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DAY 1

1 BEFORE APPRAISERS KELLING, ALLEN AND SAFER

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5 In the matter of the appraisal)

6 of the)

7 DESIMONE/DUWAMISH MARINA)

8 PREMISES LEASE)

9)

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11

12 ARBITRATION HEARING

13 VOLUME 1

14

15 ---

ORIGINAL

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17

18 July 12, 1994

19 9:00 a.m.

20 1111 Third Avenue, Suite 3400

21 Seattle, Washington

22

23

24 MARK HOVILA, CSR, CM

25 Court Reporter

1 A P P E A R A N C E S

2

3 ARBITRATORS: VERNE T. KELLING

4 ALLEN N. SAFER

5 BRUCE C. ALLEN

6

7 FOR THE LESSOR: P. STEPHEN DiJULIO, ESQ.

8 DAVID B. SWEENEY, ESQ.

9 Foster, Pepper & Shefelman

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12

13 FOR THE LESSEE: EVAN E. INSLEE, ESQ.

14 Inslee, Best, Doezie & Ryder

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18

19 ALSO PRESENT: RICK DICKMAN

20 RICK ANDERSON

21 MEL HESTER

22 LOU SZMODIS

23

24

25

1 E X A M I N A T I O N I N D E X

2

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1 P R O C E E D I N G S

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3 MR. KELLING: The prehearing conference that
4 was held prior to this hearing, which we're now opening,
5 provided that the lessor make the first presentation for
6 the arbitrators. And who is going to make that
7 presentation? Are you, Steve?
8 MR. DiJULIO: If it please the panel, this
9 is Steve DiJulio, Foster Pepper & Shefelman, representing
10 lessors. Also with me during these proceedings will be
11 David Sweeney, also of Foster Pepper & Shefelman.
12 Mr. Sweeney will be observing and will not be advocating on
13 behalf of the lessor before the panel today.
14 MR. KELLING: Would you care to go ahead
15 with any kind of an opening statement? I noticed you
16 passed out a document here.
17 MR. DiJULIO: I did submit an arbitration
18 memorandum that constitutes our argument on behalf of the
19 lessor. I'm prepared to proceed with opening statement,
20 although I would ask Mr. Kelling, would you prefer to deal
21 with exhibits first and then hear opening statements, just
22 to get through those? Or would you like to hear opening
23 statements and then deal with exhibits? Six to one, half a
24 dozen to the other.
25 MR. KELLING: What are you most comfortable

1 with?

2 MR. DiJULIO: Do you want to see what --

3 MR. INSLEE: I'm going to have twenty,

4 thirty exhibits I'm sure he has, and I'd just as soon have

5 him do some of whatever he wants. Maybe some of yours

6 are going to be duplicative of mine, so when you produce

7 them we will just respond by reducing the number that we

8 admit, if we've got a duplicate.

9 MR. DiJULIO: I was going to offer some that

10 I thought would go in by stipulation to expedite the

11 proceedings and not need --

12 MR. INSLEE: You mean using your opening

13 statements?

14 MR. DiJULIO: Well, you can use them in

15 opening statements. Not critical.

16 MR. INSLEE: I'd just as soon, whatever you

17 want.

18 MR. KELLING: Why don't you --

19 MR. INSLEE: I don't want to hold us up

20 going through a bunch of exhibits.

21 MR. KELLING: Why don't you go ahead with an

22 opening statement and start in that fashion.

23 MR. DiJULIO: Thank you.

24 If it please the panel, Mr. Inslee, on

25 behalf of lessors in this proceeding, I will make the

1 following opening statement. We've submitted our
2 arbitration memorandum in which we identify the prayer for
3 relief, the requested valuation to be awarded by the
4 arbitration panel to be $3,990,000.
5 In support of our position before the panel,
6 the lessor is prepared to call as witnesses Richard
7 Anderson, vice president, real estate investments at
8 Seafirst; Richard Dickman, senior surveyor and project
9 manager for David Evans & Associates; Errol Garr, executive
10 vice president and professional engineer, also of David
11 Evans & Associates; Al Lowe, property manager from the
12 marine division of the Port of Seattle, and Gordon Buchan,
13 vice president, Kidder Matthews, a recognized specialist
14 in industrial property. For purposes of scheduling,
15 Mr. Lowe will not be available today, because this is a
16 Port Commission day, but he will be available tomorrow for
17 these proceedings.
18 In 1990, the state legislature
19 revolutionized land use and development within the State of
20 Washington through the adoption of the Growth Management
21 Act. The Growth Management Act focused and intensified
22 development in the urban areas of the state of Washington.
23 We find the subject site in such an area.
24 Approximately 11.5 acres in size, located on the west side
25 of the Duwamish Waterway in the South Park neighborhood,

1 this property has been, is, and will continue to be
2 industrially available property. The appraisal problem in
3 this case we believe to be straightforward. A raw land
4 appraisal based upon June 1st, 1992, valuation, as the
5 property lay in 1974.
6 As the evidence will show to the panel, this
7 should not be an unduly complicated question, since the
8 property was at the time in 1974 generally level and at
9 grade. Highest and best use we believe should also not be
10 in substantial dispute. Heavy to light industrial, marine
11 terminal, transshipment, is a well recognized use in this
12 area. But the evidence will also show that this area, the
13 community adjacent to the site, is an area subject to
14 development and redevelopment.
15 We will introduce recently prepared studies
16 and exhibits prepared by the Boeing Company as part of its
17 Duwamish corridor redevelopment area. As the appraisal
18 panel is well aware, this area, the site, is bordered and
19 enveloped in many respects by Boeing Company facilities.
20 It is our position that the market is not a
21 mystery. We are not aware of any comparable data having
22 been submitted by the lessees in this case. The comparable
23 information that is presented is competent evidence that
24 shows a $9 to $10 valuation per square foot throughout the
25 Duwamish industrial valley. The general real estate

1 values, markets and trends will be further demonstrated by
2 the testimony, if needed, by the professional real estate
3 people from the Port of Seattle and by Kidder Matthews.
4 A mistake was made five years ago. A
5 mistake was made that cannot be repeated. The lease is
6 specific as to how this property is to be valued. And I'm
7 going to turn to them briefly in opening to emphasize that
8 point.
9 The appraisal panel is to appraise the fair
10 market value of the premises exclusive of the value of
11 improvements placed thereon by the lease, exclusive of the
12 value of the improvements as defined in the lease, and
13 shall mean that the appraiser shall appraise the real
14 property that is the subject matter of the lease as if said
15 real property was at the time of said appraisal, in the
16 same physical condition and original state and with the
17 same then existing improvements that existed as of the date
18 of commencement of the term of this lease.
19 Now, without limiting the generality of the
20 aforesaid, the lease continues that the appraiser shall not
21 take into consideration in arriving at the fair market
22 value of the premises improvements of any type, kind or
23 nature placed on premises by lessee, said improvements
24 including, but not limited to, off-site improvements, fill,
25 structures, buildings, utilities, excavation and draining,

1 grading, retaining walls or barriers, floats, whether
2 permanent or temporary in nature, placed or caused to be
3 placed on the premises after October 11th, 1974.
4 To further emphasize this point, the lease
5 goes on to say that you are not to consider the lease
6 income derived from the premises by the lessees. You are
7 to appraise the property in its raw state at its highest
8 and best use as of October 11th, 1974.
9 We will introduce to you the photo log,
10 photographs taken by Mr. Hester of the site in 1977, which
11 the parties have agreed, you may consider in your
12 determination of the value. This lease is a revaluation
13 lease. Every five years, you go back and re-evaluate
14 based upon current valuation the property as it sat in its
15 state in 1974. You can refer to this lease as a triple
16 net lease. The lease itself says it is an absolute net
17 lease and shall at all times yield to the lessors the net
18 rent values identified by evaluating the fair market value
19 of the raw land.
20 The lessees under this absolute lease are
21 responsible for all improvements. Section 7, use of
22 premises, emphasizing that the lessee is to agree to obtain
23 necessary permits and to hold lessors harmless from all
24 liabilities, costs and expenses of every kind and nature
25 whatsoever, including attorney's fees that may be claimed

1 or accrued by reason of any failure by lessees to comply
2 with any lawful governmental regulations or to obtain any
3 governmental permits lawfully required to be obtained in
4 connection with the ownership and use of the premises.
5 The lease is specific that lessors made no
6 representation that the condition of the premises on the
7 date of the commencement, that is, October 1974, complies
8 with the requirements of any federal, state, county or
9 other governmental entity. Lessees agree that it is their
10 obligation to satisfy all governmental burdens.
11 Lessees acknowledged in Section 9 of the
12 lease that they have thoroughly examined the premises and
13 that they accept the same in their present condition and
14 waive all claims of any nature that may arise therefrom.
15 This matter comes before you, then, as an
16 absolute net lease of raw land to be valued on June 1st,
17 1992, based upon its state in 1974. Rent is to be based on
18 the fair market value of that land. Lessee may not be
19 treated unfairly by requiring lease payments to be based on
20 the improved value of the property. However, lessor may
21 not be treated unfairly by requiring lease payments to be
22 reduced by the cost of those improvements. The lease
23 recognized this balance. And the panel must follow the
24 lease. Thank you.
25 MR. KELLING: I have a question. You said a

1 mistake was made five years ago. Would you elaborate on
2 that a little bit?
3 MR. DiJULIO: In the appraisal, in 1988, by
4 Paul D. Iverson, Paul D. Iverson made a conclusion of
5 value. And whether introduced by lessor or lessee,
6 Arbitrator Iverson stated, according to the terms of the
7 lease, costs of improving the land must be deducted to
8 estimate the value of the land in its physical condition as
9 of October 11th, 1974.
10 It is our position that Arbitrator Iverson
11 in rendering his award at that time made a mistake, and
12 that mistake cannot be repeated. It is our position that
13 that prior arbitration award in March of 1988 is not
14 binding, neither as to content or to approach on this
15 panel. You must appraise the property in fresh as of
16 1992, based upon the 1974 conditions.
17 MR. KELLING: Thank you.
18 Mr. Inslee, would you like to speak?
19 MR. INSLEE: Members of the panel board and
20 Steve and gentlemen, I don't have much disagreement with
21 what Steve has indicated to you thus far as far as
22 philosophy. I think that what's really important here,
23 though, is that because we have the detached reflection of
24 an arbitration to reflect on this property, that none of us
25 be carried away with generalities, rules of thumb, or

1 things that are just in terms of what generally is the
2 case.
3 What the lease asks you all to do and what
4 we're here to do is to give you all the facts to help you
5 to do it, pro and con, is to make a site specific analysis
6 of this particular property and to do two things. Decide
7 issues such as its highest and best use and market value,
8 and then determine whether or not the market value is
9 consistent with the terms of the lease that you've arrived
10 at.
11 I think that it's really important from the
12 standpoint of the lessees here to get the arbitrators to
13 really understand what the historical background was of
14 this lease. And that's difficult because only two
15 people -- put it this way, none of you were there, and on
16 the lessor's side, no one was there except Counsel Sweeney.
17 The Desimone Trust representatives have all
18 changed, the bank representatives have changed. And Dave
19 and I put this thing together back in '74, and all the
20 parties on our side of the table are the same, so maybe
21 we've got more historical information and we want to share
22 that with you.
23 I think unless you just just dis-apply
24 generalities, everything that you and I might be familiar
25 with in terms of general leases and general concepts and

1 the concept that real property just goes up forever around
2 here, I think if you restrain some of those impulses
3 sometime and look at this lease and this particular fact
4 pattern, it's going to be very helpful to you. It's hard
5 to do that, I know.
6 So this, as Steve says, we're going to value
7 this property today, or I should say as of June 1, 1992,
8 based on its physical characteristics that existed in '74.
9 So I guess the first order of business is going to be the
10 determination by this panel as to what were its
11 characteristics of real property as of October '74.
12 And you too will have a revised memorandum.
13 I had to revise it again last night based on typo errors,
14 you'll have it in a few minutes. You won't get a chance
15 to read it anyway. So I'm going to talk about this
16 property just like you were walking on it in 1974 as
17 Mr. Szmodis, Mr. Hester and I did.
18 The lease is actually '77, you'll notice,
19 but because one of our partners was a '74 original lessee,
20 and then that lease melded into this lease, everybody
21 agreed it would go back to '74, because one of our
22 partners did put some fill on the land after '74. But
23 it's appropriate to note that there's four parcels which
24 the survey will show as parcel A, B, C and D. Total
25 square footage on that absolute imputed survey is 500,862

1 feet. And portions of that are submerged under the
2 Duwamish Waterway and shouldn't be an issue of fact as to
3 how much submerged, because we've got the actual survey,
4 everybody can look at for two prior arbitration
5 proceedings. The parties have agreed on 70 or 77,000, and
6 I'll get that document into the evidence here in a minute,
7 being submerged. But I don't think that's going to be too
8 relevant when we get into this thing.
9 This site is not improved by right-of-way or
10 public access to it. At least back in '74, it had no
11 sewer, water, was not serviced. Although the property is
12 adjacent to the Duwamish right-of-way, it's not adjacent to
13 the navigable portion of the Duwamish right-of-way in the
14 sense that there's about a hundred yards of tide flats,
15 hundred feet of tide flats, between what we're going to
16 show you as the westerly submerged boundary in the
17 navigable portion of the Duwamish right-of-way.
18 The bank is not improved, it has no riprap,
19 no H beams, no improvements whatsoever on the bank.
20 Erosion has been ongoing, as the pictures will show you.
21 A stream travels through this property from west to east
22 direction. This stream drains about 800 upland acres.
23 This stream results in a continuous sediment of sources
24 with deposits within the basin of the area immediately in
25 front of the bank, if there was a bank, of this property.

1 It deposits siltation which includes hydrocarbons, zinc,
2 copper, chromium and chemicals, phenols, chlorinate
3 hydrocarbons and pesticides from this 800 acres upland.
4 That sediment continues to clog the property
5 on its water side, as does the natural sediment from the
6 Duwamish Waterway, which is a different type of sediment,
7 not abrasive. It's softer, settles out and is not abrasive
8 to the bottom of boats and things like that. But in any
9 event, that continuously builds up and fills in any basin
10 area adjacent to the westerly boundary. It's hard for me
11 to say westerly. The water boundaries, the directions
12 aren't exactly 90 degrees there.
13 The site is located in King County, as
14 counsel stated. It's in a sensitive area from two
15 standpoints. One, it's sensitive from the standpoint that
16 it's within the 100-year flood plain hazard area.
17 Secondly, the entire site is within the seismic hazard
18 area designated as a severe risk of earthquake damage as a
19 result of seismic-induced sediment or soil liquefaction.
20 In other words, this property is similar to
21 the San Francisco Bay area in terms of risk of earthquake,
22 and all of the concerns one has with regard to building any
23 improvements to equal that of a non-earthquake seismic area
24 are and will continue to be the requirements.
25 The soil on the property is not cohesive.

1 Before it was leased to the lessees here, the trust leased
2 it to the San Juan Concrete Products Company, to deposit
3 large amounts of toxic cement tailings on the property.
4 MR. SAFER: What was the name?
5 THE WITNESS: San Juan Products.
6 A. And that cement tailings, which you can see from
7 the photographs and will be depicted from the absolute
8 testimony of the witnesses, that together with the fact
9 that this was river sediment material on the property to a
10 large extent, it was a cohesiveless property in which
11 there could not be any ballast or other material deposited
12 on top of it because, number one, the toxic cement filings
13 had to be removed first and exported.
14 Then after the export was to occur, there
15 had to be importation of fill. That fill then would have
16 to be pre-stressed or pre-loaded. That would then get you
17 back to the grade that you might have seen in the pictures
18 that we're going to show you. But then because the water
19 table is three to four feet below the grade that you're
20 going to see in those pictures, the requirement is as the
21 adjacent properties around will depict if you look at some
22 of them, you got to raise the grade three to four feet
23 above that with import of material in order to have a
24 buildable site for either spread footings or to sustain any
25 type of load, whether it's container load or warehouse

1 footing load.
2 So after you've got through that export,
3 import and buildup of the property, then and only then
4 would you have a property which you might approach from the
5 standpoint of what is necessary to build the pad.
6 The evidence is going to be that, with
7 regard to this particular property, all of those things
8 that I just told you about occurred and were planned and
9 more. And that is that, as you know from the concept of
10 compression, when you deposit soil upon soil, there is a
11 compression factor. And in order to make this property
12 sustain even load bearing sufficient for container storage,
13 for almost an entire winter, truckload after truckload of
14 rock ballast was dumped into this site because it kept
15 sinking right out of site. As soon as you dump it it
16 would go away, and more would be brought in.
17 The property had had no permits, it had no
18 improvements, it had no authorizations or approvals in
19 1974. The height restriction, 35 feet above grade.
20 However, grade is measured from existing grade, not from
21 fill grade. So that's what you're looking at when you
22 talk about the characteristics of this property in 1974.
23 Because that's what the parties promised each other they
24 were going to do.
25 I think that's the first thing one has to

1 do, is get a mental and word picture of what there was.
2 That's going to be important from the lessee's point of
3 view, because, as Steve has stated, the landowner's
4 entitled to a return on its value. But no more, no less.
5 What the owner had in 1974 was essentially a
6 valueless piece of property. Valueless in the sense that,
7 by the party's own admission, they couldn't lease it for
8 any more than what it was leased to us initially for, $300
9 a month, because there was no, I repeat, no use capable of
10 this property in '74. Zero use in its present state.
11 The trust made the determination in 1974 and
12 prior years not to invest the millions of dollars that
13 everyone knew would be required to develop this property.
14 They made that conscious business decision for whatever
15 internal reasons they decided upon.
16 Theory and philosophy of a lease and the
17 lease negotiations was clearly and simply this. Trust, you
18 lease us the property. Trust, we're not going to pay a
19 bloody dime one for any value hereafter based on anything
20 we do, but we as the Duwamish Marina Industrial Park will
21 take the full 100 percent risk with zero contribution from
22 you, with zero risk from you, the trust, to take the risk
23 of developing this property, getting the permits and
24 putting it in a developable state. And so at 2022, when
25 you get the property back, with zero investment, you will

1 unconditional lease, promising to do this and promising to
2 pay the rent till 2022, and the original Corps of Army
3 Engineers permit was denied. And through some superhuman
4 effort of Mel Hester that he'll testify about, we got
5 that reversed and the Corps eventually issued the very
6 first permit for dredging in August 1977.
7 The original authority was for 83,000 yards
8 to be dredged. They dredged over 160,000 in actuality.
9 The evidence will be that the import material that we
10 would have had to use to fill that property came from the
11 dredging. So if we didn't dredge we would have had to
12 import it. Somebody would have had to either dredge or
13 import to get this property excavation replaced. Once you
14 remove the 7 or 8,000 yards of cement tailings and
15 yardage, exported it, and then filled it up, and then
16 pre-loaded it, and then brought it up again, that's how
17 much dredging we were able to accomplish.
18 Now, looking at the property with its
19 characteristics as of October 1974 -- your value date,
20 however, is June 1, 1992. And as of June 1, 1992, the
21 evidence will be that there are impacts on value in 1972
22 which, similar to any appraisal you've ever done in your
23 life, you've considered the impacts of the surrounding
24 circumstances and the impacts of regulation on property --
25 MR. KELLING: Excuse me. For the record,

1 you said '72, you meant --
2 MR. INSLEE: In '92, yes. I'm glad you
3 caught that. Impacts and things that relate to value is
4 what we're all going to do here for the next two days, or
5 more. So as of June 1992, I want to bring to your
6 attention that the evidence is going to show that the
7 property, taking that visualization that I gave you, and
8 the photo log will depict that property in '74, that any
9 development of this property is going to require bank
10 stabilization, whether you determine it's a water-related
11 use or a water-dependent use or not. Either way, that bank
12 is going to be stabilized. And that's going to require
13 Section 404, Corps of Army Engineers permit, pursuant to
14 the Federal Clean Water Act. That's going to require
15 bulkhead design and either H beams or deposits of large
16 rock with reinforcement between them in order to obtain it.
17 And that's going to be a review process which even includes
18 review, as you well know, of the Indian tribes, because of
19 the fish down there, or lack of fish.
20 Number 2, it's going to be subject to 1992
21 to the State Model Control Act, MTCA. The cement
22 tailings are going to require professional remedial
23 investigation. And following agreement as to whatever
24 those remedial aspects may or may not be, a professional
25 feasibility study will then be done to address the cleanup

1 methodology. And that usually will be followed by a
2 cleanup agreed order or consent decree with the Department
3 of Ecology. And then the actual site cleanup can
4 commence.
5 In addition to Federal and State, the County
6 regulations include, of course, zoning, MH, allowing
7 manufacturing use, storage warehouse and container yard
8 uses. Shoreline and related regulations are impacting the
9 property. In your valuation date of 1992 you have a
10 200-foot ordinary high water mark of the Duwamish Waterway.
11 200 feet from the ordinary high water mark is subject to
12 restrictions imposed by King County Shoreline Management
13 Code, which implements the State's Shoreline Management Act
14 of 1971.
15 You know the first 200 feet is subject to
16 regulation, and whether or not, how much that development
17 that can take place in this property is in 1972 is going to
18 be dependent on whether or not it's a water-dependent or
19 water-related use. If it's a water-dependent or
20 water-related use, then some of those use restrictions
21 might be less strict. If it's not a water-dependent or
22 water-related use, then the less stringent approach would
23 not be taken. We'll have expert testimony on that subject
24 for you.
25 In addition to the Shoreline Management Act

1 setbacks, the setbacks for warehouse, container storage,
2 container yard operation is a minimum of 50 feet from the
3 ordinary water, high water mark. King County Code 2316170.
4 These will all be in that brief. You don't have to copy
5 down these citations.
6 In addition to the setback requirements
7 imposed by the King County Shoreline Management, there
8 will be the water surface restrictions. Bioswales, or
9 filter strips, will have to be put around the property
10 along the water side. If you take the 50-foot minimum of
11 the setback for shorelines, you'll find that an additional
12 15-foot setback will occur from that for a total of 65.
13 But within that 15 feet, the bioswale can be constructed
14 and the minimum bioswale here with setbacks from the top
15 of bank or the bioswale, which is just your drainage
16 around this property that's required by King County, will
17 mean that there's an effective setback from the water,
18 ordinary high tide, of a minimum of 100 feet.
19 And the reasonable, prudent lessee investor
20 and/or evaluator in determining what square footage of
21 this property is going to be left for you to value has got
22 to do that. That's just on the Duwamish Waterway side.
23 Because the west to east stream is also now regulated, the
24 code will require a 50-foot setback on either side of that
25 stream. That drains the 800 acres. And you have the same

1 bioswale restrictions.

2 So you've got 100 feet back from the stream

3 on an east-west direction, which will be considered. And

4 then in addition to that, because parcel D is that little

5 wing we're going to see in a minute that sticks out from

6 one side of the property, that absorbed both sides of the

7 100 side buffer, so that parcel D is essentially

8 meaningless from two aspects. One, it's completely

9 encumbered by buffers and restrictions, but also, you

10 can't cross the river to get to it unless you build a

11 bridge, because you can't culvert that stream in order to

12 gain access to parcel D, which is that small little wing

13 we're going to tell you about.

14 In addition, we're going to show you about

15 .9 acres of wetlands that exist on this property. And the

16 pictures depict it.

17 MR. SAFER: How much?

18 MR. INSLEE: .8.

19 MR. SAFER: .80?

20 MR. INSLEE: Yes, 8/10ths of an acre. So

21 basically those are the things -- and by the time you apply

22 those restrictions and the flood hazard restrictions and

23 the setback restrictions, I think you're going to conclude

24 that you got something just around a little under 5 acres

25 of the 11 acres to develop here.

1 And the reasonably prudent person looking at
2 this property under no compulsion to buy or sell would go
3 through the same ministerial things that I've just told
4 you about before he or she decides to buy.
5 So we've got five acres. And the upshot of
6 the lessee's position is going to be this. Once you
7 decide as a threshold decision, one, what the
8 characteristics of the property are, and number two,
9 decide what its highest and best use, once you make those
10 two determinations, and determine what is developable,
11 then I think you're going to come to the conclusion that
12 the five acres with the highest and best use, whatever you
13 determine it to be -- and just for sake of my illustration
14 let's say it's storage yard containers. I think you're
15 going to find the storage yard containers are no more than
16 5, 6, 7 or 8 cents a foot in the real world out there,
17 depending upon who's paying the real property taxes. And
18 I think you're going to find that with that market driven
19 restriction, the rent is already in excess of fair market
20 value.
21 MR. SAFER: Mr. Inslee, are you indicating
22 that rent level on a monthly basis?
23 MR. INSLEE: Yes. So annualize it out,
24 sure. So what you're going to find is, I think, that using
25 the best part of that 7, 7 and a half cents, the maximum

1 rent that can be derived from a reasonably prudent
2 subtenant or anybody using this property in the market is
3 somewhere around $15,000, $15,900 a month. That's the end
4 user rent, before taxes, debt amortization, developer fee,
5 overhead, before payment for the land use, or anything
6 else. And of course, the figures that Steve is mentioning
7 are substantially in excess of that.
8 So I think if those two threshold decisions
9 are made first, it might direct and reduce perhaps the
10 amount of comparability that you're going to try and find
11 in the 18 or 20 or 5 or 6 comparables that you eventually
12 think are comparables. Because that's going to be I think
13 a lid, so to speak, on this whole thing.
14 Now, I agree with Steve that the lease terms
15 should be made important, and he's referred to most of
16 the ones that I wanted to call to your attention, so I
17 won't repeat them, except we do call to your attention
18 that in this lease, the only minimum rent that you must
19 set is the rent set November 1, 1982.
20 For the reasons that I will point out to you
21 in the brief, the lease is very clear. There are no
22 minimums. You do not have to set the rent for this
23 property today based upon what the rent was in 1989 or what
24 it might be in 1995. The first time a minimum rent kicks
25 in under the terms of the lease is after the year 2000.

1 And some of the extensions that I will call to your
2 attention there say that when you get into those extension
3 terms, the terms of the rent will not be in excess of that
4 in the prior term, but that's not so today.
5 The lease clearly says that the minimum rent
6 will be the minimum rent set for December 1, 1982, and that
7 was -- pardon my memory, I think it's $4,976, some number
8 like that. We submit to you that your findings in this
9 case should be that there's no basis to go above that
10 minimum rent. And I agree that Paul Iverson made a
11 mistake. He set rent too high. I agree with counsel.
12 Absolutely.
13 Now, insofar as the escalators, this has
14 been a win-win situation. As I say, the lessee already
15 has done what it promised to do and the lessor's already
16 got, subject to the lease expiring, what it wanted, an
17 improved piece of property and rent. And I call to your
18 attention that the parties themselves built in escalators.
19 The rent started out at $300, escalated to $1,000 a month,
20 finally to $1,250 a month. It was then going to be
21 adjusted every five years. In '82, that is when that 4900
22 and change figure was set. In '88 it was set by
23 Mr. Iverson based on 7 percent of value and now it's going
24 to be set at 8 percent of value. And of course, that
25 connotes to a 14.29 percent increase by the parties

1 themselves, providing escalators.
2 So all I'm pointing this out to is the
3 evidence is going to show that the trust hasn't been taken
4 advantage of here. The parties' agreed to escalators have
5 been adhered to and we've never missed a lease payment.
6 The evidence will be that even though we're
7 not to consider rental from the property and it's well we
8 shouldn't, because the evidence will be that due to
9 siltation problems, that Duwamish Marina that presently
10 operates on the property has a short life. It's not going
11 to be able to dredge the harbor -- not the harbor, the
12 waterway.
13 This lawsuit against King County for
14 sedimentation, the evidence is going to show, failed, and
15 it's just a question of time before that silts itself out
16 of any usage. And that's the lessee's risk, you see, not
17 the lessor. Again, what the highest and best use is going
18 to be, the evidence which you consider it to be, it's our
19 position that it's either warehouse storage container or
20 storage property.
21 I think you're going to conclude, as I have,
22 at least, and you're certainly not binding on you, that
23 this is not a water-dependent or water-related use, because
24 there's no piers, no ability to dredge the piers. There's
25 three bridges between it and the Elliott Bay, each one of

1 which restricts navigable traffic up that waterway, which
2 is a privately owned waterway, as you know the history of
3 the commercial waterway district that set up Duwamish
4 Marina, and there's no ability to land or put docks or
5 things in there. Anybody would do that would be a waste of
6 time.
7 I think you're going to conclude, after you
8 get into it, hear the evidence, at least I think you would,
9 that probably the existence of the Duwamish Waterway as the
10 stream is an impediment to the value of the property for
11 the purposes of its highest and best use of warehouse
12 storage. I think you're going to find that more likely
13 than not, any warehouse or storage or container comparable
14 is the most comparable, if it's not really a water-related
15 use that this property's capable economically of
16 performing.
17 We suggest that to build into the system,
18 once you make a highest and best use decision, that's your
19 first decision. To build into the system comparables that
20 are water-related and then make adjustment unduly
21 complicates the appraisal process, which, although not
22 scientific, is a difficult scientific process to begin
23 with. Because why start with adjusting a lot of
24 water-related use properties and then trying to adjust them
25 back to a non-water related use, just because this property

1 is adjacent to a body of water?
2 Unless this is a water-related use or
3 water-dependent use property, there exists no rational
4 basis to go through that mechanics with the fraught of
5 failure or of error that it creates. Because otherwise I
6 have comparable we're going to have to go through and say,
7 all right, does it have a dock, how deep is the water, is
8 it dredged, was there toxics on the property, did they
9 have to fill it, and do all the things had from a
10 water-related use standpoint, as distinct from a warehouse
11 container use standpoint.
12 And so we think that the mistake that was
13 made was made since '82 and the property hasn't got a value
14 which justifies any increase in rent. And much the
15 converse, it should be reduced to its minimum rent.
16 Now, there's one thing that -- the prior
17 arbitration proceedings are not binding on this board in
18 any respect. And I certainly agree with counsel on that.
19 But I suggest to you the philosophy taken by both parties
20 at both prior proceedings is relevant, because what's
21 relevant is how the parties construed the lease is evidence
22 as to what they thought it meant.
23 What they thought it meant is obvious. In
24 both proceedings, '82 and '88, it was conducted after '88,
25 the parties went through and they got rid of all the

1 improvements. And the only difference of opinion between
2 counsel and Iverson and myself may be the methodology by
3 which you reduce this property back to a raw land state.
4 The effort there was made to just take off the total cost
5 of improvements of the lessee to get back to a raw land
6 state. And that was error, because it was 1974 costs. To
7 get it back to a raw land state, you should be using 1992
8 or 1988 costs. So that only complicated the factor.
9 Now, that concludes my general comments, and
10 I think that we're going to produce some evidence relating
11 to what that water use is or isn't. And we're going to
12 produce evidence from Jaddi Milligan, who were the
13 engineers back in '77 on this site, who will produce
14 evidence as to the quantity of material that was actually
15 utilized and had to be moved versus estimates.
16 We will have the engineer certify that what
17 the volumes were, based on his review and based on
18 Mr. Szmodis's actually being there at the time, providing
19 quantities. We'll have the engineer certify to you what
20 costs would be today of doing the same thing, only because
21 it's relevant, because any prudent investor looking at
22 this property on January 1, '92, would have to consider as
23 part of the feasibility study in contingency period, what
24 would be the cost to develop this property today?
25 And so those figures show that there's going to be about

1 $3.7 million just to put it into a container storage
2 usage, about $9 million plus to put it into a warehouse
3 facility.
4 Now, if you backtrack and disavow yourself
5 from this lease you'll say, oh, but that's all in now.
6 But you see, the philosophy of the lease was, you don't
7 get dime one for our investment over the next 50 years.
8 That's why we're willing to front load this property and
9 develop it from not just a pad state, from a sub pad, raw
10 land state, and the promises were that you wouldn't charge
11 us the rents based on our improvements.
12 So that's why it's fair, reasonable and
13 proper. And there's no undercurrent here of an unfair
14 lease. If anything, this has been extremely fair to this
15 lessor. There's no restrictions here that this lease put
16 on anybody. This was a very fair lease and everybody's
17 thus far gotten the quid pro quo value that they each were
18 entitled to. So that's why we'll produce evidence as to
19 current cost and production of putting this land into
20 shape, because that's what the parties would do in the
21 real world in evaluating what they'd lease this property
22 for, what they'd use it for.
23 Then we'll have an expert come in who
24 represents King County, and now in private practice, to
25 testify to these permit processes that I will have outlined

1 to you and you'll get in a few minutes. And then we'll
2 have testimony of the Duwamish Marina by declarations
3 and/or by their engineers as to -- or affidavits that were
4 already submitted in other cases to demonstrate that what
5 we said is accurate.
6 We'll have the historic records of the photo
7 log and the survey and the photos and relationships of this
8 property to the bridges that are in the area. And I think
9 that will give you then the base line to give you the
10 factual information or a good start on it that you're
11 going to need to determine what this raw land is worth in
12 1992.
13 Thank you.
14 MR. KELLING: I have three clarifications I
15 want to inquire about. You indicated what you thought a
16 proper rent might be, but in the lease it calls for an
17 appraisal of the fair market value of the land. What is
18 your figure that you're going to work with for the fair
19 market value?
20 MR. INSLEE: We'll say the fair market value
21 is zero, because today, nobody in his right mind would
22 build on it. They'd put a fence around it and forget it.
23 MR. SAFER: Is that your position?
24 MR. INSLEE: Yes. They'd put a fence
25 around it and forget it in the real word. So we're paying

1 the minimum rent of '82, which is the $4,900. Because in
2 reality, that's what happened.
3 MR. KELLING: So your figure you feel is
4 negative, or zero?
5 MR. INSLEE: Yes, when you apply the
6 economic factors that anybody has to apply today in
7 developing that property. That's why I say it's been a
8 win-win deal for the lessor. They've gotten a good value.
9 MR. KELLING: My second question is, you
10 mentioned there was no public access in '74.
11 MR. INSLEE: By public roadway.
12 MR. KELLING: Yes. There was no street
13 frontage, no --
14 MR. INSLEE: Lou?
15 MR. SZMODIS: There was to --
16 MR. INSLEE: Go ahead.
17 MR. SZMODIS: -- to parcel D, which was
18 South 96th, there was a roadway coming down into that, but
19 there was -- then you still had the stream.
20 MR. KELLING: Was that a city right-of-way?
21 MR. SZMODIS: I would assume so. I don't
22 know.
23 MR. KELLING: You don't know?
24 MR. SZMODIS: There was -- the access, I
25 believe on South 93rd, which would be to the north end of

1 the property, was just a dirt road, that you just came
2 through. And that shows on the photographs. And I would
3 assume both roads and their condition at that time show on
4 a photo log.
5 MR. KELLING: The photo log in the materials
6 that I was sent by Bruce Allen, there's some photographs
7 that apparently are from the photo log but they're copies.
8 MR. INSLEE: We've got the originals.
9 MR. KELLING: Do you have the originals --
10 MR. INSLEE: Yes.
11 MR. KELLING: -- that you will show? I don'
12 want to see them now. Later. But we'll get to look at
13 those?
14 MR. INSLEE: Sure.
15 MR. KELLING: All right. Okay. Those are
16 the only questions I had. Do you have any?
17 MR. ALLEN: No.
18 MR. KELLING: Thank you. I believe it's a
19 good idea to swear the witnesses as we go here. Or those
20 who are going to be witnesses. Perhaps we can do it all at
21 once.
22 MR. DiJULIO: Witnesses are going to come
23 and go. If you want to swear these two.
24 MR. INSLEE: Do it at the same time, I
25 guess.

1 MR. KELLING: Why not do everybody that's
2 here today?
3 MR. ALLEN: Do these become exhibits?
4 MR. KELLING: I think we'll need to find
5 out.
6 Do you solemnly swear that the evidence you
7 are about to give in this arbitration will be the truth,
8 the whole truth, and nothing but the truth?
9 MR. DICKMAN: I do.
10 MR. HESTER: I do.
11 MR. ANDERSON: I do.
12 MR. KELLING: Mr. DiJulio, do you want
13 to proceed?
14 MR. DiJULIO: I think it appropriate at this
15 time, if it please the panel, to identify the record and
16 begin with the documents that the panel already has and
17 then proceed to submit those additional matters that would
18 need to fill that out before we go on to the introduction
19 of evidence. And in that regard I guess I would ask that,
20 or just clarify that the arbitration submission agreement
21 is before you.
22 MR. KELLING: We were going to use numbers
23 for the lessor's exhibits and letters for the lessee's
24 exhibits, as I recall.
25 MR. DiJULIO: Yes. But there are certainly

1 exhibits that are already in your record, and I wanted to
2 identify those for Mr. Inslee and my purposes.
3 MR. KELLING: And for the record.
4 MR. DiJULIO: And for the record. So the
5 first document that I have identified is the arbitration
6 submission agreement.
7 MR. KELLING: All right. So we'll call that
8 Number 1?
9 MR. DiJULIO: Fine with me. 2 would be the
10 lease.
11 MR. KELLING: All right.
12 MR. DiJULIO: And I understand that you
13 already have copies of that?
14 MR. KELLING: I have been given a copy.
15 MR. DiJULIO: And I understand that the
16 other appraisers do as well? We don't need additional
17 copies?
18 MR. KELLING: No.
19 MR. DiJULIO: Okay.
20 MR. INSLEE: Does that have A attached to
21 it, the photo log?
22 MR. DiJULIO: I was going to propose, Evan,
23 that we identify A and the photo log as 3, since it is
24 separated.
25 MR. INSLEE: All right.

1 MR. DiJULIO: If there's no objection to
2 that.
3 MR. KELLING: So 3 would be the photo log?
4 MR. DiJULIO: Well, it's actually attachment
5 A.
6 MR. KELLING: Attachment A.
7 MR. DiJULIO: And the photo log. And I have
8 copies of that for the parties. For convenience, I've
9 reduced it to 8 and a half by 11.
10 MR. KELLING: Mr. Inslee, you asked if
11 Exhibit A was attached to the copy of the lease that I
12 have, and yes, it is.
13 MR. DiJULIO: In order to -- I think for
14 purposes of this, it may be attached, but that will also
15 serve as an introduction, then, to the photo log.
16 MR. KELLING: Yes.
17 MR. DiJULIO: Copies of which I'll now
18 provide.
19 MR. KELLING: Yes, it refers to that.
20 MR. DiJULIO: For purposes of your --
21 frankly, I think that these copies are as good or better
22 than the original log, and I'll leave that to you to
23 determine. First I would provide to you A-2.
24 MR. INSLEE: I have no objection. I'm going
25 to let him look at the originals.

1 MR. KELLING: These are very good.
2 MR. ALLEN: You were sent a copy of that,
3 too.
4 MR. KELLING: Yes, you did, you sent me a
5 copy. I didn't know whether these were color photos or
6 black and white at the time.
7 MR. ALLEN: 1974.
8 MR. DiJULIO: B-3. C-4 constituting
9 attached serial shots. Exhibit Page 5, including
10 photographs D, E, and F from the photo log. Exhibit 6,
11 photographs G, H, I, and J.
12 Off the record.
13 (Discussion off the record)
14 MR. DiJULIO: Exhibit 7.
15 MR. INSLEE: This is all still Exhibit 3,
16 but this is all Exhibit 7?
17 MR. DiJULIO: Well, that's the original.
18 MR. INSLEE: Okay.
19 MR. DiJULIO: That includes photographs K,
20 L and Exhibit 8.
21 MR. INSLEE: For the record, all of those
22 exhibits he just referred to are now composite Exhibit 3.
23 MR. DiJULIO: Off the record for a moment.
24 (Discussion off the record)
25 MR. DiJULIO: If it please the panel, the

1 exhibits to the lease and the photo log also include two
2 pages from a Group Four survey of 1976. For ease of
3 reference, we propose that the Group Four survey page be
4 identified as Exhibit 4.
5 MR. KELLING: Group Four is the name of a
6 company?
7 MR. DiJULIO: Survey company, yes. And I
8 have in this case, have one set for the panel, trying to
9 reduce the bulk of the documents.
10 Off the record.
11 (Discussion off the record)
12 MR. DiJULIO: Let me for purposes of further
13 expediting this identify and offer Exhibit 5, a general
14 area view of the site. And Exhibit 6 being the
15 generalized area map. And Exhibit 7, a generalized site
16 plan.
17 Now, also for purposes of identification,
18 does the panel have before it the appraisal of Mr. Safer
19 and the report of Mr. Allen, and are those exhibits before
20 the panel? I've been provided with both documents, and
21 Mr. Safer and Mr. Allen, I assume, have both documents.
22 MR. ALLEN: Yes.
23 MR. DiJULIO: 8 would be -- let's see, what
24 is the chronology? I guess Safer report, October 1992, I
25 believe. And 9 would be Allen report, August '93?

1 MR. KELLING: I assume both reports are made
2 for an effective date, though, of 1992?
3 MR. DiJULIO: That's my assumption.
4 MR. KELLING: All right.
5 MR. ALLEN: August '93.
6 MR. DiJULIO: And I have attached to -- just
7 for purposes of clarification, I have attached to my copy
8 of the Allen report an exhibit identified as Duwamish
9 Marina Industrial Park Site Improvement and Development
10 Costs (Original), as well as a four-page spread sheet
11 identified as Site Development Improvements - Cost
12 Estimate, prepared by Milligan Jaddi,
13 J A D D I, Inc.
14 MR. SAFER: What was the last one?
15 MR. DiJULIO: Four pages of a spread sheet
16 of site development improvements, cost estimate prepared by
17 Milligan Jaddi. Is that correct?
18 MR. KELLING: None of that sounds familiar.
19 MR. INSLEE: Is that part of your report,
20 Bruce?
21 MR. ALLEN: It's part of the report. It is
22 in the report.
23 MR. INSLEE: It is in there?
24 MR. SAFER: I don't have my copy. Is there
25 a date on that?

1 MR. DiJULIO: January 15th, 1993.
2 MR. INSLEE: What date does that refer to?
3 Milligan?
4 MR. DiJULIO: Milligan is January 15th,
5 1993. The Allen report is August 1993.
6 MR. ALLEN: Is this part of my report,
7 Exhibit 9?
8 MR. DiJULIO: I am assuming it is.
9 MR. ALLEN: So it's not a separate exhibit?
10 MR. DiJULIO: That's still part of 9. I
11 just wanted to clarify what is part of the record in this
12 proceeding.
13 MR. ALLEN: It should be in everyone's copy
14 of the report. If it's not, we can furnish the
15 information.
16 MR. DiJULIO: I am not aware of any other
17 document at this point that is part of the panel's file. I
18 stand to be corrected.
19 MR. INSLEE: I can't think of any, either.
20 MR. ALLEN: The David Evans --
21 MR. SAFER: Yes.
22 MR. ALLEN: -- information that Mr. Safer
23 submitted?
24 MR. DiJULIO: Yes, but I thought that we
25 would identify that and give it an exhibit through the

1 witness, since it's probably easier to do it that way.
2 MR. ALLEN: Okay. It was exchanged
3 between --
4 MR. DiJULIO: Yes.
5 MR. ALLEN: Okay.
6 MR. KELLING: Would you all like to take a
7 five-minute break, just to stand up and --
8 (Recess)
9 MR. DiJULIO: Anything further before we
10 proceed?
11 MR. KELLING: I can't think of any housework
12 to do.
13 MR. DiJULIO: I think for purposes of
14 expediting this, I'd like to call as my first witness Mel
15 Hester to go to the lease exhibit and identify the sites
16 from which Arbitration Exhibit 3 photographs were taken.
17 So I'll call at this time Mr. Hester.
18
19 MELVIN HESTER,
20 having been previously sworn, testified as follows:
21
22 D I R E C T E X A M I N A T I O N
23 BY MR. DiJULIO:
24 Q. Will you please state your full name?
25 A. Melvin Hester.

1 Q. Spell the last name, please.
2 A. H E S T E R.
3 Q. And you're one of the lessees, partners in the
4 lessee's group, is that correct?
5 A. Yes.
6 Q. And did you cause in, sometime in 1977, to take
7 photographs of the premises that are the subject of this
8 lease?
9 A. Yes.
10 Q. I'm going to call your attention, Mr. Hester, to
11 an exhibit that has been admitted by the panel as Number 4,
12 being a large survey page identified as Boundary and
13 Topographic Survey, Duwamish Marina, Group Four, Inc. Are
14 you familiar with that?
15 A. Yes, I am.
16 Q. And is that an exhibit to the lease?
17 A. Yes, it is.
18 Q. And does that exhibit identify particular
19 locations from which a photo log was prepared?
20 A. That's correct.
21 Q. If I could ask you, Mr. Hester, to go up to the
22 exhibit, please, since the appraisal panel may not be able
23 to see that far. I just would ask you to point out first
24 where Exhibit A-2 was taken and what view that depicts.
25 A. A-2 is right here. A-2 is from the southwest

1 corner of the property, from this little piece of the
2 property that extends out here. And it's looking basically
3 north.
4 Q. And to the best of your recollection, were you
5 standing on or near the property line at that time when you
6 took that photograph, or series of photographs?
7 A. I must have, to the best of my recollection. I
8 was in the corner of the property.
9 Q. Thank you. Exhibit B-3 is a two-page serial
10 photograph. Would you identify where that shot was taken,
11 please?
12 A. Approximately here, which was along the bank,
13 approximately on the middle east side of the property. And
14 my camera was, on this particular photograph, was pointing
15 southwest and this angle was pointing northwest.
16 Q. You were standing at that time close to the bank
17 of the Duwamish Waterway, is that correct?
18 MR. KELLING: May I interrupt for a moment?
19 Going back to the photograph A in the southwest corner,
20 South 96th Street, what was the condition of that street
21 when the property -- in '74?
22 THE WITNESS: It was about a 30-foot
23 street. Delta Marine later on, about 10 or 15 years,
24 widened it to what it is today, and then widened it again,
25 but it was about a 30-foot.

1 MR. KELLING: It did exist?
2 THE WITNESS: It did exist.
3 MR. KELLING: All right, thank you.
4 THE WITNESS: For recollection, this was a
5 wooden bridge.
6 MR. KELLING: Okay.
7 THE WITNESS: It's hard to depict, but that
8 was a wooden bridge over the stream.
9 MR. SZMODIS: You didn't drive on it?
10 THE WITNESS: You didn't drive on it, but
11 you walked over it.
12 MR. SZMODIS: I didn't drive over it,
13 either.
14 MR. DiJULIO: Any other questions about
15 Exhibit A?
16 MR. KELLING: No.
17 BY MR. DiJULIO:
18 Q. The question, Mr. Hester, that I left you with,
19 was your position when you took the photographs identified
20 on Arbitration Exhibit 4 at point B, was your back to the
21 waterway at that point?
22 A. Yes, to the best of my recollection, yes.
23 Q. On the first page of that exhibit, would you
24 briefly describe the improvements on the site as it existed
25 then?

1 A. All of the white material that you see there is
2 the cement tailings, and there was, approximately here,
3 someone had laid a concrete pad. Right here.
4 Q. Still looking at photograph B?
5 A. This way, okay. Basically there were no
6 improvements other than the white stuff you see as the
7 cement tailings.
8 MR. KELLING: You refer to it as cement
9 tailings. I'm not familiar with that term.
10 THE WITNESS: A residue from a cement plant
11 MR. KELLING: Oh, all right. Thank you.
12 THE WITNESS: -- would have been dumped
13 there. That is, that was the top of a tugboat that had
14 been dumped there. The building you see which appears to
15 be a building is actually the wheel, that is the
16 wheelhouse of a tugboat.
17 MR. KELLING: It looked like that.
18 THE WITNESS: Dumped on the property which
19 we in turn tore apart and hauled to the dump. It's not a
20 building. The property had been used as a dump site for
21 tearing apart. It was scattered full of the internal
22 workings of old tugboats. It was a bit of a junkyard, a
23 place for people to dump stuff.
24 MR. DiJULIO: Any questions about Exhibit B
25 from the panel?

1 MR. ALLEN: How about the second page?
2 Is that a northerly shot?
3 THE WITNESS: That is looking this way.
4 MR. ALLEN: Okay.
5 THE WITNESS: Looking toward the northwest.
6 BY MR. DiJULIO:
7 Q. Mr. Hester, calling your attention to Exhibit C,
8 would you please describe the series of photographs taken
9 from point C on the site?
10 A. Well, it's 180 degrees -- on the first page you
11 see a little bit of the concrete pad. This again is junk
12 that had been deposited on the property by somebody.
13 Q. That's a view approximately south and east?
14 A. I am looking now southeast. The stiff leg you
15 see over here is actually Delta Marine.
16 Q. Stiff leg meaning a boom or crane type structure?
17 A. To lower a boat in the water.
18 Q. That's not on the subject property?
19 A. Not on the property, that is over in Delta
20 Marine. You go to the next page, the building you see
21 here, which is some kind of a shed, was on Delta Marine.
22 That shed was not on our property.
23 Q. What direction is that photograph?
24 A. I'm looking south. The debris you see is, as I
25 mentioned earlier, was stuff that had been just -- it was a

1 vacant piece of property, it was an easy place to pull a
2 truck up at night and dump it.
3 MR. KELLING: Delta Marine was in business
4 in '74 on that location?
5 THE WITNESS: Right. Correct.
6 A. Page 3 is actually looking almost due west.
7 Again, the concrete pad is this concrete pad here. The old
8 wheelhouse from the tugboat, or barge. The concrete
9 tilt-up building you see is actually Delta Marine's. The
10 next photo is looking due north.
11 MR. DiJULIO: Any questions?
12 MR. ALLEN: What's the structure in the far
13 right corner of that last one?
14 THE WITNESS: On the far right is -- it was
15 an old -- I don't know the technical term of it.
16 Basically it was like a ramp that you could lower and
17 raise.
18 MR. KELLING: For loading barges or things
19 of that sort?
20 THE WITNESS: You would take a barge at high
21 tide with a tug on it and push it through the mud and then
22 you would lower the ramp in it and then you could pull it
23 out at high tide.
24 Q. Handing you a further part of this deposition
25 exhibit that's identified as Exhibit 5, it has three

1 photographs, D, E and F. Could you point out for the
2 arbitrators where those were shot, please? And it may be
3 on the next page of the exhibit. Let me get that out.
4 A. Photograph Exhibit 5, photograph number D, was
5 actually taken off the property. If you were to go up, I'm
6 saying approximately a half a block, on what is now 93rd,
7 which would put us up in here somewhere, the photograph is
8 taken --
9 MR. KELLING: Easterly?
10 A. -- easterly. And that was basically to -- this
11 property backed up to what was, you can see was basically a
12 junkyard. And that was the dirt road path that, how you
13 got all the way from -- I can't tell you the street, if you
14 go about three blocks to four blocks.
15 MR. KELLING: 14th or 16th?
16 A. That was basically the road. F is a photograph
17 taken from approximately here, just inside the property,
18 again looking west. And E was taken just off the property
19 line, basically looking east onto the property.
20 MR. SAFER: Mr. Hester, you said what is now
21 93rd and presumably South 95th, also. Back in, certainly
22 this survey was 1976, were those public right-of-ways at
23 that time?
24 THE WITNESS: I have no idea. They were --
25 MR. SAFER: They were dirt roads, but --

1 THE WITNESS: They were paths. They were
2 not -- I can tell you they were not maintained. Whether
3 they were public right-of-ways, I don't know. But they
4 were not maintained. When I say they're dirt roads, they
5 were not maintained dirt roads.
6 MR. KELLING: They subsequently have been
7 used as roads?
8 THE WITNESS: They are now roads, county
9 roads. But at the time they were not maintained, they were
10 basically paths. In other words, the County did not
11 maintain the path. It wasn't a real dirt road. Didn't
12 have a ditch, it wasn't graveled, it was just a path.
13 MR. KELLING: In '74 was this in the county?
14 THE WITNESS: Yes, it was.
15 MR. DiJULIO: For purposes of clarification,
16 I would offer a stipulation that property was and has
17 continued to be within unincorporated King County. I don't
18 think there's any dispute as to that, Mr. Inslee.
19 MR. INSLEE: I don't how you get out of it.
20 MR. SAFER: You'd like to get out of it?
21 MR. INSLEE: No.
22 THE WITNESS: You asked a question about
23 South 95th. It didn't exist.
24 MR. SAFER: As a road? Even though it's on
25 the map?

1 THE WITNESS: Didn't exist.
2 MR. ALLEN: Excuse me. South 93rd sets a
3 public right-of-way, you have an easement right over it and
4 I don't recall in legal description any mention of
5 easement. I assume we must have public access to the
6 corner property.
7 MR. KELLING: Up at the northwest corner.
8 MR. DiJULIO: Just for the record, is the
9 court reporter identifying the questions just as the
10 arbitration panel or by the individual arbitrators?
11 (Discussion off the record)
12 MR. DiJULIO: Any other questions about
13 Exhibit Page 5? Okay.
14 BY MR. DiJULIO:
15 Q. Mr. Hester, I'm handing to you now what is
16 identified as Exhibit Page 6 with a series of photographs.
17 Just for purposes of clarification, were these shot on the
18 same day or at a different time? They're color
19 photographs, the other ones appear to be black and white.
20 Do you remember if they were taken the same day?
21 A. I don't know.
22 Q. Would you please describe where those various
23 photographs were taken?
24 A. G -- Exhibit 6, G was taken approximately here.
25 And was going, shooting, which would be south. Where you

1 see the boats moored are approximately, approximately here.
2 MR. INSLEE: Where?
3 THE WITNESS: Approximately here.
4 Q. Would that be considered the turning basin area?
5 A. No. That's where -- that was the end of Delta
6 Marine's -- Delta Marine has basically what I guess you'd
7 classify as a jetty out into the river. And that was at
8 the end of their jetty they had filled out there.
9 MR. KELLING: Is the mud flat in the
10 photograph G on the property?
11 THE WITNESS: Correct. Well, no, I can't
12 tell you how much -- the mud flat goes out to almost the
13 navigable portion of the river.
14 MR. KELLING: Yes?
15 THE WITNESS: And we're approximately 175
16 feet in, so the mud flat goes out beyond the property.
17 MR. KELLING: Oh.
18 THE WITNESS: Substantially.
19 MR. KELLING: All right.
20 THE WITNESS: The property line actually, to
21 answer your question, the property line goes well inside
22 the mud flat. Approximately here. Not even out to the end
23 of the jetty. I call it a jetty, I don't know what you'd
24 call it. Landfill, jetty, sticks out.
25 MR. ALLEN: You're pointing kind of to the

1 crane, would that be --

2 THE WITNESS: If you use the crane as the

3 basis and then come north from there, that is approximately

4 the property.

5 MR. SAFER: Could you go to the map and show

6 where you think that crane is in relation to the corner of

7 your property?

8 THE WITNESS: It's right out here.

9 MR. DiJULIO: The witness is pointing

10 to an area on the southeast corner of the exhibit, just

11 below, marked 998.283.

12 A. If you distinguish between, there's actually --

13 there's -- I'm distinguishing what is called a stiff leg

14 and you are distinguishing a crane. The crane is on the

15 outside. I'm distinguishing the thing that looks like a

16 triangle. That is the stiff leg.

17 So if you take the right, which would be the

18 right side of the picture, the right, the bottom of the

19 right side of the stiff leg, that is what I'm referring to

20 as approximately where the property line is, not out where

21 the crane is. The crane just goes up in the air. The

22 stiff leg is the three-legged thing.

23 MR. DiJULIO: Any further questions about

24 G?

25 Q. Mr. Hester, you took a photograph Exhibit A, is

1 that correct?
2 A. Correct.
3 Q. Would you describe the location where that was
4 taken from and the area of the photograph?
5 A. H is approximately, was here. And is shooting,
6 what I would say is almost due east.
7 MR. KELLING: Out into the channel? Or the
8 navigable -- toward the --
9 A. To put that in perspective, the barge across
10 the river --
11 MR. SAFER: That's the barge?
12 A. That barge across the river is sitting in the
13 navigable portion of the river.
14 Q. And there's an Exhibit I.
15 A. I is basically the same position as H, but in
16 this particular case, is looking approximately due south.
17 And due south is, if you look at this area here that's all
18 built up, that is the approximate outlet for the stream.
19 If you look carefully, you can actually see some running
20 water. That's the stream outlet.
21 MR. KELLING: And photograph H, is that part
22 of the stream that was referred to by Mr. Inslee, in the
23 foreground?
24 THE WITNESS: You'll have to point
25 exactly --

1 MR. KELLING: Left of your thumb.
2 THE WITNESS: This?
3 MR. KELLING: Yes.
4 THE WITNESS: Well, no. Actually, the
5 stream is meandering. It's here and it's going back this
6 way and then it's coming back this way and then it's going
7 that way.
8 MR. SAFER: Mr. Hester, on the map itself,
9 is the stream identified as the drainage ditch? Is that
10 the stream?
11 THE WITNESS: Correct.
12 MR. SAFER: Within this channel is the
13 stream?
14 THE WITNESS: That is the stream, yes.
15 MR. SAFER: That's what I thought.
16 THE WITNESS: You can see in this picture
17 better how the water is coming out of the stream and
18 meandering.
19 Q. Referring to Exhibit Photograph J?
20 A. Correct.
21 MR. DiJULIO: Any other questions about H?
22 Or excuse me, I?
23 Q. Again, referring to Exhibit Page 6, where was
24 photograph J shot?
25 A. J was shot -- J was shot here, and that is

1 looking northeast.
2 Q. J is identified on the exhibit as a wood dock.
3 And is that the same wood dock that is depicted on
4 photograph Exhibit I?
5 A. No. It's -- this is an apron pier.
6 Q. It's identified on the exhibit as a wood dock.
7 But it is considered an apron pier?
8 A. (Nods head). This is looking approximately
9 north, it may be almost due north or due east, out over the
10 cattails. These are -- in the distance you will see the
11 greenery, those are all cattails. That's what almost cost
12 us, one of the major things which almost cost us our
13 permits. That was -- that's where the blue herons lived.
14 MR. SAFER: In 1976?
15 THE WITNESS: Pardon me?
16 MR. SAFER: You made a statement about the
17 cattails being part of the permit process?
18 THE WITNESS: Correct. Yes. During the
19 permit process, that's what -- that was one of the major
20 reasons, one of the reasons we got turned down, was that in
21 those cattails, in that wetlands, were home for blue
22 herons, and much to my chagrin, happened to fly in there
23 when we were standing there with the Corps of Engineers
24 ecologist.
25 MR. SAFER: It wasn't very well scripted.

