23 it gets to Lee Creek?

24 A. There are a couple of ridges up in there.

25 Q. Yeah.

1 A. Yeah, there's a couple ridges. And it is
2 definitely steeper up in the Stroud Creek part of the
3 drainage than it is once you get below whatever
4 confluence you're talking about.

5 Q. Okay. You mentioned in that third
6 paragraph of Exhibit 10 that the -- you said "Viewed as
7 a natural hydrologic change, the altered flow path of
8 Stroud Creek does have the potential to affect
9 administration of Lee Creek and Stroud Creek water
10 rights under the principle of futile call."

11 Do you see that sentence?

12 A. Yeah, uh-huh. I'm tracking.

13 Q. All right. Now, explain to me what that
14 means.

15 A. Well, it was discussed before. Mr. King
16 kind of started down that road.

17 Natural changes happen in channels. It's
18 just like kids grow up. You know, it's a statement of
19 fact. Some channels are much more prone to it than
20 others. You know, some -- some -- some streams flow
21 through less moveable strata, and so they -- they don't
22 move much. But this one obviously is in some alluvium
23 and it's jumped around a bit.

24 And sometimes that does change
25 administration. I mean it creates a very dynamic

1 situation where, you know, the rights might have been
2 decreed when the flow regime, as Scott calls it, or --
3 or where the flow was in one channel and the rights
4 were decreed, and then the flow changes, and the water
5 user may or may not have the legal right to get to the
6 water where it now is. And, you know -- and that
7 was -- that was an act of nature that put that water
8 over there.

9 And so, yeah, I was just simply trying to
10 acknowledge that -- that we don't know how this has
11 moved. And it could affect administration. But I
12 don't know how it will until we get out there and start
13 to administer it.

14 Q. Okay. The next sentence in that same
15 paragraph, that conclusion sentence says, in part,
16 "Certain upstream diversions remain out of compliance
17 with control and measurement requirements."

18 Can you tell me what you mean by that.

19 A. Yeah, I was referring to the Whittaker
20 diversions that we had ordered to put measuring and
21 control devices on. And as of the date that I made
22 these comments, to the best of my knowledge, that
23 hadn't yet occurred, so...

24 Q. Right.

25 A. And so what I was trying to get at there is

1 that until all the diversions are met -- you know, are
2 in compliance, it's really going to be hard to
3 administer that area the way it's supposed to be.

4 Q. But the Tomchaks aren't somebody who's out
5 of compliance with control measurement requirements.

6 A. Not to my knowledge. I have not been to
7 their diversion or to Foster diversion, but the
8 watermaster has indicated that they are in compliance
9 with the headgate measuring device requirement.

10 Q. Okay.

11 A. He was satisfied with the structures there,
12 so I didn't go visit.

13 Q. Now, as it relates to this Stroud Creek
14 channel, from what you're describing in your testimony,
15 Cindy, you really can't tell us whether or not the
16 channel has jumped around upstream from the Whittakers'
17 place or downstream, it's just in that area where you
18 were at it looked like there were some changes in the
19 channel?

20 A. Yeah, there was -- I mean I -- I did
21 actually walk over to where that side channel was
22 coming in, and I did confirm with my own eyes that that
23 side channel was in fact coming in below the McConnell
24 diversion, and on that day appeared to be carrying the
25 majority of the water. But I never did really figure

1 out why or how or where it was coming from.

2 Q. Okay.

3 A. I just knew that it wasn't available to
4 McConnell, unfortunately, so, you know...

5 Q. Because it was below their diversion point?

6 A. Because it was below their diversion. So I
7 did confirm that.

8 Q. Okay. And that channel that you looked at
9 that had the heavy flow, apparently, was that Stroud
10 Creek, as far as you could tell? Or do you know?

11 A. Don't know. It was a channel.

12 Q. It was a channel?

13 A. It was a channel. It was a side channel.
14 I really didn't -- didn't -- I don't think we know. In
15 fact, I know we don't know. And I don't know that it
16 matters, honestly, because I think that it just kind of
17 all goes to location and availability and -- and
18 timing.

19 It was coming -- it was coming out of the
20 upper reaches, and I don't know that it's important to
21 say where it's coming from, although I'm sure we'll
22 continue to investigate it.

23 Q. In that last paragraph of Exhibit 10, you
24 talk about "adequate watermaster's control, that the
25 diversions will be appropriately administered to

1 satisfy any transfer conditions and approval, and to
2 protect existing diversions on Stroud and Lee Creeks";
3 correct?

4 A. Correct.

5 Q. And tell me what you mean by that.

6 A. I anticipated that -- that if the
7 transfer -- if the Department did elect to approve the
8 transfer, particularly with the protests, that I'd
9 already seen -- and it could be that there was only one
10 protestant at the time I wrote this, because I might
11 have been writing it before all the protests came in.
12 So maybe that's why I only referenced one protestant
13 there at the beginning.

14 But given the circumstances, I figured
15 there would be a hearing. And the Department, of
16 course, is at its discretion, can add conditions of use
17 or conditions of approval to transfers. And one of the
18 primary reasons for that is to protect existing rights
19 and existing diversions.

20 And so without going through the process, I
21 couldn't predict what those conditions might have been.
22 But knowing the types of -- of conditions that are
23 typically applied, I feel that with adequate control
24 and measurement on all points of diversions, no matter
25 what conditions were put on the transfer -- unless they

1 were like crazy unreasonable, but I don't expect that,
2 but I would expect that somebody would object to them
3 if they were crazy and unreasonable. But yeah, most
4 conditions could be -- could be adequately administered
5 with enough control and measuring devices.

6 Q. Just give me a sample of what you would
7 perceive as conditions applicable to this transfer.

8 A. I don't really feel comfortable doing that.

9 Q. Okay.

10 A. Because I don't want to put thoughts in
11 anybody's head.

12 Q. Like James?

13 A. Mostly him, yeah.

14 MR. MANWARING: Do you have any thoughts in your
15 head?

16 THE HEARING OFFICER: No, I don't. Usually not.

17 THE WITNESS: He's an empty vessel.

18 Q. (BY MR. MANWARING): You mentioned that
19 there were some investigations that were being made on
20 the channels up there.

21 Can you tell me what those investigations
22 are.

23 A. The watermaster -- and again, are you
24 referring -- let me ask you before I answer. Are you
25 referring to the -- maybe the Upper Stroud Creek

1 channel?

2 Q. You just mentioned in your testimony that
3 there was some investigations that were going on up
4 there. I assume on everything, Lee Creek, Stroud
5 Creek.

6 A. Well, to be quite honest, I'm not really
7 sure, in retrospect, what I was referring to. We are
8 doing some investigations on -- with respect to this
9 west spring.

10 Q. So --

11 A. The Whittakers' west spring.

12 Q. -- the investigation relating to a spring
13 that's on the Whittakers' property or --

14 A. Yes, it's the spring that's -- that's
15 represented by Water Right 74-157 and the
16 administerability of that water with respect to the
17 rest of the Lee Creek water.

18 Q. Okay. Is there any investigation that's
19 going on to try to determine what the channel is for
20 Stroud Creek?

21 A. Well, not at the moment. We -- not at the
22 moment. I had did a little bit last summer. Didn't
23 look at all the channel, as I said. Different people
24 have looked at different parts of the channel.

25 So I anticipate additional investigation in

1 the future as we try to sort this out. But I think we
2 at one point decided that we would just wait until
3 after this hearing --

4 Q. Okay.

5 A. -- to see what -- to see where the
6 Department landed.

7 Q. And you mentioned also in your testimony
8 about the springs -- I think you mentioned one of them
9 was a tributary of Lee Creek, but you couldn't see how
10 that could be.

11 Could you explain what that was.

12 A. Well, I think my reference was to the fact
13 that 74-157 has -- lists two points of diversions
14 representing two different springs or, in my mind,
15 spring complexes, because I actually have seen them
16 both.

17 And I'm a little bit puzzled as to how that
18 right -- how they both ended up on the same right,
19 because while one spring was clearly -- clearly
20 appeared tributary to the Lee Creek system, the other
21 spring appears to, you know -- and it's hard to tell
22 because there's been development. You know, there's
23 been a collection ditch.

24 But it appears that if -- absent, you know,
25 any manmade diversions, that spring could very well

1 flow the other direction. And I'm not the only one
2 that's made that observation. And there's other --
3 there's other evidence by Mr. Contor that that spring
4 might in fact flow the other direction.

5 So I kind of just removed that from my
6 immediate concern and just said, you know, let's deal
7 with the west spring right now, and we're going to have
8 to look at the east spring to see if or if it does not
9 even conform to the -- to the decree, and then what we
10 will do about it. Again, it's that -- I administer
11 them like a see them, you know, attitude.

12 But for the time being, I just -- you know,
13 we did order there to be a control structure and a
14 measuring device on the east spring. But, you know,
15 for the time being I am not attempting to administer
16 the east spring as part of the Lee Creek system. That
17 could change. We reserve the right to change our mind
18 about that.

19 MR. MANWARING: I don't have any other questions
20 for Cindy. Thanks.

21 THE HEARING OFFICER: Okay. Thank you.

22 Ms. Foster?

23 MS. FOSTER: I'm good.

24 THE HEARING OFFICER: Okay. Mr. Harris?

25 MR. HARRIS: Yeah.

CROSS-EXAMINATION

BY MR. HARRIS:

Q. Cindy, I've got several questions.

A. I'm so surprised.

Q. I know. I'm sure you are.

A. Sorry, I didn't mean to be trite.

Q. You were appointed the watermaster for
Water District 170 in 2015; correct?

A. Correct.

Q. And I believe you testified that the way
this would work with these subdistricts is you would
hold hands or provide guidance and support; is that --
did I summarize your testimony accurately?

A. Yeah, that's -- that's exactly what I said.
And that is really my role is to -- I try to leave the
districts alone to the extent they don't need me.

Q. That --

A. But --

Q. That's --

A. -- if they need guidance, then I -- I step
in, and I give them whatever guidance they need.

Q. Well, that -- that's really what I want to
get at, because I want to understand kind of your
relationship with Mr. Udy.

Are you his boss?

1 A. I don't think that's a correct term. The
2 Department appoints watermasters.

3 Q. Right.

4 A. And as duly-appointed watermasters, they
5 are considered similar to as an employee of the State.

6 Q. Uh-huh.

7 A. Watermasters -- water districts are
8 considered instrumentalities of the State.
9 Watermasters are elected by the water users in the
10 water district and paid by the water users in the water
11 districts, so it's kind of -- I've always related my
12 job as similar to a stepparent, where I have all the
13 responsibility but none of the authority.

14 You know, I've got -- it is certainly my
15 job to guide them and to tell them if I think the water
16 is not quite being administered properly and to give
17 them whatever resources I can to help them do their job
18 the best they can.

19 But they answer both to me, representing
20 the Director of the Department, and then they can
21 also -- and they also answer to their chairman or their
22 advisory committee, who also can come in and help
23 resolve things, you know, help resolve conflict within
24 those little -- within those subdistricts.

25 Q. Is it --

1 A. So to say I'm their boss isn't really
2 accurate.

3 Q. Well, and I'm -- I'm asking, do you
4 consider yourself as boss?

5 A. No, I don't consider him -- I don't
6 consider myself his boss. I consider myself more --
7 more his mentor.

8 Q. Let me ask it this way. Let me ask it this
9 way.

10 If there's a disagreement between you and
11 him on water distribution, who's -- does your authority
12 trump his?

13 A. Yes.

14 Q. And is that why you were involved with this
15 delivery call within 74Z's Water District, is you had
16 a -- both had a disagreement on how this delivery call
17 was supposed to be administered?

18 MR. BROMLEY: Objection to the phrase "delivery
19 call." It does have legal connotations. What I
20 understand is Ms. Yenter's been involved.

21 But, Mr. Harris, when you say "delivery
22 call," I think of other things, like Conjunctive
23 Management Rules and things like that.

24 So my objection is to the phrasing. To the
25 extent you're not implying a legal conclusion as to,

1 quote/unquote, "a delivery call," that's just simply
2 the basis of my objection.

3 MR. HARRIS: And if I could respond. In your
4 e-mail you said, "But we're not concerned about it
5 until McConnell made calls for water during 2020."

6 So you could rule on the objection, but
7 that's the phraseology I'm using. You could call it
8 just a call or a delivery call, but I think they're the
9 same thing.

10 MR. BROMLEY: And, Mr. Harris, with that
11 understanding, I'm fine with that. It was just the
12 bringing it out of the chute as a, quote/unquote,
13 "delivery call." So thank you.

14 Q. (BY MR. HARRIS): Okay.

15 A. So run it past me real quick so I make sure
16 I answer the right question. Or ask me again, please.

17 Q. We need the recorder to play back the
18 question.

19 A. Okay.

20 Q. No, I'm just kidding.

21 How then -- is that why you became involve
22 in this?

23 A. Why did I become involved?

24 Q. Yeah. Why did you become involved?

25 A. Yeah.

1 Q. Was there a disagreement between you and
2 Mr. Udy on the administration?

3 A. No, not between me and Mr. Udy. It was
4 more that Mr. Udy needed my support. He had received a
5 call from Mr. McConnell that he wasn't getting his
6 water. And so he went out, and he tried to deliver
7 the -- deliver the water. And McConnell still wasn't
8 getting his water.

9 And so he called me -- well, he -- he may
10 have even done some looking around on his own. But at
11 the point that he called me, he said -- you know, it
12 was basically "I need some help."

13 Q. Okay.

14 A. "I got a situation up here and I -- you
15 know, I got a situation, and I'm not really sure how to
16 handle it." That's -- those are the big -- those are
17 the big things that I step into.

18 Q. Well, and I believe Mr. McConnell testified
19 that he didn't start this, that he heard from you.

20 Is that -- did you hear that testimony this
21 morning?

22 A. I did hear that. And I -- I did remember
23 that. I mean I think I had made the same -- I think I
24 have made the same suggestion to Mr. McConnell that
25 Mr. Cefalo may have made back in 2014, is "You need to

1 call for your water. You're entitled for it -- you're
2 entitled to it."

3 And -- but then -- and so I'm not sure
4 exactly the series of events. I can't recall them.
5 But at some point right around the same time that all
6 this happened and we knew that -- you know, Merritt
7 called me and said "I got this situation."

8 Q. Okay.

9 A. "I'm trying to get McConnell's water down
10 to him. I can't get it down to him. And I think I
11 found something. Can you come look at it?"

12 Q. Mr. Bromley asked you some questions about
13 language on decrees and language needed to be there for
14 you to administer the water rights.

15 Do you recall that testimony?

16 A. Yes.

17 Q. If two water users come to an agreement on
18 how they want to rotate water, even though they have
19 different priorities, and they tell the watermaster of
20 their agreement, would the watermaster consent to that,
21 or does it have -- does every agreement have to be on
22 the decree?

23 A. Well, the agreement's got to be legal,
24 first off. And an agreement like that probably isn't
25 legal, under Idaho water law.

1 But no, watermasters are not obligated and,
2 in fact, are asked not to administer private
3 agreements. There are certain private agreements
4 pertaining to use of diversions and use of water that
5 are kept off water rights on purpose because the
6 Department does not want to be a party to those. And
7 we don't want our watermasters delivering those kind of
8 [unintelligible].

9 Q. And I'm not suggesting the Department's a
10 party. But if they come to an agreement to say there's
11 only so much supply and -- but we're okay rotating back
12 and forth, even though one would have a senior right
13 over the other, you're saying as a watermaster you
14 wouldn't recognize their wishes; is that --

15 A. Well, I'm saying first and foremost, that's
16 not legal under Idaho law. So they can't do it, even
17 if the watermaster did agree to it.

18 Q. Well, if it doesn't affect --

19 A. Yes, it does, because it -- one --

20 Q. Hold on. Let me ask the question.

21 If you have two senior users on a creek and
22 there's not enough water to supply water to any juniors
23 but they decide we will -- we want to -- "I'm not going
24 to call for my water one day. He's not going to call
25 for it."

1 A. Okay.

2 Q. So then he gets all of it, the other --

3 A. Okay. Yeah, framed that way -- framed that
4 way, then basically those requests -- framed that way
5 with no other junior users calling for water, and let's
6 say that we're down to the last two water --

7 Q. Right.

8 A. -- framed that way, the watermaster doesn't
9 enforce it. The watermaster simply responds to calls.
10 But it's up to the water users to say "I'm calling
11 today," and the other one calls tomorrow.

12 Q. I agree with you.

13 There's obviously an issue in this case
14 over where these channels come together. And I'm going
15 to be really particular about parsing language, because
16 I think what I heard you testify to, some was based on
17 evidence, some was based on just what you assume or
18 think happened. So I want to walk through that.

19 Okay?

20 A. Okay.

21 Q. Have you -- have you actually walked the
22 stretch -- no, I'm not asking that very well.

23 You did observe that there was a side
24 channel of water coming down that bypassed the upper
25 diversion point --

1 A. I did.

2 Q. -- correct?

3 A. I did.

4 Q. But you're not -- but you're saying you
5 don't know if that was Stroud Creek or not?

6 A. I don't, really.

7 Q. Okay. What -- so tell me exactly what
8 you've done to collect evidence on that issue.

9 A. I -- I have been to both McConnell
10 diversions. And we walked -- and then I walked with
11 Mr. Udy over to see where the side channel came in.
12 But it became real clear to me that this old body was
13 not going to crash through the underbrush to walk up
14 the stream. So I said, "No, I can't do that."

15 And so we went back out. I went -- we went
16 in where the culverts are. Everybody's talked about
17 the culverts and where there's --

18 Q. Here we go right here.

19 A. Yeah.

20 Q. So --

21 A. I went to that -- I'll get the lights. I'm
22 up.

23 Let me get myself oriented here.

24 MR. BROMLEY: That was a good job of
25 multitasking being a witness and getting lights.

1 THE WITNESS: I have on three hats now.

2 MR. BROMLEY: Well done.

3 THE WITNESS: Okay. Oh, gosh, I got to get
4 myself oriented. Can you back out, zoom out just a
5 bit.

6 Q. (BY MR. HARRIS): Okay.

7 A. Thank you.

8 Okay. That's where I thought it was, yeah.
9 Because here's the road. There are three culverts
10 here. And I observed -- and I mean I think this was
11 stated by Mr. King and then refuted by somebody else,
12 but I'm going to state it again, I saw water in this
13 culvert and in that culvert. And I didn't see any
14 water in the middle culvert.

15 Just based on the map and standing out
16 there, I assume that this was the Right Fork of Lee
17 Creek coming down, and I expected to see Stroud Creek
18 coming in just -- just above this road. And I saw no
19 water. So, you know, that's -- that's what I was --
20 that's -- I have looked in here.

21 I took GPS points here, here, and here so
22 that I was positive I knew where I was. And I took GPS
23 points at each one of McConnells' diversions so that I
24 knew where I was. And so that's -- that's basically --
25 I tried to take a GPS point back there in the

1 underbrush when I -- when we -- when I was looking at
2 the side channel. And it didn't come out very
3 accurate, but I -- you know.

4 Q. Are you referring to this as "the side
5 channel"?

6 A. I don't know. That may be the side
7 channel. It might not be. Again, it's so unclear --

8 Q. Okay.

9 A. -- that I'm not willing to call any --
10 anything.

11 Q. But you in August of 2020, you asked
12 Mr. Udy to take some measurements.

13 A. Yeah.

14 Q. Let's turn to Exhibit 5.

15 A. Thanks. Yeah. I was going to ask you what
16 exhibit that was.

17 Q. Did he -- so at the bottom of that page, he
18 said, "Obtain a measurement of total flows available to
19 McConnell at his authorized point of diversion."

20 Did Mr. Udy do that?

21 A. You know, it seems to me that he did. This
22 was after we'd been up there the second time and we
23 had --

24 Q. Uh-huh.

25 A. -- been talking about, well, is this

1 really -- is this futile at this point, you know, to
2 keep the spring curtailed, is this water really getting
3 down to McConnells.

4 And -- but, you know, those -- I don't have
5 those notes with me, Mr. Harris. But -- but evidently
6 he obtained enough information and sent it to me to
7 satisfy me that -- that there really wasn't water
8 coming down there, because I allowed the springs to
9 stay on.

10 Q. So in the remeasurement 12 to 24 hours
11 later, it looked like there was -- there was no change
12 to the flows that were available at the upper point of
13 diversion?

14 A. That's my general recollection without
15 having my notes in front of me.

16 Q. Because I think the letter says forward
17 that --

18 A. He did.

19 Q. -- provide that information to you.

20 A. He was --

21 Q. Okay.

22 A. He was sending me information. We text a
23 lot. That's just an easy way for us to communicate.
24 And I'd have to go back through the text messages,
25 but...

1 Q. Wouldn't that be evidence that the water
2 coming out of the Stroud Creek drainage is not going in
3 above the upper diversion?

4 A. It was evidence on that day.

5 Q. Which would be part of the evidence you
6 would collect if you had to come to a conclusion --

7 A. Exactly.

8 Q. -- on where Stroud Creek --

9 A. Yeah.

10 Q. -- enters?

11 A. On that day only.

12 Q. Okay. And you mentioned that there's
13 probably been some braiding of channels down in here?

14 A. Uh-huh.

15 Q. Have you actually been on the -- on the BLM
16 property where the USGS map showed the confluence of
17 Stroud Creek with Lee Creek?

18 A. Well, the -- the historic or the USGS --

19 Q. Correct.

20 A. -- both.

21 Q. So yep, it would be right -- that's the
22 southeast northeast?

23 A. Yes. Zoom back out. There.

24 Well, where it shows it is right there kind
25 of where this road comes across. It shows it -- well,

1 I think Scott drew it right up here. I -- it's right
2 in here someplace.

3 Q. Here's the southeast northeast.

4 A. Right. In my mind it's drawn right in --
5 it's drawn right in here somewhere.

6 Q. Okay.

7 A. That's where those culverts come across.

8 MR. BROMLEY: Cindy, could you just explain the
9 legal descriptions where you were circling with your
10 finger and gesturing "it's right in here."

11 THE WITNESS: Where I was circling was kind of
12 in between the southeast northeast and the northeast
13 southeast of section 30.

14 MR. BROMLEY: Thank you.

15 Sorry, Rob.

16 THE WITNESS: And that is where the -- all the
17 maps. And if I go over here and look at the quad map
18 where Scott drew his circle, that's -- that's pretty
19 much -- the quad map actually has it coming in a little
20 north of this quarter-quarter line. I was standing
21 here on this culvert right here where Lee Creek crosses
22 and looking for some other channel to come in. And I
23 just wasn't seeing anything.

24 Q. (BY MR. HARRIS): Okay.

25 A. So I'm not really sure where it was

1 supposed to be, but...

2 Q. You were asked several questions about
3 what's on the face of the decree for 74-157.
4 Mr. Bromley asked you some questions on that. And I
5 think there's two issues here. One is an
6 administration question, but one's an interpretation.

7 You would agree that Stroud Creek is
8 tributary to Lee Creek?

9 A. Yes.

10 Q. Okay. Whittakers' water right says it's
11 tributary to Lee Creek?

12 A. That's correct.
13 157 you're speaking of?

14 Q. Correct.

15 A. Yes.

16 Q. It doesn't say "Lee Creek system"?

17 A. No.

18 Q. It just says "Lee Creek"?

19 A. It does.

20 Q. Does the west and east springs flow into
21 Lee Creek proper, or do they flow into Stroud Creek or
22 neither?

23 A. The east spring I have not made a final
24 determination about. The west spring appeared --
25 again -- and again, there had been a lot of manmade

1 construction, but it appeared to me, just from the lay
2 of the land and some other factors, that naturally the
3 flows out of those springs would enter Stroud Creek and
4 then Lee Creek.

5 Q. So there's some issues with how that water
6 right's described. I would agree with that. And I
7 think you summarized it in one of your watermaster
8 comments as well.

9 A. Uh-huh.

10 Q. So some things could be clarified there.

11 I want -- let's now turn to Exhibit 10.
12 This is your -- your comments on this transfer.

13 A. Okay. I just don't see in the dark.
14 There. That's better.

15 Q. The first paragraph you say, "But they were
16 not concerned about it until McConnell made calls for
17 water during 2020."

18 What -- what was that based upon, that
19 conclusion?

20 A. Well, again, as I clarified with
21 Mr. Manwaring, I think when I wrote this maybe only the
22 first protest had come in. And so -- but I can tell
23 you that I was referring to the Whittakers, simply
24 because Jordan Whittaker and I had had some brief
25 discussion out in the field. And it's in my notes, not

1 documented, but I remember it.

2 Q. Yeah.

3 A. And it seemed like he acknowledged that
4 that diversion had been there and he knew about it,
5 but -- and so I guess I just felt it just a little
6 bit -- oh, I don't know what I felt. I just thought it
7 was strange that they -- they knew it was there all
8 along but never said anything about it until -- until
9 the distribution got -- you know, got ramped up and
10 their water was threatened to be taken away from them.
11 And then they decided to come forward and say something
12 about that diversion.

13 Q. Couldn't that be because of the arrangement
14 or agreement that they thought was still enforceable
15 with regard to the Kauer Ditch?

16 A. Oh, I'm sure. Sure, it could be.

17 Q. Okay.

18 A. But you know.

19 Q. And correct me if I'm wrong, but you -- you
20 made the decision to close the Kauer Ditch; is that
21 right? You determined it was not an authorized point
22 of diversion?

23 A. No, that's not correct.

24 Q. Okay.

25 A. I think that was done in 2014 before I was

1 ever involved.

2 Q. Okay. So that was done before you became
3 watermaster?

4 A. Yeah, I've never -- I've never been to that
5 diversion.

6 Q. You've never been to the Kauer Ditch.
7 Okay.

8 In the third paragraph of your e-mail you
9 say, "I'm not convinced that the lower McConnell
10 diversion is below the historic confluence of Stroud
11 Creek and Lee Creek."

12 And my question is just simply, based on
13 what? Is it based solely on the maps, or is there
14 other information that you've based your conclusion on?

15 A. You know, I'm not even sure what I mean
16 there, Mr. Harris.

17 Q. Okay.

18 A. Hang on here a minute.

19 I'm not sure what I mean there, quite
20 honestly. I mean I -- I -- it might have been a
21 reference to --

22 Q. That's okay.

23 A. Yeah.

24 Q. If you don't, that's okay. That's fine.

25 A. Yeah, I'm not -- I'm not even really sure

1 what I meant.

2 Q. And Mr. Manwaring asked this question. It
3 said, "Viewed as a natural hydrologic change, the
4 altered flow path of Stroud Creek does have the
5 potential to affect administration of Lee Creek and
6 Stroud Creek water rights under the principle of futile
7 call."

8 A. Uh-huh.

9 Q. And is that statement based upon what you
10 ultimately discovered in 2020, that the water was --
11 most of the water was coming in below the diversion,
12 the upper diversion?

13 A. Yeah. And that was just a reflection
14 that -- that, you know, sometimes these changes happen
15 and no one's responsible for them. They're just
16 natural and -- but they do affect the dynamics on the
17 stream and...

18 Q. But if a water user like McConnells haven't
19 done anything to try to put the channel back over many
20 years but they still call for their water, and they
21 came to you as the watermaster, what would you tell
22 them?

23 A. Well, probably what I told them last year.
24 I mean we [unintelligible] --

25 Q. Which is you're -- you're stuck with the

1 natural channel that's there?

2 A. Well, no, I -- you know, I would probably
3 tell them the same thing Mr. King said earlier, is, you
4 know, if they want to pursue options to alter a
5 channel, they're going to have to get a stream channel
6 alteration permit. They just can't go out and do that.
7 That's against State -- State law.

8 But, you know, they may have some options
9 to either pursue a legal alteration of the channel to
10 get the water back where they felt that it belonged or
11 file a water right transfer to put in another point of
12 diversion to recoup the lost water. You know, they're
13 pursuing one of their legal options, I believe.

14 Q. Yeah. I want to ask you just quick
15 questions about stream morphology. And if you don't
16 think you're qualified to say much on it --

17 A. I'll let you know.

18 Q. -- you'll let me know. Okay.

19 High-flow events have a tendency to change
20 stream channels; would you agree with that?

21 A. I agree with that.

22 Q. So in this particular case, if the Kauer
23 Ditch had been used historically to take some of those
24 floodwaters, it would keep those flooding events from
25 really altering those lower channels; would you agree

1 with that?

2 A. Yeah, I think that's a fair statement.

3 Q. Okay. Let's have you look at your second
4 e-mail, which is Exhibit 17. And I think in the first
5 paragraph you've identified some -- some potential
6 legal issues with how 74-157 was decreed; correct?

7 A. Correct.

8 Q. But it does say, you're inclined to agree,
9 that in the absence of development, flows from the east
10 spring would probably not go into Stroud Creek?

11 A. Yeah, that was my determination at the time
12 and --

13 Q. Okay.

14 A. -- I'd still stand by that.

15 Q. But the west springs you would say is
16 tributary to Stroud Creek, which then goes into Lee
17 Creek?

18 A. That's what I observed on the ground.

19 Q. I think I'm just about done. I just have
20 to -- well, I'll ask this question.

21 In a minute Mr. Whittaker, Jordan
22 Whittaker, is going to go over the diversion structures
23 that are up there. And perhaps I was mistaken, but my
24 understanding is that there are measuring devices in
25 place, and that you've actually participated in taking

1 measurements up on some of those -- some of those
2 weirs.

3 A. Well --

4 Q. Is that correct?

5 A. Yes. By the second time I went up there,
6 Jordan had installed a weir on the east spring. I
7 don't know if that weir is still there. But, you know,
8 by the time I went up there the second time, he had --

9 Q. Yeah.

10 A. -- he had installed a weir on the east
11 spring, and we were able to get a measurement of that.

12 Q. Was that .8 cfs? Do you recall?

13 A. That seems correct. It was -- it was right
14 around 1 cfs. .8 might be correct.

15 Q. Okay.

16 A. I don't remember. As I said, I don't have
17 my notes.

18 On the west spring Jordan had installed
19 something akin to a submerged orifice, although only it
20 wasn't submerged on both sides, and so it didn't really
21 fit the formula, but I went home and I played with some
22 different discharge formulas based on a submerged
23 orifice that was free flowing on one side.

24 And I'm not real comfortable with those
25 formulas, but I came up with something that was, if I

1 recall, somewhere just a little over 1 cfs measured
2 through that. But I wasn't real wild about that
3 measuring device, just because it really wasn't
4 standard. And I think I had suggested that maybe he
5 try something different there.

6 MR. HARRIS: Okay. I don't have any further
7 questions.

8 THE HEARING OFFICER: Okay.

9 Mr. Bromley, it's your witness. Did you
10 have anything more?

11 MR. BROMLEY: Yeah, just -- just one or -- one
12 or would, Cindy.

13

14 REDIRECT EXAMINATION

15 BY MR. BROMLEY:

16 Q. I think I heard you say that you would
17 use -- use the USGS as a guide.

18 A. For?

19 Q. Location.

20 A. Oh, well, the Department uses USGS stream
21 names as -- as a guide for identifying water sources,
22 and particularly named tributaries, because our rules
23 say a spring or any other source that, you know, flows
24 into some other source you're to name the first named
25 stream as the tributary. And we use the USGS stream

1 names as a guide for that.

2 Q. I think one of the potential consequences
3 of this case is if you're not using something that's
4 objective like a map, or various maps in the case of
5 Scott King's testimony, he looked at three maps -- the
6 USGS quad, the Lemhi map, and this 1954 engineer's
7 map -- I think one of the consequences potentially is
8 that if you don't use maps as a guide -- and I'm just
9 curious whether you agree with this or not, but does
10 that lead others within the basin to attempt to
11 manipulate streamflow for their own benefit to the
12 detriment of others?

13 MR. MANWARING: I would object to that form of
14 question. But I'll let you decide what you're going to
15 do.

16 THE HEARING OFFICER: Yeah, I'm going to sustain
17 that. That's a strange question.

18 MR. BROMLEY: That's fine. Withdraw -- I
19 withdraw the question.

20 THE HEARING OFFICER: Okay.

21 Q. (BY MR. BROMLEY): So, Cindy, on these east
22 and west springs that you were discussing, the water
23 right again is tributary to Lee Creek; correct?

24 A. The face of the water right says "tributary
25 to Lee Creek", correct.

1 Q. So in order to alter that, a transfer would
2 be needed?

3 A. That -- yes, that -- at this point, since
4 the Court has spoken and we have the final unified
5 decree, that would be the only way to alter.

6 Q. Okay.

7 A. Alter the tributary, yeah.

8 Q. And there was a transfer that was -- was
9 filed?

10 A. There was.

11 Q. And it was -- do you recall, was it
12 withdrawn?

13 A. Yeah, it was abruptly withdrawn. I never
14 really understood why.

15 MR. BROMLEY: Okay. I don't have anything
16 further.

17 THE HEARING OFFICER: Okay. Coming around. I
18 like nodding -- noes all the way around.

19 Anything more, Mr. Harris?

20 Okay. Thank you, Ms. Yenter. Back to your
21 regular duties.

22 THE WITNESS: Back to my regular job, my day
23 job.

24 THE HEARING OFFICER: Mr. Bromley, you had
25 identified a couple other names, I think, on your

1 potential witness list.

2 Do you intend to call any -- anybody else?

3 MR. BROMLEY: No. As I said at the beginning,
4 Mr. Cefalo, we have three witnesses that we're going to
5 call.

6 THE HEARING OFFICER: Okay.

7 MR. BROMLEY: You know, reserve the right at
8 least to recall them if we need to. But no, no
9 intention of calling anybody else. So with that,
10 nothing further.

11 THE HEARING OFFICER: Okay. Thank you,
12 Mr. Bromley.

13 (Recess.)

14 MS. YENTER: All right. There's that one going.

15 THE HEARING OFFICER: Okay. Welcome back.
16 We're back on the record.

17 Mr. Harris, it is your turn. We've decided
18 that you can go first among the protestants,
19 representing -- now you represent both James Whittaker
20 and Whittaker Two Dot Ranch. And -- and so your
21 witnesses are kind of joint witnesses between those
22 two -- those two protestants; right?

23 MR. HARRIS: That's correct, yep.

24 THE HEARING OFFICER: Okay. So if -- go ahead.

25 MR. HARRIS: Just because we'll take one kind of

1 out of order, just because of cattle needs.

2 So we'll have Merritt Udy come up.

3 THE HEARING OFFICER: Okay, Mr. Udy. Come on
4 up.

5

6 MERRITT UDY,

7 having been called as a witness by Protestants James
8 Whittaker and Whittaker Two Dot Ranch, was duly sworn
9 and testified as follows:

10

11 THE HEARING OFFICER: Mr. Udy, do you solemnly
12 affirm that the testimony you're about to give is the
13 truth, the whole truth, and nothing but the truth?

14 THE WITNESS: I do.

15 THE HEARING OFFICER: Okay. Have a seat.

16

17 DIRECT EXAMINATION

18 BY MR. HARRIS:

19 Q. Could you please state your name and
20 address for the record.

21 A. My name is Merritt Udy. I'm at 238 Big
22 Eight Mile Road, Leadore.

23 Q. What's your current occupation?

24 A. I'm a rancher and the watermaster.

25 Q. Okay. For which water district?

1 A. 74Z.

2 Q. And how long have you held that position?

3 A. I -- I took over for Paul Maughan late
4 June 2019.

5 Q. And what creeks or watersheds do you
6 administer?

7 A. Big Eight Mile and Lee Creek.

8 Q. And did you say Paul Maughan was the
9 watermaster before you?

10 A. Yes.

11 Q. Did he resign?

12 A. No, I -- I guess he got fired.

13 Q. Okay. And did you want to become a
14 watermaster for the -- all the glory or the high pay?

15 A. No, I -- that year I had trouble getting my
16 water, so I thought it was a good idea so I could get
17 my own water, and then the pay, I guess, the small pay.

18 Q. When you first became watermaster, what
19 training did you receive?

20 A. Oh, very little. But I'm familiar with all
21 the points of diversion. I just got the book of how
22 much water to each water user, priority dates, yeah.

23 Q. And so what have you done to familiarize
24 yourself with the water rights and the diversions in
25 the Lee Creek drainage?

1 A. Just -- just done the job, learn as I go.

2 Q. So you -- you visited the -- you visit the
3 diversions, adjust, then measure?

4 A. Yeah.

5 Q. Okay. And does your water district include
6 Stroud Creek?

7 A. Yes.

8 Q. Okay. And you actually live kind of close
9 to all this; right?

10 A. Yeah, I do.

11 Q. Okay.

12 A. I've been -- I've lived there since 2012.

13 Q. Okay. Were you involved with the Water
14 District prior to 2012? Did you serve on the board?

15 A. No. I've just been a water user for both
16 Eight Mile and Stroud Creek.

17 Q. Okay. Are you familiar with Bruce
18 McConnell's water rights?

19 A. Yes.

20 Q. Okay. How are you familiar with them?

21 A. Just what I've got in writing, that his
22 1883s, the amounts.

23 Q. Okay.

24 A. I was -- well, the -- my first day on the
25 job Bruce took me to both diversions. I didn't know

1 that one was not legal, but...

2 Q. So --

3 A. I don't even know if Bruce knew if it
4 wasn't legal. They were just his two diversions.

5 Q. But you've been to both of them?

6 A. Yeah.

7 Q. Okay. And you understand it's the lower
8 one that he's trying to add to his water rights in this
9 proceeding?

10 A. Yeah, it's the lower one that got shut off
11 last fall.

12 Q. Were you involved in a water administration
13 dispute in 2020 that involved McConnell, Cindy Yenter,
14 and the Whittakers?

15 A. Just -- I don't know what you mean by
16 "dispute," but --

17 Q. Did Mr. McConnell call you and make a call
18 for his water?

19 A. Right. Yeah.

20 Q. Can you tell me what the -- what that
21 conversation was.

22 A. Basically he wasn't getting what he thought
23 he should, so --

24 Q. At the upper or the lower point, or both?

25 A. I think maybe -- maybe just the total --

1 Q. Okay.

2 A. -- of the two.

3 Q. Okay.

4 A. So up in the Ericsson property, where I was
5 making the adjustments, I kept -- kept adjusting, but
6 nothing would show up down below. And Whittaker had
7 explained to me what I was supposed to be doing, but I
8 misunderstood, so all the water was not going to Bruce
9 that I thought was going.

10 Q. When you say up on the -- the Ericsson
11 property, I'm going to have you look up here on the
12 map. And I know an aerial photo is sometimes a little
13 hard to see, but I'll represent to you what's outlined
14 in blue is the Tomchak property, and then the Ericsson
15 property is there in white, kind of in this area.

16 Where were you adjusting? And I can zoom
17 in a little further. Do you recall?

18 A. Right there at 74-369, yeah.

19 Q. Right here?

20 A. Right there.

21 Q. Is that the headgate that's in the yard
22 right there --

23 A. Yeah.

24 Q. -- from Stroud Creek?

25 A. Yeah, it's -- it's Stroud Creek.

1 Q. Okay. And --

2 A. So when I would make my adjustment and it
3 wouldn't show up as Bruce's, I finally walked it and
4 figured out...

5 Q. When you say you walked it, you walked
6 downstream?

7 A. Yeah. I walked down from there. And it --
8 it all makes a turn toward 74-157. And then from
9 74-157 you can turn it down to Bruce.

10 Q. Okay. And in a letter -- well, I'll have
11 you turn -- there's some binders in front of you. It's
12 Exhibit 5. There was a little letter that was
13 addressed to you?

14 A. Where would it be at?

15 Q. It's -- there's a tab. It should be 5.

16 A. 5?

17 Q. Yeah. Be right after that tab.

18 A. Okay. I got it.

19 Q. Do you recognize that letter?

20 A. Yeah, I received this.

21 Q. Okay.

22 A. As an e-mail, I believe.

23 Q. So as a result of this -- was it as a
24 result of this letter that you walked down through the
25 Whittaker property?

1 A. Yes.

2 Q. Okay. And what -- what did you -- when we
3 get down to Mr. McConnell's upper diversion point,
4 what -- what did you observe down there?

5 A. So --

6 Q. If I can zoom in. The red dot is his lower
7 diversion point. This dot right here is his upper.

8 A. So at the -- the upper, what we observed if
9 you walk into the jungle, that the Stroud -- Stroud
10 channel goes -- hits -- hits Lee Creek below his
11 diversion.

12 Q. Okay. And in your view, the water that was
13 coming down that side channel is Stroud Creek?

14 A. In my opinion, it's Stroud Creek. I don't
15 know what else it could be.

16 Q. Okay.

17 A. Because when you walk from the 74-157 down
18 it -- it stays in -- stays in that channel.

19 Q. Great. Thank you.

20 On this letter there's some instructions
21 there at the bottom for you to obtain some -- some
22 measurements.

23 Do you recall making those measurements?

24 A. Yes.

25 Q. Can you remember today what those were?

1 And if you can't, that's okay. But the first one was
2 to obtain a measurement at McConnells' authorized point
3 of diversion?

4 A. Yeah, I made both -- I made measurements at
5 McConnells' upper and lower, and then we sent the
6 74-157 west spring to McConnell. And I believe it was
7 about 1.2 cfs. And then 24 hours later it showed up in
8 McConnells' lower diversion. The upper diversion
9 didn't seem to be affected.

10 Q. Okay. In -- there's an expert report
11 that's been submitted in this matter. And I don't need
12 you to refer to it, but I think it accurately states
13 that in your 2019 watermaster report, there's no record
14 of delivery under Water Right 74-157, which are the
15 spring -- that's the spring right that Whittaker owns.

16 A. Right.

17 Q. Do you know -- can you explain why that
18 wasn't in the report?

19 A. Basically, I didn't know what I was doing
20 yet. Took on late June, and I didn't even know that
21 spring existed.

22 MR. HARRIS: Okay. I have no further questions.

23 THE HEARING OFFICER: Okay. Mr. Bromley?

24 MR. BROMLEY: Sure.

25 ///

1 CROSS-EXAMINATION

2 BY MR. BROMLEY:

3 Q. So, hey, Mr. Udy. My name's Chris Bromley,
4 attorney for Bruce and Glenda McConnell. Rob was
5 calling you "Merritt."

6 Okay if I do the same?

7 A. Sure.

8 Q. Great. So you said that -- that Bruce
9 called for his water.

10 Did he -- was it a phone call? Was it in
11 writing? Did --

12 A. Just a phone call that he was low, yeah.
13 So I would go to the -- that 369 point and make an
14 adjustment, and it still wouldn't show up. So then I
15 walked the creek to see why.

16 Q. Okay. And so then when you walked the
17 creek down, you went down to the Whittaker place?

18 A. Yeah. I -- from that point of 369, I just
19 assumed it was going to Bruce and to Jordan. But when
20 you walk it, it makes a sharp turn where they've made a
21 ditch to collect the spring. And so there at that
22 spring you can make an adjustment to send it to Bruce.

23 Q. I see. So you -- you walked what you
24 thought was the channel, I guess, of Left Fork Lee
25 Creek or Stroud Creek?

1 A. Yeah.

2 Q. And then you ended up on the Whittaker
3 place?

4 A. Yeah.

5 Q. And then you hit a sharp turn, is what you
6 were saying.

7 And is that -- that's a collection ditch,
8 in your mind or --

9 A. It looks like they dug a ditch to collect
10 the west spring.

11 Q. Okay. So then did you see a channel of --
12 of Left Fork Lee Creek or Stroud Creek, whatever we
13 want to call it, then continuing on through the
14 Whittaker place? Or how did water then get down to
15 McConnells?

16 A. Yeah, there's -- there's a spot there at
17 the 74-157 west spring where you can distribute the
18 Stroud channel and the spring or you could take the
19 spring to Whittaker, yeah. It was back and forth all
20 summer long on the spring that -- after -- after
21 walking it, I figured out that the Stroud -- how to get
22 the Stroud channel to Bruce.

23 Q. Okay. And how did -- why -- why, in your
24 opinion, is it the Stroud channel and not something
25 else that's at the Whittaker place?

1 THE HEARING OFFICER: Can you rephrase that
2 question?

3 MR. BROMLEY: Sure.

4 THE HEARING OFFICER: Yeah.

5 Q. (BY MR. BROMLEY): So you said you -- you
6 put water into something to -- originally you made some
7 adjustments in water to get it down do Bruce; right?

8 A. Right.

9 Q. And so then you walked further down and you
10 ended up at the Whittaker place, and there's this ditch
11 that's intercepting flow; is that right?

12 A. Right.

13 Q. Okay. And then you did something to get
14 water, I guess, out of the ditch and put it on
15 downgradient?

16 A. Yeah, there's -- there's board -- a board
17 headgate.

18 Q. And then it goes -- the water then that you
19 took out from that board headgate goes into what?

20 A. It's the Stroud channel. But it's -- it
21 can have the spring water with it or not, whichever way
22 you want it.

23 Q. Uh-huh. And then you think that's --
24 that's the Stroud -- you think that's the Stroud
25 channel?

1 A. I -- I think -- in my opinion, it's the
2 Stroud channel, because you can follow it clear from
3 Everson.

4 Q. Okay.

5 A. Yeah.

6 Q. Did you walk that channel all the way down
7 to Bruce's place?

8 A. Yes.

9 Q. Yeah.

10 A. I walked it from the spring down to Bruce's
11 upper diversion.

12 Q. And then into the jungle?

13 A. Yeah, through the jungle, over the river,
14 through the woods.

15 MR. BROMLEY: Right. Okay. Nothing further.

16 THE HEARING OFFICER: Okay.

17 Oh, you're still back there, Steve.

18 MR. JOHNSON: I'm good.

19 THE HEARING OFFICER: Okay. Mr. Johnson, any
20 questions?

21 Okay. Mr. Manwaring?

22 MR. MANWARING: Yes.

23 THE HEARING OFFICER: Go ahead, if you've got
24 any --

25 MR. MANWARING: Thank you.

1 THE HEARING OFFICER: -- questions for this
2 witness.

3
4 CROSS-EXAMINATION

5 BY MR. MANWARING:

6 Q. (BY MR. MANWARING): McConnells' upper
7 diversion, is there a headgate there?

8 A. No. I don't -- no, I don't think there is.
9 There's just a dam.

10 Q. Just a bank?

11 A. Yeah.

12 Q. So how can you measure flow of water at
13 that bank?

14 A. You don't measure there. The measuring
15 device is down the ditch quite a ways.

16 Q. So in order to measure what's going
17 through --

18 A. Yeah, there's no adjustable headgate.

19 Q. Okay. There's no lockable, adjustable
20 headgate at that upper diversion?

21 A. No, not at this time.

22 Q. And the only way to measure what's coming
23 through that diversion is to go even further downstream
24 to where there's a measuring device?

25 A. Yeah.

1 Q. About how far away is that?

2 A. Oh, I'd say between a quarter mile and a
3 half a mile.

4 Q. So you really don't get a very good
5 measurement as to what's at the dam?

6 A. Not so much. His lower diversion, the
7 measuring device is a lot closer to the diversion.

8 Q. So when you were talking about making some
9 manipulations upstream on Stroud to try to get some
10 more water down, you weren't seeing anything change at
11 the upper diversion?

12 A. No.

13 Q. Were you seeing any change clear down at
14 the measuring device?

15 A. No.

16 Q. Did you check both places?

17 A. Well, I -- at the diversion you -- there's
18 nothing. You can just eyeball it, yeah.

19 Q. So there's not much to check?

20 A. No.

21 Q. So you have to go clear down to the
22 measuring --

23 A. No, I -- pretty much I just go to the
24 measuring devices on both of the diversions. I didn't
25 spend any time at the diversions, because there's

1 nothing to adjust.

2 Q. Yeah.

3 A. But the way that that Lee Creek is set up,
4 Whittaker and Ericsson get their water rights, and then
5 Bruce basically gets what's left until -- if Bruce gets
6 his decree, then Tomchak and Mrs. Smith get theirs.

7 Q. They get the crumbs?

8 A. Yeah.

9 Q. Yeah. Okay. You mentioned that you've
10 walked Stroud Creek and that's defined as a channel
11 from Everson?

12 A. Well, I know where -- I know where Everson
13 hits Stroud, so I know that that's Stroud on down. And
14 I've walked it, yes.

15 Q. Have you walked it from where Everson hits
16 Stroud?

17 A. No, not from there.

18 Q. Okay.

19 A. But I used to have that ranch leased, and I
20 know -- I know that's pretty clear.

21 Q. And how do you know it's pretty clear?

22 A. Just from driving my four-wheeler up and
23 down it.

24 Q. Hasn't changed over the years?

25 A. I -- not with -- I wouldn't say

1 drastically, no.

2 Q. And from the point that -- I think you said
3 157 on down to the --

4 A. To his upper diversion I have walked.

5 Q. His upper diversion.

6 And then you've walked Stroud Creek even a
7 little further to see it go below that diversion?

8 A. Yeah, it -- it -- Stroud -- that Stroud
9 channel comes in below Bruce's upper diversion.

10 Q. And how confident are you that's the same
11 channel, that's the Stroud Creek that we're talking
12 about that flows all the way out?

13 A. I'm confident, because I walked it from the
14 157 spring.

15 Q. And is -- are there --

16 A. And nothing --

17 Q. -- other channels that confuse you when
18 you're down there, or is it a pretty straight channel?

19 A. It's pretty -- there's no -- like I know
20 where Porcupine hits Lee Creek, and I know where Lee
21 Creek is. And Lee Creek never came close to this other
22 channel.

23 Q. Okay. So back to the question I had, when
24 you're down close to where Stroud is coming into Lee
25 Creek, are there different channels in there, or is it

1 still one, clear channel that you walk?

