

1 MR. DUNN.

2 THE COURT: YOU MAY.

3 MR. DUNN: THAT'S FINE.

4 MR. ZIMMER: THAT WOULD BE EASY.

5 MR. DUNN: JUST SO THE COURT KNOWS, THE REASON WHY
6 WE DIDN'T BRING MULTIPLE COPIES IS, BECAUSE OF THE
7 COLOR, IT COST \$2,500 JUST FOR ONE SET.

8 THE COURT: WELL, HOPEFULLY KINKOS CAN DO IT
9 CHEAPER.

10 MR. DUNN: I HOPE.

11 THE COURT: ALL RIGHT. NOW, COULD I TAKE A
12 RECESS? OKAY. LET'S TAKE ABOUT A 15-MINUTE RECESS AND
13 WE WILL RESUME.

14

15 (RECESS.)

16

17 THE COURT: ALL RIGHT. I THINK THERE WAS ONE
18 ADDITIONAL MOTION IN LIMINE WE DIDN'T DO. THAT'S
19 MR. ZIMMER'S MOTION TO EXCLUDE --

20 MR. ZIMMER: ARE WE BACK ON THE RECORD, YOUR
21 HONOR?

22 THE COURT: YES -- TO EXCLUDE HEARSAY PERTAINING
23 TO ONE OF THE EXPERTS.

24 MR. ZIMMER: ACTUALLY THERE WERE TWO, BUT JUST ON
25 THAT ONE, YOUR HONOR, I SUGGEST WE DEFER THAT TO THE
26 TIME OF ACTUAL TESTIMONY. MR. DUNN CITED THE COLEMAN
27 CASE, WHICH STANDS FOR THE SAME PROPOSITION AS THE
28 CONTINENTAL CASE. BOTH CASES STAND FOR THE PROPOSITION

1 THAT AN EXPERT MAY RELY ON INADMISSIBLE HEARSAY BUT IT
2 MAY NOT INTRODUCE THE INADMISSIBLE HEARSAY. SO I
3 SUGGEST WE JUST WAIT AND SEE WHAT --

4 **THE COURT:** I THINK THAT THAT'S WHAT WE'VE BEEN
5 RULING ON THE LAST FIVE YEARS AT LEAST. IS THAT YOUR
6 RECOLLECTION?

7 **MR. ZIMMER:** I THINK SO. SINCE WE'RE IN A NEW
8 PHASE OF TRIAL, WE RENEWED IT. BUT THERE WAS ONE OTHER
9 MOTION, YOUR HONOR. I'M NOT SURE HOW I GET TO BE
10 SPOKESMAN ON THIS. THIS IS A PHELAN ISSUE.

11 **THE COURT:** WELL, YOU EXPRESSED IT AS AN OBJECTION
12 TO INTRODUCTION OF EVIDENCE ON AN UNSUPPORTED LEGAL
13 THEORY.

14
15 (REPORTER'S INTERRUPTION.)

16
17 **THE COURT:** ALL RIGHT. WANT TO USE THE PODIUM?
18 IT FEELS LIKE WE'RE IN FEDERAL COURT HERE.

19 **MR. ZIMMER:** I'LL MAKE THIS BRIEF, YOUR HONOR. I
20 DON'T KNOW HOW I GOT TO BE THE SPOKESPERSON ON THIS
21 ISSUE OTHER THAN THE FACT THAT MR. MILIBAND AND I HAVE
22 DISCUSSED IT.

23 I THINK THE CONCEPT WAS TO TRY AND GET IT
24 TEED UP IN FRONT OF THE COURT ON A LEGAL BASIS, NOT TO
25 DO A MOTION FOR SUMMARY JUDGMENT. I THINK THERE'S NO
26 DISPUTE ON WHAT THE FACTS ARE. THE FACTS ARE THAT WE
27 DETERMINED AN AREA OF ADJUDICATION ON THE EAST SIDE OF
28 THE BASIN. THAT ADJUDICATION LINE ESSENTIALLY GOES

1 STRAIGHT DOWN ON THE BORDER OF SAN BERNARDINO COUNTY.

2 AND THE -- THE BASIN, ACCORDING TO D.W.R.,
3 EXTENDS TO THE EAST BEYOND OUR AREA OF ADJUDICATION
4 BOUNDARY, SAYING THAT THAT'S THE SAME BASIN. PHELAN HAS
5 ONE WELL, WELL 14, WHICH IS ON THE WEST SIDE OF THE
6 COUNTY LINE, AND THEY PUMP WATER OUT OF THAT WELL TO THE
7 EAST SIDE OF THE COUNTY LINE. THEY USE THAT WATER OVER
8 THE SAME GROUND WATER BASIN THAT UNDERLIES THE AREA OF
9 ADJUDICATION.

10 SO AS I UNDERSTAND THE LEGAL QUESTION, THE
11 LEGAL QUESTION IS WHETHER YOU CAN PUMP NATIVE WATER AND
12 SOMEHOW OBTAIN A GROUND WATER RIGHT AS A RESULT OF
13 PUMPING THAT NATIVE WATER. AND I'M NOT AWARE OF ANY
14 LEGAL AUTHORITY THAT STANDS FOR A PROPOSITION THAT THAT
15 GIVES YOU SOME KIND OF A GROUND WATER RIGHT OR RIGHT TO
16 PUMP.

17 WE SERVED DISCOVERY. I'M JUST TRYING TO
18 FIND OUT WHETHER WE'RE MISSING SOMETHING ON THAT ISSUE,
19 WHETHER THERE IS SOME CASE LAW OUT THERE THAT INDICATED
20 THAT. NO OTHER PARTY OTHER THAN PHELAN INDICATED THAT
21 THEY WERE CLAIMING A RIGHT TO RETURN FLOW FROM NATIVE
22 WATER.

23 NOW, I AGREE THAT RETURN FLOWS ARE TAKEN
24 INTO CONSIDERATION, OR SHOULD BE, IN THE DETERMINATION
25 OF SAFE YIELD BECAUSE THEY AFFECT WHAT THE SAFE YIELD
26 IS, BUT WE HAVEN'T SEEN ANY LAW THAT INDICATES THAT THAT
27 SOMEHOW CREATES A GROUND WATER, RATHER, RIGHT, BUT I
28 LEAVE THAT TO MR. MILIBAND. AND WE'VE DISTINGUISHED THE

1 CASES THAT HE CITED.

2 **THE COURT:** ALL RIGHT.

3 **MR. MILIBAND:** GOOD MORNING, YOUR HONOR.

4 WES MILIBAND, APPEARING FOR PHELAN PINON HILLS COMMUNITY
5 SERVICES DISTRICT. JUST AS A MATTER OF FILINGS, I HAD
6 SUBMITTED A SURREPLY ON FRIDAY AFTERNOON. I DO HAVE
7 HARD COPIES AVAILABLE IF YOUR HONOR DID NOT SEE THAT.

8 **THE COURT:** I'VE READ IT.

9 **MR. MILIBAND:** BUT YOUR HONOR DID --

10 **THE COURT:** I DON'T HAVE A COPY OF IT BUT I DID
11 READ IT.

12 **MR. MILIBAND:** THANK YOU, YOUR HONOR. I DO HAVE A
13 COPY IF THE COURT WOULD LIKE ONE. JUST PROCEDURALLY, AS
14 I MENTIONED IN THE OPPOSITION, JUST A MOTION IN LIMINE
15 ITSELF IS NOT APPROPRIATE. MR. ZIMMER AND I HAVE
16 DISCUSSED THAT.

17 HE'S HAD AMPLE OPPORTUNITY TO ADDRESS THIS
18 THROUGH A MOTION FOR SUMMARY ADJUDICATION OR A SIMILAR
19 PROPER MEANS. WITHOUT WAIVING THAT PROCEDURAL DEFECT,
20 TO ENGAGE IN SOME OF THE SUBSTANTIVE TALK AND THE
21 MERITS, WE'RE NOT CONTENDING THAT THIS IS A GROUND
22 WATERWAY. THERE IS WELL-SETTLED LAW UNDER CALIFORNIA
23 LAW AS TO WHAT IS A GROUND WATERWAY. WHETHER IT'S
24 OVERLYING, APPROPRIATIVE, PRESCRIPTIVE, PUEBLO RIGHT,
25 THAT'S BEEN SETTLED.

26 WHAT'S ALSO SETTLED IS THE 1928
27 CONSTITUTIONAL AMENDMENT ABOUT WHAT THIS COURT IS WELL
28 AWARE OF FOR TRYING TO FASHION A PHYSICAL SOLUTION THAT

1 LOOKS AT SPECIFIC FACTS AND CIRCUMSTANCES TO COME UP
2 WITH WHAT IS, IN THE COURT'S OPINION, APPROPRIATE.

3 AND AS THE COURT HAS RECOGNIZED BEFORE AS
4 IT RELATES TO PHELAN, TO SOME EXTENT THERE IS A
5 UNIQUENESS, OR MIGHT BE A UNIQUENESS. THAT'S WHAT WE'RE
6 TRYING TO BRING TO LIGHT NOW. AND IT ALL STARTED WITH
7 OUR CROSS-COMPLAINT FILED BY MY PREDECESSOR SUSAN TRAGER
8 OVER FIVE YEARS AGO, INDICATING THROUGH THE SIXTH CAUSE
9 OF ACTION THE RIGHT OR REALLY DECLARATORY RELIEF CAUSE
10 OF ACTION SEEKING THE RIGHT TO RECAPTURE RETURN FLOW.

11 IRONICALLY BOLTHOUSE HAS PLED THE SAME
12 THING ALSO THROUGH THE SIXTH CAUSE OF ACTION, BUT IT'S
13 MORE OF AN ASIDE NOTE, BUT THE FACT IS WE HAVE PUT THIS
14 OUT THERE FOR FIVE YEARS NOW, LOOKING FOR THE TIME TO DO
15 IT. THE COURT INDICATED PHASE FIVE WOULD BE THAT
16 OPPORTUNITY. AND NOW WE'RE HAVING TO DEAL WITH THE
17 LEGAL ISSUE THAT BOLTHOUSE HAS JUST NOW DECIDED TO TRY
18 TO BRING UP BEFORE THE COURT.

19 SO WE HAVE FILED AND LAUNCHED WITH THE
20 COURT SOME KEY CASE AUTHORITIES THAT DO ADDRESS THIS.
21 AND BECAUSE OF THE COURT'S DISCRETIONARY POWERS AS A
22 COURT OF EQUITY AND SOME OF THE AUTHORITIES THAT I CITED
23 WITHIN THE OPPOSITION, THE COURT CAN LOOK TO THOSE
24 AUTHORITIES, STARTING WITH THE U.S. SUPREME COURT CASE
25 FROM THREE YEARS AGO, THE STATE OF MONTANA V. THE STATE
26 OF WYOMING.