1 THE WITNESS: If I had had a gun I could
2 have -- if looked them the other way I would have shot
3 them. But the timing was not perfect.
4 Q. Exhibit Page 7 has two photographs, K and L.
5 Would you briefly describe where they were shot from in the
6 area that's depicted?
7 A. K is shot at the approximate north edge of the
8 stream, looking northeast. If you look clear at the top of
9 the picture, the top of the picture out here, that
10 references the basically outside or what is supposed to be
11 the navigable portion of the river. At least in theory.
12 Q. The witness is pointing to elevation marked 16.9
13 at the top of the exhibit.
14 Photograph L, please?
15 A. Photograph L was standing -- Manson Construction,
16 this was during the Alaska pipeline, and Manson
17 Construction, the neighbor's property jetted out almost --
18 very similar to Delta Marine's, jetted out almost to the
19 navigable portion of the river. And they had built, at
20 that time in 19 -- early '70s, they had built a million
21 dollar concrete apron pier to load and offload materials
22 going to Alaska. And I was standing on that apron.
23 MR. ALLEN: How far north of the north
24 property line are you?
25 THE WITNESS: It's quite a distance. I'm

1 hesitating because I can't tell you whether it's 25
2 yards --
3 MR. ALLEN: Couple hundred feet?
4 THE WITNESS: I could measure it today for
5 you.
6 MR. ALLEN: Then is this protrusion order to
7 the Duwamish, is that your property then?
8 THE WITNESS: That is our property.
9 MR. ALLEN: Okay. That is the cattails
10 from --
11 THE WITNESS: That is the indicator cattails
12 from the --
13 MR. ALLEN: -- the other side?
14 THE WITNESS: -- other side.
15 Q. The last two photographs are Exhibits M and N.
16 Those are probably on the other page, Exhibit 1-A. The
17 second page of the survey.
18 A. M is standing inside the northwest corner of the
19 property, and the angle of the photograph is shooting east.
20 N is standing on again the northeast, approximate northeast
21 corner of the property and the photograph is shooting
22 south. The concrete building that you see is Delta Marine.
23 MR. SAFER: Mr. Hester, the portion of the
24 survey that shows the 60-foot access easements, that's a
25 continuation of South 93rd Street?

1 THE WITNESS: No, I don't believe so.
2 MR. SAFER: It's part of your property in
3 total?
4 THE WITNESS: Yes, I believe so.
5 Q. You can have a seat, Mr. Hester, thank you.
6 Handing to you again what you've discussed
7 from Exhibit B-3, photographs standing approximately at the
8 middle of the site, looking due west, and you identified in
9 that photograph some lighter colored materials as tailings
10 from cement activity, is that correct?
11 A. Yes.
12 Q. Now, has the Duwamish Marina group caused or have
13 caused in the past the testing or analysis of that
14 material?
15 A. Not to my recollection.
16 Q. And you're aware of no scientific or chemical
17 analysis of that material, is that correct?
18 A. No.
19 MR. DiJULIO: I have nothing further for
20 this witness at this time.
21
22 C R O S S E X A M I N A T I O N
23 BY MR. INSLEE:
24 Q. Mel, if you wanted to test it, could you go find
25 out where you dumped it and test it?

1 A. There's still enough under there.
2 Q. Okay.
3 A. Didn't all go away.
4 MR. INSLEE: No further questions.
5 MR. KELLING: I don't have any questions of
6 the witness at this point, but -- are you going to be here
7 tomorrow?
8 THE WITNESS: Correct.
9 MR. KELLING: Thank you.
10 MR. INSLEE: And I'm not going to
11 cross-examine him on our case.
12 MR. DiJULIO: At this point, then, I'm going
13 to take these down and call Rick Dickman.
14
15 RICHARD ALEX DICKMAN,
16 having been previously sworn, testified as follows:
17
18 D I R E C T E X A M I N A T I O N
19 BY MR. DiJULIO:
20 Q. Mr. Dickman, reminding you that you've been sworn
21 under oath, would you please state your full name for the
22 arbitration panel?
23 A. Richard Alex Dickman.
24 Q. Spell your last name.
25 A. D I C K M A N.

1 Q. And what is your job or occupation, Mr. Dickman?
2 A. Professional land surveyor.
3 Q. And are you licensed as a professional land
4 surveyor in the state of Washington?
5 A. Yes, I am.
6 Q. How long have you been so licensed?
7 A. In Washington?
8 Q. Yes.
9 A. Since 1980 -- no. Since 1986, I believe.
10 Q. Were you licensed in other states prior to moving
11 to the state of Washington?
12 A. Colorado previous to that.
13 Q. Were you licensed in other states prior to moving
14 to Washington?
15 A. Yes, in Colorado.
16 Q. And do you still maintain your certificate in
17 Colorado?
18 A. Yes.
19 Q. Are you licensed in any other states?
20 A. No.
21 Q. Who are you currently employed by?
22 A. David Evans & Associates.
23 Q. When were you employed by David Evans &
24 Associates?
25 A. It's been five years now, so 1989.

1 Q. And were you employed in Washington State prior
2 to employment by David Evans?
3 A. Yes, for two years at a company called
4 Geodimensions.
5 Q. What is your title with David Evans?
6 A. Senior surveyor.
7 Q. And what does a senior surveyor do?
8 A. Basically manages projects related to survey,
9 prepares estimates, proposals, interacts with clients.
10 Q. Was David Evans & Associates engaged by Seafirst
11 Bank to prepare some information regarding aspects of the
12 subject site?
13 A. Yes, but at the time it was Security Pacific.
14 Q. Okay. And do you remember who you were engaged
15 by?
16 A. Shirley Aguilira.
17 Q. What were the tasks that the bank, using the term
18 generically, asked you to perform?
19 A. It was fairly simple in the relative scheme of
20 things. We were asked to compare the present surface
21 conditions, not the improvements, but the plane of the
22 surface in its present condition with how it existed based
23 on the Group Four 1976 survey. And there was supposed to
24 be -- the relative line, we choose to compare those
25 conditions were, were the uplands, those lands higher

1 in elevation than the line of mean higher high water.
2 That line was picked, number one, due to
3 being a more conservative line than ordinary high water,
4 and second, is that the mean higher high water is a line
5 to the outward limits of the Corps of Engineers.
6 Q. And was there existing information that you used
7 to assist you in your work?
8 A. The Group Four survey was our basis. And then we
9 had an ALTA survey and a lot line adjustment of the
10 boundary by Townsend Chastain.
11 Q. Did you evaluate, Mr. Dickman, the entire
12 premises or just one parcel of the premises?
13 A. Parcel A only. I did have a second task. And
14 that was to show, try to delineate with what research I
15 could find, recover, the relative mean higher high water
16 lines by different surveys.
17 MR. INSLEE: Mean what?
18 THE WITNESS: We were trying, I was
19 trying --
20 MR. INSLEE: The technical word, mean what?
21 A. Mean higher high water. And that's defined --
22 Q. Let's spell the phrase for the court reporter.
23 A. Mean, M E A N, higher high. There's two words.
24 Higher high water. And what that is, it's the average
25 elevation of the higher of the two daily high tides.

1 Okay?
2 Q. You were describing what the second task was?
3 A. Oh. And that was to recover, if I could, any
4 historical surveys -- when I say historical, just surveys
5 that were prepared in the past, whatever date they may
6 be -- about the relative location of that particular line.
7 How it's situated within the 1950s or 1960s, whatever it is
8 I could find.
9 Q. Did you prepare an exhibit based upon your
10 evaluation?
11 A. I prepared a work sheet.
12 Q. And --
13 MR. DiJULIO: Let's go off the record for a
14 moment.
15 (Discussion off the record)
16 BY MR. DiJULIO:
17 Q. Would you please identify Exhibit 10?
18 A. This mounted sheet sitting on top of the chair
19 here.
20 Q. And what is the underlying base map that you're
21 using, or base information? Where is that from?
22 A. What -- I don't quite follow you.
23 Q. You made marks on this exhibit, is that correct?
24 Certain of these marks are your marks?
25 A. Correct.

1 Q. And was this an original document prepared by
2 David Evans & Associates?
3 A. Well, it's the result of a topographic survey
4 prepared on the site.
5 Q. Who prepared that?
6 A. David Evans & Associates.
7 Q. Would you describe, then, for the appraisal
8 panel, the various lines and markings on the exhibit?
9 A. Okay. All these little dots are spot elevations
10 where we just happened to take a survey shot. The -- we
11 had to -- well, we looked and saw that the Group Four
12 original datum, which is a vertical datum, which is a
13 plane, everything elevations are derived above and below
14 this particular published datum, was based on the Army
15 Corps of Engineers.
16 Q. Would you spell "datum" for the court reporter,
17 please?
18 A. D A T U M.
19 Q. Thank you.
20 A. So what we had to do was to make sure that we
21 were consistent. We had to try to get on to the same
22 datum as what Group Four was.
23 Q. Had the Group Four survey also identified
24 elevations?
25 A. Yes, they had.

1 Q. Thank you. Go ahead.
2 A. The -- in the process, the original benchmarks
3 used by Group Four had been washed away or removed. We
4 got -- we were -- we did some work to verify that we were
5 on what Group Four was using, went out, prepared a
6 topography, found the rebar and cap set by Townsend
7 Chastain in their ALTA survey and lot line adjustments, so
8 we had the correct relationship horizontally as well as
9 vertically.
10 This left line, this left yellow line, what
11 that is is the top of the bank, I hesitate to say top
12 riprap because we were not engaged to state what kinds of
13 improvements were on site. It was just the surface plane
14 only.
15 Q. When you say top of bank, that was as of the time
16 of your survey?
17 A. At the time of our survey in August of 1992.
18 Q. Okay.
19 A. This line was the edge of the water that we tide
20 out, it was at 8 o'clock in the morning on August 7th, and
21 this line is a variation because of the tides. The right
22 yellow line is a line derived by elevation, it's a zero
23 elevation line based on City of Seattle datum.
24 Q. Would you describe what, for a non-surveyor, what
25 a zero elevation means?

A. Zero elevation, again it's related to a particular datum. In this case it would be the City of Seattle. There are datum conversion tables that are published. Every surveyor in town has them. And in this particular case, zero elevation, the City of Seattle, equals a minus 1298 Corps of Engineers. And this is a fixed line but it's fixed by line of elevation.

Q. That does not correspond with any physical improvement or physical condition?

A. No. It's elevation only. And again, that is computed based on published benchmarks, which is a known point of elevation published that, maybe would be -- maybe not on this particular site, but something we would have to locate in the field based on City information, we were on a differential loop onto the site to where we knew what the elevations were of our survey control.

We take these shots, we have to interpolate, because we have an elevation above, elevation below, a known horizontal distance between the two, therefore by proportion you can determine where a zero elevation would situate.

Okay, the green line is, the only line that really deviates from the zero elevation. The zero elevation is also within a foot of elevation, a foot 2, of mean higher high water.

1 Q. When you say foot 2, you mean --
2 A. 1.2 feet.
3 Q. -- 1.2 feet of mean higher high tide? Is that
4 correct?
5 A. Zero elevation is 1.2 feet higher than mean
6 higher high water. So we're actually using a more
7 conservative line by staying with the zero. But -- and the
8 reason we picked that is because of the other surveys I was
9 able to find, they all reference out to zero elevation,
10 City of Seattle datum. The only survey that deviates from
11 this is this green line, which is a 1957 Ruskin Fisher
12 survey and calls out the top of bank.
13 Q. Would you spell Ruskin Fisher?
14 A. R U S K I N, F I S H E R. Two words.
15 Q. Is that a survey of record that you found?
16 A. Surveys before 1973 were not required to be
17 recorded. In fact, surveys since 1993 only went -- '73,
18 excuse me, only had to be recorded when delineating a
19 boundary. This is data that I recovered during my research
20 process.
21 Okay, the orange line is a zero elevation
22 line per the City of Seattle data prepared by Duffy, Lawver
23 & Kumpf in October of 1962.
24 Q. Spell --
25 A. Spell it?

1 Q. Yes, please.
2 A. Duffy, D U F F Y, L A W V E R, Kumpf, K U M P F.
3 And this line was fixed on their surveys.
4 Okay, the pink line --
5 MR. INSLEE: Would you mind asking him
6 what -- he said their line established, what, top of bank?
7 A. No, no. The green line was the top of bank line.
8 That's the only one that deviated. The other lines are all
9 zero elevation City of Seattle datum. So the orange line
10 is a zero elevation. The pink line, again, is a zero
11 elevation line established by the City of Seattle on an
12 aerial topographic map prepared in 1956.
13 Okay, then the other -- the two blue lines
14 are both off the Group Four topographic map, which was just
15 on the board behind us here.
16 Q. That's Exhibit 4 in this matter?
17 A. Yes. And this line here was their -- I'm not
18 sure without really looking at them, which I'd like to do
19 before I --
20 Q. If you need to refresh your memory, go ahead.
21 A. Okay, they're calling this -- Group Four's
22 calling this zero contour mean lower low, but then again
23 there is that conversion. And this blue line to the left
24 is a 12.5 contour mean higher high water, which is
25 elevation for the Army Corps of Engineer datum, but closely

1 resembles the zero elevation City of Seattle datum.
2 Q. In addition to the survey information, did you
3 consider the elevations identified by Group Four in its
4 survey?
5 A. Did I -- pardon me?
6 Q. Consider the elevations by Group Four in its
7 survey?
8 A. Only for comparison's sake.
9 Q. And with the information that you had, were you
10 able to determine the appropriate location of the top of
11 bank in 1974?
12 A. Yes. This survey here is -- there's no reason
13 for me to doubt it. It has adequate survey information,
14 there's --
15 MR. INSLEE: Which exhibit are you referring
16 to?
17 A. Exhibit 4. There is a line of spot elevations to
18 the left of the line that they call 12.5 contour mean
19 higher high, that on a 20 scale, this is maybe 10 feet to
20 the left that is approximately six to seven feet higher in
21 elevation. If does not say top of bank, but go to the left
22 of that, to the west, the ground is relatively level. If I
23 go to the right there's a sharp decrease in elevation,
24 meaning showing a slope.
25 Q. Would you briefly describe, then, or by pointing

1 to Exhibit 10, show where the approximate top of bank was
2 in 1974 and where it is today?
3 A. Okay. Then it would be approximately, the line,
4 probably something, about 10 feet. This is a one inch
5 equals 20 foot scale drawing.
6 Q. Exhibit 10 is a 1 to 20 scale?
7 A. Yes. So it would be half an inch roughly to the
8 left of this, left blue line. And the top of bank now as
9 it currently exists is this left yellow line.
10 Q. And is the area between those two lines the area
11 that was, based upon your site review, the area developed
12 for the marina?
13 A. Correct.
14 Q. And with that information, did you calculate or
15 did you have calculated the change in upland square footage
16 of the parcel A?
17 A. Yes, I did.
18 Q. How did you do that?
19 A. Well, the overall boundary was computed for area
20 based on the Townsend Chastain. I don't believe there's
21 any dispute on that. This line here we physically located,
22 so by trigonometry I was able to, angles and distances, you
23 determine the horizontal location of this. And you can
24 compute around the boundary to determine area for what I
25 would call the uplands. And for all future references,

1 uplands does not mean usable surface area, it only means
2 lands higher in elevation than a line of mean higher high
3 water.
4 Okay, these other lines are a bit more
5 arbitrary, only in -- to the extent that I had to scale
6 these on. These were not obviously surveyed by us, these
7 were shown in their close proximity by scaled methods. To
8 compute the area of Group Four of the uplands area, is
9 similar to how I computed the uplands, which we actually
10 physically located, except that I had -- once I put the
11 Group Four scaled line on, I then had to just compute,
12 established points based on scaling distances, angle
13 points within that line, and then I was able to compute
14 the area by the same method.
15 Q. What did you do after you calculated that
16 information?
17 A. I gave it to the bank.
18 Q. And what was your opinion as to the upland land
19 in 1974 and what was the balance then?
20 A. There was far greater upland land in 1976 than
21 there currently exists today.
22 Q. And did you conclude that the total size of lot A
23 was approximately 191,739 square feet?
24 A. Yes, I did.
25 MR. INSLEE: I'm sorry, would you repeat

1 that?

2 MR. DiJULIO: 191,739.

3 Q. And the uplands portion, based upon the Group

4 Four survey, was 128,195?

5 A. Correct.

6 Q. Leaving the remainder of the site, 63,544,

7 63,544?

8 A. For submersed lands, yes. And that's just by

9 definition, those lands covered and uncovered by tide.

10 Q. Now, did you engage as part of your work other

11 consultants to provide you with information regarding

12 parcel A?

13 A. Yes, I did.

14 Q. Who was that?

15 A. It's a company called Earthcalc.

16 Q. What did you ask Earth -- well, what did David

17 Evans ask Earthcalc to do?

18 A. Asked to compute volume differences between the

19 uplands area in 1976 versus how they existed in 1992 when

20 we prepared the survey.

21 Q. And did Earthcalc prepare such a report?

22 A. Yes, they did.

23 MR. DiJULIO: Now, this is a report that the

24 parties have that I would then ask to be admitted as

25 Exhibit 11. That should have been received by you in

1 correspondence dated June 23rd, from Mr. Sweeney. And I'm
2 going to actually give you the original exhibit. That's
3 it. Here it is.
4 Q. Exhibit 11 consists of 16 pages, page 1 being a
5 title page, and the last page being one of two pages
6 showing elevation marks. At this point, I would like to
7 call your attention, Mr. Dickman, to page 8 of the exhibit.
8 That's showing the section, section descriptions.
9 MR. KELLING: Are there not actual page
10 numbers?
11 MR. DiJULIO: No, there are not actual page
12 numbers. This is --
13 A. I might not have made that one for myself.
14 MR. DiJULIO: Did you get a copy of this?
15 MR. INSLEE: Let's see what that looks like.
16 A. I didn't make that one for myself.
17 MR. INSLEE: I don't think so, but --
18 MR. DiJULIO: Okay. Let me take a break for
19 a minute and make copies of this very quickly, because this
20 shows where those sections are on the lot.
21 (Discussion off the record)
22 MR. DiJULIO: Let's mark this as 11-A.
23 MR. INSLEE: You got a stapler? Why don't
24 you get a stapler from your secretary?
25 MR. SAFER: Were you going to provide the

1 originals with colors?
2 MR. DiJULIO: I'm going to give the
3 originals with colors to the arbitrator.
4 MR. SAFER: Perfect. Okay.
5 MR. DiJULIO: If it please the arbitrator,
6 we'll make this as an attachment to Exhibit 11 and it's
7 called Base Line Cross Section.
8 BY MR. DiJULIO:
9 Q. Now, Mr. Dickman, did Earthcalc prepare a
10 computerized depiction of the change in elevations of the
11 site at three separate elevations?
12 A. Yes, they did.
13 Q. Between 1982 and 1976?
14 A. Correct.
15 Q. And are the sections where those elevations are
16 shown depicted on the base line cross section map?
17 A. Correct.
18 Q. And going to Exhibit 10 for a moment, would you
19 just briefly describe where those sections are?
20 A. They're all east-west lines, horizontal in our
21 case, cross section A, B and C.
22 Q. A at the south, at the narrow part of the site, B
23 approximately the middle of the site, and C to the north
24 part of the site?
25 A. Correct.

1 Q. Calling your attention to elevation section A,
2 would you briefly describe the difference in elevations
3 shown on that exhibit?
4 A. Okay. The blue line is depicted on the cross
5 section R, the physical lay of the land as it existed in
6 1992. The green line by Group Four --
7 MR. INSLEE: Hold up, we're not getting
8 colors on ours so we're going to have to see what you're
9 talking about. There's no colors on it. So I don't know
10 what -- when you say blue, blue may be --
11 THE WITNESS: Okay, at the left, then, the
12 upper line, the higher one, is the blue line.
13 Let me look at it for a second and I'll get
14 out of your hair. Or, oh, yourself -- I used a color
15 pencil after I gave the copies --
16 MR. INSLEE: Is that all the way down?
17 MR. DiJULIO: Yes, blue goes all the way
18 down.
19 MR. INSLEE: Down here?
20 MR. DiJULIO: Yes.
21 THE WITNESS: Now, this is --
22 MR. INSLEE: Thank you.
23 THE WITNESS: Some of the prior pictures in
24 here, when I made this copy for myself, I just used colored
25 pencils and colored them in, but after I finish, if you'd

like to have this drawing, obviously it's not computer color, but for your references you can have this if you like.

Q. The blue line shows the 1992 conditions, is that correct?

A. Yes.

Q. Now, about halfway through that bar chart there is a grade differential, is that correct, for the existing conditions in 1992?

A. Yes, there is.

Q. Would you show where that grade differential is, approximately, at that section?

A. It would -- the grade difference occurs -- well, the first break on the blue line is the left yellow line. The second break, which now is close to the bottom of the graph, would be at the zero elevation line.

Q. That's at section A, excuse me?

A. Excuse me, yes. It would be right there. For our purposes in this graph here, we did not take into account any of the dredging activities or the bottom of the bed as it now exists. To maintain comparisons, because we were only going to mean higher high of Group Four, I had a mean higher high of our survey, I projected this line on a vertical -- on a horizontal plane to where it intersected the Group Four line.

1 Q. In reality, the point that you've just described
2 goes beneath sea level?
3 A. It continues going down in elevation, yes.
4 Q. Okay. Next calling your attention to elevation
5 B.
6 A. Cross section?
7 Q. Cross section B, excuse me. What is the top line
8 color for purposes of --
9 A. The top line color in this case is a green line,
10 which represents the Group Four surface conditions.
11 Q. As surveyed in 1976?
12 A. 1976.
13 Q. And what is the lower line?
14 A. The lower line is the current surface plane
15 surveyed by DEA in 1992.
16 Q. And would you then describe the surface line as
17 surveyed by Group Four in 1976?
18 A. Generally, fairly flat and level, as -- through
19 this area as it reaches, gets a little bit closer to their
20 mean higher high starts dropping off in grade slightly,
21 into what I believe would be this row of elevations that I
22 called out for earlier that would be about a half inch to
23 the left of this left blue line, which would be their top
24 of bank. Then it drops off fairly rapidly to where this
25 left blue line exists.

1 Q. Okay. And that's shown then on the extension of
2 Exhibit B, is that correct?
3 A. Yes.
4 Q. Or excuse me, section B?
5 A. Section B.
6 Q. Again, staying with section B, how does the
7 current top graph lie based upon your survey?
8 A. The graph shows that the current surface is
9 approximately three feet or so lower in elevation at the
10 far west end, which would be on the west boundary line of
11 parcel A. As you progress to the east, the elevations, as
12 formerly existed and what exists today, gradually daylight
13 together. What I mean by daylight is, in a design
14 situation, daylight means where design grade matches
15 existing grade. In this case I'm using the term to mean
16 where the previous elevation and the current elevation
17 match at the same elevation point.
18 Q. And then continuing on, then, at section B, with
19 respect to the current site conditions showing the
20 drop-off, again, continuing with your discussion at section
21 B, the discussion or the line showing the current
22 conditions shows the earlier drop-off, is that correct?
23 A. Right. We dropped the line to -- from the top of
24 bank to the zero elevation line, project that across on a
25 horizontal plane to where it intersects again the zero line

1 of the Group Four survey. And that's shown at the far
2 right-hand side of cross section B.
3 Q. And did you do that same analysis at cross
4 section C as well?
5 A. Yes, we did.
6 Q. Okay. And again, for cross section C of that
7 parcel, would you please describe the lines? What is the
8 upper line on that exhibit?
9 A. The upper line is the green line, which would be
10 the 1976 Group Four survey.
11 MR. INSLEE: Let's number these pages,
12 counsel. I've numbered mine 1 through 15. Then we can
13 know what page he's talking about.
14 THE WITNESS: This is cross section C.
15 MR. INSLEE: All right.
16 THE WITNESS: Right here.
17 MR. INSLEE: If might be easier if we put
18 page numbers in the lower right corner, then everyone will
19 know what page we're on without having to check everybody's
20 shoulder.
21 MR. DiJULIO: You have the same thing as he
22 does?
23 MR. KELLING: Yes.
24 MR. INSLEE: Let's number 1 through 15 in
25 the lower right corner, is that all right?

1 MR. ALLEN: What are you going to do with
2 the supplements, then?
3 MR. INSLEE: That will be 16. If we do that
4 we'll be on the same books.
5 THE WITNESS: Cross section A would be on
6 page 8.
7 MR. INSLEE: Thank you.
8 THE WITNESS: Cross section B would be on
9 pages 9 and 10. And cross section C would be on pages
10 11 -- no, just on 11.
11 Q. Focusing then on cross section C, what was the
12 status of the site in 1976 as shown by that exhibit?
13 A. Fairly similar to cross section B, that the land
14 was a foot, roughly a foot or two higher in grade in 1976
15 than it currently exists now.
16 Q. And the same analysis was performed between the
17 existing zero elevation and the zero elevation as measured
18 by Group Four in 1976?
19 A. Yes.
20 MR. INSLEE: Would you mind repeating that
21 last statement? Sorry to interrupt, Steve, but if I don't
22 get this right now I'll never get it right. The foot --
23 just repeat, please.
24 THE WITNESS: For -- in cross section C, the
25 uplands in 1976, at the west property boundary was

1 approximately one to two feet higher in grade than
2 currently exists today.
3 MR. INSLEE: I see.
4 MR. ALLEN: Can I ask a question? Do we
5 always find the east property boundary on your graph, do we
6 always get -- do we always get to the east boundary when we
7 look at your --
8 THE WITNESS: Technically the east boundary
9 is this line there. And we never -- and we only surveyed
10 to zero elevation. Here. My comparisons only went to zero
11 Group Four. Therefore, everything to the east into the
12 water of the zero elevation Group Four was beyond what I
13 was asked to prepare.
14 MR. ALLEN: But you go from the west
15 boundary, the property or --
16 THE WITNESS: No, we start to the west and
17 head east.
18 MR. SAFER: Parcel A.
19 MR. ALLEN: West boundary, parcel A?
20 THE WITNESS: West boundary of parcel A.
21 MR. KELLING: And you always start at the
22 west boundary?
23 THE WITNESS: Parcel A.
24 MR. KELLING: In the cross section?
25 THE WITNESS: Yes. Like I said earlier,

1 parcels B, C and D were not part of this exercise.
2 MR. ALLEN: Okay. That helps.
3 THE WITNESS: Now, to get elevations, Steve,
4 I don't know if you want to get into this, but --
5 MR. DiJULIO: Wait a moment. Make sure they
6 don't have any questions about the section depiction.
7 MR. KELLING: It's fairly clear to me what
8 is being depicted.
9 MR. SAFER: You're going to go into an
10 elevational discussion about flood planes, et cetera, at
11 this time?
12 THE WITNESS: I wasn't planning on it.
13 BY MR. DiJULIO:
14 Q. Let me just very quickly introduce through you
15 three photo exhibits for the -- did you check your work
16 against photo records of the site?
17 A. Well, I didn't check my work against photo
18 records. I felt satisfied because I was able to recover
19 City of Seattle benchmarks, Army Corps of Engineer
20 benchmarks that had been set, were set in 1987. I received
21 elevations of those benchmarks from Larry Signani of the
22 Army Corps of Engineers, he's the chief of the survey
23 section there, and we checked them with three
24 hundredths. I felt certain about, elevationwise, that we
25 were matching very, well. Three hundredths is about that

1 much. That I felt certain that we were on the same basis
2 of what Group Four prepared. So no, I did not compare
3 them against old aerial photos.
4 Q. You did secure old aerial photos?
5 A. I did secure aerial photos for my client.
6 MR. KELLING: Did those aerial photos have
7 topographic lines on them?
8 THE WITNESS: No, they didn't. It just
9 shows -- showed ground features.
10 MR. KELLING: And they were to scale?
11 THE WITNESS: They are to scale.
12 MR. KELLING: They are to scale?
13 THE WITNESS: They're not to this scale, but
14 there is a scale on the photos themselves, yes.
15 MR. DiJULIO: And at this time then I will
16 provide those photos to you for your use. And we did have
17 these mounted.
18 MR. SAFER: If I could ask one more
19 question before you move on. I think it's 1976 is our
20 reconstruction date. Can you estimate for us the amount
21 of elevation of the top of bank at that time that rises
22 above the water level, the mean high --
23 THE WITNESS: On Group Four's?
24 MR. SAFER: On what you're comfortable with
25 as the approximation of what was in place at that time,

1 whether it be Group Four or your own reconstruction.
2 THE WITNESS: Well, it's hard to say the
3 water level because it fluctuates.
4 MR. SAFER: The high water level.
5 THE WITNESS: The mean higher high?
6 MR. SAFER: The conservative mark that you
7 were benchmarking.
8 THE WITNESS: The top of the bank is about
9 six to seven feet higher now than the mean higher high.
10 MR. SAFER: Now?
11 THE WITNESS: Now. And on Group Four, the
12 1976 survey, again these are just rough numbers, it's
13 approximately the same thing, six to seven feet higher,
14 The top of bank.
15 MR. SAFER: So if I understand this, the
16 upland portion in 1976 was about the same elevation as
17 it's currently existing?
18 THE WITNESS: Within a couple feet, yes.
19 MR. SAFER: Couple feet lower or couple feet
20 higher?
21 THE WITNESS: Actually, it seems the
22 greatest disparity happens to be towards the westerly
23 property line.
24 MR. SAFER: I understand.
25 THE WITNESS: As you progress east it seems

1 like the elevations between prior and now more closely
2 coincided.
3 MR. SAFER: I should explain, what my
4 question really was getting at was, Mr. Inslee had made a
5 statement regarding flood planes and elevations of the top
6 of bank. And I was trying to understand more about that
7 area which is impacted by Shoreline Management. And that
8 elevation probably is of key importance.
9 THE WITNESS: Well, you have two different
10 issues. The Shoreline Management Act is regulated by the
11 State of Washington, or in this case, the City of Seattle.
12 And it's -- it's line 200 feet parallel concentric whatever
13 it is from ordinary high water, so you're impacted by that.
14 Not all areas within the Shoreline Act
15 consist of flood planes. Flood planes are handled, I
16 believe, by -- I really can't say for sure. Flood planes,
17 getting into flood planes is more of an engineering
18 function and I'm starting to leave my area of expertise.
19 I'm not really qualified to say, talk about them. But
20 this survey did not address flood plain issues. If it
21 had, then other civils would have had to have been brought
22 on to do that analysis.
23 MR. SAFER: That's fine.
24 MR. DiJULIO: I want to go very quickly
25 through this, I want to get into some information with

1 Mr. Dickman.
2 BY MR. DiJULIO:
3 Q. Mr. Dickman, did you secure a copy of the June
4 1960 photograph of the area?
5 A. Yes, I did.
6 MR. DiJULIO: Okay. And I will produce --
7 I'll give you a reduced version of this or you can take
8 them with you, Mr. Kelling, if you see fit. And I guess I
9 would identify this 1960 photograph as Exhibit 12. Is that
10 correct?
11 MR. KELLING: We are at 12, yes.
12 Q. And then, the next exhibit which will be 13, is
13 what year?
14 A. 1977.
15 Q. Basically can you point out where the site is in
16 1977 on the map?
17 A. The site is this area right in here.
18 Q. And the reason you can tell is --
19 A. And the reason you can tell is this, what would
20 you call this?
21 MR. KELLING: Slip?
22 MR. SAFER: Slip number 5?
23 A. The slip is shown on each of the surveys, or the
24 photographs. And based on the next survey, you can see
25 the marina, so it's very easy to tell where that site is

1 on the earlier photographs.
2 Q. And Exhibit 14 is what year?
3 A. 1990.
4 Q. Having determined the grade, Mr. Dickman, of the
5 parcel A in 1976 and in 1992, did you engage Earthcalc to
6 do any further calculations or further work?
7 A. Well, they determined volumes, cuts and fills on
8 the site from the Group Four zero elevation west to the
9 west property line of parcel A.
10 Q. And again, the determination of cuts and fills
11 was not actual cut and fill below elevation zero, is that
12 correct?
13 A. Correct.
14 Q. So any cuts or dredging below elevation zero that
15 may have been done by the marina for the construction of
16 the marina was not included in those calculations?
17 A. Correct.
18 Q. But rather maintaining it at elevation zero?
19 A. Yes. Zero and above.
20 Q. And is that information depicted in Exhibit 11?
21 A. Yes.
22 Q. Okay.
23 MR. SAFER: I'm sorry, excuse me. Zero
24 elevation, as we're referring to it again, is that the
25 maintenance of that level six to seven feet above mean high

1 water? Is that the zero elevation?
2 THE WITNESS: Zero elevation is 1.2 feet
3 higher than mean higher high water.
4 MR. SAFER: Thank you.
5 MR. KELLING: I usually hear this referred
6 to as mean high high. Is mean higher high the same?
7 THE WITNESS: Yes, it is.
8 MR. KELLING: All right. Thank you.
9 Q. The numbers that Earthcalc calculated with your
10 information again were hypothetical numbers and not actual
11 numbers, is that correct?
12 A. No, they're actual numbers.
13 Q. But do not include whatever dredging or cutting
14 went below zero elevation, is that correct?
15 A. Correct.
16 Q. And are those numbers reflected in the report
17 detailed in Exhibit 11?
18 A. The net numbers are, yes.
19 Q. Turning to page 2 of that exhibit, then.
20 Actually, it's --
21 MR. ALLEN: Page 1 and 2?
22 MR. DiJULIO: It should be page -- it's page
23 1 on your exhibit.
24 Q. Would you summarize or describe what those
25 numbers indicate?

1 A. Where do you want me to start?
2 Q. Well, total of -- begin with each column.
3 A. Okay, the first, under Area, Square Foot, there
4 is the word "total". And under that you have the number
5 49842, which is the land line -- I should have my exhibit
6 showing.
7 Now, all these numbers, these values are
8 digitized. So again, they're not precisely exact. They're
9 a very close approximation.
10 Q. Is there a plus or minus figure that you can
11 assign to this, based upon the digitization?
12 A. Vertically it's probably -- it -- plus or minus a
13 tenth. Horizontally, plus or minus a half a foot.
14 Q. Total?
15 A. Yeah. Depending on how close he digitized them,
16 of course. And he would have to answer that, not me. Now,
17 the 49842 is the area between the grower group or
18 elevation and the elevation as we determined it. The
19 77344 is the upland area of line west of the zero
20 elevation line for a total of 127,000 plus or minus square
21 feet.
22 MR. INSLEE: Parcel A only?
23 THE WITNESS: Parcel A only.
24 A. The columns to the right of the total cut and
25 fill are -- is a total amount of cut within those areas,

1 and the total amount of fill in those areas compensating
2 for, if there's -- say there's fill here, there might be
3 some fill here and there might be some cut here. It's
4 just, stating how much cubic, how many cubic yardage is,
5 within these particular areas.
6 Q. And what do the second two columns show? Or the
7 last two columns?
8 A. The last two is just the net values after you
9 subtract out the -- let me look here. The last two are the
10 volumes. The cuts and the fills.
11 Q. The total cut and fill volumes?
12 A. Total cut and fill volumes. The areas -- the
13 first cut and fills to the left under areas is the area of
14 the land where there is cut and the area of the land where
15 there is fill.
16 Q. Again, the first three columns on page 1 of the
17 exhibit are areas subject to cut and fill and the last two
18 columns are the volumes of cut and fill?
19 A. Correct.
20 Q. The next exhibit, page 2 of Exhibit 11, the first
21 two columns are the carry-forward from the last two columns
22 on page 1, is that correct?
23 A. Yes.
24 Q. The next column is entitled Compaction. What
25 does that mean?

1 A. Well, compaction, the one, that's a scale factor.
2 What he does is when he digitizes these spot elevations, he
3 can work on different datums, he can work on different
4 scales. This map is drawn intentionally to be at the same
5 scale as the Group Four topographic survey. Therefore,
6 when he digitized this map and the Group Four map, because
7 they were the same scales, you have a scale factor of one.
8 It's an exact same factor.
9 Q. And therefore, the next two columns are identical
10 to the first two columns?
11 A. Correct, because it's one times that number.
12 Q. Okay. And what do the export or import number
13 or columns show?
14 A. Those are the net numbers where you have a total
15 amount of fill, a total amount of cut. The number at the
16 bottom is 13,287, which means after you subtract out the
17 fill from the total amount of cut, you have 13,287 cubic
18 yards of material removed from the site.
19 Q. And what does the last column indicate?
20 A. That I really couldn't tell you. I don't know
21 what that is.
22 Q. Okay. Turning then to the graphic depictions of
23 the site, turning first to the first photograph, which is
24 page 3 --
25 MR. INSLEE: Counsel, can you make an offer

1 of proof where we're going with all this? Maybe we're not
2 in disagreement, maybe there's an offer of proof I'd be
3 happy to hear you make as to what this is all
4 establishing.
5 MR. DiJULIO: Obviously the first point was
6 just to show the elevations in 1974. That was the obvious
7 point, we're done with that. The second issue is just to
8 show graphically what those changes of elevation have been
9 from then to now.
10 We didn't go beyond elevation zero because
11 we're not supposed to consider the fact that a marina was
12 built there, under the lease. But we wanted to show that
13 were cuts and fills performed, this is what they would
14 have shown and these are what the values were based upon,
15 graphic and computerized information based upon the 1982
16 survey and the 1976 Group Four survey. That's what these
17 show.
18 MR. INSLEE: '92.
19 MR. DiJULIO: '92.
20 MR. INSLEE: By his calculations. Okay.
21 Q. Very quickly, Mr. Dickman, would you briefly
22 review what -- beginning on page 3 of the exhibit?
23 A. Three shows the 3-D of the Group Four survey
24 as the land existed in 1976. It's easier to see on the
25 computerized colorization. My grade school coloring

1 doesn't quite --
2 Q. Match up?
3 A. -- give it justice.
4 Q. And on page 3, would you basically show where the
5 zero elevation would be, in 1976?
6 A. In 1976, it would be -- or that break.
7 MR. ALLEN: This is A only, right?
8 MR. DiJULIO: Parcel A only again.
9 Q. Oh, page 6?
10 A. It shows the same thing as page -- oh, page 6.
11 Q. I'm sorry, the next page, page 4, excuse me.
12 A. Shows the same thing as on page 3, except now the
13 lines of elevation are now added on. The Group Four
14 survey.
15 MR. KELLING: These relate to the larger
16 exhibit there on the drawing?
17 THE WITNESS: Correct. This actually
18 relates to the Group Four, I believe Exhibit 4.
19 Q. Next page, page 5?
20 A. This represents a 3-D view of the site as it
21 currently exists in -- well, as it exists in 1992. Now,
22 the colorization, there is colorization on this. I believe
23 the red and the blue --
24 MR. SAFER: Red and green?
25 THE WITNESS: Red and green?

MR. SAFER: There's some blue on --

MR. INSLEE: He's on page 6. Are you gentlemen on page 6?

THE WITNESS: I'm on page 5.

MR. INSLEE: I'm sorry, I'm reading upside down. Oh, 5? Okay.

MR. ALLEN: We're on 5.

MR. DiJULIO: We're on the third chart. Yes.

THE WITNESS: Is that this one you're looking at?

MR. INSLEE: In the eyes of the beholder what the color is.

THE WITNESS: Yes, it is. Anyway, I did write on these exhibits what these colors represent.

Q. Excuse me. Now we're back -- still on page 5?

A. My page 5, yeah. The red areas are cut, the blue areas are fill, the darker the colors, the more -- the deeper the cuts, the greater the fill.

MR. SAFER: And a cut also is excavation?

THE WITNESS: Cut is excavation.

MR. SAFER: Including the dredging?

THE WITNESS: Yeah. To zero elevation.

MR. SAFER: Okay.

Q. Next page is page 6.

1 A. This again is 1992. Just another color exhibit,
2 the darker the red hatch, the deeper the cut between Group
3 Four -- no.
4 MR. INSLEE: Mine doesn't come through,
5 that's why I'm trying to verbalize. Okay. Thank you.
6 Q. And the remainder --
7 A. The remainder are cross sections, and except for
8 the last two pages, last four pages. What this is --
9 Q. What page are you on for Mr. --
10 A. I'm on page 12 now. The bar graph, it really
11 helps to have the color prints on this, but the bar
12 graph -- the color graph on the right-hand side of the page
13 shows you plus or minus differences between '76 and '92.
14 And then you can just relate those colors to the drawing on
15 the left. You'll see the vertical differences.
16 Q. There is a solid line approximately shown on the
17 main exhibit as blue. What does that depict?
18 A. That would be zero elevation.
19 MR. KELLING: You're referring to this line
20 right here?
21 MR. DiJULIO: Yes.
22 A. That would be zero elevation 1992. The solid
23 blue line represents the zero elevation line.
24 MR. KELLING: Can you spot that, Mr. Inslee?
25 MR. INSLEE: Yes. Blue in here.

1 MR. ALLEN: So would the next line be top of
2 bank? Fine line?
3 MR. KELLING: Line to the west?
4 THE WITNESS: Correct.
5 MR. INSLEE: Why don't we put an X on that
6 one.
7 MR. ALLEN: Do it on this page?
8 THE WITNESS: Top of bank would be --
9 MR. INSLEE: Right here?
10 THE WITNESS: Yes.
11 Q. And the next page is a continuation of the
12 southern part of that property?
13 A. Yes.
14 Q. What do the last two pages of the exhibit show,
15 Mr. Dickman?
16 A. The last two pages show relative cuts or fills, I
17 believe in 20-foot sections across the property. So you
18 have a 20-foot, you have a spot here, you have another spot
19 20 feet away, and so forth. The top line, you have a C or
20 an F, which is cut or fill, with the grade differences
21 between '76 and today.
22 The middle line where you have, for
23 instance, it's 12 plus 95, that's -- their machine prints
24 out pluses, it's actually 12.95 which represents the
25 present elevation, and the bottom line, 16.75, would be the

'76 Group Four elevation. And the difference between the bottom -- the middle and the bottom numbers should equal the top number.

Q. Now, the middle number does have a plus between it, for example, in your typical example, you have C 3.8, 12 plus 95, and 16.75. Would you explain that, please?

A. Okay, the top line, C 3.80 is cut. They cut 3.80 feet between '76 and today. Or 1992. The middle line, 12 plus 95, again it's just the way the computer prints the information. The plus --

Q. Means the same as a decimal point?

A. Correct. And in the bottom is the 1976 elevation. And you know it's a cut because we were comparing '76 to today, therefore, the 16.75 is higher in grade than the 12.95, subtracted to have a cut situation.

Q. And in this exhibit, the cuts are all shown in red and the fills are all shown in blue?

A. Correct.

MR. KELLING: Will there be much more testimony by Mr. Dickman, or should we break at this point or --

MR. DiJULIO: No, let's just finish up.

Q. Now, based upon the information presented, David Evans prepared some estimates with respect to the cost of such cut and fill activities, is that correct?

A. Yes.

Q. You were not responsible for preparing that estimate, is that correct?

A. No, I wasn't, nor do I know. I'm not familiar with the cost construction estimates for these type.

MR. INSLEE: I have no objection to them, counsel, if you want to use them.

MR. DiJULIO: I think what I would do, then, and perhaps to facilitate this, I would offer as Number 15, the Evans correspondence, most of which I think you may have seen already. There's an additional packet --

MR. INSLEE: That doesn't mean I agree with it, it just means I don't object to it coming in.

MR. DiJULIO: Sure.

MR. ALLEN: So is this an exhibit?

MR. DiJULIO: This would be Exhibit 15.

MR. ALLEN: Okay.

MR. DiJULIO: And again, I would call your attention to the sentence in the second paragraph of the February 25th letter from Mr. Dickman to Mr. Anderson, "Any dredging materials that were or might have been removed for construction of the marina yacht basin is not included as an element of this volumes report."

I have nothing further for this witness at this time.

1 MR. KELLING: Thank you very much. Shall we
2 agree on how long lunch period will be?
3 MR. DiJULIO: Let me ask Mr. Inslee how much
4 cross-examination he might have of this witness before we
5 break.
6 MR. INSLEE: Not a whole lot. As soon as I
7 understand it. You want --
8 MR. DiJULIO: He has another appointment and
9 if it's not going to be extensive --
10 MR. INSLEE: Then to accommodate him I would
11 try and get done very soon.
12 MR. DiJULIO: And then we can break for
13 lunch after this witness's testimony?
14 MR. KELLING: If you all can hold up and you
15 want to go ahead with your cross.
16 MR. INSLEE: If you want me to, I will.
17 MR. KELLING: We could stay here. But if
18 anyone doesn't want to do that --
19 MR. DiJULIO: The reason I suggest that is,
20 we are going to change conference rooms. So if you finish
21 this witness we can take the break and move upstairs where
22 we're going to be for the next couple of days, so it might
23 be convenient at that time.
24 MR. KELLING: Shall we continue right now?
25 MR. DiJULIO: I would recommend that.

1 MR. KELLING: All right. Fine.
2
3 C R O S S E X A M I N A T I O N
4 BY MR. INSLEE:
5 Q. Richard, in connection with the volumes of cubic
6 yard of material that you've indicated in exhibit, both cut
7 and fill, would it be a correct statement that that is
8 nothing more than what you would do to balance the site to
9 make it come out in a level format?
10 A. Not necessarily. I was -- this was a comparison
11 of top of plane, nothing to do with cuts that might have
12 been made for the parking lot to get to the subgrade. But
13 it is, surface conditions, not surface conditions, but
14 surface elevations of grade, comparing the 1976 Group Four
15 survey and so on the ground, the top, whatever, asphalt,
16 whether it was dirt, that wasn't taken into account. It
17 was the top of the surface, whatever that surface may be
18 of. It was the comparison between the two surveys.
19 Q. Yeah. And then in connection with that you're
20 not purporting to identify what may or may not have been
21 physically moved or altered by any developer with regard to
22 parcel A, are you?
23 A. No.
24 Q. Okay. And you're not trying to historically
25 apply in your calculations, or Evans' calculation, I should

1 say, you're doing nothing more than making those two
2 comparisons?
3 A. That's all I am doing as a survey, yes.
4 Q. And in connection with the parcel A, let's make
5 sure that we understand what -- you've been mentioning
6 parcel A repeatedly. Let's identify that for the
7 arbitrators just so we all understand before you get away
8 from this what parcel A is.
9 A. Okay. Parcel A -- well --
10 Q. Parcel A is a term of art used by Group Four or
11 somebody? It got a defined description?
12 A. It has a defined description, but I'm also trying
13 to find -- this is an ALTA survey by Townsend Chastain,
14 which shows parcels B, C and D. Parcel A is an area
15 sitting just to the east of the parcel B, C and D as
16 represented by this lot line adjustment.
17 Q. So you don't have anything other than this lot
18 line adjustment to give us what lot A is? Let me help
19 you. Maybe I've got something to show you.
20 MR. DiJULIO: I would offer for purposes of
21 just easing this along, that there were three tax parcels,
22 I think everybody's aware of that, at the time. And they
23 were identified earlier on as parcels A, B and C.
24 Subsequently there was a redevelopment that created a new
25 lot, but in this case the easterly waterfront lot was

1 evaluated the work of Mr. Dickman's testified to.
2 THE WITNESS: These are the same dimensions.
3 MR. INSLEE: Yes.
4 Q. So if I show you the Townsend Chastain, Inc.
5 survey of, and unfortunately the date is 9/9/81, and I
6 guess that would be our first Exhibit A.
7 A. I am referring to the same parcel A that is on
8 the survey.
9 MR. INSLEE: All right. Let me hand
10 everybody a copy of that so we know what we're discussing.
11 Are you all giving him a separate one and marking a
12 separate one for the record, so to speak, or --
13 MR. DiJULIO: Verne Kelling has the record.
14 MR. INSLEE: All right.
15 MR. KELLING: I'm trying to mark each one.
16 Q. So in looking at what Exhibit A is, when you use
17 the term "parcel A" in all of your terminology, it's the
18 parcel A that's denominated as parcel A on Exhibit A,
19 right?
20 A. Correct.
21 Q. All right. So that's about a 4.40-acre site?
22 A. Uh-huh.
23 Q. All right. And then you haven't done any calcs
24 on parcel B, have you, of Exhibit A?
25 A. No. Nor C, nor D.

1 Q. Okay. Appreciate that. And again, with regard
2 to the top of bank, the Townsend Chastain, or the survey
3 of, you've indicated here in yellow, that top of bank,
4 which existed in 19 -- what year is that?
5 A. This is '92.
6 Q. Yeah, but -- that's '92, right?
7 A. Uh-huh.
8 Q. Where is the top of bank in the same -- who wrote
9 the word "top of bank" on there?
10 A. I did.
11 Q. And so that distinction was copied from somebody
12 else's --
13 A. No, that's the top of bank as currently exists.
14 Q. Okay. And what did you do to identify top of
15 bank off the prior survey like Exhibit A or your prior
16 document?
17 A. I'll show you the Group Four survey, which is
18 Exhibit 4.
19 Q. Yes.
20 A. I don't really have the Group Four top of bank
21 shown on this survey. But you can ascertain where it is
22 here. This left blue line is this 12.5 contour line right
23 there. This is the line again of constant elevation, this
24 light one. If you look to the left, this next rule of
25 elevation, 12.5 here, 18 here, you go to the west it's

1 19. So within a span of maybe eight to ten feet, you've
2 gained six feet vertically.
3 Q. Yeah. But now my question is simply this --
4 maybe I could straighten it out for myself -- are you
5 saying that's what they call top of bank?
6 A. No, I'm not.
7 Q. Okay. What I'm trying to get is your definition
8 of top of bank. Because these words may or may not mean
9 the same thing to different guys.
10 A. Top of bank is just a grade break, a radical
11 grade break from a relatively flat surface to a steeper
12 one that leads into the water.
13 Q. All right.
14 A. That's my definition of top of bank in this case.
15 Q. All right. And based on the top of bank in that
16 definition back in 1977, where is that on Exhibit -- what
17 is -- what's this number?
18 MR. DiJULIO: That's Exhibit 10.
19 Q. Where is top of bank on Exhibit 10? I'll put a
20 10 up here if that's all right, counsel. Where is top of
21 bank based on the 1977 survey which you just referred to,
22 Exhibit 1?
23 A. I'm not quite following you.
24 Q. This top of bank, which is on Exhibit 1, where is
25 that on Exhibit 10?

1 A. You mean with this --
2 Q. No, where their designated line is that you've
3 said is their top of bank, where is that on Exhibit 10?
4 A. It's not on here.
5 Q. Where would it be?
6 A. About a half an inch to the left.
7 Q. Of?
8 A. Of this left blue line.
9 Q. Of this left blue line, right here?
10 A. Right.
11 Q. Okay.
12 A. It's only by the way I'm defining top of bank.
13 Q. That's why we're getting --
14 A. Maybe I should say major grade break, if that
15 will help you.
16 Q. All right. And here, top of bank in 1957, about
17 three-quarter, maybe an inch to the left of the blue line
18 in 1957 --
19 A. That's actually called out on -- I can show you
20 on the Ruskin Fisher.
21 Q. Let me get my question out. That's what they
22 called top of bank in '57, a major grade break?
23 A. No. That -- I can't interpret what their intent
24 is. That -- on their survey, that is the words that they
25 used.

1 Q. That's my point. Are there words of art
2 associated with the words "top of bank" within the
3 surveying field?
4 A. Pretty much -- pretty much the way I'm
5 interpreting top of bank in a surveying field, pretty much
6 any other surveyor would interpret it the same way.
7 Q. All right. So what you're telling me, in if the
8 '57 survey as you've indicated and the '77 top of bank is
9 as you've indicated, there's somewhat of an accretion
10 or additional property being added to uplands between '57
11 and 1977? Is that correct?
12 A. Well, based on these surveys.
13 Q. Yeah. So actually the upland is getting larger?
14 A. It's possible. But then there's a factoring of
15 whether there has been grading.
16 Q. I'm not defending it, I'm just saying how it got
17 there. The surveys suggest that in the intervening 18, 19
18 years, the top of bank has been further to the east.
19 A. You can say it could be by accretion, but it
20 could be by other methods also.
21 Q. Oh, yeah, I don't know how it got that way.
22 A. Yes.
23 Q. That's all I'm saying. And in terms of the
24 top of bank, in its present form, on Exhibit 10, right?
25 A. Uh-huh.

1 Q. Is that based on your observation where the top
2 of the riprap and things are currently located?
3 A. That would be the top of the riprap, yes.
4 Q. All right. Now, between the two elevations, two
5 designations of top of bank, I guess we can identify it
6 from your survey the amount of water inundation, so to
7 speak. But would it be your observation that everything
8 eastward of top of bank is pretty much in a mud or water
9 condition, excluding improvements that were put in? But,
10 I mean, it's not --
11 A. Right. Yes.
12 Q. Okay.
13 A. No, I can't quite say that, because I do not
14 know how far down into beyond this elevation the riprap
15 continues. We didn't survey that. So --
16 Q. I see.
17 A. But from all appearances at high tide, you could
18 say it's water east of that line. At high tide it's all
19 water east of that line.
20 Q. So when we talk about property, whether it's
21 usable or not usable, is a term of art, I guess?
22 A. I never said --
23 Q. I don't mean to -- that's what I'm saying. So
24 from the standpoint of, if I'm going to use the property
25 only west of the top of bank, it's everything west of this

1 yellow line?
2 A. Well, if you remember earlier I said that what I
3 was doing was computing uplands area, those lands higher
4 than zero elevation, not whether or not it's usable. I
5 never got into that cost.
6 Q. That's right. So when you use that definition of
7 higher high, that has nothing to do with use or usable?
8 A. Higher high is a line of elevation.
9 Q. Right. And nothing to do with submersible?
10 Whether it's under water at any given time of year?
11 A. There are different definitions. It's -- a mean
12 higher high line does not change over time. It doesn't
13 change within a 19.6 year time. Mean higher high tide
14 elevation is changed gradually through time by the Geodetic
15 Survey based on averages of tides throughout a 19.6 year
16 cycle. Submersed lands by definition never change because
17 those are lands that are covered and uncovered by tide. So
18 it doesn't really matter where the elevation is if those
19 lands are covered or not covered by tide, they're submersed
20 lands. Where mean higher high water is a fixed line of
21 elevation.
22 MR. INSLEE: Right. Thank you. No further
23 questions.
24 MR. KELLING: That's it? Thank you.
25 MR. DiJULIO: I have nothing further.

1 Just for purposes of clarification, we're
2 going to take our noon break at this point then?
3 MR. KELLING: That's what I would suggest.
4 Shall we move now to the other room or shall we wait?
5 MR. DiJULIO: Let me step outside.
6 MR. KELLING: Thank you.
7 (Lunch recess taken at 12:30 p.m.)
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1 AFTERNOON SESSION
2 1:45 p.m.
3 MR. KELLING: Back on the record now.
4 MR. DiJULIO: Thank you. My list shows
5 Exhibits 1 through 14 of lessor and Exhibit A of lessee,
6 just to clarify that.
7 MR. INSLEE: Exhibit 15, Evans
8 correspondence.
9 MR. DiJULIO: Evans, thank you.
10 Okay, Mr. Anderson -- Do you want to have
11 him testify from this chair or do you want to have him
12 testify from down here?
13 MR. KELLING: It's a long distance down
14 there and he should be closer to the reporter.
15
16 RICHARD HENRY ANDERSON,
17 having been previously sworn, testified as follows:
18
19 D I R E C T E X A M I N A T I O N
20 BY MR. DiJULIO:
21 Q. Mr. Anderson, reminding you that you have
22 previously been sworn, will you please state your full name
23 for the panel?
24 A. Richard Henry Anderson.
25 Q. And spell your last name, please?

1 A. A N D E R S O N.
2 Q. And where are you currently employed,
3 Mr. Anderson?
4 A. At Seattle First National Bank.
5 Q. What is your position there?
6 A. Vice president of real estate with Seafirst
7 investment counselors.
8 Q. How long have you been employed by Seafirst?
9 A. Ten years.
10 Q. And in what capacity have you been employed?
11 A. Always in the area of trust real estate or --
12 handling real estate that is in trust.
13 Q. Prior to joining Seafirst, where were you
14 employed?
15 A. All over.
16 Q. You'll have to be more specific than that.
17 A. Okay. I've got 38 years in the real estate
18 business in western Washington. Starting out in 1955
19 from -- graduating from the University of Washington, I
20 went with Unico Properties for seven years. Then I took
21 over the property management function for Sterling
22 Recreation and the estate of John Danz for six or seven
23 years. I then took over the office building division of
24 the Vance Corporation, and completed the Plaza 600
25 Building and managed the Tower Building, Joseph Vance and

1 Lloyd Building in addition.
2 I then went out to -- I was there I think
3 seven years. Then went out to Sea-Tac with Kilroy
4 Industries and filled the first mid-rise building at the
5 Sea-Tac Office Center project and was involved with the
6 construction of the second and third towers.
7 I then -- what did I do then? I went with
8 Olympic Savings and did the rehab of the old Unigard
9 Building at Second and Pine. And when that was completed,
10 I took over as director of property management for Carma
11 Developers and was there two and a half years. Then went
12 with -- then went into the commercial and industrial
13 leasing and brokerage business for five years with Bullier
14 & Bullier and Morrie Piha.
15 Q. Would you spell Bullier?
16 A. B U L L I E R. And then I was offered this
17 position with -- or a position with Seafirst.
18 Q. And have you been a licensed real estate broker
19 in the state of Washington?
20 A. Yes.
21 Q. Are you currently?
22 A. No, I am not.
23 Q. And why aren't you?
24 A. It's against corporate policy.
25 Q. Seafirst policy?