2 A. Yeah, there's two channels. There's what I
3 call the Stroud channel and the Lee Creek channel.

4 Q. And --

5 A. They don't -- they don't go back and forth.

6 Q. They don't go back and forth?

7 A. No.

8 Q. Okay. That's what I'm painfully trying to
9 get at but couldn't.

10 A. Okay.

11 Q. So thank you for that.

12 I don't think I have any other questions.
13 Thank you.

14 A. Okay.

15 MS. FOSTER: I'm good.

16

17 EXAMINATION

18 BY THE HEARING OFFICER:

19 Q. Mr. Udy, you may have said this, and I'm
20 jotting down thoughts and notes quickly, so I apologize
21 if you've already answered it.

22 As the Stroud Creek channel comes down from
23 the Whittaker Ditch, that 369 ditch I think is what you
24 call it, and, you know, it stays in the Stroud Creek
25 channel until you -- until it hits this spring ditch,

1 maybe a ditch coming from the west springs, then that
2 Stroud Creek water is taken out of the Stroud Creek
3 channel at that location, at the spring -- spring area,
4 right, or at this Whittaker spring ditch; is that
5 right?

6 A. It's hard to say what -- what was the
7 original channel or not, because it -- this ditch that
8 collects the spring, it looks like it's been there
9 forever.

10 Q. It collects Stroud Creek too?

11 A. Yeah, the Stroud -- Stroud Creek and the
12 spring are in this same -- it's running -- the ditch
13 runs opposite of the channel to try to collect the
14 spring.

15 Q. After it makes that 90-degree turn, what is
16 the distance between that -- that intersection point
17 between Stroud Creek and that ditch and where water
18 then gets turned back out of the ditch into Stroud
19 Creek? Do you have any estimate for what that distance
20 is where you can then turn water back to the Stroud
21 Creek channel?

22 A. From the -- from like where they collect --
23 where they collect the spring back to the original
24 channel? It's pretty short distance.

25 Q. Are we talking hundreds of feet? 50 feet?

1 12 feet?

2 A. Oh, probably a hundred yards.

3 Q. A hundred yards?

4 A. At the most.

5 Q. Okay. Where water then would be taken out
6 of the Stroud Creek channel into that west ditch or
7 that ditch coming from the springs, then you turn it
8 back toward the Stroud Creek channel at that -- you
9 said there was some boards that you can manipulate --

10 A. Yeah.

11 Q. -- turn back water back down?

12 A. Yeah.

13 Q. Is that correct?

14 A. Right. But this -- this has been there so
15 long that I can't tell where the original channel was
16 or if this might be the original channel. I -- but it
17 appears that it's been dug to collect the spring,
18 because the springs are sporadic through there.

19 THE HEARING OFFICER: Okay. So hundred --
20 hundred yards between those two points.

21 Okay. Thank you.

22 Mr. Harris, this is your witness. Did you
23 have any other questions for Mr. Udy.

24 ///

25 ///

1 REDIRECT EXAMINATION

2 BY MR. HARRIS:

3 Q. Just to piggyback off of Mr. Cefalo's
4 testimony -- and I don't know if an aerial photo helps
5 or not, but there's -- if we zoom in, there's a circle
6 right there that's a pipeline intake.

7 Are you familiar with that?

8 A. Let's see.

9 Q. I believe the channel that you were talking
10 about collecting west springs comes in this way.

11 A. Oh, yeah.

12 Q. But I -- and then this is where it can be
13 turned back.

14 Is that -- if I zoom in, does that help you
15 out?

16 UNIDENTIFIED SPEAKER: And that's an older photo
17 that you see.

18 THE WITNESS: Yeah, I don't recognize the sheds.
19 The sheds aren't there anymore, are they?

20 UNIDENTIFIED SPEAKER: No. That was --

21 THE WITNESS: Okay.

22 UNIDENTIFIED SPEAKER: -- a milking barn.

23 THE WITNESS: Okay. Yeah, I -- I recognize
24 this --

25 Q. (BY MR. HARRIS): Okay. So --

1 A. -- spot.

2 Q. -- Mr. Cefalo -- this is where water from
3 west springs comes in, and then it goes down
4 approximately a hundred yards, and there's a structure
5 there that would turn what's left back down this way.

6 Is that -- do I understand your testimony
7 correctly?

8 A. Yeah. Zoom out a little bit.

9 I think that ditch is right through here --

10 Q. Yep.

11 A. -- going opposite direction.

12 Q. Yep.

13 A. All these springs are right in here.

14 Q. And then it takes the 90-degree turn --

15 A. And then it takes --

16 Q. -- and it appears --

17 A. Yeah, and then it -- and then it -- so this
18 is your Stroud channel and it's collecting these
19 springs, then --

20 THE HEARING OFFICER: A ditch channel -- or the
21 ditch, you mean?

22 THE WITNESS: A ditch, yeah.

23 THE HEARING OFFICER: Yeah.

24 Q. (BY MR. HARRIS): Okay.

25 A. So I don't know. The original channel

1 might have went that way. I don't know.

2 Q. But then you say after -- as I zoom in, it
3 looks like there's kind of an overflow. You walked
4 basically this --

5 A. Yeah. I walked from right there down to
6 Bruce's upper diversion.

7 Q. And there's a road right here.
8 Are you --

9 A. Yeah.

10 Q. -- familiar with this road?

11 Okay. So is this the approximate location
12 of the channel that's collecting?

13 A. Yeah. It looks so small right now. But
14 there's -- there's quite a bit of water there.

15 MR. HARRIS: Okay. I was just trying to help
16 pave what you were talking about, James. That's all
17 the questions I have.

18 THE HEARING OFFICER: Okay.

19 Mr. Bromley?

20 Any other parties have questions?

21 MR. BROMLEY: Sure.

22

23 RECROSS-EXAMINATION

24 BY MR. BROMLEY:

25 Q. So, Merritt, you said that the original

1 channel might have gone that-a-way, like back over to
2 the left --

3 Is that to the west?

4 MR. HARRIS: Yeah, this would be west, this way.

5 MR. BROMLEY: Yeah.

6 Q. Is that what you meant? It might have gone
7 to the west, but you don't know?

8 A. Yeah, I don't. I don't know if this is
9 original or if this has been dug. But this is the way
10 the water goes. But up here where you're thinking
11 you're --

12 MR. HARRIS: Oops, sorry. I pushed the wrong
13 button.

14 THE WITNESS: Yeah.

15 THE HEARING OFFICER: Can you actually pull that
16 back out --

17 THE WITNESS: Can you go this way?

18 THE HEARING OFFICER: -- Mr. Harris --

19 MR. BROMLEY: Yeah.

20 THE HEARING OFFICER: -- so we can see the
21 channel coming from --

22 THE WITNESS: Up here is where you make your --

23 MR. HARRIS: There is it is, yep.

24 THE WITNESS: -- your adjustments. And you
25 assume this is Bruce's water and this is Whittakers'

1 water, so you assume it's headed to Bruce. And then
2 when you walk it, it comes down and goes -- and goes
3 this direction.

4 Q. (BY MR. BROMLEY): And the -- so the water
5 going through there has been turned into ditches, it's
6 been channelized.

7 And what you're saying is you're not really
8 sure where Stroud Creek channel was up there
9 originally?

10 A. Yeah, I don't know for originally.

11 Q. Uh-huh.

12 A. But I know from -- from that point down
13 it's all in one original-looking channel.

14 Q. But you also said that the ditch looked
15 like it had been there forever too?

16 A. Yeah, it's -- the ditch is probably older
17 than me.

18 Q. So it's -- it's difficult to say, then,
19 what -- what's natural, what's been human caused; is
20 that true?

21 A. Yeah, I wouldn't know.

22 MR. BROMLEY: Nothing else.

23 THE HEARING OFFICER: Okay. Any other
24 questions, Mr. Manwaring?

25 MR. MANWARING: No.

1 THE HEARING OFFICER: Mr. Harris?

2 MR. HARRIS: No.

3 Thank you. Good luck with your cows.

4 THE HEARING OFFICER: Okay.

5 THE WITNESS: Thank you.

6 MR. BROMLEY: Thanks.

7 MR. HARRIS: Okay. We'll call Jordan Whittaker.

8 THE HEARING OFFICER: Okay. Come on up, Jordan.

9

10 JORDAN WHITTAKER,

11 having been called as a witness by Protestants James

12 Whittaker and Whittaker Two Dot Ranch, was duly sworn

13 and testified as follows:

14

15 THE HEARING OFFICER: Mr. Whittaker, do you
16 solemnly affirm that the testimony you're about to give
17 is the truth, the whole truth, and nothing but the
18 truth?

19 THE WITNESS: I do.

20 THE HEARING OFFICER: Thanks.

21 I don't think I've had you under oath in
22 any water matter before. Okay.

23 THE WITNESS: This is my first time ever
24 testifying in a water hearing.

25 THE HEARING OFFICER: All right. Good. Let's

1 make it your last.

2 THE WITNESS: Good? It's not good.

3 THE HEARING OFFICER: Make it your last. That's
4 okay.

5 THE WITNESS: It's not good at all.

6

7 DIRECT EXAMINATION

8 BY MR. HARRIS:

9 Q. Jordan, could you please state your name
10 and address for the record.

11 A. Jordan Whittaker. 201 Gilmore Avenue,
12 Leadore, Idaho 83464.

13 Q. And are you a member of an entity known as
14 Whittaker Two Dot Ranch, LLC?

15 A. I am.

16 Q. Okay. And in your capacity as a member or
17 manager of the LLC, you filed a protest in this matter;
18 is that correct?

19 A. Yes.

20 Q. Okay. And what is your current occupation?

21 A. I'm a farmer slash rancher slash irrigation
22 contractor in irrigation design.

23 THE HEARING OFFICER: Okay.

24 Q. (BY MR. HARRIS): Okay. You install center
25 pivots?

1 A. Yes.

2 Q. Okay. And Whittaker Two Dot Ranch, LLC,
3 owns farm and ranch ground in Lemhi County; correct?

4 A. Yes.

5 Q. Okay. And have you -- because of that,
6 have you become familiar with water rights and water
7 distribution?

8 A. Yes. Now, I've been involved in water
9 right administration my entire life.

10 Q. Are you generally familiar with McConnells'
11 transfer that's the subject of today's hearing?

12 A. Yes.

13 Q. Okay. How did you become familiar with
14 that?

15 A. I had to become familiar with it because I
16 feel -- I feel threatened by it.

17 Q. Okay. And I'm going to pull up -- I might
18 be going back and forth a little bit, but this is a GIS
19 map. And this doesn't capture all of your property.

20 But does the -- this green line generally
21 depict the property that Whittaker Two Dot Ranch owns
22 in this Lee Creek, Big Eight Mile drainage?

23 A. Yes.

24 Q. And the irrigation place of use for your
25 Water Right 74-157 is depicted in that yellow single

1 hatch; is that right?

2 A. Yes, that's correct.

3 Q. Okay. And so how long has the Whittaker
4 family owned that property?

5 A. There's two different ranches there. But
6 the one to the west we've owned since the 1920s.

7 Q. Okay. And you're generally familiar with
8 where McConnells' property is located --

9 A. Yes.

10 Q. -- right?

11 And are you familiar with his points of
12 diversion on Lee Creek?

13 A. I am now.

14 Q. Okay. Have you ever -- have you been
15 there?

16 A. Yes.

17 Q. Okay. Do you know who the watermasters for
18 74Z were before Mr. Udy?

19 A. Yeah. We had Paul Maughan who was -- for
20 about half a year. I think he was 2018 and half a year
21 in 2019. Gerald Peterson did it for, I believe, a year
22 before that. And then we had Tom Udy. And then prior
23 to that it was Calvin Udy on Lee Creek.

24 Q. And was Calvin --

25 A. Or Calvin Whittaker, excuse me, on Lee

1 Creek.

2 Q. And was Calvin the watermaster for a long
3 time?

4 A. Forever.

5 Q. Okay. Is he still alive?

6 A. No. He's passed away.

7 Q. Okay. And this is always a loaded
8 question, but how old are you?

9 A. I'm 42.

10 Q. 42. Okay. How -- how -- how long would
11 you say, then, have you been familiar with this
12 property?

13 A. You know, I was moving cows and running
14 haying equipment from the time I was 5, and changing
15 dams with my dad. I've been there.

16 Q. Okay.

17 A. 37 years I would say I've been very well
18 acquainted with that property.

19 Q. So you -- you've become familiar with this
20 property and this watershed; is it fair to say?

21 A. Extremely.

22 Q. Okay. And did the prior watermasters
23 adjust headgates and deliver water?

24 A. Yes.

25 Q. Okay. What I want to do now is we'll kind

1 of go to Google Earth. And I think it would be helpful
2 for you to just walk through your -- the distribution
3 system and point out certain features on the property.

4 So we'll start here. And just generally, I
5 believe this is --

6 A. Can I --

7 Q. Yeah, go ahead and stand up.

8 A. -- go up to the board?

9 Okay. So this would be our Stroud Creek
10 diversion, the senior water rights for 2.4 cfs. And it
11 turns --

12 Q. So right as you stand up, I'm going to have
13 you grab a book. Sorry.

14 If you could turn to our exhibit book at
15 Exhibit 159.

16 MS. YENTER: Maybe the other book.

17 THE HEARING OFFICER: I think that's that one.

18 MS. YENTER: Yeah.

19 THE HEARING OFFICER: The photos all the way at
20 the back.

21 MR. HARRIS: Yeah.

22 THE HEARING OFFICER: Yep.

23 Q. (BY MR. HARRIS): That picture.

24 A. Okay.

25 Q. Is -- is where you're pointing there -- I

1 call it in the yard. And I should clarify this.

2 Whose property is this?

3 A. It's Rosalie Ericsson's now. It was my
4 Uncle Cal's.

5 Q. Okay. And so is the location you've
6 identified, is that what is depicted on that picture?

7 A. Yeah, that's the headgate that sits right
8 there.

9 Q. Okay. And so then go ahead and continue
10 down the system.

11 A. Okay. It -- yeah, it crosses the weir
12 that's Exhibit 161 right there. There's a brand-new
13 weir from what was there that was an old wood one, and
14 it was starting to fail. I replaced that one prior to
15 the irrigation season starting.

16 Water crosses there.

17 Q. Real quick, if you turn the page -- or 160,
18 is that -- is that that measuring device?

19 A. Yes. That's the one that's currently
20 there.

21 Q. Okay.

22 A. Okay. So the water goes over the weir,
23 goes into an intake for a bubbler, hits the pipeline,
24 and goes kind of north, maybe northeast just a slight
25 bit to a pivot point that's, oh -- it's probably --

1 probably a mile to the pivot point from this point
2 right here.

3 Q. Okay.

4 A. The excess water that the -- if there's
5 excess water that the pivot doesn't take, it goes down
6 this ditch, which unites with -- with bypass flow for
7 the bubbler and heads that direction.

8 Q. So this is -- right here, this is an
9 overflow ditch here to the right?

10 A. Yeah.

11 Q. And then over here to the left is -- is
12 what is not diverted from Stroud Creek?

13 A. That's correct.

14 Q. Okay. And then at some point it crosses
15 the fence and goes into some brushy area.

16 A. Yeah.

17 Q. Could you just describe --

18 A. So this -- this was a ditch that was dug
19 right here to kind of keep my Uncle Cal's place from --
20 or his pasture from where it just built up the ice.
21 And so they dug this ditch to the willows. And then in
22 the wintertime the ice builds up in here.

23 But what's happening now is Stroud Creek
24 goes in here and it fans -- fans out through these
25 willows and gets -- gets to be a general mess. It's

1 knocked the fence down between Grady Ericsson and I.

2 And then it goes up to our west spring
3 ditch and gets gathered up for multiple -- multiple
4 locations, and then comes back into our ditch.

5 Q. So let's -- let's talk about the west
6 spring. So I'm pulling this up right here. It appears
7 that there's a channel starting about right here
8 that --

9 A. Yeah, it starts at the fence line between
10 us and -- and Johnson, Steven Johnson. And it just --
11 it just peters through here, and I don't know. We
12 could measure it if we wanted to, but it's like a
13 quarter of a mile long, and it picks up 5 inches here,
14 5 inches there, all -- all the way along. And by the
15 time it gets over here, there's typically 80 -- 80 to
16 90 inches, depending on the time of year, that gets
17 gathered up by it.

18 Q. Okay. So the west springs comes in this
19 location. And I want to back up just a little bit,
20 because it now appears that there's a channel coming in
21 from the east.

22 A. So if you -- if you zoom out just a little
23 bit, you can see -- see the east ditch, east springs
24 ditch, starts almost clear back over at the road to
25 Shanna Foster's house. But it -- it winds along and it

1 picks up little, bitty springs.

2 It used to be a lot more effective when
3 this place was being flood-irrigated, but it's being
4 sprinkled now. But it used to pick up Uncle Cal's
5 wastewater and some springs, but now it just -- it just
6 has some springs that it's picking up.

7 And comes -- comes back in here and about
8 the fence line --

9 Q. Do you want me to zoom in?

10 A. Yeah.

11 So at Cindy's request, I put a weir in
12 right here at the fence line last year. And we
13 measured that. Her, Merritt, and I measured about
14 40 inches of water right there.

15 Q. And I'm going to have you look at
16 Exhibit 161. It's the last picture.

17 A. Okay. At 161 is -- is the weir. So I
18 don't know where the picture went to that actually has
19 the -- has that weir on it, but it's missing.

20 Q. Okay. So 161 is -- is not the east springs
21 weir?

22 A. No.

23 Q. Okay.

24 A. That's the west spring weir that's there
25 currently.

1 Q. Okay. I apologize. I don't know if I have
2 any springs one.

3 A. So --

4 Q. But there is --

5 A. There's a weir that sits at this location
6 that both -- that Merritt measured and Cindy -- Cindy
7 and I were there when Merritt measured. There was
8 about 40 inches.

9 Q. Okay.

10 A. And it's a brand-new Cippoletti.

11 Q. So then the -- this ditch -- well, go ahead
12 and keep describing there.

13 A. Okay. So the -- so the -- all of this was
14 built initially to flood-irrigate before the pivot got
15 put in in 1996.

16 So in order to flood-irrigate this hill,
17 the water from Stroud Creek, the water from the east
18 springs, and the water from the west springs all got
19 channeled to -- this is a -- this is a ridge, basically
20 it's like a Continental Divide between -- between Lee
21 Creek and -- and Big Eight Mile.

22 And -- anyway, this -- the Stroud Creek
23 water, the West Fork water, and the East Fork water all
24 came together and followed the very tippy top of this
25 ridge and went -- went out to flood-irrigate where this

1 pivot is now.

2 Q. So if I zoom out --

3 A. Yeah. Yeah.

4 Q. -- just a bit.

5 A. There was a mess of ditches out there when
6 I was a kid.

7 Q. Okay.

8 A. But now most of the time Stroud water,
9 there's not enough Stroud water to fill the pivot.
10 It -- it takes 3 cfs to fill the pivot, and Stroud --
11 the Stroud water rights were 2.4. And so since 19- --
12 well, we used to have a diesel motor that pumped it. I
13 can't remember what year we put in the gravity line.

14 But all this water used to flow out the
15 ditch. And then we had a diesel pump out there that
16 pressurized the pivot. We put in a gravity line I'm
17 guessing sometime around 2000. And then we picked up
18 the west spring water. And there's a little electric
19 pump that boosts it to give us enough water to run --
20 to run that Harry's pivot.

21 And there's -- there's typically some water
22 left. If we shut off the pivot or anything like that,
23 all the water come -- all of our water is supposed to
24 come down this ditch and go to areas that we
25 flood-irrigate, which would be this -- what we call

1 Harry's Swamp.

2 And then there's one more bubbler on down
3 this ditch just at that location on the edge of the
4 pivot that drops -- drops a mainline off the edge of
5 the hill where there's some hand lines that pick up the
6 corners.

7 Q. So ditch comes down, and then at this
8 location there's --

9 A. Yeah, there's one more bubbler right there
10 that drops the mainline off the hill into -- to the --
11 to the corners. You notice that the -- when you pulled
12 up the -- like -- like this area here and then this
13 area right in here.

14 Q. Okay.

15 A. And then the flood irrigation occurs --
16 occurs down through there.

17 Q. Just as a point of reference, is there
18 something constructed here now where this is disturbed
19 or --

20 A. That's just a big clay pit.

21 Q. Okay.

22 A. The main point of reference is this tree
23 has got to be -- that tree is as old as -- as there's
24 been people in the valley. It's amazing.

25 Q. Okay. So let's come back now to where all

1 of these come together.

2 Is there a control structure there by your
3 bubbler intake?

4 A. There's a control structure right here.
5 And when Gerald was administering the water, he just --
6 he just put a little spike in the board and -- where he
7 thought 50 to 80 inches was going by. And -- and then
8 the -- the water was spilling -- Tom Udy -- when Tom
9 Udy was administering water, the water went out up in
10 the Kauer Ditch, so he didn't -- he -- I mean it was
11 just an earthen dam, and the whole spring went to us.

12 Q. Okay. Currently, though, this -- if
13 there's excess water, it looks like there's a channel
14 that comes down.

15 A. It --

16 Q. Is that --

17 A. It can be turned out. So prior to the 2020
18 irrigation season, it was -- everything with Paul was a
19 lot of work. And so I -- I -- I had been raised
20 knowing and understanding that the spring was ours and
21 that McConnells received Stroud water.

22 And when they were no longer taking it down
23 the Kauer Ditch, it got a lot more complicated to
24 administer, so I put in -- I put in two weirs so that
25 we could measure their water in and measure it back

1 out, which in effect, with a little simple algebra, you
2 end up with how much water is left in our ditch.

3 Q. So the water that comes down from here --
4 this is on your property?

5 A. Correct.

6 Q. Have you walked from this point?

7 A. I've walked the entire length.

8 Q. And you were here during the testimony of
9 Merritt Udy just a minute ago; correct?

10 A. Yeah.

11 Q. Is there anything you want to add to his
12 testimony about where some of the features are with
13 this water?

14 A. You know, this is -- this area here,
15 what -- what they're calling the channel, is -- is a
16 ditch. And there's a ditch here.

17 Q. Is that the old Bohannan Ditch?

18 A. That's the old Bohannan Ditch. And it --
19 it kicked water out onto the bar on the opposite side
20 of this knoll.

21 Q. Okay.

22 A. I walked this section by myself. Well,
23 I've walked it multiple times. I've walked it -- I
24 walked a fair amount of it with Bryce. I walked it by
25 myself. I didn't walk this with Merritt.

1 The section -- none of you guys are -- so
2 far, with the exception of Merritt, nobody's really
3 been right.

4 If you scroll down to where the culverts
5 are.

6 Q. Okay.

7 A. So this deal here is not the channel.
8 That's just a little -- that's just a little, piddly
9 spring that comes out. This is Lee Creek, and this is
10 Stroud Creek.

11 From this area down there's -- there's a
12 natural ridge that -- from someone who can run grade at
13 a half an inch in a trackhoe over a quarter mile,
14 there's a substantial ridge that runs down through
15 here. I -- I, for the life of me, can appreciate why
16 me, Merritt, the sheriff, the deputy, Dave Tomchak, I
17 mean you dump some Kool-Aid in right here, you can do
18 whatever you want, the water is not deliverable to --
19 to this upper point of diversion.

20 Q. So you're -- you've walked it, and
21 you're --

22 A. I've -- I've -- I've crawled through the
23 brush, number one, because I had very strong incentive
24 to walk through the brush last year, as I was watching
25 an awful lot of my livelihood disappear.

1 Q. Okay. Any other details on the irrigation
2 system, your current irrigation system, that you want
3 to point out?

4 A. You know, it's a pain in the ass. And it's
5 not my fault, I guess, would be part of it. I'm...

6 Q. All right. I want to talk now about the
7 2020 administration matter. Well, actually, let me
8 back up. There's a couple things I do want to ask you.
9 So if you want to go ahead and have a seat.

10 I'll have you switch binders. Well, we
11 won't do it that way.

12 You've been here during Cindy's testimony
13 where she said at least preliminarily the east springs
14 appeared to not be tributary to Stroud Creek.

15 Did you hear that testimony?

16 A. Yeah, I did.

17 Q. Okay. Do you agree with that?

18 A. I -- I -- I agree that preliminarily -- but
19 I mean in my mind if you've been working around water
20 your whole life, you should -- it's not even a
21 question. It's an absolute certainty that they're not
22 tributary. I mean water doesn't run uphill. That
23 ditch is cut on grade, a very -- a very flat grade. It
24 doesn't run very fast. It's cut there to bring that
25 water to that ridge. It's not -- it's not a -- it's

1 not a matter that needs more investigation. It just
2 needs smarter people.

3 Q. But you -- you did have Bryce Contor go up
4 and do a technical evaluation?

5 A. Yeah. No, I had Bryce come and do a
6 hydrological analysis of it.

7 Q. Okay. Okay. I want to talk to you now
8 about the 2020 administration matter.

9 When did you first in 2020 become aware
10 that there was potentially an issue with water
11 distribution in this drainage?

12 A. So the end of May -- I -- I -- I had taken
13 Merritt and I'd shown him the new weirs that I put in,
14 and I thought I explained how to get Bruce's water by
15 my deal. I -- and I -- I wear a million different hats
16 and go a million different places, but the last week in
17 May we didn't have our 2.4 cfs, so there wasn't any
18 Stroud water coming down into the west spring. So the
19 headgate was completely shutting off any flow to go on
20 down to Bruce.

21 And the lady that I have that was
22 changing -- changing the floodwater and kind of
23 watching over the -- I've got a slew of kids that
24 change pipe for me.

25 And Morena [phonetic] -- I don't speak good

1 enough Spanish, and she doesn't speak good enough
2 English, but anyway, she kept saying that they weren't
3 hardly getting any water down to the lower bubbler,
4 which catches water for the -- for the pipeline. And I
5 wasn't going there myself. I just -- I just figured
6 that the creek hadn't come up yet.

7 And then shortly after the 1st of June,
8 I -- I drove up there in person.

9 And if we could scroll back up, I could
10 show you where it all happened. Go back up to where
11 that old house is on this map.

12 Q. Well, I'm just -- what communication did
13 you receive that there was an issue? Did that come
14 from the watermaster or directly from Mr. McConnell or
15 from another --

16 A. In my recollection, it was Dave who had the
17 issue, because he wasn't -- they weren't getting any
18 water. And I -- in my mind, I was like, Well, hell,
19 I'm not getting any water either.

20 And so anyway, I rode up here on my
21 motorbike. And about right here on this hillside my
22 ditch is blown out and there's a slew of water just
23 pouring down into the swamp. And I knew we had some
24 problems, so I went up here to this headgate, switched
25 it to turn all the water to Bruce until I could get my

1 ditch fixed.

2 Q. Okay.

3 A. And at that point in time, I believe it
4 would be somewhere around the 5th to the 10th of June
5 is when Cindy became involved. And I -- I felt like
6 we'd resolved the issue because I -- after I fixed the
7 ditch, I went back to taking between 50 and 80 inches,
8 enough just to get my pivot filled and run a few hand
9 lines, and turned the water -- the rest of the water
10 loose to Bruce. But --

11 Q. Let me ask you, are you familiar with the
12 Kauer Ditch?

13 A. Yeah, I'm familiar with it.

14 Q. Okay. How are you familiar with that?

15 A. So we have a State section.

16 Q. Here's 36.

17 A. Anyway, so if you park the horse trailer at
18 Uncle Cal's place, because this road back through here
19 going towards Porcupine is miserable.

20 Q. Sorry.

21 A. But anyways, you park the horse trailer to
22 Uncle Cal's place, and then you ride your horse back on
23 this road, you cross the Kauer Ditch. Every year when
24 we're taking care of cattle up here on the school
25 section, we ride across the Kauer Ditch.

1 Q. Okay. And do you know what year the Kauer
2 Ditch was -- was officially closed?

3 A. I know it had water in it in 2015. I
4 don't -- I don't -- I don't believe it ever had any in
5 2016.

6 Q. So just as a general matter, can you
7 describe, as you were growing up, how water was -- how
8 the Kauer Ditch was involved with water distribution in
9 this drainage.

10 A. So any -- any water above -- there's 4 cfs
11 goes down to Uncle Cal, 2.4 cfs goes to us. And then
12 Cal, I think, had an arbitrary number in his head.
13 Maybe it wasn't arbitrary. I see in some of the --
14 some of the stuff you guys submitted there was a 4 cfs
15 quantity at one time coming from the -- coming from
16 this side.

17 But at any rate, Cal had a number. Cal
18 turned a number in this ditch, and then he sent 2 more
19 to us. He probably didn't send the 2 that goes to him,
20 and then he filled them, filled -- filled Tomchak
21 and -- and Shanna up.

22 And things got a lot more complicated when
23 Cal retired. And then after Tom Udy died, then -- then
24 everything got screwed up.

25 Q. So since 2015 -- or you haven't seen water

1 in the Kauer Ditch after that year?

2 A. No.

3 Q. Okay. And now the way that water -- well,
4 let me -- let me withdraw the question.

5 A. The nice -- the nice thing about -- the
6 nice thing about that was is everything that just came
7 down here -- I mean Cal -- Cal turned us down our 2.4.
8 Everything that came in the west and the east springs
9 just -- we just got.

10 So there -- I mean there's -- there's a
11 giant -- not a giant, but there's a big -- this west
12 springs ditch is an earthen dam that's been there --
13 been there for longer than anybody in this room's
14 probably been here.

15 Q. And -- and I'm just talking about what was
16 historically done.

17 But now the way water gets down to Lee
18 Creek is through your property, whereas before it was
19 turned down the Kauer Ditch, it would inject into the
20 Right Fork?

21 A. It would inject into Porcupine and then go
22 on down.

23 Q. Okay. Okay. And that arrangement, in your
24 view, was explained in the Idaho Supreme Court opinion
25 from 1954; correct?

1 A. Yeah.

2 Q. And -- but you would agree that that is not
3 on the face of the spring water right at this point?

4 A. No.

5 Q. Were the water rights affected by that
6 decree, were they ever amended, even in the Lemhi
7 adjudication, to describe this arrangement?

8 A. No.

9 Q. And the Supreme Court didn't say you had to
10 go file a transfer in the opinion, they just said
11 here's an agreement?

12 A. Yeah.

13 Q. Okay.

14 A. And it worked for a hundred years.

15 Q. Okay. There's been a lot of discussion
16 about -- so I'm going to take you back to Stroud Creek
17 and label the features. But you say you've walked
18 Stroud Creek as it -- during -- on the lower parts of
19 your property. And there's -- at least on the USGS
20 map, there's an indication that the Stroud Creek
21 channel came in in the southeast to the northeast.

22 Are you familiar with that property?

23 A. I am now.

24 Q. Okay. Have you located anything -- any
25 sort of a remnant channel on that property?

1 A. No.

2 Q. Okay. What -- describe for me what you
3 found there?

4 A. So water crosses out of our property, and
5 it's -- it's a very well-defined channel all the way --
6 all the way down. And there's a pretty good -- pretty
7 good ridge in the middle of it.

8 Q. So there's -- there's an elevation change
9 right there that would direct water --

10 A. Yeah.

11 Q. -- further down?

12 A. I mean it -- it wouldn't -- it's not like
13 you could put a canvas dam at any point in that channel
14 and divert it over.

15 Q. Okay. Now, in 2020 there was a letter that
16 was sent by Cindy to Merritt Udy to do some
17 measurements.

18 Did you accompany him --

19 A. Yes.

20 Q. -- with those measurements?

21 A. Yes.

22 Q. And you were here during his testimony
23 earlier?

24 A. Yeah.

25 Q. Do you agree with how he described the

1 measurements that were taken and the results?

2 A. Yeah. Yeah. No, we -- I -- that's -- you
3 know, there were -- there were a couple things that
4 occurred. I believe it was on the 31st of July we'd
5 gotten the sheriff to turn our water back on, the
6 spring water back on. And that was a Friday. And so
7 our water ran through the weekend.

8 And then on Monday Cindy came back up and
9 she said, "Well, this will be an interesting test to
10 see whether it's a futile call." And so we -- we
11 turned the water all back down. I wasn't -- it's not
12 like I was excited for a test, but anyway, Cindy turned
13 the water back down.

14 And when we went down to that lower point
15 of diversion, Cindy had said, just kind of halfway in
16 passing, and I just only halfway heard it, that
17 McConnells only had one point of diversion. And then
18 it took about 48 hours for the water to actually show
19 up at the lower point of diversion.

20 But I was mainly intrigued, possibly -- I
21 mean partially because I had that prick in my ear from
22 Cindy saying there was only one point of diversion held
23 by McConnells. And then the other interesting thing
24 was is we observed absolutely no change in the upper
25 point of diversion. And so all our water went down to

1 that lower one.

2 And so I thought about that for a while.

3 And then I dug out the Green Book and looked up
4 McConnells' water rights, and then I got that map
5 essentially right there and I located the -- located
6 the point of diversion and determined that their upper
7 point of diversion had to be it.

8 And at that point in time it was -- it was
9 getting late into the evening. But I walked the
10 channel the rest of the way down from -- through the
11 BLM. And I found that that was Stroud channel that
12 came out below theirs and that it was a futile call.

13 And so I -- I had the sheriff and his
14 deputy come up, as well as Merritt. I can't remember
15 whether it was Steve or Chip. I think it was Chip.

16 UNIDENTIFIED SPEAKER: It wasn't me.

17 THE WITNESS: Yeah. I think -- and Chip came up
18 there. And so there was quite a flock of us walked it.
19 And, you know, you can -- you can listen to -- you can
20 listen to your GPS director in the car, but if it tells
21 you to hang a left into a lake, just because it's the
22 damn map doesn't mean it's right.

23 And I mean you talk about -- you talk
24 about -- I've heard thing things about meandering and
25 braided channels. And it's not a meandering or braided

1 channel. And -- and it has the soil structure that
2 it's highly erodable.

3 Well, it's not. It's full of willows.
4 It -- the other thing is is that until 2000 -- 2016
5 there hasn't been any kind of -- any kind of flow
6 bypass -- bypass that west springs ditch. So if
7 that -- if -- if the Kauer Ditch has been used since
8 the '30s, it's been 90 years since there's been any
9 kind of -- any kind of flow go down -- go down that
10 channel.

11 Q. In 2020 you were ultimately able to use
12 Water Right 74-157 again; correct?

13 A. Yes.

14 Q. Okay. If this transfer is approved, it
15 would add a point of diversion below the current
16 confluence of Stroud Creek and Lee Creek; correct?

17 A. Yes.

18 Q. Why is that a concern to you?

19 A. Well, because the way the water rights are
20 structured right now, the historical administration
21 remains the same. They can't call for 74-157. If you
22 move that point of diversion down in the absence of any
23 kind of agreement, they're calling for -- for water
24 that they've never had.

25 Q. And you believe that would be an injury to

1 you?

2 A. I have no doubt it would be an injury. I
3 had to -- had to cut --

4 Q. What about -- what about others on Stroud
5 Creek?

6 A. You know, there's -- there's -- there's a
7 lot more injury to it than just me. There's an awful
8 lot of injury to Steve. Not just in his water
9 administration. When you -- when you take that water
10 essentially from one side of that Continental Divide to
11 the other, you make -- you make Harry's Swamp, which it
12 turned out to be last year infinitely drier.

13 And so all his water coming from Eight
14 Mile, his -- his ditch didn't work, you know.

15 Q. If --

16 A. Then the other thing is there's -- there's
17 no good channel. There's no efficient way for that
18 water to get through there. There's places where the
19 creek is 100 feet wide. And so when you -- when you
20 look at Tomchak and when you look at Shan, if it's
21 taking 8 cfs going past my place, there was at least
22 12 cfs available up there where the Kauer Ditch is, and
23 there's only maybe 6 cfs getting down to them, you
24 have -- you have an awful lot of loss that's being
25 stood by junior water right holders that don't have

1 much to go on anyways.

2 Q. If the Hearing Officer were to approve this
3 transfer but subordinate McConnells' water rights to
4 your rights and the others on Stroud Creek, would that
5 resolve your protest?

6 A. Yeah. No, that would -- that would resolve
7 my protest.

8 Q. Okay.

9 A. That's --

10 Q. So you don't have a problem with him using
11 the lower point of diversion to irrigate his ranch, do
12 you?

13 A. No. No.

14 Q. It's the administration effect potentially
15 on you that you're concerned about?

16 A. It's the administration effect on me.

17 Q. Okay. And if for some reason this
18 proceeding doesn't turn out like you had hoped, is one
19 of your options to pursue a District Court action over
20 the agreement?

21 A. It's -- it's absolutely what we have to do.
22 It's too expensive. It's too big of a loss not to
23 pursue.

24 Q. Is that something you hope to avoid?

25 A. Oh, absolutely.

1 I don't know about you, Bruce, but this is
2 making me old.

3 MR. HARRIS: No further questions. Thank you.

4 THE HEARING OFFICER: Okay.

5 Mr. Bromley?

6 MR. BROMLEY: Sure.

7
8 CROSS-EXAMINATION

9 BY MR. BROMLEY:

10 Q. So hi, Jordan. Chris Bromley, Bruce and
11 Glenda McConnell.

12 A. Yeah.

13 MR. BROMLEY: Rob, could you --

14 MR. HARRIS: Which map would you like? I can
15 pull up --

16 MR. BROMLEY: I think if you could just back
17 out.

18 MR. HARRIS: On the GIS map?

19 MR. BROMLEY: Yeah, I think that was -- yeah.
20 Try to go back to, you know, where Stroud Creek comes
21 into maybe that -- is it 369?

22 MR. HARRIS: The -- this Google Earth image
23 might be the best, so...

24 MR. BROMLEY: Yeah. If you can just back out
25 more.

1 MR. HARRIS: Oh, sorry.

2 MR. BROMLEY: Yeah. Maybe even more. Maybe a
3 little bit more. Sure. Let's give it a shot there.

4 Q. So, Jordan, where is -- where is Stroud
5 Creek in -- in this look at Google Earth? Is it in the
6 bottom left-hand corner, maybe?

7 A. So it's coming right along here.

8 Q. Yeah. Kind of in at a 45 going to -- I'm
9 not sure -- at the top of the [unintelligible]?

10 A. Where are we -- we going to?

11 Q. Yeah. It's --

12 A. Here?

13 Q. Yeah, I'm just taking it from the bottom
14 left-hand corner.

15 A. Okay.

16 Q. Okay. And so that's -- that's Stroud
17 Creek?

18 A. Yes.

19 Q. Where is -- so where's the diversion from
20 Stroud Creek?

21 A. Which one?

22 Q. Your 369.

23 A. 369 is.

24 MR. HARRIS: Is that --

25 Q. (BY MR. BROMLEY): Sorry.

1 A. -- down in Uncle Cal's yard.

2 MR. HARRIS: Yeah. Did you want to see it on a
3 GIS map?

4 MR. BROMLEY: Yeah, I was just trying to trace
5 things, and it was a little hard for me to follow
6 the -- the drilled in --

7 THE WITNESS: 360 --

8 MR. HARRIS: Sorry.

9 THE WITNESS: That was uncalled for, Chris.
10 [Unintelligible.]

11 Q. (BY MR. BROMLEY): What did I say?

12 A. You said the drilled in, you started on
13 something.

14 Q. No, I was --

15 A. Anyway.

16 Q. Yeah. I wasn't going anywhere with it. I
17 promise you.

18 A. Okay. All right. Fine. That's good. My
19 mistake.

20 Right there is 369.

21 Q. Okay. So that's -- is that Stroud Creek,
22 then?

23 A. This is Stroud Creek right here.

24 Q. Okay. So that's -- that's then the
25 headgate --

1 A. Yeah.

2 Q. -- where you would divert water into your
3 diversion for 369?

4 A. Yes.

5 Q. Okay. So then where is -- where is water
6 then -- then measured?

7 A. Right there.

8 Q. Okay.

9 A. You could see the tail, tail coming out of
10 the Cippoletti.

11 UNIDENTIFIED SPEAKER: The weir.

12 Q. (BY MR. BROMLEY): Okay. And is that still
13 Stroud Creek?

14 A. No. That's our ditch.

15 Q. Okay. So then where does Stroud Creek --
16 Rob, if you could back out. I won't use
17 the --

18 UNIDENTIFIED SPEAKER: Right there.

19 Q. (BY MR. BROMLEY): Where does Stroud Creek
20 go?

21 A. So since 2016 it -- they regulate 2.4 to
22 us, and then it comes down this ditch here.

23 THE HEARING OFFICER: Down the channel?

24 THE WITNESS: Yeah. Well, it's a ditch.

25 But anyway, it goes down the ditch, and

1 then it spreads out in the willows here. That's where
2 it goes.

3 Q. (BY MR. BROMLEY): Okay. So Stroud
4 Creek -- you're in your Uncle Cal's yard there?

5 A. Yeah.

6 Q. That's where the diversion -- the headgate
7 is --

8 A. Yes.

9 Q. -- the diversion?

10 A. Yes.

11 Q. Where does Stroud Creek go from there? Or
12 does it not go? Does it just go into the ditches?

13 A. Yeah.

14 Q. Okay. So Stroud Creek, at your Uncle Cal's
15 place, goes into ditches?

16 A. Yeah. I mean so this -- this deal here is
17 a ditch that takes the water out of this little
18 pasture. And then after this ditch it just fans out in
19 the willows, and then it gets collected back up at
20 various points all along this.

21 Q. Okay. So then there are -- there are
22 ditches that are taking the water -- getting back into
23 the system that you're using to irrigate?

24 A. Yes.

25 Q. Okay. And then -- so then it continues to

1 go through this system of ditches.

2 And then you were talking about a center
3 pivot that I think was designed for what was it, 3.2
4 or --

5 A. 3 cfs.

6 Q. 3, yeah.

7 Where is at that center pivot again?

8 A. It would be out right here.

9 Q. Okay. Is -- is that a bluff? I -- since I
10 don't know the topography.

11 A. This is a big sagebrush ridge.

12 Q. Yeah.

13 A. Glaciers died right here and pushed that
14 mound up.

15 Q. Okay. So that -- that center pivot is up
16 above?

17 A. Well, it's -- it's -- I mean so this ditch
18 here is grade.

19 Q. Okay.

20 A. The water doesn't flow uphill. So it's
21 downhill from all of this.

22 MR. HARRIS: So maybe if I can interject.

23 Google Earth does have an approximate
24 footage.

25 THE HEARING OFFICER: No, I don't want it.

1 MR. HARRIS: Okay.

2 THE HEARING OFFICER: I don't need it. Go
3 ahead.

4 Q. (BY MR. BROMLEY): I'm just trying to
5 understand where that center pivot is.

6 It's above the channel of Lee Creek down
7 there; is that right?

8 A. Well, so there's a ridge. There's this
9 ridge in between us.

10 Q. Uh-huh.

11 A. And Stroud would be over here.

12 Q. Okay. So then backing out again, you go
13 into Uncle Cal's yard where the headgate is.

14 That's where Stroud Creek, it sounds like,
15 ends at his place, because you're not saying it's
16 channelized? It's going into the ditch system?

17 A. Yeah.

18 Q. And then some of it's then going into the
19 willows and then it's getting recaptured, and it's then
20 being brought down to the center pivot on the right
21 there, and there's a divide between the center pivot,
22 which is on the east side, and the -- the Lee
23 Creek/Stroud Creek/Left Fork Lee Creek drainage on the
24 west side?

25 A. Yes.

1 Q. Okay.

2 A. Yeah.

3 Q. So then water that's going into this ditch
4 system, it otherwise should have gone into Stroud
5 Creek, but there isn't a Stroud Creek to put it in to?

6 A. That's pretty accurate.

7 Q. Okay.

8 A. We've been -- we've been turning loose
9 the -- I take between 50 and 80 inches out of the west
10 springs.

11 Q. Okay.

12 A. That's what I was told was mine.

13 Q. Okay. And I'm -- you know, I'm just trying
14 to understand kind of the lay of the land. And it was
15 really helpful to understand where all of the ditches
16 are located.

17 So then where do you think Stroud Creek --
18 so it -- we know that it's not -- it stops, it seems
19 like, at Uncle Cal's place.

20 And then where do you think Stroud Creek
21 picks back up again?

22 A. So if you want to -- if you want to zoom in
23 right here, I think -- I think Stroud Creek went a
24 million different directions. I think that at some
25 point in time there's a -- there's a ridge right here

1 that was dug through by hand and the dirt's piled up.
2 You can find -- the only place that you can find open,
3 exposed gravels, like a -- like a historical stream
4 channel, is here.

5 And then could you scroll that way.

6 Right here.

7 THE HEARING OFFICER: I --

8 THE WITNESS: And right through there. And then
9 you can find an irrigation ditch.

10 THE HEARING OFFICER: I'm struggling because --
11 because this -- you know --

12 THE WITNESS: It's hypothetical.

13 MR. HARRIS: Okay.

14 THE HEARING OFFICER: Well, just the map is --
15 is going to be very difficult to track through all of
16 your questions, Mr. Harris, and through these
17 cross-examination questions. There's a lot of "here's"
18 and "there's." I'm not so interested in -- in pointing
19 at the map. I just want to hear how things exist on
20 the ground.

21 MR. HARRIS: Okay.

22 THE HEARING OFFICER: And so --

23 MR. BROMLEY: And so that --

24 THE HEARING OFFICER: Yeah.

25 MR. BROMLEY: Mr. Hearing Officer, that's what I

1 was trying --

2 THE HEARING OFFICER: Great.

3 MR. BROMLEY: -- to do, then, with Jordan, is to
4 get the explanation, that Stroud Creek shows up at
5 74-369 at the diversion at Uncle Cal's place. And then
6 the channel of it --

7 THE WITNESS: The historical channel --

8 MR. BROMLEY: We don't -- he doesn't -- it then
9 ends up in ditches, and we don't know where the
10 historical channel was.

11 And then my question to Jordan was, where
12 do you think the historical -- where do you think the
13 channel picks back up? Because we went through a
14 series of questions from Mr. Harris about --

15 THE HEARING OFFICER: And rather than showing me
16 on the map, have a seat.

17 MR. BROMLEY: Yeah.

18 THE HEARING OFFICER: And just answer the
19 question. Yeah.

20 MR. BROMLEY: And -- so the map, I was trying to
21 get my own brain oriented --

22 THE HEARING OFFICER: Uh-huh.

23 MR. BROMLEY: -- because we've been moving
24 around so much to help me --

25 THE HEARING OFFICER: Right.

1 MR. BROMLEY: -- with my question.

2 Q. So, Jordan, at Uncle Cal's place, Stroud
3 Creek is there, and then it goes into your headgate.

4 Stroud Creek, then, isn't on your place for
5 some length, because it's getting --

6 A. Yeah.

7 Q. -- channelized into ditches, it goes into
8 the willows with more ditches picking it back up,
9 putting it back into your -- the main ditches --

10 A. Uh-huh.

11 Q. -- is that right?

12 A. Yes.

13 Q. Okay. And then -- and then eventually it
14 makes its way to your center pivot, which is --

15 A. That's our -- that's our water rights that
16 go there.

17 Q. Yeah. And again, I'm just trying to
18 understand the system.

19 So then it ends up in the center pivot,
20 which is down there where the -- let's just loosely
21 call it the confluence area, where the culverts are?
22 It's over there to the east?

23 A. To the west.

24 THE HEARING OFFICER: To the west.

25 MR. BROMLEY: I'm sorry.

1 THE HEARING OFFICER: Uh-huh.

2 Q. (BY MR. BROMLEY): Okay. So that helps.

3 The Stroud Creek channel, then, is where?

4 A. The Stroud Creek channel picks --

5 there's -- there's a valley -- I mean the -- the grade,
6 water seeks the lowest place. That's where it's going
7 to go. And so below the Bohannan Ditch.

8 OPERATOR: Hello, there doesn't appear to be any
9 activity in this meeting. If you would like to stay on
10 the line until others join, please press 1.

11 THE HEARING OFFICER: Candice must have signed
12 off.

13 We're good. Go ahead.

14 THE WITNESS: Anyway, below the Bohannan Ditch,
15 there's -- the ridges kind of become more apparent and
16 the water is in the lowest place there.

17 Q. (BY MR. BROMLEY): Okay. So you've walked
18 downstream into the -- into the Lee Creek drainage, and
19 you've followed something that you think is Stroud
20 Creek or Left Fork of Lee Creek; right?

21 A. Yes.

22 Q. And that's your opinion?

23 A. It's what it is. I mean it's -- it's where
24 the water goes. It's what -- I mean I -- I had to say
25 I agree with Bruce. I agree with Cindy. I agree with

1 Merritt. I agree with everybody who -- who has seen
2 it, it comes out below their point of diversion.

3 Q. And you remember the maps we've looked at?

4 A. Oh, yeah.

5 Q. Okay. And so again, it's -- your opinion
6 is that this channel of Stroud Creek/Left Fork Lee
7 Creek --

8 A. You walk with your walk -- I mean if you
9 want to -- if you want to take your boots off, you'll
10 stay in water the whole way down. If you climb out and
11 go to the west, you walk across dirt the whole way
12 down. So it's -- it's Stroud water.

13 Q. Okay. And again, that's -- this is your
14 opinion, because we've looked at maps. Maps have their
15 own opinions. Mr. King's given his opinion.

16 This is your opinion; right?

17 A. It's -- it's the way it is.

18 Q. Okay.

19 A. It's not my opinion. It's the way it is.

20 Q. Okay. Well, it's your observation?

21 A. Sure.

22 Q. Okay. You weren't alive when this
23 litigation between the Kauers and the Whittakers
24 happened; right?

25 A. No.

1 Q. Okay. So again, your -- your statements
2 about this 1956 Idaho Supreme Court case, those are
3 also just your opinion?