27 THAT HAS CALIFORNIA'S FINGERPRINTS WRITTEN
28 ALL OVER IT, WITH NOT ONLY THE SPECIAL MASTER BEING A

1 STANFORD LAW PROFESSOR, BUT THE COURT ALSO CITED TO
2 MR. WIEL'S MATERIALS. AND MR. WIEL'S, W-I-E-L, IS ONE
3 OF THE FOREMOST TREATISES IN CALIFORNIA.

4 WHAT WAS SAID IN THAT CASE IS THAT THE LAW
5 OF RECAPTURE OR THE DOCTRINE OF RECAPTURE, PARTICULARLY
6 FOR APPROPRIATORS, IS UNCLEAR. THIS IS THAT TIME AND
7 THIS IS THAT OPPORTUNITY, WITH THE UNIQUE PARTY IN THIS
8 CASE, TO ADDRESS THAT. AND THERE ARE OTHER AUTHORITIES
9 FOR IT.

10 MOJAVE SOMEWHAT KNOCKED ON THE DOOR OF THE
11 ISSUE BUT NEVER REALLY HAD TO DEAL WITH IT FULLY BECAUSE
12 THERE'S STIPULATED JUDGMENT. SO OUR UNIQUENESS ARISES
13 FROM DIFFERENT, REALLY, POTENTIAL FORMS OF LIABILITY.

14 THERE ARE PARTIES IN THIS CASE THAT HAVE
15 ALLEGED TAKINGS OR INVERSE CONDEMNATION AGAINST MY
16 CLIENT. AS A RESULT OF THAT, WHAT THIS RETURN FLOW
17 RIGHT WOULD DO IS HELP OFFSET ANY LIABILITY THAT ARISES
18 FROM THAT, OR EVEN TO THE POTENTIAL EXPORT PROVISION
19 THAT WOULD LIKELY BE IN A PHYSICAL SOLUTION OR IN -- IN
20 THE JUDGMENT.

21 **THE COURT:** YES. WELL, MR. MILIBAND, I'M
22 OBVIOUSLY NOT GOING TO DECIDE THE ISSUE ON A MOTION IN
23 LIMINE. AND TO THE EXTENT THAT A PARTY OBJECTS TO THE
24 OFFER OF EVIDENCE, I'LL RULE ON THE OBJECTION. BUT I
25 THINK THAT THERE IS A VERY INTERESTING LEGAL ISSUE THAT
26 ARISES AS A RESULT OF THE PUMPING THAT YOUR CLIENT DOES.

27 IT'S PARTICULARLY INTERESTING BECAUSE THE
28 BASIN EXTENDS INTO MOJAVE COUNTY. AND MOJAVE COUNTY HAD

1 ITS OWN ADJUDICATION. AND ONE OF THE REASONS WHY I SET
2 THE BOUNDARY WHERE I DID FOR JURISDICTIONAL BASES WAS
3 BECAUSE I DIDN'T WANT TO INTRUDE ON THE JUDGMENT IN
4 MOJAVE, WHICH IS -- IS EXTANT AS A JUDGMENT IN EQUITY,
5 AS I UNDERSTAND IT. AND SO I WANTED TO MAKE SURE THAT I
6 DIDN'T CONFLICT WITH MOJAVE AND THE COURT IN THAT CASE.

7 SO I'M NOT SURE WHERE THIS IS GOING TO GO.
8 I KNOW THAT YOU'RE PUMPING IN THE ANTELOPE VALLEY, IN
9 APPARENTLY LOS ANGELES COUNTY, AND YOU ARE TAKING THE
10 WATER INTO MOJAVE COUNTY, SO THAT THE WATER IS THEN
11 LEAVING THE JURISDICTION, SO TO SPEAK. AND I'M NOT SURE
12 WHAT THE EFFECT OF THAT IS.

13 THERE ARE LOTS OF LEGAL ISSUES HERE THAT
14 ARE GOING TO HAVE TO BE DECIDED, AND I PROMISE YOU I
15 WILL DECIDE THEM, BUT NOT TILL I HEAR THE EVIDENCE.

16 **MR. MILIBAND:** THANK YOU, YOUR HONOR.

17 **THE COURT:** AND MORE.

18 **MR. MILIBAND:** I APPRECIATE THAT. AND JUST FOR
19 CLARITY OF RECORD, THEN, IS THAT THE COURT'S RULING OF
20 DENYING THE MOTION IN LIMINE AT THIS POINT?

21 **THE COURT:** YES. AND IF YOU'D LIKE TO HAND UP
22 YOUR COPY OF YOUR FILING, I'M HAPPY TO HAVE THAT TOO.

23 **MR. MILIBAND:** WELL, THEN, MAY I APPROACH, YOUR
24 HONOR?

25 **THE COURT:** YES.

26 **MR. MILIBAND:** THANK YOU.

27 **MR. ZIMMER:** YOUR HONOR, THAT'S SUBJECT TO MAKING
28 A MOTION TO EXCLUDE THE TESTIMONY AT THE TIME OF TRIAL?

1 **THE COURT:** YES. OBVIOUSLY WHATEVER MOTIONS
2 ANYONE WISHES TO MAKE AT THE CONCLUSION OR ANY OTHER
3 TIME DURING THE CASE, I'LL HEAR IT.

4 **MR. MILIBAND:** (INDICATING.)

5 **THE COURT:** THANK YOU.

6 ALL RIGHT. I THINK THAT TAKES CARE OF THE
7 MOTIONS IN LIMINE, WHICH MEANS THAT IT'S TIME FOR
8 HEARING ON THE FEDERAL RESERVE RIGHT CLAIMS. SO HOW DO
9 YOU WISH TO PROCEED?

10 **MR. LEININGER:** GOOD MORNING, YOUR HONOR.
11 LEE LEININGER FOR THE UNITED STATES. YOU MENTIONED
12 EARLIER POTENTIAL FOR OPENING -- AT LEAST OPENING
13 PRESENTATIONS, OPENING ARGUMENTS. AND I DIDN'T KNOW IF
14 YOU WANTED US TO PROCEED ALONG THOSE LINES OR JUMP RIGHT
15 TO PRESENTING WITNESSES. I JUST HAVE A FEW POINTS TO
16 MAKE IN MY OPENING.

17 **THE COURT:** WELL, IF YOU WISH TO MAKE AN OPENING
18 STATEMENT, YOU MAY. THAT'S ALL I WAS INDICATING. I WAS
19 NOT GOING TO PRECLUDE THAT. I THINK THAT THE ISSUES ARE
20 PRETTY OBVIOUS, GIVEN THE PRIOR MOTIONS THAT I'VE HEARD
21 IN THIS CASE. AND I THINK I KNOW WHERE YOU'RE ALL
22 GOING. BUT I'M ALWAYS INTERESTED IN LAWYERS' ARGUMENTS.

23 **MR. LEININGER:** WELL, THANK YOU, YOUR HONOR.
24 THEN -- AND I DON'T KNOW IF OPPOSING COUNSEL ALSO WISHES
25 TO MAKE AN OPENING STATEMENT OR HAS ANY OBJECTION TO MY
26 MAKING COMMENTS.

27 **MR. FIFE:** YOUR HONOR, OF COURSE NO OBJECTION.
28 BEFORE WE GET INTO ALL THIS, WE WANT TO ALERT YOU TO A

1 WITNESS ISSUE WITH REGARD TO THE UNITED STATES
2 WITNESSES. THEY HAD DESIGNATED MS. JUNE OBERDORFER AS
3 AN EXPERT WITNESS. ON FRIDAY THEY REVISED THEIR WITNESS
4 LIST AND REMOVED HER. SHE WAS DEPOSED, ALL THAT KIND OF
5 STUFF. SO IT IS -- IT WILL BE OUR INTENTION TO SUBPOENA
6 HER.

7 NOW, WE DIDN'T FIND OUT ABOUT THIS UNTIL
8 FRIDAY; SO WE HAVEN'T HAD TIME TO ISSUE THE SUBPOENA
9 YET. SO I DOUBT IF WE'RE GOING TO BE ABLE TO GET HER IN
10 HERE BY TOMORROW. SO WE WANTED TO RAISE THIS ISSUE
11 BEFORE YOU.

12 **THE COURT:** DO YOUR BEST.

13 **MR. LEININGER:** YOUR HONOR, IF I MAY ADDRESS THAT
14 ISSUE FOR ONE MOMENT. DR. OBERDORFER HAS TESTIFIED IN
15 PREVIOUS PHASES OF THE TRIAL HERE AS AN EXPERT IN
16 HYDROGEOLOGY, AND THAT IS NOT HOW WE HAD RETAINED HER
17 FOR THIS PHASE OF TRIAL. SHE WAS RETAINED AND SHE WAS
18 IDENTIFIED AS AN EXPERT FOR THIS PHASE OF TRIAL
19 BASICALLY ON HER EXPERTISE IN REMOTE SENSING.

20 SO SHE WAS TASKED WITH EXAMINING PHOTOS TO
21 EXAMINE THE AMOUNT OF AGRICULTURAL PUMPAGE AND USAGE
22 THAT WAS TAKEN OUT OF PRODUCTION AS EDWARDS AIR FORCE
23 BASE AND PLANT 42 WERE FORMED. THAT'S THE EXTENT AND
24 THE SCOPE OF HER TESTIMONY HERE.

25 WE RECEIVED A PRETRIAL BRIEF -- I BELIEVE
26 IT WAS MR. KUHS'S PRETRIAL BRIEF -- WHICH REFERENCED A
27 NUMBER OF CONCLUSIONS THAT DR. OBERDORFER HAD MADE
28 EARLIER WITH REGARD TO GROUND WATER FLOW. WE'RE NOT

1 PRODUCING HER FOR THAT REASON. WE'RE NOT PRODUCING
2 HER -- AND SHE WAS NEVER IDENTIFIED FOR THAT REASON,
3 EVEN IN OUR CASE IN CHIEF.

4 WE HAVE NOW MADE THE DECISION TO TRY TO
5 STREAMLINE THIS CASE AND JUST HAVE HER AVAILABLE FOR
6 REBUTTAL TESTIMONY, BUT WE WILL OBJECT TO THEM CALLING
7 OUR EXPERT FOR PURPOSES THAT SHE WAS NOT IDENTIFIED
8 FOR -- IN THEIR CASE IN CHIEF.

9 SO, YOUR HONOR, WITH THAT I THINK I WOULD
10 JUST LIKE TO BEGIN BY IDENTIFYING OUR TRIAL TEAM, WITH
11 THE COURT'S PERMISSION.

12 **THE COURT:** YES.

13 **MR. LEININGER:** WE HAVE MR. DUBOIS, ALSO FROM THE
14 DEPARTMENT OF JUSTICE. MR. ED OYARZO IS AIR FORCE
15 COUNSEL, AND MR. OYARZO WILL BE HELPING WITH
16 LOGISTICALLY TAKING EXHIBITS, PRESENTING THEM TO THE
17 COURT FOR MARKING, AND THEN PRESENTING THEM ALSO TO THE
18 WITNESS FOR THE WITNESS'S EXAMINATION.