1 A. Yes.
2 Q. Now, Mr. Anderson, when did you become familiar
3 with the Duwamish Marina property?
4 A. It came over from Security Pacific as a result of
5 the merger with Seafirst, and we actually didn't merge the
6 trust function until November of '92, I believe it was.
7 And at that time the account was being managed by Shirley
8 Aguilira. And the determination was made that I should
9 take over the account, which I did, I would say early '93,
10 something like that.
11 Q. And Seafirst commissioned the -- or in its
12 predecessor capacity, commissioned the Safer report that is
13 Exhibit 8 before the arbitration panel?
14 A. The appraisal, yes.
15 Q. Is that the opinion of the trustee in this case,
16 the lessor, as to the value with respect to that property
17 as modified in our statement to the appraisal panel?
18 A. Yes. I fully reviewed it and reviewed it with
19 some of my contemporaries at the bank and we fully support
20 Mr. Safer's valuation.
21 Q. Now, are you otherwise familiar with the Duwamish
22 corridor?
23 A. Yes. I manage, in addition to the involvement
24 with the Duwamish Marina, a number of other properties,
25 including the Oxbow Industrial Park right along the

1 Duwamish corridor. I'm also active in the Duwamish
2 Corridor Group.
3 Q. What is the Duwamish Corridor Group,
4 Mr. Anderson?
5 A. It's a coalition -- it's actually called the
6 Duwamish Coalition. And there's a bunch of movers and
7 shakers that have vested interests in the industrial --
8 maximizing the industrial use of all that area along the
9 Duwamish in through that area. The heavy industrial stuff.
10 Q. Now, are you aware of recent or current studies
11 with respect to redevelopment in the immediate vicinity of
12 the Duwamish Marina site?
13 A. Yes. There are two. Boeing is anticipating an
14 upgrade of 30 percent of their existing facilities through
15 the Boeing -- through the Duwamish corridor in the next ten
16 years. And they did a very comprehensive preliminary study
17 that is an ongoing thing.
18 There is also in addition a major
19 undertaking by the Corps of Engineers and the Port of
20 Seattle, the Muckleshoot Indian tribe, City of Tukwila,
21 King County. There's about seven or eight or nine
22 bureaucracies involved in an upgrading and cleaning up of
23 the Duwamish River itself, including fish resting areas
24 and all that sort of thing.
25 Q. Turning your attention to the Boeing

1 redevelopment plans, I'm handing you what we will offer as
2 Exhibit 16. Can you identify that, Mr. Anderson?
3 A. Yes, this is a report that I just briefly had
4 referred to, done for the Boeing Company.
5 Q. And what's the purpose of that report?
6 A. The -- this is the first phase in some long-range
7 ten-year planning by the Boeing Company. The report is
8 entitled Boeing Duwamish Corridor Redevelopment.
9 Q. And is there a map attached to that report
10 showing the area that is the subject of that study?
11 A. Yes. This study, incidentally, is dated May of
12 1992.
13 Q. And does the exhibit map attached to Exhibit
14 Number 16 show the area of the subject site, the Duwamish
15 Marina site?
16 A. Yes.
17 Q. Now, was there an Environmental Impact Statement
18 prepared on that as well?
19 A. Preliminary, yes, there was.
20 MR. DiJULIO: Now, first of all, I guess, to
21 be formal, I'll offer Exhibit 16 to the panel for its use
22 in evaluating the subject.
23 MR. KELLING: Yes. That's fine. I have
24 already done that.
25 Q. At this time I'm handing you excerpts from the

1 draft Environmental Impact Statement for that corridor
2 study. Did you prepare that for me from your files?
3 A. Yes, I did.
4 MR. DiJULIO: Okay. And for purposes of the
5 arbitration, we would offer that. We have only attached to
6 that the graphics that we think to be of interest to the
7 panel showing land use, the Boeing land use in the
8 vicinity, the transportation corridors, utilities, and
9 other graphic depictions of the land use and activities in
10 the area.
11 We would offer 17 to assist the appraisal
12 panel in its effort.
13 MR. KELLING: You don't want to make this
14 just part of 16?
15 MR. DiJULIO: It's a separate document. And
16 I think it probably would be just as easy to identify it
17 separately as Exhibit 17.
18 MR. KELLING: Okay.
19 Q. Now, Mr. Anderson, being familiar with the
20 Duwamish corridor and the redevelopment and development
21 activities within the area, what is your opinion as to the
22 highest and best use for the subject site?
23 A. The -- I think it's zoned heavy industrial and
24 therefore I think it's either container storage,
25 warehousing, industrial, shipbuilding. Not necessarily

1 water-oriented uses.

2 Q. Now, you understand that the Port recognizes

3 container terminal usage as water-oriented uses?

4 A. Well, yes. I was thinking of the Delta Marine

5 next door.

6 MR. KELLING: As a shipyard, you mean?

7 THE WITNESS: Yes, as a shipyard, yes.

8 Q. In 1992, June of 1992, was this property in your

9 opinion at its highest and best use suited for office or

10 research and development facilities?

11 A. Say that again?

12 Q. In June of 1992, the date of valuation that

13 you're considering, is this property appropriate for

14 development for office or technology, research facility

15 development?

16 A. Not in '92, I don't think, no.

17 Q. Is that the direction, however, that the Boeing

18 Company is going with its surrounding facilities?

19 A. Very definitely.

20 MR. DiJULIO: I have nothing further for

21 this witness.

22 MR. INSLEE: Nothing further.

23 MR. KELLING: May I ask a question? Do you

24 feel there's a difference in uses on either side of the

25 Duwamish? Highest and best use concept?

1 THE WITNESS: Yes, primarily because of the
2 Boeing Company being on the east side of the river. And --
3 but on the other properties on the west side of the
4 Duwamish that I'm involved with, we're right in the process
5 of looking at the, an upgraded usage. Technology, office,
6 that sort of thing.
7 MR. KELLING: I have one other question. Do
8 you know anything about replacement of the 16th Avenue
9 South Bridge that accesses South Park, or -- is that going
10 to happen, or have you heard anything?
11 THE WITNESS: That's like asking me where
12 the Seattle Symphony's going to land.
13 MR. SAFER: Well, where are they?
14 THE WITNESS: Downtown, unfortunately. But
15 that's still in limbo, Verne. No one knows. It's becoming
16 quite political, very honestly.
17 MR. KELLING: I can imagine that. Thanks.
18 MR. DiJULIO: We have nothing further at
19 this time.
20 MR. INSLEE: Well, I'll raise one question
21 in view of that.
22
23 C R O S S E X A M I N A T I O N
24 BY MR. INSLEE:
25 Q. I want to clarify your testimony, Mr. Anderson.

1 You said this property, in your highest and best use
2 opinion, was warehouse and container -- container storage?
3 A. In 1992, correct.
4 Q. Sure. Container storage? And then you said, I
5 thought you said something about shipbuilding, but not
6 water-related? Or was that --
7 A. No, no. What I said was, when he clarified the
8 container usage, land usage was water oriented, water
9 oriented, I didn't want that confused with shipbuilding as
10 next door.
11 Q. Isn't the water-related usage relating to
12 containers that you're talking about when you say it's
13 water-related terminal facilities versus straight storage
14 facilities?
15 A. I suppose it would be.
16 Q. Would be terminal?
17 A. Yeah.
18 Q. So in other words, you're saying that a
19 prospective highest and best use of this property then
20 would be to install facilities to allow this to become a
21 terminal, meaning the exiting and receiving of freight
22 from the waterway?
23 A. Correct.
24 Q. And what studies have you undertaken to identify
25 what would be required to make this a terminal facility?

1 A. We have 11 acres of undeveloped heavy industrial
2 properties on South 96th, about two miles from this, the
3 Duwamish Marina, that we are aggressively working on right
4 now to develop into just such a container terminal. And
5 I've determined that there is a very strong market for this
6 type usage. And we're in the process now of dealing with
7 two prospective tenants on a long-term ground lease basis
8 for that particular site. So I'm fairly conversant with
9 what the current requirements and demand are.
10 Q. Directionally, how is that property two miles
11 from the subject located in relationship to the 16th
12 Avenue South Bridge?
13 A. Well, it's directly -- it's at 8th Avenue South
14 and South 96th. So it's due west.
15 Q. So it is west of the bridge?
16 A. Yes. It's right -- fairly close to within a half
17 a block of the Burien freeway, you know, 509, Highway
18 509.
19 Q. Have your studies indicated to you a marked
20 difference between availability for water usages above or
21 east of the bridge as distinct from west of the 16th South
22 Bridge?
23 A. I haven't even looked at that.
24 Q. So if that was an impediment or issue, that
25 hasn't been taken into consideration by you?

1 A. Correct.
2 Q. If you were going to utilize this property at its
3 highest and best use --
4 A. Which property?
5 Q. The subject, excuse me. -- as a terminal
6 facility, that would, I take it, require some engaging of
7 some type of pier or dock facility?
8 A. I would assume so, although there's some major,
9 as we're all aware, some major problems of sediment and
10 siltage in that, on the waterfront area now, and the lack
11 of dredging permits could cause a major problem in that
12 area, I would think.
13 Q. That's what I was getting to, the site
14 specifically of this particular parcel, outside of the
15 example you've given us two miles to the west, I take it --
16 and I'm not asking this as a criticism one way or the
17 other -- that you haven't undertaken any feasibility
18 studies with regard to the subject property, what would or
19 wouldn't be required to either make it a terminal or any
20 water-related usage?
21 A. I have not.
22 MR. INSLEE: Okay, thank you. No further
23 questions.
24 MR. DiJULIO: I have nothing.
25 MR. KELLING: I have one more question. The

1 bank trust department administrates this property,
2 technically?
3 THE WITNESS: Seafirst is co-trustee along
4 with (b)(6) [redacted]
5 (b)(6) [redacted] So from a
6 practical point of view -- and it's all real estate, the
7 entire series of trusts that are involved. So from a
8 practical point of view, I sort of -- I manage the
9 portfolio, in conjunction with working with these two
10 elderly people.
11 MR. KELLING: Not necessarily getting into
12 the specifics of what you might have been exposed to, but
13 have you as a trust administrator ever been approached by
14 terminal operators?
15 THE WITNESS: We're right in the process of
16 that as we speak.
17 MR. KELLING: To, say, purchase this subject
18 property?
19 THE WITNESS: No.
20 MR. KELLING: You have not?
21 THE WITNESS: Have not.
22 MR. KELLING: All right.
23 THE WITNESS: I think it's pretty much known
24 that it's under a long-term ground lease.
25 MR. KELLING: Yes. But I meant despite

1 that, has anyone talked about that?
2 THE WITNESS: No, not at all.
3 MR. KELLING: Approached you to purchase the
4 property?
5 THE WITNESS: No.
6 MR. KELLING: Thank you.
7 MR. ALLEN: I have one question, Rick. When
8 did the Duwamish Corridor Group, when did it initiate?
9 THE WITNESS: It's fairly recent. I'd say
10 about six months ago it really got off the ground. Gary
11 Locke is involved and Norm Rice is involved and some very
12 dedicated people. Russ Segner.
13 MR. ALLEN: There's been some articles in
14 the paper.
15 THE WITNESS: Yeah. And they're getting
16 good political support, and I think we're going to be able
17 to get something done.
18 MR. ALLEN: Thanks.
19 MR. INSLEE: I'll urge us to consider that
20 in 1997 when we reconvene.
21 MR. ALLEN: Such an optimist.
22 MR. KELLING: I hope actually you don't have
23 to reconvene, that you can all agree on something.
24 We don't have any other questions, do we, of
25 Rick? Okay.

1 MR. DIJULIO: He's not going anywhere.
2 THE WITNESS: I'll be here.
3 MR. SAFER: I think --
4 MR. KELLING: We do?
5 MR. SAFER: I wanted to just open this
6 briefly, but you say you're under discussion with several
7 people that are in the business of container usage. The
8 site that you're referring to, I'm a little confused, is
9 it on the Duwamish?
10 THE WITNESS: No, no, it isn't. It's a dry
11 land site.
12 MR. SAFER: So they're just using it as a
13 transshipment?
14 THE WITNESS: Yeah. Exactly.
15 MR. SAFER: I was confused. That's it.
16 MR. DiJULIO: Perhaps that was not clear.
17
18 R E D I R E C T E X A M I N A T I O N
19 BY MR. DiJULIO:
20 Q. Water access, or waterway use does not dictate
21 whether a marine terminal determination is made. Is that
22 correct?
23 A. That's correct, yeah. Both of these prospects
24 have relationships with the Port of Seattle on waterfront
25 locations. And both of them would augment our 11-acre site

1 to their present facilities.
2 MR. KELLING: Thank you.
3 MR. DiJULIO: That's all we have.
4 MR. KELLING: You have no further --
5 MR. DiJULIO: No, we have understood that
6 the --
7 MR. KELLING: -- witnesses?
8 MR. DiJULIO: -- testimony of Errol Garr,
9 the Evans engineer, as to the financial calculations that
10 are contained in his letter, we don't need to call him.
11 That's in the letter, Mr. Inslee doesn't agree with them,
12 but he understands that that's what Mr. Garr would testify
13 to, so there's no need to call him.
14 Al Lowe, as we indicated in our opening
15 statement, is involved in Port Commission meetings today
16 and will be available tomorrow morning. So that's all we
17 had at this time.
18 MR. INSLEE: Without specifics, is Lowe just
19 going to talk about the generalities of the area, or is he
20 something --
21 MR. DiJULIO: No, he's going to expand upon
22 the same thing and what the market is and who bears what
23 responsibilities for development and redevelopment of
24 container and marine terminal property development in the
25 current market.

1 MR. INSLEE: Is he the guy from Kidder
2 Peabody?
3 MR. DiJULIO: No, he's the guy from the
4 Marine Division of the Port of Seattle.
5 MR. INSLEE: You're not calling somebody
6 from Kidder?
7 MR. DiJULIO: At this point we don't intend
8 to, depending on what we hear. We may have to call them in
9 rebuttal, but at this point we have no --
10 MR. INSLEE: I appreciate that. See, we've
11 accomplished today what about three court days would take.
12 MR. DiJULIO: Mr. Inslee knows that I can be
13 efficient and economic.
14 MR. KELLING: At this point, then, maybe we
15 could -- or let's do some housekeeping in terms of timing.
16 Mr. Inslee, you're going to make your
17 presentation next. What do you anticipate in terms of time
18 involved here in the hearing room? Because we have, the
19 arbitrators, three things to consider, two of which are a
20 conflict that Mr. Safer has, needing to fly out on an
21 airplane Thursday morning. However, he has said that if
22 necessary, he will cancel that.
23 MR. INSLEE: I think we're going to get
24 done --
25 MR. KELLING: And the other thing is that --

1 MR. INSLEE: -- by Wednesday.
2 MR. KELLING: -- we want to make a formal
3 site visit with a representative of both sides, at least
4 with me. There doesn't mean Safer and Allen don't want to
5 go along, because they performed appraisals. But my
6 presence would demand that a representative from each side
7 be present, if you wish.
8 MR. INSLEE: Okay.
9 MR. KELLING: And I want to try and time
10 that. So do you anticipate --
11 MR. INSLEE: That's not going to be done
12 tomorrow, though.
13 MR. KELLING: You feel you will be done by
14 tomorrow?
15 MR. INSLEE: Yes, sir. The only thing,
16 I've got Lou Szmodis, Hester, I've got Melody McCutcheon
17 from the Hillis law firm, the expert on these rules, and
18 we've got, hard to pronounce his name, Benjamin Ansty,
19 A N S T Y, professional engineer with Jaddi, Milligan &
20 Associates.
21 MR. KELLING: Well, it looks like you might
22 be able to fly out Thursday morning.
23 MR. SAFER: Thank you, sir.
24 MR. ANDERSON: I'd like to volunteer
25 something. Everyone in the room should know that Milligan

1 Jaddi are tenants of mine in another Desimone property over
2 in Bellevue. And I don't think that has a damn thing to do
3 with anything, but I wanted it to be on the table.
4 MR. KELLING: Thank you. My comments just
5 now, I certainly don't want them interpreted to mean that
6 we're trying to shorten things if either side has more to
7 present or more to say. But we'll recess at the end of
8 tomorrow. We'll recess. And then we'll make the site
9 visit with your help. And then if we need to meet again,
10 we're willing to meet again, certainly.
11 MR. ANDERSON: I've left my schedule open
12 if either Lou or Mel wants to do it, while this is all
13 fresh in your mind, if you want to go out, say, Thursday
14 morning?
15 MR. KELLING: That would be fine. Now,
16 Allen won't be there.
17 MR. SAFER: I've been there.
18 MR. KELLING: Do you want to stay home or do
19 you want to go along?
20 MR. INSLEE: Mr. Hester's available Thursday
21 morning.
22 MR. KELLING: Thursday morning would be fine
23 for me.
24 MR. ANDERSON: Shall we meet at the site?
25 MR. KELLING: That would be fine.

1 MR. HESTER: What time would you like to
2 meet?
3 MR. ANDERSON: You're not an early bird.
4 MR. HESTER: I don't care. Whatever time is
5 fine.
6 MR. KELLING: 9 o'clock too late?
7 MR. ANDERSON: 9 Thursday morning.
8 MR. DiJULIO: At the gate?
9 MR. KELLING: At the front gate. I won't
10 step foot on the property until you're both there.
11 MR. INSLEE: Super.
12 MR. ALLEN: I think I probably should not go
13 as long as Allen's not.
14 MR. KELLING: Mr. Allen just said he will
15 not be there, to keep things balanced.
16 MR. INSLEE: Mr. Hester, do you want to sit
17 over in that chair? You've been sworn.
18
19 MELVIN G. HESTER,
20 having been previously sworn, testified as follows:
21
22 D I R E C T E X A M I N A T I O N
23 BY MR. INSLEE:
24 Q. What's your full name and address?
25 A. Melvin G. Hester, H E S T E R, (b)(6)

1 (b) (6)

2 Q. What's your educational background?

3 A. (b) (6)

4 (b) (6)

5 Q. Would you identify for the arbiters what your

6 work experience has been, particularly as it relates to any

7 real estate development?

8 A. I was of course a partner in the Duwamish Marina

9 Industrial Park and did all the permit work. I was

10 original developing partner in South Lake Union where

11 Benjamin's is located, and in fact I designed that marina.

12 I sold my interest about seven years ago. I was -- I

13 pursued the development of marinas on -- I was the -- I

14 designed the float system marina, much of the marina on

15 the Willamette River in Portland which is a 150 slip

16 marina.

17 I worked diligently on two additional marina

18 projects, which we never got off the ground because of

19 problems on the Columbia River and one at Discovery Bay

20 north of here in the -- I don't know how to describe it

21 other than north.

22 MR. KELLING: Jefferson County?

23 THE WITNESS: Yes, up by Sequim.

24 A. As far as the South Lake Union project, my

25 partner and I, Joe Alhadeff, did all the permit process for

1 that. I was the lead for that, with my experience in
2 getting permits. We did the design and basically built it.
3 I am a licensed real estate agent in the state of
4 Washington. That is my profession at this time.
5 Q. And is that?
6 A. I have --
7 Q. Excuse me?
8 A. I own -- I'm a partner in a technology firm in
9 San Francisco which deals in water technology. Various and
10 sundry other things. But for the most part, as far as
11 relates to this project, that's most of it.
12 Q. And would that encompass, all of the activities
13 you just testified to be activities that you engaged in
14 between '76 and 1992?
15 A. Correct.
16 Q. Mel, would you tell the arbiters how Duwamish
17 Marina Industrial Park Partnership was formed? What was
18 the nucleus by which that group associated together?
19 A. This was a project that I ran into while I was --
20 one thing I failed to mention I was involved in, at the
21 time was involved in 84 condominiums, Lou and I had a small
22 interest in 84 condominiums development near the University
23 District.
24 I in turn learned of a limited partnership
25 that had in turn failed to try to develop a piece of

1 property on the Duwamish River. Lou and I met with one of
2 the original limited partners, went over what they had in
3 turn were attempting to do and failed to do, and we came to
4 the conclusion that we could pull it off.
5 Q. And was that subject, the subject property, what
6 the limited partnership had failed to develop?
7 A. Correct.
8 Q. All right. Who is the Duwamish Marina Industrial
9 Park Partnership?
10 A. The partnership is made up of four individuals.
11 Lou and myself, at the time was a gentleman by the name of
12 Jim Harper, (b)(6) has in turn
13 taken his interest, and a fellow by the name of Charles
14 Girncher, who is passive investor person.
15 Q. And Judy Harper was the successor to Jim Harper
16 and Jim Harper was the successor under the lease to lease
17 to North Coast Construction?
18 A. Yes. Correct.
19 Q. So those are the four entities. All right. Now,
20 in connection with the property, would you tell me, please,
21 what -- of course there was negotiation for this lease.
22 Can you give the arbiters some idea who the players were
23 on both sides?
24 A. At the time was Bob Reynolds, who was the
25 predecessor to Mr. Anderson, who was running the trust

1 department at, at that time Rainier Bank, I believe. There
2 was, as I remember, Harold Shefelman himself was involved
3 at least in the negotiation. Evan Inslee was counsel for
4 us. Mondo Desimone?
5 MR. SZMODIS: Mondo, yes, Desimone was
6 involved in the actual negotiation.
7 A. Those were the players.
8 Q. Would you give the arbiters a verbal description
9 of the site as it existed prior to the time the lease was
10 signed? By that I mean immediately prior. You can use
11 Exhibit A if you want to utilize any portion of that.
12 A. Sure.
13 Q. I'll give you my copy.
14 MR. DiJULIO: Let me -- I guess we should
15 ask for --
16 MR. INSLEE: That's already an exhibit.
17 MR. DiJULIO: That's fine.
18 MR. INSLEE: I should have said that.
19 BY MR. INSLEE:
20 Q. Tell them just a general overview, we'll get into
21 the specifics later, what was this -- you've already talked
22 about the pictures, but --
23 A. I was the one who took the pictures, so that
24 generally is what you found. Basically what we had was, we
25 had -- to the north we had the old South Park housing

1 development, which had at that time been torn down, what
2 was left was basically piles and piles of bricks.
3 Manson -- I believe it was Manson or
4 General, but I believe it was Manson Construction -- had
5 developed a very heavy-duty concrete apron pier to the
6 north of the property for the purpose of lifting very heavy
7 things onto barges to go to Alaska. The property, first
8 time I ever saw the property was, it was covered with
9 cement tailings of which, when it rained, you literally had
10 to have a walking stick. If you're familiar with those
11 things, there is no base -- there is no substance to it
12 and you can't even stand up on it. I mean, it is pretty
13 amazing stuff.
14 The property was strewn with junk. We had
15 to contract to have all of that removed. We were told by
16 neighbors that it was a favorite place to dump stuff at
17 night, because there was access to it. It had also been,
18 we were told, by the neighbors, leased or at least used
19 for the purpose of dismantling most everything, and that's
20 where you find the old, either tugboat or barge house.
21 There was heavy machinery, iron barrels, tanks, debris.
22 There was a stream that separated the
23 property. We observed kids with fish in the stream, there
24 was actually fish in the stream. This was a favorite place
25 to fish. The stream was completely covered with mulberry

1 bushes. You had to literally dig through them to get to
2 the water, but the mulberry bushes had basically
3 embankments of the stream. If you can picture it, the
4 mulberry bushes over the years and years had grown and
5 become quite dense.
6 On this portion of the property, which is
7 sort of like a little leg that sticks out here --
8 Q. You're referring to parcel D like in dog?
9 A. Parcel D as in dog. That was one entrance to
10 get to the property. That property had been -- there had
11 been a lot of debris dumped on it. It was grown up to
12 about chest level in weeds. There was a small dirt path
13 or semi road that went to the stream, and then there was a
14 little wooden bridge that you would cross if you wanted to
15 walk over to the other side. And I will add there was a
16 very mean junkyard dog that lived there.
17 MR. SAFER: Where was the junkyard dog
18 located? I'm just kidding.
19 A. I don't want you to miss anything. A very mean
20 junkyard dog. I'm serious. There were approximately, at
21 the first time I saw the property I couldn't tell you how
22 much, but there basically were cattails out here, we later
23 learned it was .8 acres.
24 Q. How were you able to later learn that, Mel?
25 A. The Corps of Engineers, one of the reasons that

1 the administrators of the Corps proposed to deny our permit
2 for a marina was -- one of the reasons was that this was a
3 wetland that had .8 acres of cattails and housed rare birds
4 such as blue heron.
5 On the northern side of the property,
6 directly to the west, there was a junkyard. And it was not
7 a fancy junkyard, this was a dismantling junkyard, very
8 large junkyard. That's all that was on the property behind
9 us all the way to -- again I'm -- I can't tell you the
10 street. Almost to the freeway. In order to get to the
11 property, we started at approximately West Marginal and we
12 basically drove this little dirt road path, whatever, it
13 was not an improved road, it was not a kept road, other
14 than the guys in the junkyard would do something to it
15 from time to time. That's how we got to the property.
16 Q. You might take, if you would, please, and maybe
17 on whatever the official copy of Exhibit A, and I guess
18 that's Verne's copy, and just put a pink line wherever the
19 stream physically meanders across or crosses the Exhibit A
20 property.
21 A. The development required that King County
22 Hydraulics demanded us -- demanded of us to do an extensive
23 study of this stream, and --
24 MR. KELLING: Excuse me. Could you draw
25 that on our copy, too?

1 A. Our knowledge of this stream, when I say it
2 drains 800 acres, it wasn't that I went and measured it,
3 but this was data that was gathered in the permit process
4 that was required by King County Hydraulics to evaluate
5 this stream. Now, this stream went straight here and then
6 there was also --
7 Q. Continue the markings just on Verne Kelling's
8 copy, because that's the official version.
9 A. I have to go off the property here. But what I'm
10 saying is that this stream had several -- this was not --
11 when it got to our property, it was a single stream, but
12 there were inlets leading into it. There were several
13 streams that led into this stream. It was not a single
14 stream. So you had a stream that came off somewhere down
15 here and went across at that time where the junkyard dog
16 was, that area of property that led into the stream. There
17 was also a stream that continued somewhat straight. So you
18 had several streams leading into this stream.
19 MR. KELLING: Was that stream coming off Our
20 Lady of Lords hill there where the grotto was?
21 THE WITNESS: This, according to the report
22 of our engineers who we studied it with, this stream and
23 the different tributaries, I guess you would call them, all
24 ran under West Marginal Way and then drained that whole
25 valley on the other side and the hillside that you would

1 see way to the west. So that was the number they placed on
2 it was approximately 800 acres. Of many little streams,
3 all sort of leading to another stream, to another stream,
4 ending up into this stream.
5 BY MR. INSLEE:
6 Q. Now, does that pretty well describe the physical
7 characteristics in a general way that that --
8 A. Well, just maybe to correct something, the
9 property was not level by any stretch of the imagination.
10 The photographs you can -- but the property was just -- it
11 had been dumped on with cement tailings and it had not been
12 spread -- I'm not suggesting it was spread, it was just
13 dumped. In other words, it was a fly-by-night, pull the
14 dump truck in, dump it and drive away. No one had a
15 machine there to level it nor did they spread it or this
16 type. So the property was like this. It wasn't a flat
17 piece of property.
18 Q. All right. First of all, tell the arbiters what
19 the considerations were, first of all, to your knowledge,
20 as to how it came to pass that this lease was put into the
21 format that it was, relative to specifically to why it
22 came to pass that the valuation method and the rents, how
23 they were set and negotiated.
24 A. It was very clear. There were no
25 misunderstandings. It was our understanding from the trust

1 that they wanted this property developed. They understood
2 very clearly that this was going to require permits and a
3 major expenditure. They understood at the time that the
4 property had no value. And in return, this was a lease
5 that the trust proposed to us. It was not a lease that we
6 necessarily negotiated. We negotiated some specific lines
7 in the lease, but it was a proposed lease by the trust that
8 we develop the property.
9 It was their suggestion, the trust's
10 suggestion, that they would lease us the property for $300
11 a month, for a substantial period of time, understanding
12 that it would take quite a while just to try to figure out
13 what we could get away with doing. We in turn, there had,
14 they then suggested that after a certain period of time,
15 we would have to go to the record exactly, but the lease
16 would then go to $1200 a month.
17 Again, this was 11 and a half acres. This
18 was basically a pittance. And so we were, to be perfectly
19 honest, pretty naive in terms of the permit process. And
20 we just assumed that this would not be a problem. And it
21 was eight months later that we sat around going oh, my
22 gosh.
23 Q. What happened after -- well, sticking with the
24 lease negotiation, how did it come to pass that this photo
25 log and word description Exhibit A came to be inserted in

1 this lease? I must tell you I've not seen that before and
2 I want to know how it came about, if you know.
3 A. I know exactly. Because I became very concerned
4 with -- there had been at one time some plans, some ideas
5 of what could be done with the property. We in turn
6 accepted that as being somewhat reasonable. After we
7 entered into this lease, we discovered that what had at one
8 time been considered for this property was totally
9 unreasonable.
10 Q. And what had been considered?
11 A. A fairly good-sized marina, upland development,
12 warehousing, mini-storage, and we found that that was not
13 only physically impossible, but could not be permitted.
14 The marina that had at one time been sketched on this piece
15 of property we found. We discovered in the permit process
16 that at best we could do is half that.
17 We did not at that time understand how the
18 river worked. We assumed that we would have free access to
19 the river. We then found out during the permit process
20 that the Port of Seattle and the Corps of Engineers were
21 arguing over who had jurisdiction -- if you remember here
22 in these maps, this is the outer edge of our property. And
23 if you will note, that goes down the middle of our marina.
24 You then go approximately 175 feet before you reach what is
25 considered the navigable portion of the river.

1 We also learned much to our chagrin that the
2 Port of Seattle in turn's estimates as to the depth of
3 the river were just that, estimates. They were way off.
4 The river was not nearly as deep as the Port of Seattle
5 said they had dredged it. So when we in turn calculated
6 depths, we found out that those depths were not true. Now,
7 whether that was based because of fast siltation, but they
8 weren't true.
9 So we in turn found out that we could
10 basically only build about 2,000 lineal feet of leasable
11 moorage space, which would not in any way, shape or form
12 justify this development. We then had to go into lengthy
13 negotiations with the Port of Seattle because the Corps of
14 Engineers basically said they had final sign-off as to what
15 the Port agrees to, but the Port is the one you have to
16 first get to agree to it.
17 So the Port had to write us letters as to
18 we'll let you do this. So what they finally told us was,
19 the Port of Seattle said they would not approve any
20 development that was any closer than 60 feet from the outer
21 edge of the marina -- excuse me, outer edge of the -- I'm
22 sorry, let me say that again. The Port of Seattle directed
23 us that they would not accept any development plan that was
24 closer than 60 feet from the outer edge of the marina.
25 So you go from the edge of the marina,

1 which is again extended far beyond our property, you then
2 go from the outer edge of the marina another 60 feet
3 before you hit what was considered the navigable portion
4 of the river, that portion where you had to get to in
5 order to float. Until you got to the outer edge of the
6 river, which was not nearly as deep as they told us it
7 was, in order to get to the outer edge of the river, you
8 had to get there before you could float, during medium or
9 low tides.
10 So what happened was, we lost a major share
11 of the river. But also what happened is, what we had
12 originally estimated as dredge, we had to dredge not only
13 all of the property that we are paying the fee on, we also
14 had to dredge from the outer edge of our property another
15 175 feet to get to the navigable portion of the river
16 that's deep enough that we could in turn float.
17 Now, the Corps of Engineers, excuse me, the
18 Port of Seattle then told us that they would give us only a
19 30-day lease on all the property from our property line
20 out, so that half of the marina is on property which is
21 under basically a lease to the Port of Seattle with a
22 30-day cancellation clause. That if in turn we became at
23 any time a hindrance to navigation, i.e., if Mr. Anderson's
24 barges that he proposed earlier came up this river and in
25 any way got in the way, the Port of Seattle could basically

1 say you've got 30 days to get your marina out of the water.
2 That's the agreement that we are still under. So we agreed
3 to that. At that time we had no choice. That was another
4 lengthy negotiation, to say the least.
5 Q. In connection --
6 MR. DiJULIO: I think, if I might interpose
7 an objection, and I -- I think it is important that I make
8 a record on this. I will object to further testimony as to
9 the extent of the improvements or activity performed by the
10 lessee on the site, since the lease specifically directs
11 the appraisers not to consider such activity. I did not
12 object initially to Mr. Inslee's question, because he asked
13 a question relating to the negotiations regarding the
14 lease.
15 I object to further testimony with respect
16 to the improvements engaged in by the lessees and would
17 move to strike that portion of the testimony that was
18 non-responsive to the question and related to that
19 improvement activity.
20 MR. INSLEE: We're obviously offering it for
21 a different purpose. Number one, to establish and show
22 what the locale is and what these same things apply today.
23 And counsel in his brief has told us that he thinks this
24 is a water-related use. This is preliminary to showing,
25 our showing, that anybody that considers this to be a

1 water-related use today has not done their homework.
2 That's number one. So all this is information that
3 relates to that. And is current today. Same 30-day lease
4 exists today.
5 Secondly, with regard to the position or the
6 argument that somehow this lease has to be studied in a
7 vacuum and not given the background and circumstances,
8 every court decision in our state is saying nowadays you
9 get the background and circumstances so you can help
10 interpret the language and the intent of this party, of
11 both parties. And that's basic to our whole philosophy
12 here of what this lease means and your getting the proper
13 understanding of it.
14 Thirdly, under the information already
15 supplied by various documents already in evidence, certain
16 construction costs have been assumed, and what you do with
17 them, I don't know. But you're going to do something with
18 them, because it's in one of your appraiser reports that
19 they've already submitted. If you're going to consider
20 that, we have the right to delve into the factors as to
21 whether or not those factors, particularly in construction
22 site, particularly with regard to whether or not a
23 reasonably prudent person looking at this site would choose
24 to make it a marina or a warehouse or storage containers,
25 has got to take into consideration these identical factors.

1 So that's why it's all relevant. If it
2 isn't relevant, you throw it out, but I think we're
3 entitled to present it.
4 MR. KELLING: We can, as appraisers acting
5 as arbitrators, sort out the description of the development
6 as it differs from the physical attributes of the land that
7 happens to be between the present marina and the navigable
8 portion of the river. So let's let it stand and realize
9 that we can relate to the description as it describes the
10 land as it was in 1974, as Mr. Hester is describing it.
11 MR. DiJULIO: Mr. Kelling, not to belabor
12 this point, and both parties have been more than
13 cooperative in advancing this to the arbitrators'
14 consideration. The first point is that I would like to
15 have a continuing objection. Mr. Inslee's correct, the
16 courts are allowing interpretations, background
17 information as to how parties got to contracts. I'm not
18 objecting to that. What I'm objecting to is the cost of
19 improvement information. I don't want to interrupt
20 constantly with such an objection that I understand we'll
21 probably get into that. I would like to ask for a
22 continuing objection on that so I don't have to be
23 interposing it on a regular basis.
24 MR. INSLEE: Thus far I hadn't asked any
25 questions on cost intentionally, not that I remember. I

1 haven't asked for any figures yet.
2 MR. KELLING: Perhaps it was offered.
3 MR. INSLEE: By you.
4 MR. KELLING: By Mr. Hester, and I can
5 understand that.
6 MR. DiJULIO: May I have that continuing
7 objection?
8 MR. KELLING: Certainly you may.
9 MR. DiJULIO: The second point is, I assume
10 that I don't have to raise evidence about street use rights
11 and the fact that we all understand that substantial
12 development occurs in reliance upon 30-day street use and
13 other public access uses.
14 MR. INSLEE: I think we can get to argument
15 in that in closing, I think. I don't think it's germane
16 to argue the positions as a form of objection.
17 MR. DiJULIO: I'll reserve that for cross,
18 thank you.
19 MR. KELLING: Okay. The present use and the
20 improvements bear on that need for a permit to have access
21 between the marina and the navigable portion, so again, as
22 appraisers we can, as is your business, relate to what it
23 was in '74 physically, which is my understanding at this
24 point what we should do.
25

1 BY MR. INSLEE:

2 Q. Okay, and your testimony, Mr. Hester, to date as
3 to the physical characteristics, assuming they existed
4 in 1992, would they be germane insofar as somebody
5 evaluating what the value of this property may be worth in
6 1992, assuming we're describing visually what it was in
7 '92?

8 A. It's exactly the process they've gone through on
9 every marina that I have built.

10 Q. Now, showing Exhibit B -- and there's a copy
11 there for you and for the three arbiters -- you indicated
12 you obtained the permit, there was some question raised in
13 preliminary appraisals that somehow this property had
14 received either permits or approval processes for a
15 development prior to the time of your lease. Can you tell
16 us and clarify that issue for us, please?

17 A. There were no permits. We had not even gone to a
18 stage of drawings or submittal until 19 -- nearly two
19 years after -- '76. October, I believe. I would have to
20 look at the information exactly. But nearly two years
21 after that that we actually did submit for the permit.

22 Q. Is Exhibit B the first permit that you physically
23 obtained in connection with this property?

24 A. The permit was issued in August 19th of 1977.
25 We actually submitted for the permit on December 7th of

1976.

Q. So my answer, yes, this is the first permit that was issued?

A. Yes.

Q. Were you the sole person who was working on getting these permits?

A. Yes.

Q. You didn't hire an outside consultant or engineer to assist you?

A. Not beyond the engineering, doing the actual drawings.

Q. And did you get your permit on the first shot?

A. Well, the Corps of Engineers' first initial recommendation was to deny the permit.

Q. Now, as the lease itself so states, you've recited in the statement which maybe the arbiters haven't had a chance to read yet, but you as the lessees in the lease promised to get these grading permits and development permits, did you not?

A. Absolutely.

Q. And why was it that you promised that? Why couldn't you just pay rent for the rest of the term and never do anything active?

A. The property basically was not usable at the time. It was being used on a sporadic basis for junk.

1 Q. To the extent that those lease terms required you
2 to obtain permits to develop the property, would that be
3 something you would have put in there as a term on behalf
4 of the lessee?
5 A. If I were to do this again, I definitely would.
6 Q. The promise was to the lessor, that you would go
7 out and do this, and I'm saying, who insisted that that
8 clause be in there? You or the lessor?
9 A. Of course it was the lessor.
10 Q. All right.
11 A. It was not me.
12 Q. So you affirmatively undertook --
13 A. What I meant, what I was saying was that I would
14 not agree to it today.
15 Q. Oh, I see what you mean.
16 A. Would not do it again.
17 Q. Was that a quid pro quo in the negotiation that
18 you were going to develop the property as a promise to the
19 lessor?
20 A. It was our understanding that the terms were very
21 firm.
22 Q. Now, with regard to the yardage which is
23 mentioned here, it authorizes in Exhibit B to dredge 83,000
24 cubic yards. Was that a number generated before you
25 realized what was really contained in the waterway?

1 A. Absolutely. When you submit for permits, you do
2 it as inexpensively and as quickly as you can. And that
3 was the basic, our first quick calculations based on what
4 the Corps of Engineers said was beyond their 60 -- a lot
5 of the depths that we had counted on from the Corps of
6 Engineers didn't materialize. In addition to that, Evan,
7 we found out that the bank was continuing to slough, and
8 so we were constantly fighting it filling up. I mean, we
9 were -- it was, as it is today, it's an ongoing matter.
10 You dig some, but every day goes by, it adds a little
11 more.
12 Q. And in connection, then, relative to the issuance
13 of the permit, Exhibit B, how soon thereafter did physical
14 activity start with construction on the site of any
15 dredging, improvements, or otherwise?
16 A. I don't -- it was fairly immediate.
17 Q. You mentioned cement tailings. Do you know the
18 source of the same?
19 A. No.
20 Q. Give a copy to counsel, will you? I may have
21 given you his copy.
22 A. I know they were there the first time I ever saw
23 the property. That's the extent of my knowledge.
24 Q. And in connection with this letter that was sent
25 by Mr. Reynolds, a copy to you, does it reference its prior

1 lease with the San Juan Concrete Products in January of
2 '63?
3 A. Yes.
4 Q. Now, in connection with the -- and I'm not going
5 to ask you what you did on a step-by-step basis to develop
6 this property. I just now want to get through some of the
7 overall procedures. So following the time sequence, the
8 obtaining of the permit and the dredging occurred, is that
9 correct?
10 A. Correct.
11 Q. And then the marina, after the dredging had been
12 done, then the riprap or whatever had been put up on the
13 bank, which Szmodis will tell us about, then the marina
14 got put in?
15 A. Correct.
16 Q. Then when in relationship to the marina did any
17 work begin on the upland portion, not just parcel A, but
18 the entire upland portion?
19 A. Approximately 19 -- I would have to refer
20 exactly, but 1980s, 1981, '82.
21 Q. Okay.
22 A. And I will clarify an exact date. That would be
23 easy to do.
24 Q. Would that be for the warehouse, you mean?
25 A. It's not a warehouse, it's a metal building.

1 What it is is a 12,000-square-foot metal building. 6,000
2 square feet of it is basically metal building, 6,000
3 square feet of it is a lean-to. So picture basically a
4 metal building.
5 Q. By not withstanding that building not being
6 started until 1980, or whatever date Lou will identify for
7 us when he comes back, what was the period of time in
8 relationship to the dredging operation in the marina basin
9 did any physical excavation or anything occur on the upland
10 properties?
11 A. We removed, removed the cement tailings.
12 Q. Okay.
13 A. And disposed of them. That was the period of
14 time where there were some pretty gigantic holes in the
15 South Park area that did not have City inspectors.
16 Q. And then as you removed cement tailings, what was
17 the water table at that point in time before any work was
18 done on the property?
19 A. There were no sewers to the property. In fact,
20 during our first two years of operation, we had what we
21 called a Honey Dew wagon would come and pump. We had
22 an engineering firm come to see if the property would
23 perk. And the report -- I'm not being facetious, the
24 report was they dug a ditch, jumped in the ditch, tide
25 came up, almost drowned. As I say, I'm not being

1 facetious, this is what the engineer reported. So
2 basically, at high tide, basically the property filled
3 back up because it was quite porous.
4 Q. Would this be in the upland area, not just parcel
5 A, but also the upland portion which is --
6 A. The perk test was taken on parcel B.
7 Q. Okay. That's where you're describing the water
8 table as you've just described?
9 A. It -- pardon me?
10 Q. That's where you described the water table as
11 being as you just described it?
12 A. Correct. We dug down and found it.
13 Q. All right. Now, we've heard a lot of testimony
14 about what should or shouldn't be done in parcel A. Was
15 this excavation of the cement filings on parcel B or A?
16 A. It was on both.
17 Q. And in connection with the excavation, I'll have
18 Lou talk about amounts or quantities if that's necessary
19 later, but where was that -- I don't mean the specific
20 location. Was that all exported?
21 A. Yes.
22 Q. And if that were there today it would have to be
23 exported, I take it, also?
24 A. No question about it.
25 Q. Even if it's not toxic, why would it have to be

1 exported?
2 A. You can't build on it, you can't do anything with
3 it. You can't even stand on it. You can't do anything
4 with it.
5 Q. Now, after the parcels were excavated with
6 cement tailings, and there was some kind of void created
7 there, what was used to fill it up, initially?
8 A. Initially, we used the dredge spoils and
9 pre-loaded the entire property.
10 Q. You got some photographs, don't you? And I don't
11 know if they're in your briefcase or next to you.
12 A. They're next to him in my briefcase. I'd be
13 happy to get them.
14 Q. Would you please get it? Why don't you take your
15 whole briefcase down there, because you'll be utilizing
16 certain things there I'm sure from time to time. Take that
17 map, also, would you?
18 Do you have a picture that illustrates the
19 extent or quantity of dredge material that was put in after
20 the area was excavated with regard to the cement tailings
21 and the unsuitable --
22 A. Yes.
23 MR. DiJULIO: While he's looking that up,
24 may I have my continuing objection as to the work on
25 site?

1 MR. KELLING: Yes.
2 Q. Mel, this work would have to be done June 1,
3 1992, if you're going to develop the property, would it
4 not?
5 A. Absolutely.
6 Q. Would a developer who looks at this property be
7 able to identify the cement tailings as you did?
8 A. Of course. Obvious.
9 Q. Was it obvious that the cement tailings and the
10 soft material had to be removed?
11 A. No question about it.
12 Q. In your experience as a realtor, would the
13 removal of this material be material insofar as evaluating
14 the value of this property to a potential user?
15 A. There's other pieces of property with it right
16 now that are having the same problems, of course.
17 MR. KELLING: Excuse me, I'm not sure I
18 understand that answer. You asked would a realtor --
19 MR. DiJULIO: Would a reasonably prudent
20 person looking at the property now see the cement tailings?
21 He said yes. Would they have to be removed now in order to
22 develop the property? He said yes.
23 MR. KELLING: Okay, that leads me to ask,
24 did you not inspect the property before you leased it for
25 a for specific things that might affect value?

1 THE WITNESS: To be perfectly honest, we had
2 no idea as to the extent, how extensive the cement tailings
3 would be. It was substantially more difficult to handle
4 than we had ever estimated.
5 MR. DiJULIO: We're not claiming foul play.
6 We're just saying that's what a guy would have to do today.
7 MR. KELLING: I understand that.
8 BY MR. INSLEE:
9 Q. It would be obvious to any prudent investor?
10 A. Let me explain.
11 Q. Mr. Hester, listen to my question. Would it be
12 obvious, just as it was to you, that they exist even if you
13 don't know the extent thereof?
14 A. Yes.
15 Q. All right. Excuse me. Go ahead.
16 MR. KELLING: That's fine.
17 Q. Now, after the cement tailings had been
18 excavated, we'll have Lou talk more about that, you've
19 indicated that the property then was dredged and the
20 dredged material deposited into these voids, is that
21 correct?
22 A. Correct.
23 Q. So we can identify later how much was excavated,
24 and to fill the voids, you say you got a picture there.
25 Would you mark that as Exhibit Number D like in dog? And

1 give everybody a copy of that whole set and we'll walk
2 through it together, then we can get that identified at
3 this time.
4 MR. ANDERSON: That was C.
5 MR. INSLEE: Harold Weiss, Safeco Title,
6 from Mr. Reynolds, a copy Duwamish Marina, February 3rd,
7 '78. Okay. You got one there, counsel?
8 MR. DiJULIO: I do. Thank you, Mr. Inslee.
9 MR. INSLEE: All right.
10 Q. Now, obviously the first page of Exhibit D is a
11 picture showing the site as it existed, and I don't know
12 what date this photo was taken, maybe you can tell us.
13 A. '84, somewhere in there, I'm not -- I can clarify
14 exactly the time. Lou actually took this photograph. He
15 flew it. So he can tell you exactly.
16 Q. All right. So just walking Mr. Kelling through
17 it, because he's the only one that hasn't been out there so
18 far, I see a red line, that purports to show a property
19 line as far as you best understand it?
20 A. Correct.
21 Q. Pardon?
22 A. Yes.
23 Q. And then that extends back to the red line on the
24 east?
25 A. Yes.

1 Q. Or I guess that's -- I don't know what direction
2 it is. And then the uses are the marina and then what's
3 the flat area?
4 A. Directly behind it is the parking lot for the
5 marina. And then at that particular time we actually had a
6 boatyard.
7 Q. All right. And then the next usage is obviously
8 that of container storage, right?
9 A. Correct.
10 Q. And then that 6,000 lean-to 6,000 building is
11 there, right?
12 A. Correct.
13 Q. So the entire perimeter of that property extends
14 as you show by the red lines, under the uses as shown in
15 '84, does that use continue today? Or say up through '92?
16 A. No. The boatyard failed. And so it is now
17 utilized as ship container storage.
18 Q. All right. Now, is there a photograph that
19 depicts the beginning stages of filling and pre-loading?
20 A. Correct, the next photograph. That was almost --
21 that was very early on. That was the absolute beginning.
22 Q. What's that white appearing material in the
23 foreground?
24 A. That's just some of the cement tailings that were
25 left. It was very difficult to get it all.

1 Q. Based on your familiarity with the area, is this
2 on a portion of parcel A or parcel B? With reference to
3 Exhibit Number A.
4 A. It's on A and B.
5 Q. Okay. And I guess you can get some sense of how
6 high those volumes of material are in comparison to the
7 crane that's utilized on the left, is that right?
8 A. Correct. You can see where we have taken most of
9 the cement tailings away, you can tell by the earth, color
10 of the earth.
11 Q. And then on the back side of this photo appears
12 some more pictures, what does -- the back side, where the
13 crane is in the air and is hidden by a pile of something?
14 A. Well, if you -- the crane which is on the
15 opposite side of the pile of dirt there is actually
16 dredging. This was a hill of dirt, the length of the
17 marina. You can see on the side of the picture where most
18 of the cement tailings have been taken off and then this is
19 the dirt that we basically pushed back to refill the
20 property.
21 Q. Did any of that material that you're dredging get
22 off site, exported?
23 A. Very little.
24 Q. All of it went onto the site?
25 A. Not every square foot, but it was miniscule --

1 Q. All right.
2 A. -- compared to the hole.
3 Q. All right. Now, in connection when you refilled
4 the excavated area where the cement tailings had been
5 located, and excavated, and then filled, did you fill back
6 to the original elevation or surface as the original terra
7 firma?
8 A. Actually, we -- I don't know if I can tell you
9 exactly. We filled approximately in three and some places
10 four feet.
11 Q. Would that be in excess of the elevation as it
12 then existed before you did the excavation?
13 A. In most cases -- I don't know. We basically dug
14 a hole and then we filled it up and just kept filling.
15 Exactly what the elevations were -- some holes were deeper
16 than other holes when we'd excavate.
17 Q. Was there any plan insofar as you know to raise
18 the elevation of the subject site?
19 A. Oh, yes. We had to.
20 Q. Why did you have to raise it now?
21 A. Well, the water table was within shovel range.
22 I mean, we could literally dig a hole and at high tide hit
23 water. So we had to put a base on the property to get to
24 the point where we could, you know, do anything with it.
25 Q. Now, if you were going to put a footing in, you

had to raise the property in order to install a footing?

A. Of course.

Q. If you weren't going to put a footing in, were just going to use container storage, would you have to fill it just for container storage?

A. It would be worse. We in fact did fill substantially more where ship containers went. By substantially, I mean substantially.

Q. Well, I'm not clear on your answer, because my question dealt with the question of if you were only going to put in ship container storage, weren't going to put a footing in, weren't going to put a building on there, would it still have been necessary to raise the elevation of the original grade of the site?

A. Yes.

Q. And tell the arbiters why.

A. Anytime you use an industrial use, ship containers are moved a lot and they're used with very heavy forklifts. And people do not typically asphalt or concrete these because these forklifts tear up the asphalt. So what you have to do is, after we raise the property three to four feet, which would be typical fill and pre-loading, we then -- in fact, I still have the truck trips, we then brought in for an entire winter on a daily basis trucks with piggybacks with rock approximately from this size to

1 this size.
2 Q. Indicating two to six inches?
3 A. And completely over the entire ship container
4 facility, which is all of parcel B, we basically reinforced
5 the fill another three and in some cases as much as five
6 feet of rock in order to carry the forklifts and the ship
7 containers.
8 Q. To the extent that the fill material came from
9 the dredge site that you've identified, what, if anything,
10 was its degree of compressibility? In other words, I don't
11 mean a technical compressibility, but did it compress as
12 you loaded rocks on it?
13 A. Oh, sure. It was great soil for that purpose.
14 Q. All right. Now, after the rocks had been
15 deposited, what did you physically observe occurred, after
16 you had this winter of rocks being dumped by the trucks
17 into the site in order to prepare it?
18 A. We were forced to dump more rocks. I started
19 getting bills from -- we had to continue to dump rock
20 because once we got containers and started using the yard
21 they started sending us bills for broken axles because they
22 would bury them.
23 Q. And so that continued?
24 A. Right.
25 Q. Would that activity be something that would have

1 to be done in June of 1992 if you're going to go out and
2 develop this property into something that's going to hold
3 either containers or whatever?
4 A. Yes. Of course.
5 Q. Now, what is the other pictures that are
6 depicted in Exhibit D?
7 A. The very next page shows the outfall from the
8 stream. This is a very recent photo. We in turn -- it was
9 demanded by Hydraulics that we -- this is a seven-foot
10 culvert. So you can -- if you were to choose to you could
11 stand in this culvert.
12 Q. And that was installed by your partnership?
13 A. It was installed by our partnership and required
14 by the King County Hydraulics.
15 Q. Would something have to be done with the stream
16 under 1992 standards? You don't have to say what it is,
17 but --
18 A. Yes, something would have to be done. You
19 couldn't ignore it.
20 Q. Now, to the right it shows a culvert and it shows
21 an embankment?
22 A. Yes.
23 Q. What is that?
24 A. You see two things there. You see -- in fact,
25 if you look at this picture then flip to the two pages, in

1 order to hold the bank in place, we were required to drive
2 H beams the entire length of the property, because the
3 bank kept sloughing off into the river as we were working.
4 So we were required, we had to drive H beams the entire
5 length of the property and then we jettisoned in between
6 the H beams, water jettisoned, reinforced concrete panels.
7 You basically lower them on a crane and you put on each --
8 bottom of each one of them you put very high-powered water
9 jets. Because you can't dig in this soil because when you
10 dig down one foot, it goes out two and a half feet.
11 So to work with this kind of soil, we drove
12 H beams and then we jettisoned concrete panels in and
13 literally blew the earth away. And then in front of that
14 we piled six and eight man rock, meaning boulders. They
15 were brought in by barge and lifted off by a crane, the
16 entire length of the property to, one, hold back the bank,
17 and, two, the panels kept this very -- this soil, which is
18 basically topsoil, from filtering and sloughing off.
19 Q. Now, in connection with the embankment that's
20 depicted in these photographs, would you look at Exhibit 4?
21 Could you hand that to him, Mr. Kelling? It's the map of
22 the -- it's the survey map of Group Four.
23 A. There's one additional photo.
24 Q. Oh, did I skip one? On the end?
25 A. Much to our chagrin, we were told later, this

1 particular part of the bank --
2 Q. Which photo?
3 A. The last photo. On that particular part of the
4 bank, we couldn't jettison in the concrete, so we had to
5 drive -- those are sheet piling. S H E E T. And we were
6 informed by Ivar Hagland, who -- Ivar Jones, excuse me,
7 Ivar Jones, who owned Delta Marine, that the reason we were
8 having so much, so many problems with that bank was that
9 bank was filled with Christmas trees. That's how it came
10 in existence, it was a dump place for Christmas trees. And
11 Ivar found that quite amusing.
12 Q. All right. Now, in connection with the
13 activities, if one were going to have to retain this
14 embankment in 1992, would this or similar type of
15 embankment be required?
16 A. No question about it.
17 Q. Would the methodologies change from 1974 to 1992
18 as to what would be required in your judgment, based on
19 your experience with marinas, from the activities that you
20 performed post '77?
21 A. This is not a bank that you can riprap. This is
22 a bank that you have to build some type of bulkhead. And
23 then you have to reinforce the bulkheads because of the
24 pressure of the water coming in under the earth, twice a
25 day, and then going back out. It causes tremendous

1 hydraulic pressure. So you have to build a bulkhead and
2 then you have to keep those soils from flowing back out.
3 Q. All right. Showing you Exhibit 4, which is that
4 survey, can you look at that and tell me what extent of
5 the property's boundary was enforced by the bank or banks
6 that you've just described? Where is that bank on Exhibit
7 4?
8 A. This is the river. It starts here, goes back
9 here, the entire length of the property, and out to the end
10 out here. This is Delta Marine out here. So clear out
11 here. Every inch of the property.
12 MR. SAFER: Mr. Hester, is that what you
13 dredged to or is that what was pre-existing?
14 THE WITNESS: Sorry, I don't quite
15 understand.
16 MR. SAFER: That line, that embankment,
17 that's where you dredged to, that's the current toe of the
18 bank, or foot of the bank?
19 THE WITNESS: No, the bank actually comes
20 like this.
21 MR. SAFER: So that line right there, what
22 does that represent, that you just sketched?
23 THE WITNESS: This line?
24 MR. SAFER: Yes.
25 THE WITNESS: I understand from Group Four,

1 it's the bank in 19 --
2 BY MR. INSLEE:
3 Q. I'm trying to identify where in relation to that
4 bank that Group Four drew before you ever got construction
5 going, was the physical bank that you constructed in these
6 pictures located.
7 MR. SAFER: That's fine, I misunderstood.
8 Q. That was my question. Did you answer that?
9 Answer it again.
10 A. As to -- ask the question again.
11 Q. Where is the bank in the pictures that we see?
12 A. About like this. This comes back in just a
13 little -- we squared it off.
14 MR. SAFER: Sure.
15 A. This meanders.
16 Q. Okay. Did you square off any more or less than
17 what was necessary based on the requirement of
18 restabilizing the bank?
19 A. We just made a straight line.
20 Q. And based on your experience in marina
21 construction, would that be a prudent thing to do in 1992,
22 if you were going to stabilize this bank and install it?
23 A. Sure.
24 Q. You wouldn't try and follow the contours of the
25 land, you would put it in a straight line, more or less?