4 A. They're my opinion based off of the
5 administration that I saw my entire life.

6 Q. But again, you're 42, so you were born --

7 A. Yeah.

8 Q. -- what, in the late '70s?

9 A. 1978, yep. Yeah.

10 Q. And water is really important in this
11 state; right?

12 A. It's extremely important.

13 Q. Yeah. In the Western United States it's
14 lifeblood?

15 A. Uh-huh.

16 Q. It's hard to do much without water.
17 Water rights are really important, too;
18 right?

19 A. Yep.

20 Q. And so the McConnells, you know, as you
21 pointed out, you went back to the Green Book, there was
22 one point of diversion.

23 McConnells are in a transfer proceeding;
24 you understand that?

25 A. Yes.

1 Q. And they're pursuing their legal remedy to
2 add a point of diversion?

3 A. Yes.

4 Q. Okay. And for something that -- and again,
5 it's the testimony was, and the opinion is that
6 something got missed, and they're pursuing their legal
7 options today to make a change.

8 You understand that?

9 A. Yes.

10 Q. Okay. So this 74-157 right, since water is
11 important -- I don't know if you recall the testimony,
12 but the documents have consistently shown throughout
13 history into the SRBA that these were springs tributary
14 to Lee Creek.

15 MR. HARRIS: I'm going to object. That
16 misstates what is in the Lemhi adjudication documents.

17 MR. BROMLEY: Okay. So I'll -- I'll rephrase
18 that, Rob. That's fair.

19 Q. In the Snake River Basin Adjudication, this
20 74-157 was claimed as Lee Creek -- I'm sorry, springs
21 tributary to Lee Creek; correct?

22 A. That's the way it appears on the paper.

23 Q. Yeah. And we looked at a notice of error
24 form that was signed by James Whittaker agreeing with
25 that.

1 Do you remember that?

2 A. Yes.

3 Q. Okay. And then the SRBA decree comes out,
4 and it explains springs tributary to -- to Lee Creek?

5 A. Yes.

6 Q. Okay. So then -- I mean I fully appreciate
7 that you understood that something was -- something was
8 wrong with 74-157, because if you turn to Exhibit 15 in
9 the white book that you've got there.

10 A. Well, appreciating that something was wrong
11 with it, I -- I don't know that I agree with that
12 statement.

13 Q. Okay. So let's -- let's look at
14 Exhibit 15.

15 A. I gotcha.

16 Q. Yeah. Can you turn to Exhibit 15, because
17 I'm not sure that you're --

18 A. I've got it right here.

19 Q. Yeah. That's not 15.

20 A. 1-5. [Unintelligible.]

21 Q. Yeah, there you go. Exhibit 15 at the
22 bottom right.

23 A. Yeah. Sorry.

24 Q. Okay. So do you know what this document
25 is?

1 A. No.

2 Q. Okay. I'll represent to you it's a water
3 right transfer receipt at the top corner.

4 Transfer No. 84508?

5 A. Yes.

6 Q. Okay. And it was filed by James Whittaker
7 and Paula Whittaker?

8 A. She's deceased.

9 Q. Okay. Who's James Whittaker?

10 A. That's him right there.

11 Q. Okay. Your father?

12 A. Yes.

13 Q. So let's turn to the second page, then, of
14 this application for transfer.

15 And do you see a line A at the bottom,
16 "Purpose of Transfer"?

17 A. Yes.

18 Q. And line 1, and then there's a box that's
19 checked "Other," correct, "Tributary"? Do you see
20 that?

21 A. Yes.

22 Q. Okay. And this -- this then has to do
23 with -- if you flip to the page 3, Water Right 74-157,
24 do you see that up there at the top?

25 A. Yes.

1 Q. Okay. And so then back on page 2, if you
2 flip back one page to "Purpose of Transfer," see the
3 line 3, "Describe your proposal in narrative form"?

4 A. Yes.

5 Q. And what is it -- what's written in the
6 underline part of that?

7 A. "The transfer proposes to update the
8 identified tributary. This water right utilizes water
9 from the identified source of springs to extinction.
10 The source springs does not actually flow into a
11 tributary water stream. No change to the point of
12 diversion rate, diversion rate, stock water amount, or
13 irrigation acres will be changing with this transfer."

14 Q. Okay. So what that -- you know, what do
15 you think that's saying in -- in plain English?

16 A. Well, what it's saying is that we didn't
17 feel like the tributary belonged on there. But what
18 the conclusion that we reached is, like Cindy said,
19 where your water right is or your point of diversion is
20 is where you're -- where you're allowed to divert.

21 And so we felt like with -- there was --
22 with Bruce McConnell's single point of diversion, he
23 didn't have the ability to call for this water right.
24 So in effect, it was correct.

25 Q. Okay. So McConnell has senior priority

1 dates, 1883?

2 A. No.

3 Q. Some of his water rights; correct?

4 A. Well, he can. But it's a futile call to
5 call for this water, because he can't get it, so the
6 water right was protected.

7 Q. Okay. And I recall Ms. Yenter saying that
8 a futile call then is -- you know, you mentioned futile
9 call is a case-by-case determination?

10 A. Yes.

11 Q. Okay. So then this transfer, if you'd turn
12 to Exhibit 18, was then withdrawn?

13 A. Yes.

14 Q. Is that what that says, "Withdrawal of a
15 transfer"?

16 A. Yes.

17 Q. Okay. And do you know why it was
18 withdrawn?

19 A. Because -- because it was a futile call,
20 and we felt like -- felt like the water right worked
21 the way it was, the way it was intended to work. Let
22 the historical administration stand.

23 Q. Okay. But for some reason you thought you
24 needed to file a transfer, and then you changed your
25 mind; is that -- is that accurate?

1 A. Yeah.

2 Q. Okay. And you understand that the
3 McConnells are here trying to pursue the legally
4 correct thing?

5 MR. HARRIS: I'm going to -- I'm going to
6 object. I think we've gone through this. It's been
7 asked and answered before, this question about
8 McConnells going through the transfer process. I think
9 he's answered why he withdrew it. So I think we've
10 gone through this before. That's my objection.

11 THE HEARING OFFICER: Okay. Your question was
12 the McConnells are seeking to add a second point of
13 diversion?

14 Q. (BY MR. BROMLEY): So your understanding is
15 there's a legal way to pursue corrections to water
16 rights, and a transfer is one of those ways; correct?

17 A. Yes.

18 Q. Okay.

19 A. But for a transfer to proceed, there can't
20 be injury to water rights.

21 Q. And --

22 A. And you guys injure my water right with
23 this transfer. So you put some conditions in there, we
24 all move forward, and we go on with life.

25 Q. Okay. And that -- Jordan, I completely

1 understand that. And that's why we're in a contested
2 case proceeding, and we have a Hearing Officer who's
3 going to make that determination, because everybody in
4 here has their own opinion, otherwise we wouldn't be in
5 here.

6 That Kauer Ditch point of diversion, that
7 was -- it's further up -- up drainage --

8 A. Yeah.

9 Q. -- right?

10 A. Yeah, it's up -- it actually is on
11 Tomchak's ground.

12 Q. But I don't believe we've seen that point
13 of diversion described on any of the water rights; is
14 that true?

15 A. That's true. It was theirs. As far as --
16 as far as we were concerned, we -- we -- we moved
17 through the SRBA process as best as we could. We have
18 an awful lot of water rights to wade through. And so
19 long as things like -- like they were represented to us
20 with the SRBA, so long as the administration stayed the
21 same as they were. We weren't going to mess with
22 McConnell because we didn't want McConnells' water. We
23 wanted him to have his.

24 MR. BROMLEY: Okay. Okay. Nothing further.

25 THE HEARING OFFICER: Okay.

1 Any questions for this witness,
2 Mr. Manwaring?

3 MR. MANWARING: Yes.

4 THE HEARING OFFICER: Go ahead.

5 MR. MANWARING: Thank you.

6

7 CROSS-EXAMINATION

8 BY MR. MANWARING:

9 Q. Back on Exhibits 159, 160, and 161.

10 A. Okay.

11 Q. I just want to make sure we're clear,
12 because I'm still somewhat fuzzy here. Not personally,
13 but I could be.

14 Exhibit 159 is a headgate?

15 A. Correct.

16 Q. Is that headgate in Stroud Stream or is
17 that in your ditch?

18 A. It's in the Stroud Stream.

19 Prior to the irrigation system, though, we
20 had lockable headgates, as Cindy asked for. So we'll
21 be putting one in here in the next week or so.

22 Q. So 159 is a headgate but that's in the
23 stream channel?

24 A. Yeah. Prior to 2015 all the water that
25 came down there just went to us, because the Kauer

1 Ditch was in existence. So the water that didn't go to
2 us either went to Cal or it went to McConnell or it
3 went to Shanna, Tomchak.

4 Q. Okay. I just want to make sure where that
5 headgate [unintelligible].

6 A. Yes.

7 Q. Exhibit 160, I think you said, is the weir?

8 A. Yes.

9 Q. And is that the same as 161?

10 A. No. This weir -- this weir's on Stroud
11 Ditch.

12 Q. When you say "this" one, which one do you
13 mean?

14 A. The 160.

15 Q. 160 is on the Stroud Ditch?

16 A. Yes, it's our upper -- upper point of
17 diversion.

18 Q. And when you say "Stroud Ditch," is that
19 the ditch you made, or is that the Stroud Stream
20 channel?

21 A. This is a ditch we made, a ditch somebody
22 made a long time ago.

23 Q. Okay. And that's the measuring device for
24 that ditch?

25 A. Yeah.

1 Q. Okay. 161 is what?

2 A. 161 is an open 2-foot Cippoletti right now.
3 And it -- it measures accurately as an open Cippoletti.
4 But what I've done to try and alleviate the situation
5 earlier was I -- there's bolt holes in it where you
6 could put a plate down to where it essentially will
7 only allow close to 80 inches through it, and then it
8 forced the rest of the water out of our ditch down
9 towards McConnell.

10 Q. So where is 161 located?

11 A. 161 is located -- you know that little
12 round -- funny, little, round thing that they pointed
13 out up there? It's just upstream from that.

14 Q. Oh, okay. Your funny, little, round thing
15 was a [unintelligible] --

16 A. It's an intake screen for -- for the
17 pipeline that -- there's a little pump there that
18 pressurizes the spring water into the pivot system.

19 Q. And I think you said that was a pump right
20 there?

21 A. Yeah. The round thing's a screen, and then
22 there's a pump just beside it.

23 Q. Okay. All right. Now, you've been talking
24 about walking that Stroud channel, particularly from at
25 least where the culverts are?

1 A. Yes. That's where the most people have
2 walked it.

3 Q. And it's your testimony that you can stay
4 within a clear channel when you're walking the Stroud
5 Stream?

6 A. Yes. Yes. Sorry.

7 Q. And that -- that Stroud channel is
8 unable -- is separated from the Lee Creek channel by a
9 rise in elevation of some kind?

10 A. Yeah, there's -- there's a pretty
11 substantial ridge between the two of them most of the
12 way down.

13 Q. What about upstream from the culverts, is
14 there still an elevation between them?

15 A. Yeah. The elevation actually gets greater
16 when you go upstream from the culverts. You can see on
17 the map, if you want to look. But it doesn't really
18 matter to me, that there's a -- there's an actual
19 ridge --

20 Q. You can just tell me.

21 A. -- there that comes kind of down Johnson's
22 fence line and ours that separates it, separates it.
23 And there's -- hasn't been -- hasn't been any
24 modification in any time.

25 Q. And would that same ridge elevation exist

1 on past where you've been talking about, the east
2 springs and the west springs?

3 A. Yes. Yeah, it's what separates Stroud
4 Creek from Porcupine.

5 Q. Okay. So even if you have ditches around
6 your springs area, you still have an elevation between
7 that Stroud tributary channel and what would be over on
8 Lee Creek?

9 A. Yeah, it didn't -- it didn't -- it didn't
10 flow to Lee Creek up -- upstream. It's -- it's too big
11 of a ridge. You're...

12 Q. You were being asked about where the Stroud
13 channel was on Cal's place.

14 I just want you to -- can you explain, if
15 you know, whether that historic stream channel is still
16 visible somewhere on that area, or it's if it's just in
17 the ditch?

18 A. There's -- there's an historic -- there's
19 gravel that looks like a hundred-year-old stream
20 channel kind of towards the far right. And it -- it --
21 to me it actually looks like at one time -- at some
22 point in history Stroud's been tributary to Big Eight
23 Mile, instead of Lee Creek. But it hasn't been -- I
24 don't know.

25 Q. Is there a channel along that right-hand

1 side of those trees you can see depicted on this map?

2 A. No, there's not. That's a fence line that
3 you see right there, and that's uphill in elevation.

4 Q. [Unintelligible.]

5 A. So this -- this is a -- this is a jack
6 fence right here, and this is an old wire fence that
7 the trees have all grown into right here. And this is
8 where the water goes right now.

9 Q. Okay. And part of the Stroud Creek channel
10 as it goes through I think it's Rosalie's place --

11 A. Yes.

12 Q. -- is there an old overgrown weir dam or
13 something in there that causes an obstruction of flow?

14 A. There's lots of stuff in there that pushes
15 it out of the -- pushes it all over.

16 Q. Is that part of the problem that you're
17 facing when you're trying to re-collect the flow from
18 Stroud Creek?

19 A. That's -- that's -- that's one of the main
20 issues.

21 Q. If there's a heavy runoff year or a heavy
22 downpour, let's say, how does the water flow all the
23 way down through Stroud? Does it have to go through
24 headgates or --

25 A. Yeah, if there's -- so prior to -- prior to

1 '16 if there was any kind of heavy flow, it would go on
2 around into our place and probably blow out the ditch
3 like it did again this year. But there -- there's not
4 anything that would make it over the dam without --
5 without opening that -- without -- without having the
6 headgate open.

7 Q. And from what you were able to determine, I
8 think you said even this last year, you can't like
9 put -- I think you said drop some Kool-Aid in the
10 [unintelligible] --

11 A. Yeah, you -- you --

12 Q. -- Stroud and put it in Lee Creek?

13 A. -- could put a bunch of dye in. You could
14 put whatever you want in it. It's not going to -- it's
15 not going to go over above their point of diversion.
16 That's the simplest way, if you want to see it.

17 Q. You were asked by Mr. Bromley whether it
18 was your opinion that the Stroud Creek channel goes
19 downstream from the upper diversion point at
20 McConnells.

21 Do you remember those questions?

22 A. Yeah. Yeah.

23 Q. Were you just rendering an opinion, or were
24 you stating your observation?

25 A. I was stating -- stating an observation,

1 stating -- stating the way it is. I'm not an attorney.
2 It's black or it's white. The water -- that's where
3 the water goes.

4 MR. MANWARING: I don't think I have any other
5 questions, Jordan.

6 THE HEARING OFFICER: Okay.

7

8 EXAMINATION

9 BY THE HEARING OFFICER:

10 Q. Mr. Whittaker, would you turn to 154. This
11 is that engineer's map.

12 So, you know, we're -- at this main
13 diversion dam that you have on Stroud Creek, you say
14 that that -- that the water passing the dam, that you
15 aren't diverting, that the water passing the dam is a
16 ditch.

17 What makes you say that that's a ditch?

18 A. Because below it, it's the Bohannon Ditch.
19 And so they -- they cut what seeped out of the dam into
20 a ditch. And then there was another ditch that came
21 over, and it forced it all out the Charlie Bohannon
22 Ditch.

23 Q. In this -- and you almost have to have
24 maybe a little bit of a magnifying glass --

25 A. In the Bohannon Ditch.

1 Q. -- can you identify, then, that location of
2 your Stroud Creek diversion on this map?

3 A. Give me just a second. The actual thing is
4 a lot bigger to look at.

5 Q. Yeah, I'm sure that the original is a lot
6 bigger.

7 A. So what was the question?

8 MR. HARRIS: Here's --

9 Q. (BY THE HEARING OFFICER): Can you
10 identify --

11 MR. HARRIS: Do you want me to --

12 THE HEARING OFFICER: Yeah, that's fine, if you
13 want to zoom in.

14 Q. Can you identify on this map your point of
15 diversion on Stroud Creek --

16 A. Okay.

17 Q. -- that main ditch that takes off.

18 A. Do you see it says "John Whittaker house"?

19 Q. Yep.

20 A. Okay. I believe that little letter "e"
21 there.

22 Q. So at least on this map, Mr. Whittaker,
23 that -- that channel headed off or that continues on to
24 the west on that -- sorry, on the west side, is
25 identified as Lee Creek?

1 A. So this was taken from a -- it wasn't just
2 hand drawn. It was -- it was taken from an aerial.
3 And so I think if you'd lay that on the USGS line, it
4 would probably -- probably line up with what that map
5 said and doesn't reflect what was actually there.

6 Q. But at least on this map, the -- the Left
7 Fork of Lee Creek channel continued on past the -- the
8 Floyd J. Whittaker Ditch?

9 A. Yeah, according to the map.

10 Q. Okay. There was some natural channel that
11 continued?

12 A. Yeah.

13 Q. And it follows roughly that same direction
14 of the channel that's there; is that true?

15 A. I -- yeah.

16 Q. Okay. Okay. And at least on this 1954
17 map, it then winds to the north until there's some
18 intersection here with the -- the Floyd J. Whittaker
19 Ditch, west springs ditch, I guess what we've been
20 calling west springs ditch --

21 A. Uh-huh.

22 Q. -- and that there's some intersection
23 there.

24 You say recently that as it crosses --
25 before it hits that west spring ditch that the water

1 fans out, and it's not in a single channel, I guess --

2 A. No, it's not.

3 Q. -- headed to the north, it fans out?

4 But it's still then captured by this --

5 A. West springs.

6 Q. -- west springs ditch and pulled over into
7 the common ditch system, as you described, connects
8 with the water coming from the south, which is called
9 east springs ditch, and all that flows together again
10 at this downstream location?

11 A. Uh-huh.

12 Q. Are you -- does -- we've looked at water
13 rights earlier, much earlier today for Rosalie
14 Ericsson.

15 A. Uh-huh.

16 Q. Is that -- those water rights are taken out
17 upstream, though?

18 A. Yeah.

19 Q. They don't share a point of diversion --

20 A. No.

21 Q. -- down here with you?

22 A. No, they're [unintelligible].

23 Q. Is there a water right -- are you familiar
24 with a water right that would allow diversion opposite
25 you into that --

1 A. No.

2 Q. -- other side?

3 A. No.

4 THE HEARING OFFICER: There's not a water right
5 there.

6 Okay. Okay. Mr. Harris, that's the
7 question I had.

8 But anything else?

9 MR. HARRIS: I don't have any follow-up.

10 THE HEARING OFFICER: Anything else?

11 MR. BROMLEY: Nothing.

12 THE HEARING OFFICER: Okay. Thank you,
13 Mr. Whittaker.

14 MR. HARRIS: Hold on. I'm zooming in and out.
15 That's to try to hypnotize you.

16 THE HEARING OFFICER: Making us dizzy.

17 MR. BROMLEY: You're doing a good job.

18 (Recess.)

19 THE HEARING OFFICER: Okay. We're back on the
20 record.

21 Mr. Harris, you can call your next witness.

22 MR. HARRIS: We'll call Larry Borstelman.

23 ///

24 ///

25 ///

1 LARRY BORSTELMAN,
2 having been called as a witness by Protestants James
3 Whittaker and Whittaker Two Dot Ranch, was duly sworn
4 and testified as follows:

5
6 THE HEARING OFFICER: Mr. Borstelman, do you
7 solemnly affirm that the testimony you're about to give
8 is the truth, the whole truth, and nothing but the
9 truth?

10 THE WITNESS: Yes.

11 THE HEARING OFFICER: Okay. Have a seat.

12

13 DIRECT EXAMINATION

14 BY MR. HARRIS:

15 Q. Larry, could you please state your full
16 name and address for the record.

17 A. It's Larry Borstelman. Box 70 -- or
18 376 Morgan Lane, Pocatello, Idaho.

19 Q. And I'm going to start off by asking you,
20 how old are you?

21 A. I will be 77 May 2nd.

22 Q. And you've been here part of the day at
23 this hearing discussing areas around Stroud Creek.

24 Are you familiar with the Stroud Creek
25 area?

1 A. Yes, I am. I was raised in that area ever
2 since I was born. And I left there shortly after I
3 graduated from high school.

4 Q. And what year did you graduate from high
5 school?

6 A. In 1962.

7 Q. Okay. And who was your father?

8 A. Harry Borstelman.

9 Q. Okay. And are you related to the Whittaker
10 family?

11 A. My mother was a Whittaker.

12 Q. Okay. And so did you irrigate the Stroud
13 Creek -- in the Stroud Creek area that we've talked
14 about?

15 A. Yes. I worked -- I worked in that area,
16 and from time to time growing up, I did irrigate, yes.

17 Q. Okay. Have you been on the Whittaker
18 property that we've talked about today where these
19 springs are located and further down where Stroud --

20 A. Yes.

21 Q. -- and Lee Creeks are?

22 A. Yes.

23 Q. For what reasons were you on the property?

24 A. Well, as a kid you like to go and do things
25 and you roam around. And being raised out in the

1 country like we was, why I roamed around through
2 those -- through that area pretty much all my life
3 growing up.

4 Q. Okay. So we've a couple times talked about
5 a place where there's some -- some culverts down close
6 to the Lee Creek channel and the Stroud Creek channel.

7 Are -- do you know the area that I'm
8 referring to?

9 A. Not -- that's one area that I couldn't
10 recollect.

11 Q. Okay. But as far as down in that lower
12 area of Lee Creek and Stroud Creek, there's been
13 testimony from Jordan Whittaker about what is down
14 there.

15 Did you hear that testimony here today?

16 A. Yeah.

17 Q. Are you familiar with that area?

18 A. Yes. And I'm sure I'm familiar with it.

19 Q. Okay. Is there anything in his testimony
20 that you would disagree with with how he described
21 those channels and the -- the elevation change in
22 between those two?

23 A. The way that Jordan described the
24 elevations down through there I pretty much agreed with
25 his testimony.

1 Q. Okay. And that's because you've -- you've
2 been on that property?

3 A. Yeah, because I -- I was raised there, and
4 I spent a lot of time there and listened to my father
5 because he irrigated the place for years and years and
6 years.

7 Q. When you say your father irrigated the
8 place, he irrigated the Whittaker property?

9 A. Yes.

10 Q. Okay. And you helped him with that work?

11 A. From time to time.

12 MR. HARRIS: Okay. I have no further questions.

13 THE HEARING OFFICER: Okay. Mr. Bromley?

14

15 CROSS-EXAMINATION

16 BY MR. BROMLEY:

17 Q. Hi, Mr. Borstelman.

18 A. Hi.

19 Q. Chris Bromley, representing the McConnells.
20 So Mr. Harris just asked you if you had heard Jordan's
21 testimony.

22 And you said you had?

23 A. Yeah.

24 Q. What was -- what was Jordan explaining in
25 that area down there below the culverts?

1 A. Well, he -- he was pretty much -- in the
2 way I recollect it and the way I comprehend it, is that
3 he was explaining how the lay of the land goes through
4 that area.

5 Q. Okay. And I recall Jordan talking about
6 some elevation changes.

7 Do you remember that?

8 A. Yes. The -- the only thing that I can
9 maybe say about that that I'm -- I'm sure of is that I
10 know how Stroud Creek ran down through there for all
11 the time that I was -- lived there and I was being
12 raised there. And it's pretty much the same as what
13 they described it to be.

14 Q. Okay. So you were saying you agree with --
15 with Jordan.

16 A. Yeah.

17 Q. And what I'm wondering is, so he was
18 talking about some elevation differences that was down
19 in that -- I think Merritt Udy called it the jungle
20 mess down in there.

21 What kind of elevation changes do you
22 recall? You know, was it like 10 feet in elevation
23 difference? a foot? Do you -- do you know?

24 A. Well, there's -- I'm -- I work in
25 excavation so I dig a lot of basements, so I shoot

1 grade a lot. So I understand what grade is. And I
2 understand you can't make water run uphill and it don't
3 make much -- it doesn't take much of a hill to prevent
4 water from running that direction. And if you could
5 make water run uphill, you'd be -- you'd have a
6 lucrative business.

7 Q. You could turn water into gold; right?

8 A. That's right.

9 Q. Yeah. So yeah, it doesn't take much grade,
10 then, for water to move one way or the other?

11 A. Yeah.

12 Q. You've -- do you recall being down in that
13 area?

14 A. Yeah. I mean I've been in that whole area.

15 Q. So when you've been down in that area, you
16 know, do you have to look up at some sort of elevation,
17 or is it all pretty much kind of in front of you?

18 A. Well, it's -- in some places the elevation
19 would -- you'd probably have to get an instrument out
20 to shoot the elevation to see what the difference is.

21 And I work with that all the time. And
22 sometimes you don't know. And unless you get the
23 instruments out and you shoot the elevation, oh, that's
24 2 feet higher than where we're at right now, you know.

25 Q. Right. So yeah, maybe in the neigh- -- so

1 we're not talking about tens of --

2 A. Yeah, we're not talking about gigantic
3 fields. In some of the places we are, but maybe some
4 places. But the way -- the way the channel come
5 through there when I was a kid, it's always been that
6 way as long as I can remember.

7 Q. Okay. And since you're talking about, you
8 know, water is finding the path of least resistance.

9 And then in high-flow events, in your
10 experience, have you seen water move rock around,
11 sediment around?

12 A. It's possible that it could, but it takes
13 a -- it usually takes more than the usual amount of
14 water to do that.

15 Q. And that area down there it's -- there's --
16 looking at the photos, it seems like there's a lot of
17 vegetation.

18 Is that what you remember?

19 A. Yes.

20 Q. Okay.

21 A. Yeah.

22 Q. Have -- did you ever walk the -- the Stroud
23 Creek channel from the Whittaker place from where Cal's
24 diversion was for the 369 right all the way down?

25 A. Down toward the -- to the north, you mean?

1 Q. Yeah. Downstream into Lee Creek walking
2 the channel.

3 A. I -- I've been through that whole area,
4 yeah.

5 Q. Okay. So that was some -- was that
6 sometime in the 19 -- you said you graduated from high
7 school in 1962?

8 A. Yeah.

9 Q. So that would have been sometime in the
10 1950s?

11 A. Yes, it would -- it would have been
12 probably from around 1950 to '62.

13 Q. Okay. So --

14 A. We moved there in 1948. And I think I was
15 4 years old when we moved there.

16 Q. Okay. This -- this is Exhibit 154.

17 THE HEARING OFFICER: It's open right in front
18 of you.

19 Q. (BY MR. BROMLEY): Yeah, there you go.
20 It's a colorful map.

21 THE HEARING OFFICER: That map.

22 Q. (BY MR. BROMLEY): Yeah.

23 THE HEARING OFFICER: Yep.

24 Q. (BY MR. BROMLEY): So you were then -- you
25 know, you graduated high school in 1962. So then you

1 were alive with good recollection when this map was
2 made in 1954, is my understanding.

3 So 1954, how old were you?

4 A. In '54 I would have been 10.

5 Q. Okay. And so you had good recollections
6 from the time you were 10, would be my guess?

7 A. Yeah, I can remember a lot of things. But
8 there's some things, you know, that I'm sure we all
9 can't remember.

10 Q. Yeah. So this map shows this Left Fork of
11 Lee Creek that sort of goes through section 31 on
12 almost a 45-degree angle.

13 Do you see that in the bottom left-hand
14 corner? And then it makes a bit of a jog in that upper
15 corner of section 31, and then it follows its way down
16 into section 30. And that's all listed as Left Fork of
17 Lee Creek. Do you see that on the map?

18 A. Yes.

19 Q. Do you -- is that your recollection, that
20 the Lee Creek went -- and it's also called Stroud
21 Creek --

22 A. Well --

23 Q. -- that it went through the Whittaker place
24 and then on down?

25 A. Yes, I -- that's one thing I've been a

1 little confused about all day is I knew that as Stroud
2 Creek. I never knew it as Lee Creek.

3 Q. All right. And so on the map it's Left
4 Fork of Lee Creek.

5 A. Yeah.

6 Q. But you knew it as Stroud Creek?

7 A. I knew it as Stroud Creek.

8 Q. Okay. And so you would have followed,
9 then, that on down?

10 A. Yeah.

11 MR. BROMLEY: Okay. I don't have anything
12 further. Thank you.

13 THE HEARING OFFICER: Okay.

14 Mr. Manwaring, go ahead.

15 MR. MANWARING: Thank you.

16

17 CROSS-EXAMINATION

18 BY MR. MANWARING:

19 Q. Larry, back in the day were there any
20 headgates on Lee Creek or Stroud Creek that you
21 remember seeing?

22 A. I'm trying to remember. There was -- there
23 was probably a couple where water -- water would be
24 diverted different directions for irrigation purposes.

25 Q. And do you recall today if those were on

1 Lee Creek or Stroud Creek?

2 A. Well, I knew it as Stroud Creek.

3 Q. And there were some headgates on Stroud
4 Creek?

5 A. Yeah.

6 Q. Do you recall any on Lee Creek?

7 A. I was not -- I -- like I mentioned earlier,
8 I was not familiar with that as being Lee Creek when I
9 grew up, because it was always called Stroud Creek.
10 And so I only knew it as Stroud Creek.

11 Q. Oh, okay. So when you're looking at
12 Exhibit 154 that you have in front of you, where --
13 that portion that is in the square marked "30" in a
14 circle, do you see that "30" that's been circled in the
15 upper left-hand area?

16 A. Okay.

17 Q. Right below that "30" is some little
18 streams that have been designated. And one says "Right
19 Fork of Lee Creek" -- they both say "Right Fork of Lee
20 Creek," then it goes down to "Right Fork of Lee Creek."
21 So we got two Right Forks of Lee Creek, or three.

22 A. Okay.

23 Q. Is that Stroud Creek to you, or is that Lee
24 Creek?

25 A. That's Lee Creek.

1 Q. That's Lee Creek?

2 A. Yeah.

3 Q. And did you see any headgates on Lee Creek,
4 on that part of Lee Creek?

5 A. On that part of Lee Creek?

6 THE HEARING OFFICER: Uh-huh.

7 THE WITNESS: No.

8 Q. (BY MR. MANWARING): Okay. And the part
9 that's the Left Fork of Lee Creek that's shown on that
10 same Exhibit 154, do you see that coming up there? Is
11 that Left Fork, is that what you knew as Stroud Creek?

12 A. Yes.

13 Q. Okay. And is it on Stroud Creek that you
14 saw some headgates?

15 A. Well, there -- there was -- I know there
16 was a headgate where my dad could divert irrigation
17 water, but I'm not sure just where it went --

18 Q. Okay.

19 A. -- at the time.

20 Q. Was that on what -- Whittakers' property?

21 A. Yeah.

22 Q. Okay. And were there some collection
23 ditches that you see showing on this Exhibit 154, if
24 you look? I'd have to point it out probably.

25 Could I go and point that out?

1 THE HEARING OFFICER: Oh, yeah. Uh-huh. Yeah,
2 that's fine.

3 MR. MANWARING: Feels good to stand and walk.

4 Q. Larry, what I'm looking at is on
5 Exhibit 154, right below this section line between
6 section 30 and section 31, there's a red section line
7 there.

8 Okay?

9 A. Okay.

10 Q. And to the -- in the upper right-hand
11 corner, you see a little ditch right there --

12 A. Uh-huh.

13 Q. -- with some springs.

14 Do you see that?

15 A. Yeah.

16 Q. And do you recall seeing that ditch when
17 you were a youngster?

18 A. Yes, I do.

19 Q. So that's been there awhile?

20 A. Yes, it has.

21 Q. And where was your dad's headgate on this
22 Stroud Creek? Do you remember, roughly?

23 A. From this illustration, it's pretty hard
24 for me to say where that would have been.

25 Q. Okay.

1 A. It would have to be more -- more detail.

2 Q. There would have to be more detail than
3 what you can see?

4 A. Yeah.

5 Q. So this Left Fork of Lee Creek that I'm
6 pointing to that courses from section 30 upstream down
7 through 31, kind of runs at a 45 through 31, is that
8 what you knew as Stroud Creek?

9 A. Well, what I knew as Stroud Creek is it
10 didn't go here. It went here in this --

11 THE HEARING OFFICER: That's going to be pretty
12 important, Mr. Borstelman. When you're saying "from
13 here to here," what do you -- what do you mean? Give
14 us some references on the map.

15 THE WITNESS: Well, let me see if I can find one
16 that I'm familiar with.

17 Yeah. Is -- is this an irrigation ditch
18 here?

19 Q. (BY MR. MANWARING): You know, I have no
20 clue.

21 What he's pointing at is a little channel,
22 it looks like, that's right there with the No. 11 and
23 south by No. 28. It does say "ditch" on it.

24 A. Is this Floyd Whittaker --

25 Q. Floyd Whittaker Ditch?

1 A. Yeah, Floyd Whittaker Ditch.

2 MR. MANWARING: So he's pointing to this portion
3 right here.

4 THE HEARING OFFICER: Okay. All right. That's
5 that common ditch after all of this -- the west and the
6 east springs ditch come together, there's a common
7 ditch that winds out through section 29. Okay.

8 Q. (BY MR. MANWARING): That's what you recall
9 as the Stroud Creek?

10 A. Yeah, uh-huh. Well, yeah, that's where --
11 that's where the water that came out of Stroud ran.

12 Q. Okay. Okay.

13 A. From my recollection.

14 Q. Do you remember having any high water years
15 when you were young, watching the runoff come heavily
16 down through those two creeks, Stroud Creek and Lee
17 Creek? Do you remember seeing any heavy water running
18 through there?

19 A. Well, as a kid you don't pay a lot of
20 attention to some of -- some of that sort of thing.
21 And I'll admit that I didn't pay attention to a lot of
22 the details about that, because as a kid it doesn't
23 affect you personally, so you just don't pay a lot of
24 attention to it.

25 Q. You're just having fun. I can appreciate

1 that. My wife thinks I still am.

2 THE HEARING OFFICER: Sometimes.

3 MR. MANWARING: I don't think I have any further
4 questions.

5 THE HEARING OFFICER: Okay.

6

7 EXAMINATION

8 BY THE HEARING OFFICER:

9 Q. Mr. Borstelman, as you look at this map, is
10 there anything that jumps out to you about this map
11 that is inconsistent with your recollections?

12 A. The one -- the one part that's -- that is
13 inconsistent with my recollection is is the fact that
14 the Left Fork of Lee Creek I knew it as Stroud Creek.

15 Q. So a naming issue --

16 A. Yeah.

17 Q. -- that you would call it Stroud Creek?

18 A. The main issue is is that I wasn't familiar
19 with that.

20 Q. Okay. Anything else?

21 A. And then -- then where it shows that Lee
22 Creek runs up in section 30, see, I was not familiar
23 with -- with it ever running in that there.

24 Q. Can you -- can you direct me to where you
25 think there's an issue in that section 30?

1 A. Well, it's -- it's probably -- the way I
2 recollect it is that it's come down through there, and
3 it always went -- this is a hill; right? I'm kind of
4 confused about -- but as far as I recollect, it always
5 went this other direction.

6 Q. So let the record reflect that
7 Mr. Borstelman is saying that his recollection is that
8 Stroud Creek continued down what is highlighted kind of
9 in brown and identified as the Floyd J. Whittaker Ditch
10 that terminates in section 29 just below the words
11 "divide ridge." So that's -- that is what he says is
12 his recollection, that's where Stroud Creek went.

13 Okay. Anything else that you see that --
14 besides -- besides those two things that are
15 inconsistent with your memories?

16 A. Well, the one thing that I -- stands out
17 with me is that that water was always used for
18 irrigation purposes, because my dad irrigated.

19 THE HEARING OFFICER: Okay. Okay. Very good.

20 Mr. Harris, anything more?

21 MR. HARRIS: No.

22 THE HEARING OFFICER: Thank you for your time.

23 THE WITNESS: Yeah.

24 THE HEARING OFFICER: Okay.

25 MR. HARRIS: Okay. Call James Whittaker.

1 THE HEARING OFFICER: Great. The faster you
2 talk, the sooner we get to eat dinner.

3
4 JAMES WHITTAKER,
5 having been called as a witness by Protestants James
6 Whittaker and Whittaker Two Dot Ranch, was duly sworn
7 and testified as follows:

8
9 THE HEARING OFFICER: So, Mr. Whittaker, do you
10 solemnly affirm that the testimony you're about to give
11 is the truth, the whole truth, and nothing but the
12 truth?

13 THE WITNESS: I do.

14 THE HEARING OFFICER: Okay. Have a seat.

15
16 DIRECT EXAMINATION

17 BY MR. HARRIS:

18 Q. James, could you please state your name and
19 address for the record.

20 A. James Whittaker, P.O. Box 240, Leadore,
21 83464.

22 Q. And I ask everybody this, so I'm going to
23 ask you: How old are you?

24 A. 75, almost 76.

25 Q. Okay. So what year were you born?

1 A. '45.

2 Q. Okay. And was your father Floyd Whittaker
3 that was involved in the --

4 A. Yes.

5 Q. Well, let me -- sorry --
6 -- in the Whittaker versus Kauer
7 litigation?

8 A. Yes.

9 Q. Okay. And are you generally familiar with
10 the Stroud Creek property that we've been talking about
11 all day today?

12 A. Yes.

13 Q. Explain to us how you're familiar with it.

14 A. I've spent my lifetime there. And for the
15 last 45 years, why I've ran the place and the ranch and
16 everything until 2019 when I'm in the process of
17 turning the ranch over to my two boys.

18 So I moved the cattle, of course all the
19 water. Why you got to be on top and know and show
20 different ones how to irrigate and where to irrigate
21 and how much water they got coming and...

22 Q. How many acres of land do you own in Lemhi
23 County? Do you have an estimate?

24 A. Well, 18,000-plus.

25 Q. Okay. So you have a lot of water rights?

1 A. A lot of water rights.

2 Q. In a lot of different drainages?

3 A. A lot of different drainages.

4 Q. Okay. And with this property in
5 particular -- and I recognize I'm taking some liberties
6 here, so if there's any concerns with going too fast,
7 please let me know.

8 But you heard Jordan's testimony earlier
9 today describing the irrigation system on the property;
10 correct?

11 A. Correct.

12 Q. Is there anything that you want to correct
13 about what he described as far as the current system
14 that's on the property today?

15 A. Probably not. I don't know that -- it's
16 close enough. Close enough.

17 Q. There's a map in front of you.

18 And you -- you actually have the original
19 of that map, correct, the engineer's map?

20 A. That's correct.

21 Q. Okay.

22 MR. MANWARING: Which one are we talking with?
23 I'm sorry.

24 MR. HARRIS: 154.

25 MR. MANWARING: 154. Okay.

1 Q. (BY MR. HARRIS): And do you know why that
2 map was created?

3 A. My father had made one. He had a lawsuit
4 with the Kauers, who at that time owned the McConnell
5 property. And they were -- had had the watermaster
6 break the dam that was -- earthen dam that was there
7 and turn that water down the creek to them.

8 And of course, my father had to challenge
9 it. And they had that lawsuit. And in that lawsuit my
10 father prevailed and -- and just like the record shows
11 in there, why back in 1932 they had an oral agreement
12 and worked on that. And that was pre-Kauer days. And
13 it worked.

14 And there was either an earthen dam or a
15 flume underneath clear from -- clear back to prior to
16 1912, that that water has gone to the Whittaker
17 property. And the Whittakers have now owned that.
18 This will be the 96th year that the Whittakers have
19 owned that property.

20 And that -- during my lifetime all that
21 water has been diverted out of that east and west
22 spring both to the Whittaker property. And it was
23 beyond my wildest dream that anybody could ever make an
24 attack on that.

25 And if that spring is taken from us, that

1 is a definite injury, and it's -- it's an injury of the
2 magnitude that basically it just makes that property
3 nonprofitable. We've put new pivots on it. We farmed
4 it. My father broke a lot of that out of the sagebrush
5 and things.

6 Q. Uh-huh.

7 A. And he dug the east spring back in the
8 late -- late '20s.

9 Q. Let -- let me interrupt you. And let's
10 talk about that.

11 A. Okay.

12 Q. This map depicts -- generally it depicts
13 some ditches and other features on the property.

14 Do you think it does a fairly accurate job,
15 generally speaking, of depicting where those features
16 are? Or is there anything in this map that you would
17 say is not quite accurate?

18 A. Well, I'd just reiterate what Larry said
19 there, is that we never knew that as Lee Creek going
20 through there.

21 Q. Okay. It was Stroud Creek to you?

22 A. Yeah, it was Stroud Creek.

23 Q. Okay. And did -- as far as the west
24 springs, the ditch that collects it, my understanding
25 is there's a -- there's a berm that goes across there

1 to then run that into the ditch.

2 Was that there when you were a kid on the
3 property?

4 A. It's -- it's been there my whole lifetime.
5 And I remember specifically that after I got out of
6 high school and I made a little money and I bought a
7 backhoe, and that's when backhoes weren't real popular.

8 That spring was just plumb full of softest
9 silt and everything. And Larry's dad -- I said, "Well,
10 I'll clean it."

11 "Oh, you can't do that."

12 But I took that backhoe up there, and I
13 remember when I got in there, why I just had to jump it
14 through there. And every time I'd let it down, it
15 would throw water out the sides there. Clean that out,
16 and that's why it's got that huge bank off to the lower
17 side there is because I put all that out and grew grass
18 and stuff now, it's been out there. But I've done that
19 at least twice in my lifetime.

20 Q. Okay. And you're familiar with --
21 eventually that water collects, and I just refer to it
22 as kind of a hilltop split where you can send water
23 down to the pivot.

24 Are you familiar with that?

25 A. Yes.

1 Q. Okay. And historically did water just --
2 did that ditch carry water out for flood irrigation
3 where the pivot now is?

4 A. It did. It's a -- all the time that
5 Larry's dad was on there, we went out there for flood
6 irrigation. And he -- Larry's dad was a man that
7 tended water when it needed tended. And it's hard to
8 believe, but he irrigated almost as much as --
9 flood-irrigating as we're doing now with a pivot.

10 Q. Okay. There's been a lot of discussion
11 today about down where Lee Creek and Stroud Creek are
12 pretty close together. And we've referred to a couple
13 culverts down a little bit further down.

14 Do you recall the area that I'm talking
15 about?

16 A. Yeah.

17 Q. Okay. So I'm going to ask you a question,
18 how are you familiar with that area?

19 A. Well, I'll tell you how I'm familiar with
20 it. And that's why Larry -- right after -- it wasn't
21 long after I got out of high school that my dad bought
22 another grazing permit to the west of us there that --
23 and we call it the dry farm area. And we'd been -- we
24 had a band of sheep, but now we had cattle too.

25 But historically they had to move those

1 sheep clear around through my Uncle Cal's property and
2 down. But there was -- at that time at the bottom of
3 that property there, that was just like the rest of it
4 going down the creek, all that brush and everything,
5 you couldn't get through there.

6 And I -- I went and I talked to my father
7 about that. And I says, "You know, Dad, if we could --
8 if I could get a Cat and clean that out of there and
9 put a couple bridges in, why we could have those sheep
10 home in a couple hours instead of a day going clear
11 around that deal."

12 And so initially he -- typical dad, he
13 said, "No, you -- that's not a good idea." But
14 fortunately next spring he said, "When are you getting
15 that Cat to push that out?"

16 So I got the Cat and pushed it out. I put
17 the bridge in there, what was the bridge, it's a
18 culvert now because the bridge rotted out, and this had
19 to be in late '60s, just not long after Larry moved out
20 of there, basically.

21 And we put them in. And we could bring
22 cattle clear from our Barrow's [phonetic] ranch and put
23 them on the dry farm in one day instead of two days.

24 UNIDENTIFIED SPEAKER: Good story.

25 THE WITNESS: I reckon there are -- there's just

1 two streams there. And Stroud Creek stream, on both
2 sides of it a little, it was kind of springs and seeps.
3 And so I dug back a little bit with the backhoe each
4 way to kind of collect that so we could dry that up,
5 so -- especially the sheep don't like to walk in water
6 across there. And so --

7 Q. (BY MR. HARRIS): So before I get lost real
8 quick, so where there's two culverts on that property,
9 there used to be bridges?

10 A. Two -- they're culverts now. One is in Lee
11 Creek and one's in Stroud Creek.

12 Q. Okay. Did you install those culverts?

13 A. I did.

14 Q. Do you know what year you installed those
15 culverts?

16 A. It would have -- I can't tell you the exact
17 year, but it would have been somewhere between '65 and
18 '70.

19 Q. Okay. And prior to that they were bridges?

20 A. Well --

21 Q. Or there was [unintelligible] --

22 A. -- prior to that there wasn't anything
23 until I had the brush pushed out of there and put them
24 in. I did that.

25 THE HEARING OFFICER: Bridges -- bridges first.

1 When did -- you replaced the bridges with culverts.

2 When did that happen?

3 THE WITNESS: Well, the one culvert's been in
4 their all the time, Lee Creek.

5 THE HEARING OFFICER: I see.

6 THE WITNESS: It's never changed.

7 THE HEARING OFFICER: Okay.

8 THE WITNESS: But I put a bridge in the other
9 because at that time it was soft and it just seemed to
10 fit better. Well -- and I couldn't get equipment there
11 that we had in those days to put enough gravel in
12 there, because that's why I had that little backhoe and
13 I dug those deals. And it did kind of dry up. But
14 initially I put a bridge in there.

15 But I can't tell you, but it's probably
16 been at least 15 years ago when I --

17 UNIDENTIFIED SPEAKER: It's been a lot longer
18 than that.

19 THE WITNESS: Yeah.

20 UNIDENTIFIED SPEAKER: [Unintelligible.]

21 THE WITNESS: Yeah.

22 UNIDENTIFIED SPEAKER: You're probably talking
23 more --

24 THE WITNESS: Yeah, in fact, it's probably 30
25 years ago, because I just looked at it the other day

1 and it's -- it's all rusted out and needs replaced and
2 worked on again going through there.

3 THE HEARING OFFICER: And there are -- there are
4 three culverts there now?

5 THE WITNESS: No, there aren't. There's only
6 two. There's always been just two. There aren't
7 three. There's just two culverts. One's in Stroud and
8 one's in Lee Creek.

9 THE HEARING OFFICER: Okay.

10 Q. (BY MR. HARRIS): Okay. And so Jordan's
11 testimony was that -- that -- well, that area's been
12 referred to a little bit like a jungle.

13 And you would agree with that?

14 A. Oh, no doubt.

15 Q. Okay. But to the best of your
16 recollection, have there been two channels paralleling
17 each other? And does Stroud Creek come in below
18 McConnells' diversion?

19 A. Undoubtedly. And the reason I'm sure of
20 that is because, like I said, we have that range right
21 on the hill right next to that. And every year, why we
22 put our bulls out, and invariably they get into what's
23 now Johnson's property, one or two of them. And as
24 they've said, that is full of brush in there. They are
25 a bear to get out of there.

1 And so they're every year, and it's not
2 really something I can send most men to do and get
3 accomplished. I had to go do it myself with my dogs
4 and crawl through there and get them out of there.

5 Q. So if this transfer's approved, are you
6 concerned that administratively McConnell would be able
7 to call for water out of Stroud Creek when he hasn't
8 been able to up to this point?

9 A. Yeah. As far as we're concerned, that's
10 devastation, because we've depended on that for, like I
11 say, 95, 96 years.

12 Q. Now, I'm -- I'm sure Mr. Bromley will ask
13 you some questions about your Water Right 74-157 and
14 why this agreement wasn't claimed in the adjudication,
15 so I'll just ask you that question.

16 Do you -- can you tell us why it wasn't
17 included? Did you think it didn't have to be? What
18 was the reasoning?

19 A. Well, I don't know. In my mind I guess
20 it -- it's been kind of -- and I think Chris alluded to
21 that before is that -- well, in the 1982 adjudication
22 it was in there the way it was supposed to be. It was
23 listed as separate.

24 And according to what Bryce has said there,
25 when they went in to research those out, they were

1 supposed to reflect the way they were -- it -- in the
2 '90 -- 1987 report. And if that would have been done,
3 we wouldn't be in here today.

4 Q. Okay. You don't think that reflected at
5 least the historic administration at the time?

6 A. It didn't reflect what was in the 1982
7 adjudication.

8 Q. Okay. And didn't reflect what the
9 agreement was that the Supreme Court --

10 A. It didn't reflect the agreement either.

11 MR. HARRIS: Okay. I have no further questions.

12 THE HEARING OFFICER: Okay.

13 MR. HARRIS: Thank you.

14 THE HEARING OFFICER: Go ahead, Mr. Bromley.

15 MR. BROMLEY: Sure.

16

17 CROSS-EXAMINATION

18 BY MR. BROMLEY:

19 Q. So hi, James. Chris Bromley on behalf of
20 the McConnells.

21 This -- the 1982 or ish, like that time
22 frame adjudication that you're talking about, was that
23 the Lemhi adjudication?

24 A. It was.

25 Q. Just trying to make sure.

1 A. And I'm referencing the Green Book. If
2 you'll look in the Green Book, it's not listed as
3 tributary. It's listed in springs separate.

4 Q. Okay. So do you have a copy of that Green
5 Book that we can --

6 UNIDENTIFIED SPEAKER: I have a copy -- I have a
7 copy on my phone.

8 MR. HARRIS: Well, you can't testify right now.
9 Sorry.

10 Q. (BY MR. BROMLEY): And we have a witness
11 and exhibit list. And I'm just wondering where in the
12 exhibits that you said you would use at hearing, which
13 exhibit -- you know, where does it say that?

14 MR. HARRIS: Well, hold on. I'm going to
15 object. Yeah, we didn't include it as an exhibit
16 because we didn't think it was an issue. But he's
17 testifying from his memory, which I think he can do.