19 YOU HAVE IN FRONT OF YOU -- I BELIEVE IT'S
20 THAT BLUE BINDER RIGHT THERE. YOU HAVE A THREE-RING
21 BINDER OF EXHIBITS THAT WE WILL BE PRESENTING HERE.
22 THOSE EXHIBITS ARE IN ORDER THAT THEY WERE IDENTIFIED ON
23 THE COURT'S WEB PAGE IN WHICH WE HAD FILED OUR EXHIBIT
24 LIST.

25 WE'RE ACTUALLY GOING TO BE GOING OUT OF
26 ORDER AND WE ARE NOT -- FOR ALL COUNSEL, WE'RE NOT GOING
27 TO BE PRESENTING INTO THE RECORD ALL THE EXHIBITS THAT
28 HAVE BEEN IDENTIFIED. WE DECIDED TO TRY TO STREAMLINE

1 THIS PRESENTATION. SO WE'LL BE IDENTIFYING THE EXHIBITS
2 AS WE GO ALONG.

3 AND THEN THE ORDER OF PRESENTATION, YOUR
4 HONOR, WILL BE -- THERE WILL BE SIX WITNESSES. WE'RE
5 GOING TO START WITH HISTORIES OF BOTH EDWARDS AIR FORCE
6 BASE AND PLANT 42. WE HAVE TWO HISTORIANS HERE,
7 MR. HERBERT AND DR. HALLION, AND WE'LL BEGIN WITH THEIR
8 TESTIMONY, THEN WILL BE FOLLOWED BY GENERAL BREWER, WHO
9 IS THE COMMANDER OF EDWARDS AIR FORCE BASE.

10 AND MR. JUDKINS IS A CIVIL ENGINEER AT
11 EDWARDS AIR FORCE BASE. THAT WILL CONCLUDE EDWARDS AIR
12 FORCE BASE. AND WE'RE GOING TO PROCEED WITH LIEUTENANT
13 COLONEL CUMMINS AT -- HE'S COMMANDER WHO'S IN CHARGE AT
14 AIR FORCE PLANT 42. AND THEN WE'LL END WITH MR. SCOTT,
15 AND HE'S THE ENGINEER AT -- AT LEAST COVERING AIR FORCE
16 PLANT 42.

17 **THE COURT:** I WOULD JUST HAVE A QUESTION FOR YOU.
18 A LOT OF THE FACTS THAT YOU'RE GOING TO PRESENT
19 TESTIMONY CONCERNING ARE REALLY NOT IN DISPUTE YET OR
20 NOT SUBJECT TO DISPUTE BECAUSE THEY'RE FACTUAL, SUCH AS
21 EXECUTIVE ORDERS AND THE LIKE.

22 HAVE YOU HAD AN OPPORTUNITY TO DISCUSS
23 POTENTIAL STIPULATIONS AS TO THOSE UNDISPUTED FACTS?
24 I -- DURING THE HEARING ON THE MOTIONS, THERE REALLY
25 WERE NO DISPUTED FACTS.

26 **MR. LEININGER:** SURE.

27 **THE COURT:** EXCEPT FOR THE NUMBER OF EXECUTIVE
28 ORDERS THAT THEY RECALL AS THEIR DEBATE.

1 **MR. LEININGER:** YOUR HONOR, THESE DOCUMENTS -- NOT
2 ONLY ARE THERE NO DISPUTED FACTS. THESE DOCUMENTS
3 PRETTY MUCH SPEAK FOR THEMSELVES. BUT THEIR
4 INTERPRETATION IS IN DISPUTE.

5 WE HAD -- WE HAD APPROACHED OPPOSING
6 COUNSEL WITH REGARD TO STIPULATIONS. WE SAW THEIR
7 MOTIONS IN LIMINE AND THEIR OPENING BRIEFS AND PRETRIAL
8 BRIEFS AND DECIDED THAT WE NEED TO CREATE THIS RECORD.
9 WE NEED TO MAKE SURE EVERYTHING IS IN THE RECORD, AND WE
10 NEED TO HAVE OUR WITNESSES ADDRESS ALL OF THESE FACTUAL
11 DOCUMENTS.

12 I DON'T THINK IT WILL BE A LABORIOUS
13 PROCESS. I THINK WE CAN DO THIS FAIRLY QUICKLY. WE
14 JUST WANT TO HAVE A COMPLETE RECORD, YOUR HONOR.

15 **THE COURT:** ALL RIGHT.

16 **MR. LEININGER:** THANK YOU. SO WITH THE COURT'S
17 PERMISSION, I'LL JUST MAKE A COUPLE OF STATEMENTS IN
18 OPENING AND ONLY TWO POINTS, YOUR HONOR, AS WE GO
19 THROUGH THIS TRIAL, TWO LEGAL POINTS AND ONE FACTUAL
20 POINT.

21 BEYOND WHAT WAS ADDRESSED IN BOTH OUR
22 RESPONSES TO MOTION IN LIMINE AND PRETRIAL BRIEF, THE
23 LEGAL POINT WE HAD MADE IN THIS BRIEFING IS THAT UNLIKE
24 A FEDERAL RESERVE BOND RATE FOR A NATURAL FOREST, SAY,
25 WHICH IS THE U.S. V. NEW MEXICO CASE WHERE, IN THAT
26 CASE, THE UNITED STATES SUPREME COURT LOOKED TO THE
27 UNDERLYING ORGANIC DOCUMENTS TO MAKE A DECISION OF WHAT
28 IS THE SCOPE OF THE FEDERAL RESERVE WATER RIGHT.

1 THE ISSUE IN THAT CASE WAS COULD THE UNITED
2 STATES HAVE A FEDERAL RESERVE WATER RIGHT FOR STOCK
3 WATERING AND OTHER MINOR PURPOSES ON -- ON THE FOREST
4 LANDS? AND THE DECISION IN THAT CASE WAS THE SUPREME
5 COURT LOOKED AT THE ORGANIC UNDERLYING DOCUMENTS, THE
6 LEGISLATION, AND DETERMINED THAT, NO, THEY SAY NOTHING
7 ABOUT STOCK WATERING HERE.

8 SO THE PURPOSES FOR THE NATIONAL FOREST WAS
9 TO CREATE A FAVORABLE FLOW OF WATER TO BASICALLY SUPPORT
10 THE FOREST, THE TREES, AND TO ALSO GET THAT WATER DOWN
11 TO MUNICIPALITIES WHERE THEY COULD USE IT OUTSIDE THE
12 FOREST.

13 IT DIDN'T INCLUDE STOCK WATERING. AND
14 THAT'S WHERE THE TERM "SECONDARY PURPOSES" CAME FROM.
15 SO THE DISTINCTION HERE IS -- THE DIFFERENCE HERE IS WE
16 DON'T HAVE THAT DISTINCTION.

17 FOR MILITARY PURPOSES, YOUR HONOR, IT'S --
18 IT NEEDS TO BE BROADLY INTERPRETED. WE'RE GOING TO GO
19 THROUGH BOTH THE VARIOUS USES OF TERMS RELATING TO
20 MILITARY PURPOSES TO MAKE THE ARGUMENT THAT THERE IS NO
21 DISTINCTION, THAT WHAT THESE LANDS WERE RESERVED FOR,
22 WHAT THESE LANDS WERE USED FOR, WHAT THESE LANDS WILL BE
23 USED FOR IN THE FUTURE ARE MILITARY PURPOSES.

24 SO THAT'S THE ONE LEGAL POINT. THE
25 OTHER -- THE SECOND LEGAL POINT IS, I BELIEVE IT WAS
26 MR. KUHS THAT RAISED CALIFORNIA V. UNITED STATES WITH
27 REGARD TO RIPARIAN RIGHTS. THIS ISN'T A TRIAL ABOUT
28 RIPARIAN RIGHTS, YOUR HONOR. THIS IS A TRIAL ABOUT OUR

1 FEDERAL RESERVE WATER RIGHT. AND IT'S DISTINCT. SO
2 WE'RE NOT GOING TO BE GIVING EVIDENCE WITH REGARD TO OUR
3 OVERLYING RIPARIAN INTEREST, EVEN THOUGH WE ARE, I
4 BELIEVE, THE LARGEST LANDOWNER OUT THERE, 300,000 ACRES.

5 THE LAST POINT, YOUR HONOR, IS A FACTUAL
6 ONE. FOR QUANTIFYING A FEDERAL RESERVE WATER RIGHT,
7 THAT WATER RIGHT -- AND THAT'S -- THIS IS KEY. THIS IS
8 CRITICAL IN THIS ANALYSIS, YOUR HONOR, IS TO TRY TO
9 DETERMINE HOW MUCH WATER IS GOING TO BE NECESSARY IN THE
10 FUTURE FOR MILITARY PURPOSES.

11 SO WE'RE GOING TO PRESENT TODAY HOW EDWARDS
12 AIR FORCE BASE HAS CHANGED, HOW IT HAS EVOLVED. WE'RE
13 GOING TO PRESENT THE UNIQUE CHARACTERISTICS OF EDWARDS
14 AIR FORCE BASE. AND BASED UPON THOSE IS OUR CONCLUSION
15 OF A REASONABLE PROGNOSTICATION OF HOW MUCH WATER THIS
16 FACILITY IS GOING TO NEED IN THE FUTURE. NOT TEN YEARS
17 IN THE FUTURE, NOT FIFTY YEARS IN THE FUTURE. THIS IS
18 DETERMINED -- THEIR WATER RIGHTS IN PERPETUITY.

19 SO WITH THOSE POINTS, YOUR HONOR, I'LL CALL
20 MY FIRST WITNESS.

21 **THE COURT:** ALL RIGHT. YOU MAY.

22 **MR. KUHS:** YOUR HONOR, IF I WOULD BE ALLOWED.

23 **THE COURT:** WOULD YOU LIKE TO MAKE IT NOW?

24 **MR. KUHS:** BRIEFLY, YOUR HONOR.

25 **THE COURT:** SURE.

26 **MR. KUHS:** I'LL ADDRESS THE LAST POINT, WHICH IS
27 QUANTIFICATION OF THE RIGHT. AND I THINK YOUR HONOR IS
28 GOING TO HEAR A PRETTY REMARKABLE REQUEST FOR WATER FROM

1 AN AGENCY WHICH HASN'T BEEN USING ANYWHERE NEAR THE
2 QUANTITY OF WATER THAT THEY'RE ASKING THIS COURT TO
3 AWARD, ON THE MAGNITUDE OF 400 PERCENT GREATER THAN
4 THEIR CURRENT DEMAND IN AN OVERDRAFT BASIN.

5 PLANT 42 AT AN AVERAGE WATER USE, ACCORDING
6 TO THE RECORDS, AND YOU'LL HEAR EVIDENCE OF THIS, IN '11
7 AND '12, 253 ACRE-FEET OF WATER. EDWARDS AIR FORCE BASE
8 HAD AN AVERAGE FOR '11 AND '12 OF 2,700 ACRE-FEET OF
9 WATER.