1 A. A little piece of dirt out here is of no value.
2 I mean, you know. We're talking the size of this room.
3 We'd square it off.
4 Q. Now, in connection with the -- I'm not going to
5 ask you about the quantities or the amounts of material
6 that had to be performed. After you got the permits and
7 they put in this marina, did the dredging you've talked
8 about, then of course it's now leased to two separate
9 people and you don't need to tell us what the lease deal
10 is, but is there only two tenants there now, the marina and
11 this --
12 A. Correct.
13 Q. -- container usage?
14 A. Correct.
15 Q. All right. You have some familiarity with regard
16 to the vicinity down there, you've inspected adjacent
17 properties and looked at some of the properties that have
18 been mentioned as comparables in prior aappraisal reports?
19 A. Yes.
20 Q. Have you performed a picture analysis as well as
21 maybe a word analysis of those adjacent or vicinal,
22 V I C I N A L, properties?
23 A. Yes.
24 MR. SAFER: What does it mean?
25 MR. INSLEE: Adjacent.

1 MR. SAFER: Thank you.
2 MR. INSLEE: All the easements you'll see
3 for the east side say vicinal.
4 MR. SAFER: Sounds obscene.
5 MR. INSLEE: I know it.
6 BY MR. INSLEE:
7 Q. Before we get into Exhibit E here, Mel, let me
8 ask you, generally speaking, we've heard what the terrain
9 was per the Group Four elevations, and a comparison made
10 between Group Four elevations and elevations that
11 Mr. Richard -- his last name escapes me.
12 MR. DiJULIO: Dickman.
13 Q. Dickman. He testified this morning. In
14 connection with that, I'm not asking you to recap his
15 entire testimony, but generally speaking, he testified only
16 as to parcel A calculations.
17 A. Correct.
18 Q. Now, looking at Exhibit A, I see that parcel A,
19 at least some portion of that's been submerged and then
20 the bank would run through parcel A, correct?
21 A. Correct.
22 Q. And then where the ship container storage is
23 depicted on Exhibit Number D.
24 A. Correct.
25 Q. Would that be primarily on portions of parcel B

1 of Exhibit A?
2 A. That is parcel B.
3 Q. Okay. Now, with regard to the raising of the
4 elevation of the property from what its pre-development
5 state was to its current state, what is the fact as to
6 whether or not property adjacent on -- I guess it's one of
7 the comparables. Well, first of all, what is your general
8 knowledge as to whether or not a party's properties
9 adjacent to your parcel have been raised over and above
10 terrain level, original terrain level?
11 A. The property directly behind us, which at the
12 beginning of this development, which was basically level
13 with ours, prior to building that warehouse was filled in a
14 minimum of two to three feet. It's still lower than ours.
15 The property where Sea King is had enormous fill. I'm
16 guessing about eight feet. The property which is --
17 appears to be still vacant, which was directly to the north
18 where the apron pier is, was filled because we filled it.
19 Q. Now, before we talk about the fill area, I want
20 to get your opinion now, you developed or participated in
21 how many marinas?
22 A. Three that were built and six -- three that were
23 built and three that weren't built.
24 Q. Now, I want you to tell the arbiters what
25 considerations you want them to think about with regard to

1 whether this property should be, can be a water-related or
2 water-dependent use.
3 A. It's a very simple formula. You basically
4 calculate what is the return, gross return on the highest
5 and best use of water-related, you estimate what it would
6 cost you to get to that point where you can start
7 collecting rents, and calculate a return, and from that you
8 derive what the land value is. There's no magic to it.
9 Q. With regard to this property, Mel, what are the
10 considerations that tend to suggest to you, at least from
11 your position, that this property should not as its highest
12 and best use be utilized as a water usage or
13 water-dependent use?
14 A. The marina is not a working marina as you would
15 know a working marina, such as where you might find at a
16 port. This is called the Duwamish Yacht Club and it is a
17 private marina. In other words, they don't pay rent every
18 month, they basically belong to a club that owns the marina
19 and they in turn do whatever they have to do to keep their
20 marina in place.
21 The dredging alone -- and there has been
22 three dredging operations minimum since they had it. The
23 dredging in 1990 by the marina, just the dredging, that the
24 dredging came to 361,000 and some change. If you count
25 all of the outside piers to the marina -- and the marina

1 is maxed out -- if you count all the outside piers as
2 being leasable space, even though because of backwash and
3 et cetera they aren't, you have about 4,000 lineal feet.
4 If you calculate that out, these people are
5 paying in, in terms of rent, about double what they could
6 pay for on Lake Union if they just went down there and
7 rented a space. But the reality is, it's a club in which
8 they have an interest and they stick with it. So a marina
9 makes no sense.
10 Q. Have you become privy to Duwamish Yacht Club
11 documents regarding the studies they've done of the silting
12 problem with regard to the yacht basin area?
13 A. Yes.
14 Q. I believe the next one is -- I've kind of
15 abandoned E temporarily, I haven't forgotten it. This is
16 going to be F. Would you hand F to everybody?
17 And what is Exhibit F, if you can tell the
18 arbiters, Mel?
19 MR. INSLEE: Does everybody have enough
20 copies so far?
21 MR. SAFER: We can use another one.
22 MR. INSLEE: All right, there's my last
23 shot.
24 Q. What is F?
25 A. F is -- F is data that was acquired by the marina

1 in preparation for a lawsuit against King County based on
2 the fact that the stream was not only silting up the
3 marina, but was dumping contaminants, and that they had
4 been informed by the County that the next dredging
5 operation that they would be facing may not be possible
6 because the materials are considered contaminated. So the
7 first sheet basically is a breakdown of their cost of just
8 the 1990 maintenance dredging.
9 Q. The 361, including that labor cost?
10 A. Yes, sir. The other information has to do with
11 sort of an explanation of the problems that they are
12 facing.
13 Q. Is this Applied Science & Engineering, Inc.
14 report attached to that from Dr. J -- whose name I can't
15 identify, but is identified in the CV attached. All right.
16 And in connection with, you mentioned that -- that
17 describes the problems they're having, right?
18 A. Correct. They had to actually in the last
19 dredging operation take much of the soil, all the soil had
20 to come upland and much of it had to be disposed in the
21 waste disposal type of operation, contaminated soil
22 disposal.
23 Q. Mel, are you aware of any factor in January of
24 1992 that would make this not an ongoing continuing issue
25 insofar as this report implies?

1 A. No, it would be a continuing issue.
2 Q. Showing you Exhibit G, here's your copy. What is
3 that? Is that the affidavit of Roger Lowe, a geotechnical
4 consultant whose affidavit was filed in that proceedings
5 involving the yacht club and King County's lawsuit?
6 A. Yes, it is.
7 Q. Does that declaration describe in it the nature
8 of the siltation coming from that uplands area that comes
9 in through the stream?
10 A. Yes.
11 Q. Adjacent to -- crossing your property?
12 A. Yes, it does.
13 Q. Does it describe in some detail the amount of
14 chemicals and nature thereof?
15 A. Yes.
16 Q. And Mr. Lowe's CV I believe is attached. And
17 that being executed in March of '91, has there been
18 anything differently accomplished or anything done as of
19 June 1, 1992, to restrict or otherwise amend or change the
20 character or nature of sediment coming down through the
21 stream depositing into this yacht basin area?
22 A. Not to my knowledge.
23 Q. Now --
24 MR. INSLEE: And we'll go over that. We
25 won't go over that in detail at this point, but when you

1 get time to look at it and describe all the things that we
2 put in our pretrial statement to you.
3 Q. Returning now, Mel, to Exhibit E, the photographs
4 that you've previously identified, and we're not picking up
5 on the Safer report because the only report that we have
6 that has comparables is before this board. I want to talk
7 about those comparables with you, Mel, just to get you to
8 share with the arbiters what you know, if anything,
9 relative to the same. And with regards to the comparables,
10 have you put those on a large vicinal map?
11 A. Yes.
12 Q. Could you mark that, please, as Exhibit Number H?
13 Is that the next one?
14 MR. SZMODIS: Yes.
15 Q. All right. Why don't you, Mel, describe first of
16 all -- I guess we can all spot where comparable 1 is on
17 Exhibit Number H, but tell us what considerations you'd
18 like to share with the arbiters with regard to comparable 1
19 of Exhibit E.
20 A. Well, Exhibit 1 is on Elliott Bay. It is a part
21 of a billion dollar Port of Seattle southwest harbor
22 cleanup and redevelopment project. It adjoins a 100-acre
23 container terminal. By terminal I mean a facility where
24 you can offload containers directly from a water vessel
25 onto the ground.

1 The property has been filled -- if you go to
2 page 2, you'll note that I took, in the left-hand side
3 corner, a photograph where I was standing off the property
4 and I was shooting onto the property to give -- I
5 understand that this property has been filled
6 substantially.
7 The subject property is here. I have
8 placed on a map, although everyone here of course knows
9 where they are, but the Spokane Street Bridge, First
10 Avenue Street Bridge, and the 16th Avenue Street Bridge,
11 which is a drawbridge with limited height and limited
12 depth.
13 Q. Would you explain to the arbiters your awareness
14 as to what the location between subject and comparable 1,
15 why those bridges impact the property, if at all?
16 A. Every time you go under a bridge, the value
17 decreases. The property on this side is substantially more
18 valuable than properties, if we're talking about water use,
19 on the south side of the Spokane Bridge, you have one
20 bridge. Once you start getting into these bridges, you're
21 getting into height problems.
22 Also, the Duwamish River is a very
23 interesting river, in that there are actually portions on
24 this river that get deeper every year, believe it or not.
25 There are portions on this river which we know get

1 shallower every year. So as the topsoil in turn comes down
2 the Duwamish, down this little stream, the topsoil -- if
3 you notice this big rounded bend here, just about 4,000
4 yards south of the subject site, the purpose of that bend
5 in the river and the purpose of this wide spot there was,
6 under the Corps' idea, was that was where they were hoping
7 the majority of the dredge spoils would in turn drop.
8 Whenever you slow up water, dredging spoils
9 drop. So what happens is, the closer you are to this bend
10 in the river, the more dredge spoils drop, the faster the
11 river fills up. As you go down the river, the speed of the
12 water increases, and there are actually places along this
13 river, according to the reports that I have initiated,
14 that actually get deeper every year.
15 So the stability of banks and the amount of
16 dredge spoils at this portion of the river are
17 substantially different than the amount of dredge spoils at
18 this end. Also, most of this property, such as the subject
19 property, was actually fill. If you are familiar with the
20 Marina District in San Francisco, it's just like the Marina
21 District. Basically it is, in this case, topsoil, which
22 has basically filled this in. The Marina District, during
23 the earthquake, basically it was like jelly. And that's
24 because it was all fill. When you get at this end of the
25 river, it's not fill like it is here.

1 So that -- so each -- and each time you go
2 under a bridge, once you get past the 16th Avenue Bridge
3 you're limited to types of vessels, you have to raise the
4 bridge, those types of things. So that's why I depicted
5 the bridges.
6 Q. Now, in connection then, you've indicated that
7 there's a different use with regard to the potential water
8 use, and you've already described to me limitations on the
9 subject of a water use. Based on your experience, Mel, are
10 the economics associated with putting in a pier or an apron
11 pier or a dock for any access to the navigable portion of
12 the Duwamish right-of-way on this subject property
13 economically viable, and if not, why not?
14 A. Well, you have to do one or two things. You have
15 to dredge the entire basin and then continue to dredge it,
16 in order to get to the bank, or you have to build a pier
17 out to deep water, which is totally impractical.
18 Q. Insofar as dredging in 1992, given Roger Lowe's
19 report, and your knowledge of the Duwamish Marina
20 sedimentation issues, what, in your best judgment, would be
21 the ability of an owner of this property in 1992 to, A, be
22 able to export the cement filing area and then to fill it
23 with the dredging from the river bank? I mean from the
24 river basin.
25 A. There would be no chance. We were denied the

1 right to drop these dredge spoils in Elliott Bay, which is
2 the least expensive way to dredge. You climb it onto a
3 barge, pull the barge up north and unload it. So all of
4 our dredge spoils -- that's the reason you saw the mountain
5 of dirt. All the dredge spoils were required by the
6 Corps of Engineers to come upland, which means you've got
7 to truck them somewhere. They've got to go somewhere.
8 You've got trucking costs. We use those
9 spoils to fill. Today, you would have contaminated
10 material, which is already pointed out in this report.
11 You'd have to -- if you could get the permit to dredge, you
12 would have to dump those at some type of a toxic landfill.
13 MR. DiJULIO: I'm going to object to the
14 characterization. Mr. Hester testified earlier that he
15 had no basis for determining the toxicity of the
16 materials, and I believe in earlier testimony, he further
17 supported that position. He suspected, but did not know.
18 And this panel does not base its determination on
19 speculation. I would move to strike or at least that the
20 panel ignore the characterization.
21 MR. INSLEE: In response, I think my
22 esteemed colleague has misinterpreted what we're asking
23 about. We never asked about the toxicity of the tailings.
24 He didn't know the toxicity of the tailings. The Roger
25 Lowe report, which counsel hasn't had an opportunity to

1 review obviously yet, does contain the toxicity
2 information. That's what we're relying upon.
3 We have not independently gone beyond and
4 tested, no. So there's the evidence of that. If we're
5 talking about the dredging, not of the white tailings.
6 MR. KELLING: Just a moment. I've wondered
7 also about the question of the statements made here today
8 on the toxicity of the stream. And we don't know yet what
9 the basis for those statements are.
10 MR. INSLEE: That's in the Roger Lowe
11 report, which you haven't had a chance to read yet, and in
12 the reports of the expert attached to the Duwamish
13 right-of-way -- Duwamish Yacht Club people. Mr. Lowe is a
14 civil engineer and he's proposed a declaration there.
15 MR. KELLING: Roger Lowe is an engineer?
16 MR. INSLEE: Yes.
17 MR. KELLING: And he addresses these things?
18 MR. INSLEE: Yes. You'll get an
19 opportunity, hopefully someday, to read that.
20 MR. KELLING: All right. And that's current
21 material, I take it?
22 MR. INSLEE: 1991, yeah. Six or eight
23 months before '92. About May, yes, and that's why I
24 asked him if anything happened since May of '91 to change
25 that to June '92, and he says he knows of no activities.

1 The County didn't do anything, in other words.
2 MR. KELLING: We'll read that report and see
3 how it relates to what the current condition is.
4 MR. INSLEE: Sure.
5 MR. DiJULIO: Let me just --
6 MR. KELLING: Steve, you want to say
7 something?
8 MR. DiJULIO: The comment was based upon the
9 toxicity of the dredge spoils.
10 MR. INSLEE: Yes, sir.
11 MR. DiJULIO: And is there any attempt to
12 distinguish the dredge spoils at this site from the rest of
13 the Duwamish Waterway, that this panel can certainly take
14 notice of, are contaminated from Elliott Bay north past
15 this site?
16 MR. INSLEE: Yes, this always comes from the
17 800 acres upland that only deposits at this site. And
18 downstream.
19 MR. DiJULIO: I guess my question is, are we
20 going to now, in this arbitration proceeding, argue about
21 the toxicity of the dredge spoils throughout the Duwamish
22 River basin? Which is, you know, of course, the subject of
23 numerous and ongoing studies and reports, up and down the
24 river all the way down to Elliott Bay. Are you attempting
25 to distinguish this dredge material from other dredge

1 materials?

2 MR. INSLEE: I am in the sense that it --

3 the outfall, which is the source of it, not the waterway,

4 the outfall which crosses the subject property, is the

5 source under Mr. Lowe's declaration, and therefore, only

6 this property is impacted and downstream from it. So we're

7 not talking about the whole bay, we're talking about just

8 this site specific property. And his affidavit makes clear

9 that it comes from the stream, and is not common to the

10 whole waterway.

11 MR. KELLING: We've decided we'd like to

12 take a break and discuss this among ourselves to see what

13 else we should find out about here. And so let's take a

14 break and we will do that while we decide what to ask.

15 (Recess)

16 MR. KELLING: I'd like to make an

17 announcement that the arbitrators have thought better of

18 the idea of only me going out to inspect the site, because

19 both of the other arbitrators have not been to the site

20 recently and would like to have their memories refreshed

21 about what they saw originally. So we're going to wait

22 until Allen gets back into town next week.

23 MR. ANDERSON: Mel, why don't you and I be

24 the contacts?

25 MR. HESTER: That would be fine.

1 MR. ANDERSON: That's fine with me.
2 MR. KELLING: All right, we'll arrange it
3 with both of you --
4 MR. ANDERSON: Fine.
5 MR. KELLING: -- at that time.
6 MR. SZMODIS: I'm probably going to be
7 there, too.
8 MR. HESTER: If you talk with either Lou or
9 me --
10 MR. ANDERSON: All right. So we'll just
11 leave it, we'll cancel Thursday and --
12 MR. KELLING: Yes, right.
13 MR. ANDERSON: All right, fine.
14 MR. KELLING: The other thing is, and I want
15 to try and state this carefully, all of us as appraisers
16 are fully aware of the extent of the toxics problem and the
17 contamination issues in Elliott Bay and Harbor Island and
18 the Duwamish. We want to listen to what both sides have to
19 say about that in relation to this particular property.
20 And if it can be kept as specific as possible to this
21 property. And hopefully we'll hear things that relate not
22 to off-site dredging, for example, but on-site dredging.
23 That would be helpful. Carry on.
24 MR. INSLEE: That's all that report relates
25 to, is the marina, period. Mr. Lowe is not talking about

1 any site other than this specific marine site.
2 MR. KELLING: I'm saying sometimes when a
3 site is developed, any generic site, you have to do
4 off-site improvements. And yes, that is something that a
5 developer would consider in the valuing of a site. But
6 we'd like that distinction made as to whether it's off site
7 or on site.
8 MR. INSLEE: Yes.
9 MR. KELLING: If you can.
10 MR. INSLEE: This is all on site because
11 submerged lands are part of the lease.
12 MR. KELLING: It isn't always easy.
13 MR. INSLEE: The marina is all on the site
14 except for the outboard portion that you described, which
15 is on the tideland side.
16 MR. SZMODIS: Port of Seattle.
17 MR. INSLEE: The Port of Seattle.
18 BY MR. INSLEE:
19 Q. You've pointed out Exhibit E the comparable
20 sale number 1, the adjustment? The Exhibit 8 was for
21 location only, and you're indicating in Exhibit 1 that
22 there's been inspection of a good degree of fill on
23 comparable 1?
24 A. Well, it's basically a ship terminal. It is a
25 major cog in a quarter of a billion dollar Port of Seattle

1 development on Elliott Bay, and I don't know how it can
2 relate to south of the 16th Avenue Bridge was my point.
3 Q. Okay. And then the next pictures in Exhibit E
4 relate to comparable 2 of Exhibit 8?
5 A. Comparable 2 is located just south of the Spokane
6 Street Bridge. It is the site for General Construction
7 Company. The site has -- if you go on page 2, and page 3,
8 which are the same site, if you look, this is the site
9 here, if -- it's very difficult to get directly across the
10 river. And this will reference it to the Spokane Bridge.
11 But the site, as you can see here, it has a substantial --
12 the width of the property has a very substantial apron
13 pier, therefore, a very heavy-duty commercial apron pier
14 that runs the length of the property.
15 And I'm distinguishing between a pier that
16 goes out in the water with a pier that runs along the
17 shoreline to just as reference on that pier, two of these
18 very heavy-duty cranes which only leads me to believe that
19 this is a -- it is a very heavy-duty pier. And from that
20 they can load and offload construction equipment to go
21 wherever on the property.
22 The address that was given was 3840 West
23 Marginal Way Southwest, this particular building, which is
24 by no means a new building, it's been there for a long,
25 long, long time. That was the address on that building.

1 So I'm assuming that that was included in the property.
2 Rather nice office building, two stories, one in the
3 front -- actually two stories.
4 Q. Excuse me?
5 A. That's it.
6 Q. Land sale 2 is only adjusted relative to
7 location. Does land sale 2 purport to have some rail
8 access there?
9 A. Land 2 has rail running directly in front of it
10 and there are rails that run from this spur into the
11 property. I can't tell you whether they're used or not
12 used, but they're there. The use of this property, the
13 potential use and the present use of this property is not
14 compatible with the present or possible use of the subject
15 property. You couldn't do on our properties what they're
16 doing here.
17 Q. Why not?
18 A. You would have to dredge an entire basin and keep
19 it dredged, and you would have to go under the First
20 Avenue Bridge. Little cranes, the construction company
21 loads cranes on here. Cranes have big things that stick
22 out that -- have buckets on the end. So you would have to
23 raise bridges. Also, the vessels that I observed along
24 here were not barges, but they were vessels that have some
25 draft to them. So you can't do the two, three, four feet

1 twice a day. Have to keep six feet, eight feet. So that
2 was the difference in that particular one.
3 Q. All right. Comparable number 3, 5500 West
4 Marginal Southwest.
5 A. This property was number 3, and again, it is
6 still north of the First Avenue Bridge. And as I said,
7 it's, you know, every time you go under a bridge, you
8 decrease the usefulness of the property. On number 3, this
9 is where I distinguished several times during this meeting
10 between ship container storage and the ship container
11 terminal. This is a ship container terminal. What I mean
12 by that is if you go to the back page you will see moored
13 alongside a very large oceangoing barge stacked with
14 containers. The type of barge that you fill up with
15 fishing supplies and drag to Alaska.
16 So this is a terminal where you can in turn
17 load and offload -- it is what you would call a deep water
18 terminal that you can load and offload ship containers from
19 the water to the land versus taking them from the water,
20 putting it on the land and then bringing semi trucks,
21 loading them on the semi trucks and then driving them to
22 someplace where they're stored, which is a ship container
23 storage yard, basically.
24 Directly across the street is this, is
25 Alaska Marine's corporate offices. I photographed that, I

1 don't know that that was involved in the sale. But that
2 is -- it's in proximity of their offices, the corporate
3 office, which was quite nice. But that is basically that
4 property.
5 Q. So you believe adjustment should be made other
6 than just simply location?
7 A. Well, you could not -- the purpose of this
8 property, the use of this property could not be done here.
9 It's not possible.
10 Q. In connection with number 4 of Exhibit 8, land
11 sale 4, 17 South Massachusetts.
12 A. I went inside the buildings, I observed them
13 basically to be old buildings. I don't know what to tell
14 you. If you look at the back page, what I did was -- what
15 we have is basically a large, which appears to be a large
16 block of old warehouses.
17 MR. KELLING: Excuse me, where is that on
18 your map?
19 THE WITNESS: I'm sorry, that is here.
20 MR. KELLING: All right.
21 A. If you go to the next page, I went out, I went
22 directly at this corner, the middle of the street, which is
23 East Marginal Way, and I pointed my camera towards the
24 city. And even though when you shoot a photograph, you do
25 photography, things always appear to be further away than

they are. But generally speaking, this is within walking distance of Pioneer Square. And I photographed this large concrete tilt-up, or concrete structure which appears to be warehousing or something, four stories or more, is a structure across the street, it's not part of the property. And the reason I photographed that is I'm assuming that is this particular property directly across this very narrow little street, could be the same thing that's across the street.

So the potential, the potential for this property in terms of height, limits and warehousing and proximity is not compatible with what's down here. You couldn't do -- if you make the assumption that you can do across the street the same thing that is across the street from this, you can't do that down here.

Q. And then land sale number 5, 9203 East Marginal South, 38.02 acres?

A. I don't have much information. 1987, this as I understand, was an acquisition -- 1986? Or 1987? -- was an acquisition of 38 acres, I believe, 38.02 acres by Boeing. And it's now a major development. It's contiguous with the Boeing factories, et cetera, et cetera. I don't know what else to tell you about that.

Q. Okay.

A. It is located here. It's right on East Marginal

1 Way, right across from the airport.
2 MR. INSLEE: Well, I think we said we'd be
3 done by 4. It's 10 after.
4 MR. KELLING: You made it.
5 MR. INSLEE: So we'll resume at what time,
6 Your Honor -- or Mr. Chairman?
7 MR. KELLING: Just Verne.
8 MR. INSLEE: Just Chairman Verne.
9 MR. KELLING: Would you like to start a
10 little earlier tomorrow, would that be convenient,
11 especially for the participants' witnesses and the two
12 attorneys?
13 MR. INSLEE: That would be really super,
14 because I told Melody McCutcheon to come here at 9, that
15 was yesterday I told her that. So if we can start a little
16 early maybe you'll be done with Mel --
17 MR. DIJULIO: We can start at 8:30.
18 MR. KELLING: 8:30? All right. We'll meet
19 here then at 8:30 and continue.
20 (Proceedings recessed at 4:10 p.m.)
21
22
23
24
25

1 C E R T I F I C A T E

2

3 STATE OF WASHINGTON)

4 COUNTY OF KING)

5

6 I, the undersigned Notary Public in and for

7 the State of Washington, do hereby certify;

8

9 That the annexed and foregoing hearing was taken

10 stenographically before me and transcribed under my

11 direction;

12

13 I further certify that all objections made at

14 the time of said examination to my qualifications or

15 the manner of reporting the hearing, or to the conduct

16 of any party, have been noted by me upon said transcript;

17

18 I further certify that I am not a relative or

19 employee of any such attorney or counsel, and that I

20 am not financially interested in the said action or

21 the outcome thereof;

22

23 I further certify that the foregoing is a full

24 and correct transcript of the testimony, including

25 questions and answers and all objections, motions, and

1 exceptions of counsel made and taken at the time of the
2 foregoing hearing;
3 IN WITNESS WHEREOF, I have hereunto set my hand
4 and affixed my official seal this 18th day of March
5 1995.
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10 Mark Hovila
11 Notary Public in and for the
12 State of Washington, residing
13 at Seattle
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NOTICE OF SERVICE OR FILING
OF SEALED ORIGINAL TRANSCRIPT

Date: 3/20/95

To: P. Stephen DiJulio
Attorney at Law
1111 Third Avenue, Suite 3400
Seattle, WA 98101

Re: Desimone/Duwamish Marina Lease

This letter is to notify you that the following original transcript is today being served for filing upon you:

Arbitration hearing
Taken: 7/12/94

Sincerely,

SEATTLE DEPOSITION REPORTERS

Mark Hovila, CSR

cc: Evan Inslee

DAY 2

1 BEFORE APPRAISERS KELLING, ALLEN AND SAFER

2

3)

4 IN THE MATTER OF THE APPRAISAL)

5 OF THE DESIMONE/DUWAMISH)

6 MARINA PREMISES LEASE)

7)

8

9 VERBATIM REPORT OF

10 ARBITRATION PROCEEDINGS ORIGINAL

11

12

13

14 Wednesday, July 13, 1994

15 8:45 a.m.

16 1111 Third Avenue

17 Suite 3400

18 Seattle, WA

19

20

21

22

23

24

25 MARY A. GANZ, CSR

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15 ALSO PRESENT: Mr. Rick Anderson

16 Mr. Mel Hester

17 Mr. Lou Szmodis

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1 MR. KELLING: Good morning. It's July 13th,
2 1994. We are doing a continuation of the arbitration
3 hearing.
4 Mr. Inslee, Mr. Hester is being examined?
5 MR. INSLEE: Yes. I have a few more
6 questions.
7 MR. KELLING: Please go ahead.
8 MEL HESTER, previously sworn on oath, testified:
9 EXAMINATION
10 BY MR. INSLEE:
11 Q. Yesterday, Mr. Hester, you discussed the comps that
12 have been made a part of the exhibit by the lessors.
13 Do you have other properties and photographs of
14 the same that you think would be helpful to the
15 arbiters in determining valuation?
16 A. Yes.
17 Q. Could you produce those and give everybody a copy?
18 A. Absolutely.
19 Q. We will start off with whatever the next exhibit would
20 be. It would be I, I believe. You can identify what
21 they are.
22 First of all, identify what it is you have that
23 would be helpful to them.
24 A. What I have basically are I have a ship container
25 facility, two ship container facilities within the

1 close proximity of this particular ship storage yard.
2 They are very similar and identical. One is being
3 offered for lease. The other was recently leased.
4 MR. DIJULIO: Am I missing something? Are we
5 offering comparables that were not offered prior to
6 the start of the arbitration proceeding?
7 MR. INSLEE: It's just the witness here.
8 MR. DIJULIO: But I thought we understood
9 that if we were going to be producing additional
10 comparability data that we would be sharing that prior
11 to the beginning of the arbitration proceeding.
12 MR. INSLEE: Well, I just heard about it this
13 morning, so I don't know how I could share it. I
14 didn't know we were under any restriction for
15 introducing evidence. We said if there is new
16 evidence then you can go out and look at it. We are
17 going to take a recess, as I understand it, anyway
18 based on what the arbiters have told me.
19 MR. DIJULIO: I am not suggesting that to
20 Mr. Inslee, but I think all three of the arbitrators
21 were there at the same time and heard that
22 information.
23 MR. KELLING: Would you like to review the
24 part of the prehearing conference that indicated how
25 we would deal with comparable information and exhibits

1 and things of that sort?
2 MR. INSLEE: While he is looking, my
3 recollection is -- why I am acting the way I am -- is
4 because by definition there were two people who had
5 prior comps who were also arbiters, so we went to
6 great efforts to make sure those were put forth on the
7 table, so to speak, so we know what the arbiters knew.
8 If anything the other arbiters knew, that's what you
9 are supposed to bring in.
10 Clearly we are entitled to present evidence of our
11 own, because otherwise we would be restricted to comps
12 that you have already looked at maybe that may, for
13 reasons now known to you, be not appropriate. The
14 arbitration agreement does not preclude us from
15 presenting evidence. In fact, it affirmatively says
16 we can produce evidence on values.
17 MR. KELLING: Steve, could you remind the
18 group of that agreement and the essence of it?
19 MR. DIJULIO: I am looking at the document.
20 It says that an arbitrator selected by a party can
21 make information previously made known to the
22 arbitrator concerning the comparables. Such
23 comparables in evidence must be identified before the
24 close of the hearing so such comparables and/or
25 evidence can be examined and tested as part of the

1 proceedings.
2 As I understand it, there is not an arbitrator
3 that is going to be presenting this information but
4 rather a party to the proceedings. If the arbitration
5 panel, if the appraisers in this case are going to
6 receive such evidence, we would reserve the right to
7 request any additional continuances in order to
8 respond and prepare responses to the information.
9 MR. KELLING: That's very reasonable to
10 request that and certainly you have that right.
11 MR. INSLEE: In the arbitration agreement
12 that resides in the procedure on the bottom of page
13 two, procedurally the evidence of the parties will be
14 submitted as to factors, concepts, historical and
15 current data as deemed relevant as well as the
16 ultimate issue of fair market value and all other
17 evidence deemed by either party to be relevant. All
18 evidence deemed relevant can be presented by live or
19 declaration testimony from any reliable source or
20 witness. I presume that we will have a little set
21 over here so --
22 MR. KELLING: Yes. The arbitrators want to
23 hear anything that's helpful, but we want to make sure
24 that both sides have a chance to evaluate the
25 information adquately.

1 MR. INSLEE: Sure.
2 Q. (By Mr. Inslee) Mr. Hester, why don't you tell me
3 what you have here that you think would be helpful to
4 the arbiters in determining valuation of this
5 property.
6 A. Well, the appraisals that were given us from the bank
7 have indicated and the consultants for the bank have
8 indicated to us in our meetings that they feel that
9 the uplands, highest and best use for the upland has
10 been basically what we are using it for. That is
11 container storage. So these particular comps
12 basically indicate what the market value is for
13 container storage space.
14 This first happens to be 9.2 acres which is
15 located -- If I could open this map I will show you
16 exactly where it is.
17 MR. KELLING: Certainly.
18 Do you intend to number each of these as I and J
19 or do you want to lump these together as Exhibit I?
20 Q. How are they situated in your exhibits, since you
21 xeroxed them this morning?
22 A. There are three sheets to this particular one, and I
23 have just one other. So there are just two.
24 Q. What he is asking is, are both the items in one
25 exhibit?

1 A. No.
2 Q. Let's talk about the first one.
3 A. Yes, they are. Both items could be in one exhibit.
4 Q. Let's mark them collectively as I. Would you put an I
5 in the upper left-hand corner and give the arbiters a
6 copy and counsel a copy and me a copy?
7 A. I have only one copy of this.
8 MR. KELLING: If you have only one copy of
9 something, I think we need to reproduce it so that the
10 lessor has an opportunity to look at the information
11 as well as listen to it.
12 MR. INSLEE: We don't need that right now.
13 It's a copy of the lease that he is going to talk
14 about. We can make copies later and give it to
15 everybody.
16 MR. SAFER: This was Exhibit H?
17 MR. KELLING: This was Exhibit H.
18 A. I am going to reference for you where -- What
19 basically we have here is a letter from Hurley, Atkins
20 & Stewart, which is a partner in a ship container --
21 present, active ship container facility with 9.2 acres
22 on Eighth South. This is the current photograph of
23 the facility, which is fenced.
24 Q. Give counsel a copy. Mark them all first, would you,
25 please, Mel? Mark them all as I.

1 A. Eighth Avenue South. Eighth Avenue South is just
2 across the freeway next to the asphalt plant basically
3 right here.
4 MR. KELLING: Is there a hundred block or a
5 street address?
6 THE WITNESS: Eighth Avenue South and South
7 96th Street, so South 96th Street is adjacent to the
8 subject property. So if you go basically straight
9 across the freeway, just on the other side of the
10 freeway on South 96th you will run into this property.
11 It's 9.2 acres.
12 MR. KELLING: That's west across the freeway?
13 THE WITNESS: West across the freeway, yes.
14 MR. SAFER: Why don't you put an X where you
15 think that is.
16 MR. ANDERSON: Is that next to the Clark Lift
17 building?
18 THE WITNESS: It's in that vicinity.
19 MR. KELLING: This is an offering to sell a
20 property?
21 THE WITNESS: No. This is an offering to
22 lease a property.
23 MR. KELLING: To lease a property.
24 MR. DIJULIO: We are not in condemnation. My
25 understanding is that the appraisers will be

1 considering offerings and listings in its
2 determination of market value.
3 MR. INSLEE: Well, certainly if it's offered
4 and somebody were to offer that price, that sets the
5 minimum certainly.
6 MR. DIJULIO: Well, you know, Mr. Inslee,
7 that such evidence is not admissible in court
8 proceedings.
9 MR. INSLEE: Well, we are talking here about
10 the lease value of a piece of property. If somebody
11 is willing to lease an identical piece or maybe
12 identical for X dollars --
13 MR. KELLING: In response to Mr. DiJulio's
14 comment, the issue before the panel is the fair market
15 value of this property.
16 If you, Mr. Inslee, develop through Mr. Hester
17 some kind of indication of the fair market value of
18 our subject property through this testimony, that
19 certainly would be helpful. To just leave us with a
20 lease rent offering is less helpful.
21 MR. INSLEE: Yes. He is going to describe it
22 more than that.
23 Q. (By Mr. Inslee) Describe this property, Mel, and what
24 its characteristics are.
25 A. This is a property that has been filled. The reason I

1 know it's been filled is because we made an offer on
2 the properties, this property, at the same time that
3 we were building the marina.
4 The property has been filled. It is graveled. It
5 has drainage. It is fenced and has been a working
6 ship container yard for some years. Basically it has
7 now been offered to Itel for lease for six cents per
8 square foot for the first year, a five-year lease, and
9 an escalation in year two through five for seven cents
10 a square foot.
11 The second piece of property --
12 Q. First of all, Exhibit I has a photo of the subject
13 property attached; is that correct?
14 A. Right.
15 Q. That's the subject of Exhibit I?
16 A. Correct.
17 The second property that I gave you is a property
18 that's directly across the street from the subject
19 property. This is a property that is being leased to
20 our tenant Itel by Delta Marine. It is literally
21 right here. If you in turn see this facility, if you
22 were to drive across the street, you would drive into
23 the subject property.
24 MR. KELLING: Across which street, for the
25 record?

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1 THE WITNESS: To the south. This is now
2 South 96th.
3 MR. KELLING: Delta Marine is an owner of
4 that property?
5 THE WITNESS: They are the lessor.
6 MR. KELLING: Yes. But do they own it?
7 THE WITNESS: I don't know. I don't know.
8 MR. KELLING: I thought that was City of
9 Seattle property there.
10 THE WITNESS: It may be. They may be in turn
11 leasing it. I don't know. They are the lessor on the
12 lease. I gave you a copy of the lease.
13 MR. KELLING: Oh, you have.
14 THE WITNESS: The lease from Delta Marine to
15 Itel for this property.
16 A. The difference between the offer on this property at
17 six and seven cents a square foot was that it was a
18 triple-net lease requiring the tenant to pay taxes.
19 Delta Marine is leasing two and a half acres here
20 which was improved. Again, it's rocked, fenced and in
21 a ready-to-go condition for a ship container facility.
22 It is being leased to Itel now for $8,250 a month,
23 eight cents a square foot, and a copy of that lease.
24 I offer that information primarily because, as a
25 developer, I think a little bit differently than maybe

1 an appraiser does. I think more in the terms of -- I
2 approach a piece of property a little bit differently
3 because the situation is always different. You are
4 trying to appraise value for -- to estimate a purchase
5 price or in terms for financing.
6 When I look at a piece of property, I take a look
7 at a piece of property and figure the highest and best
8 use for the use that I have for that property. I go
9 into the marketplace. I find out what the marketplace
10 will in turn pay me for that property. Then I back
11 into what can I pay for that piece of land, improve
12 it, knowing very well that this is the market. I
13 can't charge ten cents a square foot. I can't charge
14 nine cents a square foot. I am going to get six and
15 seven cents a square foot in this area for container
16 facility. That's all I can get. So I have to
17 economically be able to purchase that property, bring
18 it up to this standard, at least equal or better, and
19 that's what I am going to get. It doesn't take a
20 rocket scientist to figure out what land is worth.
21 That's all you can pay for it from my point of view.
22 The reason that I offer that is because in reality the
23 marketplace for containers is what sets the
24 marketplace for the land.
25 Q. Now, you might mark that exhibit that you referenced

1 as South 96th Street directly across as J and make
2 sure that the arbiters' copies have a J in the upper
3 right-hand corner, please.
4 Have you done that, Mel, on your copy? Leave that
5 out for a moment. Wait a minute. Wait a minute.
6 Let's get square. The last picture, label that J.
7 A. J. That's what I did.
8 Q. Now, you mentioned that first document, which was I,
9 which is the prior document. Then you said and
10 counsel wants a copy probably of the lease that you
11 just said you had only one copy of?
12 A. Yes.
13 Q. Maybe we can mark that and then make copies after the
14 fact. Mark that.
15 A. This is J. That is the lease. This is I.
16 MR. KELLING: Are these assembled correctly?
17 Q. No. Because you have J on the lease, Mel, and I
18 haven't marked the lease yet.
19 A. I haven't marked the lease.
20 Q. We haven't. You did. Hand it back to me. That's the
21 one counsel wants a copy of.
22 J is the picture. I is the first three documents
23 that are attached to the HAS May 31st Hurley, Atkins
24 letter.
25 Now, the lease that's July 9th '91 relates to

1 which property?
2 A. J.
3 Q. I am going to put J1 on that just so counsel knows.
4 Then we will give him that and maybe we can make a
5 copy and give everybody one, okay?
6 MR. DIJULIO: Now, you have put J1 on this,
7 Mr. Inslee. My understanding --
8 MR. INSLEE: It relates to lease J. That's
9 why.
10 MR. DIJULIO: It relates to the Delta Marine
11 lease to Itel?
12 MR. INSLEE: Yes, sir. That's why I did
13 that.
14 MR. DIJULIO: This is a three-year lease,
15 August '91 to July, 1994. I will have copies made.
16 MR. KELLING: Mr. DiJulio, would it be
17 possible to get copies made of all of these things
18 right now for the benefit of everyone who needs a
19 copy?
20 MR. DIJULIO: I think the only thing we don't
21 have copies of --
22 THE WITNESS: I have five copies of
23 everything except the lease.
24 MR. KELLING: The lease is the only thing
25 then?

1 THE WITNESS: Yes, sir.
2 MR. KELLING: Thank you.
3 MR. INSLEE: So you all should have I and J
4 hopefully at this point.
5 MR. DIJULIO: Again, for the record, I is a
6 letter dated May 31st, 1994, from Hurley, Atkins to
7 Mark Gonzales with an attached site plan, lease
8 proposal and photograph. Exhibit J is a photograph
9 and a lease between Delta Marine and Itel dated July
10 9th, 1991.
11 MR. SAFER: So the Gonzales letter is I?
12 MR. KELLING: Yes. That's the offering to
13 the lease letter.
14 Q. (By Mr. Inslee) Mel, the reason I wanted the map left
15 out is because you indicated to me that there was
16 another parcel of property, which I think is
17 identified either in Mr. --
18 MR. INSLEE: Did you introduce a copy -- You
19 didn't introduce Bruce Allen's?
20 MR. DIJULIO: It's in.
21 Q. In one of those there was another parcel of property
22 that was relevant.
23 A. I don't think I can point to it on this particular
24 map.
25 Q. Can you describe it to the arbiters as to the parcel

1 that you felt had some comparables insofar as
2 characteristics of this property?
3 A. There is a parcel in the vicinity that has a similar
4 problem with cement tailings that has been on the
5 market in the $5 range for many, many years. The
6 seller finally divided off the property, as I
7 understand, kind of spun it out in order to separate
8 it from the good piece. Basically, at least from my
9 opinion, the hesitation on the property is there is
10 nothing you can do with it because of the cement
11 tailings.
12 Q. Where is that property?
13 A. It's in the South Park area. Again, I would have --
14 Q. Can Lou Szmodis point it out?
15 A. Lou may be able to.
16 MR. DIJULIO: Let me object and ask if I may
17 voir dire for a moment.
18 Do you have personal knowledge of this or are you
19 just repeating information that you have heard from
20 another source?
21 THE WITNESS: This is the report from an
22 appraisal that we had done.
23 MR. DIJULIO: But you are not proposing to
24 introduce that appraisal; is that correct?
25 THE WITNESS: No. I'll --

1 MR. INSLEE: We don't have another appraisal.
2 Q. Which one are you talking about, Mel?
3 A. This was an appraisal done years ago.
4 MR. DIJULIO: I will object to this
5 testimony. This is clearly attenuated. If the
6 appraisers are going to go out and find comparable
7 properties or if they are going to consider listings,
8 they are perfectly competent to do that. I think this
9 witness's second- or thirdhand testimony is
10 particularly inappropriate in this case.
11 MR. INSLEE: We will withdraw it and make
12 Mr. Szmodis the witness.
13 Q. I thought you were the one that had knowledge of it.
14 A. No. It wasn't my case. I can bring photographs of it
15 later.
16 MR. INSLEE: I have no further questions.
17 Thank you.
18 MR. KELLING: Do you have any questions,
19 Bruce?
20 MR. ALLEN: I guess I would like a
21 clarification.
22 EXAMINATION
23 BY MR. ALLEN:
24 Q. You have talked a lot about the differential between a
25 container facility that has site improvements and the

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1 rent you can achieve from that versus land
2 unencumbered with the site or not developed with the
3 site improvements. You mentioned a rock ballast that
4 you had to put on this site in order to be able to
5 move the containers around. Then you talked, in this
6 recent conversation, you talked a bit about what
7 container facilities leased for.
8 Do you have a basis for the cost to take your
9 site, unimproved, to create this rock ballast on it
10 and so on, or is that going to be Mr. Szmodis's
11 testimony?
12 A. I think that's going to be more Mr. Szmodis's
13 testimony. We have construction records, truck slips.
14 By truck slips, I mean every time a truck drops a load
15 you get a slip. But I think that is more Mr. Szmodis.
16 He was more involved in the construction of it than I
17 was on the site. I can speak to it, but I don't think
18 I could speak to it in -- He would be better to speak
19 to that.
20 I think the difference is that you have to --
21 There is a great deal of weight in a container
22 facility. You are moving very heavy obstacles with
23 large forklifts. You will note that there are few
24 ship container storage facilities that are asphalted
25 even, because it tears it up. In other words,

1 basically you must create a very solid rock base.
2 Q. I think we understand that. It's just the question is
3 presented but not answered.
4 A. I think Mr. Szmodis is more able to answer that.
5 MR. KELLING: I have one clarification I
6 would like to achieve.
7 EXAMINATION
8 BY MR. KELLING:
9 Q. You have developed or worked on the development of
10 several marinas you said?
11 A. Correct.
12 Q. Was this Duwamish Marina the first one that you were
13 involved with?
14 A. Correct.
15 Q. It was. That is helpful.
16 MR. KELLING: Thank you.
17 MR. ALLEN: I have another question that
18 maybe again will be another individual's testimony.
19 FURTHER EXAMINATION
20 BY MR. ALLEN:
21 Q. Stabilization of the bank, in your discussion about
22 the stabilization and how difficult it was and the
23 amount of work that had to be done because of the type
24 of soils apparently and therefore higher costs of
25 Christmas trees you brought out and just the saturated

1 soils and the fact that you had to do both riprap rock
2 and the H piles and so on, do you think that those
3 costs on this site would be any different than any
4 other site along the Duwamish?
5 A. They are. The reason is that the Duwamish at the turn
6 of the century was a very small stream. Basically, as
7 you know, it goes up into the Kent valley which was
8 all truck farming.
9 Then during the turn of the century the Corps of
10 Engineers and the federal government decided to widen
11 these rivers and make them into navigable commercial
12 waterways, which then Corps of Engineers then took
13 some responsibilities.
14 Still what we have is, coming down the Kent
15 valley, we constantly have siltation coming down. The
16 further in the river, the further away from Elliott
17 Bay, you have more siltation and you get more topsoil
18 dropping. Most of this area where we are is basically
19 fill, so you have very porous material. As you get
20 closer to Elliott Bay you have more stable material.
21 Every marina site that I have ever looked at,
22 which is literally dozens and dozens and dozens, they
23 are all different. They are extremely different in
24 terms of bank stability, depth. Some people have the
25 opposite problem. They have rock. In this particular

1 case we ran into soil that was just very difficult to
2 stabilize.
3 MR. KELLING: Mr. Inslee and Mr. Hester, I am
4 still left wondering how the rental testimony here
5 relates from your viewpoint to the value of the
6 subject property.
7 MR. INSLEE: It's one chink of evidence as to
8 what value from a commercial parcel, if any credence
9 is placed on rental income, then what rental income
10 can be derived from a property. It's one of the
11 methodologies which is relevant to commercial
12 properties. That's the only reason.
13 MR. KELLING: I think we want to know from
14 Mr. Hester perhaps, or another witness of your choice,
15 how you would transform the rental income into value.
16 FURTHER EXAMINATION
17 BY MR. INSLEE:
18 Q. Mel, you have done some rough figures on that. Why
19 don't you go ahead and respond to that.
20 A. Well, I think this is information that Lou will
21 probably discuss. But just very simply, if you take
22 that piece of property, if I as a developer walked on
23 that piece of property today, this is the formula that
24 I would use.
25 If I in turn determined that highest and best use

1 for that piece of property is to store containers,
2 that's where I can generate the most money, I will
3 then go into the marketplace and find out what the
4 marketplace is going to pay for a container facility.
5 I will go right across the street, right across -- The
6 two that I went to are perfect examples. I know I can
7 get between six and seven cents per square foot per
8 month if I can deliver to someone a container facility
9 which is fenced and has enough rock and base that they
10 can run containers in and out and in and out in semi
11 trucks, lift them and shift them, this type of thing.
12 That's what I can get.
13 Now, if I go back to this piece of property that
14 is the subject property, I am going to calculate what
15 is it going to cost me. First of all, I am going to
16 calculate, since it's on the river, I am going to
17 calculate exactly how much property I have to utilize.
18 Having built a number of marinas and anybody who
19 gets near the water knows that you have setbacks. You
20 have things that you have to do. In other words, you
21 have a net piece of property. You always calculate so
22 you end up with a net piece of property that you can
23 in turn improve and lease. I know I can get six to
24 seven cents a square foot if that net piece of
25 property is put up and graveled and fenced.

1 Then in turn I calculate what will it cost me to
2 bring this piece of property up to the same standard
3 that my competitor is across the street and across
4 West Marginal. I take that number. Then I take that
5 number. Then it tells me how much money can I afford
6 to buy this raw piece of land for in order for me to
7 develop it, lease it, manage it, put it in the
8 marketplace.
9 My calculation in terms of the net piece of land
10 that's available after setbacks, the Duwamish, if the
11 land were in its original condition right now, would
12 cost me $3.7 million to bring it up to the identical
13 standard that my competitor has across the street.
14 If it costs me $3.7 million and I can only get six
15 to seven cents and my net piece of land that I can use
16 after setbacks I have calculated to be five acres, my
17 cost of bringing the land from the raw state to a
18 marketable state, just the cost of bringing it to that
19 point, makes this not a profitable venture. I cannot
20 make any money at the market rate of six to seven
21 cents if it costs me $3.7 million. So therefore, to
22 me, I can't buy this piece of land. If I do, I am
23 going to lose money.
24 MR. KELLING: Then as a developer of
25 container storage sites, you wouldn't use this site?

1 THE WITNESS: Absolutely not.
2 MR. KELLING: What other highest and best
3 uses -- Excuse me for usurping here.
4 MR. INSLEE: That's fine. When you want to
5 know the information I think is the most prudent.
6 FURTHER EXAMINATION
7 BY MR. KELLING:
8 Q. What other uses do you see the market imputing to this
9 land?
10 A. I would look at it if I was a developer looking at a
11 raw piece of land, I would say, well, we are in an
12 area of warehouses. Maybe I should put up warehouses.
13 Now, I know that across the street at Sea Land --
14 MR. INSLEE: Sea King.
15 A. I know across the street at Sea King and I know at the
16 Duwamish Manor directly behind me, each of them has
17 space for rent right now. I can go rent it, and I can
18 rent it for 40 cents. There is my market again. I've
19 got 40 cents.
20 Q. Excuse me for interrupting. So you back into a
21 value --
22 A. A developer always backs into a value.
23 Q. Yes, of course. I am aware of that, with a land
24 residual.
25 A. That's correct.

1 Q. Sea King developed when?
2 A. Sea King, shortly after we did. I can't tell you
3 exactly. It was shortly. They were working down
4 there when we were working. That's all I can tell
5 you.
6 MR. DIJULIO: Does the appraisal panel know
7 where Sea King is located?
8 MR. KELLING: Yes. We probably ought to
9 state that for the record.
10 MR. ALLEN: It's located adjacent on the
11 north.
12 A. So if I say to myself, okay, I have 40 cents to work
13 with per square foot and I have to deliver a leasable
14 space, I have to manage it, I'm going to have some
15 vacancy, as I am going to have in a ship container
16 facility, so now what I do is I back into it.
17 On this piece of land again, I take all my
18 setbacks. How many square feet could I reasonably
19 build on this property based on my studies? What I
20 come up with is approximately -- It is not
21 approximately. It is exactly 110,500 square feet.
22 Now, what is it going to cost me to build that? I
23 know I am in a seismic area. We built a metal
24 building on this property, a big, blue, metal
25 building. I know that cost us 40 -- In 1982 or '81

1 that cost us $40-plus a square foot, because I know I
2 couldn't believe it cost $40-plus per square foot.
3 MR. DIJULIO: If we are going to talk about
4 the costs that the developer spent, we might as well
5 start talking about the income they derive from the
6 property, which is all prohibited by the lease. This
7 is all very interesting, but it's not supposed to be
8 considered by the panel.
9 MR. KELLING: Well, it is a method of backing
10 into a land value that is recognized and one that
11 appraisers do consider. For that reason only --
12 MR. DIJULIO: But, again, appraisers consider
13 that. I understand that. But you are also governed
14 by the lease terms that require you to conduct your
15 analysis in a particular way. This isn't a
16 capitalization of rents lease. This isn't a
17 percentage of profits lease. You have appraised such
18 fair market values in other scenarios.
19 If we are going to get into the improvements, if
20 we are going to get into all of those things, perhaps
21 we should get into the income that the property
22 currently derives.
23 MR. KELLING: I will respond to it. This is
24 a valid technique to attain the goal of estimating the
25 fair market value of land. It's clearly recognized

1 and used often, so that's the only reason that I am
2 interested in hearing this.
3 MR. DIJULIO: Will the appraiser then also
4 hear evidence of income derived from the property
5 currently?
6 MR. KELLING: No. Because that has to do
7 with the lease rent of the land, as I recall it, and I
8 could be corrected, of course, pertaining to this
9 particular lease. We are prohibited from that, as I
10 understand it.
11 MR. DIJULIO: You are also prohibited from
12 considering the costs to improve the property under
13 the lease.
14 MR. INSLEE: No. We are not prohibited.
15 That's not at all. That's a technique. That's the
16 issue. He says the prior arbiters were wrong. We
17 don't know which approach you are going to take. It's
18 data available to you.
19 I would also suggest to counsel he is a little
20 late in raising the argument. His Exhibit 9 contained
21 not only the quantities of work we did, but also the
22 original cost of the work we did. He introduced that
23 into evidence, not us. That's relevant for the very
24 reasons that what you do with it is up to you, but the
25 datum is there for whatever value.

1 MR. DIJULIO: Mr. Inslee, I did not introduce
2 that exhibit. The exhibit was already before the
3 panel. I am --
4 MR. INSLEE: Exhibit 9, I didn't introduce
5 it.
6 MR. DIJULIO: The appraisal panel knows full
7 well that those documents came in as a matter of
8 stipulation as part of the appraisers' existing
9 record, not as part of my case.
10 MR. INSLEE: It's part of the record. It's
11 his exhibit number.
12 MR. KELLING: Let's get back to the question
13 of how fair market value of land can be determined.
14 There are a number of techniques.
15 A developer's back-in technique is a technique
16 that all three of the arbitrators would be interested
17 in knowing about through testimony.
18 MR. DIJULIO: If you are going to consider
19 income, if you are going to consider that technique,
20 should you not also consider income to the property if
21 you are going to consider the cost to improve the
22 property, as well, as Mr. Hester is testifying to now?
23 MR. KELLING: Well, I think the answer to
24 that question is to go back and look at the lease
25 language which prohibits us from considering the

1 present lease and prohibits us from considering the
2 subleases that may be on the subject property.
3 MR. DIJULIO: We have insisted throughout
4 this and have maintained an objection throughout to
5 considering the costs of improvements, as well. I
6 mean, it's clearly an important issue in this because
7 they --
8 MR. KELLING: Yes.
9 MR. DIJULIO: We have maintained a continuing
10 objection.
11 MR. KELLING: I agree.
12 MR. DIJULIO: My concern is if you are going
13 to consider this approach -- And I don't disagree with
14 you that that is a legitimate appraisal approach
15 typically, but this is not necessarily a typical
16 appraisal problem.
17 The lease says you shall not consider income. You
18 shall not consider improvements placed on there by the
19 lessee. If you are going to consider the improvements
20 placed on there by the lessee, then are you also going
21 to disregard that provision of the lease that says
22 don't consider income? Because if you are going to
23 consider the improvements placed thereon by the lessee
24 and you are going to do this kind of analysis that you
25 typically do as appraisers, then you may also consider

1 the income currently derived from the lessee on the
2 site.
3 MR. INSLEE: If I could just respond quickly,
4 then I will shut up.
5 MR. KELLING: Well, he asked me the question,
6 if I may respond.
7 MR. INSLEE: I thought he was objecting, and
8 I was going to respond to his objection.
9 MR. KELLING: My understanding of the lease
10 is it doesn't say that we can't consider income in the
11 generic sense that land derives.
12 What it specifically says, as I recall the lease
13 and the instructions to the arbitrators in the lease,
14 is that we are not to consider the specific income
15 from the present lease and the subleases. I would be
16 willing to be corrected if I am wrong.
17 MR. DIJULIO: I don't disagree with you, but
18 the lease also says you are not to consider the
19 improvements placed on the land by the --
20 MR. KELLING: All right. Let's go to that
21 subject.
22 We are not considering the improvements as they
23 lend any income factor to the land at all. We
24 listened to what the improvements are and how they
25 were created in the light of trying to find out how

1 the land affected those kinds of developments and
2 costs.
3 The thrust of the whole thing, as I understand it,
4 is to find out what the condition of the land was
5 originally. It's in that light only that we were
6 listening to what the improvement problems were.
7 MR. DIJULIO: With that understanding, I will
8 maintain my continuing objection.
9 I am concerned, however, when the witness's
10 testimony starts to go into actual costs, for example,
11 $40 per square foot spent on a metal building in 1982,
12 which is an actual cost to improve the property which
13 the lease says you are not supposed to consider. If
14 you are going to consider that not for purposes of
15 valuing the fair market value in 1992, then I am not
16 concerned.
17 MR. KELLING: That certainly is a fair
18 objection to stating what a specific building did
19 cost, yes.
20 A. The purpose of stating that number is that my
21 calculation, if I have determined that I can build
22 110,500 square feet worth of warehouses, if I use a
23 number of $35 a square foot --
24 Q. (By Mr. Kelling) Is that a 1992 figure?
25 A. That's a 1994 figure. '92 figure. Excuse me.