18 MR. BROMLEY: Okay. So --

19 MR. HARRIS: He's saying his recollection of
20 what's in the Green Book is it was in a separate
21 section.

22 Q. (BY MR. BROMLEY): Mr. Cefalo, so all I'm
23 trying to find out is, do you have a document in front
24 of you that says that or are you testifying from your
25 recollection?

1 A. Right now I'm testifying from my
2 recollection. But I have that Green -- well, just a
3 minute. I -- I think I do have it. I do have it.

4 Bring that up, Jordan.

5 MR. BROMLEY: Mr. Hearing Officer, my question
6 was simply, I'm trying to understand what he was
7 testifying from.

8 But please, Jordan, don't come up directed
9 by James. Let's wait to try and figure this out.

10 In my opinion, it's a side issue. I was
11 just trying to find out, did he have a document in
12 front of him, or is he testifying based on
13 recollection?

14 THE HEARING OFFICER: That's fine. And you --
15 and you answered that question.

16 MR. BROMLEY: Yeah.

17 THE HEARING OFFICER: It's based on
18 recollection.

19 MR. HARRIS: Correct.

20 THE HEARING OFFICER: There isn't an exhibit, I
21 don't think, that is that.

22 THE WITNESS: I do have it right there.

23 THE HEARING OFFICER: Great.

24 Q. (BY MR. BROMLEY): So --

25 THE HEARING OFFICER: You can continue.

1 THE WITNESS: And I brought it.

2 MR. BROMLEY: That's all I'm trying to find
3 out --

4 THE HEARING OFFICER: You can continue.

5 MR. BROMLEY: -- is what was going on.

6 Again, I --

7 Q. James, you understand, though, that the
8 74-157 as it was decreed in the SRBA says "springs
9 tributary to Lee Creek"?

10 A. I understand that.

11 Q. Yeah.

12 A. But --

13 Q. Go ahead.

14 A. On that same token, I see we're even
15 claiming wells as tributaries, something now published
16 in the paper. And it seems to me like ever since this
17 last adjudication everything has to have a tributary on
18 it. And my son-in-law just filed a -- for a well the
19 other day, and in my mind I'm sure that I was asked by
20 the Department to put tributary on there, you know,
21 because I knew it was different. But they said it's
22 got to be tributary to something.

23 And I'm sure that whoever I met with said,
24 "Hey, you need to put 'tributary' on there." And
25 that's been one of the biggest mistakes of my life.

1 Q. Okay. So thank you for that.

2 This Exhibit 154, the colorful map, you
3 said that this was made during the Kauer dispute by --
4 was it by your father who had the map commissioned?

5 A. It was. He had an engineer do it.

6 Q. Okay. And -- and other than the -- just
7 like Mr. Borstelman saying, other than this Left Fork
8 of Lee Creek, it really should be Stroud Creek.

9 Again, what else is incorrect about this
10 map?

11 A. I don't know. But I'd like to point out
12 that both of those springs are called the Floyd J.
13 Whittaker Ditch. And ever since that 1916 -- or 2016
14 when Cindy had us turn that water down, why when you
15 have all that water come down and -- that hasn't been
16 through there for 95 years or during my life, why you
17 can imagine what a problem that causes.

18 And at that time I was still running the
19 ranch and was trying to get up there and try and keep
20 it rational so we was sending Bruce's down but yet was
21 protecting my spring. We didn't have weirs in. We
22 didn't have anything to measure with. And we knew what
23 we was entitled to, but it was virtually guesswork.
24 And so...

25 Q. And on this map, James, that I see running

1 basically from the bottom left-hand corner through
2 section 31 and then it jogs into section 29 is this
3 "divide ridge" and it's in red.

4 Do you see that?

5 A. Let's see. I'm sorry, Chris. Say that
6 again.

7 Q. Sure. In the bottom left-hand corner do
8 you see "divide ridge" written in in red? Bottom
9 left-hand corner.

10 A. Oh, yeah. Okay. Okay.

11 Q. And it -- and it then sort of runs a path,
12 and it ends up in section 29, says "divide ridge" in
13 "section 29."

14 So that -- what I understood from listening
15 to Jordan was -- I mean he was talking about it almost
16 as a Continental Divide, that it was a divide with --
17 if water stays on the right-hand side of the divide, it
18 flows off to the right; if water is on the left-hand
19 side of the divide, it would flow into the Lee Creek
20 drainage.

21 Is that your understanding of what this
22 divide ridge is about?

23 A. Yes.

24 Q. Okay. So then water that ends up in the
25 Floyd J. Whittaker Ditch, if we could trace that down,

1 it ends up on the right-hand side of the "divide
2 ridge"; is that correct?

3 A. Let's see. What ends up on the right-hand
4 side?

5 Q. This -- the Floyd J. Whittaker Ditch. If
6 you follow the Floyd J. Whittaker Ditch, it originally
7 starts on the left-hand side of the divide and then
8 it -- according to the map --

9 A. Yeah, it crosses it. Yeah.

10 Q. Uh-huh. Okay.

11 A. Yeah, sure.

12 Q. And then it ends up on the right-hand side
13 of the divide.

14 So water that's diverted on the Lee Creek
15 side of the divide can then make its way to the
16 opposite side of the divide?

17 A. No, that --

18 Q. Yeah.

19 A. Just like Larry pointed out there -- and
20 it's amazing, Larry's dad used the old-time level and a
21 stick 16 feet long, and he surveyed a lot of those
22 ditches and stuff. And it was unbelievable the job he
23 did.

24 Q. Well, yeah, it is. And if we look at
25 Exhibit 155, which is the next page, James. And this

1 is small, but --

2 A. Did you say 1- --

3 THE HEARING OFFICER: Uh-huh. 155.

4 Q. (BY MR. BROMLEY): Yeah, 155. Just the
5 next -- the next page.

6 A. Oh, okay.

7 Q. There's a lot of detail that went into, it
8 looks like, and it's hard to read it. But legal
9 descriptions and description of the -- in that second
10 box, Floyd J. Whittaker, John Whittaker ranches,
11 detailing the acreage. I mean there's a lot of detail
12 that went into this map.

13 Do you agree with that?

14 A. Yeah.

15 Q. Yeah.

16 A. No. I've looked that over pretty
17 thoroughly, and it's accurate today.

18 Q. It's accurate today?

19 A. It is.

20 Q. And then I see there are profiles that are
21 listed.

22 Do you see -- so there's a box that says
23 "details." There's a box that says "Floyd J.
24 Whittaker." There's a list of --

25 A. I see "profile."

1 Q. Yeah, "profile."

2 Are those -- are those elevations? Again,
3 it's difficult to see.

4 A. Well, it apparently is. It says, "Fall of
5 7.1 to" I think "800 feet" there. Something like that.

6 Q. Yeah. And then do you see an engineer's
7 certificate in the bottom right-hand corner? This gets
8 real small.

9 A. Yeah, I see it. Yeah.

10 Q. Okay. And we can read that. And it says,
11 "The above plat was made by me from a survey -- made by
12 me on October 1 and 2, 1954, and from a tracing I made
13 of the aerial photograph in the county assessor's
14 office at Salmon, Idaho. The aerial photograph was
15 dated August 1946. The acreages of 28 tracts were" --
16 what is that? Platted? No. Something "from a base
17 map from which this tracing was made. The above
18 plat" -- that word I can't --

19 A. "Tabulations."

20 Q. -- "tabulations" -- thank you -- "and
21 profiles are true and correct to the best of my
22 knowledge and belief."

23 And then it's signed by a registered
24 engineer; is that right?

25 A. That's right.

1 Q. Thanks, James.

2 A. Emelda Christensen [phonetic].

3 Q. Yeah. Thank you.

4 So then looking back at Exhibit 154, which
5 was -- was truth and verified by a professional -- or
6 I'm sorry, a registered engineer, it -- in 1954
7 Mr. Christensen, the registered engineer, is putting
8 the confluence of Left Fork Lee Creek, which you call
9 Stroud Creek, which -- and Right Fork Lee Creek almost
10 in the middle of section 30; is that right? On the
11 east side, but the, you know --

12 A. Where are we looking?

13 Q. That's the confluence of the Stroud and
14 Right Fork Lee Creek?

15 A. Yeah, I see it.

16 Q. Yeah, okay. The -- you were talking about
17 the culverts.

18 Do you remember that?

19 A. I do.

20 Q. And so before the -- do you remember what
21 was there before the culverts?

22 A. Well, is all it was was brush, and it was
23 in two separate channels. Just -- I didn't move the
24 channels or anything when I did that through there, but
25 you -- you couldn't walk through there before we got

1 the Cat and cleaned that all out.

2 Q. Okay. So when did you drive in there with
3 the Cat to clean it out?

4 A. Some -- between '65 and '70.

5 Q. Okay. So that would have been after this
6 map was -- was created?

7 A. Right.

8 Q. All right. So before the map was -- you
9 don't have any -- and, you know, your testimony, as I
10 understood -- please correct me if I'm wrong -- is
11 that, you know, other than the Stroud Creek -- what
12 should be named Stroud Creek --

13 A. Right.

14 Q. -- the map looks accurate?

15 A. Yeah.

16 Q. Yeah. And it was -- and it was certified.

17 So then in the late '60s/early '70s,
18 that -- is that when you put the -- I think you might
19 have said, was it one culvert originally?

20 A. No. Two.

21 Q. Two. Okay.

22 A. Well, one was a culvert and one was a
23 bridge.

24 Q. Okay. One was a -- okay. One was a
25 culvert?

1 A. But there was two channels --

2 Q. Okay.

3 A. -- is the main thing.

4 Q. Okay. Great. Okay. Two channels.

5 The culvert went in which source?

6 A. In Lee Creek source.

7 Q. Okay.

8 A. And the bridge was over the Stroud.

9 Q. Okay. So the culvert went into Right Fork
10 of Lee Creek and the bridge went over Left Fork of --
11 I'm just using the words on the map, the bridge went
12 over Left Fork of Lee Creek, which you call Stroud
13 Creek?

14 A. Right.

15 Q. And I don't think -- there's nobody in here
16 who's disputing that it's not Stroud Creek. So I'm
17 just trying to understand what happened.

18 At some point, then, you took the bridge
19 out?

20 A. And put a culvert in.

21 Q. Okay. And put another culvert in.

22 So now there are two culverts?

23 A. Now there are two culverts.

24 Q. Do you recall how you sized the culverts?
25 Did you just --

1 A. No, I think the one in -- the one in Lee
2 Creek is a little bigger. If I remember right, it's,
3 I'm going to say, a 3-foot arch. And the one in Stroud
4 Creek is smaller. It's probably an 18 or something
5 like that, because basically all of Stroud was headed
6 off before coming down there, [unintelligible] --

7 Q. Are they half circles or are they full
8 circles?

9 A. The -- the -- I said the one was an arch in
10 Lee Creek. And it -- it's an oval shape one. And the
11 other one's a round one.

12 Q. Okay. I'm just trying to understand.

13 So when you -- when you put the culverts
14 in, then, the confluence of Stroud Creek and the Right
15 Fork of Lee Creek was where it's mapped in Exhibit 154?

16 A. Well, as near as I can tell, it probably
17 was, but --

18 MR. HARRIS: I'm going to object.

19 Hold on.

20 I'm going to object. I -- I'm not sure he
21 understands the question.

22 Are you talking in relation to the
23 McConnell points of diversion?

24 MR. BROMLEY: I'm talking on -- just on the map,
25 Rob.

1 THE WITNESS: Well, just a minute here.

2 MR. HARRIS: I think that's what's confusing.

3 THE WITNESS: I've got to give this a little
4 more -- I got to -- I'm not quite sure where I'm
5 located here. Well, it's the bottom of our property.
6 Well, it's got them -- the confluence there, and that's
7 not right. This map's not right there.

8 Q. (BY MR. BROMLEY): Okay. So, James, your
9 prior testimony was that the map was right --

10 A. Yeah, but --

11 Q. -- other than the -- other than the
12 statement of --

13 A. Well, I was thinking initially we was below
14 our property. But that's -- that's above our property,
15 and that's not right.

16 Q. Okay. And this --

17 A. The confluence is down on either the BLM or
18 Johnson's property. I'm not sure whose it is.

19 Q. Okay. But you also testified, James, that
20 this map was commissioned by your dad during the --

21 A. It was. It was made by -- by Dad.

22 Q. -- during the lawsuit of Whittaker versus
23 Kauer?

24 A. Right.

25 Q. And then we've looked at -- we've talked

1 about all of the detail that went into this map. And
2 we've looked at Exhibit 155 that explained a lot of the
3 detail, including profiles and acreage. And then we
4 read the engineer's certificate signed by
5 Mr. Christensen saying that that was true and correct
6 to the best of his knowledge.

7 And then was this map used in the
8 litigation of Whittaker versus Kauer?

9 A. You're right. But we've been talking
10 basically about maps all day. And what's on the map
11 and what's physically on the ground in a lot of cases
12 have been two enormously different things,
13 especially -- well, that's that line. So anyway, but
14 that's not correct. That part of this map's not
15 correct.

16 And that -- for the importance of why this
17 map was made, it covered this section of the springs.
18 That's why it was made. And I -- they probably weren't
19 too careful about what happened at that point in time.
20 But I can tell you that that -- I -- I don't think that
21 ever was accurate, that they had confluence clear up
22 there.

23 Q. But there was an engineer certificate on it
24 explaining that it was true and correct. You'd agreed
25 with me when we read through the certificate about the

1 detail that went into this map. It was a tracing of
2 what the engineer saw. It was commissioned by your
3 family for litigation against the Kauers.

4 And now you've -- you're changing what you
5 said, and saying that the map is now not accurate?

6 A. Well, I guess that I was looking more at
7 the rest of the map as in regard to Whittaker. And
8 since you pointed that out, that -- that's not
9 accurate. It -- it wasn't in the 1960s, it's not now,
10 and to my knowledge, it never was.

11 Q. Okay. It's still your testimony that you
12 put a culvert and a bridge into the Right Fork of Lee
13 Creek and Stroud Creek; correct?

14 A. That's correct.

15 Q. And then you removed the bridge, which was
16 in Stroud Creek, and replaced that with a culvert; is
17 that correct?

18 A. That's correct. It's -- I think is where I
19 got mixed up, I was looking at the wrong corner of the
20 property here in the -- down there I think that I'm --
21 let's see. We've got a map somewhere. It --

22 THE HEARING OFFICER: Why don't you ask your
23 next question.

24 MR. BROMLEY: That was my question. He was
25 providing more -- more answer. I just asked the

1 question, Mr. Hearing Officer.

2 THE HEARING OFFICER: He's answered that one --

3 MR. BROMLEY: Yeah.

4 THE HEARING OFFICER: -- about culverts and
5 bridges. Move -- jump to your next one.

6 MR. BROMLEY: Okay. I --

7 THE HEARING OFFICER: Okay.

8 MR. BROMLEY: He was speaking, so if you're
9 cutting the witness off, that's [unintelligible].

10 THE HEARING OFFICER: Well, he answered your
11 question.

12 MR. BROMLEY: Of course he had.

13 THE HEARING OFFICER: And then we were kind of
14 heading down some other path.

15 MR. BROMLEY: Yeah.

16 THE HEARING OFFICER: So I just -- we'll take --
17 if you want to have him dig into it, you can ask that
18 question.

19 MR. BROMLEY: No, I wasn't the one who asked him
20 to stop speaking, so...

21 THE HEARING OFFICER: Yeah.

22 Q. (BY MR. BROMLEY): The sizing of the
23 culverts, was that a guess on your part, or did you
24 have any engineering that went into it?

25 A. I've been an engineer on that ranch for

1 years. And I can tell you awful close to what
2 something is.

3 MR. BROMLEY: Okay. I don't have anything
4 further.

5 THE HEARING OFFICER: Okay. Ms. Foster,
6 anything from you?

7 MS. FOSTER: I'm good.

8 THE HEARING OFFICER: Anything, Mr. Manwaring?

9 MR. MANWARING: I have a couple questions.

10 THE HEARING OFFICER: Okay.

11

12 CROSS-EXAMINATION

13 BY MR. MANWARING:

14 Q. James, you mentioned in your testimony that
15 you dug something or cleaned something out twice. And
16 I was just a little vague on what you were talking
17 about.

18 Can you explain what you were doing?

19 A. Is what I was doing is I was cleaning that
20 west springs. It fills up with fine silt. It's all
21 those little springs coming in all along there. And of
22 course, they keep washing. It's like any swamp where
23 it's been cut. It's got pretty steep banks there now.
24 And that just keeps flowing in there and filling up.
25 And every so many years you have to clean it out.

1 Q. On Exhibit 154 when you say that you were
2 cleaning up in the west springs, is that the ones that
3 are in section 32?

4 A. Let's see. Just a minute here. I don't
5 see section 32. That's 31.

6 THE HEARING OFFICER: No, it --

7 THE WITNESS: No, it's in 31.

8 Q. (BY MR. MANWARING): That's the east
9 springs that are in 32?

10 A. Yeah.

11 Q. Okay. So in section 31 is the west springs
12 that you were cleaning out?

13 A. Yeah. And I have cleaned some on the east
14 springs, but it's -- it's nothing like the west
15 springs. The west springs is tough.

16 Q. And how -- when's the first time you did
17 that? What year probably?

18 A. Oh, I was trying to think when I got at
19 that first -- it would have been probably back in the
20 '60s too.

21 Q. And the second time?

22 A. And the second time probably -- I'm going
23 to say probably in -- I'm going to say probably early
24 '90s.

25 Q. Okay. And just describe what you mean by

1 cleaning them up. Would you just shovel things out?
2 digging things out? scooping things out?

3 A. Well, just assume there's just a great, big
4 ditch there now. And these springs keep washing in
5 from the sides. And they just got a little dirt, they
6 just keep bringing just a little, little, little until
7 after somewhere, 20 to 30 years, why that thing's about
8 full of silt again. And you have to go through it and
9 clean it all back out.

10 Q. Okay. So you weren't digging in the
11 channel of Stroud Creek, you were digging in where the
12 springs are?

13 A. I was digging in the west springs.

14 MR. MANWARING: Okay. Nothing further.

15

16 EXAMINATION

17 BY THE HEARING OFFICER:

18 Q. Mr. Whittaker, I had intended to ask Jordan
19 these questions, but you might actually be the better
20 person to ask.

21 In your time, then, running irrigation
22 water on that property, you've been involved in
23 water -- in the Water District, Water District 74Z; is
24 that correct?

25 A. That's correct.

1 Q. Okay. So you've worked with watermasters
2 over the years or have --

3 A. I have.

4 Q. -- had interaction with watermasters over
5 the years?

6 Are you familiar with how the water rights
7 are administered in that Stroud Creek drainage?

8 A. I'm -- I think I'm more knowledgeable on
9 more drainages up there on the distribution of water
10 rights probably than anybody up there, because we have
11 more tributaries that we're involved in. But yes, I
12 am. And --

13 Q. Stroud Creek would be one of those?

14 A. And Stroud Creek is one of those.

15 Q. Does -- if we went back prior to 2015 when
16 the Kauer Ditch was still in use, did the watermaster
17 ever regulate your Stroud Creek diversion based on
18 diversion rate?

19 A. Yes. Right there at the Cal Whittaker
20 house.

21 Q. At the Cal Whittaker house?

22 A. And I'm glad you asked that question,
23 because what made this thing work is easy. In below
24 that point all the water was ours. And from there up
25 to the -- well, we had -- they measured our water

1 right. We've always had a weir right there at the Cal
2 Whittaker property there in that ditch. And it's
3 always been measured there as long as I can remember.

4 Q. Uh-huh.

5 A. And when that water was in the Kauer Ditch,
6 basically is all they had to do, with the exception of
7 real high water, was go to that upper diversion there
8 where they check ours and then go up and get Cal's,
9 because they've got those sideboards on that we talked
10 about, making them senior water rights.

11 Q. Uh-huh.

12 A. And then basically they're -- most of the
13 season there, if Bruce called on it, all the rest was
14 his. And it went into the Kauer Ditch. It went around
15 there, and that's all there was to it.

16 Q. So -- so when you say you'd been be -- if
17 you had more than the 4.4 cfs -- and if we're talking
18 just the senior rights, it's something less than that,
19 but if there was more water at the -- at your -- at the
20 Whittaker diversion down -- down in the yard, then
21 there would be adjustment made upstream to send more
22 water through the Kauer Ditch? That's how you
23 described regulation?

24 A. Yeah, it's all -- all just prorated
25 according to --

1 Q. Okay.

2 A. -- when the water rights were. Just our
3 two early water rights is the only one that had the
4 sideboards on. The others didn't.

5 Q. Yeah.

6 A. They was...

7 Q. Since the Kauer Ditch had -- since the time
8 that the Kauer Ditch was closed and hasn't been used,
9 has the watermaster limited you to your water rights at
10 that Whittaker Ditch?

11 A. Yes.

12 Q. And then the rest of the water goes into
13 that other channel headed to the north?

14 A. Yes.

15 Q. Okay. Have -- here's a question for you:
16 So you're familiar, then, with the water rights held by
17 Foster and Tomchak, and that they're junior rights
18 compared to the 1883 rights?

19 A. Right.

20 Q. Have they been shut off in the past to
21 provide water to McConnell? Have they -- have the
22 Foster -- let me ask it this way.

23 Have the Foster and Tomchak rights been
24 curtailed in order to provide water to McConnells'
25 senior rights?

1 A. Oh, sure.

2 Q. Okay.

3 A. Sure.

4 Q. And that -- and that existed prior to 2015?
5 That was the case prior to 2015?

6 A. No, that's -- well, that's happened since.

7 Q. And that's happened since 2015?

8 A. McConnells got the senior water right. So
9 it's got to be filled or I don't know.

10 Q. So my question is, those rights, those
11 junior rights, have been regulated against McConnells'
12 senior rights in the past?

13 A. They have, yeah.

14 Q. Okay. And that's as long as you've been
15 familiar with the Water District?

16 A. Yeah.

17 THE HEARING OFFICER: Okay. Mr. Harris,
18 anything else?

19 MR. HARRIS: No. No follow-up.

20 THE HEARING OFFICER: From any of the other
21 parties? Okay.

22 MR. BROMLEY: I have just a follow-up question,
23 so --

24 THE HEARING OFFICER: That's okay.

25 MR. BROMLEY: Is that all right?

1 THE HEARING OFFICER: Yeah, that's okay. Yeah.

2 MR. BROMLEY: Thank you.

3

4 FURTHER CROSS-EXAMINATION

5 BY MR. BROMLEY:

6 Q. So the McConnell points of diversion are
7 down -- down below you, down below Tomchak and Foster;
8 right?

9 A. Right.

10 Q. So if that spring water always got to them,
11 it seems like the litigation of Whittaker versus Kauer
12 was accomplished to keep that spring water from going
13 to them?

14 A. I'm sorry. I don't know if I understand.

15 Q. That's okay. It was -- it was poorly
16 stated.

17 The Whittaker versus Kauer case was -- what
18 was the -- what was the reason for that case?

19 A. Well, it was to protect the spring. Kauers
20 wanted our spring. And so they went to bat. And it's
21 just exactly why we're in this room today trying to
22 settle the same -- same deal. It's res judicata or
23 however you say it.

24 Q. Res judicata.

25 A. Yeah, okay.

1 Q. That's silly Latin words that we learned in
2 law school.

3 But if they couldn't have received the
4 spring water, there's no reason to have had the case;
5 is that true?

6 A. I'm sorry?

7 Q. That's okay. So if they couldn't have
8 received the spring water -- you know, if the spring
9 water wasn't going to get to them anyway because of
10 where the -- you know, how the hydrology of the system
11 worked, you wouldn't have needed to file a case? The
12 case made your spring rights senior to them,
13 effectively; is that true?

14 A. I don't know. It is -- it's -- it's
15 basically just the same. They -- they were making a
16 call on what was -- rightfully had been used for at
17 that time they said 40-plus years. And if you'll go
18 to -- they have quiet title in Idaho Code. And it's
19 Whittaker versus Kauer. And it says that irregardless
20 of whether the spring was private or public, you can
21 quiet title to it.

22 And so -- and that's the other reason, I
23 had no idea that a call could ever be made on this
24 water, because quiet title, in my mind, we had a case.
25 And that's why you have a case is to settle title to

1 it. And that's what --

2 THE HEARING OFFICER: This was a similar
3 question that you asked of a previous witness, and I
4 understand the purpose of the question. So I think
5 we're all right.

6 MR. BROMLEY: Yeah. That's fine. Thank you.

7 THE HEARING OFFICER: Okay.

8 MR. BROMLEY: Thanks, James.

9 THE HEARING OFFICER: Thank you, Mr. Whittaker.

10 THE WITNESS: Okay.

11 MS. FOSTER: Hey, I got one question for James.

12 THE HEARING OFFICER: Oh, if you do, yeah,
13 that's fine.

14

15 CROSS-EXAMINATION

16 BY MS. FOSTER:

17 Q. So, James, did you know that Bruce's lower
18 diversion was illegal? I mean had you known that for
19 all the years or --

20 A. I'm sorry. I'm having a hard time hearing.

21 Q. That's fine. Did you know that Bruce's
22 lower diversion was illegal? I mean has that always
23 been the case? Did you know that was illegal, that --
24 or have you just always known him to use the upper one?

25 A. No, I didn't know it was illegal. And

1 I'm -- I'm glad you asked that question. I want to
2 address that just a little more.

3 When the Kauer Ditch was in use, of course,
4 all that water went from the Left Fork to the Right
5 Fork in the Kauer Ditch and came down, and just as
6 Bruce has indicated, his upper diversion, they can't
7 divert that much water in it.

8 So it's how it's been used historically is
9 a re-diversion. They'd cut that ditch low and let that
10 water flow down, and it's come out that ditch.

11 And as far as I'm concerned, I don't have a
12 problem with that. But I have a problem with making --
13 taking it down through our channel there and being able
14 to call on it with a seniority over our water that
15 we've used 90-plus years in the family.

16 THE HEARING OFFICER: Thank you.

17 Thank you, Mr. Whittaker.

18 MS. YENTER: We done?

19 (End of audio file.)

20 -oOo-

21

22

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24

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Audio Transcription

REPORTER'S CERTIFICATE

I, JEFF LaMAR, CSR No. 640, Certified Shorthand Reporter, certify:

That the audio recording of the proceedings were transcribed by me or under my direction.

That the foregoing is a true and correct transcription 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 6th day of January, 2022.



JEFF LaMAR, CSR NO. 640

Notary Public

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Boise, Idaho 83701-2636

My commission expires December 30, 2023

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR) Docket No.
TRANSFER NO. 84441 IN THE NAME OF)
BRUCE AND GLENDA MCCONNELL)
_____)

TRANSCRIPT OF RECORDED HEARING
VOLUME II (Pages 410-640)

BEFORE

HEARING OFFICER: JAMES CEFALO

Date: April 22, 2021

Location: BLM/U.S. Forest Service Office
Salmon, Idaho

TRANSCRIBED BY:

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

Notary Public

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NO. ADMITTED

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1 (Beginning of audio file.)

2 MS. YENTER: If I can find my mouse. There it
3 is.

4 THE HEARING OFFICER: Okay. We are back on the
5 record for Day Two of this hearing for Application for
6 Transfer 84441 in the name of Bruce and Glenda
7 McConnell.

8 When we left off yesterday evening,
9 Mr. Harris, you were in the middle of your presentation
10 of evidence. And call your next witness.

11 MR. HARRIS: Yeah. Call Bryce Contor.

12
13 BRYCE A. CONTOR,
14 having been called as a witness by Protestants James
15 Whittaker and Whittaker Two Dot Ranch, was duly sworn
16 and testified as follows:

17
18 THE HEARING OFFICER: Mr. Contor, do you
19 solemnly affirm that the testimony you are about to
20 give is the truth, the whole truth, and nothing but the
21 truth?

22 THE WITNESS: I do.

23 THE HEARING OFFICER: Okay. Have a seat.

24 Go ahead, Mr. Harris.

25 ///

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Bryce, could you state your name and address for the record.

A. Bryce A. Contor, 5223 Steel Avenue in Iona, Idaho.

Q. Okay. What is your profession and occupation?

A. I'm a hydrologist. And my occupation is a consultant for Rocky Mountain Environmental Associates, which is a private consulting firm.

Q. Okay. And is that in Idaho Falls?

A. It is.

Q. How long have you worked for Rocky Mountain?

A. Since 2010.

Q. Prior to that time could you describe your work and employment experience.

A. Yeah. So I farmed for about ten years. During that time I was a canal company secretary. And in that role I filed our companies Snake River Basin Adjudication claims.

And then I spent a year as a seed company rep. And I spent a year investigating -- or inspecting chemigation -- chemigation backflow preventers for the

1 Department of Ag.

2 Since 1996 I've been in water resources,
3 first for the Department of Water Resources and then
4 the University of Idaho and then private consulting.

5 Q. Okay. You were hired by Whittaker to
6 perform consulting work both for this proceeding today
7 but then also the water administration matters in 2020;
8 correct?

9 A. Yes. And also 2006 I helped with some
10 amendments to adjudication claims.

11 MR. HARRIS: And I believe we stipulated to his
12 admission as an expert; is that right, Chris and Kipp?

13 MR. BROMLEY: Correct.

14 MR. MANWARING: Yes.

15 MR. HARRIS: Okay.

16 Q. So with that, Bryce, I'll move into this
17 transfer.

18 Are you familiar with transfer No. 84441
19 that's the subject of this hearing?

20 A. Yes.

21 Q. Okay. How are you familiar with it?

22 A. So I'm familiar with it by mistakenly
23 reading the prior transfer, because that was the one
24 that came up on the website when I queried for the
25 number. And then you provided me the correct transfer

1 application. And I've read that carefully.

2 I -- I did my expert report based on the
3 understanding of that transfer and what it proposed.
4 And then I've also read Mr. King's report.

5 Q. And did you also spend time on the property
6 in the summer of 2020?

7 A. I did.

8 Q. Okay. What -- could you just describe what
9 you generally did.

10 A. Yeah. So there were two tasks that I was
11 given. One task was to evaluate the east springs and
12 give an opinion as to what would happen if water --
13 if -- if that water right were curtailed, would that
14 water become tributary to Lee Creek.

15 The other task was I was asked to evaluate
16 a number of channels to describe their condition and
17 capacity.

18 Q. Okay. And for your visit in 2020, those
19 reports are contained at Exhibit 152 and 153 in --
20 there in front of you?

21 A. That's correct.

22 Q. Those are your expert reports?

23 A. Yes.

24 Q. Okay.

25 A. And these were not prepared for this

1 proceeding. These were prepared at the client's
2 request. But those are my opinions.

3 Q. And then Exhibit 151 is the injury analysis
4 you performed for this transfer; correct?

5 A. Yes.

6 Q. Okay. Let's start with Exhibit 153, which
7 is your west springs report.

8 The -- on the first page of that report, it
9 references Water Right 74-157?

10 A. Yes.

11 Q. You're familiar with that water right?

12 A. Yes.

13 Q. Okay. Your report begins with some
14 background on the source of this right.

15 Can you describe what the source of the
16 rights are.

17 A. It's -- it's two spring complexes. The
18 east springs complex is -- is gathered by a mostly
19 straight collection ditch. And the west springs
20 complex is gathered by a -- sort of a serpentine-shaped
21 collection ditch.

22 West springs collection ditch, the
23 downstream bank of it essentially forms a ditch levy
24 that completely blocks what would have been the
25 historic channel of what's been called Stroud Creek and

1 the Left Fork of Lee Creek.

2 Q. And did you actually examine the springs or
3 get close to them?

4 A. I did. I walked that bank. I tromped
5 through the brush with -- with Jordan. And then I went
6 back later on my own and did additional walking along
7 east springs and in the drainage below the west
8 springs.

9 Q. Okay. So why were you asked to prepare
10 this report?

11 A. I didn't get into the nitty-gritty of the
12 dispute, but I understood that there had been a change
13 in the way water was delivered and a change in
14 administration that Whittakers felt was depriving them
15 of some of their historical enjoyment.

16 Q. What information did you review to prepare
17 this report?

18 A. So I had a large copy of the 1954
19 engineer's map. I had the USGS maps. I had various
20 aerial photography, topographic maps. I used an
21 electronic digital elevation model. I used the IDWR
22 GIS data for -- for points of diversion. And then of
23 course, my own field observations.

24 Q. And you mentioned a 1954 engineer's map.

25 Has the technology for preparing maps and

1 utilizing aerial photos improved over the course of
2 your career?

3 A. It has.

4 Q. Okay. In what way?

5 A. Well, so the engineer referenced that he
6 made his -- his maps by overlaying paper and tracing an
7 aerial photograph. And my experience is the older
8 historical aerial photos don't have the resolution of
9 the modern.

10 And then there's the fact that the earth is
11 round and paper is flat. And -- and he had no way of
12 geo-referencing, other than marks that would have been
13 placed on the paper map. And we don't know how those
14 marks were placed.

15 And so the relationships of features were
16 likely correct, but the absolute location of those
17 features relative to a survey quadrant may or may not
18 have been accurate in those days.

19 Q. And so why did you find that map useful?

20 A. The reason that I looked at that map was --
21 was primarily to ascertain what the historic -- history
22 was of the features that I saw on the ground. I saw
23 a -- a ditch berm or a ditch levy that blocked the
24 channel of Lee Creek, had trees and vegetation on it.

25 And this helped me understand how long it

1 may have been there, what the history of that feature
2 may have been.

3 Q. In your work, both with the Department and
4 in your other careers, have you used USGS maps?

5 A. I use them a lot.

6 Q. Okay. Like Exhibit 23 -- 24?

7 A. Yes.

8 Q. Okay. And in your experience, are maps
9 always correct or perfect?

10 A. No.

11 Q. Okay. And what's that based upon?

12 A. Well, so I can think of a couple of
13 examples from this map right here. We've -- we've got
14 a long series of aerial photography. As far back as I
15 can go in the aerial photography, I can observe
16 Mr. McConnell's upper ditch.

17 And this map is represented to have been
18 produced from 1985 aerial photography, and that upper
19 ditch isn't on the map. You know, whether they just
20 deemed it not a significant enough feature to map or
21 missed it, I don't know.

22 And I think the other example from that map
23 is the National Hydrographic Dataset is prepared
24 largely from the line work on these paper maps. And if
25 you pull up Stroud Creek on that dataset and overlay it

1 on a 2019 aerial photo, it shows Stroud Creek jumping
2 from one linear feature with a lot of trees across a
3 bare feature with sagebrush to another linear feature
4 with a lot of trees. And I don't believe that's
5 actually how Stroud Creek runs.

6 Q. Okay. And so in your -- to try to
7 ground-truth something, would you rather rely on
8 observation and investigation, as opposed to maps?

9 A. For present condition where we can do that
10 ground-truthing, absolutely.

11 Q. Okay. In this report you -- just kind of
12 going through it, you do discuss the Kauer Ditch.

13 And again, what was the reason that you
14 looked at the Kauer Ditch? Or why were you asked to
15 look at it?

16 A. Yeah. So I was asked to describe the
17 condition of various channels as they existed as of
18 last summer and to give my opinion as to what their
19 capacities were. And the Kauer Ditch was an important
20 feature, as I've learned since, in the history of how
21 water was used there. But physically on the ground
22 it's an important feature.

23 Q. And did you locate the Kauer Ditch heading?

24 A. I did.

25 Q. Okay. Did it have an IDWR tag number?

1 A. It had. And I think it's in here, probably
2 on page -- I think on page 3. Well, it's in here
3 somewhere. But yes, I did locate the tag number, and I
4 did include it in the report.

5 Q. Okay. And what -- what is the significance
6 of an IDWR tag diversion?

7 A. So there may be other purposes. But in the
8 hundreds of tags I nailed on power poles and banded to
9 motor conduits, the purpose of that was to provide a
10 unique identifier for a feature on the ground so that
11 in the future that could be tied to any records from
12 various programs or activities so that there wasn't
13 ambiguity.

14 We got ambiguity when a single water right
15 has multiple points of diversion. We have ambiguity
16 when a single point of diversion contained -- conveys
17 multiple water rights. And we have ambiguity when
18 there are conflicting local names for features.

19 So the site tag is just a long number
20 that's unique that all records can be tied to. But it
21 means that someone from IDWR visited the location,
22 nearly always that they took a GPS reading of the
23 coordinates, and that they recorded that somewhere.

24 Q. And are those tags -- I mean how do you
25 tell that that's a genuine IDWR tag or maybe something

1 that somebody just stuck on the diversion?

2 A. So the -- when you've seen a few of them,
3 you begin to recognize they have a distinct size and a
4 distinct pattern, distinct font, and they say "Idaho
5 Department of Water Resources." I don't -- I can't
6 quote the exact. But when you've seen a few of them,
7 you immediately identify that yeah, this is the thing.

8 Q. And on page 3 of Exhibit 153, you reference
9 the tag number --

10 A. Oh, I do. There it is.

11 Q. -- as A0011439?

12 A. That's correct.

13 Q. Did it look like the other IDWR tags that
14 you had placed on the other diversions or that you had
15 seen in your experience?

16 A. It did, yes.

17 Q. Okay. Can you describe what you did in
18 your review of the Kauer Ditch.

19 A. So --

20 Q. This is summarized in your report. And --

21 A. Yeah.

22 Q. -- I don't need you to read, but --

23 A. Yeah.

24 Q. -- could you just generally describe it.

25 A. So -- so with Mr. Whittaker we drove most

1 of the length of it. I crossed it in two places and
2 observed the condition of the crossing. I observed the
3 heading of the ditch. I observed the measurement
4 structure. I took a cross-section at one location,
5 Jordan helped me -- you know, took a -- took a depth
6 and got the geometry of the channel.

7 And then back in the office I used the
8 trace of that from aerial photography and from the
9 engineer's map and the topo map to get a gradient. And
10 then I calculated a theoretical flow capacity of that
11 ditch.

12 Q. Okay. And what -- what was the theoretical
13 flow capacity?

14 A. It was 15 --

15 MR. BROMLEY: Mr. Cefalo, I'm going to object to
16 this whole line of questioning. It's in my motion in
17 limine. You've already made a decision that you'll
18 entertain the relevance of it. The Kauer -- the
19 testimony has come in that the Kauer Ditch has nothing
20 to do with this proceeding. It's not on the transfer.
21 It -- you know, it's information surely, yes, but it
22 has nothing to do with this transfer.

23 So my objection, again, goes to relevance.
24 Mr. Harris is asking for information that doesn't have
25 anything to do with the transfer that's in front of

1 you.

2 THE HEARING OFFICER: Mr. Harris?

3 MR. HARRIS: What it has to do with is he's
4 verifying just the historic delivery and administration
5 up there. In his report, as he said, he measured it to
6 be 15 cfs. He didn't know that that is about the
7 amount of water rights that Mr. McConnell had. So it
8 at least verifies what other people have testified to
9 from a technical standpoint.

10 So I think it's relevant from that
11 standpoint. Mr. Bromley's exactly right. We're not
12 suggesting that that ditch has to be used now. We're
13 not suggesting you could order that it be used. But
14 this is all information that I think is relevant to the
15 baseline administration that occurred up here, and
16 that's relevant to an evaluation of injury.

17 MR. BROMLEY: If it doesn't have to be used and
18 it has no bearing on this proceeding, I fail to
19 understand why we're talking about it.

20 THE HEARING OFFICER: Anything? Go ahead,
21 Mr. Manwaring, you can weigh in too.

22 MR. MANWARING: Yeah. Can I ask a question in
23 aid of objection to the same line here?

24 THE HEARING OFFICER: You can.

25 ///

VOIR DIRE EXAMINATION

BY MR. MANWARING:

Q. Bryce, the IDWR water tag that you found on the device there at the Kauer Ditch, that doesn't say that that's a decreed point of diversion for anyone, does it?

A. No.

Q. It's just an identifier of some location on the ground?

A. That's correct.

Q. And you've not found anything in the Idaho Department of Water Resources' records that show there is a water right attached to that Kauer Ditch location?

A. There's a memo from Mr. Luke that was included in the -- the adjudication claims for McConnells' water rights that indicate that that was the point of diversion for -- it said McCollum [phonetic], I think, in the document. And Tim Luke affirmed in his affidavit in 2014 that he believes that should have been McConnell.

And so at that point it was the perception of Idaho Department of Water Resources that that was the point of diversion for those rights.

Q. Have you seen a record from that or the Department of Resource that says that is a diversion

1 place for any water right?

2 A. I just described the record that I have
3 seen from Idaho Department of Water Resources
4 describing it as the point -- pre-adjudication claim
5 record describing the point of diversion for
6 McConnells' water rights.

7 Q. I understand that's in his affidavit.

8 But anything else from the Department of
9 Water Resources that says there's a decreed right on
10 the Kauer Ditch?

11 A. That's the only documentation I have from
12 the Department of Water Resources.

13 MR. MANWARING: Okay. Then I join in the
14 objection as to relevance, because we're not talking
15 about an actual water right in Kauer Ditch. We're
16 talking about a diversion, legal or illegal, that took
17 place for years historically.

18 But that doesn't apply to what you're
19 trying to decide here today as to the transfer of a
20 diversion point that's on Lee Creek. Has nothing to do
21 with Kauer Ditch.

22 THE HEARING OFFICER: Okay. Those objections
23 are noted on the record. I find that it is relevant.
24 We've covered a lot of ground already from the
25 applicants' witnesses, talking about the historical

1 deliveries of water within the Lee Creek drainage. And
2 I think this goes to that understanding and that
3 question. So I'm going to allow this line of
4 questioning to continue.

5 But, Mr. Harris, I mean you've noted that
6 you don't believe that you can demand that the Kauer
7 Ditch be added as a point of diversion. And so I don't
8 know that spending two hours on -- on the Kauer Ditch
9 is going to be a worthwhile venture. But you can
10 continue with your line of questioning.

11 MR. HARRIS: Well, and ironically, that was the
12 last question I was going to ask him about the Kauer
13 Ditch is what was the capacity.

14
15 FURTHER DIRECT EXAMINATION

16 BY MR. HARRIS:

17 Q. So maybe just to clear the record, what was
18 the measured capacity from your evaluation?

19 A. I calculated approximately 15 cfs.

20 Q. Okay. I do have one more question on the
21 Kauer Ditch.

22 Did you see trees or shrubs or anything
23 growing in the ditch that would indicate that it hadn't
24 been used for an extended period of time?

25 A. No indication that it had been a long

1 period of nonuse.

2 Q. Okay. I now want to talk about the other
3 part of your report, which is the current Whittaker
4 delivery system on the property. And I think you have
5 a pretty good figure. It's Figure 11.

6 A. Yes.

7 Q. You've been here during the testimony --
8 well, you were here all day yesterday; correct?

9 A. Yes.

10 Q. And you heard the description of the
11 irrigation system that Jordan provided and then also
12 James talked about briefly?

13 A. Yes.

14 Q. As a general matter, did they accurately
15 describe what you observed that's documented in this
16 report?

17 A. They did. I may have called some features
18 different things than they did, but I didn't hear
19 anything yesterday, either from Whittakers or from
20 Watermaster Udy or from Mr. -- name starts with a "B,"
21 I don't hear anything from any of them --

22 UNIDENTIFIED SPEAKER: Borstelman.

23 THE WITNESS: Borstelman.

24 -- that conflicted with what I observed.

25 Q. (BY MR. HARRIS): Okay. So what's --

1 MR. BROMLEY: Rob, I'm sorry to interrupt.

2 Which exhibit are you on?

3 MR. HARRIS: Well, I was going to jump to
4 Figure 11.

5 THE HEARING OFFICER: Exhibit 153.

6 MR. HARRIS: 153.

7 MR. BROMLEY: Exhibit 153. I'm sorry.
8 Figure 11. Thank you.

9 Q. (BY MR. HARRIS): When you were up there
10 the day of your visit, did you take a GPS with you?

11 A. I did.

12 Q. Okay. And so there's several figures that
13 have GPS-plotted points.

14 What was the GPS device that you used?

15 A. It was a Garmin. I think it's called
16 eTrex -- eTrex something. Maybe eTrex H. I don't
17 remember the model number.

18 Q. Okay. So on Figure 11 I think what we're
19 looking at is the -- what I've referred to as the farm
20 yard; is that correct?

21 A. The farm yard is in the southwest corner of
22 that figure.

23 Q. Okay.

24 A. Yes.

25 Q. And again, I just want to be brief, because

1 we talked about this, but what -- there's a red dot
2 with a smaller black dot in it.

3 What -- what does that depict on the -- the
4 map?

5 A. So that depicts a wooden gate about this
6 wide, can be lifted by a screw. When that gate is
7 lifted, then the water goes into that -- if you're
8 facing downstream, what would be the left channel.
9 When that gate is closed, it pushes water to the right
10 channel, which feeds the intake to a pipeline.

11 Q. And the intake to the pipeline is depicted
12 with a blue dot?

13 A. Yes, that's correct.

14 Q. Okay. Now, I notice the -- there's a solid
15 red line below the left weir that would be the channel
16 that continues down and then eventually gets lost in
17 all of the willows.

18 Do you see that channel?

19 A. Yes.

20 Q. Okay. I notice there's a dashed line
21 through those willows.

22 What does that indicate?

23 A. That indicates that in that area -- well,
24 you can see from any GPS track that I didn't walk that
25 entire ditch. I -- the green dots are where I walked.

1 Q. The green triangles, you mean?

2 A. Green triangles, yeah.

3 But the fact that it's broken means that I
4 presume that's where the channel went, but I actually
5 couldn't identify the channel there. And that's
6 consistent with Mr. Whittaker's testimony that there
7 the water spreads out.

8 Q. You didn't want to wade into the jungle?

9 A. I did wade into the jungle. And it was a
10 slog. But I didn't -- I didn't examine every square
11 inch of the jungle.

12 Q. Okay. So I noticed from your GPS tracking,
13 too, it looks like you walked over to the west springs
14 channel that comes in from the west.

15 Could you just describe what you observed.

16 A. Yeah. So there's a deep ditch, you know,
17 more than knee deep. I didn't -- I had hip boots, and
18 I didn't dare step into it. And at the west end it's
19 narrower, and it gets wider as it picks up more water
20 moving towards the east.

21 On the downhill side of it is a substantial
22 earthen berm. And that earthen berm constitutes a dam,
23 if you will, or a ditch levy that blocks the -- you
24 know, the natural topographic depression that somewhere
25 would have contained the historic bed of Stroud Creek.

1 Q. Okay. So you followed that channel down.
2 And it looks like you then went up to I
3 believe what you've called the hilltop split?

4 A. Yes.

5 Q. Could you -- could you just tell us on this
6 map where that's located.

7 A. So in the -- the top part of the map, just
8 a little bit east of center, there are two yellow boxes
9 was Xs in them that represent weirs that kind of
10 obscure a couple of red dots that indicate control
11 devices. That's -- that location is what I call the
12 hilltop split.

13 Q. Okay. And there's a -- there's a red
14 channel that goes off to the west and appears to go
15 down the drainage.

16 And it looks like you walked that from the
17 control structure on the ditch; is that right?

18 A. That is right.

19 Q. Okay. What -- tell us what you saw.

20 A. So what I saw is that going down the hill
21 there's a defined channel that looked like a newer
22 construction that's been riprapped to prevent erosion.
23 And then at the bottom of the hill the flow is -- looks
24 like in sort of a self-eroded channel, and it goes
25 maybe 3, 4, 500 feet, mostly north northwest, and then

1 it intersects an older historical ditch.

2 And that ditch for a short distance
3 captures the entire flow. But as -- as that flow moves
4 then towards the northwest, the ditch isn't large
5 enough, so then the flow spills out of that ditch. And
6 it has cut several erosional channels across a meadow,
7 and then eventually coalesces into a location that
8 looks like it was probably one of the historical
9 channels or the historical channel of Stroud Creek.

10 Q. Now, the ditch that you've talked about,
11 does -- does that have a name?

12 A. So the -- this northernmost ditch, the last
13 one that I talked about that intercepts --
14 Mr. Whittaker called it, I thought, the Bohan Ditch,
15 but my hearing's not really good. And I think in the
16 engineer's maps it's called the Bohannan Ditch, but it
17 is a historical named ditch.

18 Q. Okay. And on this map it doesn't appear
19 that you walked, at least based on the GPS tracker, any
20 further north than that up to the place where Stroud
21 Creek comes into Lee Creek; is that right?

22 A. I -- I walked quite a bit further north
23 than this figure indicates. Even Figure 2 shows that I
24 walked quite a bit further -- walked and rode in the
25 side by side. But even that doesn't show the furthest

1 extent. But even so, I did not find the -- the
2 confluence of Stroud Creek and Lee Creek. At that time
3 I didn't know that was an important feature, and I
4 didn't go far enough north to see it.

5 Q. Okay. I want you to look at Figure 10. I
6 forgot to ask this before. But there's a blue line
7 that's on that map.

8 And it's indicated here that's a 1954 trace
9 of the Kauer Ditch?

10 A. Yes.

11 Q. Okay. So is it -- is it off a little bit
12 from what the aerial shows today?

13 A. It is.

14 Q. Okay. And so at least -- did you
15 geo-reference that map?

16 A. So I geo-referenced the paper map, and that
17 offset is likely an effect either of my geo-referencing
18 or the fact that the section lines drawn on the
19 engineer's map themselves had not been geo-referenced
20 properly to the aerial image that the engineer was
21 tracing.

22 Q. So again, the '54 engineer map was helpful
23 to give you a general idea of what's there, but you
24 would say it's not pinpoint accurate?

25 A. Yes.

1 Q. So just to finish up with this report, on
2 page -- on page 5 you begin, there's a series of
3 measurements that you took.