10 WHAT THEY'RE ASKING THIS COURT FOR TODAY IS
11 AN AWARD FOR EDWARDS AIR FORCE BASE OF 10,717 ACRE-FEET
12 OF WATER. THAT'S A 400 PERCENT INCREASE OVER THEIR
13 CURRENT USE. AS TO PLANT 42, THEY'RE ASKING THIS COURT
14 TO AWARD THEM 966 ACRE-FEET OF WATER, AN INCREASE OF
15 ABOUT 400 PERCENT OVER THEIR CURRENT USE.

16 HOW DOES EDWARDS AIR FORCE BASE GET TO THAT
17 NUMBER? THE NUMBER HAS TWO COMPONENTS. ONE IS THEIR
18 CURRENT WATER USE AVERAGED OVER A PERIOD OF TIME OF TEN
19 YEARS, TWELVE YEARS MULTIPLIED BY 30 PERCENT BECAUSE OF
20 ENGINEERING JUDGMENT.

21 AND THEN THE SECOND COMPONENT OF THAT, IT
22 IS WHAT I CALL A FICTIONAL FUTURE FIGHTING SQUADRON.
23 THEY HYPOTHECATED THAT AT SOME TIME IN THE FUTURE THERE
24 WAS ENOUGH CAPACITY IN THIS BASE TO WARRANT ANOTHER
25 SQUADRON OF 72 AIRCRAFT, AND THAT IF THOSE AIRCRAFT WERE
26 ASSIGNED, THEY WOULD HAVE DEMAND OF ROUGHLY 5,000
27 ACRE-FEET OF WATER FROM THIS BASIN.

28 THE EXPERTS THAT THEY IDENTIFY THAT WERE

1 DEPOSED SAID THERE WAS NO CONCRETE PLANS, THERE WERE NO
2 APPROPRIATIONS. THIS WAS SIMPLY AN IDEA OF HOW TO, IN
3 ESSENCE, SUBSTANTIALLY INCREASE THEIR DEMAND FOR WATER
4 IN THE BASIN ABSENT THEIR CURRENT REASONABLE BENEFICIAL
5 USE. I'D LIKE YOU TO KEEP THOSE FACTS AND FIGURES IN
6 MIND AS YOU HEAR THE EVIDENCE TODAY.

7 THE SECOND COMPONENT OBVIOUSLY RELATES TO,
8 SIMPLY, MY CLIENT TEJON. WE SUBMITTED A BRIEF ON THAT
9 ISSUE. THE SUM AND SUBSTANCE OF IT IS WE'RE ENTITLED
10 PER DATES IN U.S. TITLE TO THESE LANDS. WE HAVE
11 DISTRICT COURT OPINION WHICH WAS FINAL AS BETWEEN TEJON
12 AND THE UNITED STATES. SO WHATEVER THEIR RIGHTS MIGHT
13 BE IN THE BASIN, THEY CAN'T INFRINGE ON, THEY CAN'T
14 SUBORDINATE, THEY CAN'T IMPAIR THE RIGHTS OF TEJON
15 RANCH.

16 THE COURT: ALL RIGHT. I'LL JUST REMIND COUNSEL
17 AT ANY TIME THAT YOU OBJECT OR MAKE ANY PRESENTATION,
18 MAKE CERTAIN TO IDENTIFY YOURSELF FOR THE COURT REPORTER
19 ON EACH OCCASION. OKAY?

20 ALL RIGHT. GO AHEAD. CALL YOUR WITNESS.

21 MR. LEININGER: THANK YOU, YOUR HONOR. UNITED
22 STATES CALLS RAND F. HERBERT.

23 THE COURT: THE CLERK WILL SWEAR THE WITNESS.

24 THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

25 YOU DO SOLEMNLY STATE THAT THE TESTIMONY
26 YOU ARE ABOUT TO GIVE IN THE CAUSE NOW PENDING BEFORE
27 THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND
28 NOTHING BUT THE TRUTH, SO HELP YOU GOD?

1 **THE WITNESS:** I DO.

2 **THE CLERK:** THANK YOU.

3 **THE COURT:** SPEAK INTO THE MICROPHONE, SIR. STATE
4 YOUR FULL NAME AND SPELL IT, AND YOUR BUSINESS ADDRESS.

5 **THE WITNESS:** RAND FRANK HERBERT. R-A-N-D IS THE
6 FIRST NAME. FRANK, F-R-A-N-K, HERBERT, H-E-R-B-E-R-T.
7 MY BUSINESS ADDRESS -- PARDON ME -- IS 2850 SPAFFORD
8 STREET, S-P-A-F-F-O-R-D, DAVIS, CALIFORNIA, 95618.

9 **THE COURT:** PROCEED.

10 **MR. LEININGER:** YOUR HONOR, MAY MR. OYARZO
11 APPROACH, MARK IN THE FIRST EXHIBIT?

12 **THE COURT:** YES.

13 **MR. LEININGER:** AND, YOUR HONOR, I REFER TO
14 EXHIBIT 1 ON YOUR -- IN YOUR BINDER.

15 **THE COURT:** ALL RIGHT.

16 **MR. LEININGER:** MY UNDERSTANDING, YOUR HONOR, IS
17 THE COURT CLERK IS SATISFIED WITH OUR EXHIBIT NUMBER
18 MARKING. AND I'M TRYING TO KEEP THESE EXHIBIT --

19 **THE CLERK:** THAT'S FINE. I'LL HAVE TAGS AT THE
20 BREAK, AND I'LL TAG THEM WITH AN ITEM TAG.

21 **MR. LEININGER:** GREAT. THANK YOU. AND WE ALSO
22 HAVE A CHART AND WE WILL KEEP TRACK IF YOU WISH --

23 **THE CLERK:** OKAY.

24 **THE COURT:** SO, MR. LEININGER, WE'RE GOING TO STAY
25 WITH YOUR NUMBERING?

26 **MR. LEININGER:** THAT'S MY UNDERSTANDING.

27 **THE COURT:** ALL RIGHT. BUT THEY WILL NOT BE
28 SEQUENTIAL BECAUSE YOU'RE NOT GOING TO OFFER EACH ONE OF

1 THESE; IS THAT RIGHT?

2 **MR. LEININGER:** THAT'S CORRECT.

3 **THE COURT:** SO IT WILL BE U.S. 1.

4

5 **DIRECT EXAMINATION**

6 **BY MR. LEININGER:**

7 **Q** SO MR. HERBERT, YOU'VE BEEN APPROACHED AND
8 HANDED A DOCUMENT. WHAT IS THAT DOCUMENT?

9 **A** THIS IS MY MOST RECENT CURRICULUM VITAE.

10

11 (EXHIBIT U.S. 1, IDENTIFIED:
12 CURRICULUM VITAE OF RAND FRANK
13 HERBERT.)

14

15 **BY MR. LEININGER:**

16 **Q** OKAY. AND SO YOU'RE FAMILIAR WITH THAT
17 DOCUMENT?

18 **A** YES. I PREPARED IT.

19 **Q** AND LET'S BEGIN BY JUST GOING THROUGH THAT
20 DOCUMENT AND ESTABLISHING YOUR QUALIFICATIONS.

21 WHAT IS YOUR FORMAL EDUCATION?

22 **A** I RECEIVED A BACHELOR'S DEGREE FROM THE
23 UNIVERSITY OF CALIFORNIA AT BERKELEY IN 1973 AND A
24 MASTER'S OF ARTS IN TEACHING HISTORY AT THE UNIVERSITY
25 OF CALIFORNIA, DAVIS, IN 1977.

26 **Q** DO YOU BELONG NOW TO ANY PROFESSIONAL
27 ORGANIZATIONS IN THE STATE OF CALIFORNIA?

28 **A** I BELONG TO A NUMBER OF HISTORICAL

1 SOCIETIES, LOCAL HISTORICAL SOCIETIES; ALSO, THE
2 CALIFORNIA COUNCIL FOR THE PROMOTION OF HISTORY, THE
3 NATIONAL COUNCIL FOR PUBLIC HISTORY, NINTH CIRCUIT COURT
4 HISTORICAL SOCIETY, WESTERN MINING HISTORY ASSOCIATION.
5 I DON'T KNOW.

6 Q HAVE YOU RECEIVED ANY AWARDS ASSOCIATED
7 WITH YOUR PROFESSION?

8 A I RECEIVED A SUSTAINED LIFETIME ACHIEVEMENT
9 AWARD FROM THE CALIFORNIA COUNCIL FOR THE PROMOTION OF
10 HISTORY SORT OF AS A GENERAL PAT ON THE BACK TYPE OF
11 AWARD. THEY GIVE IT ANNUALLY. AND JRP, RECEIVED FOR A
12 PROJECT I RAN FOR THE COMPANY IN CONJUNCTION WITH SOME
13 OTHER FEDERAL AGENCIES AND OTHER PRIVATE FIRMS. THE
14 GOVERNOR'S AWARD FOR HISTORIC PRESERVATION. IT WAS IN
15 THE YEAR 2000, AND IT WAS FOR A STATEWIDE STUDY OF
16 MILITARY INSTALLATIONS IN CALIFORNIA.

17 Q SO YOU MENTIONED JRP HISTORICAL. WHAT IS
18 THAT?

19 YOU'RE PRINCIPAL OF JRP HISTORICAL; IS THAT
20 CORRECT?

21 A THAT'S RIGHT. I'M ONE OF THE FOUNDERS.
22 IT'S A COMPANY THAT'S BEEN IN OPERATION SINCE 1981. I'M
23 A VICE PRESIDENT. IT'S A HISTORICAL CONSULTING FIRM.
24 AND WE TAKE ON CASES OR PROJECTS AS REQUIRED. SO A
25 NUMBER OF OUR PROJECTS DURING A YEAR MIGHT BE RELATED TO
26 CULTURAL RESOURCES SUCH AS HISTORIC BUILDING SURVEYS,
27 INVENTORIES AND SO FORTH.

28 WE'VE DONE A LARGE NUMBER OF THOSE ON

1 MILITARY BASES. AND WE ALSO UNDERTAKE EXPERT WITNESS
2 SERVICES FOR CASES OR ADJUDICATIONS THAT REQUIRE
3 HISTORIC RESEARCH. SO THOSE MIGHT BE LAND USE HISTORIES
4 FOR, LIKE, POTENTIAL RESPONSIBLE PARTIES IN A TOXICS
5 CASE, WATER RIGHTS RELATED CLAIM AND USE, INFORMATION
6 FOR PRE 1914 WATER RIGHT, OR OTHER LAND USE TYPE CASES.

7 WE'VE ALSO UNDERTAKEN FLOOD DAMAGE CASES,
8 MOSTLY FOR THE -- ON BEHALF OF THE STATE OF CALIFORNIA,
9 THE LEVY FAILURES FROM THE SACRAMENTO, SAN JOAQUIN
10 DELTA.

11 Q ANY OF YOUR PROJECTS INVOLVE EDWARDS AIR
12 FORCE BASE?

13 A OUR CULTURAL RESOURCES WORK. WE HAVE DONE
14 CULTURAL RESOURCES WORK AT EDWARDS AIR FORCE BASE, AND,
15 OF COURSE, THIS CASE.