1 Q. That's a generic?
2 A. No, that is not, but there will be testimony to verify
3 that.
4 You asked in terms of backing into it as to -- The
5 question, as I understand it, was what would I do
6 next. If it didn't work for a ship container, what
7 would be my next step. My next step, as I was
8 explaining, was that I would then say, okay, what
9 other uses in this area are typical. That would be
10 warehousing.
11 So again, I would back into the number. I would
12 go to my neighbors. I would go to Sea King, and I
13 would go to the Duwamish Manor. They both have space
14 for lease for 40 cents a square foot. I know that's
15 the number that I am competing with. Now I know
16 basically.
17 Now I go in and I am going to calculate how many
18 square feet of warehouse space could I legally, under
19 shoreline, et cetera, build on this piece of property.
20 I have come to the conclusion through studies that
21 that's 110,500 square feet.
22 If I put $35 a square foot -- and I will show you
23 that later -- which is $5 or more less than it costs
24 us to build the metal building, so I know that number,
25 if anything, is low, which is the only reason that I

1 brought up that number, the cost of building 110,500
2 square feet on this piece of property -- Because
3 again, as we did in the beginning, we had to build
4 spread footings, et cetera, et cetera, because of the
5 seismic area and the soils and so on and so forth. It
6 would cost me $9.5 million to build 110,500 square
7 feet of which I could generate a gross rent of 40
8 cents.
9 The reason I get into this thoroughly is because
10 this has been the contention between the partnership
11 and the trust throughout. In the very beginning when
12 we got the initial letter from the bank, the rent that
13 they were asking for the land exceeded the gross rent
14 we received on the entire property.
15 Q. We don't want to get into the gross rent.
16 A. If we want to go into rents, it would make me nothing
17 but happy. So what happens is you can only get so
18 much.
19 Q. My fellow arbitrators may still be waiting also.
20 MR. INSLEE: He wants a capper. What does
21 that mean?
22 A. What I am saying basically is the highest and best use
23 for the property as indicated by the appraisers, as
24 indicated by the bank is to, one, build a marina. If
25 we want to get into costs in building a marina, we are

1 now going to have to dredge 160,000 cubic yards.
2 A marina does not work. One, we would not ever
3 get the permits again in 1992, nor would it be
4 economically feasible.
5 Two, the highest and best use according to the
6 bank is a ship container storage facility. What I am
7 saying is that the market is six to seven cents. My
8 costs to build it makes it a loser in terms of
9 financially. In other words, it loses money if the
10 land is zero value. The same way with the --
11 Q. I do understand your opinion. So you are saying, may
12 I state, that both the appraisers are wrong in their
13 highest and best use estimates? I am asking your
14 opinion.
15 A. I am going to give you a lengthy answer for a reason.
16 They are not wrong in that the highest and best use
17 for this area is warehousing and ship container
18 facility use. But on this specific piece of land,
19 because it is on the water and in turn has to deal
20 with a stream through the middle, it is not a square
21 piece of property like the property before you. You
22 have little odd things with streams running through
23 the middle. You have all of the problems with
24 shoreline and in turn you have a piece of property
25 that's in a floodplain. You have a piece of property

1 that's in a seismic area, which is like jelly. What I
2 am saying is that kind of use in this area is the
3 highest and best use. But on this specific piece of
4 property, the construction costs prohibit utilizing
5 those end uses.
6 Q. So what is the highest and best use of the property?
7 I'm sorry to press you this way, but I would like to
8 know your opinion.
9 A. The property that we -- This is the basis of this
10 lease. When we took over this property, it was being
11 utilized on a kind of month-to-month one-year lease,
12 come in, tear down your tugboat, so on and so forth.
13 There are properties around that are used for that
14 typically because the properties are not sellable or
15 usable. That is probably the only use for this
16 property.
17 Q. A storage yard or an assembly yard?
18 A. Well, no, because you have it filled full of cement
19 residue. You can't touch it. In reality today
20 environmentally you would probably put a fence around
21 it and forget you owned it.
22 Q. If it were in the condition --
23 A. If it was in the condition it was in 1992, you would
24 put a fence around it --
25 Q. No, if it was in the condition it was in in 1974.

1 A. If it was in the condition that it was in 1974 today,
2 a prudent owner would put a fence around it and forget
3 he owns it because it basically has no use.
4 When I talk about cement tailings, the best
5 example I can use is pretend that you have all of your
6 property covered with the liquid -- the stuff that's
7 used for -- graphite.
8 Pretend that you are walking across a field of
9 graphite. That is the closest thing that I can give
10 you as an example. Try to take a handful of graphite
11 and make it do anything other than slide through your
12 fingers and be slick. That's what cement --
13 Q. I do understand that. You have answered the question
14 now. You don't feel the property is useful for most
15 things at this time.
16 A. It has the very same use that it had when the trust
17 owned it and utilized it for month-to-month come in
18 and tear something down.
19 MR. KELLING: Thank you. I will stop
20 interrogating here.
21 MR. ALLEN: I have one question.
22 FURTHER EXAMINATION
23 BY MR. ALLEN:
24 Q. We had testimony earlier about the size of the site
25 and the surveys. You are using a usable area of five

1 acres, yet it appears the upland portion of the site
2 is nine-plus acres prior to excavation for the marina.
3 Can you clarify for me how it went from -- I
4 understand the problem of going back to '74 to date.
5 If we look at the site today as filled and include the
6 marina upland portion that you have --
7 MR. INSLEE: Let me give you an exhibit by
8 which that was derived.
9 A. I would prefer that -- We have an expert witness to
10 that effect. I would probably prefer that that person
11 do that, not me.
12 Q. I was just trying to develop some relationship between
13 your 3.7 million and the five acres of usable,
14 whatever that is.
15 A. He will get into more detail. What we basically have
16 done was we have -- As a developer, when you go to a
17 piece of property, especially on the water, one of the
18 very first things you do is you calculate -- And this
19 will be described in more detail with our expert
20 witness. The first thing you do is you calculate the
21 usable space.
22 In other words, how much property am I going to be
23 able to get a permit to improve, doing away with
24 setbacks, because a ship container facility guy will
25 not pay six and seven cents for setbacks, et cetera,

1 et cetera. They will pay for usable space.
2 So the first thing we do is we go in and we
3 calculate what is reasonably usable space. We
4 eliminate setbacks. Obviously we can't charge six or
5 seven cents for a stream. We have to eliminate that.
6 We have to eliminate setbacks. We have to deal with
7 shoreline. What we end up with is a net piece of
8 square footage that we could most likely develop.
9 In this particular case there is five acres.
10 That's what's left. That's real common throughout
11 developments, as you well know, a large piece of dirt
12 and there is only this much.
13 MR. INSLEE: That will be a combination of
14 our next two witnesses to develop that factually and
15 legally.
16 MR. ALLEN: Thank you.
17 MR. INSLEE: Benjamin from Jaddi is going to
18 deal with that and so will Ms. McCutcheon. In fact,
19 counsel has been nice enough that if we can call her
20 out of order that that would be helpful to her and her
21 itinerary and fee basis.
22 Is that all right with you, Counsel?
23 MR. DIJULIO: I have no objection to that.
24 Thank you.
25 MR. INSLEE: That's what we'd like to do when

1 you are through with this witness.
2 MR. KELLING: That's fine. Are you through?
3 MR. INSLEE: Yes.
4 I will ask Ms. McCutcheon to take the stand. Give
5 me back the exhibit there, and I will mark that later.
6 MR. KELLING: Thank you.
7 MR. DIJULIO: I have copies of Exhibit J1.
8 MR. INSLEE: Thank you.
9 MR. KELLING: Let's go off the record.
10 (Off-the-record discussion.)
11 MR. KELLING: Ms. McCutcheon, will you take
12 the stand over here?
13 MELODY B. MCCUTCHEON, sworn on oath, testified:
14 EXAMINATION
15 BY MR. INSLEE:
16 Q. Would you state your full name, please?
17 A. Melody Broadbent McCutcheon.
18 Q. And your address?
19 A. It's 500 Galland Building, 1221 Second Avenue,
20 Seattle, Washington, 98104.
21 Q. And your occupation?
22 A. I am an attorney.
23 Q. Would you give us a brief statement of your date of
24 admission and the type of work that you followed up to
25 the current date?

1 A. I was admitted to the Bar in Washington in 1988, and I
2 am presently a partner at Hillis, Clark, Martin &
3 Peterson. I have been with the Hillis firm since
4 1988, since the beginning, specializing in land use
5 and environmental law. I work with a wide variety of
6 both municipal clients and private individuals,
7 businesses, in the field of obtaining permits for
8 development, also on occasion working with those who
9 have concerns with development and representing their
10 concerns.
11 Q. What prior history, prior to your commencement of work
12 with Hillis, did you have relative to development?
13 A. Prior to going to law school my background was in the
14 urban planning field. I have a master's in urban
15 planning from the University of Washington.
16 (b)(6) [redacted]
17 (b)(6) [redacted] I then worked with a private
18 consulting firm preparing environmental impact
19 statements with R. W. Thorpe & Associates. From there
20 I began work with the City of Seattle in their
21 Department of Construction and Land Use for a
22 seven-year period, with my major job responsibilities
23 being to review development proposals for compliance
24 with Seattle regulations, zoning, shoreline,
25 environmental, a wide variety of regulations. So that

1 was my professional background was in the urban
2 planning field and in reviewing development projects.
3 Then I went to law school and from there specialized
4 in land use and environmental law.
5 Q. That's what you have been doing ever since?
6 A. That's what I have been doing ever since.
7 Q. What information that's going to become relevant to
8 your testimony here were you provided relative to the
9 property that we are having this arbitration about?
10 What kind of assumptions were you given?
11 A. The major assumption I was given was to operate from
12 the conditions of the property in 1974 and to take
13 those physical conditions of the property from 1974
14 and apply present day, meaning 1992, regulations to
15 the development of that property.
16 In terms of those existing -- I will call them
17 existing conditions -- we are almost in a time warp
18 here with that factor. But Mr. Mel Hester provided me
19 with photographs and maps of the site from 1974, along
20 with the plat of the property so that I could get an
21 idea of what it was like in 1974.
22 Q. In connection with that were you also familiar with
23 the fact that the characteristics of the site includes
24 an east-west stream that drains upland property?
25 A. Yes.

1 Q. We also provided information that the site is
2 underlaid by a very shallow water table?
3 A. Yes.
4 Q. Were you also told that there was a layer of soils
5 that would need removal due to cement tailings or
6 something like cement tailings?
7 A. Yes. I was told that the cement tailings -- There was
8 a substantial amount of cement tailings on the
9 property prior to '74, and I could see the residue of
10 that in the photographs, as well. It's quite evident.
11 Q. Were you told that there would be necessities to
12 perform some filling on this property in order to
13 develop it?
14 A. Yes.
15 Q. In connection with the requirement of the bulkhead,
16 what were you told about that?
17 A. The assumption would be that a bulkhead was necessary
18 to help protect the property from the erosion and
19 tidal influences of the Duwamish Waterway, which forms
20 the eastern edge of the upland.
21 Q. In connection with the assumptions and other pieces of
22 evidence here, which I won't go into detail with you
23 right now, would you tell us, please, first of all, in
24 terms of analysis of development regulations what the
25 various entities are that would control or govern

1 development of this property in '92?
2 A. Yes.
3 But one other thing before that, the other
4 existing site condition is the existence of a wetland
5 on the site. It was described to me but is also
6 evident in the photographs. There is cattails, a
7 shallow kind of beach area. So that's another
8 regulatory factor is the existence of that wetland in
9 1974.
10 Q. Those were explained to you by Mr. Hester as well as
11 depicted on the photographs?
12 A. Yes.
13 Q. In connection then with the analysis of development
14 regulations that would be applicable in '92, what
15 basically are the three entities who would have
16 jurisdiction so to speak?
17 A. Federal law, state, and local, meaning King County.
18 Q. So to be of assistance to these arbiters so they don't
19 have to go out and research this themselves, first of
20 all, from a federal requirement what permits, if
21 anything, would be required to go ahead and develop
22 all or any portion of this property?
23 A. First, on the federal level the Army Corps of
24 Engineers is the agency with jurisdiction over the
25 work. There are really two areas that the Corps would

1 be involved in. One would be the bulkhead, and the
2 second would be with the wetland.
3 With respect to the bulkhead, any construction
4 there on the waterway would require issuance of a
5 Section 10 permit under the federal Rivers and Harbors
6 Act. Through the Corps permit process they want to
7 review the particular method of bulkheading the
8 property, impacts to water quality, fish habitat and
9 so on.
10 Then separate from that is a permit requirement
11 related to the wetland, Section 404 under the Clean
12 Water Act permit. Wetlands, as we all know, have
13 become such a horrific topic in the last few years.
14 It's kind of like the W word that you hate to hear.
15 What that, just in a nutshell, requires is that a
16 professional study needs to be done to determine what
17 the size and area of the wetland is. So you have to
18 follow the federal standards for delineation of
19 wetlands and classes of wetlands, have a professional
20 go out and survey the property based on soil and water
21 and plant conditions, determine the size of the
22 wetland under those federal standards.
23 Then depending on the size, you have different
24 types of permitting requirements with the Corps of
25 Engineers. Back in '92 if the wetland was less than

1 one acre in size, you could go through what's called a
2 nationwide permit to alter the wetland. Typically you
3 have to preserve it. But if it's less than one acre,
4 you have a very simplified permit process to go
5 through.
6 If it's more than one acre, then you have to get
7 an individual permit through the Corps of Engineers
8 for any development around the wetland. That's a much
9 lengthier process to go through the individual permit
10 process with the Corps. That could be easily a six-
11 to nine-month process to get them to act on an
12 individual permit.
13 Typically they will not start their substantive
14 review until you have your local permits. They say
15 when you are done and when you have local approval,
16 then we will talk. So you can apply for a Corps
17 permit, but it very likely sits there until you finish
18 your local permit process.
19 One last thing on the Corps process, they do have
20 a public comment period where they send out a notice
21 of your application to public agencies, interested
22 groups and tribes in particular regarding the
23 Duwamish.
24 Based on my experience, even in '92, there were
25 very strong tribal concerns about development on the

1 Duwamish. It's not untypical for the applicant to
2 negotiate directly with the tribes whatever the
3 environmental mitigation is going to be for a bulkhead
4 or for wetland, work around a wetland. The Corps
5 simply will not issue a permit if there are tribal
6 objections, so you have to work out any issues with
7 the tribes before the Corps would even consider
8 issuing you a permit.
9 MR. SAFER: Is that including the nationwide
10 permit?
11 THE WITNESS: Yes. There is a comment period
12 on the nationwide permit, as well, where tribal
13 concerns can be raised.
14 Q. What interest, if any, would the Corps have in
15 sediment quality?
16 A. Oh, they would be very interested in sediment quality
17 and fish habitat. There is an interrelationship
18 between sediment quality, water quality, contamination
19 and fish habitat. That's their main area of review
20 when they are looking at these applications.
21 Q. I gave you a copy of a declaration under oath of Roger
22 Lowe, did I not?
23 A. Yes, you did.
24 Q. If Mr. Lowe, who is an engineer, is assumed to be
25 accurate in what he stated there, would the details of

1 his report be of any issue to the Corps?
2 A. Yes, they would. I mean, they document some long
3 history of contamination and basically drainage from
4 upland properties, for a large upland area, through
5 that stream that comes out right at this property.
6 Those are all important characteristics that the Corps
7 would consider.
8 Q. From a state viewpoint would you please review what
9 application regulations or acts would be of concern or
10 would have to be taken into consideration by a
11 developer in '92?
12 A. Well, I would say one of the most significant
13 regulatory changes between 1974 and 1992 has to be the
14 Model Toxics Control Act and environmental cleanup in
15 general.
16 Back in the '70s you had contaminated properties,
17 but you just built right over them. If the soil was
18 stable enough to support a building, then it was good
19 enough. Those days, many would say for good, are
20 gone. The first order of business becomes, what's out
21 there now and how dirty or clean is it? So you have a
22 whole nother layer of regulation, the Model Toxics
23 Control Act, through the Department of Ecology that
24 would be applicable today.
25 Because of the cement tailings and just the

1 history of the Duwamish and surrounding uses, this
2 would certainly be a property where you would expect
3 to have to address those issues. So far as I know
4 there hasn't been specific bioassay testing of the
5 materials out there, so we are going to make an
6 assumption that if the cement tailings -- This is a
7 reasonable assumption. If the cement tailings exceed
8 the standards set up in the Model Toxics Control Act,
9 then you are looking at environmental cleanup of that
10 property. That's a very reasonable assumption based
11 on Duwamish properties and the particular conditions
12 on that one. That process is long and involved.
13 The first step essentially is to have what's
14 called a remedial investigation, an RI, done by a
15 professional that will document what the historical
16 uses of the property have been, surrounding uses, take
17 soils borings, do an analysis of what's in those soils
18 and whether they exceed environmental standards, basic
19 site conditions analysis that has to be reviewed and
20 approved by the Department of Ecology so that you have
21 an understanding and agreement on what's out there.
22 From there, the next step is what's called a
23 feasibility study, an FS, where various methods for
24 cleaning up the dirty dirt are identified along with
25 the cost and environmental trade-off of each of those,

1 ultimately leading to selection of a particular
2 cleanup method, again with review and approval by the
3 Department of Ecology on what's the best way to clean
4 up the site to meet environmental standards.
5 MR. DIJULIO: May I interrupt for a minute,
6 Ms. McCutcheon?
7 Have the appraisers never heard about an MTCA
8 process? This is a generic discussion about what an
9 MTCA process entails. If you haven't heard about an
10 MTCA process before, then this may be relevant, but I
11 am not sure that Ms. McCutcheon is educating the
12 appraisal panel with any information that they are not
13 currently aware of.
14 MR. INSLEE: Well, I will object to counsel
15 trying to interfere with what evidence we think is
16 relevant to this proceeding. I respect the fact that
17 he doesn't want to treat this like a major issue, but
18 it's a major issue as far as we are concerned.
19 MR. DIJULIO: But I think the testimony
20 before the panel already is that there is no evidence
21 or indication that the materials are toxic.
22 Therefore, we are speculating about an MTCA cleanup.
23 MR. INSLEE: Well, we are not speculating,
24 Mr. Chairman. It was removed in 1974. We can't test
25 it because it has gone to the four winds. We can

1 state that it isn't there. It's a concern. Nobody is
2 trying to say it has a specific toxicity level, but it
3 would have to undergo this process to determine what
4 it was. Nobody could ignore it in '92.
5 MR. KELLING: Our concern in valuing as of
6 1992 is the condition that may be present on the
7 property in 1992 as the property was configured in
8 '74.
9 Have you visited the site?
10 THE WITNESS: Yes.
11 MR. KELLING: Are you qualified to, in your
12 own opinion, to judge whether some of these conditions
13 that you are describing would be administered by
14 various agencies that exist on this site in 1994 when
15 you visited it?
16 THE WITNESS: Without a doubt, properties,
17 industrial properties along the Duwamish, will have to
18 go through the Model Toxics Control Act. The
19 contamination in the Duwamish industrial area is
20 widespread and well-known. You couldn't just come in
21 and say, I am going to plop a building down without
22 somebody saying, what about environmental
23 contamination and cleanup?
24 MR. KELLING: Steve, you had a comment on
25 that?

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1 MR. DIJULIO: Well, your question was site
2 specific. My comment was, is she testifying to
3 anything that we don't already know about the
4 contamination levels within the Duwamish River
5 corridor? You can notice that. That's common
6 knowledge.
7 MR. INSLEE: It's not common knowledge at
8 this site. Let me get this in perspective.
9 Counsel is taking the approach that every site
10 along the Duwamish Marina is being gobbled up by this
11 new group that was formed, these movers and shakers,
12 if you count Locke and other guys as movers and
13 shakers.
14 We are saying that site-specific information about
15 this site, the conditions that we are re-creating --
16 because none of us can visually look at it without
17 re-creating it -- are relevant to determine what a
18 reasonably prudent investor, buyer, lessee would do.
19 Now, if there are cement tailings, as have been
20 described like graphite covering the property, you
21 sink up into it and they had to pull it out and put it
22 back in, I think it's reasonable to think that
23 somebody could have figured that out in '92. That's
24 all we are saying.
25 MR. KELLING: Well, if we zero in on and

1 focus on the subject site rather than the generic
2 condition of the Duwamish, I think it's reasonable to
3 hear what you are going to say.
4 Q. (By Mr. Inslee) You have been told, you weren't
5 there, so you have been told the extent and nature of
6 the tailings?
7 A. Yes.
8 Q. And you observed the whiteness in the photographs
9 also?
10 A. Yes.
11 Q. Based on your experience would that be enough to
12 excite somebody in 1992?
13 A. Excite them, yes, negatively.
14 Q. Are cement tailings something in violation of MTCA?
15 A. That depends on specific testing of those cement
16 tailings, but that would be a huge red flag.
17 Q. But even if it wasn't toxic, if the developer said it
18 ain't going to hold up buildings, would that be
19 relevant from a seismic standpoint even though it's
20 not toxic?
21 A. Certainly.
22 MR. SAFER: Your cadence has already been
23 broken, so I would like to hear some more about your
24 experience with cement tailings. That's actually
25 something I would like to hear something about.

1 THE WITNESS: I am working on a very large
2 property up at the mouth of Elliott Bay, the Southwest
3 Harbor project for the Port of Seattle. That's an
4 existing 100-acre container terminal that they are
5 expanding with another 185 acres for the American
6 President Lines container terminals. I am assisting
7 them with the permitting requirement at all levels for
8 that project.
9 We have spent a considerable amount of time on the
10 environmental cleanup issues. One of the constituents
11 out there is cement tailings. There are many others.
12 Steel is there and there is slag and there is scrap.
13 There are many other things out there, a former Wycock
14 site and lumber treatment and all of that. But one of
15 them is cement tailings, so I have had experience with
16 that through the Southwest Harbor project.
17 MR. SAFER: Great.
18 Could you tell me some more about cement tailings?
19 What are the concerns? What are the issues?
20 THE WITNESS: The concerns from -- This is
21 now not the building stability side but the
22 enviromental cleanup side. They can have contaminants
23 within them that exceed the limits of the Model Toxics
24 Control Act. It's not just sand. It's not just dirt.
25 But it often has other contaminants in it that are

1 above the MTCA standards.
2 MR. KELLING: But we don't know on the
3 subject site, because there has been no testing --
4 THE WITNESS: That's correct.
5 MR. KELLING: -- if that is the case or not?
6 THE WITNESS: That's correct.
7 That's why I say cement tailings is a red flag.
8 We don't know the exact constituents of those cement
9 tailings. So what you would have to go through,
10 though, is this process to determine whether the
11 standards were exceeded. If they were through the
12 cement tailings or some other use of the property,
13 then you would have to go through the cleanup process.
14 MR. SAFER: Who was the originator of those
15 cement tailings at the mouth of the Duwamish?
16 THE WITNESS: I don't know that.
17 MR. SAFER: Has it been discovered that it
18 is, in fact, a contaminant that needs to be handled as
19 a hazardous material?
20 THE WITNESS: Down at the Southwest Harbor
21 site, yes.
22 MR. ALLEN: Have they come up with a process
23 to correct it then with feasibility?
24 THE WITNESS: With a number of the materials
25 there, it's likely to be that limited -- There is a

1 limited amount of on-site treatment you can do, and
2 you are just going to have to dispose of it off site.
3 MR. ALLEN: You can't capsulize it in some
4 type of a legal --
5 THE WITNESS: One possibility is to
6 encapsulize it in the -- For example, at Southwest
7 Harbor a certain amount of the site is going to be
8 paved for additional container backup space and so on.
9 One of the possibilities is encapsulate it in the
10 concrete that you are going to put over on the site.
11 So you essentially can contain it, control it there.
12 That's one method of keeping it on site. The other is
13 just to dig it up and haul it and dispose of it
14 properly off site.
15 MR. KELLING: Shall we move on?
16 Q. (By Mr. Inslee) From a King County standpoint, you
17 mentioned that as another jurisdiction after federal
18 and state.
19 What's the King County considerations in terms of
20 regulation development of this site in '92?
21 A. King County would be sort of the major locus for
22 getting permits for development of this site. One of
23 the issues is zoning. One is shorelines. There are
24 sensitive areas on this site, and each of those
25 regulations apply.

1 From a zoning standpoint the site is zoned heavy
2 manufacturing, which does permit container terminals,
3 warehouses, storage, so those types of uses are
4 permitted by the existing zoning designation. From
5 there the issue becomes, okay, that's an acceptable
6 use, but how much of it can I have and where on the
7 site. That's when you start getting into these issues
8 of the setbacks and so on for shorelines and sensitive
9 areas.
10 Q. Why don't you take a point of time. First of all,
11 look at the shoreline considerations, if you could.
12 A. The shoreline in this area, in addition to the zoning
13 designation, there is a shoreline designation that
14 regulates the types of activity. And here, this part
15 of King County has an urban, not surprising, an urban
16 shoreline environment designation.
17 MR. SAFER: Is that an overlay?
18 THE WITNESS: Yes, an overlay to the zoning.
19 A. In general, the regulations in the county's shoreline
20 code are somewhat less stringent if you have a
21 water-dependent or water-related use, meaning for
22 water-dependent it's a use that absolutely has to be
23 on the water. A water-related use means a use that
24 doesn't necessarily have to be there, but
25 substantially benefits from being next to the water.

1 In this case given the difficulty with actually
2 using the water area, again, with 1974 conditions and
3 basically beach, subtidal and intertidal beach along
4 there, I have not assumed a water-dependent or
5 water-related use. I rather have assumed warehouse,
6 storage, container terminal where goods are not being
7 brought by water, but goods are being brought by truck
8 or by the existing transportation system on land. So
9 it's not a water-dependent or water-related use. We
10 are not barging in materials.
11 It is, however, allowed. Industrial use is
12 allowed in this shoreline environment, but there are
13 certain setbacks that go with that. The clearest one
14 is there is an automatic 50-foot setback from the line
15 of the ordinary high watermark of the Duwamish
16 Waterway. I will get to the stream later.
17 Just talking now from the Duwamish Waterway, there
18 is a 50-foot no-man's-land protective buffer setback
19 that would apply there. If you have any required
20 drainage or utilities and all of that, that has to be
21 outside of that 50 feet. That is one of the shoreline
22 issues is you have this setback that applies.
23 In addition, any development or alteration of the
24 site within 200 feet of the ordinary high watermark
25 requires issuance of a shoreline's permit, shoreline

1 substantial development permit from King County. In
2 addition, I should say under the zoning to establish
3 your use, you would need a site plan approval. That
4 would be another type of permit you would need from
5 King County.
6 MR. SAFER: These are all for
7 nonwater-related or dependent?
8 THE WITNESS: Yes.
9 Q. (By Mr. Inslee) Is there also a height limitation?
10 A. Yes. In the shoreline district, which is to say
11 within 200 feet of the ordinary high watermark, there
12 is a 35-foot height limit.
13 Q. Where is that measured from?
14 A. It's measured -- The ordinary high watermark is a
15 defined term in terms of the average, the average zone
16 where the water meets the land. Then the 200 feet is
17 measured horizontally from that line.
18 So if the shoreline is meandering, so does your
19 200 foot line meander parallel to that.
20 MR. ALLEN: The shoreline would be mean high
21 water or --
22 THE WITNESS: It's called ordinary high
23 water.
24 Q. Now, in connection with the --
25 MR. ALLEN: These requirements are no

1 different for any other property on the Duwamish, this
2 50-foot setback and going through these permits for
3 King County?
4 THE WITNESS: The difference is that if you
5 had a water-dependent or water-related use then, for
6 example, your setbacks are less. Your development
7 restrictions are less. So the 50-foot setback is
8 assuming that because of the individual
9 characteristics of this site, not a water-dependent or
10 water-related.
11 If you have, for example, a water-dependent,
12 water-related use on some other site in the Duwamish
13 where you can really use the water, then your setback,
14 for example, is 20 feet. The regulations, if you
15 will, are a little more stringent for
16 nonwater-dependent, nonwater-related uses.
17 MR. ALLEN: It was brought up earlier that --
18 There was some discussion about water-dependent and
19 whether a container use, where it might be an off-site
20 storage for a container facility that also used port
21 facilities for unloading, would be considered or could
22 be argued to be a water-dependent use. You've got the
23 expertise here. I am sure that you have tried it.
24 THE WITNESS: I have tried it many ways in
25 various locales. That's a very strict definition.

1 Water-dependent in my experience means you are
2 actually getting your materials from barge, from ship,
3 from the water. It can't just be, hey, generally
4 containers come by ships and we have a container, so
5 we are water-dependent.
6 That means you have to get your materials -- It
7 could be a gravel operation and there is a question
8 about, well, gee, gravel could come by barge or by
9 truck, so you are water-related. You are not
10 water-dependent. It's a very strict test. If your
11 raw materials or your product, your container
12 terminals, aren't coming from the water, you are not
13 water-dependent. You're water-related.
14 MR. ALLEN: Does it have to be on site? If
15 everything is coming from the water, does it have to
16 be on my site?
17 THE WITNESS: To your site for you to have a
18 water-dependent or water-related use.
19 MR. KELLING: What would the distinctions be
20 if you had a dryland marina versus an in-the-water
21 marina in relation to water-dependent or
22 water-related?
23 THE WITNESS: Marinas are generally
24 considered to be water-dependent certainly if they are
25 in the water. I mean, you have no choice. They're

1 water-related if, for example, you have storage, dry
2 boat storage, that type of thing, up on the water.
3 Then you are water-related, because you could be just
4 doing repairs. Some places, all you are doing is
5 repair. You could do repair anywhere. You don't have
6 to be necessarily next to the water to do repair, so
7 traditionally that's been water-related. You can
8 benefit from being there, but you don't have to be
9 there.
10 MR. SAFER: Are the setbacks and other
11 restrictions the same for water-dependent as
12 water-related?
13 THE WITNESS: Yes. Those are lumped
14 together.
15 Q. (By Mr. Inslee) What in your judgment would be the
16 requirement of stabilizing the bank property as part
17 of the development's property?
18 A. The assumption is that you would need a bulkhead,
19 which is a pretty common assumption. The bulkhead
20 would be part of the development that would require a
21 shoreline substantial development permit. There is a
22 whole bunch of standards, environmental standards,
23 that apply to bulkhead construction to address similar
24 concerns, sediment quality, water quality, fish
25 habitat.

1 You can't be creating any dry land behind the
2 bulkhead. The bulkhead really has to be for the
3 protection and at the edge of the upland property.
4 You can't, for example, say my bulkhead is ten feet
5 out in the water. I am going to fill behind it. The
6 bulkhead has to be for the protection of the existing
7 bank.
8 Q. You indicated previously this was in a sensitive area.
9 Other than shoreline management, would you explain to
10 the arbiters what the sensitive area considerations
11 are and where they come from?
12 A. King County has a sensitive areas ordinance and a
13 map -- they call it a folio -- that goes with that
14 that shows designations of properties throughout the
15 county as environmentally sensitive areas. There are
16 different types of those areas, and then there are
17 different regulations that apply to each type.
18 This site shows up on those maps in a number of
19 different ways. One is the fact that the drainage
20 ditch is actually considered a stream, capital S
21 stream, by King County. That's a designated natural
22 feature on the site.
23 MR. SAFER: Has it been designated as
24 habitat?
25 THE WITNESS: It's called an unclassified

1 stream, so they haven't given it a particular type.
2 It would depend on the study of the physical
3 characteristics of that stream.
4 MR. KELLING: What is the date of that
5 ordinance?
6 THE WITNESS: 1990 is when the sensitive
7 areas folios was adopted, so it was in existence in
8 '92.
9 A. So one of the issues is the fact that you've got the
10 stream. Another is the fact that a portion of the
11 site is in the 100-year floodplain, which goes along
12 with the Duwamish Waterway.
13 The entire site is in another type of sensitive
14 area called a seismic hazard area due to its
15 liquefaction potential, the cohesion with soils that
16 exist there.
17 Those are the three types of sensitive areas that
18 you've got there. You also have a wetland. That's
19 sort of a fourth one.
20 But taking them sort of each in turn, one issue
21 that we deal with first is the floodplain. What
22 happens with the floodplain is that you have to have a
23 civil engineer basically review the drawings for
24 compliance with the county's floodplain standards.
25 That means meeting certain flood protection criteria

1 and certifying that the habitable -- first level of
2 habitable pay is above the flood protection elevation,
3 that sort of thing.
4 MR. SAFER: What is the elevation at that
5 site?
6 THE WITNESS: I don't know that.
7 MR. ALLEN: Does anyone know that?
8 MR. INSLEE: What was the question again?
9 MR. ALLEN: The elevation of the floodplain.
10 MR. DIJULIO: We are going to introduce the
11 FEMA map.
12 MR. SAFER: Very good. Thank you.
13 A. That's one issue with the floodplain.
14 The second issue is the stream on the site.
15 Again, it's sort of a change in the regulatory world
16 here. I mean, the stream, as we all know, has been
17 culverted. Under present day environmental
18 regulations it would be considered a resource that you
19 would protect. It's very clear to me that you would
20 not be able to just go in and culvert that stream
21 today. It would be seen as something that is a
22 sensitive area that has to be retained.
23 In addition, there are certain requirements,
24 stream buffers, that have to be provided. There is a
25 50-foot buffer no-man's-land again on either side,

1 both sides of the stream.
2 In addition, you have a 15-foot building setback
3 line from the 50-foot buffer. So it goes 50-feet
4 buffer and then a 15-foot building setback line.
5 If you have drainage-type facilities, for example,
6 swales or whatever, which is typical for helping to
7 protect the water quality, you can't have those swales
8 or drainage facilities within that 50 feet. You can
9 have them within your 15-foot building setback, but
10 the 50 feet is an absolute. Then you have your
11 building setback line, which can include drainage
12 facilities. Then if you do put in like a drainage
13 swale, there is a 20-foot setback from the drainage
14 swale. So you start to back up from the stream in
15 terms of creating an area that is undevelopable with
16 respect to the stream.
17 MR. SAFER: Within the 25-foot setback from
18 the drainage swale that's usable --
19 THE WITNESS: Actually it's a 15-foot
20 building setback from the buffer. There is a 20-foot
21 setback from the swale.
22 MR. SAFER: Within that 20 feet, is that
23 usable or is it you can't pave it, you can't make it
24 impervious?
25 THE WITNESS: It's not usable.

1 MR. SAFER: Parking or anything else?
2 THE WITNESS: No. Vegetation.
3 MR. ALLEN: This is the swale?
4 THE WITNESS: It's for vegetation. You
5 couldn't store containers right up to the edge of your
6 bio-swale.
7 MR. ALLEN: You would have alternatives of
8 using the swale?
9 THE WITNESS: There could be other
10 alternatives. That's just one that you would have as
11 your option under county regulations.
12 There is the possibility of, because part of this
13 property is -- The stream goes through the middle, so
14 there is a portion of it, maybe about an acre, that's
15 south of the stream. The question would be, well,
16 what do you do? If you have a stream and you've got
17 buffers and setbacks, what are you supposed to do with
18 that acre to the south?
19 MR. INSLEE: You said the stream goes through
20 the middle. You might illustrate with the map there.
21 MR. SAFER: It goes along the edge and cuts
22 through the edge of parcel D.
23 MR. KELLING: It seems to be on one end of
24 the major portion of the property, and then it goes
25 through the middle of the easterly part.

1 THE WITNESS: Yes. I don't mean goes through
2 the middle like this, but it divides the property. So
3 the question becomes, well, if you have all of these
4 buffers, what happens down here?
5 The comment I would have is it is possible under
6 county regulations to construct a bridge over the
7 stream. If you wanted to get vehicular assess or any
8 kind of access to this parcel, you would have to build
9 some sort of a bridge over the stream.
10 MR. KELLING: Are you aware there are, I
11 believe, four tax parcels here?
12 THE WITNESS: Yes.
13 You could build a bridge over the stream, but your
14 footings and the structure of it couldn't be within
15 the stream or the streambed itself. So you would have
16 to create a span essentially to bridge the stream.
17 MR. KELLING: Do you know, has that stream
18 ever flooded over this property or Delta Marine's
19 property or any properties right in there?
20 THE WITNESS: I don't know the answer to
21 that.
22 A. The other issue is liquefaction. What that generally
23 means is that a civil engineer will need to review any
24 buildings that are going to be put on the site. So
25 basically under county standards what you have to do

1 is you have to be able to certify that your building
2 is as stable as if it were not a seismic hazard area.
3 In other words, through structural design and so
4 forth you have to mitigate that you have liquefaction
5 material. That means assessing what type of movement
6 you would have in the structure at various types of
7 earthquakes, what to do designwise to mitigate that.
8 MR. KELLING: Soils drilling testing, that
9 kind of thing?
10 THE WITNESS: Yes.
11 MR. ALLEN: Have you been involved in an
12 example of something similar to this property?
13 THE WITNESS: Yes.
14 MR. SAFER: On the Duwamish?
15 THE WITNESS: On the Duwamish and on the
16 Seattle central waterfront, as well as liquefaction
17 zones on the Seattle waterfront.
18 MR. KELLING: I believe we should take a
19 ten-minute break to let everybody rest.
20 (Deposition at short break.)
21 Q. (By Mr. Inslee) Would you just culminate by giving us
22 a listing, an overview, of the permit process, not in
23 detail, but the time elements involved?
24 A. Sure, although I will go back again. The wetlands was
25 the last sensitive area.

1 Q. Oh, we didn't cover that. Go ahead.
2 A. Yes. We took a break after streams, floodplain and
3 seismic.
4 The wetland on the site was, according to the
5 information, approximately .8 acres and from the
6 photographs and so forth had cattails and the lichen
7 in it and was in fairly close proximity to the
8 waterway itself.
9 Under county regulations it would be very unlikely
10 that you could build over or disturb that wetland, but
11 rather it would have to be preserved. There is a
12 100-foot buffer around a class I wetland.
13 Again, you determine the type of class of wetland
14 through in-the-field analysis. But based on my
15 experience, given the cattails and the close proximity
16 of the Duwamish, it probably is a class I wetland,
17 meaning it has the highest value of wetlands, which
18 requires a 100-foot buffer around the wetland, again,
19 of no activity and then a 15-foot building setback
20 line from that edge of buffer. So that's another sort
21 of environmental constraint on development of the
22 property that would have to be taken into account.
23 MR. SAFER: Melody, is there a clarification
24 yet on the issue of shadows, shadowing a buffer area?
25 THE WITNESS: That's an issue of some debate.

1 I should say that the building setback line, the way
2 the county -- for all of these setbacks what they say
3 is it's a minimum of 15 feet. I have used 15 feet for
4 my analysis. I also have been involved in cases where
5 they want more than 15 feet due to the special
6 conditions of that wetland and the development.
7 The theory is that the buffer and the building
8 setback are supposed to mitigate such that you don't
9 have -- If you stay back of that, then you are okay.
10 But there are some individual cases where you have to
11 do more.
12 MR. SAFER: I was specifically referring to
13 the cattails, sort of the shadow or something built
14 over the top where you avoided the wetland entirely,
15 but there might be a shadow.
16 THE WITNESS: Oh, yes. You would not be able
17 to build over this wetland. The preservation of the
18 wetland 100-foot buffer means no structures at all, at
19 all, in that area.
20 MR. SAFER: Just so I am clear, put your
21 pilings 100 feet apart or whatever or there may be
22 something that's set off from the wetland and there is
23 a shadow that's cast. There was some controversy
24 regarding openness and access to air.
25 THE WITNESS: One of the things that I have

1 seen, for example, with piers in areas of known fish
2 habitat and other types, decks and other things,
3 sometimes what they do is they require that portions
4 of it be built with translucent material so that you
5 are able to get sunlight penetration down into the
6 water. Not for a wetland, but out into the water you
7 can build some over-water structures, but you have to
8 maintain a translucent material on the surface.
9 MR. SAFER: So some sort of over-water
10 structure might be feasible. That doesn't preclude
11 development of the site.
12 You are suggesting in your experience the .8 acres
13 probably would not be handled under a nationwide bill,
14 nationwide 404?
15 THE WITNESS: Yes.
16 A. Let me back up. The wetland we are talking about,
17 though, is not immediately adjacent to the waterway.
18 It's up -- It's near but not in the water --
19 MR. KELLING: Can you show us that?
20 A. Let's see. I need to refer to maybe the parcel map.
21 Q. That original photo log, I think, is where we showed
22 it if you can have the original there. I can show you
23 xeroxed copies which aren't too bad.
24 MR. KELLING: Well, if it would be possible
25 to do it on Exhibit A, that illustrates the property

1 boundaries. While the photo log is illustrative, it
2 doesn't tell us where the property lines are. I am
3 not stopping you from --
4 MR. INSLEE: No. We can have other people
5 examine it. Mr. Hester can identify it and also
6 Mr. Szmodis.
7 A. Based on the photographs, the wetland area that we are
8 talking about is on parcel A in approximately this
9 area here. And this is not to scale.
10 MR. SAFER: Obviously.
11 A. I am not scaling off the --
12 MR. KELLING: Do you want to put a W there or
13 shed a tear on it?
14 A. And buffer. It's not to scale, but it's the
15 approximate location of the wetland.
16 The reason I raise that is because what we are
17 really talking about is, because it's on the upland
18 property, you have the wetland to be preserved and the
19 buffer around it and the building setback around it.
20 The issue I was speaking to more is when you have
21 pilings out in the water and a pier on top, then there
22 are some issues about shading and translucent decking.
23 When you have a wetland, though, on your upland
24 parcel, what you are really dealing with is this is a
25 no-man's-land. Then you have the buffer. Then you

1 have the setback where there is no structures allowed.
2 MR. ALLEN: Could you mitigate it?
3 THE WITNESS: The option is provided in
4 county regulations to essentially do mitigation that
5 would maybe fill this wetland and provide habitat
6 elsewhere on the site or elsewhere off site. That
7 kind of technology and technique, if you will, is
8 strongly discouraged. Here we are talking about King
9 County regulations. We have another set of
10 regulations at the federal level, the Corps, where
11 that is the last, last possibility. Preservation is
12 first and foremost.
13 There have been a few cases where you could fill
14 and reestablish a wetland in a different portion of
15 the site. It met with mixed success frankly. That's
16 partly why keeping it there is the preferred method
17 both under King County and federal regulations.
18 MR. ALLEN: If it was mitigated, would it be
19 one to one?
20 THE WITNESS: No. The mitigation would be
21 higher. I do not know what the specific replacement
22 ratio might be here.
23 MR. SAFER: Does three to one sound about
24 right?
25 THE WITNESS: For a class I wetland, you are

1 definitely looking at somewhere like two to one or
2 something in that nature. But, like I say, I really
3 don't even think that's -- I don't think that's in the
4 cards.
5 MR. ALLEN: If this was the Port of Seattle's
6 property and they were going to do it for a container
7 facility with a loading dock out there, they would be
8 prohibited from utilizing that wetland portion if it
9 was identified as a class I, in your experience, with
10 their other facilities and they build around it?
11 THE WITNESS: They build around it. They
12 will retain the wetland, keep the buffer. Now, in
13 Seattle the buffer requirements are less than in King
14 County. But keep the buffer. You usually have to
15 fence it, and that's what it is.
16 MR. SAFER: That wetlands buffer now is how
17 big?
18 THE WITNESS: 100 feet.
19 MR. SAFER: Same as the shoreline setback?
20 THE WITNESS: The shoreline setback is
21 actually 50 feet, and the wetland buffer is 100 feet.
22 Q. (By Mr. Inslee) In connection with the permitting
23 process, just the list of permits and approximate time
24 of obtaining --
25 A. The first order of business with this site would be to

1 address environmental cleanup issues in terms of doing
2 the remedial investigation and, if cleanup is
3 required, negotiating that whole process with DOE,
4 which based on my experience -- and I am not in any
5 way overestimating here -- would be in the range of
6 one to two years to negotiate if cleanup is required,
7 to negotiate those cleanup standards and the cleanup
8 method for this site.
9 Then typically you would apply for your local
10 permits, your King County permits. The permit
11 application would trigger the State Environmental
12 Policy Act. The way the county system is set up,
13 before they even begin their substantive review of
14 their application, the first order of business is to
15 do their environmental determination on whether an
16 environmental impact statement needs to be done,
17 whether there is any environmental mitigation that
18 should be imposed.
19 My assumption would be that they would not require
20 an environmental impact statement for this site, but
21 they would closely review the environmental issues and
22 what mitigation measures were appropriate.
23 The whole SEPA process has to run its course
24 through an appeal process from any interested party.
25 And if there is an appeal filed, things stop until the

1 appeal is resolved through their subdivision and
2 zoning examiner. Then they come back. If there is no
3 appeal filed, if the appeal is resolved, then they
4 start processing the substantive permits, your
5 shoreline permits, site plan approval and the like.
6 My estimate would be that the permit process just
7 through the county alone would be one to two years to
8 obtain your local permits.
9 As I have indicated, you also have Corps permits
10 to get. And although you can apply for them, there is
11 limited work that occurs on them until you get your
12 local permits. I am estimating -- And again, I am not
13 overestimating this in the slightest. I am estimating
14 about six months for the Corps permit process.
15 So if you add them all together, based on my
16 experience, I would estimate that obtaining permits
17 for a container terminal warehouse outdoor storage
18 would be in the vicinity of two and a half to five
19 years from the date you apply until the date you had
20 all your permits issued.
21 MR. SAFER: The Corps permit you are
22 referring to is Section 10?
23 THE WITNESS: Section 10 and the Section 404,
24 the wetland.
25 MR. SAFER: Section 404 would take the same

1 time as Section 10?
2 THE WITNESS: Yes, yes.
3 MR. ALLEN: Are you assuming that two and a
4 half to five years if you are doing something in the
5 tidal area?
6 THE WITNESS: Only the bulkhead.
7 MR. ALLEN: So you are staying away from the
8 water-related --
9 THE WITNESS: Yes. Because the issues there,
10 part of the complexity there is the amount of dredging
11 that you would have to do.
12 If you were going to really set this up as a site
13 where you had vessels coming in and bringing
14 materials, that sort of use, the dredging that you
15 would have to do there is substantial. The issues
16 again of contamination within the dredged materials of
17 the Duwamish are well-known. You would have to
18 address that whole process, as well. So in terms of
19 in-water work, the only thing I am assuming is the
20 bulkhead.
21 MR. SAFER: Are you aware of any other pier
22 or other kind of tideland, submerged-land work that's
23 been going on since these regulations have been in
24 place in the Duwamish and Harbor Island areas?
25 THE WITNESS: Yes.

1 MR. SAFER: What kind of examples could you
2 draw on?
3 THE WITNESS: Well, there is a large amount
4 of work, of course, that the Port of Seattle does at
5 its various terminal facilities in terms that they
6 repair their pier aprons and pave over additional
7 container yard space. They make various improvements
8 around the Duwamish for their facilities, and I am
9 familiar with those.
10 MR. SAFER: What about new piers?
11 THE WITNESS: New piers on the Duwamish?
12 MR. SAFER: Or Harbor Island.
13 THE WITNESS: Harbor Island area? The port
14 is proposing a new or an extension of an existing pier
15 at the Southwest Harbor site. There is an existing
16 pier there that would be extended 400 feet for APL.
17 That's one that I am familiar with.
18 MR. KELLING: Are you aware of any project on
19 Pier 27?
20 THE WITNESS: No.
21 MR. KELLING: Thank you.
22 MR. ALLEN: So I guess the other part would
23 be, is there an example of where there has been
24 dredging and what they have done with the dredged
25 material?

1 THE WITNESS: At Terminal 30 there was a
2 small amount of dredging, a few thousand cubic yards,
3 in connection with some repair work for the apron.
4 There will be some dredging associated with the
5 400-foot apron at the Southwest Harbor site.
6 MR. ALLEN: Do you know what they have to do
7 with the dredging? Can they put it on site capsulated
8 or do they have to haul it out?
9 THE WITNESS: Well, what happens is that the
10 dredged materials, there needs to be considerable
11 testing of the materials to determine whether they
12 meet the Puget Sound dredge disposal criteria for open
13 water disposal or not and to figure out what the
14 constituents of that material is.
15 I don't know at Terminal 30 where the dredged
16 material is going. At Southwest Harbor it hasn't been
17 determined yet because the environmental testing
18 hasn't been completed to know whether it's something
19 that could be used upland or has to be disposed of off
20 site.
21 Q. (By Mr. Inslee) Melody, you habitually as part of
22 your work engage in the evaluation and investigative
23 processes on behalf of persons who are prospectively
24 interested in procuring land?
25 A. Yes, I do.

1 Q. If the arbiters conclude that this property is better
2 suited for a nonwater-related or nondependent-water
3 use so that we are now sitting and looking at a parcel
4 which may be warehouse container and container
5 storage, based on your knowledge of the property,
6 would you advise your client to be acquiring this
7 parcel for that purpose versus an inland portion
8 completely removed from the Duwamish Waterway or any
9 streams?
10 A. One looks for a property with the fewest environmental
11 constraints possible. One of the things that I always
12 have to do for people is they come to me with a site
13 and they want to know how much of it is really usable
14 given wetlands. This one is sort of even worse
15 because it not only has wetlands, it has a stream
16 running through it.
17 I would have to do that analysis for them and
18 figure out how much is left over as usable, given
19 exactly the type of factors I have gone into today,
20 the setbacks and buffers and environmental conditions.
21 I would want any prospective purchaser to know that
22 this site comes with some severe environmental
23 constraints that limit the usability of the site.
24 The other whole factor in advising somebody is the
25 issue of environmental contamination, which is a huge

1 topic all by itself, as to whether I would encourage
2 somebody to even buy a piece of property that had
3 cement tailings on it that hadn't been tested. That's
4 just a whole nother area of risk assessment that you
5 would counsel somebody on.
6 MR. INSLEE: Thank you. No further
7 questions.
8 MR. KELLING: I have one question.
9 EXAMINATION
10 BY MR. KELLING:
11 Q. Have you made a calculation as to how much of this
12 property is usable if it were to be developed in the
13 fashion you have described without water-dependent or
14 water-related use?
15 A. I haven't done that calculation myself, but instead
16 indicated what the regulatory requirements would be in
17 terms of buffers and setbacks from which someone could
18 do that calculation.
19 MR. KELLING: Thank you.
20 MR. SAFER: I have no further questions.
21 EXAMINATION
22 BY MR. ALLEN:
23 Q. I guess I want to explore this issue of contamination,
24 because it appears that we have limited information on
25 contamination that was submitted here. We don't have

1 the ability to -- I don't think we do -- to bring in
2 an expert to test this site as it was in 1974 even
3 today.
4 What I hear you saying with the contamination
5 issue on the site, that that precludes any, aside from
6 the wetlands, precludes in your opinion any
7 development of the water side, the primary reason
8 being the contamination issue on that portion, because
9 you wouldn't know how to get -- You have to get rid of
10 the dredging or you can't put it on site. Without the
11 contamination issue, you could develop the water side?
12 A. Yes. Without the contamination issue, you would have
13 to dredge out sufficient --
14 Q. We have a cost factor there, but I am looking at it
15 from an approval process.
16 A. Yes. I mean, the contamination issue raises a lot of
17 unknowns. But leaving that aside, you could dredge
18 out the area next to the dry land of some quantity,
19 depending on what the depths were and what depths you
20 needed for navigation. It could be dredged out.
21 It raises a lot of regulatory issues about fish
22 habitat and water quality and mitigation. When you
23 disturb an area like that, the Corps of Engineers,
24 City of Seattle, they are looking for mitigation of
25 that disturbance of subtidal and intertidal areas.

1 So it's not uncommon for them to say you are
2 dredging out, you are disturbing this amount of area.
3 We want that amount of intertidal area created
4 somewhere else on your site or off site as mitigation
5 for the disturbance. So you would be involved in a
6 different, a whole nother regulatory process to
7 address the proper mitigation for disturbing that
8 tidal area.
9 Q. Even in an urban shoreline with heavy industrial
10 zoning it's not allowing you to proceed necessarily
11 with the uses that are allowed in that area if you are
12 going to disturb environmental --
13 A. I think maybe it goes too far to say that you can't do
14 it, in other words, that you are prohibited from doing
15 it. I don't think that's correct.
16 What it means, though, is you have a whole nother
17 round of negotiations about mitigation. It may mean
18 that the habitat is so valuable that the Corps or the
19 local agencies will say that you can't disturb it.
20 The other alternative, though, which is probably
21 more likely, is that you could, but you would have to
22 mitigate it on site or at another site in terms of
23 disturbing habitat. So it's not necessarily
24 impossible, but it's a whole nother regulatory scheme
25 that you go through to determine what you have to do

1 to mitigate that impact.

2 EXAMINATION

3 BY MR. SAFER:

4 Q. Let me raise something related to that. That's
5 involving dredging.
6 If someone chose to put piles down to extend
7 access to the navigable channel, that doesn't come
8 under the same, as I understand it, that is not the
9 same issue.
10 A. It's a little different issue. I mean, you still have
11 issues of contamination in terms of when you drive
12 piles you suspend the sediments. If the sediments are
13 contaminated, you are spreading contamination. That's
14 been part of the problem.
15 For example, the ferry terminal project, they
16 drove the piles and all kinds of junk came up. The
17 question is, from where and who did it and all of
18 that.
19 So you still have some issues of contaminated
20 sediments even when you are not dredging and you are
21 just driving a pile in the material.
22 The habitat issues are ones of shading then but
23 not outright removal. So you look for different types
24 of mitigation like the translucent decking and the
25 like. So that's an alternate method.

1 What I don't know, because I haven't studied that
2 there, is how far out you would have to go with a pier
3 to get to an adequate depth. That I don't know.
4 Q. Is it more likely that that would be approved or
5 approvable?
6 A. A pier structure as opposed to dredging, for example?
7 Q. Yes.
8 A. Assuming that the pier is feasible -- The reason I
9 hesitate is I don't know how far out you would have to
10 go, so that raises some issues.
11 Q. Well, there is a fair amount of landfill that was
12 excavated from 1974, so there is not quite the same
13 distance if the land were in the same condition as it
14 was in '74. I am not sure about that issue either.
15 Getting beyond the cost issue from an approval or
16 regulatory standpoint, what would you say?
17 A. I would say that a pier, as opposed to dredging, would
18 be easier to have approved.
19 Q. Would it be probable or just possible?
20 A. You mean, probable to obtain approval for a pier?
21 Q. What would you think your odds would be if you went in
22 for such approval, the contamination issue being what
23 is general without being site specific to the Duwamish
24 issues?
25 MR. INSLEE: You are talking about a dock or

1 a pier?
2 MR. SAFER: Well, piers by necessity have to
3 be driven in order to have a dock. Piers are the
4 issue.
5 A. Pilings with a dock on top?
6 Q. That's right.
7 A. I would say that it's -- Leaving aside the
8 contamination issues, which is like --
9 Q. You have to take the general issues up and down the
10 Duwamish which are well-known?
11 A. I would say that obtaining approval for a pier
12 structure is likely, and you are going to have to
13 mitigate the environmental impact of the pier.
14 MR. SAFER: Thank you.
15 FURTHER EXAMINATION
16 BY MR. ALLEN:
17 Q. I guess one of the things that's surfaced here is that
18 our property line doesn't get to navigable water.
19 Do you have any background as to the ability to
20 extend the pier out into DNR-controlled lands?
21 Otherwise, we would have to get in there and excavate
22 out the soil to a water depth in order to serve the
23 pier. We have -- Is it 150 feet --
24 MR. KELLING: Somewhere around there, 120.
25 Q. -- from the property line to the navigable edge of the

1 Duwamish.

2 Has anybody had any experience about attempting to
3 build structures out in that area?

4 A. Two issues occur to me. One, getting approval from
5 DNR is very slow and difficult when you are putting
6 improvements out on DNR-controlled property. I have a
7 lot of experience with that for various Port of
8 Seattle projects. That is a very time-consuming and
9 difficult process and bogs down with environmental
10 contaminations issues and a variety of other issues.

11 The second issue, though, is the whole point of
12 the Section 10 permit under the Rivers and Harbors Act
13 that the Corps administers is to regulate development
14 in navigable areas. The statutory mandate, of course,
15 is to not unreasonably interfere with navigation.
16 That's the point of a navigable waterway.

17 I have never worked on a project where somebody
18 had to extend a pier so far out that that could be an
19 issue. The types of piers I have worked on, you have
20 your depths there and you just need to build a pier in
21 order to facilitate the vessel moorage. So it's hard
22 to speculate, but you would certainly be involved in
23 some federal permit issues of some magnitude.

24 MR. ALLEN: Thanks.

25 MR. KELLING: I don't have anything else.

1 FURTHER EXAMINATION

2 BY MR. INSLEE:

3 Q. At least in your experience, what do you think the
4 likelihood is of being able to dredge in that basin in
5 view of the existence of the stream discharge?

6 A. Really difficult. Dredging on the Duwamish is
7 difficult all by itself, and you have obviously
8 contamination and habitat issues. The stream and the
9 interrelationship between the tidal area and the
10 stream is a whole nother factor that is specific to
11 this site that would create a number of regulatory
12 complications.

13 Q. Mr. Szmodis is going to testify, which hasn't been
14 before the board yet, but let's assume that he
15 testifies that even back in '74 the Indians spread
16 their nets across this site to prevent whatever
17 development was then going in, or '77.
18 What would happen in 1992 if the Indians objected
19 to a development permit?