4 And so could you just briefly describe
5 what -- what you were measuring.

6 A. Yeah. So I was trying to ascertain the
7 water budget of the flow as it was occurring on the --
8 on the day that I visited. And so I started at the top
9 and measured flow -- I measured just above the old
10 heading of the Kauer Ditch. The Kauer Ditch was not
11 taking water on that day.

12 I measured flow in the farm yards to the
13 two directions that it could go. Measured flow at the
14 hilltop split. And then I measured flow -- I went far
15 enough down Stroud Creek, but downstream, so north, far
16 enough that I believe that I had captured -- that the
17 channel had captured all of the diffuse flows from this
18 erosion process of exiting the Bohan Ditch. But I
19 wanted to be upstream as far as possible to not capture
20 any other tributary springs.

21 And so I picked a point -- in retrospect, I
22 probably went too far downstream. But those are the
23 locations that I measured.

24 Q. Okay. And so you were trying to get an
25 idea of what the discharge was at west springs or all

1 of the water coming down the creek?

2 A. Yeah. So what I was trying to do was to
3 see whether the combination of conveyance in the Stroud
4 Creek channel, which from what I could observe and what
5 I had been told, had not -- for many years had not
6 carried a lot of water. So any losses that might occur
7 in that channel, combined with whatever water was being
8 picked up from the west springs. Because as that
9 diffuse flow north of the farm yard was then gathered
10 up by the west springs collector ditch, it necessarily
11 commingled with west springs water. And I was just
12 trying to ascertain, you know, the net effect of all of
13 that from top to bottom.

14 Q. And that's what -- that's what's summarized
15 in this report and these measurements?

16 A. Yeah. There's three tables of summary, and
17 I don't have them memorized. But they -- they document
18 what those calculations are and the -- you know, my
19 estimated imprecision.

20 Q. Okay. And did it appear to you that west
21 springs had been -- had some human intervention as far
22 as a collection ditch and how it was plumbed into the
23 ditches on the property?

24 A. Very much so. And it -- you know, from
25 the -- from the appearance of the ditch bank, the trees

1 and the vegetation growing on that, it looked like it
2 was a very old structure.

3 Q. Okay. I now want to talk about your east
4 springs report. So that is Exhibit 152.

5 A. Okay.

6 Q. And you open that up, the first thing I'd
7 like you to do is actually open up the other exhibit
8 binder to Exhibit 17. It's an e-mail from Cindy
9 Yenter.

10 A. Okay. I brought these for a reason.

11 Q. The second paragraph in this e-mail says,
12 "I'm inclined to agree that in the absence of
13 development, flows from the east springs would run
14 generally east northeast and would sink long before
15 reaching a named tributary."

16 As a general matter, do you agree with
17 that --

18 A. Yes, I --

19 Q. -- that characterization?

20 A. Yes, I do.

21 Q. Okay. What is that based upon?

22 A. So I don't know what Ms. Yenter based hers
23 upon, but my opinion is based on walking that ditch,
24 the full length of it, and then circling back above and
25 below to see what else was going on in that general

1 vicinity, and then laying my GPS track over the
2 topographic map, and then also using a digital
3 elevation model.

4 And then also yesterday Mr. Bromley
5 referred to some cross-section profiles that were on
6 the '54 engineer's map. And all of those show that
7 if -- if left undisturbed by human intervention or
8 if -- if not diverted and delivered, that water
9 naturally would proceed to the -- to the north
10 northwest, be tributary to the Big Eight Mile system.
11 Although I don't think that on the surface it would go
12 that far. But that would be the direction that it
13 would run.

14 Q. And so if -- if this transfer were approved
15 and east springs is one of the sources for the right
16 and Mr. McConnell called for water from east springs,
17 do you believe without the ditch that it would be
18 tributary to the Stroud Creek drainage?

19 A. It couldn't be.

20 Q. Okay. Let's now talk about your last
21 report, which is Exhibit 151 that's specific to this
22 transfer. And in Mr. King's report there's a statement
23 in there that says that "The POD was inadvertently
24 omitted from the water right claims filed in the SRBA."

25 And were you asked to evaluate essentially

1 that sort of a statement?

2 A. I was.

3 Q. Okay. Is there a technical definition for
4 "inadvertent omission" that you're aware of?

5 A. You know, there's a legal term, "clerical
6 omission," and I'm not sure of its definition. But I
7 know that when I worked in the Department of Water
8 Resources doing adjudication recommendations that we
9 talked about mistakes, we talked about errors, we
10 talked about omissions.

11 And, you know, from lay terms, in my mind,
12 if -- if there was a known fact on the ground that
13 didn't get included in the claim that should have,
14 that's an omission. And that was the sort of context.
15 I wasn't, you know, parsing exact legal meanings of
16 words. That's not my expertise.

17 Q. And you're not asserting that -- that the
18 SRBA decree doesn't have legal significance, you're
19 just looking at the historical development of these
20 water rights; is that right? McConnells' water right.

21 A. So the -- you know, my understanding from
22 the discussions that you and I had was that the
23 transfer was represented to better conform the SRBA
24 decree to what should have been claimed, what existed
25 historically as of 1987.

1 And so -- and then that was confirmed when
2 I read similar statements in Mr. King's report. So
3 my -- my effort was to see if that was a correct
4 representation, if the transfer did what it was
5 represented to do.

6 Q. And in terms of McConnells' water rights on
7 the SRBA, they filed late claims on the SRBA; correct?

8 A. Yes, very late claims.

9 Q. Do you know what year that was?

10 A. They filed them in 2014.

11 Q. Okay. And in your evaluation of those
12 water rights, did you find information about the
13 diversions on Stroud Creek, including the Kauer Ditch?

14 A. I did.

15 Q. And is that the Tim Luke information you've
16 referred to before?

17 A. Yes.

18 Q. Okay.

19 A. The Tim Luke information was from the
20 claims files.

21 Q. Okay. Did you review aerial images as
22 summarized in your report as well?

23 A. I did.

24 Q. Okay. And what was the purpose for that?

25 A. So the purpose for --

1 MR. BROMLEY: Mr. Cefalo, I'll just continue to
2 sustain my objection from the beginning that this
3 entire line of questioning, again, is irrelevant. We
4 have testimony, again, explaining that this transfer
5 was not filed to correct a, quote/unquote, "clerical
6 error," as mentioned by Mr. Contor. The entire line of
7 questioning has, again, nothing to do with the transfer
8 that's in front of you that was filed with the \$1,700
9 filing fee, as opposed to the \$350 filing fee.

10 MR. HARRIS: Mr. Contor has not testified that
11 it was filed under 42-221.08. He's just trying to
12 verify whether the lower point of diversion did exist
13 at the time, whether it was listed in any prior water
14 rights. And that's been, I think, brought up by
15 Mr. Bromley and others. So I think it's relevant.

16 THE HEARING OFFICER: Mr. Manwaring, any other
17 parties want to weigh in on this objection?

18 Yeah, Mr. King's report included evidence
19 about the existence of the lower ditch in 1986 aerial
20 photos. And he established that it could have been
21 included in an adjudication claim in the SRBA. I find
22 that it's relevant.

23 You can continue with this line of
24 questioning.

25 MR. HARRIS: Okay.

1 Q. Based on your review, did it look like the
2 section 20 POD or the lower POD, did you look at it to
3 see if it was existing in 1987?

4 A. I did.

5 Q. Okay. And what did you conclude?

6 A. I agree with Mr. King, that that -- there
7 was a diversion there.

8 Q. Okay. You also performed an injury
9 analysis with this transfer; is that right?

10 A. I did.

11 Q. Okay. And did you conclude that approval
12 of this transfer without certain conditions would
13 injure Whittaker's 74-157?

14 A. I did.

15 Q. Okay. And why -- why is that?

16 A. There's -- there's two lines of reasoning.
17 And I think the easiest, and particularly with
18 Mr. Bromley's discomfort with historical, is so look at
19 the present --

20 MR. BROMLEY: Objection. Making statements
21 about my, quote/unquote, "discomfort" has nothing to do
22 with responding to Mr. Harris' statement.

23 THE HEARING OFFICER: I agree. Go ahead.

24 THE WITNESS: I apologize.

25 So if you have a condition like this where

1 if this is a stream coming up and this is another
2 stream, if you have a place here that is not authorized
3 to divert water, then the water right associated with
4 this unauthorized place has no ability to call upon --
5 a call made upon that point of diversion has no ability
6 to cause curtailment up here.

7 Q. (BY MR. HARRIS): Uh-huh.

8 A. But if that were to then become authorized,
9 then a call made to deliver that water right would have
10 the ability to cause this water right to be curtailed.
11 And that's the situation of the 74-157 right, that
12 right now it's not able to be curtailed to satisfy
13 McConnells' rights. And if the transfer approved, it
14 would. And that would be -- that would be a detriment
15 to the enjoyment of 74-157.

16 Q. So it would give administrative access to a
17 stream of water that physically it doesn't currently
18 have; is that right?

19 A. That's -- that's correct.

20 Q. Okay. And again, you didn't go down and
21 visit where Stroud Creek came into Lee Creek --

22 A. No.

23 Q. -- you didn't go down to that area?

24 For purposes of administration today, do
25 you think that administration should be based upon

1 what's physically happening on the ground or what
2 historical maps may or may not have shown?

3 A. I think physically on the ground is the way
4 the watermaster would have to make his or her decision.

5 MR. HARRIS: Okay. That's all the questions I
6 have.

7 I would move to admit Exhibits 151 through
8 153 into the record.

9 THE HEARING OFFICER: Are there objections above
10 and beyond those that were raised either already
11 verbally today or within your motion in limine?

12 Mr. Bromley --

13 MR. BROMLEY: So --

14 THE HEARING OFFICER: -- any other objections
15 that you would want on the record?

16 MR. BROMLEY: Well, Hearing Officer, why don't
17 we -- you know, before Mr. Harris moves to offer and
18 admit, why don't we let the cross go around the table?

19 THE HEARING OFFICER: I'd -- I'd be okay with
20 that.

21 Do you have any problems?

22 MR. HARRIS: Yeah, that's unusual.

23 Are you objecting and asking questions in
24 aid of an objection?

25 MR. BROMLEY: No. I'm just interested to get

1 the cross in prior to you offering them and having them
2 admitted in.

3 But you're saying you'd want to have them
4 offered and admitted in and then have the cross stem
5 off of that?

6 MR. HARRIS: That's just how I've usually done
7 it. I've laid a foundation for my expert reports. I
8 move to have them admitted.

9 MR. BROMLEY: My typical experience in these
10 hearings has been that we've been taking it up at the
11 end when we have exhibits that we haven't stipulated
12 to.

13 THE HEARING OFFICER: We've done it -- I've done
14 it both ways.

15 MR. HARRIS: Okay.

16 THE HEARING OFFICER: I don't feel strongly.

17 MR. BROMLEY: Okay.

18 THE HEARING OFFICER: Mr. -- so you may have
19 additional objections, is that what you're saying?

20 MR. BROMLEY: No, I was just surprised to hear
21 it being done that way.

22 THE HEARING OFFICER: Okay.

23 MR. BROMLEY: So, you know, if we want to do it
24 procedurally that way, Rob, that's fine.

25 THE HEARING OFFICER: Yeah, we can -- let's talk

1 about admission just right now.

2 Mr. Manwaring, did you have any other
3 objections that weren't already expressed in your
4 written motion to join the motion in limine?

5 MR. MANWARING: Just the ones we put on the
6 record at the beginning of day yesterday concerning
7 materiality and relevance --

8 THE HEARING OFFICER: You bet.

9 MR. MANWARING: -- in light of the fact that
10 we're dealing with a ditch that has no decreed right or
11 point of diversion, period.

12 THE HEARING OFFICER: Okay. Those objections
13 are noted in the record.

14 I will admit Exhibits 151, 152, and 153
15 into the record at this time.

16 (Exhibits 151 through 153 admitted.)

17 THE HEARING OFFICER: And so we can proceed now
18 with cross -- cross-examination.

19 We'll start with you, Mr. Bromley, that --
20 Protestants have an opportunity, too,
21 Ms. Foster, Mr. Johnson, to ask any questions, if you
22 have any, of Mr. Contor also.

23 Go ahead, Mr. Bromley.

24 MR. BROMLEY: Sure.

25 ///

CROSS-EXAMINATION

BY MR. BROMLEY:

Q. So hi, Mr. Contor. How are you?

A. Pretty good. Thank you.

Q. Chris Bromley on behalf of the McConnells.

Okay. So you -- you stated previously, then, that Exhibits 152 and 153 were not written in response to the transfer that was filed; correct?

A. That is correct.

Q. All right. And we know that because the dates of the reports. So 152 was authored by you on July 17, 2020; 153 was authored on July 20th, 2020.

Does that sound about right?

A. I think so. You know, we can look at the dates, but that sounds about right.

Q. Okay. And Exhibit 151 was written on March 26th of '21, so less responsive.

So we know that by the dates and by your testimony, then; correct?

A. Yes.

Q. Okay. So let's just go back to 151, Bryce. And in your testimony you stated that this was a clerical error correction.

So what I'm curious about is when I read your attorney's response to motion in limine and/or

1 motion to strike on page 17, referencing "The first
2 third page of page 2" -- and I'm reading here from the
3 response, "The first third page of page 2 of Contor's
4 injury report describes that one of the stated purposes
5 of the transfer was that it was filed pursuant to Idaho
6 Code 42-221.08. The inclusion of the statement is the
7 result of poor communication from Whittakers' counsel
8 to Contor, as it was McConnells' prior transfer that
9 was submitted on that basis, not the transfer 84441."
10 Skip down to the next sentence, "We apologize for this
11 error."

12 So my question is, did you review the
13 transfer or was it communicated to you by counsel that
14 the transfer was filed as a, quote/unquote, "error
15 correction"?

16 A. So -- so thank you for the opportunity to
17 clarify.

18 I did not testify at this hearing today
19 that I thought that the transfer was a clerical error
20 correction. I did put that in this report. And
21 Mr. Harris has taken some blame that partly belongs to
22 me.

23 What happened was that he called me on the
24 telephone. He said that there's this transfer that's
25 represented to correct an omission in the record, the

1 transfer number is 84441.

2 I went to the IDWR website. I queried
3 Transfer No. 8441. I pulled up the only transfer
4 application that at that time had been scanned and been
5 made available to the public. And I -- that transfer
6 did have that box checked. And as I read through that
7 transfer, I thought, number one, it doesn't talk about
8 a section 20 POD. Number two, it looks like it's
9 already been approved.

10 And so then I called Mr. Harris and I said,
11 "I think I'm reading the wrong transfer."

12 And he said, "Well, I will send you the
13 correct one." And then he e-mailed me a copy of
14 application 84441. And in my mind I conflated the two,
15 and I -- this was a mistake, this -- these first two
16 paragraphs were a mistake.

17 However, the rest of the document does
18 speak to the represented purpose of the -- of the
19 transfer. The transfer, as represented by Mr. King and
20 by testimony, is to restore it to the decree, a point
21 of diversion that has never been on IDWR's records, has
22 never been decreed, has never been described in a water
23 right, but I think we all agree historically existed.

24 And so the rest of this is in the context
25 of if that is what the transfer purports to do, does it

1 do it correctly? And I approached that from the
2 framework that I described in the document.

3 So I apologize that I erroneously said that
4 the transfer was represented as a clerical error
5 correction. But I believe the analysis is appropriate
6 to what the transfer has been represented to be in this
7 hearing, which is to add a point of diversion that was
8 omitted for whatever reason.

9 Q. And it was also signed by Roger Warner,
10 when I look at page 11.

11 A. Yes.

12 Q. And so then a second set of eyes looked at
13 this and didn't catch it.

14 So again, there isn't a clerical error
15 correction that's occurring here?

16 A. I agree. I believe that Mr. King's
17 representation is more accurate, that the claims that
18 were prepared by a consultant for -- for the McConnells
19 somehow did not include a point of diversion that they
20 should have, and that this transfer is an effort to
21 correct that omission.

22 Q. So a plain language review of the
23 Reddington decree doesn't have anything to do with
24 putting in a -- asking for a new point of diversion,
25 not to correct the decree -- because we'd be in the

1 SRBA if we were correcting the decree; correct?

2 A. So, you know, that's a legal term that I
3 probably don't understand. What I know is that when I
4 worked for the Department of Water --

5 Q. So, Mr. Contor, if we were trying to
6 correct the decree, would we not be in the SRBA?

7 A. I do not know.

8 Q. Okay. That's fine.

9 A. Yeah, I do not know.

10 Q. The map on Exhibit 24, you stated,
11 Mr. Contor, that many ditches were not included on the
12 quad.

13 A. Oh, that will be better. I think I need
14 these glasses.

15 THE HEARING OFFICER: Uh-huh.

16 Q. (BY MR. BROMLEY): But, you know, which
17 ditch do you see in section 20 or section 30?

18 A. Okay. I believe I see the lower ditch.

19 Q. On the quad?

20 A. Yes.

21 Q. Okay. And it -- you know, in your
22 experience, Mr. Contor, is it common to see every
23 diversion put onto a USGS quad?

24 A. No. And I think we have an example here.

25 Q. Exactly. So we have an example of the

1 lower diversions appearing on the quad?

2 A. Yes.

3 Q. But the upper diversion, which is on the
4 decree, is not on the quad?

5 A. Yes.

6 Q. Okay. In your Exhibit 151, Bryce, I think
7 it's Figure 2. Yeah, it looks -- are we looking at the
8 same?

9 A. Yeah.

10 Q. Okay. Okay. What are these -- the white,
11 are they diamonds?

12 A. Yes. So that's the GPS track of all the
13 places that I walked or drove or rode in July of 2020.

14 Q. Okay. And so then the northernmost points
15 are on a horizontal line there in section 30.

16 Do you see those?

17 A. Yes.

18 Q. Where were you?

19 A. So I was on that east-west road that we
20 have talked about where Mr. Whittaker placed culverts
21 many years ago. And that's as far north as I went.

22 Q. And do you recall how many culverts you
23 saw?

24 A. Well, I thought -- my recollection was that
25 I had only seen one. But I was not looking for

1 culverts. And I think that I would rely rather on
2 Whittaker's testimony than my own recollection.

3 Q. So we have some conflicting testimony.
4 You're saying you think you saw one. Mr. Whittaker is
5 saying there were two. Ms. Yenter said there were
6 three.

7 So I was just curious --

8 A. Yes, so --

9 Q. -- if you could resolve -- Mr. Contor, just
10 a moment.

11 I was just curious if you could resolve the
12 conflicting testimony. That was my only question.

13 A. Yeah, so -- so I'm not testifying that I
14 saw two -- or one, rather. I'm testifying that I
15 recall only one, but that to resolve the testimony,
16 I -- I believe that the eastmost channel -- I think
17 what confused me is I recall riding in the -- in the
18 side-by-side we dipped through a channel that had no
19 culvert. I believe that was probably the eastmost
20 channel. And I incorrectly attributed that memory also
21 to the center channel.

22 I think that of the three conflicting
23 versions, Whittaker's is likely the most correct. But
24 I don't see how it has anything to do with anything.

25 Q. And, Mr. Contor, all I was trying to find

1 out is was there a way to resolve -- you know,
2 Ms. Yenter said she saw three. Mr. Whittaker says
3 there are two.

4 MR. HARRIS: I'm going to object.

5 Q. (BY MR. BROMLEY): Only question.

6 MR. HARRIS: It's not his job to resolve the
7 testimony. The testimony is what it is. So I don't --
8 when you say "resolve," I don't know what it is you're
9 asking him.

10 THE HEARING OFFICER: Noted on the record. I
11 don't have any problem with the questions that were
12 asked. Yeah, I thought they were all right.

13 MR. BROMLEY: Okay.

14 Q. So, Mr. Contor, you were then down here in
15 this middle area of section 30 on your way points, as
16 you call them.

17 Let's look at Exhibit 154, and that's the
18 colorful map.

19 A. Yes.

20 Q. So on Exhibit 154, to me it looks like the
21 map confluence is down where you were on those way
22 points where the culverts were.

23 Does that look about right to you?

24 A. It's certainly in the same vicinity, yes.

25 Q. It's, yeah, certainly close. So the

1 culverts are there.

2 If you channelize streams, in your
3 experience, with a culvert going in a direction and a
4 direction, what happens below the culverts with the
5 stream?

6 A. So the culvert can accelerate the velocity.
7 And so for some distance downstream there may be some
8 enhancement of the channel. If it's fairly flat
9 gradient and low flow, it may not make any difference
10 at all.

11 Q. Yeah. Did you look over the culvert into
12 that area?

13 A. You know, I -- I glanced around. But
14 again, the culverts had nothing to do with the purpose
15 that I was down there. And so I did not -- I did not
16 spend any time evaluating north of that point.

17 Q. On the -- you're familiar with quad maps;
18 correct?

19 A. Yes.

20 Q. When you look at the elevations on the quad
21 map in that -- that area, are -- is there a lot of
22 elevation change on the quad maps down there in that
23 section 30, section 20? What do you see with the
24 contour lines?

25 A. Well, so they're 40-foot contours, so

1 they're not adequate for describing any kind of subtle
2 change. But they tell me that northeast is downhill
3 and that the gradient is, you know, fairly constant
4 along that section, that as you get into the upper
5 reaches of these creeks, the gradient is steeper than
6 it is down there.

7 Q. Okay. Okay, Bryce, let's -- let's talk
8 about Exhibit 153.

9 MR. HARRIS: Did you say 153 or 2?

10 MR. BROMLEY: I did, yeah. I'm sorry, Rob.

11 THE WITNESS: Okay.

12 MR. BROMLEY: 153.

13 Q. Are you -- Bryce, are you saying that the
14 west springs ditch blocks the channel of Stroud Creek?

15 A. Yes.

16 Q. Okay. And were we looking at -- was it
17 Figure 11? I think that's what -- we were talking
18 about Figure 11 and how -- is that -- is that Cal
19 Whittaker yard where the two yellow dots and the red
20 dot at the south end of your way points, is that where
21 the diversion, the headgate is on Stroud Creek?

22 A. Yes.

23 Q. Okay. And then -- and then water is then
24 moving down into the jungle, and there are ditches that
25 are bringing it back up.

1 Is that then -- is it the Floyd J.
2 Whittaker Ditch? Is that --

3 A. So on the 1954 map --

4 Q. Uh-huh.

5 A. -- there are at least three ditches, and
6 perhaps more, that are labeled Floyd J. Whittaker
7 Ditch. But one of those is -- so if you start in the
8 northwest quadrant, there's a sort of W-shaped ditch
9 that snakes along, and it joins my -- my GPS trail.
10 That is one of the ditches labeled Floyd J. Whittaker
11 Ditch, which I have called the east springs collector
12 ditch.

13 Q. Okay. And is -- is it this --

14 A. Yes.

15 Q. Okay.

16 A. Yeah, we're talking about the same thing.

17 Q. Right. So the red -- the red line that
18 sort of moves from west to east that's further to the
19 north on Figure 11; is that correct?

20 A. Yes.

21 THE HEARING OFFICER: And, Mr. Contor, west
22 springs collection ditch?

23 THE WITNESS: Oh, yes.

24 THE HEARING OFFICER: That's okay. I just want
25 to make it clear.

1 THE WITNESS: Yes, I apologize.

2 THE HEARING OFFICER: West springs collector
3 ditch.

4 THE WITNESS: I've been making that mistake
5 since July.

6 Q. (BY MR. BROMLEY): No, thank you. Just
7 trying to get the plumbing on the ground.

8 A. Yes.

9 Q. That's all I'm trying to figure out.

10 So water would be flowing to the west, and
11 it's then picked up in this west springs collector
12 ditch that brings it back to the east?

13 A. So -- so the -- at the farm yard water that
14 is not diverted to the point of diversion -- or to the
15 pipe intake marked in blue proceeds to the northwest
16 and, as Mr. Whittaker said, fans out. But the general
17 direction of flow is still to the northwest.

18 And this ditch that you had me identify,
19 the east-west curved ditch, that captures the water and
20 carries it east to intersect the traces of the other
21 ditches. And then from there the water continues more
22 north, but still a little bit of eastern component, and
23 then turns back a little to the northwest until it
24 reaches that northern area where there are the yellow
25 boxes and the red circles.

1 Q. Okay. And then I think you referred to
2 that as the hilltop split?

3 A. And that's my name. But I call that the
4 hilltop split.

5 Q. Sure. And I heard Jordan talking about a
6 Continental Divide.

7 Is that -- I'm just wondering, are those
8 sort of the same things, the hilltop split, does that
9 mean water that goes to the east goes into Big Eight
10 Mile, water to the west might go back into Stroud?

11 A. So the Continental Divide is a linear
12 feature. What I call the hilltop split is a point on
13 that linear feature that at that point, yes, water that
14 goes east is in the -- in the top of a tributary to the
15 Big Mile -- Big Eight Mile, water that goes west is in
16 a basin that would be tributary to Lee.

17 Q. So on Exhibit 154, Bryce, which is the
18 colorful engineer's map --

19 A. Yes.

20 Q. -- where approximately is this, is the
21 hilltop split? And if there's a number on that map
22 that kind of corresponds with it, if you could --

23 THE HEARING OFFICER: Or a letter.

24 Q. (BY MR. BROMLEY): Yeah, or a letter.

25 A. Yeah. So there's a small letter -- it's

1 either a "v" or a "w," that's between the circled
2 numbers "23" and "27." That's the approximate
3 location.

4 THE HEARING OFFICER: Okay.

5 Q. (BY MR. BROMLEY): Okay. Thank you.

6 MS. YENTER: That's what I call the west spring,
7 or I mean the west -- the bypass.

8 Q. (BY MR. BROMLEY): Can you follow the
9 divide ridge, do you see the red divide ridge that
10 starts --

11 A. Yes.

12 Q. -- southwest of section 31 and then it
13 moves northward?

14 Is that hilltop split on the -- on the
15 divide ridge?

16 A. It is.

17 Q. Okay. So then water -- you know, as I
18 understand it from the prior testimony, and are -- do
19 you understand it that the channel of Stroud Creek
20 is -- it ends at the -- at Cal Whittaker's yard and
21 then disappears for some time, water then, though, is
22 going into the -- into the ditch system; is that what
23 you understand?

24 A. Yes, that is.

25 Q. Okay. So then water that ends up in the

1 Floyd J. Whittaker Ditch or water that's intercepted by
2 the west springs ditch, there's then this division
3 point at the hilltop split where decisions, I guess,
4 then are made with water that would otherwise appear to
5 be Stroud Creek water could be moved over to the Big
6 Eight Mile drainage or water could be presumably kept
7 in the Stroud Creek drainage; is that right?

8 A. Yes, that is right.

9 Q. And to me on that map it looks like the
10 Floyd J. Whittaker -- which side of the divide do you
11 see the Floyd J. Whittaker Ditch after the hilltop
12 split? Which -- which side of the divide is it then
13 on?

14 A. So it's on the -- on the Big Eight Mile
15 side.

16 Q. Okay. So that's the east side of the map
17 moving into the Big Eight Mile drainage?

18 A. Yes.

19 Q. Okay. Thank you.

20 So then water that is Stroud Creek water
21 that ends up in the Floyd J. Whittaker Ditch ends up in
22 the Big Eight Mile drainage; correct?

23 A. It can, yes.

24 Q. Okay. Bryce, in your testimony with --
25 with Mr. Harris about Exhibit 153, you talk about the

1 measured capacity of the Kauer Ditch?

2 A. Yes.

3 Q. And I believe you attributed it to luck in
4 your -- in your report?

5 A. Yes.

6 Q. What goes into calculating a channel
7 capacity to render a number going one way or another?

8 A. So the -- there's three things. One could
9 be imprecision in measurement of the geometry, and
10 particularly there was no flow. And so I had to
11 ascertain what I thought was the typical water level
12 from the appearance of the banks.

13 And if I were too low, then that would
14 reduce the calculated capacity. If I were too high,
15 that would increase it.

16 Another is that I scaled the slope off of
17 the topographic map. You know, if I did that
18 incorrectly or imprecisely, that could result in
19 imprecision.

20 Probably the biggest is there's a
21 coefficient describing the roughness of the channel.
22 And if you get that wrong, then it will scale the
23 results up or down.

24 And I think in my -- my July 2020 report I
25 put some fairly wide brackets of uncertainty on my

1 estimate.

2 Q. Okay. Thank you.

3 If there were areas of the ditch that had
4 low spots, would that also affect the outcome?

5 A. Well, so if I had -- if I had measured --
6 you know, if I had measured the cross-section in an
7 atypical section, so a short section that had a
8 different slope than I calculated for the long section
9 of the ditch, yeah, a slope -- a slow-moving spot of
10 the ditch might have a greater cross-section area and a
11 fast-moving ditch might have a smaller cross-section
12 area, relative to the average.

13 Again, this was a -- you know, a quick
14 reconnaissance level. If I had wanted to really nail
15 it down, I would have taken multiple cross-sections and
16 I would have been much more careful. I probably would
17 have got an instrument to determine slope rather than
18 scale off of that.

19 Q. Okay. Thank you.

20 During your testimony, Mr. Contor, in
21 relation to Exhibit 152, which is the east springs
22 report, you stated that east springs is tributary to
23 Big Eight Mile?

24 A. So it's -- it would -- by -- if you mean by
25 tributary that east springs water would reach Eight

1 Mile Creek on the surface, I didn't really pursue that
2 question. But if not diverted, the direction that the
3 east springs water would have moved would have been
4 downgradient towards Big Eight Mile.

5 Q. Okay. So then if diverted, where is east
6 springs going?

7 A. So currently if diverted it can be brought
8 to that hilltop split, and then it can be put in any of
9 the places any other water that reaches there can go.

10 Q. Okay. So then if undiverted it would -- in
11 your opinion, it would go into the Big Eight Mile
12 drainage?

13 A. Yes.

14 Q. But you would agree, would you not, that
15 Water Right 74-157 states that those springs are
16 tributary to Lee Creek?

17 A. It does say that on the face.

18 Q. Okay. And how do you go about changing the
19 face of the water right?

20 A. A transfer proceeding if -- if there's not
21 an active adjudication that allows you to use other
22 mechanisms.

23 MR. BROMLEY: Okay. Thank you.

24 Nothing further. Thank you.

25 THE HEARING OFFICER: Okay. Go ahead,

1 Mr. Manwaring. Do you have questions for this witness?

2 MR. MANWARING: I do, yes.

3 THE HEARING OFFICER: Go ahead.

4
5 CROSS-EXAMINATION

6 BY MR. MANWARING:

7 Q. Bryce, with respect to the transfer
8 application that's before the Department today, why are
9 we even discussing the Kauer Ditch?

10 A. So, you know, as I explained in my report,
11 I go back to my training making water right
12 recommendations. And that training was -- it was
13 drilled into us, I think Ms. McHugh and Mr. Bromley
14 were part of the team drilling that into my head, is
15 that our job was to represent in our recommendations
16 the water right as it existed as of November 1987. And
17 that includes the entire package of how the water was
18 distributed and administered.

19 And there is a condition, a physical
20 condition, at the west springs that affects whether
21 water coming down that drainage would ever reach Lee
22 Creek. And the existence of the Kauer Ditch is the
23 most likely explanation of that physical condition.

24 And so if I were tasked with making this
25 water right conform to how I would have been instructed

1 to recommend it in the adjudication, all of those
2 historical, physical parts of the distribution of that
3 water right, even the lower diversion, which was, you
4 know, never decreed or never recorded in the Department
5 of Water Resources, should have been represented.

6 And so the discussion of the Kauer Ditch
7 really is an explanation of how it is that water that
8 came down the Stroud Creek or the Left Fork Lee Creek
9 channel would not have been part of the supply for that
10 water right.

11 Q. You're not suggesting that the Kauer Ditch
12 needs to be reinstated here?

13 A. No.

14 Q. And you're not suggesting there's any water
15 right that McConnells or Whittakers have to the Kauer
16 Ditch?

17 A. So I don't know about the second question,
18 but I'm certainly not suggesting that it has to be
19 reinstated.

20 Q. Do McConnells have a right to the Kauer
21 Ditch, a water right to the Kauer Ditch?

22 A. So right now there is nothing recorded.

23 Q. Do the Whittakers have a water right to the
24 Kauer Ditch?

25 A. Not that I know of.

1 Q. And when you looked at the Kauer Ditch, did
2 you actually see that it had been blocked off?

3 A. So I did not see that it had actually been
4 blocked off. I saw that water was bypassing it. I
5 didn't have any indication whether that had occurred by
6 chance or purposefully.

7 Q. You didn't -- you didn't see where it had
8 been blocked off physically with dirt, did you?

9 A. So it was -- water was prevented from
10 entering the Kauer Ditch by a dirt bank. I couldn't
11 determine whether that was a result of natural
12 processes or human intervention.

13 Q. There wasn't a headgate there in use any
14 longer?

15 A. So there was a headgate there, but water
16 wasn't -- didn't go far enough for that headgate to be
17 functional.

18 Q. Was the headgate in place or pulled out?

19 A. It was in place. It was physically, you
20 know, there in the -- in the channel, in the vicinity.

21 Q. It wasn't pulled out?

22 A. No, it didn't look pulled out to me. I've
23 seen photos of other headgates that may have been, but
24 that one was not.

25 Q. And in your determinations of gradient or

1 capacity, I think your testimony was you calculated a
2 theoretical gradient?

3 A. Yes. Well, the gradient was based on the
4 maps. The capacity was a theoretical calculation.

5 Q. Okay. So you were relying upon the USGS
6 gradient in making your own calculations of the
7 capacity?

8 A. Yeah. Yes. The USGS -- the gradient
9 derived from the USGS map was one of the parameters
10 that went into the calculation.

11 Q. Were there any watermaster reports from
12 historical sources that talked about any water flow
13 through the Kauer Ditch, measurable water flow?

14 A. I did not look for those, other than the
15 document from Mr. Luke that we've talked about.

16 Q. So you don't know if there are any of those
17 around or not?

18 A. I don't know.

19 Q. And if you will go back to Exhibit 153.
20 Why don't you look at Figure 11. And you were talking
21 about the rather serpentine shape of the collection
22 ditch in the west springs.

23 A. Yes.

24 Q. And you walked that, according to your GPS,
25 you're following that course?

1 A. Yeah, the western -- probably the western
2 300 feet I did not walk. There was no brush in there.
3 And I could see that direction, but I didn't walk --
4 from that point east clear to the end of that ditch I
5 walked.

6 Q. Did you see any devices in there, wood
7 devices, that had trees or brush running through them?

8 A. I don't recall any wooden structures in
9 that stretch, no.

10 Q. See any dead cows in the ditch?

11 A. Not there.

12 Q. Where did you see one?

13 A. I think it was further north we came across
14 a -- Mr. Whittaker said, "That's where that bull went."

15 Q. Further north, where would it be, then?

16 A. So I think it was off this map.

17 Q. It's off this map?

18 A. Yeah.

19 Q. It's not in that area where that collection
20 ditch is?

21 A. No.

22 Q. So off this map being --

23 A. Further north.

24 Q. How close to the diversion point of the
25 McConnells was the dead cow, the dead bull?

1 A. So probably a mile, because I didn't get
2 that close to McConnells' diversion. And, you know, it
3 wasn't important to what I was doing, so I didn't
4 really make any note of where it was. And I really
5 don't recall that well now exactly where it was.

6 Q. How would you describe the flow of that
7 collection ditch through there? Is it free flowing?
8 Is it choked?

9 A. The collection ditch? So it's a very flat
10 ditch, so the gradient is low, the flow is slow, but it
11 was not choked when I observed it.

12 Q. It was not -- I'm sorry?

13 A. Choked.

14 Q. Choked. Okay. Seemed free flowing, as far
15 as you could tell?

16 A. Yes.

17 Q. Now, there was some discussion from the
18 1954 engineer's map that you also looked at, and there
19 was this red line that you've just been discussing with
20 Mr. Bromley that was a ridgeline through there.

21 A. So that's the -- 154, is that the --

22 Q. Yes.

23 A. Okay. Okay.

24 Q. That's the divide ridge, that ridgeline
25 at --

1 A. Yes.

2 Q. Has sinuous look to it bisecting the area?

3 A. Yes.

4 Q. You mentioned in your testimony regarding
5 Exhibit 153 that you also did some topography, you did
6 some measurement.

7 Did you measure any topography relating to
8 that divide ridge?

9 A. Not relating to the divide ridge. It was
10 so pronounced that I could see it with my eyes, but I
11 didn't evaluate it.

12 Q. And the flow of Stroud Creek, the natural
13 channel coming from the canyon up there flows directly
14 towards that divide ridge and then moves more north
15 from there; correct?

16 A. Yes.

17 Q. Would that be consistent with the
18 topography, it would have to move in that direction?

19 A. No.

20 Q. Where would it have to move to be
21 consistent with the divide ridge?

22 A. So in the farm yard, that's a point where
23 the natural topography could allow Stroud Creek to go
24 either direction. And currently it is going to the
25 east. There's a natural topography that could either

1 allow it to go east, but there's also natural
2 topography that could coalesce, and there's also -- it
3 currently is going west. There's natural topography
4 that could allow it to go east.

5 And I need to write a "W" on one hand and
6 an "E" on the other. But it is what it is.

7 Q. I'll tell you, you know which one's the
8 left foot and the right foot; right?

9 A. No. I have that problem also.

10 Q. Okay. So they -- the current flow, though,
11 is to the west?

12 A. The current flow is to the west.

13 Q. When you say there's some topography that
14 would allow it, what do you mean by that, then?

15 A. So -- and Mr. Whittaker talked about this
16 yesterday: In the farm yard there is the channel of
17 the -- the flow of Stroud Creek currently as it comes
18 from the southeast goes through the farm yard, and on
19 its west side is a fairly high bank of earth. There's
20 a narrow gap in that bank of earth that proceeds
21 through that, and immediately after that is that
22 headgate.

23 When the headgate is open, it proceeds on
24 the westernmost of two channels; when it's closed, it
25 proceeds on the easternmost of two channels. If that

1 narrow gap had not been there, then from that point
2 there is a topographic depression that you can see
3 standing on the ground that trends to the northeast.

4 And I followed that on foot to the
5 northeast, and that's actually the only place in the
6 vicinity of the farm yard that I found a residual
7 channel. And they're in a clump of willows north of
8 the fence. Then that depression turns into a defined
9 channel. And that -- that channel goes to the
10 northeast towards the Big Eight Mile drainage.

11 Q. And that's a channel you have an opinion on
12 that was the Stroud Creek natural channel at one point?

13 A. So my opinion is is that, you know,
14 pre-human intervention, it's likely that at times
15 Stroud Creek went to the east and at times Stroud Creek
16 went to the west. And my opinion is that is most
17 likely a residual of one of those times that it went to
18 the east.

19 Q. It would depend on the flow?

20 A. Well, I think what it would depend on would
21 be what sort of natural reworking occurred during
22 high-water events and then which path the water
23 happened to find as the flow receded after a high
24 event.

25 Q. Now, you heard some testimony yesterday, I

1 believe Jordan talked about the fact that between the
2 actual Lee Creek channel and the Stroud Creek channel
3 there's also a topography that's an elevation between
4 those two.

5 Do you remember that?

6 A. I do.

7 Q. Did you observe any of that?

8 A. I did.

9 Q. What did you observe?

10 A. So I didn't go as far north as
11 Mr. Whittaker did, but where I went, you know, it was 2
12 or 3 feet at minimum. And there were places where you
13 were standing in -- in either of the creeks or on
14 either bank the rise between would be so high you
15 couldn't see to the other.

16 You know, the further south you go, the
17 further upstream you go, the more pronounced the
18 topographic divide between the two channels becomes.

19 Q. And if I understand correctly, you didn't
20 make it all the way down to see where the confluence
21 was of Stroud Creek and Lee Creek?

22 A. That's correct.

23 Q. If we can go to Exhibit 151. Page 3 of
24 that exhibit, you reference a 1911 decree.

25 A. Yes.

1 Q. What -- what's the significance of that
2 determination?

3 A. So the 1911 decree made a determination of
4 the relationships of -- of the water rights on Lee
5 Creek and at least some of the tributaries. I don't
6 know if it was inclusive of all.

7 Q. And what was the result of that decree
8 determination?

9 A. So it assigned priority dates to water
10 rights. It specified some special relationships. One
11 of them we heard testimony about yesterday. There's
12 another one that makes a particular water right, and
13 subordinate only to flows below the second ditch
14 that -- that truncates the natural channel of Stroud
15 Creek, the western natural channel of Stroud Creek.

16 Q. Are you talking about the language in the
17 water rights that discuss the pro rata sharing of water
18 in the 1880s?

19 A. So that's what was discussed yesterday.
20 But there's an additional provision that it's Water
21 Right 367 has a particular condition that subordinates
22 it to water above where the Bohannon Ditch truncates
23 the natural western channel of Stroud Creek.

24 Q. On page 6 of Exhibit 151, you talk about
25 the Department of Water Resources' instructions to a

1 watermaster from an August 6th, 2020 letter?

2 A. Yes.

3 Q. You'd already testified that you had no
4 reason to dispute the conclusion that Stroud Creek
5 enters Lee Creek below the McConnell diversion.

6 But you didn't explore that, from what I
7 gather?

8 A. I did not.

9 Q. Why would you have no reason to dispute
10 that, then?

11 A. I think that -- you know, I've known Cindy
12 since -- what? -- 1997? 1996?

13 MS. YENTER: At least.

14 THE WITNESS: Cindy works carefully, and I have
15 no reason to suspect that she would take an
16 administrative action without good reason to do so and
17 without working carefully.

18 Q. (BY MR. MANWARING): So it's based upon
19 your understanding of the person and their character?

20 A. Well, I guess you could say it's faith in
21 the process.

22 Q. Okay.

23 A. But on the -- and additionally, I don't see
24 any convincing physical evidence that -- that would
25 make that, you know, questionable or seem unreasonable.

1 Q. Okay. And that goes to another point of
2 questioning I have for you.

3 When you were there traversing through
4 these areas, did you see anything in the Stroud Creek
5 channel that suggested that it had multiple channels
6 just in the recent history? You mentioned one
7 historical one that you mentioned.

8 A. Yes.

9 Q. But any others?

10 A. So the flow that comes from the hilltop
11 split is intercepted by the remnant of the Bohannon
12 Ditch. And for a short distance it's all confined in
13 that ditch. And then it begins to break out, and
14 overtop that ditch there's a distance of -- I don't
15 know -- an eighth of a mile where there are multiple
16 little rivulet channels being cut into a meadow that
17 eventually coalesce into what appears to be a
18 historical channel.

19 But other than that, no, I didn't see
20 evidence of -- of multiple channels of Stroud Creek.

21 Q. Okay. On page 8 of Exhibit 151, you start
22 your injury analysis.

23 A. Yes.

24 Q. You talk about on -- and I think the
25 carryover's now on page 9, about supplies to other

1 water users and interference with other water rights,
2 that section?

3 A. Yes.

4 Q. The other water users you're specifically
5 talking about are the Whittakers' use on the west
6 springs apparently?

7 A. The entire 74-157 right, yes.

8 Q. Okay. Would the same problem with
9 curtailment of right apply to anyone else further
10 upstream from Whittakers on Stroud Creek?

11 A. Yes.

12 Q. Same injury?

13 A. Yes. As long -- a junior upstream would be
14 affected, yes.

15 Q. Okay. On page 10 of your Exhibit 151 in
16 your "Conclusions" section, that first paragraph in
17 your conclusion talks about "increasing McConnells'
18 enjoyment by giving administrative access to waters at
19 west springs, which historically were not delivered."

20 When you mean administrative access, what
21 are you talking about?

22 A. So the ability to make a call that would
23 result in upstream juniors on Stroud Creek being
24 curtailed.

25 Q. And so if this application's approved, that

1 kind of result would occur?

2 A. In my opinion, it would.

3 Q. And that would give McConnells access to
4 water historically that they did not have access to
5 before?

6 A. Yes.

7 Q. Now, in that third paragraph under the
8 conclusion that begins with the words "The
9 application," you talk in there about a point of
10 injection.

11 Can you explain what you're talking about
12 there.

13 A. Yeah. So at the hilltop split the water is
14 all in ditches. It's no longer in the stream channel.
15 And from there when Whittakers turn water down to go to
16 McConnell, it again enters a stream channel, and that's
17 a point of injection. And I don't see that that's
18 authorized by any water right anywhere.

19 Q. Okay. So that's what you're discussing, is
20 the flow of the Stroud Creek waters after it comes out
21 of that manmade channel into the natural channel again?

22 A. Yeah. Out, yes.

23 Q. That's a point of injection?

24 A. Yes.

25 Q. Okay. You then go on to say that

1 "Inexplicably, the application does not seek
2 authorization for this diversion delivery and injection
3 necessary."

4 And tell me what you under- -- what you
5 were trying to convey with that.

6 A. Yeah.

7 Q. What's your problem with the application?

8 A. So for -- for the water to be delivered,
9 you know, to increase the enjoyment that that
10 administrative access would create, water has to be
11 carried in -- in human-made ditches beyond that
12 obstruction. And for some reason there was no
13 provision made in the transfer application to authorize
14 that.

15 Q. Okay. So you see that as a deficiency
16 somehow?

17 A. Yes.

18 Q. Okay. Now, if we can go to Exhibit 153.
19 If you'll look at Figure 2.

20 A. Yes.

21 Q. Now, this is an expanded view of your
22 roaming?

23 A. It is.

24 Q. And it looks like down at the bottom there
25 there's some numbers, you've got "2" and "3," and then

1 up further you have sequential numbers going higher.

2 Is there a number "1" that's not showing
3 here or...

4 A. There -- probably number 1 was a failed way
5 point. Sometimes on those GPS points if you push the
6 button and it hasn't quite yet acquired a satellite
7 fix, it will plot someplace strange. And I expect
8 that's what it is. You know, we could pour through the
9 text. And Mr. Cefalo could do that and see if I
10 reference a way point 1. But I don't know that answer
11 right now.

12 Q. Okay. Down there at the area 2 or 3, where
13 are -- where are you roaming? What's -- what are you
14 looking at down there?

15 A. So area 2 is the -- point 2 is the heading
16 of the Kauer Ditch. Point 3 is a crossing. That's
17 probably the point where I measured the dimensions of
18 the ditch.

19 Q. Then I see you go somewhat away from the
20 Kauer Ditch and go continuing along its course north;
21 is that correct?

22 A. So that is correct.

23 Q. So you didn't walk the entire Kauer Ditch
24 this time?

25 A. No, I probably -- you know, looking at it

1 all, probably half of it. And I -- I rode with
2 Mr. Whittaker in his side-by-side. I didn't walk that
3 part.

4 Q. Okay. And when you get up to the Kauer
5 Ditch, it looks like you come to a T-intersection in
6 your travels?

7 A. Yes.

8 Q. Where were you going on that to the west?

9 A. So Jordan was driving. I think he was
10 looking for a better road to get up to the diversion.
11 The road we ended up taking was a little bit of a bumpy
12 ride. But that's -- that's my recollection.

13 Q. Okay. So is it fair to say that this
14 figure, then, is based upon your travels when you were
15 with Jordan in the side-by-side? Is that accurate?

16 A. So it's all my travels. Some of it I was
17 driving in my own vehicle. Some of it I was with
18 Jordan in his side-by-side. You can kind of tell how
19 fast we were moving by how close together the dots are.
20 You know, it records every so many seconds. It's
21 all -- all of the above.

22 Q. Okay.

23 A. And after -- some people have to work for a
24 living. And so after Jordan went back to work, I did
25 additional exploration on my own that he wasn't with

1 me. And that was all on foot or in my own car.

2 Q. Okay. I want you to look at Figure 5 on
3 that same exhibit.

4 A. Okay.

5 Q. This is where you're making some
6 measurements of the Kauer Ditch; right?

7 A. Yes.

8 Q. And I notice that the bed of that ditch is
9 cobbled?

10 A. Yes.

11 Q. How consistent is that geographic feature,
12 that cobbling, with the rest of the area up there where
13 even below the injection point from Bohannon Ditch, how
14 [unintelligible]?

15 A. So it's more cobbly in the south, in the
16 vicinity of the Kauer Ditch, than it is further north.
17 Further north where that Bohannon Ditch was, where the
18 point of injection is, you know, none of the cobbles
19 were that big. It was gravelly, but it was smaller --
20 smaller material.

21 Q. These are -- would you say have some pretty
22 good sized to them, these rocks that are in there,
23 these cobbles?

24 A. In Figure 5? Yeah, those are -- they're
25 pretty good size.

1 Q. And just to make sure we're clear, on
2 Figure 7, same exhibit, you show a point of injection
3 from the Kauer Ditch into the Right Fork of Lee Creek?

4 A. Yes.

5 Q. And this is based on the 1954 engineer's
6 map; correct?

7 A. Yes.

8 Q. Is that the Right Fork or could that be
9 Porcupine Creek?

10 A. It's Porcupine. And I think I miscorrecly
11 identified it in one of the written reports as Lee.
12 But it is Porcupine -- it is now called Porcupine. Or
13 it's labeled -- it's now labeled on the maps as
14 Porcupine.

15 Q. Okay. If you'll go to Figure 12 on the
16 same exhibit.

17 And where are we at --

18 A. So --

19 Q. -- on this view?

20 A. -- we're in the farm yard. We're
21 immediately north of that diversion gate. This is the
22 channel -- when the gate is open, this is the channel
23 that conveys the Stroud Creek water north into that
24 area where it spreads out. So this is the water that
25 Whittakers are not diverting at the farm yard.

1 Q. Is this -- to use your phraseology, is this
2 the injection point or --

3 A. No. This would -- this would be a
4 measuring point along the channel, I think would be the
5 best water right description of it.