16 Q HOW MANY TIMES HAVE YOU TESTIFIED?

17 A IT'S IN MY RESUME. I BELIEVE IT WAS --
18 IT'S EIGHT TIMES. AND I'VE BEEN DEPOSED THE SAME NUMBER
19 OF TIMES, THOUGH NOT ALWAYS DEPOSED AND TESTIFIED.
20 SOMETIMES TESTIFIED BUT NOT DEPOSED.

21 Q HAVE YOU EVER BEEN QUALIFIED AS AN EXPERT?

22 A YES, IN THOSE CASES THAT I'VE LISTED.

23 Q AS A HISTORIAN?

24 A YES, AS A HISTORIAN.

25 Q WHAT WERE YOU ASKED TO DO IN THIS CASE?

26 A IN THIS CASE, WE WERE ASKED TO COLLECT
27 INFORMATION RELATED TO HOW EDWARDS AIR FORCE BASE AND
28 AIR FORCE PLANT 42 WERE ESTABLISHED AND THEN GREW OVER

1 TIME. SO -- AND ALONG WITH THAT, TO GET A SENSE OF THE
2 ACTIVITIES THAT WERE INVOLVED AND WERE ONGOING AT THE
3 BASE. OR -- AND AT PLANT 42.

4 WE ALSO COLLECTED INFORMATION RELATED TO
5 TOTAL POPULATION ON THE FACILITIES, AND WE COLLECTED
6 WATER USE WHERE WE COULD FIND IT. YOU KNOW, STATISTICS
7 ON WATER USE ON THE BASE OVER TIME.

8 Q YOU KEEP REFERRING TO "WE." WHO IS -- OR
9 WHO IS WE?

10 A I APOLOGIZE. FOR THE PURPOSES OF THIS
11 PROJECT, I AND A TEAM OF RESEARCHERS UNDERTOOK THE
12 RESEARCH. SO I HAD AN ASSISTANT, DR. SCOTT
13 MILTENBURGER, WHO RECEIVED HIS PH.D. FROM THE UNIVERSITY
14 OF CALIFORNIA AT DAVIS, AS ONE OF MY PRINCIPAL
15 ASSISTANTS; AND HEATHER NORBY, THAT'S N-O-R-B-Y, WHO
16 RECEIVED HER MASTER'S DEGREE FROM THE UNIVERSITY OF
17 CALIFORNIA AT BERKELEY. BOTH IN HISTORY.

18 THEY WERE MY PRINCIPAL ASSISTANTS. THEY
19 AND I WENT TO A LARGE NUMBER OF REPOSITORIES OF
20 INFORMATION TO COLLECT DATA FOR THIS PROJECT.

21 Q CAN YOU SPECIFY WHERE YOU COLLECTED THIS
22 DATA?

23 A YES. PRIMARILY -- WELL, WE STARTED OFF BY
24 GOING FIRST TO EDWARDS AIR FORCE BASE. EDWARDS AIR
25 FORCE BASE HAS AN OFFICE OF HISTORY. IT ALSO HAS A
26 CULTURAL RESOURCES FACILITY. IT HAS A BASE HISTORIAN.
27 SO THEY HAVE COLLECTED INFORMATION OVER THE YEARS.

28 WE WENT THROUGH THAT LOOKING FOR THE ISSUE,

1 MATERIAL, WHAT I DESCRIBED EARLIER. WE THEN WENT TO THE
2 NATIONAL ARCHIVES, BOTH IN SAN BRUNO -- BRANCHES OF THE
3 NATIONAL ARCHIVE. SO WE WENT TO SAN BRUNO AND TO THE
4 BRANCH IN RIVERSIDE.

5 AND IN THOSE LOCATIONS WE COLLECTED
6 INFORMATION RELATED TO THE COURT CASES ON CONDEMNATIONS
7 ON THE FACILITY. SO AS LAND IS CONDEMNED, WE WERE
8 COLLECTING EXAMPLES OF THEIR -- OF THE PLEADINGS, THE
9 DECLARATIONS OF TAKINGS AND OTHER COURT DOCUMENTS,
10 DECISIONS, JUDGMENTS, AND SO FORTH.

11 AT RIVERSIDE WE ALSO COLLECTED SOME
12 INFORMATION ABOUT CONSTRUCTION ON EDWARDS AIR FORCE
13 BASE. AS YOU MIGHT UNDERSTAND, WHEN YOU UNDERTAKE ONE
14 OF THESE, YOU CAST A RELATIVELY WIDE NET; SO WE
15 COLLECTED A LOT OF INFORMATION OVER THE COURSE OF OUR
16 INVESTIGATION, ONLY SOME OF WHICH IS IN YOUR BINDERS OR
17 IN THE COURT BINDER.

18 WE ALSO WENT TO THE NATIONAL ARCHIVES IN
19 WASHINGTON, D.C., IN -- IT'S ACTUALLY IN COLLEGE PARK,
20 MARYLAND, NOW. AND IN THAT INSTANCE WE EXAMINED RECORDS
21 OF THE OFFICE OF THE SECRETARY OF THE AIR FORCE, I
22 BELIEVE THE AIR CORPS QUARTERMASTER GENERAL, THE ARMY
23 AIR CORPS, A NUMBER OF AGENCIES THAT HAD SOME -- BUREAU
24 OF THE BUDGET, FOR THAT MATTER -- THAT HAD SOME ROLE TO
25 PLAY IN THE -- EITHER THE WITHDRAWAL OR ACQUISITION OF
26 LANDS AT EDWARDS AND PLANT 42.

27 WE ALSO UNDERTOOK RESEARCH OF CALIFORNIA
28 STATE ARCHIVES TO FIND OUT WHAT WE COULD LEARN THERE

1 ABOUT THE ISSUE OF A -- OF EXCLUSIVE JURISDICTION AND
2 WHAT THE FEDERAL GOVERNMENT AND THE STATE GOVERNMENT,
3 WHAT CORRESPONDENCE THERE MIGHT HAVE BEEN BETWEEN THE
4 FEDERAL GOVERNMENT AND, SAY, THE GOVERNOR'S OFFICE ON
5 THAT ISSUE. AND WE ALSO USED STANDARD UNIVERSITY
6 LIBRARIES, KERN COUNTY RECORDER, OTHER LOCATIONS LIKE
7 THAT.

8 **MR. LEININGER:** AND, I'M SORRY, LET ME PAUSE FOR
9 ONE MOMENT AND JUST POINT OUT FOR EVERYONE ELSE WE'RE
10 PROJECTING EXHIBITS ON THE SCREEN HERE. WE ALSO HAVE
11 ONE BINDER FOR OPPOSITION COUNSEL, HARD COPIES. BUT
12 WE'RE GOING TO BE PROJECTING THE EXHIBITS AS THEY'RE
13 PRESENTED. SO THIS IS MR. HERBERT'S C.V. I HOPE I --

14 **THE WITNESS:** THAT'S JUST THE FIRST PAGE BUT --

15 **MR. LEININGER:** SORRY. YES, THE FIRST PAGE OF
16 MR. HERBERT'S C.V.

17 **BY MR. LEININGER:**

18 **Q** SO LET'S START. I'M GOING TO WALK YOU
19 THROUGH THE HISTORIES HERE. LAND ACQUISITION HISTORIES
20 OF PLANT 42 -- OF EDWARDS AIR FORCE BASE AND PLANT 42.
21 WE'RE GOING TO TALK ABOUT THE GEOGRAPHICAL GROWTH AND
22 THE MILITARY USES OF THESE FACILITIES. THEN WE'RE GOING
23 TO END UP WITH JUST YOUR HISTORICAL KNOWLEDGE OF THE
24 WATER USE.

25 OKAY. YOU READY?

26 **A** YES.

27 **Q** ALL RIGHT.

28 **THE COURT:** YOU KNOW, I THINK BEFORE WE GET

1 STARTED, IT'S ABOUT TWO MINUTES TO 12 BY THAT CLOCK,
2 WHICH IS ABOUT RIGHT; SO MAYBE WE OUGHT TO JUST TAKE OUR
3 NOON RECESS. WE CAN START A WHOLE LITANY OF QUESTIONS.

4 **MR. ZIMMER:** YOUR HONOR, THIS IS A MATTER OF
5 HOUSEKEEPING.

6 IF WE'RE GOING THROUGH THE EXHIBITS,
7 MR. LEININGER, AND YOU INTEND TO INTRODUCE ONE OF THOSE,
8 CAN WE KNOW THAT NOW SO WE CAN HAVE DISCUSSION ON THAT
9 RATHER THAN WAIT TILL THE END AND TRY AND GO BACK TO ALL
10 THESE EXHIBITS?

11 **THE COURT:** I'M NOT SURE I UNDERSTAND WHAT YOU
12 WANT.

13 **MR. ZIMMER:** WELL, IF HE'S GOING TO INTRODUCE AN
14 EXHIBIT, I'D LIKE TO HAVE THEM DO THAT NOW SO WE CAN
15 HAVE DISCUSSION ABOUT HEARSAY ISSUES IN PARTICULAR
16 DOCUMENTS RATHER THAN WAITING UNTIL WE HAVE TO GO BACK
17 AND REFRESH OUR MEMORY ON WHAT WAS THERE AND ARGUE ABOUT
18 IT LATER.

19 **THE COURT:** SURE.

20 **MR. ZIMMER:** THANK YOU, YOUR HONOR.

21 **MR. DAVIS:** YOUR HONOR, MICHAEL DAVIS. SOME
22 HOUSEKEEPING ISSUES.

23 **THE COURT:** YES.

24 **MR. DAVIS:** THERE ARE A NUMBER OF PARTIES WHO ARE
25 NOT GOING TO BE PARTICIPATING IN THE FEDERAL RESERVE
26 RIGHT ISSUES AND WILL BE RETURNING WHEN THE RETURN FLOW
27 ISSUES COME UP.

28 WOULD IT BE POSSIBLE TO ASK THE COURT TO

1 POST ON THE COURT'S WEB SITE WHETHER OR NOT ON THE 18TH
2 THERE WILL BE A RESUMPTION OF FEDERAL RESERVE RIGHT
3 TESTIMONY ON THAT PORTION OF THE TRIAL OR WHETHER WE'RE
4 GOING TO BE READY TO START ON THE RETURN FLOW SO WE KNOW
5 WHEN TO SHOW UP?

6 **THE COURT:** WE WILL BY THE CLOSE OF BUSINESS
7 TOMORROW KNOW WHAT'S GOING TO BE HAPPENING ON THE 18TH.
8 AND I EXPECT WE'D BE ABLE TO GET SOME NOTES TO YOU.