20 A. You wouldn't get the Corps permit and you wouldn't be
21 able to build.

22 Q. Merely by the fact of the objection?

23 A. Yes.

24 MR. INSLEE: Thank you.

25 MR. KELLING: That's it?

1 MR. INSLEE: Yes, sir.
2 MR. KELLING: Mr. DiJulio?
3 EXAMINATION
4 BY MR. DIJULIO:
5 Q. Ms. McCutcheon, following up on your last statement,
6 you are aware that the Muckleshoots filed an action
7 against the Elliott Bay Marina project, are you not?
8 A. Yes.
9 Q. And you are aware that that project was subsequently
10 built?
11 A. It was built after tremendous, quote, unquote,
12 mitigation for that marina and after years of
13 negotiation with the tribe.
14 Q. Well, you don't need to talk about how long the
15 negotiations went on, but your statement that it would
16 not happen is not correct.
17 There is waterfront development that has proceeded
18 notwithstanding tribal opposition; is that correct?
19 A. If the applicant can come to some agreement with the
20 tribes such that the tribes remove their objections to
21 the permit, then the permit, if it meets other
22 standards, can be issued. But it's coming to terms
23 with the tribes that can be a lengthy and expensive
24 process.
25 Q. But it's not an absolute as you testified previously?

1 A. Well, the question from Mr. Inslee was, if there are
2 objections, will the permit be issued? The answer is,
3 if there are objections, the permit will not be
4 issued. If you negotiate away the objections, then
5 it's a different question and the permit could be
6 issued.
7 Q. As I understand your testimony, you are representing
8 the Port of Seattle with respect to the APL
9 development?
10 A. Yes.
11 Q. You are not representing APL?
12 A. No.
13 Q. You understand that it is your client's position, the
14 port's position, that container storage transshipment
15 facilities are water-dependent or water-related uses
16 even if they are not immediately adjacent to a
17 navigable waterway?
18 A. You are asking me a very abstract question. I mean,
19 the APL site has direct water access, deep harbor
20 access by container vessels, so they receive the
21 containers from vessels. They off-load it on the
22 site, and then they load it in the intermodal rail
23 yard.
24 Q. The reason I ask that question is that Al Lowe from
25 the port will be testifying on behalf of the lessors

later today. He will be testifying on that issue, so I will ask the question a different way.

Are you aware of what the port's position is with respect to the status of transshipment container facilities that are not adjacent to navigable waterways?

A. That's too broad a question for me. I mean, are you saying am I aware of their position on container facilities that don't get any materials from water?

Q. No, no.

Just for purposes of clarification, assume a piece of property that is not adjacent to the Duwamish but has a nonnavigable stream or watercourse that would bring into play the provisions of the county's shoreline management regulations. Assume further that the property owner of such a property wishes to develop it for a transshipment or container facility that will access or service a port facility.

What is the setback from the stream or watercourse in that case?

A. Well, the setback from the stream or watercourse is irrespective of the type of development. I mean, if there is a stream on the property, you have to have a setback whether it's a water-dependent warehouse or a warehouse that gets goods from the water.

1 Q. The question is, what is the setback if it is
2 water-related or water-dependent as I have described
3 the use of the premises?
4 A. So if the site is developed with water-related or
5 water-dependent activity, what is the stream setback?
6 What is the setback under the Shorelines Management
7 Act for that purpose? So not the stream setback but
8 the --
9 Q. The setback from the ordinary high watermark of the
10 stream course.
11 A. Those are two different.
12 Q. We realize that. We have gone through that before
13 with this group.
14 A. The setback would be 20 feet.
15 MR. ALLEN: Rather than 50?
16 THE WITNESS: Right.
17 MR. SAFER: That's from the stream as well
18 as -- The stream setback is different than the
19 shoreline setback?
20 THE WITNESS: Yes. You still have -- The
21 stream setback is totally separate from that.
22 MR. SAFER: And unaffected by the use?
23 THE WITNESS: And unaffected by the use.
24 MR. SAFER: That's what I thought.
25 Q. (By Mr. DiJulio) When were you engaged by the lessees

1 in this case to perform your evaluation?
2 A. Approximately two and a half weeks ago.
3 Q. And we haven't discussed this case previously, have
4 we?
5 A. You and me?
6 Q. Yes.
7 A. No.
8 Q. Have you discussed the case with Rick Anderson from
9 the bank?
10 A. No.
11 Q. Have you discussed it with any of the appraisers?
12 A. No.
13 Q. Now, have you read the lease between the lessor and
14 lessee?
15 A. No, I have not.
16 Q. You are not knowledgeable about the terms of the lease
17 that dictate when the evaluation of this property by
18 the appraisers is to take place?
19 A. The only thing I am aware of, as I have testified, is
20 that we are to take the conditions of the property
21 from 1974 and use that as our baseline.
22 Q. But as I understand your testimony, you were directed
23 or, to be more polite, the instructions were to
24 evaluate based upon 1992 regulations?
25 A. Well, I was told to look at it in terms of current

1 regulations. The land use regulations are ever
2 changing. So the question is, what does current mean?
3 Should I look at what's going to be in effect in a
4 year? Should I look at ... What I looked at is what
5 is current as of 1992. It also happens that in all
6 respects those are also current today.
7 Q. For example, you did not refer to the June, 1993,
8 zoning code of the county, Title 21(a)?
9 A. Title 21(a) is changing. There is a new Title 21(a),
10 although it's not in effect yet. It doesn't have an
11 effective date until the zoning designations are done.
12 So although the code is there and available, it's not
13 in effect yet. I did not use the future Title 21(a).
14 I used the current Title 21(a).
15 Q. Well, you used the current Title 21?
16 A. I'm sorry. I used the current Title 21.
17 Q. For the record, if you know, Title 21(a) was adopted
18 June 7th of 1993, correct?
19 A. Title 21(a), yes. But it is not effective yet until
20 the zoning designations to implement it are adopted.
21 Q. And you have not considered the current regulations in
22 your evaluation, is that correct, the 21(a)
23 regulations in your evaluation?
24 A. I have taken those regulations that apply to the
25 property today, not the ones that will apply once

1 zoning designations are done in about nine months.
2 Q. So you are using the zoning code, the King County
3 zoning code currently in place at Title 21?
4 A. Yes.
5 Q. The zoning code includes such issues as flood control;
6 is that correct?
7 A. Yes.
8 Q. And Title 21 includes such matters as Chapter 2154,
9 "Special Control Areas and Flood Hazard Areas"?
10 A. Yes.
11 Q. All those regulations are zoning regulations of the
12 county that you considered?
13 A. Yes.
14 Q. In your evaluation of the property, am I correct in
15 assuming that you relied on the King County Sensitive
16 Areas Map Folio of December, 1990?
17 A. Yes.
18 Q. Now, for purposes of the appraisers' consideration, I
19 am going to ask you to make reference to the previous
20 map folio dated March, 1980. That's the previous map
21 folio to your knowledge; is that correct?
22 A. Yes.
23 Q. I am going to have you, for the appraisers, go through
24 and identify each of the subject areas and identify
25 the parcel and what is indicated thereon as a result

1 of that earlier mapping. So first --
2 MR. INSLEE: I will object to the 1980
3 rendition. It's not relevant here, and it's going to
4 take a lot of time. We don't want to trace the last
5 12 years of changes. The relevant time is '92.
6 MR. KELLING: Are you going to relate this to
7 the 1992 date?
8 MR. DIJULIO: The zoning in place at the time
9 is referenced in the lease, the 1974 zoning. The
10 witness has testified that the regulations she is
11 referring to are the zoning code regulations.
12 Consequently, that is what I am referring her to.
13 I understand there is a dispute between the
14 parties as to whether or not we look at '74
15 regulations or '92 regulations. For purposes of the
16 appraisal panel, I am going to go through both very
17 quickly.
18 MR. INSLEE: I would object to 1980 still for
19 the same reason. I don't agree that that's a zoning
20 code, but go ahead.
21 MR. DIJULIO: It's your witness who testified
22 to that, Counsel.
23 MR. INSLEE: No.
24 He is crossing her on things that I didn't cover,
25 so it becomes his witness as to the areas that I

1 haven't covered. I am not responsible for 1980, nor
2 did I get into it, nor is it a zoning code in 1980
3 that's relevant. I don't know why -- It's my first
4 objection in two days. That's not bad.
5 MR. KELLING: You don't know why he is doing
6 it?
7 MR. INSLEE: Well, it's not relevant. It
8 just leaves another kite tail that we may have to
9 chase. In the confines of your meeting after we get
10 out of here, I don't know what you are going to
11 consider. I just want to keep out stuff that I don't
12 have to chase and then spend a day proving why it's
13 relevant, not relevant.
14 MR. KELLING: Off the record, please.
15 (Off-the-record discussion.)
16 MR. KELLING: I think there is a great deal
17 of latitude that needs to be exercised in a hearing
18 like this, and I think it's all right to go ahead.
19 The panel agrees.
20 MR. DIJULIO: With all deference, I am going
21 to move very quickly through this area. Although
22 counsel did not ask Ms. McCutcheon to bring the maps,
23 I will show the maps to the appraisal panel both from
24 the 1980 and 1990 folios.
25 Q. (By Mr. DiJulio) First, Ms. McCutcheon, for the

1 appraisers' benefit, we've got landslide hazards,
2 seismic hazards, erosion hazards, wetlands and coal
3 mine.
4 You have only identified certain hazards areas
5 that are of relevance to your inquiry; is that
6 correct?
7 A. That were designated and -- For certain reasons, the
8 property is designated enviromentally sensitive.
9 Q. We don't need to get into landslide hazards. That's
10 not an issue in this case; is that correct?
11 A. Well, to be thorough, what I would do is I would go
12 through each one of them and check.
13 Q. Well, let's look at page four. For the record, we
14 will identify this as the Sensitive Areas Map Folio,
15 King County, March, 1980. Wetlands updated April,
16 1982.
17 Turning your attention to the subject property,
18 there is no landslide hazard area designated?
19 A. That's correct.
20 Q. Let us turn to Section 2 then of the folio. That is
21 the class III seismic hazard areas. Again, the
22 Duwamish area and calling your attention to the
23 property, take some time to evaluate that.
24 A. Well, it's difficult to tell whether the class III
25 seismic hazard area includes a portion of the site or

1 not. I would say it probably does include a portion
2 of the site.
3 Q. But it would be a little bit, because it seems to go
4 around the site, doesn't it?
5 A. Well, a little bit is relative. If any part of it's
6 seismic hazard, then special regulations apply. I
7 would say some of it is.
8 Q. Some of it is. I would not disagree that some of the
9 area might touch upon the site.
10 Let's go to the folio Section 3 on erosion hazard
11 area. Anything in the Duwamish area under the erosion
12 hazard area?
13 A. No.
14 Q. Section 4, wetlands, Duwamish, any wetlands shown on
15 the site in this map?
16 A. No.
17 What's shown is, of course, the Duwamish River
18 itself and then the 100-year floodplain designation.
19 Q. Where is the floodplain designation?
20 A. It's really running parallel with the Duwamish River.
21 These are not closely scaled, so you can't determine
22 that some small portion to the west of the Duwamish
23 River is also floodplain.
24 Q. Both sides of the navigable waterway to a certain
25 extent is included within the 100-year floodplain; is

1 that correct?
2 A. Yes.
3 Q. Let's be complete. Coal mine hazard area, we don't
4 have any coal mine hazard area?
5 A. No.
6 Q. We are referring to the Sensitive Areas Map Folio,
7 King County, Washington, December, 1990. This is what
8 you based your evaluation on; is that correct?
9 A. Yes.
10 Q. You didn't bring this with you today, did you?
11 A. No.
12 Q. The first section in this folio is identified as
13 wetlands; is that correct?
14 A. Yes.
15 Q. This map page is map page four; is that correct?
16 A. Yes.
17 Q. Would you identify what is indicated in proximity to
18 this site or on this site for wetlands?
19 A. This particular diagram does not show any wetlands. I
20 would, though, caution that there is a note on every
21 single one of the maps that these are approximate and
22 that the actual circumstances depend on site
23 characteristics.
24 Q. The next section of the folio are streams and flood
25 hazard areas; is that correct?

1 A. Yes.
2 Q. Page four of the folio identifies the Duwamish
3 corridor and shows the unclassified stream course that
4 you testified concerning; is that correct?
5 A. Yes.
6 Q. It is not a class I or class II?
7 A. Yes. It's considered an unclassified stream, meaning
8 it hasn't been determined if it falls within those
9 other classes.
10 Q. The next section is erosion hazard areas; is that
11 correct?
12 A. Yes.
13 Q. And again, looking at map page four of the Duwamish,
14 there is no erosion hazard area; is that correct?
15 A. That's correct.
16 Q. Landslide hazard areas is section -- whatever section
17 it is of the folio.
18 A. The next section.
19 Q. The next section.
20 Is there any landslide hazard area associated with
21 this site?
22 A. No.
23 Q. With respect to seismic hazard area, unlike the prior
24 1980 folio this does, in fact, include the site
25 entirely; is that correct?

1 A. Yes, it does.
2 Q. And that's map page four; is that correct?
3 A. Yes.
4 Q. It includes a substantial amount of the corridor west
5 of -- or excuse me -- east of 509 within that; is that
6 correct?
7 A. It shows what it shows. I don't know what you mean by
8 the 509 corridor, but it's not just this parcel.
9 There are other areas, as well.
10 Q. You are aware of other properties that have developed
11 notwithstanding in that area, notwithstanding the
12 seismic hazard designation; is that correct?
13 A. You mean developed since these regulations?
14 Q. Yes.
15 A. I don't know specifically.
16 Q. Thank you.
17 With respect to the seismic designations, those
18 are based on a United States Department of Interior
19 geological survey, 1975; is that correct?
20 A. They are based in part on that.
21 Q. I am handing to you what we will ask to be marked as
22 Exhibit 18.
23 A. Thank you.
24 Q. Thank you.
25 Are you familiar with that, Ms. McCutcheon?

1 A. Yes.
2 Q. Is that the report you were referring to?
3 A. Yes.
4 Q. Particularly turning to the map, for example, you
5 testified earlier that the port central waterfront
6 property is facing this issue, in fact, all of Seattle
7 and Harbor Island is in the high hazard area; is that
8 correct?
9 A. Yes.
10 Q. This site is, as indicated both in the King County
11 folio maps and on this map, in the moderate area; is
12 that correct?
13 A. Could you repeat that, please?
14 Q. As indicated on the King County maps as well as on
15 this map, the area is shown as moderate hazard; is
16 that correct?
17 A. It's shown as moderate hazard on this exhibit. I
18 don't recall that being the particular designation on
19 the sensitive areas folio.
20 Q. Substantial property, as indicated by the exhibit, in
21 the Puget Sound area, particularly Seattle and King
22 County surrounding Elliott Bay, are so affected by
23 these designations, are they not?
24 A. There is a substantial amount of property around
25 Elliott Bay and the Duwamish that have that

1 liquefaction condition because of historical filling
2 and other factors, yes.
3 Q. Thank you.
4 Now, as I understand your testimony with respect
5 to crossing a stream course and particularly the
6 stream course on Exhibit A between parcel D and what I
7 believe to be on that exhibit C, C and D -- For the
8 record, different maps have the parcels designated
9 differently, so we are referring to the Exhibit A map
10 and the parcels C and D.
11 Are you aware that the lessees in this case did an
12 evaluation prior to their construction and culverting
13 of that stream course? Were you advised of that by
14 the lessees?
15 A. No.
16 Q. As I understand your testimony, culverting or crossing
17 of that stream course is not prohibited by the Chapter
18 2154 of the zoning code that you evaluated?
19 A. Well, you could build a bridge over the stream as long
20 as the footings and the rest of that structure were
21 not in the stream or streambed.
22 Q. Isn't it the case that under those codes such a bridge
23 or crossing could also be done by culvert under the
24 regulations in place?
25 A. You mean could the entire stream be culverted?

1 Q. No.
2 Could the crossing be done with a culvert as
3 opposed to pilings?
4 A. I am having trouble picturing this method of
5 construction. The bridge -- There would be a bridge
6 spanning the stream and the stream would be culverted
7 below the bridge? I am not understanding your
8 question.
9 Q. Well, let me show you 2154, 320 (b)(1). That refers
10 to the use of culverts, bottomless culverts, in
11 construction, does it not?
12 A. Well, (b)(1) says, All road crossings shall use
13 bridges or other construction techniques which do not
14 disturb the streambed or bank, provided, however, in
15 the case of class II or class III streams, bottomless
16 culverts or other appropriate methods demonstrated to
17 provide fisheries protection may be used if the
18 applicant demonstrates such methods and implication
19 will pose no harm to the stream or inhibit migration
20 of fish.
21 So to me what I testified to is the same. The
22 bridge or its structure, its foundation, cannot
23 disturb the streambed or the stream bank. In other
24 words, you couldn't put pilings down in the middle of
25 the stream.

1 Q. That's why the fisheries permits that we get for such
2 activity is narrowly limited in time often so that the
3 construction period is very carefully set in order not
4 to disturb the stream or the fisheries potential; is
5 that correct?
6 A. Yes.
7 Q. Just for clarification, the urban designation under
8 the county shorelines act that you evaluated is the --
9 I think you used the term less restrictive, but it is
10 the most liberal of designations, is it not?
11 A. The order of priority goes anywhere from natural,
12 meaning it has to be absolutely retained, to urban.
13 So urban is the designation within the county
14 shoreline program that allows the greatest range of
15 development, yes.
16 Q. We all recognize it is nevertheless restrictive even
17 if it is the most liberal of development standards
18 within the shoreline; is that correct?
19 A. Yes. Regulations are inherently that way.
20 Q. Those standards, the urban designation would apply to
21 this site as well as any other site falling within the
22 urban designation in the shorelines management
23 provisions of King County?
24 A. Yes.
25 Q. Now, development within the 200 feet is not prohibited

1 under the Shorelines Management Act regulations; is
2 that correct?
3 A. Yes.
4 Q. Development within those shorelines, however, are
5 restricted; is that correct?
6 A. Yes.
7 Q. Now, you assumed, did you not, that a bulkhead would
8 have to be developed; is that correct?
9 A. Yes.
10 Q. You did not prepare any independent evaluation of the
11 need for a bulkhead or bank restoration of the
12 property under different development scenarios in
13 1974; is that correct?
14 MR. INSLEE: '74?
15 MR. DIJULIO: '74.
16 MR. INSLEE: I object. Nobody asked her
17 about assumptions and developments in 1974 in this
18 entire proceeding.
19 MR. KELLING: We are concerned with '74 as
20 the property lay at that time.
21 MR. INSLEE: This witness never testified
22 anything about development requirements in '74 to my
23 knowledge.
24 MR. DIJULIO: If she doesn't know, she
25 doesn't know.

1 MR. KELLING: His question was she didn't
2 prepare -- Would you restate the question?
3 Q. Did you evaluate the requirement for bank
4 stabilization or improvement under different
5 development scenarios as the property lay in 1974?
6 A. You mean, did I assume no bulkhead as required?
7 Q. In your evaluation -- Let me ask the question a
8 different way.
9 What regulation in the zoning code did you
10 evaluate to determine the necessity of a bulkhead or
11 bank improvement relating to this property?
12 A. The assumption about a bulkhead, need for a bulkhead,
13 doesn't come from the regulations. In other words,
14 the regulations don't mandate that you must put in a
15 bulkhead. They mandate that you have to provide for
16 protection of water quality and so on. It is common
17 to bulkhead property as a means of controlling the
18 erosion and tidal influences of a waterway.
19 Q. Well, Ms. McCutcheon, maybe you can answer this
20 question.
21 What is, if you know, King County's policy with
22 respect to bulkheads or bank restoration as a part of
23 a development project? Is it generally mandated or is
24 it generally avoided?
25 A. Well, the answer has to be it depends. The basic

1 standpoint you operate from is the applicant
2 determines what he or she wants to do with a property
3 and makes that proposal to the various regulatory
4 agencies. Then they review it for compliance with
5 regulations.
6 Those decisions are based on, frequently with
7 bulkheads, issues about protecting the bank.
8 Bulkheading is one recognized method, probably the
9 most common method, for creating a stable bank.
10 Q. I am looking at Section 2154, 330, mitigation for
11 streams, subsection (b)(1)(e) particularly.
12 It appears that maintenance of existing or
13 restoration of banks to existing conditions is a
14 priority and is certainly specified in the regulation;
15 is that correct?
16 A. Well, we are talking about two different things here.
17 I was talking about the bulkhead that would run along
18 -- roughly run along parcel A to protect the property
19 from erosion from the Duwamish Waterway. This section
20 is referring to what's preferred and so on for the
21 stream.
22 Q. Well, excuse me for a moment.
23 Focusing on the Duwamish, the Duwamish is a class
24 I stream, is it not, under the regulations?
25 A. Yes.

1 Q. So the same standard would apply?
2 A. Under the shoreline provisions -- You are looking at
3 sensitive areas 2154. Under the shorelines
4 provisions, you are allowed to have a bulkhead along
5 the Duwamish Waterway. It has to be designed to meet
6 certain environmental standards, but you are allowed
7 to have a bulkhead.
8 Q. But we are assuming from your testimony, are we not,
9 that this property, because it fronts the Duwamish, a
10 class I stream, as designated by the environmental
11 Chapter 2154 is going to be subject to these more
12 strict regulations?
13 A. Well, in my experience when you have a waterway and
14 it's regulated by the shoreline code, King County will
15 definitely allow you to have a bulkhead along the
16 Duwamish Waterway.
17 Q. My question goes not to what King County would allow,
18 but what the regulations provide. I recognize that an
19 applicant may choose to seek approvals for bulkheads
20 or bank stabilization. But what does King County
21 require under Chapter 2154?
22 MR. INSLEE: Counsel, are we in agreement now
23 this is a nonwater-related property, a nonrelated use?
24 MR. DIJULIO: No. We are exploring various
25 options, because the port's witness will testify --

1 and I think these arbitrators have heard numerous
2 times -- that water access is not required for water
3 dependency or water-related --
4 MR. INSLEE: I am going to object because the
5 Port Authority under no state statute, case law or
6 regulation, county, federal or state, is a regulatory
7 body capable of defining water-dependent or
8 water-reliant uses for purposes of these acts. They
9 are not so empowered. They can bring in King County
10 to say that. It's just his opinion.
11 MR. DIJULIO: I will rely on your expert's
12 testimony.
13 MR. INSLEE: Well, you keep throwing the port
14 at us like we are supposed to fall down in awe. I am
15 just wondering where this awe comes from.
16 MR. KELLING: I am not sure --
17 MR. INSLEE: I am objecting to the regulatory
18 nature of his question that the port authority is God
19 and can define water-related use. I object to that
20 because there is no such showing.
21 Q. (By Mr. DiJulio) Let me rephrase the question.
22 Is property abutting the Duwamish Waterway subject
23 to Chapter 2154?
24 A. Yes.
25 Q. Consistent with Chapter 2154 you have testified about

1 a 115-foot setback; is that correct?
2 A. Say that again.
3 Q. You have testified about the 115-foot setback from the
4 Duwamish under the Chapter 2154 regulations, have you
5 not?
6 A. No.
7 Q. You have not?
8 A. No.
9 Q. What is the setback from the -- Well, let me ask you
10 this.
11 With respect to this property, what is the setback
12 from the high watermark as required under Chapter
13 2154?
14 A. Perhaps we have a disagreement, and you think that the
15 buffers and setbacks are even greater. But based on
16 my experience the county would apply the shoreline
17 code is controlling within the 200 feet of the
18 ordinary high watermark. They would require a 50-foot
19 setback from ordinary high watermark, not the 100-foot
20 buffer from a class I stream.
21 Q. Now, on what basis do you make that determination?
22 A. My experience with representing individuals who want
23 to do development including bulkheads.
24 Q. Now, going through this, is it correct that the
25 Duwamish is a class I stream? It's a river, but is it

1 a class I stream for purposes of Chapter 2154?
2 A. In my experience the county does not treat the
3 Duwamish Waterway under that system of class I, II,
4 and III streams when you are talking about shoreline
5 setbacks. They apply the shoreline setback from their
6 shoreline management code, not a buffer standard from
7 a class I stream.
8 Q. In making that determination, does the county act by
9 ordinance authority or do they act by variance
10 authority?
11 A. It's not by variance. It's not by a zoning variance
12 or shoreline variance that they do that. They have
13 multiple sets of regulations and they need to apply
14 them to a single piece of property. And in so doing,
15 in my experience, they would apply the 50-foot
16 setback. You seem to be arguing for a double the
17 setback as 100 feet.
18 Q. No. I understood your testimony to be that 115 feet
19 of the uplands of this property was impacted by
20 Chapter 2154.
21 A. Let me clarify. The shoreline setback is 50 feet from
22 the ordinary high watermark of the Duwamish.
23 Q. Assuming nonwater-related or nondependent?
24 A. Yes.
25 Q. Now, how does Chapter 2154 impact the 20- or 50-foot

1 setback?
2 A. In my experience it would not be used to increase the
3 setback from the Duwamish Waterway. It would,
4 however, apply to the stream that is running
5 perpendicular to the waterway. There would be
6 100-foot buffers plus 15-foot building setback lines
7 from that stream that crosses the property. So the
8 115 feet was from the stream. Otherwise it's 50 feet
9 from the waterway.
10 Q. But the code Chapter 2154 does not make such a
11 distinction, does it?
12 A. Well, you have to read the shoreline section in
13 combination with this section on sensitive areas as to
14 what the setbacks are.
15 Q. I guess my question is getting to something that these
16 appraisers will be struggling with, net developable
17 property perhaps.
18 Your testimony, your expert opinion, is that you
19 don't have to set back 115 feet from the ordinary high
20 watermark, but you would have to set back 20 or 50
21 feet depending on the use of the premises?
22 A. That's correct.
23 Q. But with respect to the stream course between parcels
24 D and C as shown on Exhibit A, you would have to set
25 back 115 feet; is that correct?

1 A. That's correct.
2 Q. Thank you.
3 MR. ALLEN: I guess I need a clarification.
4 I thought the stream setback was 50 feet.
5 THE WITNESS: 50 plus 15.
6 MR. ALLEN: 15 for the building. Or unless
7 you did swales, you would have to set back from the
8 swales.
9 The maximum I got from the testimony, and tell me
10 if I am wrong, was 50 and 20, a 70-foot maximum
11 setback from the stream corridor. Then there is going
12 to be a building setback, which is typical. If you
13 did some other kind of drainage rather than a swale,
14 your maximum setback is 50 feet from the stream
15 corridor.
16 THE WITNESS: The 115 is around the wetland.
17 MR. ALLEN: That was the wetland.
18 THE WITNESS: It's 50 feet from the shoreline
19 from the Duwamish Waterway ordinary high watermark.
20 Then for the stream what we talked about was the
21 buffer and then the drainage system and the setback
22 from the drainage system. But the stream has a 50
23 foot on either side. I don't know if that's where you
24 get 100, but it's 50 feet on either side of the
25 stream.

1 Q. (By Mr. DiJulio) Well, let me ask the question again.
2 I understand it's 115 feet from the wetland. With
3 the Duwamish, as I understand your testimony, the
4 setback is either 50 or 20 depending upon
5 water-related or water-dependent use; is that correct?
6 A. That's correct.
7 Q. With respect to the stream course is it also either 50
8 or 20 dependent on water-related use?
9 A. No. The 50 on either side is absolute regardless of
10 the type of development.
11 Q. Thank you.
12 Now, Ms. McCutcheon, in addition to your
13 representation of the Port of Seattle, the Hillis firm
14 represents a number of other developers in the Puget
15 Sound community; is that correct?
16 A. Yes.
17 Q. You are aware as a result of your representation of
18 both the Port of Seattle and of other developers of
19 the tension that exists with respect to the limited
20 capacity of industrial properties, particularly in the
21 Seattle, King County region, isn't that correct?
22 A. That's correct.
23 Q. In fact, you have personally lobbied a Seattle council
24 member to allow for commercial and retail uses in
25 industrial zones?

1 A. Absolutely not.

2 MR. INSLEE: What's this all about? That's a
3 cheap shot, and I object to it. I can take counsel's
4 50 partners apart at this table if I wanted to, too,
5 and I object to this approach.

6 MR. DIJULIO: This is not an attempt to
7 embarrass or --

8 MR. INSLEE: Then what's it for, Counsel?

9 MR. DIJULIO: It's to get to the point of the
10 limited industrial properties that are available.
11 This witness, because of her background and her firm's
12 representation, is knowledgeable about the limited
13 extent of industrial properties and the tension that's
14 been created in the community with respect to that in
15 the Seattle and King County industrial policies and
16 the ability to do that. I am just asking her to talk
17 to these appraisers about that issue.

18 MR. KELLING: I don't see any objection to
19 hearing from her on the subject of shortages or the
20 amount of inventory available, if she has any
21 knowledge about that.

22 Is that all right with you, Mr. Inslee?

23 MR. INSLEE: Go ahead. If you want to ask
24 anybody in the room anything, it's your prerogative.
25 What I objected to was not that subject.

1 MR. KELLING: You had disappeared from my
2 line of sight, and I thought you were under the table
3 for a moment.
4 MR. INSLEE: Not yet.
5 Q. (By Mr. DiJulio) Let me ask the question another way.
6 The Hillis firm represents the developers of the
7 Sodo Center, is that correct, on First Avenue South?
8 A. We represent the landowner.
9 Q. You are also aware because of your knowledge about
10 community activity about other retail commercial
11 proposals for development in the industrial areas of
12 the City of Seattle; is that correct?
13 A. Generally aware.
14 Q. There is a tension concerning the use of industrial
15 properties, losing industrial-zoned properties to
16 commercial and retail use, is there not?
17 A. That's correct.
18 Q. That's because of the limited extent of industrial
19 properties in the community; is that correct?
20 A. Yes.
21 MR. DIJULIO: That's all I have.
22 MR. INSLEE: No questions.
23 MR. KELLING: Thank you very much.
24 (Off-the-record discussion.)
25 / / /

DFT 000403

1 BENJAMIN P. ANSTEY, sworn on oath, testified:

2 EXAMINATION

3 BY MR. INSLEE:

4 Q. Your name, sir?

5 A. Benjamin Patrick Anstey.

6 Q. Spell Anstey, please.

7 A. A-n-s-t-e-y.

8 Q. Your employment, sir?

9 A. I am employed by the firm of Millegan Jaddi,

10 Incorporated.

11 Q. How long have you been so employed?

12 A. Approximately a year.

13 Q. What is your educational background?

14 A. (b)(6)

15

16

17 Q. Would you give us, please, a history of your

18 employment in generalized terms?

19 A. (b)(6)

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21

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25

1 Q. What was the nature of the engineering that you
2 performed from '78 to '88?
3 A. Land development, storm drainage and general civil
4 engineering.
5 Q. Are you licensed?
6 A. Yes. I was licensed as a civil engineer in the state
7 of Washington in 1982.
8 Q. In connection with your work at Boeing, what was the
9 general nature of that work? I know you gave us a
10 title, but what were you doing?
11 A. I managed construction contracts. I was assistant to
12 the North Boeing Field plant engineer, and I inspected
13 construction projects.
14 Q. What is the nature of the work you perform for
15 Millegan Jaddi? Who is Millegan Jaddi and what is its
16 business?
17 A. Millegan Jaddi is a civil structural engineering,
18 consulting engineering firm. I am their civil
19 engineer of record.
20 Q. Based on historical information are you aware that
21 Millegan Jaddi was the engineer that performed
22 services for the Duwamish Marina back in the '70s?
23 A. Yes.
24 Q. Now, normally we would put Mr. Szmodis on before you.
25 But what were you asked to do relative to this

1 property?
2 A. I was asked to prepare cost estimates for the
3 theoretical construction of a container facility and a
4 warehouse facility on the site.
5 Q. Were you to use 1992 cost estimates for this purpose?
6 A. Yes.
7 Q. In connection with that as the first order of
8 business, did you make any determination as to what
9 the square footage was that could be subject to
10 development of this property assuming that you had
11 done that?
12 A. Yes. I assumed a 100-foot setback along the high
13 waterline of the Duwamish River and a 100-foot setback
14 along the stream. From those setbacks I determined
15 that there are approximately five acres of buildable
16 land.
17 Q. Let's get the map out that I had previously marked.
18 Well, I guess it hasn't been marked.
19 Did you at my request draw those setbacks that you
20 have assumed? Then we will get into why you have
21 assumed them.
22 A. Yes.
23 Q. Showing you Exhibit K, can you tell me what that is,
24 please?
25 A. This is a basic markup of the site plan that I

1 prepared.
2 Q. Now, in connection with the -- I know you are going to
3 get to the explanation. But, first of all, take this
4 yellow marker and mark in it what you determined to be
5 the five-acre buildable portion. Then we will get
6 into why.
7 A. (Witness complied.)
8 Q. Now, what have you drawn in yellow there, Ben?
9 A. That's the area bounded by the 100-foot setbacks from
10 the stream and the high waterline and the property
11 lines.
12 Q. Now, first of all, let's start off with the setback
13 that's on the easterly portion of Exhibit K. Tell me
14 what assumptions you made as to setbacks there and
15 why.
16 A. We had a 50-foot shoreline setback from the high
17 watermark and then a bioswale or storm drainage area
18 of approximately 30 feet and then a building setback
19 line of approximately 20 feet.
20 Q. Now, we have already heard testimony of the prior
21 witness, and you were here during most of her
22 testimony.
23 You consulted with her and confirmed certain
24 things with her?
25 A. Yes.

1 Q. Tell us what this bioswale is all about and how you
2 arrive at its width.
3 A. I did not do a detailed storm drainage analysis at the
4 site, but from my experience with King County they
5 require the bioswales or other biofiltration methods
6 to purify storm water that would run off the site
7 before it is allowed to enter the natural watercourse.
8 Q. What is Exhibit L?
9 A. These are photocopies from the King County Surface
10 Water Design Manual.
11 Q. How do they relate to swales, if they do?
12 A. It shows a basic, typical swale design with the flat
13 bottom and three-to-one side slopes and the water
14 surfaces.
15 Q. Would you point out to the arbiters where the swale
16 typical design is located on that exhibit?
17 A. Oh, I did not do a complete site design.
18 Q. No, not site design, but what might be a typical cross
19 section of it.
20 A. (Witness complied.)
21 Q. First of all, tell the arbiters -- I am sure they
22 know -- what a bioswale's purpose is and why it needs
23 to exist.
24 A. As I stated, the bioswale was designed to purify the
25 storm water runoff from the site, to remove sediments

1 and petroleum products before the water enters the
2 natural waterway.
3 Q. Why did you assume the 30 foot before you got to the
4 20-foot setback from the swale to the building site?
5 A. Due to the side slope requirements and the volume
6 needed for a five-acre impervious site.
7 Q. In connection with that, I see you also have -- This
8 is your drawing, your handwriting, on this Exhibit K?
9 A. Yes.
10 Q. With regard to the stream, what setbacks did you
11 consider?
12 A. I showed a 100-foot setback from the high watermark of
13 the stream which included the buffer and bioswale for
14 that also.
15 Q. The buffer that you used was 50 feet?
16 A. Including the bioswale.
17 Q. And you put the bioswale within the 15 feet. We heard
18 testimony that it's 50 feet and then a 15-foot
19 setback.
20 A. No. The bioswales, the 15 feet has to be outside the
21 bioswaling.
22 Q. So with regard to that setback from the stream, is
23 that depicted on what would be the northerly side of
24 the stream and also in parcel D which would be south
25 of the stream?

1 A. Yes.
2 Q. Would that be applicable on both sides of parcel D?
3 A. Yes.
4 Q. Now, with regard to this bioswale, what is the fact as
5 to why or what could be done to reduce the width of
6 that bioswale?
7 A. That depends on the county requirements. Those are
8 somewhat unknown until you actually talk to the plan
9 checkers.
10 There is basically two ways of doing it, either an
11 actual bioswale or there is a filter strip, which I
12 also included, I believe, on the last page of
13 Exhibit L.
14 Q. I misconstrued my pages. I have them screwed up.
15 What's the page designation on your last page,
16 46.3-2? I think it is mine. Oh, yours is blacked
17 out. I'm sorry.
18 But you have underlined filter strips?
19 A. Right. That's another option, but it doesn't
20 necessarily reduce the area required.
21 Q. Why couldn't you just put a tight line of some sort
22 all around this building and avoid this 20- or 30-foot
23 bioswale or filter strip area?
24 A. The latest county requirements I am aware of were that
25 they wanted the exposed filtrations, so they have gone

1 away from underground storage tanks. They find that
2 the exposed storage is more maintainable and provides
3 better filtration and biological purification.
4 MR. SAFER: Can I get a clarification on that
5 point? When you say the latest, is that recently,
6 like 1994? How did they feel about it last year?
7 THE WITNESS: No. That's been their policy
8 since -- Let's see. I believe about 1988.
9 Q. On this document, yours is cut off. I don't know if
10 the arbiters' is. It has a date of January 9th. I
11 don't know if everybody's got cut off.
12 MR. SAFER: 1980?
13 MR. INSLEE: Well, no. 1990. I have a date
14 in the bottom right-hand corner. I don't know if it
15 came out on your copy or not.
16 MR. KELLING: It's black.
17 MR. INSLEE: Somehow we got two different
18 sets, and I don't understand that. We will swap with
19 somebody who doesn't have one that's black. Maybe you
20 could take that as the official one, and I will swap
21 with you, Mr. Chairman.
22 Q. Now, in connection with the setbacks that you
23 described here, how did you arrive at five acres was
24 the buildable site?
25 A. Mathematical computation of the length and width of

1 the remaining area.
2 Q. What assumptions did you make as to the buildability
3 of any structure or part improvement on parcel D south
4 of the setback on that property?
5 A. Due to the setback requirements and the requirement
6 for bridging the stream, I felt that that area as well
7 as the remaining buildable area would be uneconomical
8 to develop.
9 Q. Were you here for the prior witness when she talked
10 about the requirement for bridging?
11 A. Yes.
12 Q. Is that consistent with what you believe the county
13 would require based on your experience?
14 A. Yes.
15 Q. Now, if there is a five-acre parcel subject to
16 development based on the analysis that you have just
17 provided what else did -- well, I didn't ask you --
18 somebody ask you to do relative to assumption of
19 construction of improvements on this site?
20 A. I utilized the basic cost estimate that the firm of
21 Millegan and Jaddi previously prepared for this site
22 and deleted the shoreline dredging items and
23 calculated fill requirements and checked the other
24 utilities improvements that would be required to
25 upgrade the site for making it buildable.

1 Q. Did you exclude water development in the sense of a
2 pier at our request in the preparation of this
3 document?
4 A. Yes.
5 Q. Showing you what has been marked M, do you have your
6 M? This is going to relate to the site as a container
7 yard.
8 MR. SAFER: Are you saying that those costs
9 do not include the bank stabilization at all?
10 MR. INSLEE: No. That would be covered in
11 the testimony, but we are not going to have marina use
12 or water-related use so to speak as we understand that
13 term to be.
14 MR. DIJULIO: May I ask just for purposes of
15 -- Oh, I do see this. This is updated from the prior
16 exhibit or is it the same exhibit that was included in
17 Mr. Allen's report?
18 MR. INSLEE: It's not the same thing as
19 Mr. Allen's. Mr. Allen was in there for a different
20 purpose, and this is not the same.
21 MR. DIJULIO: Thank you.
22 Q. Now, let's label Exhibit M. This is going to relate
23 to what type of improvement? The one that is
24 3,764,000 on the bottom right corner, that's the one
25 that I have marked as M.

1 A. That would be a container storage yard, which I
2 assumed would be just basically a flat piece of ground
3 with some paving on it that they could pull containers
4 in and set them there with maybe a small office or
5 something like that.
6 Q. With regard to working up the cost figures, even
7 though it's dated July '94, I understand you used '92
8 figures; is that correct?
9 A. Now, construction costs haven't changed substantially.
10 Q. Now, with regard to the container usage in M, tell me
11 what -- Did you go down and look at the property and
12 assume that you are starting with what you see now?
13 What assumptions did you make as to the base point of
14 your start?
15 A. I used the topographic map provided by Mr. Lowe to
16 determine what the existing contours were before they
17 started developing the property.
18 Q. That topo map, I don't know if you have it here.
19 That's the Group 4 document which is in evidence here,
20 Exhibit 4. If you can identify it, was that the
21 boundary and topography survey of Group 4?
22 A. Yes.
23 Q. Would you just walk the arbiters through this, what
24 you did and where you got the figures?
25 A. The bank total site development, improvements were

1 bank stabilization, which I took from our previous
2 analysis, which provides H beams and sheet piles to
3 stabilize the bank, but it doesn't include any other
4 marine-type activities.
5 Q. No dredging in terms of dredging the material?
6 A. Right.
7 Q. You utilized a bank stabilization figure if you are
8 going to put a container site in here for what reason?
9 A. Well, to basically insure that the shoreline would
10 stay where it was and you wouldn't have the problem of
11 the channel moving into the property or the bank
12 falling away.
13 Q. Based on your experience, Ben, what do you believe to
14 be the requirement if you were going to put a
15 container storage yard on the site as to whether or
16 not there would be requirements for a bank
17 stabilization?
18 A. Well, I don't think anyone would require it, but it
19 would be rather risky not to do it on this type of a
20 site.
21 Q. Why would it be risky?
22 A. Well, the soils being erodible silts, major flood or
23 earthquake or just the normal course of the river's
24 meanderings, it would change the shoreline.
25 Q. Then what did you have? Try to correlate the bank

1 stabilization with page two of the exhibit. In other
2 words, I see the summary on the first page. What is
3 page two doing then?
4 A. Just itemizes the bank stabilization items that we
5 felt would be appropriate.
6 Q. Then on upland site work would you walk us through how
7 you arrived at the estimate of the quantities and the
8 figures that you utilized there?
9 A. I determined that the first item would be to grade and
10 clear the site to remove the existing unsuitable soils
11 and debris.
12 Q. That's on sheet three you are now referring?
13 A. Yes.
14 Q. Where did you get the 7,000 yards in terms of cubic
15 yards of quantity of removal?
16 A. That was basic area to a depth of, I believe,
17 approximately one foot.
18 MR. SAFER: That was for the -- Is that the
19 tailings removal?
20 THE WITNESS: Approximately, yes. When you
21 clear and grub a site you strip off the top foot to
22 get rid of all the organic and unsuitable materials.
23 Q. All right.
24 Then what is the loader time, truck trailer and
25 dump fees?

1 A. All of that material would have to be hauled off to a
2 suitable disposal area since it was unsuitable to be
3 used on site.
4 Q. What's the next item in your itemization?
5 A. Hazardous waste disposal, which would include concrete
6 tailings.
7 Q. What is the fill raising the site elevation 25, and
8 where did you get 25?
9 A. Elevation 25 is approximately the elevation at South
10 93rd Street and that corner of the site. I felt it
11 was only prudent to raise the site up to create a
12 level site for storage so they would be able to move
13 their containers around without obstruction or having
14 grades to contend with.
15 Q. Do you know of your own knowledge how that varies from
16 the current site grade?
17 A. No. I don't have real good information on what the
18 current site grade actually is.
19 Q. Mr. Szmodis will get into that.
20 Then so that fill to raise the site, what was your
21 assumption as to where you got that 32,266 yards in
22 1992?
23 A. I assumed that you would require an average fill of
24 five feet over about four acres of the buildable
25 portion of the site.

1 Q. Now, in your grading, clearing and removing, are you
2 limiting that to only the five acres or is that going
3 to be other portions of the site?
4 A. Basically the five acres. Well, there would be some
5 grading done to create the bioswales.
6 Q. In connection with the filling the site to elevation
7 25, what portion of the site are you elevating to
8 elevation 25?
9 A. That would be the area that I marked in yellow.
10 Q. The five-acre site?
11 A. Yes.
12 Q. What are you talking about when you say preload in and
13 out and compaction?
14 A. That's in cases where you need to -- Like if you are
15 putting in a building there for the site to house an
16 office or something, you normally pile a large mound
17 of dirt that approximately equals the weight of the
18 building that you are going to be building and allow
19 that to settle for six months or so so that when you
20 remove the dirt and build the building you don't get
21 any further settlement.
22 Q. With regard to this container settlement, what
23 building are you contemplating putting on there that
24 would require the preload?
25 A. I would assume they would need some type of a small

1 building.
2 Q. So this is not a large building? This is just an area
3 for a storage site building?
4 A. Yes.
5 Q. What's the stabilization gravel and rock quantity for?
6 A. That would be the surfacing of the driveable areas.
7 Q. Essentially what portion of that five acres are you
8 talking about?
9 A. It was somewhat less than the full area, but all areas
10 where you would have to drive around to get into,
11 extra rock there to insure that the wheel loads are
12 supported.
13 Q. Now, the next item is heavy ballast and geotextile
14 fabric. There is some pretty good-sized quantity,
15 124,300. What is that for?
16 A. That's for the main travel lanes where you have your
17 heaviest loads. The gravel would be additional gravel
18 to spread the load out. Geotextile fabric is a
19 commonly used technique to insure that your gravel
20 doesn't sink down into the underlaying material.
21 Q. Now, the storm drainage, would you tell the arbiters
22 what that involves in your assumptions there?
23 A. These were from the previous cost estimate. It's a
24 minimal storm water collection facility to collect the
25 runoff from the site. You would need culverts and

1 catch basins and then at least 200 feet of the
2 biofiltration swale if you could route all the water
3 to that.
4 Q. The water system, would you explain that, please?
5 A. That's extending the existing water pipes so that
6 there would be water service to the site for fire
7 protection and domestic use. That was from the
8 previous cost estimate also.
9 Q. Now, where did you obtain the material costs for those
10 quantities?
11 A. Those were mostly taken from the Means Construction
12 Cost Estimating Guide of 1992.
13 Q. What about the labor costs?
14 A. Also from the Means.
15 Q. What is the engineering estimate column relating to or
16 depicting?
17 A. That's kind of the total cost. There is a unit cost
18 and the total.
19 Q. Then when you get into page four, which is starting
20 the trenching, that's also part of the site work you
21 described on page one?
22 A. That's a continuation of the water system.
23 Q. I will not ask you to go through each and every one of
24 these. But in performing this, you tried to do
25 everything and include both quantity and type of

1 improvement that would go into a container facility
2 yard?
3 A. Correct. These were basically taken off the previous
4 estimate that our firm had done.
5 Q. Then your total upland site work comes to
6 $2,085,247.92; is that correct?
7 A. That's correct.
8 Q. Then the next category you have with regard to
9 Exhibit 1 on the first page talks in terms of general
10 requirements.
11 Would you walk us through everything below that
12 line and why you include the numbers that you
13 utilized?
14 A. Are you talking about site improvements?
15 Q. After you get the subtotal and the 2,483,000, general
16 requirements, general contractors, I want you to give
17 us an expansion of what assumption you made and where
18 you got those percentages and why you used those.
19 A. General requirements are costs that the general
20 contractor incurs that are related to the
21 subcontractor or individual items, the general
22 contractor's overhead and profit.
23 Q. Well, general requirements, sani-cans and saw
24 sharpeners and things that are necessary?
25 A. Things the general contractor requires or provides for

1 the entire site that are used by all subcontractors.
2 Then there is the contractor's overhead and profit.
3 Probably 10 percent or so of that would be profit.
4 Seven percent would be overhead, depending on the
5 contractor. Then the Washington State sales tax on
6 materials is 8.2 percent, which is fairly common.
7 Then the construction permit costs, engineering at 7
8 percent, surveying, geotechnical. These are estimates
9 that the firm of Millegan and Jaddi did of what they
10 estimated the costs would be. They are not really
11 firm, but they are just our firm's best estimate as to
12 what we would expect from our past experience.
13 Q. That covers the rest of these percentages also?
14 A. Yes.
15 Q. Now, this is something that you historically have done
16 in your expertise, prepared cost estimates for owners
17 or --
18 A. Yes.
19 Q. -- engineering estimates for owners?
20 A. Yes.
21 Q. Have you done anything different than you did for
22 other clients assuming it is '92 versus '94?
23 A. Well, normally we have a more detailed site plan.
24 This was a rather general estimate. Then I used a lot
25 of the numbers that had been previously prepared by

1 the firm since this was kind of an ongoing cost
2 estimate. We were modifying rather than starting from
3 scratch.
4 Q. Now, with regard to Exhibit N, which I am handing you,
5 that is the one that relates to another type of
6 facility.
7 I don't know. You have your copy there. You
8 might want to put an N in the upper corner so you know
9 which one we are referring to.
10 What was the assumption and what was the purpose
11 of Exhibit N?
12 A. That would be to determine what the costs would be
13 when you would develop the site for warehouses.
14 Q. What assumptions did you make with regard to the
15 warehouse that would be put on this property and its
16 size, configuration?
17 A. I talked to some of our in-house people and architects
18 that we work with on what the basic requirements of
19 the warehouses were. From that I laid out a couple
20 theoretical warehouses with about a 100-foot --
21 actually 120 turning space in between them for the
22 trucks to back in and out. That gave me the building
23 setback lines and the requirement for traffic flow.
24 That gave me a total warehouse square footage that I
25 thought would be appropriate of 110,500 square feet of

1 warehouses that we could build on this site.
2 Q. Does that appear on Exhibit N?
3 A. No. Oh, the quantity, yes.
4 Q. The 110 square footage?
5 A. It appears on sheet five.
6 Q. Does that come to what would be subject to the
7 parameters you have set of a turning space and
8 setbacks and traffic flow, a maximal use of this
9 five-acre property in your opinion?
10 A. Yes.
11 Q. I am not going to ask you to go through again the site
12 work. That is essentially about the same, isn't it?
13 A. Yes.
14 Q. There is a little difference in total dollars. I
15 don't know if that's significant site work here totals
16 -- Well, you describe what goes through this site
17 improvements.
18 A. The bank stabilization is the same. Upland site work
19 has to increase a little bit because you have to fully
20 extend the water system to complete a water loop,
21 because warehouses require greater fire flow
22 capability than just a container storage would. I
23 think that was the major difference.
24 Q. Now, you've got site improvements before the subtotal.
25 Of course, that's going to include the warehouse as

1 distinct from merely a container storage yard in this
2 analysis, isn't that correct?
3 A. I believe so, yes.
4 Q. Then going through this exhibit, I am not going to ask
5 you to retrace the description and the type of things
6 that went in there, but I need to ask you this.
7 With regard to the warehouses on sheet five, you
8 came up with a warehouse 110,500 unit cost of $35 a
9 square foot?
10 A. Yes.
11 Q. Where did you get that number and how authentic is it
12 for the type of structure you are discussing here?
13 A. I got that from discussing past experience with our
14 in-house personnel at Millegan and Jaddi. Millegan
15 and Jaddi shares office space with the construction
16 firm of Jaddi Construction, which does a lot of
17 bidding of this type of commercial work.
18 Q. So what is your conclusion as to what would be the
19 anticipated cost in '92 to put warehouses of the type
20 and description that you have made and the assumptions
21 that you have made on the subject property?
22 A. With the total normal markups of construction, I
23 estimated $9,622,142.
24 Q. Now, Mr. Anstey, you have done work you indicated for
25 Boeing and others.

1 What is the extent of your familiarity with the
2 site across the marina to which the Boeing site is
3 adjacent? Across the waterway I should say.
4 A. That's near the South Park site, and I drove by there
5 many times during my work at Boeing.
6 Q. Did you have any working knowledge of the site?
7 When you worked at the Boeing site across the
8 waterway, is that the one we are talking about?
9 A. Right. I worked at North Boeing Field and I worked at
10 Duwamish Towers and I worked at South Park.
11 Q. The one I am talking about is next to Isaacson Steel.
12 A. Oh, that's the plant two site.
13 Q. Yes. Across the waterway?
14 A. Right.
15 Q. Now, there has been discussion about the thriving
16 metropolis called the Duwamish Marina Waterway. Tell
17 me what considerations, if any --
18 First of all, was Boeing at that time that you
19 were working there interested in acquiring or
20 investigating the Isaacson site, for example?
21 A. I was working in the Boeing construction office when
22 they were looking at acquiring sites for their 777
23 development program, which led to them acquiring the
24 Longacres site. They did look at the Isaacson Steel
25 site at that time.

1 Q. What, to your knowledge, were the considerations -- I
2 gather they didn't develop it?
3 A. No.
4 Q. What was your understanding of their considerations as
5 to why that site was not one that they wanted to
6 develop?
7 MR. DIJULIO: I would like to object and ask
8 if this witness has personal knowledge of this.
9 Did you work on the project, sir?
10 THE WITNESS: I was working in the office,
11 and the project was discussed at meetings which I
12 attended.
13 MR. DIJULIO: Thank you.
14 Q. Go ahead.
15 A. I was told that the site was considered unbuildable
16 because of hazardous waste material remediation
17 requirements, that they did not adequately feel that
18 they could be sure that they would ever be able to
19 satisfactorily build on the site to do what they
20 wanted.
21 Q. Was that restricted solely to hazardous waste
22 considerations or others?
23 A. I wasn't aware of all the considerations that they
24 might have had, but I know hazardous wastes were a
25 major consideration.

1 MR. INSLEE: No further questions.
2 MR. KELLING: Do you have any questions?
3 MR. SAFER: I do.
4 EXAMINATION
5 BY MR. SAFER:
6 Q. Can I call you Ben?
7 A. Sure.
8 Q. Can you tell me why you exclude the area that's marked
9 on the site plan 60-feet access easement of the
10 subject property in your calculations?
11 A. Since that was an access easement and they would need
12 access to the site anyway, I didn't think that would
13 be areas that they would want to build or store things
14 on because it would block access to the site.
15 Q. You don't think that's part of a site area that one
16 would consider usable then?
17 A. Well, actually, yeah. It could be used for access,
18 but not for buildings.
19 Q. You indicated you thought that this leftover part of
20 parcel D was not economic?
21 A. Right.
22 Q. Could you explain that to me?
23 A. Well, just the costs of building a suitable structural
24 bridge across the stream and the difficulties of
25 trying to move containers or big truck traffic around

1 smaller areas just didn't appear to be logical at that
2 time.
3 Q. So you are basing that totally on gaining access to
4 this parcel from the balance of the site?
5 A. Yes.
6 Q. When you were doing some of these cost estimates for
7 doing the site work, I wonder if you could explain to
8 me where the $15 per yard of fill material came from
9 delivered?
10 MR. INSLEE: What exhibit, Mr. Safer?
11 MR. SAFER: Exhibit M or N, upland site work.
12 MR. INSLEE: Which exhibit are you using?
13 MR. SAFER: Let's take Exhibit M.
14 Q. Fill raised site to elevation 25, $15 per cubic yard.
15 Was that from Means or some other source?
16 A. That was from Jaddi Construction estimating based on
17 their experience of trucking suitable material into
18 the Seattle area.
19 Q. You don't know where that's originally from, where
20 they are hauling from?
21 A. Not exactly, no. Various pits up there.
22 Q. Some of these other costs that you have included,
23 including fencing and barbed wire that you included
24 for the container yard, I note that you also included
25 that in the warehouse. Is that typical improvement

1 for a warehouse facility?
2 A. Oh, all commercial or industrial sites are fenced.
3 You want to maintain site security. It's a common
4 thing to do is to fence your property.
5 MR. SAFER: I don't have any further
6 questions.
7 MR. ALLEN: I have a couple.
8 EXAMINATION
9 BY MR. ALLEN:
10 Q. First of all, as I understand your water extension,
11 you talked about you are bringing water off site to
12 the corner. Then you are grouping it within the site
13 as the balance of your --
14 A. I think the water actually comes up this way and comes
15 around here, and then it would have to be drowned.
16 Q. Is that based on where water is today off site versus
17 where it was in 1974?
18 A. It's my understanding that the cost estimate was
19 developed on where the water was in '74.
20 Q. So we are assuming it was on South 96th then?
21 A. Right.
22 Q. Then on sewer, what's your assumption on where sewer
23 was? We have had testimony that they had to wait for
24 sewer and we do have some historical costs that they
25 had to go off site for --

1 A. We show holding tanks here which may or may not be
2 approved. Certainly under today's guidelines it's
3 difficult to get a holding tank approved, but that's
4 -- If you don't have sewer, that's what you have to
5 use.
6 Q. Then you would have a force main. You don't actually
7 have a cost in here for a lift station then. How is
8 it served now as compared to your estimate?
9 A. I am not familiar with what they have today.
10 Q. The 25-foot elevation is the basis of South 96th. You
11 were asked a question what the elevation was as built.
12 A. From the G4 survey map they showed, that's where I
13 plotted these contours for.
14 Q. The 32,000 yards would be equal to how many feet of
15 fill?
16 A. Approximately five feet of fill over the remaining --
17 You have 25 here and 20 here and 15 down here, so it
18 averages about five feet. Some areas would require
19 less. Some areas would require more. I assumed an
20 average of five feet.
21 Q. Where we are doing preloading of the site, is there
22 any possibility we have a doubling up here of fill and
23 compaction and fill and take away?
24 A. Well, the preloading is normally removed after --
25 Unless you can work that in, normally the

1 preloading --
2 Q. You bring it all in together and take off the excess
3 after it's compacted?
4 A. They may be able to do it that way. They may not.
5 Normally you have to bring the site up to the
6 elevation you want and you preload it, so then you
7 have to get rid of it all.
8 Q. Getting back to Mr. Safer's question, is that the
9 difference in the material used for preload versus
10 what you are raising?
11 A. That was not included in -- The preloading was
12 considered separate.
13 Q. But you have different unit costs, material costs?
14 A. I have different material. For preload material --
15 Let's see. Where did we show that? That would be
16 like junk material on site that you could scrape.
17 Q. I just wonder if that number comes out of the original
18 study that dealt with excavating the marina portion
19 and putting on site some dredging, using dredging.
20 A. That was the number from our previous cost estimate
21 that there would have been material you could have
22 scraped up on the site to do your preloading with.
23 You are only concerned about weight rather than real
24 type of material.
25 MR. INSLEE: For preloading?