6 Q. Oh, okay. Is this the channel that's the
7 natural stream channel or the ditch channel?

8 A. So, you know, legally I don't know what it
9 is. Physically it is the channel that conveys water
10 north if it doesn't go to -- to Whittakers' diversion
11 in the farm yard. It's where the water goes now.

12 Q. Okay.

13 A. And it looks like it was originally human
14 made to me by a couple of criteria. But, you know,
15 that's -- it is what it is. You can see it as well as
16 I can see it.

17 Q. Okay. And that's Stroud Creek?

18 A. That's Stroud Creek water, yes.

19 Q. Okay. Now, if you'll look at Figure 13,
20 tell me where we're at there.

21 A. So we're in that area of diffuse flows. So
22 the Figure 12 channel, you can see it goes north and
23 there's a fence. Once it crosses the fence, the flow
24 is spread out and diffused. And this is just a picture
25 of some of that area where that diffuse flow is kind of

1 tearing up a wetland area.

2 Q. Is that the same with Figure 14?

3 A. That's the same with Figure 14, yes.

4 Q. And Figure 15 is what?

5 A. So Figure 15 is in that channel, if you --
6 if we went from the Figure 12 location and went north,
7 that's on that channel between Figure 12 and the area
8 where the flow fans out.

9 Q. Okay. So this Figure 15 is before you get
10 to the fan-out part?

11 A. Yes. Yeah, upstream of the fan-out.

12 Q. Okay. What's significant about a head
13 cutting in a private ditch?

14 A. So, you know, a private ditch may be a
15 misnomer. It's that channel, whatever legal status it
16 has. But the significance of head cutting is head
17 cutting occurs when a longstanding flow regime changes
18 and the stream is trying to re-equilibrate to a larger
19 flow regime.

20 And so this is -- this was an active
21 occurring head cut, which means that it's been subject
22 to some recent change in flow regime.

23 Q. Okay. And that could be attributed to any
24 number of factors or...

25 A. Well, so it means that water is being sent

1 down this channel that historically was not.

2 MR. MANWARING: Okay. Okay. I think that's all
3 the questions I have. Thank you, Bryce.

4 THE HEARING OFFICER: Anything?

5 MR. JOHNSON: I think I'm good.

6 THE HEARING OFFICER: Okay. Well, I do have a
7 couple questions.

8 THE WITNESS: Okay.

9
10 EXAMINATION

11 BY THE HEARING OFFICER:

12 Q. Mr. Manwaring asked just right here at the
13 end a few that I had.

14 And I think it's helpful maybe to start at
15 Figure 2, because it --

16 A. Okay.

17 Q. -- again, kind of the broad overview of --
18 of the math that you walked, especially from -- from
19 the Cal Whittaker yard kind of up to the north through
20 the willows. And maybe, actually, why don't we turn to
21 Figure 11. It zooms in a little bit more on that --

22 A. Yes.

23 Q. -- spot at Cal Whittaker's place.

24 So I -- your report and your testimony is
25 the first that I've heard that there actually are two

1 weirs. There's a weir on down in the Cal Whittaker
2 yard, a weir for the ditch, the Whittaker Ditch --

3 A. Yes.

4 Q. -- headed off for diversion, but there's
5 also a weir on the natural channel side now too?

6 A. So there's -- when I was there, yes, there
7 were two weirs there, and then there were an additional
8 two at the hilltop. So there's -- I saw four
9 altogether.

10 Q. Okay. You observed four. But you had just
11 testified, based on Mr. Manwaring's questions, that the
12 water flowing north through that -- through that north
13 channel, the water that's not diverted by Whittaker is
14 Stroud Creek water?

15 A. Yes, it is.

16 Q. It continues on, and that's what's measured
17 across that weir just above the red dot?

18 A. Yes.

19 Q. So then you -- you followed up -- so I do
20 want to look, then, up at the hilltop structure.

21 You also testified, and in fact you were
22 here to hear both, I guess, Merritt Udy and Jordan
23 Whittaker talk about what's going on at that hilltop
24 divide --

25 A. Yes.

1 Q. -- or that divide structure?

2 There's a control structure up there. And
3 if I recall Mr. Udy's testimony correctly, he had --
4 there was a situation where Mr. McConnell had asked for
5 additional water, and Mr. Udy had come and made an
6 adjustment to this -- this control structure in the Cal
7 Whittaker yard and then realized that no water was
8 getting there. And Mr. Udy had testified that he then
9 was informed that he actually needed to make the
10 adjustment down at this hilltop structure.

11 A. Yes.

12 Q. You -- you recall that?

13 A. Yes.

14 Q. So then as water is turned out of that
15 structure, Mr. Contor, you walked that, and so you --
16 you followed those drops of water, you followed that
17 return water to the north?

18 A. Yes, I did.

19 Q. And that's represented in this red -- solid
20 red line --

21 A. Yes.

22 Q. -- that follows -- there's some green
23 triangles that follow along?

24 A. Yes.

25 Q. So as you get up to kind of the very north

1 end of this map, there's some -- there's some green
2 triangles that go crisscross --

3 A. Yes.

4 Q. -- kind of back and forth?

5 And if I read through your report
6 correctly, you ran a transect there, and it was
7 identified -- I think it's shown in Figure 20?

8 A. 21. Well, yeah, 20 is the points, and then
9 21 is the transect.

10 Q. That's right.

11 A. Yeah.

12 Q. Yeah, those two together. Figure 20 and
13 21. So you had said map of Bohan Ditch transect.

14 So in this Figure 20 you can see visibly on
15 here a channel with probably water in it at the time on
16 the eastern side or the right side of this map?

17 A. Yes.

18 Q. But you also found something on the left
19 side of that kind of narrow -- narrow channel, I guess,
20 or that valley coming through there?

21 A. Yes.

22 Q. And that's represented, then, in Figure 21,
23 that you actually would say, I guess, in that location
24 there are really two channels coming through that area?

25 A. That's correct.

1 Q. Okay. You know, earlier in your testimony
2 you had said as you had followed this Bohan Ditch up
3 you couldn't find any trace of any natural channel, but
4 at least in this transect there appeared to be kind of
5 two -- two channels running south to north --

6 A. And so --

7 Q. -- in that area?

8 A. -- I may have misspoken. From the Bohan
9 Ditch north, the water was not flowing any -- in any
10 defined channel. This channel, this channel here at
11 like 115 feet horizontal distance, that's a very
12 distinct and defined channel. But there was no water
13 in it. It looked like there had not been water for a
14 long time, from the grass, you know, the sod -- robust
15 sod in that -- mat in all of the channel.

16 Q. The only water observed -- and you have a
17 water elevation line -- was in the easternmost channel?

18 A. Yes.

19 Q. And that one seems to be a pretty narrow
20 channel --

21 A. It is, yeah.

22 Q. -- compared to what --

23 A. Yes.

24 Q. -- was to the west?

25 Okay. Did -- did you continue down the dry

1 channel at all in your -- in -- I'm trying to recall.

2 A. No, I did not. It would have been a clever
3 idea, but I did not.

4 Q. So you can't, then, testify where that dry
5 channel ends up?

6 A. No.

7 Q. Okay. Let me -- there was one other
8 question on these figures that I wanted to ask you
9 about. 22 -- 22. Oh, where -- where on this -- so if
10 we go to Figure 22.

11 Can you help me know where that -- where
12 that Bohan Ditch transect falls, because it doesn't
13 match any of these other transects. But where does it
14 fall spatially on this map?

15 A. So it would have been -- and I'd have to go
16 back to my GIS and plot my points on this, but you --
17 there is -- sort of in the center there's a Q to R
18 transect.

19 Q. Uh-huh.

20 A. And then north of that is an S and T.

21 Q. Yes.

22 A. That hand -- so -- and these were just DEM
23 evaluations. But the hand transect, or measured
24 transect, was in that vicinity. I think it was
25 probably between those two. But, you know, I could be

1 mistaken. It could have been a little north of S-T or
2 a little south of Q-R.

3 Q. Okay. Just -- just to the -- just to the
4 east of Q, there's kind of a narrow channel or a narrow
5 valley that forms, at least that's showing kind of as
6 far as a wetland area headed from south to north.

7 And you're saying that it's probably in
8 that -- in that band?

9 A. So just east of Q, you said?

10 Q. Just east of the Q blue dot, yes.

11 A. Yeah. So where the -- where there's a
12 mapped channel, it was right in that vicinity.

13 Q. Okay. Good.

14 A. And I think -- I'm sure that my transect
15 crossed that mapped channel. I don't know how far
16 north and south it did, but I'm sure that it crossed
17 that channel.

18 Q. Okay. Thank you.

19 Mr. Contor, you've had a chance to review
20 not only McConnells' water rights, the water rights
21 included in the application for transfer, but you've
22 also reviewed Whittakers' water rights. Not only Water
23 Right 157, but also other water rights that Whittaker
24 holds.

25 A. So for this process I didn't review any of

1 Whittakers' other water rights.

2 Q. Oh.

3 A. In 2006 I assisted with an amended claims
4 focused on places of use. So I really have not
5 evaluated all of Whittakers' water rights. And really
6 with McConnells' rights, I gave a cursory look at
7 Mr. King's review, but I focused on the transfer
8 application.

9 Q. Are you familiar enough with the Whittaker
10 water rights out of Stroud Creek or the Left Fork of
11 Lee Creek to answer questions on those?

12 A. Not a lot of questions. I can answer some
13 perhaps.

14 Q. I'm trying to recall where -- I think it
15 was in Mr. King's report. Why don't we look there, if
16 you've got that.

17 A. That's Exhibit 1.

18 Q. Yeah. I think he included a -- just a
19 quick list of the water rights held by Whittaker. But
20 he may have included -- I think he included water
21 rights that may have even been for Eight -- Big Eight
22 Mile Creek.

23 A. Mine only has the cover page, but I
24 probably --

25 UNIDENTIFIED SPEAKER: Here.

1 THE HEARING OFFICER: Great.

2 UNIDENTIFIED SPEAKER: [Unintelligible.]

3 Q. (BY THE HEARING OFFICER): So this would be
4 the last page of Appendix A. So as you start working
5 through that report there, yeah, some blue pages --
6 appendices, and Appendix A is just an overall summary
7 of the various protestants' water rights.

8 A. Okay.

9 Q. So on here he identifies, of course, at the
10 top 74-157 --

11 A. Yes.

12 Q. -- which we've -- you've already spoken
13 quite a bit about.

14 And then there are these three water
15 rights. The source in two of them is Left Fork of Lee
16 Creek. The source on the other is Stroud Creek, as
17 we've heard.

18 A. Yes.

19 Q. That's the same -- same source. So
20 Whittakers have three water rights out of that Stroud
21 Creek.

22 Do you know where that authorized point of
23 diversion is located?

24 A. So it's mapped in the farm yard.

25 Q. Okay. So I guess my question for you is,

1 with what you've heard as part of this hearing so far
2 and your -- you know, you're familiar -- to the extent
3 that you're familiar with the Stroud Creek water rights
4 held by Whittaker, what -- do the Whittaker water
5 rights currently reflect the irrigation practices
6 taking place on the Whittaker property?

7 A. So up until the administrative actions of
8 2020, I think they probably do. But that's with the
9 caveat that I have not gone back and reviewed all the
10 place of use.

11 Q. Okay. So do you -- do you see anyplace
12 where the Whittakers' water rights should be updated or
13 corrected in any way?

14 A. I think that -- you know, I don't know the
15 nature of the correction, but I think that the current
16 representation of 74-157 doesn't match what all the --
17 all the testimony I've heard and all the physical
18 evidence I have seen suggest has been the historical
19 practice.

20 Q. Okay. In your -- as you walked the Stroud
21 Creek channel and observed flow in Stroud Creek, do you
22 believe that there are times when the flow in Stroud
23 Creek exceeds the 4.4 cfs authorized by Whittakers'
24 rights in the Cal Whittaker farm yard?

25 A. In the Cal Whittaker farm yard?

1 Q. Do you think the flow would exceed
2 4.4 cfs --

3 A. Yes.

4 Q. -- during certain times of the year?

5 A. Yes.

6 THE HEARING OFFICER: Okay. Those are the
7 questions I had.

8 Mr. Harris did you have any follow-up
9 questions?

10 MR. HARRIS: I have no follow-up.

11 THE HEARING OFFICER: Based on my questions,
12 anything else?

13 MR. HARRIS: No.

14 THE HEARING OFFICER: Okay, Mr. Contor. Thank
15 you.

16 THE WITNESS: So do you want this back, Scott,
17 or should I leave it here for --

18 UNIDENTIFIED SPEAKER: Yes, please take it.

19 MR. BROMLEY: That's the exhibit book.

20 THE WITNESS: Did I give you the wrong book?

21 MR. BROMLEY: Yeah, you gave --

22 THE WITNESS: May I have a break?

23 THE HEARING OFFICER: Yes, let's do.

24 (Recess.)

25 THE HEARING OFFICER: Okay. Welcome back.

1 We're back on the record.

2 So, Mr. Harris, if I understand correctly,
3 we've reached the end of your presentation of evidence?

4 MR. HARRIS: Correct.

5 THE HEARING OFFICER: Okay.

6 So, Mr. Manwaring, on behalf of the
7 Tomchaks, if you would like to then move forward with
8 presenting your evidence.

9 MR. MANWARING: Thank you.

10 I think first we'll begin with talking with
11 one of the other protesters. Shanna Foster had -- I
12 talked with her, and she had some information to share
13 about a question that came up yesterday about calls for
14 water, so...

15 THE HEARING OFFICER: So are you calling her as
16 a witness, or are you just saying maybe we handle her
17 presentation of evidence first?

18 MR. MANWARING: I think we just handle her
19 presentation of evidence first, and then --

20 THE HEARING OFFICER: I'd be fine with that. We
21 can do that.

22 So, Ms. Foster, come on up. And as a
23 protestant, you're allowed to participate in this
24 hearing and make a statement on your own behalf, so as
25 a witness.

1 SHANNA FOSTER,
2 having been called as a witness by Protestant Smith 2P
3 Ranch, was duly sworn and testified as follows:
4

5 THE HEARING OFFICER: Ms. Foster, do you
6 solemnly affirm that the testimony you're about to give
7 is be the truth, the whole truth, and nothing but the
8 truth?

9 THE WITNESS: Yes, I am.

10 THE HEARING OFFICER: Okay. Have a seat. And
11 you can again provide that testimony in narrative form.

12 THE WITNESS: Okay.
13

14 DIRECT TESTIMONY

15 BY MS. FOSTER:

16 So yesterday you asked if we had ever been
17 called upon our water for McConnells. And we have
18 never been called upon. We just get a text or a call
19 thing, you're turned on, you're turned off.

20 The -- and go walking down through from our
21 weir down to Ericssons' weir, it's -- the channel's all
22 one. From Ericssons' weir down to Whittakers', going
23 down through Ericssons' place, the channel goes all
24 over. It's -- I'm sure we're losing a lot of water to
25 get down to there. So I'm sure we're losing water on

1 our end that we don't get water for.

2 And then at a meeting five, six years ago,
3 we had -- Mr. Tomchak brought up whether the Kauer
4 Ditch was a legal ditch or not. And at that time the
5 water person that was there said no, it wasn't, that
6 McConnell would have to abandon that ditch.

7 And at that time McConnell said that he
8 would like to have his water checked at the lower
9 diversion. And everybody kind of agreed upon that,
10 except Mr. Whittaker said that we'll probably regret
11 that.

12 So over the next five years we have noticed
13 that our water has gone substantially down to three
14 days, if we're lucky at that.

15 And Mr. King suggested that there was some
16 property that I was not irrigating. I just don't have
17 the water anymore to get to that property to irrigate
18 it.

19 And that's about all I have.

20
21 EXAMINATION

22 BY THE HEARING OFFICER:

23 Q. The water rights I noticed for your
24 property are held in the name -- in your name, Shanna
25 Foster.

1 A. Uh-huh.

2 Q. But the land, I guess, is held now by Smith
3 2P Ranch.

4 Can you talk us through the relationship
5 between you and --

6 A. Okay. It's me and my sister. And we're
7 trying to go through to get it all like a ranch-type
8 thing. We don't have everything filed yet. But so
9 that both of us -- because if something happens to me,
10 she can just take over. It's with me and my sister.

11 Q. What's your sister's name?

12 A. Jennifer Ayers.

13 Q. A-y-e-r-s?

14 A. R-s, yes.

15 Q. A-y-e-r-s. Great.

16 And so you've -- you and Jennifer formed
17 Smith 2P Ranch?

18 A. Yes, sir.

19 Q. Is it an LLC?

20 A. Yeah, we're working on getting our
21 paperwork put through.

22 Q. Okay. And registered with the State, then?

23 A. Yes.

24 Q. Okay.

25 A. I just don't have -- we don't have it done

1 yet.

2 Q. So -- so Smith 2P Ranch isn't really even
3 registered with the State yet?

4 Okay. And you intend to then convey, I
5 guess, or update, not convey or update --

6 A. Yes.

7 Q. -- the ownership of the water rights over
8 to Smith 2P Ranch at some point in the future?

9 A. Yes.

10 Q. Okay. How actively are you involved in the
11 day-to-day management of water on the ranch?

12 A. I live on the ranch right now.

13 Q. Okay. Does Jennifer live on the ranch?

14 A. No.

15 THE HEARING OFFICER: Okay. Great. I think
16 I've got a few other questions, but I think I'll offer
17 Mr. Bromley a chance to ask questions, and maybe circle
18 around the other parties here too.

19 Mr. Bromley?

20 MR. BROMLEY: So thank you.

21
22 CROSS-EXAMINATION

23 BY MR. BROMLEY:

24 Q. Hi, Shanna. Yeah, Hearing Officer asked
25 basically everything that I was going to ask. I was

1 curious about the Smith 2P Ranch, what that was.

2 One thing you said that was interesting,
3 you said at this -- I think it was at the 74Z meeting
4 five or six years ago, so that was in the 2014/'15 time
5 frame. I think we've heard about that meeting before.
6 I know I've heard about it from my client.

7 And I think what you said was that -- and
8 please tell me if I'm wrong, but I thought what you
9 said was that everybody agreed with Bruce that he
10 should be able to take his water down low except the
11 Whittakers?

12 A. Yeah.

13 Q. Okay. And then your observation is -- from
14 living up on the ranch is this -- the channels are
15 going everywhere?

16 A. Uh-huh.

17 Q. Are you able to identify Stroud Creek
18 anymore once it hits the Cal Whittaker place?

19 A. I mean you can't -- I mean it's hard to
20 tell where it's going. I mean to say okay, it's just
21 this diversion or is it all these little
22 [unintelligible] go, you know. I mean coming down from
23 our place down to there, it is really -- I mean it's
24 just one channel down through there. But when it gets
25 down below right in -- Ericssons' place is where I

1 mainly walk, you know, it just goes everywhere.

2 Q. Okay.

3 A. If we could put it all in one little thing
4 and send it down, everybody would probably get a little
5 bit more water.

6 Q. Okay. And -- and then the first thing that
7 you said was that you'd never been called by -- called
8 on by McConnells. You just -- your water has just been
9 turned on or off?

10 A. Yeah, I'm the type that figured the
11 watermaster is the one in charge. He should take care
12 of it, and I try not to [unintelligible] -- do my thing
13 and go home and not bother anybody, so...

14 Q. Yeah. And being in a water district,
15 that's what you'd expect?

16 A. Yeah. So --

17 Q. Nothing further.

18 A. -- whether it's they're calling for it and
19 he just shuts me off, I don't know. I just know that
20 we have it and we don't.

21 MR. BROMLEY: I have nothing further. Thanks,
22 Shanna.

23 THE WITNESS: Yeah.

24 ///

25 ///

FURTHER EXAMINATION

BY THE HEARING OFFICER:

Q. How long have you -- how long have you been there? Did you grow up on -- in that --

A. Yeah.

Q. -- area?

A. Yeah. My dad got the ranch when I was about 10 years old.

Q. How long ago was that?

A. I'm 50. So that would have been about 40 years.

Q. Okay. So you've -- you've had, you know, maybe 30 years, assuming as an adult, you've had 30-plus years kind of being familiar with water delivery on -- on the ranch?

A. Yeah. I just took it over about ten years ago. My dad passed away ten years ago.

Q. Okay.

A. And I moved up there and took over the ranch --

Q. Okay.

A. -- and stuff. So I mean I've kind of been around, you know, but the last ten years really that's where I've lived.

Q. Okay. So in those ten years --

1 A. Uh-huh.

2 Q. -- what have -- maybe I should -- maybe I
3 should start here.

4 Do you have multiple ditches that deliver
5 water to your property, or does it come off of one
6 ditch?

7 A. One ditch.

8 Q. One ditch that delivers water.

9 So in those ten years, what -- just talk me
10 through, what has been your experience in getting water
11 from Stroud Creek?

12 A. I don't get it out of Stroud.

13 Q. Or Everson.

14 A. I get it out of -- we just get it out of
15 Everson.

16 Q. Out of Everson. Okay.

17 A. Yeah. And, you know, when I first got
18 there, we'd have it for maybe 15, 20 days, and it's
19 just gone downhill more and more and more each year.
20 We did get a letter that we had to put a locking
21 headgate and weir in. And we did that from the
22 water -- from the other water meeting, the board did.
23 So we did put that in.

24 Q. So on a -- on a really good water year, at
25 the high end you'd have three, four weeks of water?

1 A. We --

2 Q. How many --

3 A. I'd be dancing in the -- yeah, that would
4 be wonderful.

5 Q. So there's been some testimony about 2009
6 being a very good water year.

7 A. Yeah.

8 Q. I mean in a year like 2009, how much -- how
9 long would you be able to be on in a year like that?

10 A. Probably about three weeks, a good three
11 weeks.

12 Q. Okay. And in a bad water year like 2012 or
13 '13 that were both drought years, even up here --

14 A. Yeah. Well --

15 Q. -- what's your experience in a drought --
16 drought year?

17 A. Well, even in a drought year, we'd at least
18 have it for ten days. You know, last year was our
19 worst year. We had it for three days, three to four
20 days.

21 THE HEARING OFFICER: Okay. Okay.

22 Mr. Manwaring, do you have questions for
23 this witness?

24 MR. MANWARING: Yes, I do.

25 THE HEARING OFFICER: Yeah, go ahead.

CROSS-EXAMINATION

BY MR. MANWARING:

Q. Shanna, the meeting that was referenced back in 2014 with the Water Department representative being there, you were asked whether everybody agreed that the McConnells could go from the lower diversion.

Were you aware at that time that that was not a legal diversion?

A. No, I was not.

Q. Would that have made a difference to you at that time?

A. Probably would have made a difference to a lot of us. I don't think many of us knew that it was. That's like when I asked Mr. Whittaker did he know that it was an illegal diversion, and he wasn't aware of it. So -- yesterday when I asked him.

Q. So any agreement or consent the other water users had at the lower diversion is just based on an incorrect understanding of the legality of that diversion?

A. I believe so.

Q. You've been around this area long enough to know -- have you been getting the snowfall that you historically have received in that Everson drainage?

A. No. We're avid snowmobilers. And, you

1 know, some years when you go up and you sink clear up
2 to your waist or above, you know it's going to be a
3 good year. This year we didn't -- hardly could make it
4 off the bar plates because of the snow. It's just not
5 there. Things are changing.

6 Q. What's that been like over the last same
7 ten-year span that Mr. Cefalo was asking you about?

8 A. We've had some really good years, and then
9 some really bad years. You know, it's kind of hit and
10 miss for the most part, though years have been better.

11 Q. What about since 2014?

12 A. Since 2014? It's been going downhill very
13 steadily. I mean it seems like our days are getting
14 shorter and shorter and shorter of what we have our
15 water, even with a good snowpack. When the water is
16 high, we don't usually have any.

17 Q. And do you know where the watermaster would
18 measure to determine whether you actually get some
19 water from Everson Creek?

20 A. Well, I think he has to measure everybody
21 on up to -- or out of Everson? He probably measures at
22 Ericssons and McConnells, because it all runs into
23 McConnells, because we're the short end of the stick.
24 So I'm assuming it would be at McConnells and then
25 Whittakers and then Ericssons.

1 Q. Because of the south diversion point, the
2 lower --

3 A. Uh-huh.

4 Q. -- diversion point for McConnells; is that
5 correct?

6 A. Yeah.

7 Q. And since 2014 do you have a recollection
8 of every year, what it's been like for your ability to
9 use water or access water? So like 2015, 2016, what
10 you had? Do you have good enough memory for that?

11 A. Well, I know what I paid on it. I paid
12 anywhere from \$100 to \$12. So -- so not really. I
13 mean, yeah, I can't really explain -- I can't really
14 tell you exactly what years were good and what years
15 were bad.

16 Q. But you noticed last year I think you said
17 you had two or three days?

18 A. Yeah. I think we got three days, three or
19 four days.

20 Q. Okay. But you've never had anybody call
21 you, the watermaster, and say "McConnells are wanting
22 some water, you have to shut off"?

23 A. No, sir.

24 MR. MANWARING: I don't have anything else.
25 Thanks.

1 THE HEARING OFFICER: Mr. Harris, you can ask
2 this witness questions too.

3
4 CROSS-EXAMINATION

5 BY MR. HARRIS:

6 Q. Shanna, Rob Harris, attorney for the
7 Whittakers.

8 Just -- I just want the record to be clear
9 just where your property is located.

10 Is your property east of Tomchaks'
11 property?

12 A. Yes.

13 Q. And you said this, but I just want to
14 confirm: Your water rights are out of Everson Creek?

15 A. Yes.

16 Q. And is that a ditch that's shared by you
17 and Tomchak?

18 A. Yes.

19 Q. Okay. And your property is south of the
20 Ericsson property?

21 A. Yes.

22 Q. And the Ericsson property has the farm yard
23 that we've been talking about; is that right?

24 A. Yes.

25 Q. Okay. The meeting that you're referring to

1 that was in 2014, was it the Water District meeting?

2 A. Uh-huh.

3 Q. And I didn't quite catch, what was the
4 agreement that was reached?

5 A. Well, just David had brought up "Is the
6 Kauer Ditch a legal ditch?"

7 And the person -- the water person that was
8 there representing said, "No, it's not. He'll have to
9 abandon it."

10 And McConnell says, "Well, I want my water
11 checked at the low diversion." And I guess everybody
12 kind of agreed on that. I didn't know there was two
13 diversions.

14 Q. And I think you testified that then after
15 that you've received less water?

16 A. Yes.

17 Q. So did you receive more water when the
18 Kauer Ditch was in operation --

19 A. Yes.

20 Q. -- or in use?

21 A. We didn't have -- seem to have a problem
22 then.

23 MR. HARRIS: Okay. No further questions.

24 THE HEARING OFFICER: Okay.

25 Mr. Johnson, you're still hiding back

1 there.

2 Did you have any questions for this
3 witness?

4 MR. JOHNSON: I do not.

5 THE HEARING OFFICER: Okay. Good. Thank you.

6 THE WITNESS: Yep.

7 THE HEARING OFFICER: And a note on the record,
8 Ms. Foster, you didn't identify any exhibits or any
9 other witnesses?

10 THE WITNESS: Huh-uh.

11 THE HEARING OFFICER: Okay. So that concludes
12 the presentation of evidence from Ms. Foster.

13 We turn now to Tomchaks.

14 MR. MANWARING: I'm seeing if we can get the
15 senior Tomchak on the phone.

16 THE HEARING OFFICER: I heard he might be on.

17 MR. BROMLEY: I think that may have been Candice
18 dropping off, but --

19 THE HEARING OFFICER: Oh.

20 MR. BROMLEY: -- I would check.

21 THE HEARING OFFICER: Okay. Do we have anyone
22 on the line?

23 We're still connected, so...

24 UNIDENTIFIED SPEAKER: They should be getting on
25 right now.

1 THE HEARING OFFICER: Turn this up. And I'd ask
2 you guys in the room, I think this is probably a pretty
3 good -- if Candice were still on, we'd ask her, but I
4 think it's got pretty good microphones. But if you'd
5 all speak up maybe a little louder because you've got
6 some distance here.

7 MR. BROMLEY: Yeah, she was able to hear a lot.

8 THE HEARING OFFICER: Great.

9 MS. YENTER: Good. I always worry about --

10 MR. BROMLEY: Thank you for setting it up.

11 THE HEARING OFFICER: Uh-huh.

12 MS. YENTER: I always worry about that.

13 THE HEARING OFFICER: Do you want to pause?

14 (Recess.)

15 THE HEARING OFFICER: Okay. Is your dad? So we
16 are --

17 MR. DAVID A. TOMCHAK: Can you speak up? It's
18 very, very --

19 THE HEARING OFFICER: Go ahead.

20 MS. YENTER: I'm on.

21 MR. DAVID A. TOMCHAK: It's hard to hear you.

22 MS. YENTER: I'm on.

23 THE HEARING OFFICER: Okay. We are -- we are
24 back on the record.

25 And, Mr. Manwaring, you've got David A.

1 Tomchak on the phone.

2 MR. MANWARING: Thank you.

3 Can you swear him in on the phone?

4 THE HEARING OFFICER: I can.

5 Mr. Tomchak, as a witness, as --

6 MR. DAVID A. TOMCHAK: Yes, I'm -- I'm the
7 witness.

8 THE HEARING OFFICER: What I was going to say is
9 that witnesses to these administrative hearings are
10 sworn in.

11
12 DAVID A. TOMCHAK,
13 having been called as a witness by Protestant David R.
14 Tomchak, was duly sworn and testified as follows:

15
16 THE HEARING OFFICER: And so will you verbally
17 affirm that the testimony you're about to give is the
18 truth, the whole truth, and nothing but the truth?

19 THE WITNESS: Yes, it is.

20 THE HEARING OFFICER: Great. Thank you.

21 So, Mr. Manwaring, you can proceed.

22 So what will happen -- I'm sorry,
23 Mr. Tomchak. What will happen is Mr. Manwaring will
24 ask you some questions, and then the other parties in
25 this case will have an opportunity to ask

1 cross-examination questions. And I, as the Hearing
2 Office, may ask some questions too. But we'll start
3 with Mr. Manwaring and go from there.

4 Go ahead.

5 THE WITNESS: Okay.

6
7 DIRECT EXAMINATION

8 BY MR. MANWARING:

9 Q. David, can you hear me okay?

10 A. Well, I can hear you, but not really okay.
11 Go ahead. I have a little hearing problem.

12 MS. YENTER: Do you want to just come and sit up
13 here at the table?

14 MR. MANWARING: Yeah, we can move.

15 THE HEARING OFFICER: We can do that, too, yeah.

16 MS. YENTER: Come sit right here.

17 Mr. Tomchak, we're going to have
18 Mr. Manwaring come closer. Hang on just a minute.

19 THE HEARING OFFICER: Great.

20 THE WITNESS: Thank you.

21 Q. (BY MR. MANWARING): Is this better?

22 A. It is a little better, yes.

23 Q. Wonderful. Let's try this.

24 Now that you've been sworn in, if you'd
25 state your full name and spell your last name.

1 A. Okay. David A. Tomchak, T-o-m-c-h-a-k.

2 Q. And is it okay if we call you "David"?

3 A. That's fine. Thank you.

4 Q. All right. How old are you, David?

5 A. I'm 82 years old.

6 Q. And how familiar are you with the property
7 that has water rights up on Everson Creek and Stroud
8 Creek?

9 A. I'm familiar in the fact that I owned that
10 property for several years.

11 Q. Did you first buy that property in January
12 of 1977?

13 A. Yes, I did.

14 Q. And did you stay on the property after you
15 bought it?

16 A. I lived in Leadore after I bought it.

17 Q. Okay.

18 A. That's what I did when I bought it.

19 Q. And at the time you purchased the property,
20 did it have some water rights attached to it?

21 A. It had high-water rights.

22 Q. And do you recall offhand just generally
23 what those rights were?

24 A. Not exactly, other than they were -- in the
25 earnest money agreement, it says, "Together with all

1 water rights, ditches, ditch rights, range rights, and
2 everything therein therefore included."

3 Q. Okay. Did you use --

4 A. But it was high water.

5 Q. Did you use water at your place out of
6 Stroud or Everson Creek?

7 A. Yes.

8 Q. Did you use it every year?

9 A. Yes.

10 Q. Who was the watermaster back in the 1977
11 era? Do you remember?

12 A. Dick Foster.

13 Q. There has been some testimony, David, about
14 a Kauer Ditch.

15 Are you familiar with the Kauer Ditch?

16 A. I'm familiar with -- with it, yes.

17 Q. When you bought your property in 1977, was
18 that ditch being used?

19 A. No.

20 Q. Do you have any knowledge of how long it
21 hadn't been used?

22 A. It had been several years before that it
23 had been vacated, because there was sagebrush and stuff
24 growing in the channel where the ditch was. However,
25 there was no weirs or headgates or anything. It had

1 been used an amount of years, but I don't know exactly.
2 I didn't own the property.

3 Q. Was it used during the time that you owned
4 the property?

5 A. It was opened up sometime later, probably
6 five, eight, ten years later. The -- the people that
7 owned the ranch or ran the ranch or whatever, my
8 neighbors, had -- came in and opened it on the 4th of
9 July.

10 I can remember that because we were -- we
11 owned the store. We were quite busy when I went up
12 maybe Monday, Tuesday later after the 4th of July.
13 The -- they had come in with a backhoe and dug a
14 channel.

15 Q. And is that channel from Stroud Creek or
16 Everson Creek?

17 A. I think it was from Lee Creek. It was
18 right at the confluence of all three creeks.

19 Q. And if -- if the information is that Stroud
20 Creek and Everson Creek are the only two up in that
21 area where the headgate is, does that help you remember
22 where we're at?

23 A. No, because there was no headgates.

24 Q. After they dug a channel, was that channel
25 dug along Stroud Creek or Everson Creek?

1 A. No. It branched off and come to the -- all
2 the creeks were together at that -- in that point, and
3 then below that they -- they channeled out.

4 Q. Okay. So below the confluence of Stroud
5 and Everson Creek they branched off?

6 A. Well, there was one that went straight down
7 to Cal Whittaker's. The other one went on the original
8 creek [unintelligible] bed.

9 Q. Okay. And how long did the Kauer Ditch
10 remain operational after they opened it?

11 A. I think it was operational -- I really
12 don't know. I think it might have been operational
13 after I even sold the property, but I'm not sure.

14 Q. When did you sell the property?

15 A. Well, I can't tell you. That was -- I
16 can't remember. I sold it to my son. He would know.

17 Q. All right. So it's been in the family
18 since you first bought it in 1977?

19 A. Right.

20 Q. Okay. Who was using the water from the
21 Kauer Ditch during that time that it was reopened?

22 A. It was Treasure's [phonetic], as I
23 understood it. Melvin Treasure.

24 Q. Treasure?

25 A. I'm not -- yeah, Treasure.

1 Q. Okay. And did they have a water right to
2 that Kauer Ditch?

3 A. Not to my knowledge. I don't know who
4 had -- I think -- I thought they had owned the ranch
5 and that water came with that ranch. But it was done
6 over a weekend when it was reopened at that point in
7 time on the 4th of July weekend.

8 MR. MANWARING: Thank you. I don't have any
9 other questions. Somebody else might.

10 THE WITNESS: Okay.

11 THE HEARING OFFICER: Mr. Bromley, you're close
12 enough. Maybe you can just speak right there if you've
13 got any questions.

14 MR. BROMLEY: Sure.

15
16 CROSS-EXAMINATION

17 BY MR. BROMLEY:

18 Q. Hi, Mr. Tomchak. Chris Bromley. I'm an
19 attorney for Bruce and Glenda McConnell.

20 A. Okay.

21 Q. Can you hear me okay?

22 A. Can you stay pretty close? Well, I can
23 hear you as good as I did the other younger guy. I can
24 hear you.

25 Q. So I'm going to come sit, then, where the

1 other attorney was sitting. I thought I was close
2 enough.

3 A. Yeah, that's -- yeah, that's great.

4 Q. Yeah, it's fun. We get to sit in the
5 middle of this horseshoe and be right in front of
6 everybody.

7 So, Mr. Tomchak, I just want to make the
8 record clear.

9 Have you been at any of the hearing up
10 until the time you dialed in on the phone?

11 A. No.

12 Q. Okay. Thank you.

13 Mr. Tomchak, you said that when you bought
14 the place it came with what you called high-water
15 rights?

16 A. That's what I called them.

17 Q. Yeah. What do you mean by that?

18 A. That's when the -- whenever there was a
19 certain amount of water, it was above what was already
20 decreed, we had a right to that water.

21 Q. Okay. So there's senior water rights, then
22 there are junior water rights.

23 Does that make -- am I saying something you
24 understand?

25 A. Not completely, but --

1 Q. Yeah.

2 A. -- I understand it. At my age there is
3 [unintelligible], yes.

4 Q. Okay. So your water rights -- when you're
5 talking about high-water rights, would you be saying
6 those were more junior rights?

7 A. Yeah, I would.

8 Q. Okay. And then when the Treasures opened
9 the Kauer Ditch up, it seems like maybe that might have
10 been -- you said that it hadn't been used since at
11 least 1977, and then maybe five to ten years later it
12 was opened up on the 4th of July.

13 A. Right.

14 Q. So would that have been about maybe the
15 mid '80s -- early to mid-'80s, I guess?

16 A. '77. Yeah, it would be in that period of
17 time.

18 Q. And you mentioned --

19 A. A few years after '77.

20 Q. Okay. Thank you.

21 You mentioned that it was the Treasures who
22 did that; is that right?

23 A. The reason I have to think that it was the
24 Treasures -- I know it was the Treasures is that their
25 brother-in-law was -- or maybe it was a brother or

1 something. I don't know, was building a building for
2 the school district in the town of Leadore. And he
3 also built the post office for us at the same time.

4 And he was -- he was a Treasure, Joe
5 Treasure was his name. And he's the one that told us
6 that they -- he had went up there with the old Treasure
7 and he dug the -- the ditch. Actually, it wasn't a
8 full ditch. Probably 100 yards of ditch from where it
9 left the creek to our property, my property at that
10 time.

11 Q. Do you -- Mr. Tomchak, do you know if the
12 Treasures were leasing that land down on Lee Creek, or
13 did they own it?

14 A. I thought they owned it, but I have no
15 idea.

16 MR. BROMLEY: Okay. Thank you.

17 THE HEARING OFFICER: Okay. Any questions,
18 Ms. Foster?

19 Okay. Mr. Harris?

20 MR. HARRIS: No questions.

21 THE HEARING OFFICER: Okay, Mr. Tomchak.

22 Do you have any follow-up questions?

23 MR. MANWARING: No.

24 THE HEARING OFFICER: That's all we have for
25 you. Thank you for testifying.

1 And you're free to stay on the phone,
2 because I think your son is going to take the witness
3 stand next. But the difficulty -- you may have
4 difficulty hearing him with the witness stand, so if
5 you want to sign off, you can sign off now.

6 THE WITNESS: Well, I'm going to listen and see
7 what he says.

8 THE HEARING OFFICER: Okay. That's fine.

9 MR. MANWARING: And if you yell out "Go to your
10 room," we know there's a problem.

11 THE HEARING OFFICER: Okay, Mr. Manwaring.

12 MR. MANWARING: We next call David A. Tomchak --
13 or David R., another David.

14
15 DAVID R. TOMCHAK,
16 having been called as a witness by Protestant David R.
17 Tomchak, was duly sworn and testified as follows:

18
19 THE HEARING OFFICER: Okay, Mr. Tomchak. Do you
20 solemnly affirm that the testimony you're about to give
21 is the truth, the whole truth, and nothing but the
22 truth?

23 THE WITNESS: I do.

24 THE HEARING OFFICER: Great. Have a seat.

25 Mr. Manwaring, you can proceed.

DIRECT EXAMINATION

BY MR. MANWARING:

Q. Can you please state your full name and spell your last name.

A. David R. Tomchak, T-o-m-c-h-a-k.

Q. And you just heard the testimony of your father; is that correct?

A. That's correct.

Q. And he said that he first purchased this property that you now own in 1977.

Do you remember that?

A. That's correct.

Q. So since 1977 has this same piece of property been in your family?

A. It has.

Q. And you own it now?

A. I do.

Q. And you purchased it from your father sometime in 1991 or around that area?

A. That's correct.

Q. And have you occupied it continuously since your purchase of it?

A. Yeah, I've had use of the land. I haven't lived on it, but I've owned the property and used it, yes.

1 Q. What do you use the land for? Every year
2 what are you doing with it?

3 A. I graze cattle on it or lease it out to
4 graze cattle. I have in the past. Just flood-irrigate
5 the pastures and stuff that are on it. And I do have
6 water.

7 Q. How much pasture do you have to
8 flood-irrigate?

9 A. According to my water rights, I think it's
10 like 65 acres. But -- but the amount of ground that I
11 can get across, it will vary upon the years. So I have
12 a lot more acres than that that it could be watered,
13 but that's what the rights are.

14 Q. Okay. And that irrigation water right,
15 what source does that come from?

16 A. It comes from Everson Creek.

17 Q. And you also have a water right on Stroud
18 Creek?

19 A. I do. And it's a -- basically a well-type
20 right. They talked about it in the hearing before,
21 anymore you have to file that on -- anybody's putting a
22 house in or whatever.

23 Q. How familiar -- familiar are you with the
24 Everson Creek drainage and the Stroud Creek drainage
25 and the Lee Creek drainage?

1 A. I think at this point, just from listening
2 to all the testimony, I'm probably more familiar with
3 it than the experts. Probably anybody in this room.

4 Q. Okay.

5 A. In my opinion, because I've walked it many
6 times.

7 Q. Now, Everson Creek flows out of -- what's
8 its headwaters area? Where's it come from?

9 A. Everson Creek comes from Everson Lake. And
10 it is a natural lake that's about 4, 5 miles upstream
11 from my headgate. It's a deep lake. I'm guessing
12 about a half mile across. I don't know the exact size,
13 but it's a large tributary of water.

14 Q. And what about Stroud Creek, what's its
15 headwaters area?

16 A. Stroud Creek comes from what's called
17 Stroud Lake, which is a manmade lake. It was made
18 probably 100-plus years ago with a team of horses. And
19 there's an old cabin that's up there, and the people
20 that when they built, they used that cabin and lived in
21 it while they built that lake.

22 There's actually two small lakes above
23 Stroud Lake that are more like ponds. But in
24 size-wise, Stroud Lake is minute. It's not very deep.
25 And it's not a very big footprint on the ground for the

1 amount of water that comes from it. So Stroud -- the
2 amount of water is a lot less than Everson.

3 Q. Are you familiar with the historic
4 snowfalls at both of those areas, those headwater
5 areas?

6 A. I know that -- like Shanna testified, I'm
7 an affidavit snowmobiler. And on the years when
8 there's a lot of snow, there's more water. And I ride
9 in there -- even this winter I went in there, and I had
10 to take a chainsaw with me to cut the trees, because
11 there's not enough snow -- normally you can ride right
12 over them on a snowmobile. I had to cut the trees to
13 go into the lakes this year.

14 So I'm very familiar with the amount of
15 snowfall amounts up in there, and normally how much
16 water we'd get because I've ridden it. And it's like
17 Shanna said, you get off your snow machine, you sink up
18 to your waist or above that, you know you're going to
19 have a good year. And vice versa, you know you're not
20 going to have a good year if it's a lot less.

21 Q. Does the snowfall differentiate in the
22 Everson upper areas as opposed to the Stroud Creek
23 upper areas?

24 A. Definitely.

25 Q. What's the difference?

1 A. When you go into Everson on a snowmobile in
2 the wintertime, you can ride right in, because the snow
3 is -- once you go down the trail, it packs in.

4 And I have kids that have ridden snow
5 machines since they were tiny, and they could ride the
6 snowmobiles in and follow the trail in with us because
7 the amount of snow covers all the rocks and trees and
8 everything. You don't have to worry about them hitting
9 something.

10 But if you run into Stroud Lake, there's
11 boulders and rocks, and you can't get in there unless
12 you're a really experienced rider to get in there.
13 It's -- it's -- and I know lots of very good riders,
14 and they don't -- don't even want to go in there
15 because it's so difficult because there's not as much
16 snow in Stroud.

17 Q. The flow out of Everson Creek, what would
18 you say in comparison to that flow as to Stroud Creek's
19 flow before they have a confluence?

20 A. I would say by walking it and looking at
21 it, the amount of snow coming is probably half the
22 amount of snow coming out of Stroud as it does out of
23 Everson, which is based upon the size of the creek and
24 where they come together at that confluence.

25 Q. So you're saying there's more water flowing

1 in Everson Creek?

2 A. By far.

3 Q. Do you have a point of diversion on Everson
4 Creek, or is it on Stroud Creek?

5 A. My point of diversion is on Everson Creek,
6 upstream approximately a quarter mile or half mile from
7 where Stroud Creek comes in. And they form Stroud
8 together.

9 Q. Okay. And what -- describe your diversion
10 point. What's -- like was it based on a measurable
11 headgate? Is it a weir?

12 A. Yeah, I've got a -- it's a regular, full
13 lockable headgate. I had the local welding shop in
14 Leadore build it. In fact, I actually went on it when
15 I purchased it with Shanna when we was told we had to
16 put one in. And it's a -- it's a big headgate. It's
17 setting on our ditch probably from me to the wall
18 downstream on our ditch.

19 And then -- so the amount of water that I
20 can control or the watermaster can control, you can see
21 the stream. And it's easy to work with. He can ride
22 right to it with a four-wheeler.

23 Q. Does it sit in the channel of Everson Creek
24 or next to it?

25 A. Next to it.

1 Q. And that's the headgate?

2 A. Correct.

3 Q. Does that have a measuring device on it?

4 A. Downstream from it, you can probably throw
5 a tennis ball, and that's about the distance downstream
6 is a -- we have a weir that we put in. And it's a
7 wooden, approximately 4 feet. And it is -- it's in the
8 pictures, I know, in some of the evidence. But it's
9 just a couple years old. It's -- all the watermasters
10 used it and seemed pretty happy with it, so...

11 Q. So you can measure flow of Everson Creek
12 below your headgate?

13 A. Correct. The amount of water that's coming
14 from -- if they open the -- open my headgate, I can
15 measure the water of how much is let through that
16 headgate, but I can't -- I can't control how much goes
17 down the mainstream, because my headgate's on my ditch.

18 Q. Right. Is there -- after the confluence of
19 Everson and Stroud, is there another weir in the
20 channel of Stroud?

21 A. Yes. Right below -- there's an old cabin
22 that's there. Right below that cabin is where
23 Rosalie's weir is -- or her -- excuse me, her headgate
24 is. And that headgate was actually put in by Merritt
25 Udy and his dad, because they actually ran Rosalie's

1 ranch up til just a few years ago. And they put that
2 in around the time we put ours in.

3 Ours was a new one, easy to work. That was
4 like something they drug out of the field and the extra
5 thing they just threw in there. So it's -- it does
6 have one, but there's one right there. And that's
7 right there above where you refer to as the Kauer
8 Ditch.

9 Q. And is that in the channel of the Stroud
10 Creek, or next to it?

11 A. It's next to it. Stroud -- Stroud Creek
12 has easy flow right down through there.

13 Q. Okay.

14 A. It doesn't impede it.

15 Q. And is there a measuring device either at
16 that headgate or below it?

17 A. There is. The measuring device is
18 downstream -- or down that ditch. I don't know the
19 exact. It's just after it leaves my property, so
20 probably 400 yards, approximately.

21 Q. But it's in the ditch?

22 A. But it's in the ditch, yes.

23 Q. Not in the stream channel?

24 A. Correct.

25 Q. Okay. Now, there's been a lot of

1 discussion about this Kauer Ditch.

2 To your knowledge, David, is there anyone
3 with a right to use the Kauer Ditch?

4 A. No. It -- it was brought up at our water
5 hearing, and like everybody said it. And I don't know
6 if just memory's on different people, but James was the
7 hearing officer that was there that day when it was
8 shut off. And he was the one that said it needed to be
9 shut off, so...

10 Q. Now, you're blaming James, being James the
11 Hearing Officer we have here?

12 A. Correct. Sorry.

13 THE HEARING OFFICER: Likely not a hearing
14 officer. The Department sends people to water district
15 meetings, and I was likely just the IDWR
16 representative.

17 THE WITNESS: He was -- he was just overseeing
18 excuse me.

19 THE HEARING OFFICER: Sorry.

20 THE WITNESS: Yeah. He was just overseeing that
21 hearing. From time to time they come up and just
22 oversee a hearing.

23 THE HEARING OFFICER: Again, not a hearing.

24 THE WITNESS: Or --

25 THE HEARING OFFICER: Annual Water District

1 meeting.

2 THE WITNESS: Our water meeting. Excuse me.
3 Sorry.

4 THE HEARING OFFICER: Yep, that's right.

5 Q. (BY MR. MANWARING): I was going to ask him
6 to make a correction. I don't think you were having a
7 hearing. You were having a water meeting.

8 A. Water meeting, that's correct.

9 Q. All right. Was that in 2014?

10 A. Yes.

11 Q. And at that water meeting you raised a
12 question as to whether that Kauer Ditch was a lawful
13 ditch?

14 A. That's correct.

15 Q. And Mr. Cefalo said no, it's not?

16 A. That's correct.

17 Q. At that point in time is when the Kauer
18 Ditch was no longer used?

19 A. That's correct. And it has not been used
20 since. It was leaking water last year, and the
21 Whittakers went in with a trackhoe and basically
22 plugged it tight so they couldn't get any more water
23 down it, because it was trying to leak water. Because
24 when they stopped using it, all they did was just let
25 the water go to its normal flow down through. It

1 didn't do anything. And it was just leaking a little
2 water, so they plugged it up tight as a drum.