9 **MR. DAVIS:** THANK YOU VERY MUCH, YOUR HONOR. THAT
10 IS A REQUEST --

11 **THE COURT:** I DON'T HAVE ROWENA HERE, OKAY, WHICH
12 MAKES IT A LITTLE DIFFICULT. IF YOU WANT TO GO TO
13 SAN JOSE FOR THIS TRIAL, WE CAN DO THAT TOO. IN FACT, I
14 MAY MAKE THAT OFFER TO YOU AT SOME POINT.

15 ALL RIGHT. LET'S --

16 **MR. DAVIS:** THANK YOU, YOUR HONOR.

17 **THE COURT:** -- AT THIS POINT GO TAKE OUR RECESS
18 AND BE BACK AT 1:30.

19
20 (NOON RECESS WAS TAKEN UNTIL
21 1:30 P.M.)
22
23
24
25
26
27
28

1 CASE NUMBER: JCCP4408
2 CASE NAME: ANTELOPE VALLEY GROUNDWATER
3 LOS ANGELES, CALIFORNIA FEBRUARY 10, 2014
4 DEPARTMENT 3 HON. JACK KOMAR
5 REPORTER: RHONA S. REDDIX, CSR 10807
6 TIME: P.M. SESSIONS
7 APPEARANCES: (SEE TITLE PAGE.)
8
9

10 THE COURT: BE SEATED, PLEASE. OKAY. READY TO
11 PROCEED? THE WITNESS WILL RETURN TO THE STAND.

12 YOU'RE STILL UNDER OATH.

13 MR. LEININGER: SORRY. I'M MISSING MY GLASSES.
14

15 DIRECT EXAMINATION (CONTINUED)

16 BY MR. LEININGER:

17 Q SO, MR. HERBERT, RIGHT BEFORE OUR BREAK WE
18 WERE GOING TO BEGIN YOUR TESTIMONY REGARDING HISTORICAL
19 AND -- HISTORICAL ACQUISITIONS AND WERE GOING TO START
20 WITH EDWARDS AIR FORCE BASE. DO YOU RECALL?

21 A YES.

22 Q OKAY. SO LET'S START WITH EDWARDS. IT
23 WASN'T ALWAYS CALLED EDWARDS AIR FORCE BASE, WAS IT?

24 A NO, IT WAS NOT. IT WAS CALLED ORIGINALLY
25 MUROC BOMBING AND GUNNERY RANGE AND THEN WENT THROUGH
26 SOME PERMUTATIONS OF NAMES.

27 THE COURT: DO YOU HAVE AN OBJECTION?

28 MR. KUHS: YEAH, YOUR HONOR. I DON'T BELIEVE THE

1 WITNESS HAS BEEN ACCEPTED AS AN EXPERT, AND I DON'T
2 BELIEVE HIS AREA OF EXPERTISE HAS BEEN ARTICULATED.

3 **THE COURT:** YOU'RE OFFERING THE WITNESS AS AN
4 EXPERT, AND STATE SPECIFICALLY WHAT YOUR OFFERING IS.

5 **MR. LEININGER:** YES, YOUR HONOR, OF COURSE. MY
6 APOLOGIES, YOUR HONOR. WE'RE PROFFERING THIS WITNESS AS
7 A EXPERT -- HISTORIAN EXPERT. HE WILL BE TESTIFYING
8 WITH REGARD TO THE HISTORICAL LAND ACQUISITIONS, LAND
9 RESERVATIONS, IN FACT, THE ACTIVITIES ON THE FEDERAL
10 PARCELS AND HISTORIC WATER USE.

11 **THE COURT:** IS THERE ANY VOIR DIRE?

12 **MR. KUHS:** NOT AT THIS TIME, YOUR HONOR, NO.

13 **THE COURT:** ANY OBJECTION? THE WITNESS IS -- YES.

14

15 (REPORTER'S INTERRUPTION.)

16

17 **THE COURT:** STATE YOUR APPEARANCE.

18 **MR. SHEFFIELD:** ANDREW SHEFFIELD ON BEHALF OF
19 CRYSTAL ORGANICS, DIAMOND FARMING, REMRY FARMS AND LAPIS
20 LAND COMPANY. AND I'VE RAISED AN OBJECTION. WHEN
21 THEY'RE TALKING ABOUT HISTORICAL WATER CONSUMPTION, WE
22 HAVE AN EXPERT DESIGNATION PRESENTED IN THIS CASE, AND
23 IT DOES NOT MENTION THAT.

24 I HAVE A BRIEF ON THE ISSUE. IT'S --
25 2034.260 REQUIRES THAT HE ONLY BE ALLOWED TO TESTIFY TO
26 WHAT THEY'VE DESIGNATED HIM AS AN EXPERT, HIS EXPERT
27 DESIGNATION. HISTORICAL WATER CONSUMPTION IS NOT PART
28 OF THAT. ON THAT BASIS HE SHOULDN'T BE ALLOWED TO

1 TESTIFY TO HISTORIC WATER CONSUMPTION AT THE BASE OR
2 PLANT 42.

3 MR. LEININGER: HE WAS IDENTIFIED, YOUR HONOR, FOR
4 PURPOSES OF ACTIVITIES ON THE MILITARY BASE. WHEN HIS
5 DEPOSITION WAS TAKEN -- HIS DEPOSITION, WHICH WAS TAKEN,
6 I BELIEVE, BY MR. KUHS, DID ASK QUESTIONS AND DID GET
7 INTO THESE ISSUES WITH REGARD TO HISTORIC WATER
8 CONSUMPTION. IT IS --

9 THE COURT: HE DID TESTIFY AT DEPOSITION
10 CONCERNING WATER USE?

11 MR. LEININGER: YES.

12 MR. SHEFFIELD: YOUR HONOR, ON THAT ISSUE WITH
13 REGARD TO SPECIFICALLY PLANT 42, MR. HERBERT TESTIFIED
14 THAT HE HAS VERY LITTLE INFORMATION, IF ANY, ON PLANT 42
15 ON THE WATER CONSUMPTION.

16 AND THEN THE WATER CONSUMPTION ON EDWARDS
17 AIR FORCE BASE, HE SAID ALL HE CAN TESTIFY TO IS WHAT
18 REPORTS SHOWED, THAT WERE REPORTED ANNUALLY. THAT
19 DOESN'T HAVE ANYTHING TO DO WITH HOW IT WAS MEASURED OR
20 ANYTHING ABOUT HISTORIC USES OR MEASUREMENTS OR ANYTHING
21 IN THAT REGARD. IT WOULD JUST BE REPEATING WHAT'S IN
22 DOCUMENTS. IT'S NOT, THEREFORE, EXPERT OPINION IN THAT
23 REGARD.

24 MR. LEININGER: YOUR HONOR, I WOULD GLADLY
25 ESTABLISH THAT HISTORIANS USE THAT TYPE OF INFORMATION
26 TO DEVELOP THEIR TESTIMONY. IT IS COMMONLY RELIED UPON,
27 AND MR. HERBERT CAN TESTIFY TO THAT FACT.

28 THE COURT: THERE'S NO DOUBT IN MY MIND THAT THERE

1 ARE A WEALTH OF DOCUMENTS THAT DO DESCRIBE WATER USAGE
2 AND OTHER AFFAIRS THAT OCCUR ON THE MILITARY BASE. AN
3 EXPERT HISTORIAN CAN TESTIFY AND SUMMARIZE HIS OPINION.
4 JUST TO SAVE TIME. OKAY? OVERRULED.

5 YOU MAY ANSWER THE QUESTION.

6 **BY MR. LEININGER:**

7 Q AND LET ME REPEAT THE QUESTION. SO YOU'RE
8 TELLING US THAT EDWARDS AIR FORCE BASE WAS NOT ALWAYS
9 CALLED EDWARDS AIR FORCE BASE?

10 A THAT'S RIGHT. IT STARTED OFF AS MUROC
11 BOMBING AND GUNNERY RANGE, AND THEN IT WENT THROUGH A
12 NUMBER OF NAME CHANGES, MUROC ARMY AIRFIELD, ARMY AIR
13 BASE --

14 **THE COURT:** LET ME JUST STATE THIS ON THE RECORD,
15 SINCE I DIDN'T GET A CHANCE TO DO THAT, THAT THE WITNESS
16 IS QUALIFIED AND MAY SO TESTIFY AS PROFFERED.

17 **MR. LEININGER:** THANK YOU, YOUR HONOR.

18 **BY MR. LEININGER:**

19 Q OKAY. SO WHAT WAS THE -- THIS AREA THAT'S
20 NOW EDWARDS AIR FORCE BASE, WHEN WAS IT FIRST USED FOR
21 AERONAUTICAL PURPOSES?

22 A IT WAS PRIOR TO THE EARLY 1930S. AND THERE
23 WERE PRIVATE PLANES THAT LANDED ON THE -- ON THE LAKE
24 BED. THERE'S ALSO AUTO RACING AND OTHER TYPES OF THINGS
25 GOING ON THERE.

26 **THE COURT:** WOULD YOU KEEP YOUR VOICE UP, PLEASE?

27 **THE WITNESS:** OH, I'M SORRY. IT'S HARD TO KNOW
28 WHERE THE MICROPHONE IS.

1 **MR. ZIMMER:** OBJECTION. VAGUE AS TO AERONAUTICAL.
2 IS THAT MILITARY AERONAUTICAL OR ...

3 **MR. LEININGER:** I'M SORRY. I WILL CLARIFY. ANY
4 AERONAUTICAL USE, BUT PERHAPS THE WITNESS COULD CLARIFY
5 WHETHER THAT WAS FOR MILITARY PURPOSE, WHICH YOU WERE
6 REFERRING TO.

7 **THE WITNESS:** PRIOR TO THE WITHDRAWALS TOWARD THE
8 MILITARY USE, THE LAKE WAS USED BY PRIVATE AIRCRAFT.

9 **BY MR. LEININGER:**

10 **Q** OKAY. SO WHEN WAS IT FIRST USED FOR -- BY
11 THE GOVERNMENT FOR MILITARY PURPOSES IN THIS AREA NOW
12 CALLED EDWARDS AIR FORCE BASE?

13 **A** THE HISTORICAL RECORD SHOWS THAT THE ARMY
14 AIR CORPS USED IT INFORMALLY PRIOR TO THE WITHDRAWAL.
15 THEN IT WAS SORT OF SCOUTED OUT BY HAP ARNOLD, WHO WAS
16 THE HEAD OF MARCH AIRFIELD, COMMANDER OF MARCH AIRFIELD,
17 BECAUSE HE WAS LOOKING FOR AN ARMY AND GUNNERY RANGE.

18 **Q** AND I'M SORRY. MARCH AIRFIELD?

19 **A** OH, I'M SORRY. MARCH AIRFIELD IS IN
20 RIVERSIDE COUNTY. THEY HAD BEEN USING THE OCEAN FOR
21 BOMBING AND GUNNERY, AND THAT WAS A PROBLEM FOR THEM.
22 SO THEY WERE LOOKING FOR A REMOTE AREA THAT THEY COULD
23 UNDERTAKE RANGE ACTIVITIES, AND THEY SCOUTED OUT THIS
24 AREA AND THEN ASKED THAT IT BE SET ASIDE THROUGH THE
25 FEDERAL PROCESS.