1 THE WITNESS: For preloading, yes.
2 A. If you are wanting to build up the site to have a
3 stable site, then you have to import class A gravel.
4 Q. I think it's interesting in your assumption on the
5 hazardous waste disposal we have talked a lot about
6 the tailings. I assume that's tailings. Now we are
7 down to a quantity of 555 cubic yards.
8 I guess is that in agreement that that's the best
9 guess as to what was on the site at the time?
10 MR. DIJULIO: If you are asking for the --
11 MR. ALLEN: I guess I will ask everybody.
12 MR. INSLEE: That's the conservative number.
13 Q. 555 cubic yards was a number that you possessed after
14 discussions with the lessee?
15 A. Yes.
16 Q. I think it's pretty straightforward.
17 I'll go back to Mr. Safer's original question,
18 though. Being appraisers and working with development
19 property and unit costs, the $15 a yard for your fill
20 seems excessive on the surface. Have you had a chance
21 to think about that?
22 A. It did to me also, but I talked to our construction
23 people. It was what it was costing them.
24 Q. I mean, that's the same price as your six-inch gravel.
25 A. Basically that's what it is, yes, for class A gravel

1 these days.
2 Q. Is there an option if you are going to do a container
3 site and fill it, would you -- Let's get to the
4 practical side of this. Would you spend $15 a yard
5 to --
6 A. Well, if you don't use good material, you end up with
7 potential problems later with having to take it out
8 and replace it with good material. It's easier to do
9 it right the first time.
10 MR. ALLEN: Thank you.
11 (Arbitration at short break.)
12 MR. KELLING: Mr. DiJulio?
13 MR. DIJULIO: Thank you.
14 EXAMINATION
15 BY MR. DIJULIO:
16 Q. Now, when were you first engaged to prepare your
17 evaluation, Mr. Anstey?
18 A. Oh, I don't remember exactly. I can try and look that
19 up.
20 Q. Was it last month? Did you work on this a couple of
21 years ago?
22 A. No. I have only had a few days to prepare.
23 Q. Am I correct then that you are basically repeating
24 from these exhibits work that was prepared by others
25 in your firm?

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1 A. Yes.
2 Q. You didn't prepare any independent evaluation with
3 regard to this site or these development costs?
4 A. No. I did quite a bit of work. I did the takeoffs
5 for the -- I prepared the site map, and I prepared the
6 takeoff for the quantities fill. I adjusted some of
7 the other parameters and added in some work on the
8 water system, went over it and reviewed it.
9 Q. So you are not just repeating work that was done by
10 Mr. Syed or Mr. Millegan as indicated on the exhibit?
11 A. Right.
12 Q. This is work that you actually did yourself?
13 A. Yes.
14 MR. DIJULIO: Mr. Kelling, do you have a copy
15 of Exhibit 9 available? That's the Safer report. If
16 not, I can hand him one myself, whatever is most
17 convenient. Excuse me. Not the Safer report. The
18 Allen report.
19 MR. KELLING: I have it, but it's buried.
20 MR. DIJULIO: This is the extent of my
21 report. Is this the extent of what you have in your
22 record?
23 MR. ALLEN: On the initial one that they did
24 for me?
25 MR. DIJULIO: Yes.

1 While we are still on the record, I have been
2 handed what I guess I understand to be the Allen
3 report. I see that there is sales comparison data in
4 this material that I was not made aware of.
5 For the record, I would ask that that information
6 be provided to us consistent with our prior concerns.
7 You did not provide that to us, did you?
8 MR. INSLEE: No. All the arbiters, whatever
9 they disclosed to one another, went between them. I
10 didn't provide anything.
11 MR. KELLING: Mr. Allen sent me that report
12 directly from his office.
13 MR. DIJULIO: I didn't get one. We got the
14 abbreviated version from, I think -- I don't know
15 where we got it.
16 MR. ANDERSON: I don't recall either.
17 MR. KELLING: There was a memorandum that we
18 were provided.
19 MR. ALLEN: Oh, back last week. This is
20 basically everything but the attached comparables.
21 MR. KELLING: Would you like to take that and
22 have it reproduced?
23 MR. DIJULIO: I will do that at the break.
24 Q. (By Mr. DiJulio) What I am going to ask you to refer
25 to is a Millegan Jaddi report dated January 15th,

1993, that is attached to Exhibit 9.

Now, have you seen this report previously?

A. I believe that was the basic report that we started working with.

Q. You can just keep that in front of you, sir.

Now, Mr. Anstey, looking at these two exhibits I am going to call your attention first to page three of the January report that is headed "Upland Site Work."

A. Yes.

Q. If you look down the column, the first section is identical to your Exhibit N; is that correct?

MR. INSLEE: It should be.

A. Yes.

Q. Now, looking at the next number, hazardous waste disposal, that doesn't appear on this exhibit, does it?

A. No. I don't see it.

Q. Where did you get the 555 cubic yard quantity number in Exhibit N?

A. I recall that was calculated -- I don't have my actual calculations in front of me, but it was based on a calculation based on discussions with our client on the amount of tailings and other potentially contaminated soil on the site.

Q. You don't have any independent knowledge --

1 A. No.
2 Q. -- of the nature of those materials? You were just
3 advised of them?
4 A. I saw photographs of the site that led me to have some
5 serious concerns about.
6 Q. You did the calculations that resulted in your
7 determination about the extent of that?
8 A. Yes.
9 Q. Thank you.
10 Now, the next figure is fill and raise site to
11 elevation 25. That's not included in the January
12 15th, 1993, report, is it?
13 A. I don't see it.
14 Q. Why is that, do you know?
15 A. I have no idea. I assume that wasn't part of what
16 they were doing in that report.
17 Q. The same would be with respect to the preload; is that
18 correct?
19 MR. INSLEE: Well, I am going to object,
20 Mr. Chairman. It is apples and oranges. This exhibit
21 he is referring to, why is it different, he hasn't
22 asked what the purpose of the prior exhibit was in
23 Exhibit 9, which was not the purpose of Exhibit M or
24 N.
25 Exhibit 9 contains our numbers, which he has been

1 objecting to using, brought current. These are our
2 original construction numbers and brought current.
3 He's objected to that before.
4 Q. Let me ask the question a different way.
5 Are you aware, Mr. Anstey, if the area of parcel D
6 is shown on Exhibit K?
7 A. Say that again.
8 Q. The question is, is the area available for development
9 within parcel D as shown on Exhibit K subject to the
10 stabilization identified in Exhibit M or N?
11 A. Yes.
12 Q. How are you aware of that?
13 A. That was the area that I used to base my calculations
14 on.
15 Q. So you determined that that site currently enjoys six
16 inches of gravel, six inches of heavy ballast and
17 geotextile fabric; is that correct?
18 A. No. I felt that that additional stabilization would
19 be required to make it a usable site based on the
20 information I received of its 1974 condition.
21 Q. You did not perform, as I understand your testimony,
22 any independent evaluation of the soils. There is no
23 soils reports that you looked at or relied upon; is
24 that correct?
25 A. No. Only what I was shown by our client, photographs

1 and discussions.
2 Q. Now, in your discussion -- and I understand that you
3 have used 100-foot setbacks all the way along -- did
4 you perform an independent review of the applicable
5 development regulations or did you rely on the
6 discussion by Ms. McCutcheon?
7 A. I relied basically on Ms. McCutcheon.
8 Q. You heard Ms. McCutcheon give a different description
9 of the setbacks in her testimony, did you not?
10 A. Well, I heard her testimony. I had discussed the
11 setbacks I was using with her, and she felt that they
12 were generally reasonable.
13 Q. Now, in terms of the site conditions and particularly
14 the mean high watermark, did you perform any
15 historical analysis as to the impact on the shoreline
16 of this site over the years?
17 A. No.
18 Q. Did you do any independent analysis?
19 A. No.
20 Q. Now, I am going to show you Exhibit 10. For purposes
21 of this, I will ask you to assume that the green line
22 as shown is the top of bank as a result of the 1957
23 survey. The blue line is the mean high water shown by
24 the Group 4 1976 survey and that the yellow is -- or
25 the orange is the zero datum based upon the City of

1 Seattle's data, zero elevation, based upon the City of
2 Seattle's data.
3 Based upon this information shown in Exhibit 10,
4 showing the top of bank in 1957 and zero elevation in
5 subsequent years, would you revise your opinion with
6 respect to bank stabilization or the need for the
7 improvements shown in your exhibit?
8 A. No.
9 MR. INSLEE: You want him to assume that zero
10 elevation is also top of bank?
11 MR. INSLEE: No. I didn't ask that. I am
12 not changing the exhibit. I am using a hypothetical
13 based on the information there.
14 Q. You would still, even recognizing zero elevation or
15 top of bank as shown on that exhibit, still recommend
16 to a client they go to the expense of doing bank
17 stabilization or bulkheading; is that correct?
18 A. Yes. We did discuss that.
19 Q. Are you familiar with the floodplain regulations in
20 this area having done your work for Boeing and the
21 rest?
22 A. Yes.
23 Q. Is this area within a particular floodplain
24 designation to your knowledge?
25 A. Being a major river it would have a floodplain.

1 Q. Have you ever had cause to look at the floodplain maps
2 for this corridor?
3 A. No. I didn't feel I had time to go into that detail
4 of analysis based on what I was asked for.
5 Q. Based upon your limited time to deal with this matter?
6 A. Right.
7 Q. So if I showed you the floodplain map for this area
8 you would not recognize it; is that correct?
9 A. Probably not.
10 Q. I am handing to you what is before this panel as
11 Exhibit 17, which are figures from the Draft
12 Environmental Impact Statement for the Boeing Duwamish
13 Corridor Redevelopment Proposal.
14 My first question is, are you familiar with that
15 proposal or any of the work that was done regarding
16 it?
17 A. No.
18 Q. Next, turning to figure 3-1, which is page three of
19 that exhibit, that is identified as existing site
20 uses.
21 In your capacity as a Boeing employee, had you
22 cause or responsibility to work on any of those sites
23 as an engineer --
24 A. Yes.
25 Q. -- not as being in there as an employee? Not where

1 you were physically working in one of these buildings,
2 but whether you performed engineering services with
3 respect to one of those sites.
4 MR. INSLEE: What page, Counsel?
5 MR. DIJULIO: It was on 17.
6 MR. INSLEE: What page?
7 MR. DIJULIO: Third page.
8 MR. INSLEE: Thank you.
9 A. I worked at South Park on North Boeing Field, the
10 Duwamish Towers as a construction manager and plant
11 engineer.
12 Q. You did construction management on those sites?
13 A. Yes.
14 MR. INSLEE: Counsel, he was pointing and I
15 couldn't see. What's the label on this exhibit so I
16 know where you were pointing? Help me out.
17 Q. Would you again identify from the exhibit the sites
18 that you were engaged in construction management
19 activities on?
20 A. North Boeing Field, South Park.
21 MR. INSLEE: Where is South Park? That's the
22 one I can't find.
23 MR. DIJULIO: Immediately adjacent to the
24 parcel.
25 MR. INSLEE: I found it. Thank you.

1 A. And Duwamish Office Park.
2 Q. Now, if I understand it, the South Park site is both
3 within and without the City of Seattle; is that
4 correct?
5 A. I do believe that the property line runs through
6 there.
7 Q. So you had to deal with two sets of regulations in
8 that respect, did you not?
9 A. Yes, we did.
10 Q. When was that facility constructed?
11 A. Oh, South Park is rather old. I don't know exactly
12 when it was first constructed, but it's been there for
13 some time, I believe.
14 Q. Now, in my visits to the site and driving around the
15 existing facilities out there, it didn't strike me
16 that there was 120 feet of separation between the
17 property lines and some of the buildings. There are
18 some narrow alleys and drives.
19 In your experience when you were out there did you
20 notice that, as well?
21 A. On the South Park site?
22 Q. No, no. I am talking now about immediately to the
23 east of the container terminal portion of the Duwamish
24 Marina site.
25 A. I don't recall.

1 MR. INSLEE: If counsel is going to testify,
2 I want him to be sworn.
3 Q. To confirm a question that your counsel asked you
4 earlier, it's my understanding that --
5 MR. INSLEE: I am not Ben's counsel.
6 I don't represent Ben or Jaddi, do I?
7 THE WITNESS: Not that I know of.
8 Q. -- that Mr. Inslee asked you, the construction numbers
9 are 1992 numbers as opposed to 1994 numbers; is that
10 correct?
11 A. The original numbers used were, as I understood since
12 it was done in '93, were used with '92 numbers. Some
13 of the numbers I used were more current, but there has
14 been limited inflation of construction costs. I felt
15 they were still applicable to 1992. It's kind of hard
16 to determine in any case what an accurate unit price
17 should be. There are other variables that would be
18 greater than the inflation that occurred since then.
19 Q. Now, you studied the Group 4 site?
20 A. Yes.
21 Q. Excuse me. The Group 4 survey --
22 A. Yes.
23 Q. -- and the elevations thereon?
24 A. Yes.
25 Q. Is that one of the documents that you used to rely

1 upon in your calculation of the various development
2 costs associated with this project?
3 A. Yes.
4 Q. Now, having studied that, I am going to show you what
5 is Exhibit 13. Have you seen Exhibit 13 before?
6 A. No.
7 Q. Can you locate the site on Exhibit 13?
8 MR. INSLEE: Why don't you tell him where it
9 is, Counsel. If you look at your left thumb, you are
10 awfully close.
11 A. It might be that one. That looks like a stream.
12 Q. You are aware that the Group 4 survey is November
13 11th, 1977, or approximately that time? I will hand
14 you Exhibit 1(a) of what is in this appraisal Exhibit
15 4.
16 A. That's one sheet of it. It's dated '77. That doesn't
17 necessarily mean when it was actually taken.
18 Q. Having you look at that photographic exhibit, the '77
19 aerial, does that site in your opinion, having studied
20 the elevations of the Group 4 survey, appear to be
21 consistent with your consideration of the site?
22 A. I can't really tell.
23 MR. INSLEE: Objection. I don't know what we
24 are talking about. You mean does that show him
25 elevations?

1 MR. DIJULIO: No, no. I realize that the
2 photograph doesn't show elevations, Mr. Inslee.
3 Q. Does that photograph correspond in your opinion with
4 the elevations shown on the Group 4 survey?
5 A. I can't really tell.
6 Q. In your evaluation you did not consider anything other
7 than the Group 4 survey and the information provided
8 to you by Mr. Szmodis or Mr. Hester?
9 A. Basically correct.
10 MR. DIJULIO: I have nothing further.
11 MR. KELLING: Thank you.
12 Bruce, do you have anything, or Allen?
13 MR. SAFER: I think that concludes it.
14 MR. ALLEN: I have one question about the
15 map.
16 EXAMINATION
17 BY MR. ALLEN:
18 Q. Tell me where the stream corridor is on this.
19 A. I assumed the stream to be running along the property
20 line.
21 Q. So does this hundred feet actually go from the
22 property line to --
23 A. No.
24 Q. They just take it from the easement?
25 A. The top of the bank is as near as I could identify,

1 the top of the bank. The stream would have some width
2 to it.
3 Q. So from the property line north is the width?
4 A. See the contour that I calculated roughly to be in
5 this area? Then the top of the bank might have been
6 somewhat beyond that.
7 MR. ALLEN: Do you remember that drawing we
8 had with the pink --
9 MR. INSLEE: I think she wrote that on
10 Exhibit No. --
11 MR. DIJULIO: One or A?
12 MR. INSLEE: Exhibit 7. Does that make
13 sense?
14 MR. ALLEN: No. It was introduced very
15 early.
16 MR. INSLEE: Mel Hester marked it in pink, so
17 it jolly well might be --
18 MR. ALLEN: We can find it later. It's not
19 necessary for this witness. I just thought, does it
20 show the stream corridor as being where the waterline
21 is? I just wanted to clarify that.
22 MR. INSLEE: Somebody wrote in pink. I know
23 that.
24 MR. ANDERSON: Take a look at Exhibit No. 10.
25 MR. INSLEE: That's the survey of David

1 Evans, top of bank.
2 MR. ALLEN: I think the pink was just on one.
3 We can look for it later.
4 MR. KELLING: Exhibit 10 has been checked out
5 somewhere.
6 What our concern is about is this. Is that
7 setback correct? The stream might be closer to the
8 property line is what we are thinking.
9 MR. SZMODIS: This was part of the alta
10 survey for clarifications. All of that was delineated
11 off of the survey work that Towns & Chastaine had
12 done. That stream location is in there based on its
13 actual location. It's relative to the property line.
14 The property line to the south is on the other side of
15 the stream.
16 MR. KELLING: That's correct. But we are
17 wondering how close the stream is.
18 MR. ALLEN: Is the stream 40 feet wide?
19 MR. SZMODIS: From top of bank to the top of
20 the bank in some places it is.
21 MR. ALLEN: Part of it is on the adjoining
22 properties?
23 MR. SZMODIS: Not on ours. When you get back
24 up here there is actually another stream that comes
25 into it back in this corner from the deltas that they

1 have culverted.
2 MR. KELLING: When we go on a site visit and
3 we look in that area, will we see a fence between your
4 property and Delta Marine's?
5 MR. SZMODIS: No. You will see the fence up
6 on the top part of the bank on this part of the
7 stream. The property that's over here, Delta Marine
8 went ahead and put in a culvert to catch all of their
9 streams without any permits or anything. Then they
10 put in a -- basically a manhole to collect it before
11 it goes back into the open ditch that's still there.
12 But when you see that, they are utilizing part of
13 the property. We discovered this after they had taken
14 all the improvements, done all of the work. We are
15 working on it, so we have just got everything squared
16 away.
17 MR. KELLING: Was the lessor made aware of
18 this, too, in the past?
19 MR. SZMODIS: I'm sorry?
20 MR. KELLING: Was the lessor made aware of
21 this?
22 MR. SZMODIS: Yes. It was Bob Reynolds.
23 MR. KELLING: Oh, it goes that far back in
24 time?
25 MR. SZMODIS: Yes.

1 MR. KELLING: I don't have anything else at
2 this point. You have completed your --
3 MR. DIJULIO: I have nothing further for him.
4 MR. INSLEE: May Ben be excused then?
5 MR. KELLING: Certainly, sir.
6 What time shall we reassemble, 2:15 or 2:20? Is
7 that enough time for everyone to relax and have lunch?
8 MR. INSLEE: Yes.
9 MR. DIJULIO: Fine.
10 (Arbitration at lunch break.)
11 MR. KELLING: We are back on the record.
12 Mr. Inslee?
13 MR. DIJULIO: If it please the panel, just a
14 housekeeping matter, I am going to offer the FEMA map
15 at this time for the record.
16 MR. KELLING: Thank you.
17 MR. ALLEN: What number are we going to call
18 it?
19 MR. INSLEE: 19.
20 MR. KELLING: So this FEMA map will be
21 Exhibit 19.
22 MR. DIJULIO: Mr. Inslee has been generous in
23 terms of witness allocation. At this time, the lessor
24 would call Albert Lowe.
25 Mr. Lowe, if you would have a seat in that chair,

1 please.

2 ALBERT C. LOWE, sworn on oath, testified:

3 EXAMINATION

4 BY MR. DIJULIO:

5 Q. Mr. Lowe, would you please state your full name?

6 A. Albert C. Lowe.

7 Q. That's spelled L-o-w-e?

8 A. That's correct.

9 Q. Mr. Lowe, where are you currently employed?

10 A. I am employed by the Port of Seattle.

11 Q. How long have you been employed by the port?

12 A. Approximately two and a half years.

13 Q. When did you go to work for the port?

14 A. October 28th, 1991.

15 Q. What's your position with the port?

16 A. I am titled a senior acquisition specialist.

17 Q. In that title, whatever it may be, what are your

18 duties, functions for the Port of Seattle?

19 A. My principal duties are to acquire and dispose of real

20 property for the marine division.

21 Q. Now, when you say the marine division, what is the

22 marine division responsible for?

23 A. Marine division is responsible for all of the water

24 side of the port, everything other than aviation.

25 Q. Is that the position that you held upon coming to the

1 port?
2 A. That's correct.
3 Q. Prior to coming to the port, where were you employed?
4 A. I was employed by Schueler, McKown & Keenan in
5 Seattle.
6 Q. What is that?
7 A. That's an appraisal firm.
8 Q. As if this panel needed to be reminded of that.
9 What was your capacity there?
10 A. I was a senior appraiser.
11 Q. Now, in your capacity as senior acquisition specialist
12 for the port, are you familiar with property
13 development in the Duwamish corridor?
14 A. I am.
15 Q. Now, one of the issues that we are dealing with is
16 about the size of development for transshipment or
17 container facilities.
18 Is there a minimum size that the port looks at in
19 terms of evaluating the appropriateness of the
20 facility for container or transshipment use?
21 A. No minimum size. There is a variety of users, both
22 large and small users, that are engaged in the
23 business of repair and maintenance of containers and
24 storage.
25 Q. Asked another way, is a five-acre facility a facility

1 that the port would consider for container use?
2 A. Yes.
3 Q. Is it necessary that such a parcel, whether five acres
4 or larger, be immediately adjacent to the Duwamish
5 River?
6 A. Well, there are several categories of container use,
7 but in the transshipment I am assuming that we have
8 repair and maintenance of empty containers. There is
9 no need to have any water access for that function.
10 Q. How about for other than repair and maintenance? Is
11 there a requirement to be immediately adjacent to the
12 Duwamish then?
13 A. Well, there is if you are bringing containers in by
14 ship and running a, quote, container terminal wherein
15 we would load and unload containers directly from a
16 ship.
17 Q. What about the transfer or management of trailers off
18 site of the transshipment facility?
19 A. Well, typically in a transshipment facility they leave
20 by either rail or truck and arrive the same way.
21 Q. In your evaluation of properties for such container
22 use, you look at properties both within and/or
23 adjacent to as well as in the vicinity of the
24 Duwamish?
25 A. That's correct.

1 Q. Is it necessary for a container facility to have the
2 heavy lift capability for lifting trailers off of
3 ships?
4 A. Off of ships, yes. You need a container crane.
5 Q. What does the port call such a facility that includes
6 a heavy lift facility or heavy lift capability?
7 A. Well, there are two types. One is a fully dedicated
8 container terminal that has a number of rail cranes of
9 varying gauges. Then there is a general purpose
10 facility that may, in fact, have smaller cranes. I
11 would suggest that Terminal 115 is an example that the
12 port uses for a general purpose area in small ships
13 and small containers.
14 Q. Is there another facility, another container facility
15 that simply uses top pickers, mobile top pickers?
16 A. Well, top picks are again used by both -- or complete
17 marine terminal facilities. They have the capability
18 to lift a full -- fully loaded 40-foot container.
19 They are commonly used -- The top picks are commonly
20 used to stack empty containers in the repair and
21 maintenance type of yards.
22 Q. Now, I am going to show you -- Well, rather than
23 getting into manhandling those, I am going to show you
24 Exhibit No. 5 in this arbitration. There is a parcel
25 in that exhibit that's highlighted in red. Can you

1 identify that?
2 A. Yes.
3 Q. I will ask you to assume for purposes of your
4 testimony that the area with container storage is not
5 related to the adjacent marina use.
6 A. It doesn't appear to have. From the aerial it appears
7 to have some form of buffer between them.
8 Q. Now, is that the type of facility that the port looks
9 at in terms of evaluating suitability for container
10 facility acquisition or development?
11 A. Yes. It appears to have good access to a major
12 freeway or arterial and would appear to -- I can't
13 tell from this photo if it has any rail service, but
14 those would be the two conditions that would be
15 important in a decision to use that.
16 Q. Now, what is the current availability of such
17 properties as you are familiar with the area?
18 A. Well, my experience in the port based on the number of
19 calls we get over any given period, the lease land is
20 in scarce supply. Flat, level land is not readily
21 available either for purchase or lease.
22 Q. I guess before we go much further with this, in your
23 capacity, Al, do you engage appraisal consultants,
24 appraisers, fee appraisers?
25 A. I do.

1 Q. Have you had occasion to engage the appraisers on this
2 panel?
3 A. I have.
4 Q. Have you engaged all of them at one time or another?
5 A. I have either directly or indirectly. I think Allen
6 did an appraisal in conjunction --
7 Q. When you say Allen you are going to have to be --
8 A. Allen Safer.
9 Q. And you have engaged Bruce Allen, as well?
10 A. I have.
11 Q. Thank you.
12 Now, based upon your experience in the Duwamish
13 industrial market, do you have an opinion as to the
14 value of such property suitable for container
15 development?
16 A. Well, our experience has been that the prices that we
17 are paying are somewhere between 9 and $11.
18 Q. Is that in 1994?
19 A. Well, in 19 -- I don't recall the exact date of the
20 Chevron purchase. In 1992 we paid $9.82 for -- or
21 $9.80-some cents -- I should correct that -- for a
22 parcel at Lockheed, yard two, which is on the west
23 waterway out prominent and adjacent to our Terminal 5.
24 On the Chevron property, which I think was
25 sometime in 1993, we paid $10.22 for that property

1 diagonal and adjacent to a piece of property that we
2 already owned at Terminal 108.
3 Q. Now, there has been some question about the valuation
4 of property for such uses above or below the 14th
5 Street Bridge.
6 Based upon your experience, does the location of
7 such property -- is the location of such property
8 either north or south of the 14th Street Bridge of any
9 relevance?
10 A. In my experience it doesn't make any difference.
11 MR. DIJULIO: I have nothing further for this
12 witness.
13 EXAMINATION
14 BY MR. INSLEE:
15 Q. There isn't any 14th Bridge, but your testimony would
16 be the same if it was the 16th Street, right?
17 A. 16th, that's correct.
18 Q. And no difference at all whether it's terminal
19 property or whether it's property which is not
20 terminal but it can have container storage? There is
21 no difference there either?
22 A. We don't find a major difference in property values.
23 Q. My specific question is, you don't find any difference
24 in property values between property that could be used
25 for terminal use as you use that term, either the

1 dedicated terminal or the general purpose terminal,
2 versus a site that is not located near the water but
3 is for container storage?
4 A. No, we don't.
5 I will just simply say part of the reason for that
6 is there isn't anything suitable above the Spokane
7 Street Bridge for deep-water, full container terminal
8 operation in my opinion, navigational problems for the
9 size ships, and essentially we own almost everything
10 else.
11 Q. So what you are saying is --
12 A. I don't have a basis for a comparison.
13 Q. You don't really know, isn't that a correct statement,
14 as to whether or not property which is not capable of
15 access by loading or unloading from the water really
16 has a value equal to property that has a terminal
17 capability directly off of barges or oceangoing
18 barges?
19 A. Well, off of barges I would say my estimate of value
20 is there is not a material difference. The barge can
21 get anywhere.
22 Q. You do study property for proposed acquisitions,
23 right?
24 A. That's correct.
25 Q. Is it material or of a concern to you as to what the

size of the usability portion of the parcel is after required setbacks?

A. Typically we are responding to tenant needs. We have tenant needs that range from very small parcels to much larger in the case of -- I will just use the example in the case of the Chevron acquisition. Container Care was the tenant that requested additional space. They would take twice the space that we were able to acquire for them. So size is not necessarily relevant. We can use -- I suppose I should qualify that.

Q. That wasn't my question. Let me correct it perhaps.

Is the parcel that you are looking at for purpose of acquisition ever studied by you to see how much of the parcel can be used for that tenant for a proposed use, whether an 11-acre piece has six usable or a five-acre piece has three usable? Is that of interest to you?

A. Yes, that is.

Q. That was my question.

Are you in evaluating and looking at a proposed acquisition at all concerned with regard to whether or not the property can or cannot have access to the navigable portion of the Duwamish?

A. Depending on the use that we intend to put it to, but

1 not necessarily navigable.
2 Q. Are you concerned with regard to whether or not a soil
3 that is existing on the subject property prior to
4 acquisition is or is not stable?
5 A. Again, depending on the loads that we would expect for
6 the tenant we intend to put there, typically we
7 don't -- If you are saying stable, if there is
8 significant subsidence, we would be concerned about
9 it. If, in fact, it's a matter of weight bearing, it
10 depends on the tenant use.
11 Q. How about if we are talking about subsidence? Are you
12 concerned in your acquisition or study of property as
13 to whether the soils that are on there need to be
14 replaced with soils that are not compressible?
15 A. Yes, we would be.
16 Q. Are you concerned with regard to the nature or lack of
17 or presence of any material that could or couldn't be
18 determined to be toxic?
19 A. Yes, we are.
20 Q. Are you concerned in looking at property in
21 determining what you are going to pay for it whether
22 or not you are going to have to export material from
23 it and import material to it in order to make it a
24 developable container storage area?
25 A. Yes.

1 Q. Are you concerned with regard to whether you do or
2 don't have to pay for the stabilization of banks of
3 the Duwamish as compared to not being required to
4 stabilize the banks of the Duwamish?
5 A. Yes.
6 Q. Will you concede with me that if a property was
7 otherwise an equal five acres of usable property at a
8 property which was inland that did not have a
9 water-related use and you weren't getting access to
10 barges or not for storage containers, that a parcel
11 five acres that you didn't have to stabilize a bank
12 would be more desirable than a parcel where you did
13 have to stabilize a bank?
14 A. That's correct.
15 Q. Would you be concerned with regard to whether or not
16 there are streams running by or through the property
17 insofar as determining either, A, its usability or, B,
18 cost to the ultimate tenant of what he is going to pay
19 for relative to usage?
20 A. Yes.
21 Q. I take it in all fairness -- I don't know when you
22 were retained here. But you haven't had the
23 opportunity to look at this subject site and make any
24 of those determinations about which I have just asked
25 you, have you?

1 A. I have not.

2 MR. INSLEE: Thank you, sir.

3 FURTHER EXAMINATION

4 BY MR. DIJULIO:

5 Q. Mr. Lowe, first of all, you are not being compensated
6 for your appearance here today; is that correct?
7 A. That's correct.
8 Q. You are here in your capacity as a port employee?
9 A. I am.
10 Q. And you are not allowed to testify as an expert in
11 these kinds of matters; is that correct?
12 A. Not and receive compensation.
13 Q. Now, with respect to the bank stabilization question
14 Mr. Inslee asked you, if you were to assume that there
15 would be a 100-foot setback from, say, the Duwamish
16 River with respect to such a site, would you expect
17 bank stabilization to be an element of the site
18 development?
19 A. Not in and of itself we wouldn't, depending again on
20 the degree of erosion, whether that was going to
21 consume the hundred -- The question is difficult to
22 answer because I think it's a matter of what's
23 happening on that particular site.
24 Q. It is a site-dependent issue?
25 A. It is.

1 Q. Now, in your capacity have you had experience in
2 dealing, managing the sale or acquisition of
3 properties that have been subject to either
4 contamination or questions about contamination?
5 A. Every property I've had has that element.
6 Q. Well, for example, you talked about a Lockheed sale.
7 Was that property sale impacted by valuation of
8 hazardous conditions?
9 A. It was.
10 Q. How was that managed by the port? How was that valued
11 by the port?
12 A. That particular site had a significant amount of
13 environmental testing. Lockheed had prepared a
14 preliminary remedial investigation and feasibility
15 study. We had consultants on site verifying that, and
16 we were able to estimate a cleanup cost of
17 approximately $2 million of which Lockheed left in
18 escrow to fund the cleanup.
19 Q. How did that affect the purchase price of the
20 property?
21 A. Well, from a port standpoint we were buying clean
22 property and that's what we paid for. From Lockheed's
23 standpoint one assumes that they took on the cost of
24 cleanup, so they netted a different amount than the
25 port paid for the property.

1 Q. So I think in one of the reports, either the Safer or
2 the Allen report, there is a valuation issue at about
3 $9 a square foot. Am I thinking about the right
4 property?
5 MR. INSLEE: I don't think this witness has
6 testified he is familiar with the Safer or the Bruce
7 Allen report.
8 MR. DIJULIO: I will ask the foundational
9 question.
10 Q. Is this the site in which the port did not consider
11 the tidelands to be of any value?
12 A. That's correct.
13 Q. Did you value the uplands property then on a square
14 footage basis?
15 A. We did.
16 Q. What was the value that the port applied to the
17 uplands portion of that acquisition?
18 A. I recall that it was around $9.80 a foot.
19 Q. Now, if Lockheed has to pay $2 million for that
20 remediation, what would the net return to Lockheed be
21 in your estimate per square foot?
22 A. I haven't worked that out. I don't know. I think
23 it's approximately 22 acres, so it would be that value
24 subtracted off of the -- on a per square foot basis.
25 Q. What if it costs more than $2 million to remediate the

1 site?
2 A. Well, the $2 million is applied only to the uplands
3 portion of the remediation. If it exceeds $2 million
4 it's the port's cost. The port did not accept any
5 liability for sediment cleanup should that be required
6 at any time in the future. If that happens, then the
7 net to Lockheed will be substantially less than the
8 per square foot uplands price.
9 Q. Now, have you had experience in your property
10 management or disposition or acquisition for the port
11 in dealing with sites that required stabilization
12 either by grade, fill or other similar activity?
13 A. Yes.
14 Q. Do you in your work for the port and does the Port of
15 Seattle use a rule of thumb or guide as to how that
16 expense is valued?
17 MR. INSLEE: Could you repeat your question?
18 Expense as to what?
19 Q. Well, let me ask the question more simply and more
20 directly.
21 In Exhibit 8 the report states, Al Lowe at the
22 port indicated 50 cents was a good budget to prep a
23 site for lease since all other costs, e.g.,
24 compacting, graveling and/or paving, would ultimately
25 be amortized and added on to the monthly ground lease

1 payments.

2 Is that a correct statement of your position?

3 A. That's correct.

4 MR. INSLEE: I have nothing further for this

5 witness.

6 FURTHER EXAMINATION

7 BY MR. INSLEE:

8 Q. In other words, when you look at a property, if you

9 have a lot more detailed information about it and you

10 have topogs and you have a history of the property and

11 you have stream information and you've got setbacks,

12 you just abandon all information and just go by 50

13 cents a foot? Could you answer that question first?

14 A. I will answer that question. The answer is no. We

15 don't just go by that.

16 Q. That's all I want to ask you about.

17 In connection with Exhibit H, could you hand that

18 to him. That's of the vicinity map folded up, blue in

19 character.

20 Would you be kind enough to locate in yellow where

21 that terminal site is where the owner, the seller, is

22 going to assume the $2 million of cleanup site?

23 A. Yes. Here we are. It's right here.

24 Q. In connection with that, what terminal is that

25 adjacent to?

1 A. Terminal 5.
2 Q. So that's going to be an assembly usage, meaning that
3 parcel is going to be used in conjunction with the
4 port's use of Terminal 5?
5 A. That's correct.
6 Q. You said that you, as the buyer, are not assuming
7 sedimentation risk. That's a continuing obligation of
8 the seller, Lockheed; is that correct?
9 A. That's correct.
10 Q. That's not in the $2 million necessarily, is it, sir?
11 A. It's not.
12 MR. INSLEE: No further questions.
13 MR. KELLING: Mr. Safer, do you have any
14 questions of Mr. Lowe?
15 EXAMINATION
16 BY MR. SAFER:
17 Q. I would like to get some clarification in terms of
18 buying some of the properties that may have some
19 setback requirements. I think there was an exhibit
20 that was being used that had the yellow marked out by
21 the engineer.
22 This property has a tide line about here. An
23 engineer has put setback from that high watermark as a
24 nonwater-related and nondependent use so that the
25 buffer, if you will, is this area between.

1 When you are acquiring a property, if you have a
2 buffer requirement, even though it's upland and it's
3 due to a setback or other environmental constraint, is
4 that area part of what you are paying the $9 per
5 square foot for?
6 Do you pay $9 on all of the uplands or just that
7 area that you could, in fact, put to rentable use?
8 A. Well, we like to think that we purchase only the
9 property that's usable. The reality for the port is
10 that we typically have either a marine-related or a
11 water-dependent user. The setbacks, as you described
12 here, become less of an issue because we can go out on
13 usable property out further. If there is subsidence
14 or that type of thing related to the site, we would
15 then take that into account.
16 Q. So normally there is a 20-foot setback for
17 water-dependent, water-related use. Would you not pay
18 anything for that 20 feet in the buffer?
19 A. No. We would probably pay the $9 a foot for that
20 site.
21 Q. For all the area that's clearly called uplands?
22 A. Right.
23 Q. That everybody has agreed to is uplands?
24 A. Yes.
25 Q. In this case there is a drainage ditch.

1 MR. DIJULIO: I would like to interrupt.
2 Excuse me, Mr. Safer.
3 For purposes of the record, the appraiser is
4 referring to Exhibit K.
5 MR. SAFER: Thank you.
6 Q. (By Mr. Safer) In this case there is an area that is
7 an unclassified streambed. This map calls it a
8 drainage ditch, but in fact it has been categorized, I
9 believe, as an unclassified stream also requiring some
10 level of setback.
11 Again, the same question, have you run into this
12 situation in any of the acquisitions that you have had
13 to deal with in your couple of years with the port?
14 A. We have.
15 Q. Are you paying the same per square foot all the way up
16 to the stream or do you include the stream in the
17 property? Do you net anything out for that drainage
18 ditch or that streambed?
19 A. We would net it out on the premise that the appraiser
20 doing the appraisal has considered the easement in the
21 calculation of the net usable area in this appraisal.
22 Q. The easement being the bed itself plus the buffer, the
23 setback?
24 A. Any unusuable area.
25 Q. So if there is a buffer that you cannot develop in,

1 pave, make any impervious improvements to, that's not
2 considered marketable?
3 A. That's correct.
4 Q. One final question. There is about an acre of land
5 that has no access to the water except across the
6 streambed, which would require bridging. There is, I
7 believe, street access to it.
8 Is an acre of land something that the port would
9 normally be a buyer for? Have you purchased one-acre
10 sites?
11 A. I have not.
12 Q. What's the smallest site the port normally would
13 consider for either land banking or immediate use?
14 A. Well, I think, again, if we have immediate use, we
15 have an immediate tenant, the tenant needs drive that.
16 I haven't purchased anything under about -- We have
17 purchased some acre sites that would be used for
18 assemblage on Terminal 5. But in and of itself,
19 typically we don't have a user that needs less than
20 two, two and a half acres. But it would be the
21 tenant's need. I don't exclude any size property from
22 consideration.
23 Q. We will be sure you are notified when our property
24 becomes available.
25 As a final element that I am trying to get my arms

1 around, if you have the opportunity to purchase a
2 property and you go in and you see red flags regarding
3 the topography or the terrain, there are obviously
4 some areas of site improvement that will go beyond the
5 50 cents per square foot you normally would budget,
6 how do you structure a transaction? How do you get
7 your arms around that and particularly considering
8 perhaps a property that there might be some
9 competition for that you might not be the only bidder
10 for? What would you normally do to come up with an
11 agreeable deduct, if you will, for those development
12 costs?
13 A. Well, in my experience I haven't had a situation where
14 I have been in a competitive situation. The nice part
15 about the public agency is I have this ball bat called
16 imminent domain, so I can't suggest what our reaction
17 would be.
18 But typically the property we buy is the subject
19 of negotiation of which those factors are taken into
20 account. Certain things are then passed on to the
21 tenant.
22 I will use the example of the Container Care site,
23 which is the old Chevron site that we purchased in
24 '93. There had to be significant reinforcement of the
25 sewer outfall that Metro has running down Oregon

1 Street for us to fully utilize that site. That is
2 considered a tenant improvement, because it's for the
3 unique use of one tenant to drive top picks across
4 that. That cost will be amortized as additional rent
5 over a period of time. So the tenant would pay for
6 those extraordinary improvements that the site
7 dictates if it's solely for their need.
8 Q. What if you had a site that was engineered for a
9 relatively light use and you wanted to convert that
10 into a much heavier use where you had a tenant that
11 was interested in doing heavy storage? Would the port
12 normally assume the cost of upgrading the site?
13 A. No. Again, if we have a user that has a heavy use,
14 then we would reflect that, because we are really
15 talking about paving and that type of thing to do
16 that. We would attempt to package that into the
17 lease.
18 Q. Have you had any experience with rock ballast or any
19 other method of reinforcing a load-bearing capacity on
20 a particular site?
21 A. Other than the Chevron site, that's the only site that
22 I have had experience with. We laid down a rock
23 ballast for an interim use prior to paving it. The
24 paving is waiting on the vacation of Oregon Street so
25 that we can pave the entire site at once. That

1 improvement is a net cost out of the total
2 construction cost on the site, and it will be included
3 in the rental increase.
4 MR. SAFER: I don't have any further
5 questions.
6 MR. KELLING: Mr. Allen?
7 EXAMINATION
8 BY MR. ALLEN:
9 Q. Al, as the port's program, are you acquiring land
10 south of the First South Bridge to the turning basin?
11 Is that a program that the port is following at the
12 present time?
13 A. We are not actively soliciting sites in that area.
14 Q. I think you said in your direct testimony that
15 generally the property values that you see in the
16 marketplace are consistent regardless of whether they
17 are around Spokane Street all the way south to South
18 Park. I don't know if the question was asked that
19 directly.
20 A. That's my understanding.
21 Q. So the $9 to $11 a foot?
22 A. Yes.
23 Q. If we are to use Port of Seattle sales where they are
24 acquiring property, typically the port is buying
25 properties that are in use or were recently in use

1 with often substantial improvements that the owner may
2 feel has contribution but the port would demolish them
3 anyway because they have their own specialized use for
4 the property.
5 Would it be fair to say that many of your sales,
6 the total compensation paid, reflects possibly at
7 least in the seller's opinion some contribution of
8 these improvements?
9 A. Yes.
10 MR. ALLEN: That's all I have.
11 MR. KELLING: I have one question, Mr. Lowe.
12 EXAMINATION
13 BY MR. KELLING:
14 Q. Terminal 5 is on the west side of the waterway, is it
15 not?
16 A. That's correct.
17 Q. I learned sometime ago that Harbor Island is a
18 Superfund site. Does that affect that property across
19 the waterway at all?
20 A. The designation of a Superfund site, Harbor Island, I
21 think has had a depressing factor on the property
22 values on the island. I say that by the fact that the
23 record of decision has now been entered by the EPA.
24 The prices, asking prices, appear to be going up as
25 people are recognizing that they have or don't have

1 liability.
2 But as it relates to the west waterway, we are not
3 seeing a significant difference in price on the
4 Terminal 5 and that related area as we were on the
5 east side of the waterway on the Chevron side. They
6 seem to be about comparable.
7 MR. KELLING: I don't think we have anything
8 else.
9 MR. INSLEE: Just one other question.
10 FURTHER EXAMINATION
11 BY MR. INSLEE:
12 Q. You were good enough to state that in taking your
13 economic look at the property that you do rely upon
14 the appraisers to net out any unusual area.
15 Would you be of the belief, sir, that if parties
16 hired three appraisers to examine a property and come
17 up with a value, that one of the prime issues would be
18 the usable area of that specific site?
19 A. That's correct.
20 Q. You would expect one or more of those appraisers to
21 point that out?
22 A. That's correct.
23 MR. INSLEE: No further questions. Thank
24 you.
25 MR. DIJULIO: I will ask this question of the

1 panel because I don't know this, but I assume that you
2 know this, that the reason --
3 MR. INSLEE: It said in the arbitration
4 agreement we can't cross-examine the panel. That was
5 one of my issues too.
6 MR. DIJULIO: Does the panel wish to hear
7 from Mr. Lowe about why the port acquires property to
8 lease to other properties? I assume that's generally
9 known in the real estate industry. Am I correct in
10 that we don't need to get into that?
11 MR. KELLING: For my part, and these two can
12 answer for themselves, we don't need to hear about
13 that. I have heard about it an awful lot before.
14 MR. INSLEE: And they have condemnation
15 power.
16 MR. DIJULIO: Thank you. I have nothing
17 further for this witness.
18 LOUIS SZMODIS, sworn on oath, testified:
19 EXAMINATION
20 BY MR. INSLEE:
21 Q. Lou, will you state your name and address?
22 A. My name is Louis Szmodis, Jr. My address is (b)(6)
23 (b)(6) Redmond, Washington.
24 Q. Would you spell Szmodis?
25 A. S-z-m-o-d-i-s.

DFT 000477

1 Q. What's your educational background?
(b)(6)
2 A.
3
4
5
6
7
8
9
10
11 Q. What's your construction experience?
12 A. Again, starting in the family business, starting
13 digging a ditch, very first thing on the job. From
14 there until the present time I own and operate my own
15 construction company, construction development.
16 Q. What is its name?
17 A. E-l-e-s Construction, spelled E-l-e-s.
18 Q. Have you had employment by construction companies
19 prior to the time you owned your own?
20 A. Yes, I have.
21 Q. What's the history of that?
22 A. Well, I have worked with other companies, North Coast
23 Construction, in various capacities. There have been
24 -- I have been retained as an individual or sole
25 proprietor on development work in other parts of the

1 state of Washington as well as additional work that I
2 have done in my own capacity back East. The majority
3 of my time has been self-employed either sole
4 proprietor or a corporation.
5 Q. As a contractor?
6 A. General contractor.
7 Q. For what type of projects?
8 A. Residential, some commercial. The majority is
9 residential construction as well as residential
10 development, multifamily condominium type. This type
11 of work is the majority of it.
12 Q. Your association with North Coast Construction, who
13 was originally a partner in this matter, how many
14 years did you associate with North Coast Construction
15 as a consultant?
16 A. Probably over a period of -- That's a tough question.
17 Six, seven years approximately.
18 Q. In connection with this project here, what was your
19 relationship to the project insofar as the duties you
20 assumed as distinct from Hester or Genther or others
21 who were partners?
22 A. Well, I was to oversee the day-to-day construction
23 activities on behalf of the partnership and insure
24 that the work we had planned, designed and paid for is
25 what was actually accomplished.

1 Q. In that capacity, were you the one who was the -- if I
2 can use the word -- clerk of the works insofar as trip
3 tickets and things like that were concerned, in terms
4 of measuring and determining whether the contractor
5 was or wasn't being paid for the correct amounts?
6 A. I was ultimately asked to verify quantities and that
7 specific items were accomplished, yes.
8 Q. In connection with this project here, who was the
9 contractor who performed services of site development?
10 A. Well, the general contractor overall was North Coast
11 Construction in its own capacity without me as an
12 employee. Are you referring to subcontractors?
13 Q. Yes. Who were the contractors with whom it
14 contracted?
15 A. Well, the primary subcontractor on this particular
16 project was Tripp Construction Company, which was out
17 of Renton. There was also a gentleman -- his name is
18 Dean Marshal -- who manufactured the floats and things
19 for the marina itself. So he had a substantial part
20 of it, but the majority of the work was done by Tripp
21 Construction. Then they may have had other
22 subcontractors that I may not have been aware of as
23 individuals.
24 Q. In connection with either Exhibit K or with regard to
25 Exhibit 4, I want you to clarify the areas in which

1 excavation was performed on the site by Tripp or North
2 Coast.
3 A. Well, maybe it's easier on this particular one, on K.
4 Q. Well, we are going to make this a new exhibit
5 apparently if you are not going to mark everybody
6 else's K. Let's make this Exhibit M, like in Mary. I
7 don't have duplicate copies of M for everybody because
8 it's going to be re-created before your very eyes.
9 So using Exhibit M, which is the same as K --
10 MR. KELLING: I have a conflict.
11 MR. ALLEN: We have M and N already.
12 MR. INSLEE: Then this must be O; is that
13 correct?
14 MR. KELLING: Yes.
15 Q. On Exhibit O, I want you to walk the arbitrators
16 through in hopefully as chronological order as
17 possible to depict, first of all, the excavation that
18 was performed and why it was performed.
19 A. Well, initially when Tripp moved onto the site he
20 brought in excavating equipment in the area -- It
21 doesn't show on here, but I will just kind of
22 generalize the area it shows in the photos and
23 whatever. Where all the cement tailings were, that
24 material was initially just graded back and then
25 hauled off the site.

1 Q. Now, when you say this area here, we are looking at a
2 yellow impregnation on Exhibit O which was the
3 five-acre site?
4 A. It would have been within the confines of what's shown
5 here in yellow primarily, because just south of this
6 yellow mark here was an asphalt area on the existing
7 that's marked here, the asphalt paving. So the cement
8 tailings and that were all basically north of that
9 area and west back here in parcel B.
10 Q. Now, when you say it was taken back to the back and
11 then hauled off, to what sites did that material go
12 based on your recollection?
13 A. I can't tell you that, because I am not positive where
14 -- I know where some of it supposedly went, but I
15 can't verify that that's what happened to it.
16 Q. Now, in terms of the quantity of excavation that was
17 conducted with regard to this property -- and this is
18 to clarify a question that Mr. Allen asked -- the
19 question was asked how come only 555 cubic yards of
20 hazardous was removed, and he equated that with
21 tailings.
22 My question of you is, was all the material that
23 is in Exhibit No. N, the 555 cubic yards of hazardous,
24 supposed to represent the total amount of export?
25 A. No. The 555 that's referenced in that exhibit as

1 hazardous material dealt with all of the miscellaneous
2 junk, things that were already on the site that shows
3 up in the photographs, because there were barrels,
4 there was petroleum products, there was petroleum
5 water slicks that showed the petroleum out into the
6 tidelands.
7 So when this material in these Exhibits M and N
8 were put together, I was the one primarily responsible
9 with verification of quantities. In the original
10 format or spreadsheet that we did for a marina type of
11 site like we did, the one that's in Mr. Allen's
12 report, it did not include that because I just forgot
13 it. But in here I put it because that material was
14 treated as a separate item.
15 What Tripp did with it, I don't know. Under my
16 assumption today we have to deal with that stuff as if
17 it was hazardous waste. There were old engines and
18 all sorts of junk laying around in various stages.
19 So I formulated based on those pictures what I
20 assumed to be an area ten by ten or whatever and said,
21 if you contained it all together, that's about what it
22 would be. I assumed that it would be roughly 500
23 yards. Where 555 came out, somebody may have hit the
24 key five instead of 500. I don't know.
25 Q. That's about a ten-by-three foot site?

1 A. Roughly ten by a couple feet, because you have barrels
2 that are roughly three feet high. It was assumed to
3 envelope that amount of space, and that's where that
4 figure came from.
5 Q. Now, with regard to the 7,000 cubic yards cleared and
6 removed, ten yards loaded, which is on Exhibits M and
7 N, would you explain to the arbiters the quantity of
8 material that was physically removed from the site
9 that were cement tailings, not that they were
10 hazardous, but they were cement tailings removed?
11 A. The quantities in that exhibit that show us 7,000
12 yards is deemed to be the cement tailings. At the
13 time before any of the dredging and that started, that
14 amount of material, based on my recollection of the
15 way it was excavated and my calculations of the square
16 footage, roughly if you take -- I mean, I figured to
17 excavate roughly about a foot of material off of --
18 You use a figure of about 1,800 cubic yards of dirt to
19 fill up an acre about a foot. So I took that to what
20 I figured was the surface area and came up with a
21 volume that came up to about 7,000 yards that I felt
22 was a conservative figure of the amount of material
23 that we removed from the site, so the 7,000 relates to
24 the cement tailings.
25 Q. You didn't have them tested back in '77?

1 A. I did not.
2 Q. Were they removed irrespective of how they tested?
3 A. Yes.
4 Q. Why?
5 A. Because, as Mr. Hester testified, you couldn't do
6 anything with it. You couldn't compress. You
7 couldn't provide it as a building foundation source.
8 All it did is it just got in the way.
9 If you went down there, as Mel and I did, on
10 several occasions before any work started, if it had
11 rained at all, which it occasionally does up here, you
12 didn't walk in that area. I mean, you can go and walk
13 on the asphalt paving, but the minute you got off on
14 the cement tailings you were sitting down looking up.
15 Q. What was the design grade to which this property was
16 to be filled?
17 A. Design grade, in looking at my notes and things, we
18 basically try to use an elevation, to the best of my
19 recollection, of around 25 in reference to these
20 survey maps.
21 Q. Is elevation 25 higher than what we are going to see
22 in these survey maps?
23 A. It is in most areas. The primary reason for that,
24 again, as Mr. Hester testified, one of the first
25 things we did down there was see if we can put a

1 septic tank in.
2 When you dig the test holes, in his description of
3 the report, dug a hole, the tide came in and almost
4 drowned, it's almost exactly word for word what was
5 said.
6 When you have that condition, you automatically
7 know based on experience that you either drive caisson
8 pilings in to support buildings or you provide a
9 stable base on which to build the buildings.
10 What we attempted to do was export unusuable,
11 unbuildable material, because we did take actually
12 some more material that we deemed unsuitable beyond
13 the cement tailings off of the site.
14 Then the dredged materials that we figured were
15 suitable, moved, excavated it to the shoreline to the
16 uplands and then moved back yards and then the excess
17 of that was disposed of off site.
18 Q. In connection with the testimony of Mr. Dickman, he
19 presented something I think the upshot of which was he
20 didn't think there was anything removed out of the
21 parcel which he described as A, and you used this
22 diagram to show parcel A.
23 What is the fact, Lou, as to what excavation was
24 done, if any, on Exhibit A on that property in the
25 parcel A area?

1 A. Oh, extensive, extensive excavation was done. Again,
2 going back to what my original comment was, when we
3 first started dredging we went out to the extent --
4 Basically it was done with a drag line, and we went
5 out to the extent that we could reach with it.
6 The material was then transferred back as the drag
7 line worked. With dozers we pushed the material
8 further upland. This area that he was referring to
9 off of this map and what he claimed was present day, I
10 mean, I couldn't follow the little report as to what
11 they said there was no difference. It just doesn't
12 jibe with what actually happened.
13 I mean, we physically dredged -- The reports and
14 things were in excess of 160,000 yards of material out
15 of this basin. That was done by Tripp Construction.
16 It was originally anticipated when we submitted to
17 the Corps to be 80,000 yards of material, roughly
18 88,000 or something. But when we found out that the
19 area beyond the property line we could have had a nice
20 marina dredged to a minus seven at the toe of the base
21 of the bank, we would have gone out to the property
22 line or beyond and then hit a big sandbar. We had to
23 go out and dredge out to deep water, so we ended up
24 with over 160,000 yards of material.
25 Q. I think, although I am not clear from just exactly

1 what he was trying to say, that he was saying,
2 however, that he compared and did all the convolutions
3 to get it equal from parcel A the elevation as it
4 presently existed from the Group 4 map compared to the
5 elevation that he put forth and indicated there was no
6 excavation.
7 My question is, did you excavate tailings from
8 this portion of parcel A?
9 A. Yes.
10 Q. Then you had to fill it back in?
11 A. Right.
12 MR. DIJULIO: Excuse me. I just want to
13 clarify this.
14 I understand Mr. Inslee's issue, but I don't
15 believe he testified to that. He testified as to
16 elevations under the Group 4 survey and elevations
17 today. I think in answer to examination, a
18 cross-examination question, he indicated he didn't
19 know what went on between, so I don't think he
20 characterized whether activity had taken place or not.
21 If there was misunderstanding about that, I will
22 stipulate that that was not --
23 MR. INSLEE: He wasn't trying to say there
24 was nothing removed there?
25 MR. DIJULIO: I didn't hear his testimony to

1 say that. He was just comparing elevations.
2 MR. INSLEE: To be honest with you, it was
3 not clear to me. I am just trying to cover my bases.
4 Q. Lou, in connection with the filling then that was
5 occurring you say to elevation 25, in addition to the
6 property that was filled here, was there any of the
7 dredged material deposited on adjacent land or
8 anywhere else?
9 A. There is still another sheet that goes with this that
10 shows the back five acres.
11 Q. But I mean even off of the subject property.
12 A. Yes.
13 Q. Where did that go?
14 A. Well, initially what we tried to do when we realized
15 the quantities we were dealing with, we looked to the
16 north of our property to what is now the Sea King site
17 and there was this wonderful, large chunk of land
18 there that needed fill. We thought what a wonderful
19 thing, a short haul, move it there. They didn't want
20 to do it.
21 The people immediately to the west of us that had
22 the junkyard that shows up in photographs did. So we
23 filled the property to the west of us. We filled,
24 besides our own site, that property. We filled a
25 parcel of property that is on South 96th that is now

1 owned by Delta Marine.
2 There is a separate parcel between what is
3 characterized as parcel D on here. It actually is
4 back in this area. It was owned by some people. I am
5 not positive of the name anyway at the time. But we
6 filled that parcel approximately six or seven feet to
7 the grade that makes it level with Delta Marine, who
8 is substantially lower in elevation than we are
9 currently.
10 Q. In connection with the deposit that was made on the
11 subject site, the calculations in M and N to your
12 understanding do not include the material of deposit
13 on these other sites?
14 A. It does not. M and N do not reflect anything to do
15 with dredging. Those were specifically formulated to
16 bring this site into a buildable or developable
17 condition if it was either a warehouse site, one, or a
18 ship container site as the other. It involved the
19 importation of material to bring it to the condition,
20 including the ballast and everything that was required
21 by us, to make this a stable site to handle forklifts.
22 Q. To the extent that I can spot elevations on Exhibit 4
23 at 20, 20, and 19 and 21 and 17 and so and so, but
24 with regard to that raising it to 25, it would amount
25 to an average of about how much elevation increase in

1 the elevation property as a result of your fill
2 activity and free load?
3 A. Probably overall on an average of about four feet.
4 Q. I am not going to duplicate Mel Hester's testimony,
5 but what part of the site was preloaded?
6 A. The part that was preloaded was basically parcel B. I
7 mean, there was a mountain there literally.
8 Q. That's the one we saw in the picture?
9 A. Yes.
10 Q. Now, in connection with the property which you
11 described as having been preloaded, even after it was
12 preloaded with the material that you've discussed and
13 told us about, tell us in your own words what the
14 content or amount of rock ballast that had to also be
15 brought into the site.
16 A. Well, once we removed all of the material from there
17 and got it to a grade that allowed us to -- what we
18 believed to be able to build on and develop on, we
19 graveled the site. I mean, we put in the necessary
20 drainage that was required. When Itel became the
21 tenant, we graveled the site with six inches of
22 gravel, I believe, initially on this part.
23 Parcel B is separated, since you haven't seen the
24 site. Part of it is asphalted around this metal
25 building. Then the balance of the five acres,

1 approximately three and a half acres, is unpaved but
2 is graveled. It is basically that area where the
3 containers are stored and where the excessive heavy
4 six-inch rock and things were brought in as Mel
5 testified to, plus the smaller gravel, the fines, to
6 get in between. We were trying to get this thing to
7 chunk together with a heavy ballast to provide a base.
8 Because once we first put the gravel down -- As
9 Mel said, we got a bill for a broken axle on one of
10 those forklifts. You get a little frustrated when you
11 think you have designed all your drainage and
12 everything else to be suitable and you run a piece of
13 equipment on it and it won't even hold a forklift with
14 an empty container on it. So you start to get
15 instability problems, and that's why we ended up going
16 back through.
17 If anybody has ever remodeled, you know the
18 headache of going back through and redoing something
19 that you think was done right the first time. That's
20 what happened here. You start bringing in trucks and
21 you start getting this heavy rock in and start
22 compacting it in and this stuff just keeps
23 disappearing.
24 We ended up with a heavy enough base. That's one
25 of the factors that's shown in the cost analysis on M

1 and N that you would do today that wasn't available to
2 us then was this geotextile fabric. That may have
3 helped some, some of the stabilization. It's used in
4 swamp areas and things. Some of that technology was
5 not available then.
6 MR. KELLING: May I just kind of recapitulate
7 here?
8 THE WITNESS: Yes.
9 MR. KELLING: Parcel B, as an example then,
10 was about four feet on average lower than it is today
11 when we see the property?
12 THE WITNESS: In parts.
13 MR. KELLING: I am trying to get at -- What
14 our goal is here is to understand how the site was.
15 THE WITNESS: I am using that figure four
16 feet, because initially when you take out -- And I
17 used a foot for the concrete tailings, but I know we
18 removed more than a foot. I was trying to be
19 conservative in the figures, and I put these
20 reconstruction costs together to try to make something
21 seem a logical sequence to it and that these numbers
22 made some sense.
23 In actuality what we took out of there was well in
24 excess of the 7,000 yards. When you look at the
25 pictures in trying to be able to explain to a panel of

1 arbitrators and to the trust, I wanted to say this is
2 the way it looks in the picture. That's what we used
3 to calculate it from. I was trying to have something
4 that made sense.
5 MR. KELLING: All right.
6 Q. (By Mr. Inslee) Just for explanatory purposes,
7 Exhibit P is the same thing that's in Exhibit 9,
8 Mr. Bruce Allen's report. I want to make clear to the
9 arbiters what Exhibit P is supposed to represent so
10 that we don't get some misunderstanding while they are
11 in caucus. That's the same thing that's in
12 Mr. Allen's report.
13 A. Exhibit P came about about seven years ago. This was
14 done for purposes of the preceding arbitration to
15 determine what we had actually done on this site in
16 the way of site cost to prepare the site.
17 So with the dredging, the 160,542 cubic yards came
18 from the best analysis we could put together from the
19 quantities of Tripp Construction. I did some of this
20 stuff -- We had Flotation Technology, which is a
21 construction company who took over Dean Marshal's
22 business in floats. They also were an upland
23 contractor who did some utility work. So we had them
24 go back through and try to put all of these things
25 together in black and white on paper, if we were going

1 to build this marina back in '88, all of the things
2 that were involved and all the quantities that were
3 done. We had thought at that time that we would not
4 have another arbitration situation and go through this
5 again.
6 So we did all of this with the bank stabilization,
7 the precast panels. We physically went through and
8 calculated what had been done or took quantities off
9 of as-builts. That's what all of this relates to.
10 Q. Then the quantities that relate to what you really
11 did, Exhibit P, are I think your actual costs. We are
12 not offering it for the purpose of cost but to tie in
13 those costs related to this work.
14 A. These quantities are what I gave to Millegan Jaddi
15 when we first formulated these costs to redo the work.
16 Q. To redo '77 in '92?
17 A. Into '92.
18 MR. KELLING: This was prepared about seven
19 years ago?
20 THE WITNESS: Correct, in about '87, I would
21 guess. It should have been -- That would have been
22 probably for June of '88, I guess. Whatever the time
23 frame is it was supposed to have been done by June
24 preceding the renewal period. I am not sure of the
25 date exactly.