3 Q. Okay. And it hasn't been used since 2014?

4 A. Correct.

5 Q. Now, you also heard from Shanna's testimony
6 that that 2014 water meeting, there was some discussion
7 amongst the water users as to whether the McConnells
8 could use a lower diversion.

9 Do you remember that discussion?

10 A. Yes, I do.

11 Q. At that time were you aware that the
12 McConnells had no legal right to a lower diversion?

13 A. I was not.

14 Q. Did you agree to allow them to use the
15 lower diversion at that meeting?

16 A. Based upon not knowing that it wasn't a
17 legal -- I thought it was their legal point of
18 diversion, so that's the only reason I allowed it.

19 Q. So had you known it wasn't legal, you
20 wouldn't have consented?

21 A. No.

22 Q. Now, David, have you actually physically
23 walked the channel of Stroud Creek to its confluence
24 with Lee Creek?

25 A. I have.

1 Q. On more than one occasion?

2 A. Yes, I have.

3 Q. Have you documented that with photographs?

4 A. I have.

5 Q. And when was the most recent time that you
6 actually walked the entire course of Stroud Creek to
7 its confluence with Lee Creek?

8 A. The entire route from point A all the way
9 to the bottom? Last year.

10 Q. What time of year last year?

11 A. It was during the time that the --
12 basically, when the water was all shut off and we --
13 like Shanna said, we got three days of water. And then
14 I seen water running through there like a lake, and I'm
15 wondering, Why is the water not -- why is our water
16 off, and there's water everywhere? So I walked down
17 through it.

18 I did contact James and asked him, "If I
19 don't know where my water's -- or if I'm not sure why
20 is the water not getting to me, how can I know if
21 somebody's getting their -- basically, how do I know if
22 they're doing it correctly?"

23 And he said, "Well, you can go look at
24 those weirs, and you just see how much water is going
25 through the weir. If it's the right amount and they're

1 getting their water, it's all legal."

2 And so I just walked down through there to
3 point A, which is right there at the cabin, all the way
4 down to the lower -- all the way to the bottom. So --
5 and I had chest waders on.

6 So anybody that says, well, they went
7 through the briars. I went through the briars going
8 down through there, and I think anybody that's already
9 testified has been down there, when you -- I had chest
10 waders on, and it's a long walk. It's not just a 15 --
11 it's a day to go. And it's only like maybe 3, 4 miles.
12 But it's a -- you're trudging through and pushing trees
13 out of the way to get -- staying in the streambed, of
14 course, or the apparent streambed at the time.

15 Q. Okay. So this would be during the growing
16 season last year?

17 A. Yes.

18 MR. MANWARING: Can I approach the witness,
19 Mr. Hearing Officer?

20 THE HEARING OFFICER: Yep. That's fine.

21 Q. (BY MR. MANWARING): David, you have
22 exhibits, starting with Exhibit 301, and I think you
23 have some others at the table there that go with them.
24 Those have been identified and already stipulated for
25 admission into evidence here.

1 But I want you to go through each one of
2 those and explain exactly what we're seeing, what we're
3 looking at, so that everybody has a better perspective
4 of what that's portraying. So if you'll begin with
5 301.

6 A. 301 is the weir right there in the farm
7 yard by Rosalie's area. And that is the Whittakers'
8 weir.

9 Q. And is that weir functional? You can
10 measure water through that weir?

11 A. Yes, it is.

12 Q. Now, when you're talking about before in
13 your testimony, starting at point A and going all the
14 way down, is this point A?

15 A. No.

16 Q. Where is point A?

17 A. Point A is above, just right where Rosalie
18 Ericsson gets her water. I've walked all the other
19 areas. But when I actually walked it in one day, I
20 started right there, and walked all the way down
21 through -- I started at Rosalie's diversion and went
22 all the way down.

23 Q. So --

24 A. And this would be downstream from where I
25 started approximately a mile.

1 Q. And was this photograph taken on the day
2 you were doing this walk?

3 A. Yes.

4 Q. Okay. And did you take the photograph?

5 A. Yes.

6 Q. Okay. If you'd look at Exhibit 302.

7 What is that?

8 A. That is the headgate associated to that
9 first picture of the weir. This is the headgate that
10 controls the flow for that weir. And that headgate
11 is -- it's in the main streambed. So as it lowers and
12 holds water back, it forces water kind of upstream and
13 into the channel that runs into the previous picture.

14 In fact, you can almost -- by the -- by
15 301, if you look in the background, you can see that
16 that headgate is not controlling the water in the
17 ditch. It's controlling the water in the stream.

18 Q. So the headgate you're talking about in 302
19 is actually in the stream channel?

20 A. Yes, it is.

21 Q. It's not offset from it on a ditch somehow?

22 A. No, not at all.

23 Q. Okay. So if that headgate's fully closed,
24 it is obstructing the flow of the stream itself?

25 A. Correct.

1 Q. And that's Stroud Creek?

2 A. That's correct.

3 Q. Okay. Exhibit 303?

4 A. Exhibit 303 is just below -- it is below --
5 in streambed, below where that headgate is. And it's
6 where the water kind of recedes back into the trees,
7 which is known as the springs. But when you walk down
8 through there, the streambed is in some places as wide
9 as this room and only that deep, and some places it's
10 narrow and real deep. But it just -- that's where the
11 start of the going down through Rosalie's.

12 Q. So this is where it somewhat diffuses
13 through those willows in that area?

14 A. That's true. And I wasn't sure where all
15 the measuring devices were. That's the reason I walked
16 the whole thing, figuring I don't know where they're
17 at, because I wasn't aware of all the -- basically all
18 the -- it's pinned on maps and different things. I
19 just figured you got to go down and find where the
20 guy's headgate is or where his weir is and see if the
21 water's there. And that's why I walked from point A to
22 point B.

23 Q. Do you feel you could successfully identify
24 a channel as you walk through that area?

25 A. Yeah.

1 Q. Why is that?

2 A. Well, when you're walking through it --
3 well, at least the channel that's there now. It may
4 have been moved at some time. But the channel that's
5 there now, as it flows into the spring, it's -- it's
6 all overgrown in through there. It's not a cleaned-out
7 channel, so it's been slowed down for so many years
8 that it's allowed the channel to slow up.

9 But you can walk through there and find the
10 deepest part and continue to walk through the thing.
11 It's not like it just stopped and that finger was a
12 little -- there's a definite -- as you're walking
13 through, there's always a deeper spot, and that's what
14 I walked.

15 Q. You could always find a sufficient deep
16 channel to keep a course of the stream channel?

17 A. Yes, I -- yes, I could.

18 Q. All right. Exhibit 304.

19 A. 304 was taken after all of the -- the --
20 after the McConnells applied to transfer their water
21 downstream, I went up and basically wanted to see what
22 the whole thing was about. So I wanted to go see where
23 they were wanting to move it to and get the whole --
24 wrap my mind around it.

25 And Jordan Whittaker took me up prior to

1 this to show me where -- where this headgate that's
2 in -- in that picture is. And picture 304, that is the
3 McConnells' filed-upon headgate. And it's not in the
4 ditch. It's pulled out of the ditch.

5 And if you look at the picture, which my
6 wife took of me when we went up there that day, but
7 that's where it should have been stuck in the ditch.
8 It was pulled out. So -- and that's actually upstream
9 of the Stroud tributary. When you walk down Stroud
10 Creek, you're going to come in downstream of that.

11 Q. Okay.

12 A. And --

13 Q. We'll get back to that in just a second.

14 As you were walking through that more
15 diffuse area in the willows but you could keep it main
16 channel, did you come across any obstructions in the
17 channel?

18 A. Yeah. I actually walked all through there,
19 and I'd see where water would come in and meet it, like
20 a ditch. So then I would walk up it so see, well,
21 maybe this is coming from somewhere else. And it would
22 come to a dead-end.

23 And now looking at the maps and all that,
24 that was the big ditch that was dug below the springs
25 to collect the water. And within that ditch there's a

1 spot, there was a bridge that was probably built a
2 hundred years ago, that's crossing the ditch and had
3 trees growing up through it that were a foot -- well,
4 there were good-sized trees that were growing up
5 through it, basically making a dam out of it.

6 Plus there's a dead cow in it. It was
7 blocking it. And it was just -- it wasn't a
8 free-flowing, smooth -- when I went through, it wasn't.

9 Q. The dead cow, was that in the diffuse area
10 not further upstream, as Bryce was talking about
11 finding a dead bull earlier?

12 A. No, it was in -- it was in that ditch, in
13 that catch ditch or whatever you want to call it.

14 Q. That collection ditch?

15 A. Yeah.

16 Q. From there, that diffuse area, could you
17 still follow a channel?

18 A. Yeah. But what it does -- and the maps --
19 because they're so small and stuff, and I noticed James
20 had a bigger map. But when you walk in the channel,
21 because the ditch -- because they're carrying the water
22 out of that dug ditch over, and it crosses down to
23 Harry's pivot, basically, through the -- that's where
24 they're capturing it and taking it across.

25 So the channel, all that kind of connects

1 together. But still there is a channel. You can walk
2 the main channel as those ditches form and move in and
3 around each other, you can see if water -- this is
4 where the water is going down through.

5 So it's not -- I mean it can be confusing
6 because there's a ditch with water running here and a
7 ditch running right here. Which one's a ditch and
8 which one's a stream? But after seeing the photos and
9 stuff -- or the maps and stuff, you can -- my knowledge
10 of the whole thing is way clear now, as in one's a
11 ditch and the other one's a stream.

12 Q. Okay.

13 A. They kind of -- like Jordan mentioned, they
14 flow together there for one little section. But that's
15 the only spot that they flow together. And other than
16 that, it's [unintelligible]. It's a streambed.

17 Q. And were you able to continue on further
18 north on that stream channel?

19 A. I did.

20 Q. Did you see a clearly demarked stream
21 channel?

22 A. It is. And the thing that's kind of --
23 I've listened to all the different testimonies, how
24 they -- even Larry the other day talked how there's a
25 grade between the two. But no one's mentioned that

1 the -- where those culverts are down below, right --
2 that's right like from me to you from leaving
3 Whittakers' property. So it's not way up.

4 Like if you look at the map that's drawn,
5 it's not way up on that map. It's on their property
6 line. It's definitely two streams leaving: One's on
7 the far right side; one's on the far left. And that's
8 where like Cindy even went through there, and I mean
9 she testified that she went through there. One's right
10 when you come to the bottom of the hill, that's Stroud.
11 And you cross through all of this basically mess, and
12 then the one on the other side is Everson -- or excuse
13 me, Lee Creek.

14 So they're not trying to mingle right
15 there. They're that whole distance. I mean it's not
16 just a few feet. It's -- it's quite a distance that
17 they're separated when it leaves Whittakers' property.

18 MR. MANWARING: Rob, is there a way we can get
19 Google Maps, Google Earth, somebody? Google --

20 MR. HARRIS: Yeah, it will take a second to get
21 it fired up. I can do that. Okay.

22 THE WITNESS: If you looked at Whittakers'
23 property plot map, you can see how close those streams
24 would be apart from one another, just knowing that
25 those head -- those culverts are literally from here to

1 the wall from their property line.

2 So they can't jump from the length of this
3 building in -- from me to you, unless somebody dug a
4 ditch there and tried forcing it across one way or the
5 other, because technically you could probably dig a
6 ditch and transfer all the water from Lee Creek into
7 Stroud at that point, or vice versa. But it has never
8 been done, and you can tell.

9 Even James testified he's the one that
10 cleaned all the brush out. He didn't dig a ditch
11 through there. All he done was put culverts in to let
12 the existing water go through. And one is on one side
13 and one's on the other, so...

14 MR. MANWARING: Can we get a little closer, Rob,
15 to that culvert area [unintelligible]?

16 Q. David, you were --

17 MR. HARRIS: Is that good? Do you want me to --

18 MR. MANWARING: Yeah, that will be fine.

19 Q. David, this is the area you were talking
20 about?

21 A. That's correct.

22 Q. And again, you walked on the Stroud Creek
23 portion of that?

24 A. That's correct.

25 Q. And can you tell from just looking at this

1 aerial about where you were at?

2 A. Right through here.

3 Q. And --

4 A. And this, as far as I'm knowledgeable,
5 that's their property line, so there's Stroud here and
6 Lee Creek here. They don't convert up here. According
7 to that Kauer map, it shows them coming in together
8 here. It's not that. They come together a half mile
9 or whatever, three-quarters of a mile downstream past
10 where the McConnells' point of -- their upper point of
11 diversion, their upper ditch.

12 Q. So regardless of Exhibit 154, an engineer
13 map you talked about, are there any other maps? The
14 actual physical location of the confluence of these is
15 north of those culverts?

16 A. Correct.

17 Q. And from that location going further north
18 on Stroud Creek, were you able to walk a defined
19 channel?

20 A. All the way down.

21 Q. If you'll enlarge up a little bit more,
22 Rob, that area. Go so we can see north. Okay.

23 Now, is there some topography there, David,
24 that you can help us understand how Stroud Creek flows
25 along those hill lines or ridge lines?

1 A. Yeah. Like Larry talked yesterday, because
2 he's been down through there, I've been through there.
3 He was down through there 40 years ago. I was down
4 through there last year. Nothing's changed since he's
5 been there. And it's a definite defined Stroud on this
6 side, Lee Creek on this side all the way down through.

7 It basically works back. And then through
8 the whole center of it it's definitely a rise, so they
9 can't just jump back and forth on high-water years,
10 unless somebody put in some sort of a dam or something
11 and forced all the water across.

12 But naturally, it hasn't -- it hasn't
13 happened apparently in -- since Larry said it was that
14 way 40 years ago, and it's still that way today.

15 Q. If we can go a little further north, Rob.
16 Can you see anywhere where the upper ditch
17 is for McConnells' ditch?

18 A. Yeah. This would be their upper ditch
19 here.

20 And if you scroll down just a little bit.
21 The other way. Excuse me. Keep going. Keep going a
22 little bit more.

23 It hits their property line.

24 UNIDENTIFIED SPEAKER: Zoom it in a bit, Rob.

25 THE WITNESS: I think it's right in there.

1 Go ahead and raise it back up. The other
2 way. The other way. Excuse me.

3 Okay. This is their property line here.
4 And their weir to measure their water is right here.
5 But their headgate and where their water is --
6 filed-upon water is coming from about a half mile from
7 point A to point B, so...

8 Q. (BY MR. MANWARING): Is that on the upper
9 ditch or lower ditch?

10 A. That's on the upper ditch.

11 Q. Where is the lower ditch?

12 A. The lower ditch is about -- I don't know --
13 a quarter mile down, a little less. And it's right
14 here. And it goes up through to their property right
15 here, but it's being measured kind of right in here is
16 a measuring device. So it's closer to their headgate.

17 Q. Where's the confluence of Lee Creek and
18 Stroud Creek in relation to those two ditches?

19 A. Right here is -- well, upstream --

20 Go ahead and scroll back. If you get --

21 Keep going.

22 Right -- it dumps in probably -- Lee Creek
23 actually comes right along this edge here and goes back
24 in, and it -- it's -- when I was there last, and that's
25 in the photos, there was a dam blocking all the water,

1 besides what was leaking through the dam, but all the
2 water for Lee Creek, except for what was leaking
3 through the dam was going on that upper ditch. And
4 that's -- in the pictures it shows it running.

5 And then once it hit through onto the
6 property, there's a dam there, and it -- in one of the
7 pictures it shows it was watering that whole field. It
8 was a full spray -- or a -- basically watering that
9 whole first field. But the -- they come together about
10 right here, because this one continues down and meets
11 where this one comes together.

12 Q. You could actually walk to that point?

13 A. Yes.

14 Q. And you have walked to that point?

15 A. I have.

16 And the -- there's witness, and in fact
17 Cindy's even walked to that point kind of, I'm guessing
18 just from here through the trees to get to it. But I
19 walked down through it. And you're going to get the
20 hide taken off from you.

21 But I had to do it because I felt it was in
22 my best interest to find out where's the water going,
23 why am I not getting my water. And it gets worse and
24 worse. And once you get water for three days, it's
25 like you're going to have to do something. And

1 that's -- I was just going to see where it was going.

2 Q. Did you come across any other measuring
3 devices between the culvert area and this confluence --

4 A. No.

5 Q. -- on Stroud Creek?

6 A. I did not.

7 Q. Were there any measuring devices upstream
8 from the culverts to the springs area?

9 A. Yes. Yes, there's -- it's right -- there's
10 like a bubbler, I guess they call it or whatever.
11 There's measure -- or basically a measuring device
12 there. That's the only other one that I observed. And
13 there's a headgate and stuff there that controls the
14 flow of going into that bubbler. And that's at that
15 ridge point or whatever they call it where the water
16 can go over to Harry's pivot.

17 Q. Okay. And the day that you walked that
18 last year, did you try to determine from the measuring
19 weir on the upstream portion of Whittakers, before it
20 goes downstream to the springs, and the measuring
21 device on the other side of the springs, did you take
22 any time to measure and get those two?

23 A. I couldn't tell, just for the fact that --
24 well, the main thing, I didn't know the amount of
25 water. I was just going to document how much water is

1 there, and then go back and call James' office and find
2 out, "Does this sound right to you?" Or call the
3 watermaster.

4 But when I talked to the watermaster, it
5 was -- that's the amount of water they should be
6 getting. So that's all -- that was my plan was just to
7 see how much water was flowing through.

8 Q. Okay. Now, there was some testimony
9 yesterday, David, about the measuring device in the
10 McConnells' upper ditch, and there was some
11 representation that it was a little further from their
12 property line.

13 From what you are testifying today, that
14 measuring device is right up on their property line?

15 A. Their -- on their upper ditch, the
16 measuring device for that water is probably from here
17 to the wall on BLM right before you get onto their
18 property.

19 Q. Okay.

20 A. So I didn't go onto their property, because
21 I could see the measuring device.

22 Q. But the proximity of that measuring device
23 to McConnells' property is roughly what you're
24 estimating the width of this or length of this room?

25 A. Yeah, it's almost -- it's almost on their

1 property, the line, but it's on BLM.

2 Q. Okay. And that's approximately a quarter
3 mile from the diversion point?

4 A. Yeah, a quarter to half. I don't know
5 exactly.

6 Q. Now, you're going to have to see again. We
7 can turn the lights back on before anybody falls
8 asleep.

9 So going back to Exhibit 304, now that
10 we've gone through all of the physical channels, Stroud
11 Creek down to its confluence with Lee Creek, I want to
12 go back now to 304 and have you explain where that is
13 and what we're seeing.

14 A. Okay. 304 is the upper ditch of McConnells
15 where their true water right is set. And that was
16 taken -- it's -- it was taken on the 9th of November.
17 Me and my wife went up, because we was trying to make
18 sure we had something -- I know they asked us to send
19 pictures of our headgates and weirs and all that.

20 And I was just confirming that -- pictures
21 of the McConnells' headgates and weirs would be
22 submitted so if it came up that, yeah, there's
23 something that Water Resources can refer to. And so we
24 went up. That's why the picture was taken.

25 Q. And what can you see in Exhibit 304? What

1 is it depicting?

2 A. 304 is -- it is Lee Creek. And it's where
3 it meets their ditch. And there's a -- I'm pointing at
4 the dam that's been put in place to block all the water
5 to force it into their ditch. And if -- if you were --
6 if I walk and stand over where the dam is, which I am
7 in another picture, but there's hardly any seepage
8 coming out underneath the dam.

9 Q. Not an earthen dam?

10 A. Yeah, it's just basically like a tarp or
11 something sitting there, a canvas dam with dirt piled
12 on it to make sure that -- they're trying to control
13 all the water.

14 Q. Okay. What's Exhibit 305?

15 A. Exhibit 305 is -- it is -- it shows the
16 water that's been irrigated -- or basically put out
17 over the lands right on McConnells' property. So I'm
18 standing at their weir, and there's a dam just across
19 the fence there straight, it would be to the left of
20 that photo, blocking the water. And that water was
21 flowing out into that field.

22 And if you kind of -- you kind of look down
23 far to the right, that would be where their lower ditch
24 comes into their property.

25 Q. Okay. So this is still on the upper

1 diversion part?

2 A. This is on their upper -- on McConnells'
3 upper diversion.

4 Q. Can you see a contrast of any kind between
5 that upper ditch on McConnells and their lower ditch?

6 A. A contrast as in?

7 Q. Like a difference in the -- how deep it is,
8 how maintained it is.

9 A. It's -- basically it's downhill all the way
10 from that ditch to their lower ditch. So there's not
11 like a rise or something where -- that water, you can
12 see it's flowing down and basically collecting in their
13 lower ditch.

14 Q. Okay.

15 A. So there's no -- nothing blocking it.

16 Q. That upper ditch at McConnells that goes up
17 across BLM land to their land, is that a well-defined
18 ditch?

19 A. It is.

20 Q. Has it been maintained?

21 A. No. I mean it's 100-something-year-old
22 ditch that's probably -- I don't know if it's ever
23 been -- my ditches are 100 years old, and they're the
24 original. And I -- they flow the water okay for the
25 amount of water that I get. So it's not like -- but

1 that ditch, in my opinion, hasn't really been
2 maintained.

3 Q. Compare that with the lower ditch that
4 transports water, has that been kind of a clearer
5 channel, a deeper channel?

6 A. Oh, yeah. The lower ditch is -- it's -- it
7 can handle more water, I think, just because it's not
8 as old a ditch as the upper ditch. So it hasn't --
9 sediment and everything hasn't filled it in like the
10 upper ditch has.

11 Q. What's Exhibit 306?

12 A. 306 is actually their -- their weir on
13 their upper ditch. And you can see the fence in the
14 background is their property line. And if you look
15 past that, I think you can see the canvas dam and the
16 ditch forcing the water that shows you from the other
17 picture.

18 Q. Okay. And Exhibit 307?

19 A. 307 is McConnells' weir on their lower
20 ditch. And like I said, you can tell that that's been
21 dug and maintained a lot more recent than the upper
22 ditch. That's a newer ditch.

23 Q. And Exhibit 308?

24 A. 308 is -- 308's the one where I was
25 standing right there where the -- this is at their

1 upper -- upper ditch. I'm standing in the streambed or
2 where the streambed should be, that's where the
3 headgate should be installed that was sitting off to
4 the side. And that's that dirt that's blocking it.
5 And you can see water weeping through underneath it.
6 So -- but all the water -- 95 percent of the water was
7 going down the upper ditch at that point.

8 Q. At that point. Okay. Exhibit 309?

9 A. 309 is their lower ditch headgate. There's
10 also another headgate on the right side, which would be
11 the Johnsons' or the streambed at that point of Lee
12 Creek and their -- the one on the right, which would be
13 would go to Johnsons, was closed.

14 So all the water at that point was
15 basically -- this was -- would be Stroud's water. All
16 of that water was being forced on their lower ditch at
17 that point, besides whatever was weeping through that
18 one as well, in the normal streambed.

19 Q. Okay. And Exhibit 310?

20 A. 30 -- 310 is a close-up picture of -- it
21 would be Johnsons' or the main streambed, showing that
22 it's blocked with tarps and stuff like that diverting
23 the water into that lower ditch.

24 And I'm guessing that's Johnsons' headgate,
25 but that might be a way that they've been trying to

1 transfer the water into their headgate and force it.
2 But it's -- if it's their headgate to where it moves
3 the water down the stream, and then it's -- it's in
4 conjunction with their other headgate, but they're
5 right next to each other. And it's shutting off the
6 mainstream. That's what I was taking that photo to
7 show. It's showing it's shutting off the stream.

8 Q. And Exhibit 311?

9 A. 311's just the -- it's the left side --
10 close-up of the left side of that 309 photo, showing
11 all the water that's not being blocked, that it's just
12 running straight down that lower ditch.

13 Q. And finally, 312?

14 A. 312 is just showing you the main water flow
15 down their upper ditch. This is where the headgate
16 from that other photo is sitting just off to the left
17 side. It should be setting just down a little bit,
18 because the streambed, where I was standing on the
19 streambed in Exhibit 308, I was standing on the
20 streambed right there in that same photo. So it's kind
21 of a backing up photo of 308 showing you the flow of
22 the water rolling down through there.

23 Q. Okay. Could you provide some information
24 on what your water use has been since the Kauer Ditch
25 was blocked or closed in 2014?

1 A. Well, the -- my water use has -- because
2 I've been irrigating -- my parents had me irrigating --
3 or my -- because it was both my parents' property when
4 I was growing up. They had me moving water up there.
5 Long enough ago, I was probably 12 years old, 13 at the
6 latest, because I had a Hodaka 100 motorcycle, and they
7 don't make them anymore. And they -- and that was like
8 the thing back in the day.

9 So I've been moving water driving -- I had
10 to drive out there twice a day to move water. So I put
11 a lot of miles on it going back and forth. So I've
12 been moving the water, and I understand how long you
13 normally would get. I would have a job for about a
14 month out of the summer moving water. That was just...

15 And now, since the -- they moved the water,
16 it just varies on the amount. Like this year, anybody
17 that's going to get water up there, they're going to --
18 there's not going to be any water even if this whole
19 thing happens in whatever way, there's no -- at this
20 point there's no snowpack to -- there's not going to be
21 any water this year, comparatively speaking.

22 But normally a bad year you're still going
23 to get a couple weeks of water. Good year, you can get
24 a month of water.

25 Q. Last year?

1 A. Three days. Three days of water, roughly,
2 last year. And last year is when we took all these
3 pictures, and there was water running everywhere down
4 through there. That's the reason I even -- like what
5 is going on.

6 And I think it was brought up that Merritt
7 moved water, which he thought he was doing it the right
8 way, but still that impacted our water, because if it
9 was -- had been moved correctly down through there,
10 then it would have gotten there earlier and we would
11 have had water longer.

12 But he did it unknowingly. And he didn't
13 intentionally do it, but -- so he knows how to move the
14 water properly now to get it there. But that was the
15 reason our water was shut off so early last year.

16 Q. Now, have -- have you ever had a
17 watermaster or anyone, McConnells or anyone make a
18 demand on you for their water at the lower diversion?

19 A. No, never. It -- like Shanna had
20 testified, we just get our water shut off. And I
21 haven't even gotten texts in the past. I -- I mean or
22 calls or anything. Usually if Shanna would get a call,
23 she might call me. But no notice to me.

24 Q. Now, you -- you're protesting this transfer
25 because you believe it will adversely affect your

1 ability to get the water through your Everson Creek
2 diversion?

3 A. That's -- that's correct.

4 Q. What do you think will happen if this
5 transfer is allowed?

6 A. Well, I think that the amount of water that
7 historically -- and everybody's talked about the
8 20-year, 50-year, 100-year, whenever they applied for
9 their water in 1882, that the time era might have been
10 a really good era of water in Lee Creek. Porcupine
11 might have supplied that water greatly for that upper
12 ditch. And that's where it was filed and where it all
13 happened.

14 And in my opinion, at a later date someone
15 went in and put the lower ditch in. And because like
16 they talked about the Green Book and all this, things
17 get initialed and all that, that might not get filed
18 through Water Resources.

19 But somebody over the years started getting
20 the water down below, and they probably said, "Well,
21 we're getting enough water on our upper ditch, we're
22 just going to run it in the channel and pick up -- pick
23 it up downstream."

24 There's not enough water in there now to
25 supply, like they said. But historically I think that

1 there was enough water back in the day to give their
2 15.2 cfs in that upper ditch all day long. But if --
3 if they let them pull water out of Stroud, they're
4 changing the -- they're pulling it out of our -- my
5 water and Shanna's water and Rosalie's and Whittakers'
6 water, because they're -- that's not the streambed.
7 They're not entitled to that water. It's downstream
8 from the confluence of where Everson and Stroud meet --
9 or Stroud. I'll just refer to it as Stroud.

10 Q. You think that would negatively affect your
11 ability to water at all on your property?

12 A. Yeah. It will drop the time, just for the
13 fact that they might pull the whole thing dry, and to
14 make up for the amount of Porcupine and actual Lee
15 Creek. And if they're making up water off our water,
16 they might take all of our water to make up for it.

17 Because like I said before, the amount of
18 snow that comes in Everson versus Stroud, because I'm
19 there -- I've been up there -- I've been riding snow
20 machines in there for years and years, and some --
21 there's not as much snow in Stroud as there is in
22 Everson.

23 And the same with Porcupine. And as you go
24 over to Moon Springs and all the way across, all those
25 areas, they get usually a consistent amount of water.

1 It doesn't change every year.

2 Well, one year they got a whole bunch of
3 snow at Stroud. The next year they got it at Everson.
4 It's always the same consistency of amounts of snow.
5 So the amount of water that they would be making up
6 from Everson Creek, which is Stroud, would be taking
7 our water, in a sense.

8 Q. And to your knowledge, nobody's ever had an
9 actual right to take that water from the point that
10 they're asking to take it now, the McConnells are
11 asking to take it now?

12 A. That's correct.

13 MR. MANWARING: I don't have any other
14 questions.

15 THE HEARING OFFICER: Okay.

16 Do you want to break, Mr. Bromley, or are
17 you ready to jump right in?

18 MR. BROMLEY: No, let's go.

19 THE HEARING OFFICER: Okay. Go ahead.

20
21 CROSS-EXAMINATION

22 BY MR. BROMLEY:

23 Q. Hi, Mr. Tomchak. Chris Bromley, on behalf
24 of the McConnells.

25 So a number of these wintertime photos that

1 you were going through with Mr. Manwaring, what were --
2 what was the day in November that they were taken?

3 A. It's right on the photos. 11th -- 11th
4 month, 9th day.

5 Q. Do you know what season of use on a water
6 right is?

7 A. Say it again.

8 Q. Do you know what a season of use on a water
9 right is?

10 A. It would be your months of the year that
11 you get the water.

12 Q. Right. Yep. Do you know when your water
13 rights end on the calendar?

14 A. My individual water rights?

15 Q. Uh-huh.

16 A. No, I don't know.

17 Q. Okay. Do you know when the McConnells'
18 water rights end on the calendar?

19 A. No, I do not.

20 Q. Okay. So if I showed you Exhibit 1, which
21 is Scott King's expert report -- I'm just going to
22 bring it up to you because if you don't have it in
23 front of you -- and if you just look at this table
24 here. And there's a season of use for McConnells. And
25 I'll show you yours too.

1 A. Okay.

2 Q. So on the McConnell rights the season of
3 use for their irrigation rights, it starts on which
4 month and which day?

5 A. It would be the 3rd month, 15th day.

6 Q. Okay. And it would end when?

7 A. 11th month, 16th day.

8 Q. Or 15?

9 A. Or 15th.

10 Q. Yeah.

11 A. 15th day.

12 Q. And then just look at yours real quick. I
13 just want you to be able to compare. There are yours.

14 So your irrigation rights -- that's your
15 domestic. So let's look at your irrigation. Yeah.

16 A. 3/15 to 11/15 also.

17 Q. Okay. So all I'm wondering is, so an
18 irrigation water right is allowed to turn off on
19 November 15th.

20 So then, you know, is it surprising to you,
21 then, that the McConnells' ditches had water in them if
22 their irrigation rights were allowed to still be on?

23 A. The reason that I even mentioned that was
24 the letter that was sent back in August from Cindy
25 shutting our water off. And then they -- he testified

1 that he shut his water off, as in Bruce testified that
2 they shut it off so it was no longer there. And when I
3 went up there -- and it shouldn't have been turned on
4 because they -- until this whole issue was taken care
5 of, he shouldn't have had any water.

6 So that's the reason I said I was surprised
7 to see water in there because they didn't have any
8 water rights right then.

9 Does that make sense?

10 Q. So -- yeah. No, it makes sense.

11 My only question, then, was so the
12 irrigation water rights can still be turned on, based
13 on the language in the rights that we just looked at;
14 correct?

15 A. Yeah.

16 Q. Yeah, that's all I was getting at.

17 Okay. So, Mr. Tomchak, at the very
18 beginning, how many -- you were talking about the
19 65 acres that you irrigate.

20 How many acres do you own?

21 A. 170.

22 Q. And do you know of those 170 how many acres
23 you actually irrigate in any given year?

24 A. It's hard to tell, because Shanna said the
25 exact same thing. When my water doesn't get there,

1 like last year, you're only going to get your three
2 days. And however much water you're going to get is
3 what you're going to get.

4 Q. Sure. But so how many acres do you put
5 water on?

6 A. Of where my ditches and stuff are?

7 Q. Yeah. Of all of the acres that you own,
8 how many acres get watered?

9 A. Probably about the 60 acres, 70 acres,
10 right in there where -- that can get water. Whether it
11 gets it or not, it just depends.

12 I -- last year I couldn't even get it
13 across my lands once. I mean it was -- if I moved the
14 water twice a day, I could have gotten maybe an eighth
15 away. It wasn't even beginning -- it was hardly any
16 water.

17 Q. Okay. So in a normal, kind of an average
18 year, you think you irrigate more than 65 acres or less
19 than 65?

20 A. On a normal year?

21 Q. Uh-huh.

22 A. Probably right at covering my lands, yes.

23 Q. Okay. So more than 65 acres or fewer than
24 65 acres?

25 A. Right at 65 acres.

1 Q. Okay. I'm just curious when you're saying
2 your lands, you own more than that, but --

3 A. Oh, right. No, I meant my lands as in my
4 ditch system that's been designed and put on that
5 property for over a hundred years.

6 Q. Yeah.

7 A. When I send water down the ditches, that's
8 what I mean. And I -- that's where the water rights
9 were for.

10 Q. Okay. So the property was bought,
11 according to your dad, in 1977.

12 And I think you said the same thing?

13 A. That's correct.

14 Q. Okay. So and then you came into ownership
15 of it in 1991?

16 A. Correct.

17 Q. So then your knowledge of the property is
18 from that 1977, late 1970s time frame?

19 A. Correct.

20 Q. Okay. You hadn't been up there before?

21 A. Before the '70s?

22 Q. Correct.

23 A. No.

24 Q. All right. Were you here yesterday for
25 James Whittaker's testimony when he was talking about

1 when he put the culverts in in the late 1960s/early
2 '70s, culvert and a bridge?

3 A. Yeah. I was here, yes.

4 Q. Yeah. And then your testimony was that
5 those culverts or the bridge or the combination, that
6 they're down there near the end of the Whittakers'
7 private property; is that right?

8 A. They're at the very bottom of his property.

9 Q. Yeah.

10 A. And there is two culverts.

11 Q. Uh-huh. Okay.

12 A. Because you brought that up.

13 Q. Yeah. No. Thank you.

14 A. Everybody's been saying it's two culverts,
15 so it's not confusing.

16 Q. Okay. Well, thank you for clarifying that.
17 I appreciate that.

18 Okay. So let's look at Exhibit 151. And
19 turn to Figure 2. Maybe go in 20 pages or so. I think
20 that's it right there. Go back one. Figure 2.

21 A. Yeah.

22 Q. Do you see the -- those would be the
23 northernmost east to west dots, the white diamonds in
24 section 30?

25 A. Yes.

1 Q. Is that approximately where these two
2 culverts are located?

3 A. That's correct.

4 Q. Okay. And so that legal description is
5 section 30?

6 A. It's -- I don't know the exact legal -- on
7 reading the legal descriptions, but --

8 Q. Township 16 --

9 A. I could tell you it's right there where
10 those little dots are.

11 Q. Okay. And on that map you see that as
12 section 30?

13 A. Yeah.

14 Q. Okay. So let's look at Exhibit 154. And
15 keep your finger on Figure 2.

16 Are you there?

17 A. Yes.

18 Q. Okay. And do you see where section 30 is
19 on that map? It's this colorful engineer's map.

20 A. Uh-huh, yes.

21 Q. And then as I understand that map, the
22 coloring is the coloring of private property lines.

23 So those culverts, then, would have been
24 put, as you said, down there toward the end of -- or at
25 the end of the Whittaker private property; is that

1 correct?

2 A. Further up.

3 Q. Okay. And so where -- where that -- you
4 see the color marks there in section 30 on Exhibit 154,
5 does that line up pretty well with Figure 2 that we
6 were just looking at where the white diamonds are?

7 A. So the -- the dots themselves?

8 Q. Uh-huh.

9 A. The dots themselves would be right there at
10 the very -- above where that map shows the two streams
11 come together.

12 Q. Yeah.

13 A. It's downstream of them.

14 Q. Okay. So we're looking in the same general
15 area, then. I'm not looking for pinpoint accuracy.
16 Just --

17 A. No, on the boots on the ground, there's two
18 streams running out of their property.

19 Q. I understand your testimony about what
20 you've seen today.

21 A. Okay.

22 Q. I'm just looking at the maps just trying to
23 line some things up.

24 A. Okay.

25 Q. And then, yeah, your testimony is you know,

1 having lived there since 1977 until present, what you
2 see. And you've -- and you've walked down from the top
3 to the bottom.

4 But you weren't there prior to 1977;
5 correct?

6 A. That's correct.

7 Q. And so you can't give an opinion on what
8 boots on the ground would have shown prior to that
9 time?

10 A. I didn't live there, so -- I'm just giving
11 my opinion based upon if something was disturbed or
12 whatever, as in somebody had been digging something
13 within the last few years, I mean even where James went
14 in and put the two culverts in years ago, I can't
15 remember the exact date that he testified he'd done
16 that, but you can tell that that's been disturbed. And
17 there wasn't nothing that's been disturbed. So you
18 could tell where James disturbed that, but you can't
19 tell anything else that's been disturbed.

20 So it's been a hundred years or -- a long
21 time. But I wasn't here. I wasn't alive. But that
22 hasn't been messed with down through that channel,
23 besides --

24 Q. Okay. Yeah. All I'm -- all I'm getting at
25 is the -- those culverts are lining up, as you said in

1 your testimony, basically with the Whittakers' private
2 property, and then looking at the Figure 2 in relation
3 so Exhibit 154.

4 Is it a tangled mess once you get to the
5 Cal Whittaker place where the water's -- that the
6 headgate is on Stroud Creek? You were able to then
7 follow it down?

8 A. Uh-huh.

9 Q. Pretty tangled in there? You said you were
10 in chest waders.

11 A. Uh-huh. And there's a lot of bending over
12 and moving trees and breaking branches to get down
13 through there. If somebody follows you right down
14 through it, they're going to be breaking branches and
15 everything else to stay in because it's -- to stay in
16 streambed. I mean you could walk out of the streambed
17 and bypass it and get through fairly quick. But I
18 wanted to follow the streambed to see where the water
19 was going.

20 Q. Okay. And you were able to find a -- you
21 could find a channel through there? I mean it took
22 some effort, but you were able to find something?

23 A. Yes.

24 Q. Okay. Question about the Kauer Ditch, a
25 couple questions about the Kauer Ditch.

1 So this Water District 74Z meeting that
2 we've talked about a little bit, did I understand you
3 to say that you brought up the Kauer Ditch was not
4 lawful?

5 A. I brought up -- what I brought up was, "Why
6 are they running water on that ditch?" And then it was
7 brought up in the meeting that it wasn't an original
8 ditch. Because I didn't know if it was or it wasn't
9 until it was brought up in that meeting.

10 And as soon as they -- it was said that it
11 wasn't a legal ditch, and then I'm like, "It needs shut
12 off, in my opinion, and also" -- so that's kind of what
13 I was looking for, because I didn't go out and research
14 and find out all that. It was just brought up in the
15 meeting.

16 Q. Okay. And so as far as -- did you know
17 that the McConnells had two diversions that were down
18 on Lee Creek prior to that?

19 A. No.

20 Well, prior to that meeting?

21 Q. Correct.

22 A. No.

23 Q. No. So by closing Kauer Ditch it's your
24 opinion that your water rights have been injured?

25 A. By closing the ditch -- by opening that

1 ditch and allowing water that doesn't belong to them,
2 that injures my water.

3 Q. By "ditch," I mean Kauer Ditch, not the --
4 not the lower ditch.

5 A. It's the same water.

6 Q. Okay.

7 A. You're -- you're trying to say they're --
8 are they measuring the water downstream and saying they
9 get this much water so we're going to go ahead and give
10 it upstream?

11 Q. That's not at all what I was asking.

12 I was asking you if -- if by closing Kauer
13 Ditch, do you feel your water rights have been injured?

14 A. No. I -- I think my water right for the
15 last -- since they've shut this off, the reason it's
16 been injured is the flow going through the spring isn't
17 being allowed to go through the spring and basically
18 follow the streambed, follow Stroud's streambed to the
19 lower end, which is Stroud where it comes out below
20 McConnells' upper diversion.

21 Q. Okay. But you understand that once it gets
22 to the Cal Whittaker place it's going into a ditch
23 system, correct, the water?

24 A. It's going into what system?

25 Q. Into a ditch system through the Whittaker

1 place.

2 A. Yeah. It's -- in one spot it is.

3 Q. Yeah.

4 UNIDENTIFIED SPEAKER: Could I interrupt for
5 just a second, James?

6 UNIDENTIFIED SPEAKER: No, you can't.

7 THE HEARING OFFICER: No. Sorry.

8 MR. BROMLEY: I don't have any further
9 questions.

10 THE HEARING OFFICER: Okay.

11 Mr. Harris, did you have any questions for
12 this witness?

13 MR. HARRIS: Yeah.

14
15 CROSS-EXAMINATION

16 BY MR. HARRIS:

17 Q. Mr. Tomchak, just to follow up on that last
18 question. I got to make sure I understand.

19 If there's water flowing down in that
20 spring area, your diversion is upstream of that?

21 A. That's correct.

22 Q. So how is water flowing through there, how
23 does that injure your water right up above?

24 A. I'm not allowed to get my water, my
25 filed-upon water, until the older water rights are --

1 they've been met, the senior water rights.

2 And if it's -- the stream's being blocked
3 by a headgate that's not allowing the water to flow
4 down the stream, then that water that's -- it rains
5 2 inches of rain tonight, that water doesn't go down
6 the stream. It goes over the weir into the ditches.
7 So I don't get any access to any of that water, so it
8 didn't make it down to get measured so I get my high
9 water.

10 So I'm missing on high water because the
11 diversion end stream is not allowing the water to go
12 down the stream.

13 Q. So it -- if it did connect down to Lee
14 Creek, you're saying, then, that would allow your water
15 right to be turned back on further up on Everson Creek?

16 A. If it was measured -- see, prior to this
17 whole case of the McConnells applying for a -- to
18 transfer their water rights downstream to their lower
19 ditch, unknowingly to it and everybody that's
20 testified, I've listened to, no one knew that that
21 bottom ditch could even be used. So even including
22 watermasters.

23 So they've been making up our water for
24 years taking our water to make up the 15.2 cfs. If
25 they didn't take our water to make up their water, we'd

1 be getting our water as soon as it's measured at
2 Rosalie's. We would know, because it should only be
3 Rosalie's water, which is measured right at my
4 property, right just where the Stroud comes into
5 Everson, and it would be measured again down below
6 where James and -- or Jordan gets his water right by
7 Rosalie's.

8 You could tell me within a few hours, you
9 could just go down there and see, both of them, they
10 have their water, my water and Shanna's water should be
11 turned on.

12 Q. I see. So you're -- your position is that
13 Stroud Creek water is Stroud Creek water and none of
14 that water should be allowed to be turned into Lee
15 Creek?

16 A. That's correct.

17 Q. The users on that channel, if the
18 Whittakers are getting their water, then -- and there's
19 extra, that you should be able to turn on more up
20 above?

21 A. To -- up to my amount that I'm allotted.

22 Q. Up to your -- up to your water right?

23 A. Correct.

24 Q. And so your position is that McConnell
25 shouldn't be able to call for any water out of Stroud

1 Creek, even though physically it flows into Lee Creek?

2 A. Below his upper diversion.

3 Q. Below his upper diversion.

4 And is that why you protested this
5 transfer?

6 A. That's true. That's correct.

7 Q. Are there any conditions, in your mind,
8 that could be included to protect you from injury if
9 this transfer were approved?

10 A. Conditions as in?

11 Q. Well, is it just your position that the Lee
12 Creek users can't call for any water out of Stroud
13 Creek? Is that your position?

14 A. They can down below his upper headgate if
15 it's -- say the Johnsons have water rights and they
16 want to call it, then they can call the excess water
17 that's going down.

18 Q. I see.

19 A. That's not my water --

20 Q. Okay?

21 A. -- at that point.

22 Q. Okay. I want to have you turn to your
23 exhibits, your pictures. It would be 308.

24 A. Okay.

25 Q. I think I missed this.

1 Where are you standing in this picture?

2 A. I'm standing right where the upper -- this
3 is in the -- where their upper diversion is or their
4 upper ditch is, right where the headgate should have
5 been installed -- just above where the headgate should
6 have been installed. The headgate is actually in one
7 of photos sitting off with the -- my wife took the
8 picture. And if she would turn to the left, the
9 headgate is sitting right there in the dirt out of the
10 stream.

11 Q. So we've talked about kind of this
12 elevation change between Lee Creek and Stroud Creek.

13 Are you standing on that in between the
14 creeks?

15 A. I'm standing between, yes.

16 Q. So --

17 A. Well, I'm standing right in the streambed
18 itself, or kind of on where they -- they piled -- put a
19 dam in and dirt and stuff to block all the water to go
20 from Lee Creek down their upper ditch.

21 Q. So the water that's in the bottom of that
22 photo, that's Lee Creek water, or is that in a ditch?

23 A. That's Lee Creek water.

24 Q. That's Lee Creek.

25 So Stroud Creek would be behind you in the

1 photo?

2 A. Correct.

3 Q. Okay. Lastly, just kind of an important
4 question: Is there fish in Stroud Creek -- in Stroud
5 Lake and -- or the other lakes up there?

6 A. Yes, there is.

7 Q. Okay.

8 A. And they're actually in streams too.

9 MR. HARRIS: No further questions.

10 THE HEARING OFFICER: Mr. Johnson?

11 MR. JOHNSON: Yes.

12 THE HEARING OFFICER: Any questions?

13 MR. JOHNSON: Yes.

14 THE HEARING OFFICER: Go ahead.

15
16 CROSS-EXAMINATION

17 BY MR. JOHNSON:

18 Q. Picture 307, the weir there, can you
19 describe that where that weir's at again?

20 A. That weir is just downstream from picture
21 309, the left side headgate. There's two headgates
22 sitting there.

23 UNIDENTIFIED SPEAKER: [Unintelligible.]

24 Q. (BY MR. JOHNSON): [Unintelligible] from
25 309 headgate?

1 A. Yeah. Well, Exhibit 309, there's two
2 headgates. One of them on the left and one on the
3 right. The one on the left is just upstream from this
4 weir.

5 Q. Thank you.

6 A. Was I confused?

7 Q. A little bit, yeah.

8 A. Earlier --

9 Q. Yeah.

10 UNIDENTIFIED SPEAKER: [Unintelligible.]

11 THE WITNESS: You can see the land. I --

12 Q. (BY MR. JOHNSON): And then you said there
13 was a dam, that probably my ditch, on that picture?

14 A. And that's what I was stating, that the one
15 on the right, the headgate on the right, that's where
16 the dam is. I don't know if that's your ditch or if
17 that's just the stream being blocked by a headgate.

18 Q. [Unintelligible.]

19 A. On 309 because there's two headgates right
20 there.

21 MR. JOHNSON: [Unintelligible] that's
22 [unintelligible]. Okay. [Unintelligible] no more
23 questions.

24 THE HEARING OFFICER: Ms. Foster?

25 MS. FOSTER: I'm good.

1 THE HEARING OFFICER: Okay.

3 EXAMINATION

4 BY THE HEARING OFFICER:

5 Q. Let's start -- let's start with
6 Exhibit 153. And it's going to be Figure 11.

7 A. Okay.

8 Q. I want to know, Mr. Tomchak, kind of as you
9 walk through that property, I want you to -- to talk me
10 through the path you took from the -- the Whittaker
11 point of diversion with the red dot --

12 A. Okay.

13 Q. -- in the -- in the yard up through to the
14 north part of this map. So talk me through. Where did
15 you go?

16 A. The -- there's like a red line there.

17 Q. Yeah. A solid red?

18 A. Solid red line --

19 Q. Uh-huh.

20 A. -- that goes over -- that goes over and
21 basically drops the channel into the -- that's
22 basically the channel that's there now.

23 Q. Okay. To the end of that first solid red
24 line you --

25 A. Right.

1 Q. -- reach the willows or the brush, the
2 trees there?

3 A. Right. And that's where that other picture
4 was --

5 Q. Yep.

6 A. -- showing that it's all --

7 Q. Uh-huh.

8 A. -- there. So then I went down through
9 that, and it basically, pretty close to where that line
10 actually is, follows straight down. That line pretty
11 much depicts --

12 Q. The dashed line?

13 A. The dashed line.

14 Q. That's the path you took, you continued in
15 that northeasterly direction?

16 A. That's true. Correct.

17 Q. Until you hit the next solid red line?

18 A. Yeah. Well, I got to that solid red line,
19 which is lower catch -- ditch.

20 Q. Uh-huh.

21 A. And then I walked up it, because I didn't
22 know what it was. Where was that water coming from?
23 So I walked up it to where it went to nothing. It was
24 just where it started from.

25 Then I turned around and walked back and

1 continued down the stream, which would be to the
2 northeast. And then --

3 Q. So you followed the solid red line?

4 A. The solid red line. That red line is
5 pretty close to depicting the channel.

6 Q. Now, you --

7 A. It's between.

8 Q. You're using -- I'm sorry. Get going.

9 A. It's where that lower -- that big S ditch
10 or whatever is --

11 Q. Uh-huh.

12 A. -- the channel is just -- that's flowing
13 right now is where that red line is. And you can see
14 probably historically, 150 years ago it's a little bit
15 to the west.