26 **MR. LEININGER:** SO, YOUR HONOR, RIGHT -- OR DURING
27 THE BREAK, WE HAD MARKED ALL THE EXHIBITS, AND THE
28 WITNESS NOW HAS ALL THE EXHIBITS MARKED IN FRONT OF HIM.

1 SO JUST TO TRY TO SAVE A LITTLE TIME, WE'RE GOING TO
2 JUST ASK HIM TO REFER TO EACH EXHIBIT.

3 **THE COURT:** YOU SAY THEY WERE MARKED. WERE THEY
4 MARKED ON THE RECORD?

5 **MR. LEININGER:** I BELIEVE -- NO.

6 **THE CLERK:** NO, JUST MARKED THERE. THEY STILL
7 HAVE TO MARK IT ON THE RECORD.

8 **THE COURT:** SO THEY HAVE TABS ON THEM; IS THAT
9 RIGHT?

10 **MR. LEININGER:** THAT'S MY UNDERSTANDING.

11 **THE COURT:** ALL RIGHT. THEN JUST REFER TO THEM BY
12 NUMBER. AND UNLESS THERE'S AN OBJECTION, THEY'LL BE
13 DEEMED ADMITTED.

14 **MR. LEININGER:** OKAY. AND IF WE COULD HAVE A
15 SLIDE UP HERE, PLEASE. LET'S START WITH EXHIBIT 11,
16 WHAT'S MARKED AS U.S.A.F. EXHIBIT 11.

17 **THE WITNESS:** THIS IS THE EXECUTIVE ORDER SIGNED
18 BY FRANKLIN ROOSEVELT ON FEBRUARY 6TH, 1934, WHICH CALLS
19 OUT THE WITHDRAWAL OF SPECIFIC LANDS IN AND AROUND
20 ROGERS DRY LAKE BED.

21 AND YOU CAN SEE AT THE TOP IT SAYS THAT IT
22 IS -- "IT IS HEREBY ORDERED THAT ALL PUBLIC LANDS IN THE
23 AREAS HEREINAFTER DESCRIBED BE AND ARE THEREBY -- HEREBY
24 WITHDRAWN FROM SETTLEMENT, LOCATION, SALE, ENTRY, AND
25 ALL FORMS OF APPROPRIATION SUBJECT TO VALID EXISTING
26 RIGHTS, FOR THE USE OF THE WAR DEPARTMENT AS A BOMBING
27 AND GUNNERY RANGE." AND THEN IT LISTS THE SPECIFIC
28 PARCELS.

1
2 (EXHIBIT 11, IDENTIFIED: EXECUTIVE
3 ORDER, FEBRUARY 6, 1934.)
4

5 MR. LEININGER: OKAY. COULD WE NOW HAVE
6 EXHIBIT 95, PLEASE? AND EXHIBIT -- OKAY, YOUR HONOR,
7 THESE --

8 MR. MC LACHLAN: MR. LEININGER, COULD WE ALSO HAVE
9 THE BATES NUMBERS ON THESE? BECAUSE THE DOCUMENTS YOU
10 PRODUCED ARE NOT THE SAME AS THE EXHIBIT NUMBERS.

11 MR. LEININGER: OKAY. AND I APOLOGIZE. WHEN
12 THESE WERE PRODUCED, IT WAS A INDEX THAT WAS PROVIDED.
13 BUT, SURE, I'LL PUT THAT IN.

14 THE COURT: YOU'RE REFERRING TO WHAT EXHIBIT NOW?

15 MR. LEININGER: THIS IS GOING BACK TO EXHIBIT 11,
16 YOUR HONOR. IT'S BATES NUMBER U.S.A.F. 001653. THIS
17 COMES FROM -- THE BATES NUMBERS ARE ENTIRE REPOSITORY OF
18 DISCOVER --

19 MR. KUHS: EXCUSE ME, YOUR HONOR. YOUR HONOR, I'D
20 OBJECT TO ANY EXAMINATION AS FAR AS THIS DOCUMENT. THIS
21 DOCUMENT WAS NOT PRODUCED DURING DISCOVERY AS FAR AS I'M
22 AWARE. I RAISED THIS ISSUE WITH COUNSEL BEFORE WE GOT
23 STARTED.

24 BUT IF I UNDERSTAND THE RECORD, WE HAD THE
25 FEDERAL RESERVE RIGHTS TEED UP IN PHASE 4. AND YOU'LL
26 RECALL THAT THE COURT ENTERED A DISCOVERY ORDER
27 DIRECTING THE FEDS TO PRODUCE ALL THEIR RELEVANT DATA,
28 AND THEY DID INITIAL DISCLOSURE AND SUBSEQUENT

1 DISCLOSURE. THAT SUBSEQUENT DISCLOSURE YIELDED
2 DOCUMENTS UP THROUGH 43,820. SO THE FIRST TIME I SAW
3 THIS DOCUMENT WAS WHEN IT WAS POSTED TO THE FEDERAL
4 GOVERNMENT'S EXHIBIT LIST IN PREPARATION FOR THIS TRIAL.

5 NOW, I HAD AN AGREEMENT AND UNDERSTANDING
6 WITH MR. LEININGER AND THE UNITED STATES THAT THEIR
7 EXPERTS HAD NOT DONE ANY ADDITIONAL WORK SINCE PHASE 4
8 AND WERE NOT PREPARED TO OFFER ANY NEW OR ADDITIONAL
9 TESTIMONY SINCE PHASE 4, AND ON THAT BASIS WE FOREWENT
10 TAKING THE DEPOSITION AT THE TIME BECAUSE WE UNDERSTOOD
11 THERE WAS GOING TO BE NO CHANGE.

12 BUT I DON'T -- I'VE NEVER SEEN THIS
13 DOCUMENT, AND I DON'T KNOW WHO PREPARED IT. I DON'T
14 KNOW WHAT THE FOUNDATION IS.

15 **THE COURT:** WELL, IT'S NOT EXHIBIT 11. IT'S SOME
16 OTHER EXHIBIT, AT LEAST IN MY BOOK. I CAN'T FIND THAT
17 DOCUMENT.

18 **MR. LEININGER:** OH, I'M SORRY. WE'RE REFERRING TO
19 THIS. I APOLOGIZE. BECAUSE THE EXECUTIVE ORDER WAS
20 STILL ON THE SCREEN, SO I WAS THINKING IT WAS
21 REFERENCING THE HISTORICAL DOCUMENT.

22 AND I WAS ABOUT TO EXPLAIN THESE ARE FOR
23 ILLUSTRATIVE PURPOSES, YOUR HONOR. I'LL HAVE THE
24 WITNESS EXPLAIN HOW HE CREATED THESE. BUT THEY'RE
25 BASICALLY DEMONSTRATIVE OF THESE LANDS THAT WE SET ASIDE
26 OR ACQUIRED. YOU WANT ME TO JUST TAKE YOU THROUGH --
27 CHRONOLOGICALLY THROUGH --

28 **THE COURT:** SO THAT'S NOT AN EXHIBIT?

1 **MR. LEININGER:** IT'S -- IT WAS PROFFERED AS
2 EXHIBIT 95.

3 **THE COURT:** 95.

4 **MR. LEININGER:** I'M SORRY. 95, YES.

5 **THE COURT:** ALL RIGHT. IT WON'T BE ADMITTED INTO
6 EVIDENCE. IT IS EXEMPLARY. YOUR OBJECTION IS
7 SUSTAINED.

8 **MR. KUHS:** THANK YOU, YOUR HONOR.

9 **BY MR. LEININGER:**

10 **Q** AND SO, MR. HERBERT, YOU WERE TESTIFYING, I
11 BELIEVE, THAT THIS IS A DEMONSTRATION OF THE LANDS THAT
12 WERE RESERVED UNDER EXECUTIVE ORDER 6658, I BELIEVE.

13 **MR. LEININGER:** AND TO ORIENT THE COURT, COULD --
14 SORRY, YOUR HONOR. MAY I REORIENT THE PICTURE SO IT'S
15 ON THE SCREEN?

16 **THE COURT:** DO YOU HAVE A LASER POINTER? USE IT.

17 **MR. LEININGER:** (INDICATING.)

18 SO I'LL LET THE WITNESS EXPLAIN HIS
19 ILLUSTRATIVE DIAGRAM.

20 **THE WITNESS:** ALL RIGHT. THIS IS A DOCUMENT THAT
21 I HAD MY G.I.S. PERSON, MY GRAPHICS PERSON AT THE
22 OFFICE, PREPARE BASED ON THE LANDS DESCRIBED IN THE
23 EXECUTIVE ORDER ON A BASE PROVIDED BY THE EDWARDS AIR
24 FORCE BASE TO SHOW THE EXTERIOR BOUNDARIES OF THE
25 CURRENT FACILITY, AND THEN TO LAY IN (INDICATING) THE
26 CURRENT ROADWAY AND DEVELOPMENT WITHIN THE FACILITY.

27 SO WHAT THIS SHOWS IS THE LANDS WITHDRAWN
28 ON FEBRUARY 6TH, 1934. THIS IS THE ROGERS DRY LAKE BED

1 AREA HERE. THIS IS ROSAMOND LAKE AREA. THIS IS THE
2 MAIN BUILT-UP PORTION OF THE FACILITY. PORTIONS OVER
3 HERE RELATE TO THE ROCKET TESTING AREA AND SO FORTH.

4 **BY MR. LEININGER:**

5 **Q** SO THIS IS 1934. WHAT WERE THE MILITARY
6 ACTIVITIES AT THAT TIME?

7 **A** WELL, FOLLOWING ESTABLISHMENT OF THE
8 FACILITY, THE ARMY AIR CORPS ESTABLISHED A CAMP ON THE
9 DRY LAKE BED IN THIS -- OVER IN THIS AREA. IT WAS
10 CONSISTING OF TENTS BUT ALSO A PERMANENT BARRACKS AND
11 MESS HALL, AMMUNITION STORAGE, FUEL STORAGE AND SO
12 FORTH. AND THE ARMY AIRCRAFT WOULD FLY IN, USE THE AREA
13 FOR THEIR TACTICAL TRAINING, AND THEN LAND AT THE CAMP,
14 STAY AT THE CAMP FOR THE DURATION OF THEIR PRACTICE.

15 **Q** DO YOU HAVE AN EXHIBIT THAT MAY DEMONSTRATE
16 TO US THAT EXHIBIT?

17 **A** YES. IT'S EXHIBIT 34, WHICH YOU WANT TO
18 TURN SIDeways.

19 **Q** AND IT'S A LITTLE DIFFICULT TO SEE.