16 Q. So, Mr. Tomchak, you followed the solid red
17 line up to the other yellow X squares?

18 A. Correct.

19 Q. So in other maps that's identified as a
20 ditch, but you're using terms "stream channel" and
21 "stream" for that?

22 A. Because that's where all the water is
23 flowing.

24 Q. So when you say you followed the stream,
25 you followed the water?

1 A. Followed where all the -- where all the
2 water is flowing.

3 Q. You followed the path of the water?

4 A. And it's -- it's like a -- excuse me. It
5 was a defined -- like trees. It's been there awhile.

6 Q. Uh-huh. You didn't follow out along the S
7 curve, west springs ditch to see if there's some other
8 stream channel headed to the north that may be a dry
9 stream channel?

10 A. On the -- on that S that's on there?

11 Q. Yeah.

12 A. Where that red line goes?

13 Q. Yep.

14 A. I went to the very end of that ditch where
15 it starts, and then I turned around and went back.

16 Q. But stayed in the water?

17 A. Well, you can't -- I had to walk next to
18 the water, because it -- I had waders on --

19 Q. It's deep?

20 A. -- chest waders, and it's like probably
21 2 foot of silt in the bottom of it. And you start
22 walking even in it, I mean you can't -- it would drown
23 you.

24 Q. You'd be stuck?

25 A. You got to walk next to it, and you're

1 still walking through.

2 Q. Did you go up and over the berm and
3 investigate any of the -- any of that dark green brush
4 area on the north side, just --

5 A. Yeah, I did. I actually walked all the way
6 up to where the Kauer Ditch is that's not on -- that's
7 not even on here. I walked all the way up and came
8 back.

9 Q. You came back through here?

10 A. So I walked --

11 Q. No. I'm asking, did you go up and over the
12 berm and investigate this area to the north of the west
13 springs ditch?

14 A. No. I walked all the way up here.

15 Q. Okay. You stayed pretty much right on the
16 west springs ditch.

17 So you can't say whether there's a stream
18 channel north of the west springs ditch?

19 A. No, because I didn't walk that.

20 Q. You didn't walk that. You followed the
21 water -- you followed the water up to these two Xs, the
22 yellow Xs, and continued to follow the water up -- up
23 to the northwest, or maybe almost directly north up
24 that solid red line? Because we've heard testimony
25 earlier that that's -- when water is returned toward

1 Lee Creek, that's the path that it goes.

2 Okay. Would you turn to Exhibit 1. And
3 we're going to look at these three -- three stream
4 crossings, two culverts, one that's not a culvert?

5 MR. HARRIS: Did you say 1 or 151?

6 THE HEARING OFFICER: Exhibit 151, Figure 3. I
7 apologize. I'm speaking out of --

8 Q. And so it's -- it's closer to the
9 beginning, if you have it. In the beginning of this
10 report there's a lot of other stuff going on here.
11 There it is.

12 So this is that road crossing. We've
13 looked at it a lot with a bunch of different witnesses.

14 As you followed the water --

15 A. Uh-huh.

16 Q. And you can turn this sideways. As you
17 followed the water to the north, you followed the water
18 in what has been marked as the D1 channel, the farthest
19 channel to the east?

20 A. That's correct.

21 Q. That's -- that's what -- where the Stroud
22 Creek water was flowing at the time.

23 D3 is the Lee Creek water; is that correct?

24 A. That's correct.

25 Q. Did you walk over to observe that when you

1 walked the water?

2 A. I did.

3 Q. Okay. Where are the -- where are the
4 culverts? D3 has a culvert?

5 A. And D -- D1 and D3.

6 Q. D1 and D3 have culverts.

7 D2 does not?

8 A. Just a gate.

9 Q. What do you mean "a gate"?

10 A. It's like a gate or something in there
11 controlling -- not a water gate. Like a cow gate to
12 keep cows out.

13 Q. Okay. Is there --

14 A. Or fences. I guess I should say there's
15 some fences and stuff.

16 Q. Was there water in D2 when you walked
17 through the road there or through --

18 A. Well, it wasn't flowing water. It was like
19 marshy.

20 Q. Okay. Marshy in that area.

21 Where is the water from that D2 crossing in
22 that? Do you know?

23 A. Where does it end up?

24 Q. Yeah. Where does it -- where does it --

25 A. There wasn't any water that -- I didn't

1 follow any.

2 Q. You didn't follow the water from D2
3 north --

4 A. I didn't [unintelligible] --

5 Q. -- to see if it connected to Lee Creek or
6 if it connected over to the Stroud Creek flow?

7 A. Oh, you're saying the channel that's --
8 that's basically flowing through there?

9 Q. Yeah.

10 A. [Unintelligible.]

11 Q. Where does the D2 channel go?

12 A. It would flow into D1.

13 Q. It would flow over into D1, rather than
14 into D3?

15 A. Correct.

16 Q. Even though that is --

17 A. [Unintelligible.]

18 Q. Is this ridge, is this bear spot of
19 sagebrush, is that a ridge?

20 A. It's sagebrush.

21 Q. Sagebrush. But it's not a high point
22 between D1 and D2?

23 A. They're -- they're fairly level. It's not
24 like a -- a canyon or something. It's fairly level
25 through there.

1 Q. Uh-huh?

2 A. The higher area is between D2 and D3.

3 The -- when you're looking down -- walking down through
4 there, you can definitely tell it's a -- natural earth
5 is higher between those two.

6 Q. Between D2 and D3?

7 A. Correct.

8 Q. Okay.

9 A. So I would say if water got into D2, it's
10 going to flow into D1.

11 Q. You didn't walk up that -- that channel to
12 see, though?

13 A. Of D3?

14 Q. Up D2.

15 A. Not up D2.

16 Q. Okay. I don't know that we've had any of
17 the witnesses that have walked up D2. Let's see.

18 A. One -- I would probably say that Jordan
19 would be the one that would have walked that and know
20 exactly where it goes, because it's their property.
21 But I don't know if he was asked to -- to do anything
22 on it.

23 THE HEARING OFFICER: Yeah. That's -- that's
24 all the questions I had.

25 So coming back to you, Mr. Manwaring, did

1 you have any follow-up?

3 REDIRECT EXAMINATION

4 BY MR. MANWARING:

5 Q. Just on that same exhibit that you're
6 looking at, Dave, is D3, is that Lee Creek?

7 A. That's correct.

8 Q. There's a culvert right there that the road
9 goes over?

10 A. That's correct.

11 Q. And when you say you could see evidence
12 that, as James testified, he kind of moved some of the
13 stuff around in there years ago, where do you see that?

14 A. It's just when you're -- when you're down
15 in there, because I walked all the way through, the
16 brush is kind of cleaned out that whole area. And
17 everywhere else it's packed in tight. You're moving
18 branches and stuff. And it just kind of come into an
19 open area as you're coming through there.

20 Q. Okay. So part of that open area that you
21 can see with the tracks between D3 and D2, is that part
22 of the area you can tell has been moved or changed?

23 A. Between D2 and D3?

24 Q. On the -- on what looks like road tracks
25 through there.

A. Well, that's actually the road -- and that's their property line.

A. Because there's a fence that runs -- you can almost see the fence on this map. In fact, you can. The fence runs right through. So you can see that culvert is right on the fence line, and so is the other -- so it's right on their property line.

A. So it's on their property. And I -- I guess you could probably figure with Google imagery how far the two are apart. But they're not right next to each other. You're not going to throw a tennis ball and touch either one. It's a -- it's a distance apart.

A. That's correct.

A. That's correct.

Mr. Johnson, go ahead.

///

///

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. Okay. You followed up Stroud Creek down through there. I'm going to talk about where the west springs are.

Okay?

A. Okay.

Q. When the water's coming down through the willows there on the west spring, is there much water coming over the top of the bank there to -- going down to by Stroud Creek? [Unintelligible.]

A. The ditch that's dug below the springs? Because the -- because it's higher on the low end.

Q. Okay.

A. So the water -- most of the water is captured.

Q. To me the pictures show that the -- the [unintelligible] -- the west spring ditch, trench has been dug, they said that it runs back and forth, comes across there, takes the water out over there; right?

A. Right.

Q. Okay. So what I'm -- so the Stroud water is above there, the way I think, it is filtering down through the willows?

A. Right.

1 Q. Right. Okay. So is this west spring
2 channel catching all that water that's coming down
3 through there, or is there some coming over to go on
4 down? Or what's going on in there?

5 A. When it comes down through, it hits -- all
6 the water that's in the spring gets captured by that
7 kind of S-shaped ditch. And it's carried over to the
8 east and gets -- goes into the -- basically like I said
9 before, it goes into their ditch system for a short
10 period. And that's when it's shipped back across it.

11 MR. JOHNSON: Okay.

12 THE HEARING OFFICER: Okay. Thank you,
13 Mr. Tomchak.

14 Mr. Manwaring, any other witnesses?

15 MR. MANWARING: No other witnesses.

16 THE HEARING OFFICER: Okay. We turn now to
17 Protestant Steven Johnson.

18 Mr. Johnson, much like Ms. Foster, you're
19 able to come up here and make a statement on your own
20 behalf. You, of course, are subject to
21 cross-examination.

22 MR. JOHNSON: Okay.

23 MR. HARRIS: Real quick, James, did I -- is that
24 all the witnesses that Mr. Manwaring was going to call?

25 THE HEARING OFFICER: Yes.

1 MR. HARRIS: Okay.

2 THE HEARING OFFICER: Mr. Johnson.

3 MR. JOHNSON: One second. I better step out
4 here for a second.

5 UNIDENTIFIED SPEAKER: Smart man.

6 THE HEARING OFFICER: Okay. Let's take a break.

7 MS. YENTER: Pause this or stop it?

8 THE HEARING OFFICER: Just pause it. We got a
9 long ways to go.

10 MS. YENTER: Okay.

11 (Recess.)

12 MS. YENTER: Okay.

13 THE HEARING OFFICER: Okay. We are back on the
14 record.

15 And we are at the part of the hearing where
16 Mr. -- Protestant Steven Johnson is going to present
17 his testimony in the matter.

18
19 STEVEN L. JOHNSON,
20 having been called as a witness by Protestant Steven L.
21 Johnson, was duly sworn and testified as follows:

22
23 THE HEARING OFFICER: So, Mr. Johnson, do you
24 solemnly affirm the testimony you're about to give is
25 the truth, the whole truth, and nothing but the truth?

1 THE WITNESS: Yes, I do.

2 THE HEARING OFFICER: Okay. You can have a
3 seat. And you can just go ahead and provide narrative
4 testimony. That would be fine.

5
6 DIRECT TESTIMONY

7 BY MR. JOHNSON:

8 I'm going to talk here today -- I'll try to
9 stay in the boundaries what we talked about. These
10 things that prepared for us, I want to compliment to
11 all you guys. We appreciate it, the information you
12 brought to us and that.

13 But there's some -- I want to go back to
14 like some common sense, what's really happening out
15 here in our country. It's good to have these
16 guidelines for us.

17 But I sit back and I listen to everybody
18 and I watch my neighbors, what's going on through the
19 years, so I would like to -- and I've learned some, and
20 I'm still learning, and there's a lot of it I do not
21 know. That's when you start coming back to me on a lot
22 of this stuff, I'm not going to know nothing about it.

23 So let's see. What was I going to go to?

24 There's some things piled in this one or
25 two, I might come back into it a little bit here a

1 little later on. So what I'd like to do is let's start
2 with the picture up here on this.

3 We talked with the flow of the water coming
4 from Stroud Creek and that.

5 Where is the culverts at? Oh, right here.
6 Here it is. Right here. Okay. Let's see.

7 MR. HARRIS: If you need me to zoom out, just
8 let me know.

9 MR. JOHNSON: Yeah, zoom out just for a minute.
10 Okay. Right here. Can you move it up just a little
11 bit more for a minute? Let's see. No, the other way.
12 Whoa. Back just a touch. Okay. Right here.

13 All right. This is the fence line. My
14 property -- this is the BLM -- let's see, the culverts
15 are right there, aren't they?

16 THE HEARING OFFICER: Uh-huh, yep.

17 MR. JOHNSON: Okay. The fence line comes down
18 here, and this is my property right here and that comes
19 up to here.

20 Okay. I listened to this testimonies here
21 today, if I would have been the top of this -- my 160
22 comes up here, right there, down off from the top of my
23 160 up there is where the west spring channel comes out
24 of that channel -- that ditch comes across there at
25 there. Okay?

1 Just below there, this water in here kind
2 of -- kind of it's really wet and that. But down along
3 here, all this water, this ground's a little higher
4 over here, and all this water in this country is a
5 running this way. It don't run back this way. Okay?

6 It runs down here, and it turns and it
7 comes down through here like this, for everybody's
8 information. Okay?

9 Okay. Bring it down, Rob. Back down.
10 Okay. Thank you.

11 Okay. Two culverts here. They are
12 definitely apart. There's no -- supposedly this
13 outside one -- or this one over here is Stroud Creek,
14 and this one is -- is Lee Creek.

15 Okay. I run cattle. This is my BLM in
16 here. I run cattle in here. They talked about a
17 little ridge comes down through here. There is. It's
18 not very high, but it is there. There's quaking aspens
19 grows on that little ridge down through there. Okay?

20 So it shows you it's definite. And the
21 side where the creeks are at, there's water, and some
22 places down in there there's -- them quaking aspens
23 will not grow right close to the ditch, because all
24 them quaking aspens is dying.

25 ///

EXAMINATION

BY THE HEARING OFFICER:

Q. Mr. Johnson, have a seat. And I'd like you to actually turn to Figure 3. It's just going to make the record better. Using the map up there is not as effective as being able to refer to D1, D2, and D3.

So when you talk about a ridge, where does that -- where is that located? And please refer to the D1, D2, or D3.

A. Okay. That -- that ridge is in between D2 and D3.

Q. Okay.

A. That shows it down through there. And then quaking aspens died, and I don't know why, but they've all been dying at the same time, and they fell over. And they're in -- in kind of almost in both end channels.

So what I'm trying to say is places it's dammed it up, the water a little bit down through there. But it's just washed around the trees and stayed in the channel. It has not crossed. That's been one of the big concerns here. So I just wanted to get that clarified here. Okay?

Q. What do you mean? It has not crossed from where to where?

1 A. Okay. It has not cross from -- from Stroud
2 Creek to Lee Creek or Lee Creek to Stroud Creek. It
3 has not crossed. It comes down to a point and goes
4 clear through and comes out, like everybody's been
5 saying, down there below Bruce's upper point of
6 diversion.

7 Q. How far north of this -- this cross road,
8 this east-west road, does that ridge extend? The ridge
9 between D2 and D3, how far north does that extend?

10 A. That old ridge pretty well -- as it goes
11 down, it gets a little smaller. It just -- it just
12 kind of more or less follows just like the -- the
13 water -- the two streambeds shows in the picture, it
14 does that kind of like, pretty well most of that, down
15 through there. And at the tail end there, like it
16 becomes more of willows right down at the tail end
17 there.

18 Q. Okay. Trees up here at the top, but
19 willows down at the end?

20 A. The what?

21 Q. Trees up here at the top by the road, but
22 willows farther down; is that what you're saying?

23 A. There's willows along the streambeds. But
24 in between them there's kind of just -- it's not much
25 in there. It just kind of comes up, and that's where

1 the quaking aspens grow. And then on the outside the
2 streambeds, too, where it comes up off the streambed a
3 little bit, there will be some quaking aspens down
4 along there.

5 In other words, what I'm trying to say is
6 the streambed down through there is almost on both
7 sides almost lower than what the little ridge is in
8 because for the quaking aspens, it would be too boggy
9 and the quaking aspens wouldn't grow. That's what I'm
10 trying to say.

11 Q. Okay. Go ahead. I'm sorry. It's just --

12 A. It's okay. It's okay.

13 Q. It's more helpful to look at a map that
14 will -- that will be with me in the record --

15 A. That's okay. That's fine.

16 Q. -- than this that isn't going to be with
17 me.

18 A. That's fine.

19 Q. Go ahead.

20 A. Okay. I don't know if this is appropriate,
21 but one of the things that come to my mind is we're
22 talking about the water from Rosalie's corrals down
23 through the willows there today. And I just asked this
24 question a few minutes ago to him.

25 There's been no record, as far as I'm

1 concerned that I've heard the last two days, if there's
2 been a measurement, how much water is coming out of
3 Stroud Creek up there and how much is coming through to
4 whatever. In other words, is it all sinking in there?
5 I'm hearing that there's no water down here at the
6 bottom now. What's going on here?

7 I don't know where the answer is at. Maybe
8 James can find that out or whatever down the road or
9 whatever. That's something that I see there that's
10 going on in our community and what's going on up there.

11 We talked about the Kauer Ditch. They shut
12 it off because it didn't have rights through it or
13 whatever. Well, today I heard there really wasn't a
14 right going down through Whittaker property either.

15 If that's right, then -- so how are they
16 supposed to get their water through?

17 I'm glad I'm not James Cefalo to have to
18 come up with all these answers when he gets through
19 with this.

20 Okay. Another thing I want to talk about
21 is the spring up there. There's a question on whose it
22 is. And I suspect -- and I don't want to take sides
23 here. But the question is, what I look after -- me
24 myself, I have to ask myself this: Why -- whose spring
25 is it? Okay.

1 According to water lease Whittakers or
2 whatever they filed back then, it was theirs or
3 whatever, and then the adjudication it got some ruling
4 changed. I don't know if it's right or not.

5 But the question I have to ask myself, so
6 who dug the spring? So did Bruce come up dig the
7 spring on Whittakers' ground? Did the Whittakers let
8 him do it? No, I don't know if they would or not.

9 Did Whittakers go dig that spring for
10 Bruce? I don't know. So whose spring is it? It's
11 still up in the air. Whose spring is it, the way it is
12 today? That's things that common sense, I have to go
13 out, and I look at things when I hear things, and I --
14 it makes me -- that's why that brings it to my
15 attention.

16 Q. Mr. Johnson, I'm -- I'm most interested,
17 actually, in your water rights. And I was hoping that
18 here, as you took the stand, that we would focus on --

19 A. I was going to talk about that --

20 Q. Great.

21 A. -- here in a few minutes.

22 Q. Well, okay.

23 A. Okay.

24 Q. I just want to make sure that that's part
25 of your -- your plan.

1 A. That's my plan.

2 Q. Okay.

3 A. Okay. Let's see. I want to talk about
4 Bruce's ditch that he's trying to make a transfer on.
5 Okay? I've talked to my neighbors, and they -- I -- we
6 talk. Neighbors talk and that. I talked one of my
7 neighbors, and he says, "You know, that ditch has been
8 there forever. My dad was the watermaster, and that
9 ditch was there at that time."

10 So what's happened? Why did them water
11 rights end up in the top ditch? What's going on here?

12 I feel like that ditch probably will affect
13 my water rights. Let me back that up. If I knew for
14 sure how the spring water was going to go and Stroud
15 Creek was going to go, their water rights, in other
16 words, if Bruce was going to get them or whatever, it
17 would make me decide what I'd do on my water rights.

18 But my water rights is so small. It's just
19 I would like to have -- in other words, if they lost --
20 if they don't get the spring and they don't -- and they
21 don't have no water rights out of Stroud Creek, what
22 little bit of water there is there I can go back --
23 I've got to rephrase, back up a little bit.

24 For like last summer at the end of the year
25 when Bruce lost his water in his ditch, they shut Bruce

1 off in his ditch, what water was coming down there,
2 going down the ditch, I took out and I used down there.
3 And I was able to have my stock water.

4 But if you put it back in Bruce's ditch, I
5 don't know if there would have been enough to go down.
6 It would have been called back for futile call, is what
7 I'm trying to say.

8 And at that time Whittakers didn't have
9 enough water to run all their circles -- their circle
10 up there. It was only run half stream, so that tells
11 me that -- that what little bit was coming down through
12 there was a little bit of spring water coming down,
13 seeping back in down through there, below there.

14 Okay. My water rights? I have not used
15 them much, to be very honest with you. They're such
16 poor water rights and it's so little.

17 Bruce asked me a while back ago, he didn't
18 know where that point of diversion was at between his
19 upper point and his lower point. I had somebody come
20 and find -- GPS it in for me because I didn't know
21 where it was at for sure. And I -- it was right there
22 in front of me.

23 There was a -- when I bought the place,
24 there was people traveling through there and through
25 the creek down there [unintelligible], well, it was

1 right in the streambeds channel right there where it
2 comes out. It's right on the streambed channel where
3 it comes out at.

4 Thank you for Mr. King on his paperwork.

5 My other point of diversion down there, my
6 one other point of diversion down there, it shows that
7 it's wrong. I got to go check it out. But where it's
8 deeded out is nowhere near where it's supposed to be,
9 because that ditch goes out, goes right up to my -- up
10 the sidehill into my yard, and that's where it's
11 supposed to be irrigated at under my stock water
12 rights, the same place, right there.

13 And it shows it's clear over in another
14 [unintelligible], so I got to go check that out. So I
15 appreciate that, Mr. King, putting that
16 [unintelligible].

17 My other water right below the road I've
18 used -- I used it last year, and five, six years ago I
19 used some. I'm --

20 Q. Here, I'm going to hand you this. I just
21 want to make sure we're understanding what you're
22 talking about.

23 A. Okay.

24 Q. So no. I'm just going to let you look at
25 this map.

1 So your -- purple triangles are your water
2 rights.

3 A. Right.

4 Q. And as you can see, Mr. Johnson, that upper
5 one is between McConnells' two ditches.

6 A. Right.

7 Q. And so if you want to start up there. You
8 know, a question was asked earlier --

9 MR. BROMLEY: James, if I might just for the
10 record, where are you looking?

11 THE HEARING OFFICER: Oh, I apologize.

12 MR. BROMLEY: [Unintelligible] which page?

13 THE HEARING OFFICER: This is in Mr. King's
14 exhibit.

15 MR. BROMLEY: So Exhibit 1, page --

16 THE HEARING OFFICER: It is. Page --

17 UNIDENTIFIED SPEAKER: 15.

18 THE HEARING OFFICER: -- 15. I think that it's
19 kind of a helpful map --

20 MR. BROMLEY: Thank you.

21 THE HEARING OFFICER: -- that Mr. King put
22 together, especially in terms of Mr. Johnson's water
23 rights and where they sit on the creek.

24 Q. So I want to start at that 74-1831.

25 A. Okay.

1 Q. Mr. Johnson, you're -- I think you were
2 touching on that. A question was raised earlier in the
3 hearing, is there actually a ditch at that location.

4 And you're saying there is?

5 A. There is.

6 Q. Hidden down in the creek bottom --

7 A. Yes.

8 Q. -- there is some way to get water out?

9 A. Yes, there is. And it goes through, and it
10 goes right around. And after I fished --
11 [unintelligible] follow right around, it goes through,
12 and works up on the sagebrush -- up through some
13 sagebrush on the high point there.

14 And I -- and I fed cows there the last
15 couple years over that high sagebrush point, and I was,
16 What the heck? How come this is so darn rough in here?
17 But it's the ditch. It's -- you can see it.

18 Q. There's an old ditch there, but there's no
19 headgate?

20 A. No, there's --

21 Q. Is -- is there an active diversion dam at
22 that location? Is there -- meaning is there a -- is
23 there a dam in the creek to push water?

24 A. No.

25 Q. So not a headgate, not a diversion dam.

1 But there is an old remnant ditch that you've found
2 that does travel out. Okay. Great.

3 A. 74-949.

4 Q. Let me ask one more question on 1831.

5 You haven't diverted water in the time that
6 you've owned the property through that old remnant
7 ditch?

8 A. No, I have not --

9 Q. Okay.

10 A. -- to be very honest with you. And one of
11 the reasons why I have, my water right's small and it's
12 such a junior water right to Bruce McConnell, what
13 water gets down there, I didn't think I'd ever get it.
14 But there's only been a couple years that I probably
15 could have had it. But it was over here -- it was
16 overflowing his ditch bank, so I was benefiting from
17 it.

18 Q. Have you ever -- yeah, I mean that property
19 could also be irrigated out of McConnells' upper ditch;
20 right? Because McConnells' upper ditch is the
21 upstream -- is upstream of that -- of that field or
22 that pasture.

23 A. It could be, but it's sitting on BLM, and
24 it's very hard for me to go and dig a ditch out to it.

25 Q. Okay.

1 A. To be very honest with you.

2 Q. You bet.

3 A. You know, the procedure that --

4 Q. But you've benefited in some years if
5 McConnells' ditch is overflowing, that that water can
6 come down through that property.

7 Okay. Move on to your -- what is it? 949?
8 Is that the next one downstream?

9 A. That's the next one that says it's supposed
10 to go up to my yard. It's yard. It comes out. About
11 five years after I was here, I took some dirt up and
12 plugged it off, because in the wintertime it ice up so
13 bad and flood my corrals and that with ice and that in
14 the wintertime. But that's where my stock water is out
15 at, supposed to be out that point of diversion.

16 Okay. And that's the one I'm saying that
17 description isn't right. I've got to come back to
18 Water Resource Board and go get it right.

19 Q. Point of diversion isn't in the right
20 place?

21 A. Point of diversion in the right place.

22 Q. Okay. So you're going to need to move
23 that. Okay.

24 A. 74-15201, I've used water out of that point
25 of diversion three or four times down there. And it's

1 across the road. It's right there. And it goes out on
2 that hill down there.

3 Q. Does that water that you divert there
4 comingle with water from another source?

5 A. Yes, it does.

6 Q. What is that other source? Is it Big Eight
7 Mile?

8 A. Big Eight Mile.

9 Q. -- that's bringing down?

10 A. Yes.

11 Q. Okay. So you are able to divert out of Lee
12 Creek over into a separate ditch before irrigation or a
13 common ditch with your Big Eight Mile water?

14 A. Big Eight Mile is coming to a circle, and I
15 just run that up out of the ditch and it goes up on the
16 hill, and I've got a ditch going across that runs down
17 through there.

18 Q. Okay. Do you run -- can you run the Lee
19 Creek water through your pivot?

20 A. No, I can't.

21 Q. No. So the Lee Creek water you can only
22 flood-irrigate?

23 A. Right.

24 Q. Okay. So you -- while that ground may be
25 irrigated from both sources, you aren't commingling the

1 water before irrigation, rather Lee Creek can do some
2 flood irrigation, but there's a pivot that is
3 pressurized from Big Eight Mile?

4 A. Yeah.

5 Q. Okay. I appreciate that.

6 A. Okay. And yesterday in the hearings I
7 listened to you guys talk and that, and I heard several
8 times call for your water. Call for your water. I
9 think I'm going to put headgates in and I'm going to
10 call for my water. And it's going to be, to be very
11 honest with you, it might be more than five years,
12 seven years before I ever get my water to be able to
13 use it, other than my stock water. So that's how I
14 feel about it.

15 Q. I appreciate your testimony. I do have --
16 go ahead.

17 A. And my protest, original protest on Bruce
18 was my water right should become effective before
19 Bruce's water rights in that ditch, because it was
20 going to be a 1920 point of diversion, and my water
21 right should come before them.

22 And -- and that's -- in some ways that's
23 where I still stand at. I don't think the law quite
24 reads that way, to be very honest with you. So I don't
25 know. But I -- I feel that way still today. And my

1 spring [unintelligible] high flow.

2 Okay. Bruce, yesterday in your -- in your
3 testimony you said you was president of the system for
4 several years. For your information, they've elected
5 me president this year. Okay?

6 MS. YENTER: I feel like that's no longer a
7 mystery.

8 THE WITNESS: So I appreciate what you've done
9 in the past. And I -- I want to continue here on a
10 couple things.

11 I want to appreciate my -- Bruce and his
12 family and the Whittaker family, I sit between them. I
13 appreciate them being such good neighbors. And they
14 both got older water rights than I do, and they're
15 irritating and I'm burning up. And sometimes it's
16 pretty hard to take. But that's life, I guess.

17 I was talking about Bruce's headgate,
18 that -- his ditch down there also. Back to that again.
19 I feel like my water right should come before that in a
20 way, but yet that ditch has been there for a lot of
21 years, and I don't know. Too bad we can't make it work
22 so it don't jeopardize everybody else.

23 One of the main things I see is we just
24 need -- we cannot make water. We cannot make water.
25 Mother Nature has to help us. And that's the -- in a

1 way, that's the bottom line.

2 This Stroud Creek water and Everson water
3 and Lee Creek water, I have to look back at the picture
4 clear back when they filed for these water rights.
5 Okay? I'd have to go back and look at these.

6 Why -- why was Tomchaks' and Fosters' water
7 right filed out of Everson or whatever -- Everson or
8 whatever it was? Okay. When did it become a tributary
9 to Lee Creek, if that's what you're trying to say? I
10 don't -- so that -- to me, then water rights should be
11 that Everson.

12 We got an incident going right now. Cindy
13 brought it to us here in our community in Mill Creek
14 over here, they're trying to join another system to
15 Mill Creek. And it's clear across the valley. When
16 did they join Lee Creek, Stroud Creek? Lee Creek, was
17 it originally started there or when? When did they
18 join Lee Creek and Eight Mile together as that one
19 water system?

20 I guess I'm glad I'm not you. Okay?

21 There was -- Bruce's new ditch. So maybe
22 that kind of covers it. I got another thing, I'm going
23 to come back to the -- right here in 4, in this
24 pamphlet No. 4, we talked about, it was talked about
25 yesterday several times about Bruce McConnell -- it's

1 the letter that Bruce and Glenda McConnell last fall
2 closer to their -- to their lower division --
3 diversion. Okay.

4 Right in here also in this one, as
5 president of the systems, of Eight Mile and Lee Creek
6 over there, I'm getting hit by people. But right here
7 it says, right here also in this -- let's see. "The
8 upper diversion is also required to have a
9 controllable, lockable headgate installed. Compliance
10 with that requirement may be delayed until fall of this
11 year, but no later than the start of the irrigation
12 spring of next year."

13 I got -- I'll take myself, for instance.
14 Down there I've got water's coming past, Bruce can't
15 take that water in that point of diversion. It's going
16 down the ditch. And I've -- the other day I thought I
17 should go -- I don't know how much headgates. I been
18 going build them there all winter along. I haven't got
19 them in. I should be taking it.

20 But there was a comment made to somebody
21 else on Eight Mile that if they don't have -- put their
22 point of diversion, there's going to be a \$10,000 fine.
23 I told my boy the other day, "What should I do?"

24 He says, "Don't put it in, Dad. You don't
25 want to pay \$10,000."

1 Now, if it's right or not, I don't know.
2 This is hearsay, so I come to the meeting. But I got
3 people on the system, point of diversion say it's
4 legal.

5 And so I was probably talking to you later
6 on, Mr. Cefalo, I forgot where I stand on that -- on
7 this deal, so -- or Cindy. Okay. That would be fine.
8 [Unintelligible.]

9 Q. (BY THE HEARING OFFICER): No, I just don't
10 want to get in the middle of headgates up here. We've
11 got -- that's why [unintelligible] in place.

12 A. And I have a problem with these lockable
13 headgates.

14 Q. We can -- we can take that up somewhere
15 else.

16 A. Okay. One --

17 Q. I have a couple more --

18 A. One second. I'll just finish this up right
19 quick like.

20 We're in a community up here, and we don't
21 have a lot of water, and we got to be all amongst our
22 users, and we got to make things work. We have our
23 guidelines here and here and here to make things work.
24 But we got to use some common sense what's right, what
25 makes it work for everybody.

1 You know, when you put lockable headgate,
2 I'm sorry, but I feel like we're all the biggest crooks
3 out there, because they all got to have them on. I
4 think we try to get along with everybody. It goes
5 pretty well. But that's [unintelligible].

6 Q. In 2020, Mr. Johnson, when -- when Bruce
7 was shut off in late summer --

8 A. Yes.

9 Q. -- water came down to you?

10 A. Yes.

11 Q. How did you use it? Did you irrigate with
12 it in 2020, or did you --

13 A. I did.

14 Q. -- stock -- you just used it for stock
15 water?

16 A. I used -- I irrigated.

17 Q. You were able to irrigate.

18 And that's flood irrigation through the
19 15201, through that lower ditch?

20 A. Yes.

21 Q. Okay. Last question is, are there times
22 when Lee Creek flows down through to the Lemhi River?
23 Other people have testified Lee Creek flows through
24 your property, so you get to see it after all of the
25 big diversions as it's on its way down. Are there

1 times of the year when it will flow down through to the
2 lower --

3 A. In the wintertime --

4 Q. -- Lee Creek?

5 A. In the wintertime it's short, a little --
6 maybe a little time in the spring is all.

7 Q. Okay. Snowmelt -- high -- high-flow
8 snowmelt? Okay. But usually --

9 A. Generally --

10 Q. I'm sorry.

11 A. If we have a real good year -- no, it
12 pretty well took -- it's taking it [unintelligible]
13 too. Yeah, it is. It is.

14 Q. Okay. During the summer, though, it's
15 dried up entirely?

16 A. Yes. Yes, it is.

17 THE HEARING OFFICER: Thank you.

18 Mr. Bromley, do you have any questions for
19 this witness?

20 MR. BROMLEY: I do, a few.

21 THE WITNESS: Okay. How do I [unintelligible].

22
23 CROSS-EXAMINATION

24 BY MR. BROMLEY:

25 Q. Hi, Steve. I'm Chris Bromley on behalf of

1 the McConnells.

2 Keeping with that Figure 10 that you've got
3 open in front of you in Exhibit 1, so the water right
4 74-15201, that's the -- that's the Lee Creek diversion
5 that you've used?

6 A. Uh-huh.

7 Q. And then you said you've used it three to
8 four times.

9 Do you remember when those three to four
10 times were?

11 A. I used a little bit when Tom Udy was the
12 watermaster. And he didn't record it because he
13 combines his -- "That little dab of water you got out,
14 I'm not doing it. I'm going to overlook it," what he
15 told me.

16 And then one other time I used it a couple
17 of days is all, but til -- and since then I'm -- four
18 years ago or something like that, just a couple days.

19 Q. Okay. So four years ago for a couple days?

20 A. Yeah.

21 Q. And when you've used it to irrigate, how
22 many acres do you think you've irrigated it?

23 A. Well, back then -- I don't know. Three or
24 four, five. I don't -- there's not much water. It
25 don't cover very much, to be very honest with you.

1 Q. And yet --

2 A. Last year -- last year I had some water,
3 and I covered 8, 10 acres with it.

4 Q. Okay.

5 A. To be very honest with you.

6 Q. And you also have water coming from the Big
7 Eight Mile side?

8 A. Yes.

9 Q. So that's the water -- is that the water
10 you rely on is the Big Eight Mile water?

11 A. Yeah.

12 Q. Okay. That diversion 74-949, have you
13 diverted water there?

14 A. No, I haven't.

15 Q. Okay. And the diversion 74-1831, have you
16 diverted water there?

17 A. No.

18 Q. Okay. And then I'm just working my way
19 up -- up the drainage.

20 You had talked, Steven, about the quaking
21 aspen?

22 A. Yeah.

23 Q. And this is the area below the D1, D2, D3
24 in that figure that Mr. Cefalo had you looking at, and
25 when I was watching you, I thought I saw you -- so you

1 were talking about the quaking aspen, but there's a
2 little bit of a ridge, and I thought I saw you with a
3 hand sort of down like shin level, ankle --

4 A. It's hard -- yeah, it -- not much in there,
5 you know. When you cross -- if you -- if it's low or
6 the creek's all I can tell you down through there, you
7 know. It's not a big ridge. Sometimes you guys are
8 trying to make a great big ridge out of it. It's not
9 that. It's -- it's low.

10 Q. Right. And I just -- I noticed you were
11 gesturing with your hand down by your ankle, and so
12 that's -- that's the size of the --

13 A. Yeah.

14 Q. Yeah.

15 A. It's not very tall in there.

16 Q. Right. And then last question that I have
17 is, how long do you think that lower diversion has been
18 there on McConnells' place? I thought I heard you say
19 a long time.

20 A. Okay. I guess I moved here 120 -- 2008.
21 It was there at that time. And I'm just taking word
22 from my neighbors, and that's all. And they didn't say
23 for sure how long. They said all I know is their dad
24 was -- his dad watermaster there [unintelligible].

25 MR. BROMLEY: Great. Thank you.

1 I don't have any further questions.

2 THE HEARING OFFICER: Okay.

3 Mr. Manwaring, any questions for this
4 witness?

5 MR. MANWARING: I don't have any questions for
6 Steve. Thank you.

7 THE HEARING OFFICER: Okay.

8 MS. FOSTER: I'm good.

9 THE HEARING OFFICER: Mr. Harris, anything?

10 MR. HARRIS: None for me.

11 THE HEARING OFFICER: Okay. Thank you. Thanks
12 for staying with us through this hearing.

13 THE WITNESS: Yeah.

14 THE HEARING OFFICER: Okay. Mr. King, I'll
15 swear you in again, since we're on a new day.

16

17 SCOTT KING,

18 having been called as a rebuttal witness by the
19 Applicants, was duly sworn and testified as follows:

20

21 THE HEARING OFFICER: Do you solemnly affirm
22 that the testimony you're about to give here on the
23 second day of hearing is the truth, the whole truth,
24 and nothing but the truth?

25 THE WITNESS: I do affirm.

1 THE HEARING OFFICER: Okay. Go ahead.

2
3 DIRECT EXAMINATION

4 BY MR. BROMLEY:

5 Q. Hey, Scott, you've been here for yesterday
6 and today. You've heard testimony from various
7 witnesses, including expert Bryce Contor.

8 Any points you'd like to address, given
9 what you've heard?

10 A. Yes, I do have a few points. First of all,
11 in Bryce's west spring report -- and I forget which
12 exhibit that is, but there was a Figure 12, which is a
13 photograph that I believe shows water flowing over a
14 weir that was just Stroud Creek water.

15 MR. HARRIS: Hold on. Could we --

16 THE WITNESS: Yeah, we can certainly open to
17 that.

18 THE HEARING OFFICER: Uh-huh.

19 MR. HARRIS: You're going fast, and I just need
20 to [unintelligible].

21 THE HEARING OFFICER: One of these
22 [unintelligible].

23 MR. HARRIS: You said Figure 12?

24 THE WITNESS: Yes. This was in the west spring
25 report.

1 THE HEARING OFFICER: So 153.

2 THE WITNESS: 153.

3 THE HEARING OFFICER: Right.

4 THE WITNESS: Yep, that's the one.

5 MR. BROMLEY: Rob.

6 MR. HARRIS: Yeah.

7 THE WITNESS: And if I understand right, that
8 photograph was taken on the left side of that stream.
9 That was the water that's not being diverted by
10 Whittaker. Whittakers' headgate was in the stream
11 controlling the water and pushing it over into their
12 diversion. So this is water that's flowing past the
13 headgate over this weir.

14 My point with this was, that, to me, looks
15 like a significant amount of water. I don't have a
16 measurement, I don't recall seeing one, but to me it
17 looks like if that water was contained in a channel and
18 flowing downstream we should see it down there.

19 But there's been discussion of it flowing
20 through all these diffuse different places as it's
21 going down through. And so that's just kind of a point
22 that I'm bringing up is that looks like a bit of water
23 that should make it to the bottom if it was staying in
24 a channel.

25 One of the things I looked at that I don't

1 have an exhibit of is the 1884 government land office
2 plat maps. Reviewed those. And I was looking
3 specifically at the confluence between Stroud Creek and
4 Lee Creek. And that map shows that confluence at the
5 south boundary of the southeast quarter of the
6 northeast quarter of section 30. That's exactly
7 consistent with what the USGS quad map here says.

8 And I didn't get a chance to look, but the
9 surveyors in those government land office maps also
10 talk about their survey and their chainage along
11 section lines. So someone could look and see if there
12 were multiple channels around that section 30, but none
13 were depicted on the map. Clearly showing that those
14 channels converged right there at that south boundary
15 of the southeast northeast section 30.

16 So then that will take me to this quad map.
17 And if I look at this confluence -- and I got to get
18 really close and take my glasses off and look there,
19 but there's an "X" right there along the roadway, and
20 there's numbers that say "6531." It's a survey mark.

21 There were surveyors there, and they
22 probably placed a marker. And that marker at that
23 elevation is right next to the confluence. As I hear
24 him talking about flowing a tennis ball, by the looks
25 of that map they could have thrown a tennis ball at

1 that confluence.

2 So the surveyors in 1884 placed it there.
3 And that wasn't from imagery. That was from surveyors
4 out there on the ground. And that's consistent with
5 that map and some surveyor that placed a mark at that
6 spot.

7 The next maps we have are the 1954
8 engineer's map.

9 MR. HARRIS: I think I'm going to lodge an
10 objection. I don't think Mr. Contor testified about
11 this. I don't think this is rebuttal testimony. It's
12 new testimony.

13 THE HEARING OFFICER: No, I think it's rebuttal
14 testimony.

15 MR. HARRIS: Okay.

16 THE HEARING OFFICER: You can add something to
17 the record.

18 MR. BROMLEY: No, I agree with you.

19 THE HEARING OFFICER: Okay. Go ahead, Mr. King.

20 THE WITNESS: Next we have is the 1954 map, and
21 we've talked a whole lot about that. A lot of
22 reference was been given to this colorful engineer's
23 map. And it also shows that confluence, those
24 tributaries right there close to that same location.

25 And that map shows it a little bit more to

1 the south. Definitely not to the north. That's the
2 last map that we have before any discussion was placed
3 about putting culverts in in the '60s or '70s. So we
4 know something was placed in the systems after all
5 three of these maps that have been created, which are
6 consistent.

7 And it was after the culverts that were
8 placed, now we have some kind of testimony or claims
9 that -- and probably clearly evidence that now those
10 don't confluence right there anymore, that it happened
11 somewhere else.

12 So all the evidence that I see from '54 and
13 before was that those streams had a confluence at that
14 location in this south boundary of the southeast
15 northeast of section 30.

16 Lastly, and this is the most important
17 part. There's also been testimony that Stroud Creek
18 flows into Lee Creek below McConnells' upper diversion,
19 McConnell could never ever get access to Stroud Creek
20 below the upper diversion.

21 If that's correct, there's no reason at all
22 for the Whittaker versus McConnell case in the first
23 place. McConnell could have never had access to Stroud
24 Creek water. So why would anybody go to court for it?

25 MR. BROMLEY: Nothing further.

1 THE HEARING OFFICER: Mr. Harris?

2
3 CROSS-EXAMINATION

4 BY MR. HARRIS:

5 Q. Scott, you testified that there's an "X"
6 mark and a "6531."

7 Did you testify that's a survey mark, like
8 a corner mark?

9 A. I expect that to be -- I wasn't there, but
10 based on my experience with USGS quad maps and those X
11 marks with an elevation mark, that somebody surveyed
12 that -- surveyed an elevation at that point. They may
13 have placed --

14 Q. Hold on. Hold on.

15 Surveyed an elevation?

16 A. Yes.

17 Q. But didn't necessarily survey a --
18 something of significance, like a -- like a corner of a
19 section?

20 A. They may or they may not have. There's
21 different marks, depending on what they're placing
22 there. Sometimes there's a mark for a benchmark.

23 Q. So you're -- you're saying that's an
24 elevation?

25 A. I'm saying that they marked an X and placed

1 an elevation number at that X point.

2 Q. Okay. And are you saying that's
3 significant because you think they were marking the
4 confluence of stream channels?

5 A. No, not marking the confluence. But they
6 were right there at the confluence. They were
7 surveying an elevation that was very near the
8 confluence. That's feet away, maybe yards. I mean
9 like 10 or something.

10 Q. Would you --

11 A. I didn't zoom in it to see the distance,
12 but it's really close to that confluence.

13 Q. Would you agree with me that as far as
14 pinpoint accuracy that as we've gone over time maps
15 have gotten more accurate, an 1884 map is probably not
16 as accurate as the maps we're able to create today?

17 A. Generally so, yes.

18 Q. Okay. And then you made some comments at
19 the very end about the Kauer versus Whittaker case.

20 Did you review any of the record of that
21 case or the Supreme Court opinion? Were you asked to
22 do that for this case?

23 A. I was not asked to. I have glanced through
24 it.

25 Q. Okay. And you started out by looking at

1 the Figure 12. And you just said this looks like a
2 significant amount of water. And I didn't catch the
3 significance of why you think that's important.

4 Or are you implying something that maybe is
5 going unsaid?

6 A. My implication there is that looks like a
7 significant amount of water. It's measurable.

8 Q. Uh-huh.

9 A. There's enough water going over a weir that
10 it could be measured.

11 Q. That's why there's a weir there?

12 A. Yes.

13 OPERATOR: Hello. There doesn't appear to be
14 any activity in this meeting.

15 THE HEARING OFFICER: There isn't.

16 MS. YENTER: Bye.

17 THE HEARING OFFICER: There isn't any activity
18 here.

19 THE WITNESS: And then my point is, is I'm not
20 sure that anybody's testified that they saw that same
21 amount of water downstream. There was talk from Bryce
22 and from others that there's water that now diffuses
23 out and flows through different places and rivulets,
24 and David talked about following a channel down.

25 But I'm not sure that anybody has ever said

1 we have a bunch of water here. What actually happens
2 to it when it gets to the bottom? And that I'm
3 surmising that if it was in a channel that we could see
4 about that same amount of water at the bottom, that
5 there's these diffuse things that are going on, because
6 I don't think that old channel is there anymore. I
7 think it's been manipulated.

8 Q. And I think that's what everyone said.

9 A. Yeah.

10 Q. But I think people have also testified that
11 they did see water going down through there as
12 [unintelligible] --

13 A. I'm not disagreeing with that.

14 Q. Okay.

15 A. I'm just saying I don't see it in the same
16 channel, one channel.

17 MR. HARRIS: That's all the questions I have.
18 Thank you.

19 THE HEARING OFFICER: Okay.

20 Mr. Manwaring?

21
22 CROSS-EXAMINATION

23 BY MR. MANWARING:

24 Q. As I get your point, Scott, you're just
25 saying the maps all show confluence where the -- where

1 you say the culverts were placed?

2 A. And if we were going to point to one place,
3 and I look at the imagery and the topo map right over
4 it, it's where the left or westernmost culvert is
5 located, that it shows that confluence there or right
6 upstream of that place.

7 Q. And you've heard the testimony that there
8 is in fact topographical feature that separates those
9 two channels in that very area?

10 A. Yes, I have.

11 Q. Still present today?

12 A. Yes.

13 Q. That's not shown on the topographical map?

14 A. What's not shown on the topographical map?

15 Q. The fact that there's an elevation between
16 those two creek channels even today?

17 A. No. And I think, as Bryce testified, the
18 lines are 40 -- 40 feet elevation difference there. It
19 couldn't be displayed there.

20 But we also heard talk about -- so we
21 heard -- we heard discussion from Mr. Whittaker, James,
22 about sheep and not wanting to go through a wet area.
23 And I can see moving a channel and separating that
24 confluence so that there would be more dry area to
25 drive sheep through.

1 Q. Well, I understand your point. But what
2 I'm saying is you've all -- you've heard testimony from
3 various sources that that higher elevation that's
4 between those two natural channels extends down until
5 just above the confluence where it's willows?

6 A. And my disagreement with that would be I
7 don't think that the Stroud Creek is in its old natural
8 channel. I think it's in a different channel now than
9 what it used to be before.

10 Q. That's just your opinion?

11 A. Correct.

12 Q. And you haven't walked that area?

13 A. That's correct.

14 Q. You didn't do what Dave Tomchak did?

15 A. No, I did not.

16 Q. You didn't actually see the physical
17 features and know exactly where that confluence goes?

18 A. As it is today, correct. Yes.

19 MR. MANWARING: Okay. Nothing further.

20 THE HEARING OFFICER: Okay.

21 MS. FOSTER: I'm good.

22 THE HEARING OFFICER: Okay. Good. Thank you.

23 THE WITNESS: Thank you.

24 MS. YENTER: Just pause?

25 THE HEARING OFFICER: Yeah, just pause.

1 (Recess.)

2 THE HEARING OFFICER: So we have reached the end
3 of the presentation of evidence from all of the
4 parties.

5 I should note on the record that Rosalie
6 Ericsson, or her representatives, never participated,
7 never showed up in this hearing.

8 And so unless there's anything else that
9 needs to go on the record, I'll ask one more time.

10 Hearing nothing, seeing nothing, then the
11 record for this case is closed. And I will issue a
12 preliminary order in this matter within 45 days. And a
13 copy of the preliminary order will be mailed to the
14 parties and likely e-mailed to -- because sometimes the
15 mail takes a long time, and I think it's important for
16 you guys to have that sooner than later.

17 So this hearing is now concluded, and the
18 record is closed.

19 Thank you.

20 MR. BROMLEY: Thank you.

21 (End of audio file.)

22 -oOo-
23
24
25

Audio Transcription

REPORTER'S CERTIFICATE

I, JEFF LaMAR, CSR No. 640, Certified Shorthand Reporter, certify:

That the audio recording of the proceedings were transcribed by me or under my direction.

That the foregoing is a true and correct transcription 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 10th day of January, 2022.



JEFF LaMAR, CSR NO. 640

Notary Public

Post Office Box 2636

Boise, Idaho 83701-2636

My commission expires December 30, 2023

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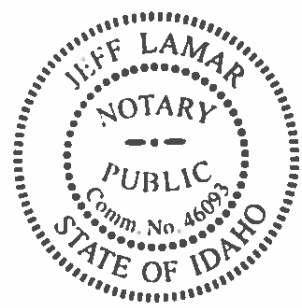
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That the foregoing is a true and correct transcription of all testimony given, to the best of my ability.

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
6th day of January.



A handwritten signature of Jeff Lamar in black ink, written over a horizontal line.

JEFF LaMAR, CSR NO. 640
Notary Public
Post Office Box 2636
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My commission expires December 30, 2023