20 I HOPE THE PRINTED VERSION IS A LITTLE BIT
21 BETTER, YOUR HONOR.

22 BUT, SO CAN YOU EXPLAIN THIS PHOTO? IS IT
23 AN AERIAL PHOTO?

24 **A** RIGHT. THIS IS AN AERIAL PHOTOGRAPH FROM
25 THE COLLECTION OF THE U.S. ARMY AIR FORCE, PRE-1954,
26 OFFICIAL STILL PHOTOGRAPHY COLLECTION, THE NATIONAL
27 ARCHIVES IN WASHINGTON, D.C. AND IT'S AN OBLIQUE AERIAL
28 PHOTOGRAPH TAKEN MARCH 12TH, 1936.

1
2 (EXHIBIT 34, IDENTIFIED: AERIAL
3 PHOTO TAKEN 3/12/1936.)
4

5 **THE WITNESS:** YOU CAN SEE THE DATE HERE
6 (INDICATING).

7 AND IT SHOWS THE -- IT'S VERY HARD TO SEE
8 ON THE SCREEN. BUT IT SHOWS THE BIGGEST PORTION OF THE
9 TENT CAMP AREA PLUS PARKED AIRCRAFT. YOU CAN SEE SMALL
10 AIRCRAFT PARKED HERE, LARGER AIRCRAFT PARKED HERE. I
11 DID A ROUGH COUNT. I THINK THERE'S ABOUT 40 OF THEM.

12 THESE ARE ALL TENTS. THE MESS HALL,
13 BARRACKS AREA IS OFF TO THE SIDE OF THIS PHOTOGRAPH.
14 UNFORTUNATELY, IT'S NOT IN THIS PHOTOGRAPH. AND THIS IS
15 THE LOCATION OF THE WELL THAT WAS DUG AT THE SITE IN, I
16 THINK, 1935.

17 **Q** HOW DID THEY GET WATER?

18 **A** AT FIRST, THEY DROVE ACROSS --

19 **MR. SHEFFIELD:** OBJECTION. CALLS FOR SPECULATION.

20 **THE COURT:** OVERRULED.

21 **THE WITNESS:** AT FIRST, THEY DROVE ACROSS ROGERS
22 DRY LAKE BED TO THE TOWN OF MUROC, WHICH, IF WE HAD THE
23 OTHER MAP BACK UP, I COULD SHOW YOU WHERE THAT IS. GOT
24 WATER THERE, BUT IT WAS SOME MILES AWAY, AND SO THEY
25 BEGAN TO LOOK FOR ANOTHER SOURCE OF WATER.

26 THERE WAS A WELL ON THIS SIDE OF THE
27 LAKE -- THIS IS THE EAST SIDE OF THE LAKE -- BUT IT WAS
28 USED FOR CATTLE, AND SO THEY USED -- THEY -- THE ARMY

1 AIR CORPS REQUESTED AND RECEIVED MONEY TO DRILL A WELL
2 AT THIS LOCATION, WHICH THEY SAID WAS ON GOVERNMENT
3 LAND, OWNED BY THE GOVERNMENT.

4 MR. LEININGER: COULD YOU NOW SHOW US EXHIBIT 10,
5 PLEASE?

6 THE WITNESS: THAT'S NOT EVEN IN FOCUS.

7 BY MR. LEININGER:

8 Q WELL, UNFORTUNATELY, THE PRINT VERSION'S A
9 LITTLE DIFFICULT TO READ. BUT DO YOU RECALL WHAT THIS
10 DOCUMENT IS?

11 A YES. THIS IS A COLLECTION OF
12 CORRESPONDENCE TAKEN FROM -- AS YOU CAN SEE FROM THE
13 FINAL PAGE, THAT IT'S TAKEN FROM THE CENTRAL DECIMAL
14 FILES OF THE ARMY AIR FORCES, RECORD GROUP 18, AND IT
15 RELATES TO THE ACTIVITIES AND CONSTRUCTION ON THE MUROC
16 FIELD.

17
18 (EXHIBIT 10, IDENTIFIED:
19 CORRESPONDENCE, ARMY AIR FORCES
20 CENTRAL DECIMAL FILE, RECORD
21 GROUP 18.)
22

23 THE WITNESS: YOU CAN SEE, UNFORTUNATELY NOT VERY
24 WELL ON THE SCREEN, BUT THIS PARAGRAPH, YOUR HONOR,
25 RIGHT THERE, "BECAUSE THE ONLY SOURCE OF WATER AVAILABLE
26 IS FROM A SMALL, PRIVATE WELL IN THE GENERAL STORE OF
27 MUROC, FIVE MILES DISTANT FROM THE TEMPORARY CAMP,
28 SUPPLY FROM THIS WELL WAS LIMITED AND INSUFFICIENT," AND

1 SO FORTH. SO THEY DETERMINED THAT THEY WOULD BE BEST
2 TO -- BEST OFF TO DRILL THEIR OWN WELL CLOSE TO THE
3 CAMP.

4 **BY MR. LEININGER:**

5 Q WILL YOU JUST READ INTO THE RECORD, PLEASE,
6 THE FIRST SENTENCE, IF POSSIBLE?

7 A THE FIRST SENTENCE OF THE ENTIRE DOCUMENT?

8 Q NO, OF THE FIRST PAGE.

9 A "IT IS REQUESTED THAT FUNDS IN THE AMOUNT
10 OF \$1,200 BE ALLOTTED MARCH FIELD FOR THE PURPOSES OF
11 DIGGING A WELL AND INSTALLING TANK AND PUMP ON THE MUROC
12 BOMBING RANGE."

13 Q AND NOW, THIS EXHIBIT CONTAINS A NUMBER OF
14 CORRESPONDENCES. SO LET'S JUST JUMP TO BATES LABEL
15 NUMBER U.S.A.F. 022910 IN THAT PACKET OF CORRESPONDENCE.
16 AND THIS CORRESPONDENCE IS ALL CONTEMPORARY? THEY WERE
17 ALL --

18 A YEAH. IT MIGHT HELP TO EXPLAIN A LITTLE
19 WHAT HAPPENS HERE. THE FIRST LETTER IS CALLED THE "BASE
20 LETTER" OR THE "FIRST LETTER," THE -- AND THEN FOLLOWING
21 ON IT ARE A SERIES OF WHAT ARE CALLED "ENDORSEMENTS."
22 AND EACH SUCCESSIVE OFFICER, AS IT MOVED UP AND DOWN THE
23 CHAIN OF COMMAND, WOULD PREPARE AN ENDORSEMENT.

24 THESE WERE PHOTOGRAPHS THAT WE TOOK AT THE
25 NATIONAL ARCHIVES. THE CURRENT POLICY OF THE NATIONAL
26 ARCHIVES IS THAT THEY WOULD LIKE RESEARCHERS TO USE
27 DIGITAL CAMERAS BECAUSE IT'S MUCH EASIER ON THE STORED
28 RECORDS, AND YOU ONLY HAVE TO SLAP THEM ON A XEROX

1 MACHINE, PRESS THEM ON THE GLASS AND SO FORTH.

2 SO WHAT YOU'RE SEEING HERE IS THE IMAGE
3 QUALITY THAT THE RESEARCHER SEES. THIS FIRST PAGE IS A
4 CARBON COPY, AND YOU JUST HAVE TO DO THE BEST YOU CAN
5 WITH WHAT'S AVAILABLE.

6 Q OKAY. SO WE NOW TURN TO PAGE -- AND I'LL
7 JUST GIVE THE LAST THREE DIGITS -- 910.

8 A YES, I HAVE IT.

9 Q AND WILL YOU READ THE LAST CORRESPONDENCE
10 HERE? WHO IS THAT FROM?

11 A THAT'S FROM BRIGADIER GENERAL HAP ARNOLD,
12 H.H. ARNOLD, WHO'S THE COMMANDER OF THE AIR FORCE WING
13 AT MARCH FIELD.

14 Q AND WILL YOU JUST READ INTO THE RECORD THE
15 LAST SENTENCE THERE, PLEASE?

16 A "THE LAND ON WHICH THE WELL IS TO BE
17 LOCATED IS NOW OWNED BY THE FEDERAL GOVERNMENT AND IS
18 FREE OF ANY VALID RIGHTS."

19 Q LET'S NOW MOVE TO EXHIBIT 15, PLEASE.

20 MR. ZIMMER: OBJECTION TO THE LEGAL OPINION THAT
21 MAY BE --

22 THE COURT: IT SAYS WHAT IT SAYS.

23 MR. ZIMMER: YEAH. I AGREE IT SAYS WHAT IT SAYS.
24 I'M JUST OBJECTING TO THE EXTENT THAT IT WOULD BE USED
25 AS SOME LEGAL CONCLUSION THAT THERE WERE NO OTHER
26 EXISTING RIGHTS.

27 THE COURT: I'M JUST ACCEPTING THE DOCUMENT FOR
28 WHAT IT IS. I'LL MAKE THE DECISION WITHOUT LEGAL

1 IMPEDIMENTS.

2 MR. ZIMMER: AND IN TERMS OF ACCEPTING THE
3 DOCUMENTS, IS THE COURT ACCEPTING ONLY PORTIONS THAT THE
4 WITNESS IS RELYING ON, ALTHOUGH THERE'S A LOT OF OTHER
5 HEARSAY IN THE DOCUMENTS?

6 THE COURT: WELL, IT'S A SERIES OF APPROVALS
7 MOVING IT FORWARD, THE REQUEST FOR \$1,200, WHATEVER THAT
8 VALUE MIGHT BE FOR DRILLING A WELL.

9 MR. ZIMMER: THE REASON I'M RAISING IT, YOUR
10 HONOR, IS THAT THIS IS WHAT HAPPENS SOMETIMES WITH
11 SIMPLY ACCEPTING A GREAT DEAL OF HEARSAY: SOMEBODY
12 COMES BACK LATER AND ARGUES THAT SOMETHING ELSE IN THE
13 DOCUMENT IS SOMEHOW RELEVANT.

14 MY UNDERSTANDING IS THAT THE DOCUMENT
15 ITSELF IS HEARSAY. THE WITNESS HAS TESTIFIED TO THE
16 EXTENT TO WHICH HE'S RELIED UPON IT TO DRILL THIS \$1,200
17 WELL. AND IF IT'S LIMITED TO THAT, THAT'S -- THAT'S ...

18 THE COURT: WELL, ONE OF THE QUESTIONS THAT I
19 ASKED OF YOU WAS TO DETERMINE WHICH DOCUMENTS WERE GOING
20 TO BE OBJECTED TO ON THE BASIS OF AUTHENTICITY. THESE
21 ARE OFFICIAL RECORDS, APPARENTLY. THE SIGNIFICANCE OF
22 THEM IS YET TO BE DETERMINED. BUT APPARENTLY THE AUTHOR
23 IS TO ESTABLISH THE HISTORIC EVOLUTION OF THE
24 DEVELOPMENT OF EDWARDS AIR FORCE BASE, AND THAT'S WHAT
25 THIS IS DOING.

26 NOW, THERE ARE LOTS OF STATEMENTS IN HERE
27 THAT ARE NOT REALLY RELEVANT TO THAT ULTIMATE GOAL, AND
28 SO THEY'RE BEING ACCEPTED ONLY FOR THE PURPOSE FOR WHICH