1 Q. Now, if this becomes relevant -- and I don't know if
2 it will -- what are items of activity that are not
3 described on Exhibit P, in other words, things like
4 developer's overhead, interim interests?
5 A. That's what's reflected on the front of the work shown
6 on M, N, whatever. Exhibit P shows quantities of the
7 hard work, actual physical materials that are there at
8 the site or what was done. But in addition to that
9 you have, for instance, under dredging, you have this
10 amount of dozer time that was stipulated. Well, you
11 have the dozer time at a certain time that pays for
12 the operator, but you still have that subcontractor
13 that's operating the dozer. You have to supervise
14 him. You have your overhead, your foreman there or
15 superintendent, your insurance, all of the things.
16 You have your overhead and profit over and above,
17 because these people basically act as subcontractors
18 to a general contractor. You have other general
19 conditions. You have the sales tax you have to pay to
20 support Olympia.
21 Q. So in terms of the second page of Exhibit P I see at
22 the bottom, permits, that's not on there and permits
23 is on M and N, correct?
24 A. Correct.
25 Q. Engineering is not on Exhibit P or the cost in

1 Mr. Bruce Allen's report, but it is in M and N?
2 A. That's correct.
3 Q. The same thing with surveying, geotech, and overhead
4 and profit?
5 A. Correct.
6 The reason we went to Millegan Jaddi was that they
7 were actively involved from the beginning. They
8 intimately knew this. So to have them rebuild this
9 marina was much more logical than going to a firm that
10 had no knowledge of what had transpired here.
11 I knew that the costs and the quantities that I
12 supplied and the costs that they would put together
13 would accurately reflect what you would do today. It
14 would make sense for somebody as a prudent developer
15 to go and have somebody with that background prepare
16 it. They would give a much more accurate figure than
17 you would from someone who had to start from ground
18 zero.
19 Q. There is some question as to the $15 on Exhibits M and
20 N for what was testified to be essentially two- to
21 six-inch rocks or whatever size it says. What is
22 impacting the cost of that fill material?
23 A. Well, as most people realize, if we had a site that
24 had fill of suitable material directly to the north of
25 us, I think our costs would be lower. But the closest

1 place I know of for adequate fill would be Black River
2 Quarry, which is down in Renton.
3 Q. Are these the actual Black River Quarry back in 1979,
4 1980, by which the quantities and trip tickets for the
5 material is all here?
6 A. No, it's not all there. That is just a small portion
7 of it. Mel had spoken of having trip tickets. We
8 brought in the package today to show you that we had
9 verification on how much rock was just brought in.
10 That's why I remember Black River Quarry, because I
11 see it on the trip ticket now. That's why I know that
12 was the closest place to get the material from.
13 With Jaddi's estimate of $15 for class A pit-run
14 material and suitable stabilizing rock that we needed
15 to do there, I think the estimate is probably
16 reasonable.
17 If I were doing it for myself without existing
18 conditions, obviously we would all try to buy it for
19 less, but you have to start at something that is
20 something that makes sense. You can't have
21 pie-in-the-sky things that aren't real.
22 Q. You have all the job cost ledgers and the North Coast
23 Construction records here?
24 A. Yes.
25 Q. So in terms of working with Ben in coming up with

1 quantities, did you utilize some of your historic
2 records to get access to quantities --
3 A. Yes.
4 Q. -- that you could pin down?
5 A. Yes.
6 I would answer one other question with regard to
7 Ben. In his testimony, as I was sitting there, he had
8 a short period of time, which is true. He basically
9 had about two weeks. When this came about to
10 formulate Exhibits M and N, the gentleman that did the
11 original work was not available. Ben, with his
12 expertise, was the one that was designated by Millegan
13 Jaddi to complete that. He did have all the
14 information. He had the background from the previous
15 report.
16 MR. KELLING: May I clarify one thing,
17 though?
18 All of this work was designed for the specific
19 project that you carried out. If you had leased this
20 land and had some other kind of project, would you
21 agree that costs and quantities would have been
22 something else quite different?
23 In other words, you had a specific project which
24 may or may not have been the highest and best use of
25 that property. I am not criticizing what you did. I

1 am just trying to ask if these kinds of preparations
2 of this ground would have been the same had you done
3 some other kind of project, say, a warehouse project.
4 THE WITNESS: Well, let me answer it in this
5 way. I thought about it many times why we did what we
6 did. In retrospect, if I had it to do today and
7 become a part of the group that put this together, if
8 I was doing this in 1992, I would not build a marina.
9 It obviously is not economically feasible and, from
10 other testimony, wouldn't be something we would
11 probably build, especially not the way we did it.
12 There are a lot of things that we were able to
13 accomplish back in the '70s to bring this site up and
14 move material off and culvert this drainage ditch that
15 we couldn't do today. So the economics of it are
16 totally different.
17 That's the reason why Exhibits M and N were
18 prepared was to say, all right, if we weren't going to
19 build a marina, what would we do when the two most
20 logical uses would be either for warehousing or
21 container.
22 To do the container facility, we wouldn't have the
23 dredge material so we would have to import material,
24 but we would still have to stabilize the ground that
25 was there that couldn't support anything. We would

1 still have to put the rock in to build warehouses. We
2 would have to put much more substantial footings.
3 In the costs that Mr. Anstey used of $35 a square
4 foot for warehousing, that's an excellent cost to use
5 when you are building on a stable piece of ground. On
6 this piece of ground until you get done with the
7 engineering and the spread footings or the pilings
8 that you would need to support that warehousing, it
9 could be substantially higher in cost than the $35.
10 So when you look at the piece of property, you can
11 go down and can see what was done with this metal
12 building. We built spread footings in there to take
13 the load of just a metal building and spread it out
14 over a much greater area for stability purposes.
15 MR. KELLING: Before you leased this ground
16 you did not have soils tests?
17 THE WITNESS: No. Like I said, in
18 retrospect, you would do things much differently.
19 Q. (By Mr. Inslee) But in 1992 we've got this
20 information?
21 A. Yes, we do.
22 Q. Right now, 1992, you have described what it would
23 cost, Ben and you. Do you agree with those numbers
24 except for the qualification that you just gave us?
25 A. I do.

1 MR. SAFER: Mr. Inslee, do you have a soils
2 report? I thought I just heard you say you had that
3 information now.
4 MR. INSLEE: We have some information about
5 the soils, but it's kind of as built. We are not
6 charging anything in those exhibits for hazardous
7 waste except the 555. So whether it is toxic or not
8 is irrelevant. It still had to be removed, so that's
9 a kite tail we don't have to chase hopefully.
10 Q. Lou, in connection with this property, with regard to
11 any issues that existed back there in '77, '78 with
12 regard to Indian environmental issues, did anything
13 come up then that surfaced as indicating whether this
14 was or wasn't a sensitive area from that standpoint?
15 A. It came up with the Indians. When we were first
16 starting work here, our workmen, Tripp's men and
17 whatever, were blocked. Getting into the site to
18 work, there were fishing nets. As it turned out, this
19 had been a place where the Indians would come in and
20 string their nets across the Duwamish and do all sorts
21 of things. There was even stories I had heard about
22 some physical retaliations. I didn't witness them,
23 but I heard about it. So there were some
24 confrontations that went on here with the Indians at
25 that time.

1 Q. Did they stretch their nets out to preclude entry,
2 access to the dredgers?
3 A. Yes, they did.
4 Q. What happened if you tried to touch their nets?
5 A. Well, like I say there were some reports of physical
6 retaliation.
7 Q. With regard to this property, was this also the method
8 in its raw land state in '74 by which the Indians
9 gained access to that river site for fishing?
10 A. Yes.
11 Q. So they objected to you guys building on it?
12 A. Yes, they did, very much so.
13 Q. I am not trying to show our cost for the very reason
14 that we have all talked about. Our costs, I don't
15 think, are relevant except that they document volumes.
16 To the extent, Lou, that there was prior
17 negotiations and prior arbitrations both in '82 and
18 '88, even though neither of those are binding as
19 Mr. DiJulio and I agree -- this board can make their
20 own independent decision -- but from a strict factual
21 standpoint, what were the submerged ground
22 calculations that were admitted to by the parties in
23 '82 and '88?
24 A. In '88 it was roughly 77,000 square feet of submerged
25 area. In 1982 it was 104,000 square feet.

1 Q. Are you able to determine anything that would
2 determine why there was such a vast difference between
3 those two proceedings as to what was submerged or
4 usable?
5 A. Well, the 104,000 square feet was determined by
6 Jennings Hanseth, who was the MAI appraiser for the
7 bank and trust department at that time.
8 My recollection is that he included the amount of
9 area in the stream as submerged and approached it from
10 that standpoint. In 1988 it somehow went back to
11 77,000. I can't tell you why we missed that 30,000
12 square feet.
13 Q. I am not going to introduce them as exhibits, but you
14 have the notes of both sessions, the '82 arbitration
15 or negotiation and the '88 arbitration?
16 A. Yes.
17 Q. That's where those numbers appear also?
18 A. That's correct.
19 MR. INSLEE: Unless you want those. I
20 presume you don't.
21 Q. To the extent that submerged lands are relevant here,
22 would it be essentially under at least the position as
23 taken by Duwamish Marina in this proceeding that the
24 amount of submerged land is an insignificant issue at
25 this point quantitatively in view of the concept by

1 which there is only five acres of developable property
2 anyway? So we didn't pursue that and measure it, did
3 we?
4 A. No, we didn't.
5 Q. It's capable, I guess.
6 A. Not with all the restrictions and all the setbacks
7 that are now imposed.
8 I would like to add for whatever information it's
9 worth to you gentlemen, that in addition to the
10 Indians, there were both children and adults that used
11 to come over here during the course of construction
12 and prior to our starting that would fish this
13 supposed drainage ditch and pull nice cutthroat out of
14 there.
15 Q. The question came up earlier and I think Mr. Allen or
16 somebody asked about a yellow, pink line depicting the
17 stream. Does Exhibit 4 depict the stream as it
18 actually exists on the survey?
19 A. It does. I can also add that I believe the question
20 related here on -- well, it's now shown as O, but it's
21 also the same exhibit in several -- about the stream
22 being this mark well in from the property line. What
23 you are seeing hashed here with the dashed lines on
24 this alta survey is the water main.
25 The stream actually does -- And I was incorrect in

1 what I said. The stream actually does flow between
2 both properties in some points as it shows on this,
3 and it shows on the extension. The majority of it is
4 on our property, but on the extension piece part of
5 that does, yes.
6 But what you were probably looking at was this,
7 the easements for the water main and the water main
8 itself. It's built above the bank. That's where this
9 shows as the water main as well from its points of
10 inception on 96th. So that's where those dashed lines
11 may look like the stream, but it's not.
12 (Deposition at short break.)
13 EXAMINATION
14 BY MR. DIJULIO:
15 Q. Lou, did you have a chance to look at Rick Dickman's
16 charts either prior to or after his testimony?
17 A. I have seen this report, but I have not looked at it
18 in any detail.
19 Q. Let me get a copy of Exhibit 10. You are generally
20 familiar with the section marks on that where they
21 were across parcel A?
22 A. Yes.
23 Q. In the exhibit of Mr. Dickman's report, do you have
24 any dispute with respect to where he showed the grades
25 to be based upon the Group 4 survey?

1 A. I mean, I can't --
2 Q. Based upon your experience with the site?
3 A. I can't verify what he is saying on this report. I
4 haven't looked at his report in correlation with what
5 was the actual Group 4, so I can't testify that I
6 agree or do not agree with what's there because I
7 haven't looked at it.
8 Q. But if you look at the site -- For example, I am
9 pointing to Exhibit 4, beginning immediately to the
10 north of the number 629 on the west parcel boundary,
11 the elevation right at that point is 21.8; is that
12 correct?
13 A. That's correct.
14 Q. The elevation immediately to the east of that is 20.7?
15 A. Yes.
16 Q. And 20.4 immediately to the east of that?
17 A. That's correct.
18 Q. So a gradual grade change is shown on the Group 4
19 survey at that point?
20 A. Correct.
21 Q. And to the further north of the site, a constant
22 series of numbers beginning with, again, 22.9?
23 A. Yes. It looks like nine. I can't tell that for sure.
24 Q. 22-point-something?
25 A. Yes.

1 Q. 21.7?
2 A. Yes.
3 Q. Going down to 20.4?
4 A. Yes.
5 Q. So generally, you have no reason to question
6 Mr. Dickman's evaluation of the levels shown on the
7 mapping or charting of the Group 4 elevations?
8 A. As I say, I haven't really spent the time to look at
9 the difference. I would assume that what you are
10 telling me is what's on there.
11 Q. If you assume, Mr. Szmodis, that you did not develop
12 within the setback of the Duwamish River with respect
13 to any development of the parcel, you would not have
14 to do grade or fill in that setback area; am I correct
15 in my assumption?
16 A. I don't understand your question. Maybe you could
17 rephrase it.
18 Q. Assuming setbacks, and we have had different testimony
19 as to what those setbacks may be, anywhere from 20 to
20 115 feet depending on the witness.
21 Assuming that setback, whatever that might be, the
22 grade and fill activity that has been discussed would
23 not have to take place in that setback area; is that
24 correct?
25 A. Not necessarily.

1 Q. Assume further for purposes of this hypothetical
2 question that there would be no bank stabilization or
3 bulkhead work down along the Duwamish River and that
4 there was to be no development within that setback
5 area. Would there be any need for grade or fill in
6 that area?
7 A. Possibly.
8 Q. Under what conditions would you believe such activity
9 to be necessary in such a setback area?
10 A. Well, I think we are dealing somewhat with '74
11 conditions as I understand it, your question. If
12 that's the case and you are choosing to not deal with
13 the area within the setback, then in essence I am
14 assuming you would prefer to leave the cement tailings
15 that were there in place and only develop the part
16 within the yellow mark on the exhibit.
17 I understand it's a hypothetical question. But in
18 reality, even within the setback, you landscape and
19 you grade and you allow for some drainage and you do
20 other things because you are trying to make your
21 developable piece of property absolutely the best
22 because you want it to be better than the others that
23 are on the market for rent. So, yes, my contention is
24 you do do something with it.
25 MR. DIJULIO: I have nothing further.

1 FURTHER EXAMINATION

2 BY MR. INSLEE:

3 Q. Next door, Lou, I think that's to this side over here,
4 they are back 200 feet?

5 A. They are back 200 feet.

6 Q. Is that property filled?

7 A. That property has been filled, but it also contains a
8 swale for storm water retention in a portion of it.

9 MR. KELLING: Clarify that for me, please.
10 Next door being in which direction?

11 THE WITNESS: North, Sea King property. All
12 of the area 200 feet back from that dock that's built.

13 Q. Give me the proper name.

14 A. We are talking about the Sea King spot.

15 Q. Well, I am talking about the 200-foot setback for the
16 property next door. I presume that would be --

17 A. That would be to the north.

18 Q. They have required fill next door.

19 Now, go back to what would be Duwamish Manor. No
20 shoreline?

21 A. Right.

22 Q. No 200-foot setback issue?

23 A. Right.

24 Q. Duwamish Manor, is that filled?

25 A. Yes, it is.

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1 Q. How much?
2 A. I would say an average of probably two to three feet
3 continuing quite a ways back.
4 MR. INSLEE: Thank you.
5 MR. KELLING: Mr. Allen has a question or
6 two.
7 MR. ALLEN: I have a couple of questions.
8 EXAMINATION
9 BY MR. ALLEN:
10 Q. In excavating the 160,000 yards when you did the
11 marina, how much of that was retained on site in your
12 estimate?
13 A. I would say probably 40 -- This is a guesstimate.
14 Somewhere around 40- to 50,000 yards.
15 Q. Could that amount of that fill also be used for
16 surcharge and compaction?
17 A. The additional amount would have been required in
18 addition to that.
19 Q. So if you did it that way, if you could do it that way
20 today, you would take enough out to do your
21 surcharging and --
22 A. That's what we did do. That's why that big mountain
23 was there. Even after we removed all of that, we
24 still had to come in with all that heavy six-inch
25 ballast and everything to stabilize the ground. Even

1 after we took out all of the preloading and all of
2 what we thought was substandard material below, before
3 we even filled it, we still had -- Because of the
4 water table and all of the things that went on, it's
5 just like a sponge in there. It was not good.
6 Q. How many yards were you able to dispose of on these
7 adjoining three properties?
8 A. This property down here was just a little over an
9 acre, so my best guess there was probably about 7- or
10 8,000 yards.
11 MR. KELLING: That's on the Delta Marine?
12 A. That's on that parcel that I mentioned that Delta
13 Marine now owns. Duwamish Manor, I can't give you a
14 figure for that, but I do know that we hauled 50,000
15 yards to a site in Renton right at East Valley Highway
16 and 405. There is a couple of lightbulb cubes,
17 flashcubes where those are.
18 Of course, we had to pay to haul it there, but we
19 didn't have sites for these, for all of this material.
20 I don't remember the exact amount, but it was a
21 significant amount of money. They were nice enough to
22 give us a place to dump it.
23 Q. You talked about adding gravel. You got your first
24 tenant in there, and they broke an axle.
25 When you added this gravel, what year would that

1 be based on when you did the construction, leased the
2 property?
3 A. When Itel came in there was late '70s or '80s,
4 somewhere right in there. I don't remember the exact
5 dates. I can't -- Within a year or two of that.
6 Q. This access road that we keep showing as an easement,
7 the only reason it's shown as an easement is it
8 accesses the marina?
9 A. No. It was an easement that was created by Seattle
10 City Light, required by Seattle City Light, which the
11 trust was required to provide the easement and sign
12 off on it. City Light said, if you want power to this
13 property, you have to give us an easement. So we
14 created that easement, and there is a legal document
15 to cover that.
16 MR. KELLING: Does that document say that it
17 is for just a power line or does it say it's for
18 automobile or ingress, egress?
19 THE WITNESS: I am not sure now. This was
20 done back in the '70s, so I don't remember the exact
21 content of it. It's a matter of record, so it's
22 available.
23 MR. KELLING: But it is a roadway into the
24 property?
25 THE WITNESS: We do utilize it as an ingress

1 and egress, yes.
2 MR. ALLEN: Can we get a copy of that?
3 THE WITNESS: We have it somewhere.
4 MR. INSLEE: The last title report would
5 probably have it, if I could get one.
6 THE WITNESS: I would have a copy of it
7 somewhere. You would have it, too, I am sure. Yours
8 might be easier to find.
9 MR. INSLEE: I would have it in our office
10 files, I'll bet.
11 MR. ALLEN: You may have the title report,
12 but you may not have the easement.
13 MR. INSLEE: We probably reviewed it.
14 MR. ALLEN: Maybe you could send that to
15 Verne.
16 MR. INSLEE: I will send a copy to everybody
17 that I know about.
18 MR. ALLEN: You can probably take care of the
19 arbitrators by just sending one to Verne.
20 THE WITNESS: There are other easements that
21 are required, too, with the water district and
22 whatever. Do you want copies of those?
23 MR. KELLING: I think so, if you can find
24 them.
25 THE WITNESS: I will look.

1 Q. (By Mr. Allen) When I did my original analysis you
2 furnished me with the original costs, which is part of
3 my report, which is stipulated an exhibit in this
4 process. You have seen them, I believe?
5 A. Yes.
6 Q. As near as you know, this is the actual costs you
7 spent on the property?
8 A. That is -- Well, there were additional costs because
9 we had -- Does that include the -- I have to refresh
10 my memory on it. It includes -- This was done again
11 for the '88 arbitration, but it does include the
12 off-site sewer and on-site sewer, so I wasn't sure.
13 Yes, that was part of it.
14 Some of these costs that are shown as original or
15 actual costs were from the time it was done. The
16 sewer, none of this was reflected for present values
17 or anything at the time. This was just given actual
18 costs at the time it was expended.
19 MR. KELLING: Do you recall what the distance
20 was to the sewer in 1974?
21 THE WITNESS: Yes.
22 MR. KELLING: Can you tell us, please?
23 THE WITNESS: Not in exact feet, no.
24 MR. KELLING: No, approximately.
25 THE WITNESS: On the other side of West

1 Marginal Way, the west side.
2 MR. KELLING: Was it a straight shot west?
3 THE WITNESS: That I can't tell you. I can't
4 tell you the exact location, but I went to Rainier
5 Vista Sewer District. It was in cooperation with
6 Rainier Vista was the reason that in the cost
7 estimates and everything you see two 1,000-gallon
8 holding tanks that are shown as part of the -- that
9 became the sewage lift station. At the time of
10 construction we put in these two 1,000-gallon holding
11 tanks, but the only way we would get permission to do
12 that was to have an agreement, a written agreement
13 with the sewer district to have a pumping contract.
14 So we had to have a signed pumping contract where an
15 operator would come in. I can't remember the exact
16 amount. It was like four cents, three or four cents a
17 gallon. We did that for many years and pumped and
18 pumped.
19 We discovered that groundwater sometimes would get
20 in from the tidal change. We were pumping groundwater
21 or water from the Duwamish besides that three cents a
22 gallon. It was a lot of fun.
23 But anyway, then we put in a force main at the
24 time of construction. When sewer was eventually
25 extended down South 96th we paid our pro rata share

1 and connected, and that's why there is a tight line in
2 there with a lift station on site.
3 MR. SAFER: That sewer line presently is in
4 south --
5 THE WITNESS: Yes, it is. It was extended
6 down by Delta Marine to accommodate their buildings on
7 the waterfront. It was done by Merlino Construction.
8 They just told us here is how much you have to pay,
9 supposedly our pro rata share.
10 MR. SAFER: Do you remember the year that
11 that occurred?
12 THE WITNESS: I believe about 1978 or '79,
13 something like that to the best of my recollection.
14 (Off-the-record discussion.)
15 MR. KELLING: As far as you know, that City
16 Light easement does not offer any benefits to any
17 adjacent properties?
18 THE WITNESS: No. In fact, we were asked at
19 one time by the developers to the north to give them
20 rights to use that. We did not do it. I told them
21 they could certainly contact the trust at the bank,
22 but we did not have authorization to grant it to
23 anyone and this is what was required of us, so we
24 abided by those regulations.
25 MR. KELLING: Thank you.

1 MR. INSLEE: I think you are going to find
2 that it is a requirement also, for any development on
3 the shoreline property, you have to have access to the
4 shoreline area.
5 MR. KELLING: Is that --
6 MR. INSLEE: Trails or whatever.
7 MR. KELLING: Is that testimony?
8 MR. INSLEE: No. I think you will find that.
9 I said, when you find the answer to that, you will
10 find that.
11 MR. KELLING: We didn't hear any testimony
12 like that pertaining to 1992.
13 MR. ALLEN: On your costs, your M and N
14 costs, you do not include the same sewer costs as you
15 do for the off-site costs?
16 THE WITNESS: No. Because we developed those
17 costs based on 1992. At that time the sewer already
18 existed essentially to the site, so therefore we would
19 be able to hook up and wouldn't necessarily have that
20 cost. We may or may not. Someone else may have had
21 the property five years before and had paid that and I
22 wouldn't know about it. So I couldn't find a reason
23 to include it in there. I just felt justified in
24 saying that the sewer was there in '92. We would only
25 take what we would have to do costwise to hook up to

1 that sewer.

2 MR. ALLEN: So then the water system, the 750

3 feet, I think it was explained to me is the line

4 that's coming into the property?

5 THE WITNESS: That's correct. That water

6 existed in South 96th at the time when we started the

7 development.

8 MR. KELLING: Allen, do you have any

9 questions?

10 EXAMINATION

11 BY MR. SAFER:

12 Q. When you started loading the upland site with ballast,

13 how did you know when you had enough?

14 A. When the stuff disappeared. When you get -- When you

15 use heavy ballast rock, what you are trying to in

16 effect do is get it like real close so it clings

17 together and provides a stable base.

18 Very often if you see construction sites when they

19 will put in a road with big heavy gravel in to get

20 trucks in and out on, the first couple of loads just

21 settle into the mud and things, especially if it's a

22 bad soil condition. That's why you use the heavier

23 rock.

24 If you want a smoother surface like we did, then

25 you go in and you put the fines and the smaller gravel

1 on top. Otherwise, you have that rough, jagged rocks
2 and stuff trying to drive on. So you basically do it
3 by the loading and with the equipment that you are
4 running over it to make sure you have it stabilized.
5 Q. Have you had any settlement areas that you have had to
6 backfill and level out since this development?
7 A. It's an ongoing process that you go back in. The
8 tenant does it at this point. They go back in and
9 they essentially -- I don't know how often. I can't
10 answer that, but I know they bring in gravel and
11 regrade and whatever. When you are having all of
12 these vehicles run on it, it does move gravel around.
13 Q. Have you had the same tenant for a number of years?
14 A. Yes. Well, they have changed ownership, but it is
15 still the same name of the company.
16 Q. How long have you had this tenant in place?
17 A. Back since the late '70s, early '80s, whatever it's
18 been. I don't know.
19 MR. KELLING: What does Itel mean? What does
20 it stand for?
21 THE WITNESS: I have no idea. It was a Dutch
22 company, I know that, at the time we signed the lease
23 agreement with them.
24 MR. KELLING: That's all right. Thank you.
25 Q. (By Mr. Safer) Is your lease agreement typically a

1 five-year term or a ten-year term?
2 A. It's --
3 MR. INSLEE: I don't know if the lease is too
4 relevant to this proceeding.
5 A. I honestly can't answer that. I know there are
6 renewable options in there, but I am not sure of what
7 the exact terms are.
8 MR. KELLING: Well, we don't want to hear
9 them.
10 MR. SAFER: We don't want to know what the
11 rental is.
12 MR. INSLEE: Well, the term would be
13 relevant, too, I suppose.
14 When you asked the question about, is there
15 subsidence, we are still getting bills in '93.
16 What is that, Lou?
17 THE WITNESS: Well, this had to deal with an
18 area that was on parcel --
19 MR. INSLEE: Well, just generally. Is it
20 because axles are breaking and they want to save the
21 15 grand?
22 THE WITNESS: Yes. This dealt with property
23 other than parcel B where it's only gravel. This was
24 dealing with the asphalt area where they are having
25 still considerable sloughage. We went through and

1 prepped all of this to handle a 30-ton travel lift.
2 Across the drainage ditch we put in a structural
3 concrete slab, almost like you would build a bridge to
4 cross that seven-foot culvert so that heavy equipment
5 going across it would not impact and cause ruts and
6 everything else. If you go down there, what you will
7 see when you do, that pad is now starting to break up.
8 I mean, you will see ruts down here in the asphalt.
9 It's the subsurface soil that still gets loaded by the
10 tidal changes, and the water that goes in there still
11 creates soil conditions.
12 When you stand across the stream on Delta
13 property, you can look and you will see where we are
14 three, four feet higher. No reference was made about
15 grade changes and whatever. But if I point to this
16 exhibit again where it's 20.1 on this side of the
17 stream and actually supposedly a foot lower on the
18 north side of the stream, when you get down there, you
19 are going to see that there is several feet difference
20 now where we filled. So, I mean, I look at the report
21 that Mr. DiJulio was talking about and that's why I
22 couldn't make heads or tails of it when it said we
23 didn't do much, because I know what we did.
24 MR. KELLING: Did you observe the
25 construction of any of the buildings while it was

1 taking place on Delta Marine?
2 THE WITNESS: Partially I did, yes.
3 MR. KELLING: Do you recall what measures
4 they took to support their buildings?
5 THE WITNESS: I don't. I don't know to what
6 extent -- They didn't really look at the design.
7 MR. INSLEE: You can hand that back to me.
8 There is just some bills attached to it for
9 subsidence, aren't there, from the tenant?
10 THE WITNESS: That was asphalting. That
11 related, as I say, to parcel C and D.
12 MR. KELLING: I don't have any questions yet.
13 THE WITNESS: Am I all done?
14 MR. KELLING: As far as we are concerned you
15 are.
16 MR. DIJULIO: I have nothing further. Thank
17 you.
18 Mel, do you want to resume over there?
19 While Mr. Hester is moving into position, I do
20 have and ask the board to take notice of Chapter 2154
21 of the King County code for whatever reason not deemed
22 by Ms. McCutcheon. I think it is appropriate for your
23 reading pleasure. My records show that that would be
24 No. 19.
25 MR. KELLING: 19 is the FEMA map.

1 MR. DIJULIO. 20. I will without comment,
2 other than to point it out, call your attention to
3 960-15.
4 MR. INSLEE: What page is that on?
5 MR. DIJULIO: Page 960-15, which is Section
6 21.54.320 (f)(3). There it reads, "Class III streams
7 and buffers may be altered for use as
8 retention-detention facilities provided that the
9 project will have no lasting adverse impacts on any
10 stream and all requirements of the Surface Water
11 Design Manual are met."
12 Perhaps that is why you heard inconsistent
13 testimony with respect to that issue.
14 MR. INSLEE: Well, you are pointing out --
15 Could I make two other marks on this for their
16 contention to review?
17 MR. DIJULIO: Sure.
18 MR. INSLEE: Now, gentlemen, if you go to the
19 preceding page dash 14 and put a yellow line through
20 the statement, A, "King County may grant exceptions
21 from stream requirements of this chapter pursuant to
22 King County 050 and 060."
23 Do you see that? It's under 320, the very first
24 sentence. The preceding page is King County 050, 060.
25 If you look at A and it's 050 and 060, would you

1 now please put a yellow mark on page number 957.
2 MR. DIJULIO: I think counsel can call them
3 out. Whether you choose to put a yellow mark on them
4 or not --
5 MR. INSLEE: Yes, you can call them out. 050
6 and 060, that's where 050 and 060 appear.
7 MR. KELLING: What page are we on?
8 MR. INSLEE: Page 957.
9 That merely calls your attention, because 050 says
10 if it's a public utility, the agency or utility may
11 apply for an exception. That's at 050. 060 is the
12 statement that says if there is no reasonable use.
13 That's the reasonable use section. That's 050 and
14 060, so you can probably get buffer relief if you are,
15 A, a public agency or, B, if you have no other use of
16 the property under 050 and 060. Thank you.
17 MR. KELLING: He kind of took over your
18 exhibit.
19 MR. INSLEE: Well, there was no testimony on
20 it --
21 MR. DIJULIO: There was testimony on it, and
22 the panel heard inconsistent testimony on it.
23 I was giving them the ordinance for its
24 consideration so that you would know the basis for the
25 testimony. I am not going to argue or try to impugn

1 either Ms. McCutcheon's or the engineer's testimony.
2 I am giving you the law.
3 MR. KELLING: Thank you.
4 MR. INSLEE: Ms. McCutcheon didn't testify
5 that we were a public agency or there was zero use of
6 the property, so she wouldn't be pertaining to that
7 section at all.
8 MR. KELLING: Please go ahead.
9 MR. DIJULIO: Thank you.
10 MEL HESTER, previously sworn on oath, testified:
11 EXAMINATION
12 BY MR. DIJULIO:
13 Q. Well, since it's in front of you, Mr. Hester, I am
14 calling your attention to Exhibit 4. That is the
15 Group 4 survey that the marina commissioned in
16 approximately 1976; is that correct?
17 A. It was a survey that we commissioned. As to the date,
18 it says '76. I can't verify that. We did commission
19 it, and it says '76.
20 Q. Now, if you look at the Exhibit 4 and particularly,
21 oh, I guess areas where you stood, there are elevation
22 differences along the -- Strike that.
23 There is a mark about the center of lot A that is
24 identified as 12.5 contour mean higher high water; is
25 that correct?

1 A. Contour mean higher high water, yes, that's what it
2 says.
3 Q. Along those points that are various elevation marks;
4 is that correct?
5 A. Correct.
6 Q. Nearly adjacent to those marks along the exhibit there
7 is another elevation mark to the west; is that
8 correct?
9 A. Correct.
10 Q. Would you agree that generally that change in
11 elevation would mark the bank as it existed in 1974?
12 A. Only if I have the opportunity to preface it with one
13 statement. You will note that this is not the only
14 survey company that we hired to survey the property.
15 The reason for that was that Group 4 had sent a
16 fairly -- Group 4 never, ever was able to close the
17 property, ever. We had to close the property. They
18 told us the problem they had was they had a guy in a
19 boat out here trying to do elevations. So it was our
20 opinion that even though this survey was probably
21 close, we wouldn't bet on it, so we in turn later
22 hired Chastaine to do another survey. They were
23 unable to close it. So to be perfectly honest, I
24 question the validity of this, as I did in 1976.
25 There are numbers. Whether they are correct, I have

1 no great faith in them.
2 Q. Chastaine didn't shoot elevations. They shot the
3 lines?
4 A. Correct.
5 What I am saying is when a surveyor cannot close
6 the property, that means he doesn't know where he is
7 when he is taking shots.
8 Q. Not surprising.
9 Now, Mr. Hester, you would agree with me, I
10 assume, that the lease between the trust and the
11 Duwamish Marina group does not require you to build a
12 marina; is that correct?
13 A. That is correct.
14 Q. In fact, in the change from the 1974 lease to the 1977
15 lease document, you specifically requested relief from
16 that obligation, did you not?
17 A. I don't -- I don't remember requesting that.
18 MR. DIJULIO: First, for purposes of the
19 record, I would offer 21, which is that October 11th,
20 1974, lease.
21 Q. I will hand you a copy for your reference, Mr. Hester.
22 You were not a party to that lease; is that
23 correct?
24 A. No.
25 Q. But you recognize this as the 1974 lease?

1 A. Yes, I guess.
2 MR. INSLEE: Look at the notarization dates,
3 would you please? It's '77.
4 MR. DIJULIO: I think you will find that
5 there was an addendum that you are looking at that has
6 the notarization dates. The actual notarization dates
7 are in October of '74.
8 MR. INSLEE: Not my copy. The very signature
9 page says April 12th, 1977, on mine.
10 MR. DIJULIO: That's an addendum. Keep going
11 back.
12 MR. INSLEE: Oh, I'm sorry. You are right.
13 Excuse me, Counsel.
14 MR. DIJULIO: Didn't you negotiate this
15 lease?
16 MR. INSLEE: Not the '74 one.
17 Q. (By Mr. DiJulio) Now, calling your attention
18 particularly in that lease -- I believe it is Section
19 8 on page seven.
20 A. Correct.
21 Q. That was a somewhat restrictive use provision, is that
22 correct, with respect to marine orientation?
23 A. Yes.
24 MR. DIJULIO: Now, to help refresh your
25 memory with respect to the change in use, I am going

1 to offer as 22 --
2 Q. Were you involved with this project by November 14th
3 of 1977, Mr. Hester?
4 A. I know the date from this document. Obviously I was
5 -- This is dated September 14th. I am included, so I
6 am sure I was by that time, yes. It was a long time
7 ago.
8 Q. It was indeed.
9 At that time, Mr. Inslee was representing you in
10 seeking modifications to a lease; is that correct?
11 A. That's correct.
12 Q. Let me call your attention, just to expedite this,
13 to -- Because they are not numbered, you have to go
14 back to Lease Paragraph to be Amended, Paragraph
15 Eight, Use of Premises. Would you just kind of flip
16 back until you find that? You will find it the eighth
17 page back on that attachment.
18 A. All right. I have found it.
19 Q. It's entitled "Lease Paragraph to be Amended,
20 Paragraph Eight, Use of Premises, Page Seven of the
21 Original Lease"; is that correct?
22 A. Once again, please.
23 Q. That page is headed "Lease Paragraph To Be Amended,
24 Paragraph Eight, Use of Premises"?
25 A. Correct.

1 Q. "Page Seven of Original Lease"?
2 A. No.
3 Q. It does not read that?
4 A. I'm sorry. You will have to point it out to me.
5 Yes, "Paragraph Eight, Use of Premises, Page Seven
6 of Original Lease."
7 Q. In that the lessees proposed a modification as shown
8 at the bottom of the page to provide that the premises
9 may be used and occupied for any lawful purpose not
10 inconsistent with the zoning classification of the
11 premises; is that correct?
12 A. Could you ask -- I was reading this. Could you ask
13 your question one more time, please?
14 Q. In that proposal with respect to paragraph eight, use
15 of premises, the lessee proposed that -- And I am
16 reading the first sentence of the proposed new
17 paragraph. "The premises may be used and occupied for
18 any lawful purpose not inconsistent with the zoning
19 classification." Is that correct?
20 A. Yes. The reason -- Do you want to have the reason for
21 that?
22 Q. Yes, please.
23 Well, does the document speak for itself as to the
24 reason?
25 A. No, no. It really doesn't. The document -- What we

1 found was that what we had originally estimated in
2 terms of what we would end up spending on this
3 property, what we had available personally and what we
4 would have to borrow through banks, there was a
5 substantial discrepancy, so we were going to have to
6 go to banks for substantial loans.
7 On our first contact with Shoreline Savings, which
8 was our bank at that time, they indicated they
9 wouldn't consider loaning us money for the development
10 of this property unless the lease was of a longer
11 term. It was not the use of the property. They in
12 turn couldn't care less, but it was the term. So this
13 paragraph was revised for the purpose of having a
14 lease that was bankable that we could borrow against.
15 Q. Well, I don't intend to -- That's one of the reasons?
16 A. That was the main purpose of this. In turn, we didn't
17 want to restrict our usage.
18 Q. The document does read, "To contract for use for the
19 next 47 years in having it limited to a staging area
20 for cargo vans, factory-built homes, mobile homes or
21 camper trailers, new cars or trucks, seems to be an
22 undue limitation and too restrictive"?
23 A. You are absolutely correct that that was also. We did
24 not want such a restrictiveness, correct. I don't
25 disagree.

1 Q. In that same document calling your attention to page
2 -- second page of the attachment beginning from the
3 beginning, looking at the letter, Exhibit 22, after
4 the letter the second draft language change, "Lease
5 paragraph to be amended, paragraph three, page two,
6 eliminate 5 (a) and 5 (b) by including them in
7 paragraph three." Are you with me on that?
8 A. No, I don't know which one.
9 Q. Again, the attachment to the letter.
10 At that point you proposed the rental formula
11 substantially in the terms that we are debating today?
12 A. Is your question that I or the partnership proposed
13 the $300 rather than the trust proposing $300? I
14 don't know what the question is.
15 Q. The formula for calculating every five years the rent
16 was proposed by the lessee?
17 A. No. That's not correct.
18 Q. You believe that that was proposed by the lessor?
19 A. Oh, it was. No question about it.
20 Q. Do you dispute that this document was prepared by your
21 counsel?
22 MR. INSLEE: Well, if you don't dispute it
23 was written to Mr. Shefelman and he agreed with it?
24 MR. DIJULIO: Obviously it's in the lease. I
25 can't contest that.

1 A. I can't tell you which attorney actually had their
2 secretary draw the document. I do know that what
3 happened in the meetings down at the Farmer's Market,
4 upstairs, we suggested little to nothing.
5 Mr. Shefelman, who was quite a bright man, didn't hear
6 very well. It was his lease.
7 Q. At that stage of his career that's probably correct.
8 A. His wheels ran just fine.
9 Q. They did very well.
10 Now, Mr. Hester, you consulted with counsel
11 concerning the preparation of Exhibit A, which was the
12 description of the leased premises that has been
13 admitted in this document as both part of Exhibit 3
14 and also as an introduction to the photo log at
15 Exhibit 2 and the photo log in Exhibit 3?
16 A. Your question was regarding this?
17 Q. You participated with Mr. Inslee in the preparation of
18 that exhibit, did you not?
19 A. I don't remember with Mr. Inslee. I participated in
20 creating this, yes.
21 Q. I have handed to you Exhibit 23, recognizing again the
22 passage of time --
23 A. I don't have a copy of it.
24 Q. -- do you have a memory of -- I'm sorry.
25 Should we go off the record while he has a chance

1 to read that?
2 (Off the record.)
3 Q. Calling your attention to Exhibit A attached to that
4 correspondence, and particularly the second page of
5 that exhibit, there is a second full paragraph in that
6 that reads, "It is acknowledged by both parties that
7 fill must be brought in to bring the property up to
8 grade, compacted in order to make it usable"; is that
9 correct?
10 A. Correct.
11 Q. In the final Exhibit A to the 1977 lease, that
12 paragraph is not found in the exhibit, is it?
13 MR. INSLEE: We will stipulate if you compare
14 Exhibit 3 to Exhibit A there is a lot missing out of
15 Exhibit 3 that was originally put forth in Exhibit A.
16 A. You are going to have to lead me a minute here so that
17 I understand your question. You are going to have to
18 show me the two pieces of paper so that I answer
19 correctly, because I am a little bit confused.
20 Are you asking me if paragraph two on this page is
21 not on this page?
22 Q. Yes. Paragraph two of proposed Exhibit A is not in
23 the final Exhibit A?
24 A. I am going to have to read it more carefully.
25 The paragraph that you point out on this

1 particular addendum is not on this sheet.
2 Q. Thank you.
3 Mr. Hester, you have been involved in numerous
4 other marina developments, have you not?
5 A. Several.
6 Q. Did those other marinas include a leased interest by
7 yourself or were they ownership interests, do you
8 remember?
9 A. The marina on south Lake Union I had an ownership
10 interest in. The marina in Oregon, Williamette, I had
11 a consulting relationship. I basically designed it
12 and did the permit work.
13 Q. Have you participated as a lessee in property or
14 projects other than the Duwamish Marina project?
15 A. As a lessee?
16 Q. Yes.
17 A. No.
18 Q. So in terms of your familiarity with commercial
19 leases, this is the only commercial lease as lessee
20 that you are familiar with?
21 A. Let me ask you this. Commercial leases is very broad.
22 In other words, i.e., south Lake Union, those were all
23 commercial leases. In other words, Benjamin's was a
24 commercial lease. The marina was a commercial lease.
25 Those are commercial leases.

1 Q. In those cases you participated as lessor; is that
2 correct?
3 A. Correct, as lessee, correct.
4 Q. As lessor you have participated in a number of
5 commercial leases, isn't that correct?
6 A. I have in some, yes.
7 Q. Would it be fair to say that as a general matter in
8 the leases that you participate in as lessor that you
9 have required your lessees to acquire all necessary
10 permits and comply with all applicable laws?
11 A. No. I never have.
12 Q. You don't understand that to be a regular term in a
13 lease, that is, that the lessee comply with all laws
14 and acquire all necessary permits?
15 A. Not when it comes to shoreline. I mean, I have never
16 participated or been in a situation where you would
17 ask someone to lease a marina and as part of their
18 responsibilities they have to go get a shoreline
19 permit to build it, if that's what you are referring
20 to. Maybe I am confused here.
21 Q. As a lessor don't you typically require your lessee to
22 comply with all laws generally?
23 A. To apply with them but not to go and to gain permits,
24 if that's what you mean by apply to laws. I have a
25 distinction. I am not quite sure what you mean by

1 apply to law.
2 Q. Wouldn't you hope that all of your lessees comply with
3 laws that are applicable?
4 A. As it regards to typical leases in terms of fire
5 department, sewage, access for wheelchairs,
6 absolutely.
7 Q. Anytime the law requires that somebody get a permit to
8 do something that they do, you want your lessee to do
9 that, don't you?
10 A. If you are suggesting that it's natural for someone to
11 say -- If I have a waterfront property and I say I
12 have this waterfront and I will lease you a marina but
13 you have to go get the permits, I am having a little
14 problem with answering your questions. No, I would
15 not expect them to go get their permits.
16 Q. You don't expect lessees to get necessary permits that
17 might be required by law for any development that they
18 might have?
19 A. If they in turn lease the land?
20 Q. That wasn't my question. My question is very
21 straightforward.
22 Do you expect lessees to comply with all laws and
23 get all permits that are required for a particular
24 development?
25 A. Yes. I will agree with you.

1 Q. Now, you may have to refer to a number of different
2 documents. If you wish, you can use my exhibit book
3 since it's probably going to be easier to access.
4 Mr. Hester, I am going to call your attention to
5 your Exhibit A, which in our book is at hopefully tab
6 A.
7 I have taken from Mr. Bruce Allen's report the
8 total square footage from those four parcels. I
9 believe this number is also reflected in Mr. Inslee's
10 report, as well, his brief, as well, as 500,862 square
11 feet. Do you have any disagreement with that number?
12 A. No.
13 Q. Now, in Mr. Allen's report -- You are familiar with
14 that report, are you not?
15 A. I will have to see what you are talking about.
16 Q. Bruce Allen's appraisal report that he did for you.
17 A. There are several reports.
18 Q. I am talking about the one that was done particularly
19 with respect to this project.
20 A. May I look at it? Yes.
21 Q. You are aware that he subtracted from the square
22 footage of this site for purposes of his analysis the
23 ditch, and he used 15,375 square feet for that
24 reduction?
25 A. I believe that was his figure.

1 Q. I have done that subtraction to indicate 485,487 feet.
2 Now, I am going to pursue a hypothetical, Mr. Hester,
3 based upon some of the testimony that has been
4 presented throughout the course of this proceeding.
5 From that 485,487 feet, I am going to ask you to
6 assume that we have subtracted all of the submerged
7 area of lot A that was testified to be approximately
8 63,544 square feet.
9 MR. INSLEE: Who testified to that again?
10 MR. DIJULIO: That was testified to by
11 Mr. Dickman. That information is also in our
12 arbitration submittal.
13 Q. Now, looking at Exhibit A again just to refresh your
14 memory, would you agree with me that the general front
15 footage of parcel A is approximately 652 feet?
16 A. You are talking the water side?
17 Q. The north-south distance, the water side.
18 A. The north south --
19 Q. The north south, I think it's scaled out on the --
20 A. It's within that ballpark.
21 Q. Now, having taken already the -- And I may be
22 overgenerous.
23 Having taken already the submerged lands, I am
24 asking you to assume that we take square footage equal
25 to the 115-foot setback from the Duwamish River. That

1 would be 652 times 115, which totals 74,980, or, for
2 these purposes, 75,000 square feet.
3 I am next calling your attention to lot B. Would
4 you agree with me that assuming you are talking about
5 115 --
6 MR. INSLEE: Why don't you just make your
7 argument. It is just argument, so go ahead.
8 MR. DIJULIO: No. I want him to understand.
9 MR. INSLEE: Let me address the board in
10 objection.
11 Both arbiters have been released from their prior
12 appraisals. Hopefully, as part of the arbitration
13 process, why we have a process is to get information
14 complete.
15 Now, when one starts from the board and goes back
16 and takes a drainage ditch that nobody talked about a
17 setback or a buffer or whether they did or didn't is
18 not going to be productive of anything. We can all
19 work off of other people's old appraisal sheets and
20 say, now, forget everything in the arbitration for two
21 days and do you agree with me. We are going to agree
22 with him because numerically he is calling the shots.
23 I say just go through and give us the numbers. It
24 will save us about 20 minutes, because it's not
25 something that's testimonial knowledge of this

1 witness.
2 MR. KELLING: We don't know yet whether this
3 is going to be helpful, so we need to listen.
4 Q. If you take lot B, Mr. Hester, as shown on the Towns &
5 Chastaine survey and if you assume a 50-foot setback
6 from the creek, the setback would be approximately 50
7 by 346; is that correct?
8 A. You are going to have to ask me again.
9 Q. Is lot B in the area of the creek a distance of
10 approximately -- Is that south border approximately
11 346 feet?
12 A. I only get 210. Are you talking about -- You are
13 going to have to give me a point of reference. Where
14 are you beginning and where are you ending? You have
15 me totally confused.
16 Q. From the survey mark at the southwest corner to the
17 survey mark at the southeast corner, the map would
18 show 346.26 feet; is that correct?
19 A. Correct.
20 Q. Now, I think it was Mr. Szmodis's testimony, was it
21 not, that the river or the creek or whatever, drainage
22 ditch, whatever it is, actually is not fully within
23 parcel B as it moves to the west of the site.
24 You remember his testimony to be that way; is that
25 correct?

1 A. Well, there is -- Yes, I do.
2 Q. But I have nevertheless assumed for purposes of this
3 that we have multiplied that 346 feet by a full 50
4 feet or 17,300 square feet.
5 I want you to assume further that lot C, that I
6 believe the border along the creek is -- What's the
7 distance there shown?
8 A. Well, it's jagged water, so I don't know how you want
9 me to calculate it.
10 Q. Well, I have done the calculation. It's approximately
11 12,400 square feet when you multiply it by the 50-foot
12 setback.
13 I am also going to ask you to assume that you can
14 convince Delta Marine or somebody to take lot D off
15 your hands, that it is of no value to anybody.
16 If you take those reductions from the gross square
17 footage, you would be left with approximately 277,221
18 square feet?
19 A. I would be left for what?
20 Q. If you take all of those setbacks, all of those areas
21 out, that's what you would be left with is 277,221
22 square feet?
23 A. Are you suggesting for the purpose of something or --
24 Q. It's a hypothetical question.
25 A. If you did all of that math, I will take your word

1 that that would be the final number.
2 Q. Your testimony in this matter, I believe, is that this
3 number would be closer to five acres or, for purposes
4 of our calculations, 217,800 square feet?
5 A. I think my testimony was that that was the calculation
6 by Ms. McCutcheon with her expertise, that that would
7 be the area that we could get permits to do something
8 on. That's where that number came from.
9 Q. Now, you would agree with me if you had a 6.4-acre
10 parcel of 277,221 square feet at $9 a square foot,
11 that would indicate $2.49 million, would it not?
12 A. I don't have a calculator, but I would take your word
13 for it.
14 Q. Assuming even 217,800 square feet at a number such as
15 -- Well, I didn't do the calculation. If you multiply
16 it by nine, you have a number that is in excess of
17 $2 million, do you not, 1,960,200?
18 A. I will take your word for it.
19 Q. Your position remains in this arbitration that none of
20 this either 6.4 acres or five acres has any value
21 whatsoever?
22 A. It has no value to a developer who wants to put either
23 a ship container facility or a warehouse on it, which
24 has been classified as the highest and best use. It
25 has no value in excess of the $4,700-a-month lease.

1 Q. Let me ask you again.
2 If you take your five-acre square footage of
3 217,800 square feet and use seven cents a month, which
4 I believe was the number that you used earlier in your
5 testimony --
6 A. Correct.
7 Q. If you multiplied that by seven cents a month, you
8 would get 15,246?
9 A. That's correct.
10 Q. If you multiplied that by 12 months, you would get
11 $182,952?
12 A. I will take your word for it.
13 Q. Were you to apply a 9 percent cap rate --
14 MR. INSLEE: This isn't question and answer.
15 This is argument. That's why I say to sit here and
16 have him say I'll take your word for it, that's why I
17 suggested before that counsel just give his numbers
18 and don't go through the charade of having this
19 witness agree or disagree to precalculated numbers
20 that he hasn't verified. I don't disbelieve his
21 numbers, but just tell us what your numbers are. The
22 witness isn't testifying to them or multiplying them
23 or giving any assistance to this tribunal, the witness
24 isn't.
25 MR. KELLING: The witness has an opportunity

1 to check his numbers.
2 MR. INSLEE: Well, we don't. We don't have a
3 calculator. We don't have the map. He assumed a
4 straight line for the bank. Everybody has testified
5 the meander line was a curved line.
6 MR. KELLING: He has identified it as a
7 hypothetical, so I think it's useful.
8 MR. DIJULIO: I think we have gone far enough
9 with this. I have no further questions with this
10 witness.
11 THE WITNESS: Do I have an opportunity to
12 comment?
13 FURTHER EXAMINATION
14 BY MR. INSLEE:
15 Q. What's your comment, Mr. Hester?
16 A. In all due respect, that's exactly how developers lose
17 their houses and go bankrupt is because you don't use
18 cap rates. You don't use internal rates of return.
19 Those are irrelevant numbers. That's why the savings
20 and loan crisis is what it was, because that's exactly
21 why banks loan against all these tens of thousands of
22 square feet around the United States of America based
23 on cap rates and internal rates of return when, in
24 reality, when it was built and the dollars that
25 finally you could take -- My dear wife calls them

1 Safeway dollars. Don't give me all the BS. Give me
2 the Safeway dollars, in other words, real money.
3 The point is, if you take 217,000 square feet and
4 you in turn put the money into it -- And I did not use
5 carrying costs. I didn't use costs of borrowing the
6 money. You in turn develop that property and you put
7 containers at the going rate of seven cents a square
8 foot. You just have exactly what happened in the
9 saving and loan crisis. You have banks who are
10 working with cap rates and internal rates of return
11 saying, how in the world did we lose a billion
12 dollars? There is the perfect example.
13 What I am trying to do, in all honesty, is tell
14 you exactly what a real buyer, a guy with real money
15 in his pocket, is going to do when he looks at that
16 piece of property like it was in 1974. He is going to
17 do exactly what I did and what Lou did.
18 He is going to analyze it, because he is a
19 developer. He has an old pair of boots at home that
20 he is used to walking in the mud in. He is going to
21 analyze it and say pass.
22 So your numbers are right. It's a nice math quiz,
23 and that's it. I'm sorry. I don't mean to be
24 hostile, but it's --
25 Q. Instead of using 15,000 for drainage, if we used a

1 100-foot setback we would come up with a different
2 number, right?
3 A. You always end up squaring off property as if
4 everything is rectangle and everything is square. Let
5 me tell you, before a developer goes down there, you
6 go down there with pile stakes and square that off.
7 All right. What you say is, okay, let's square it
8 off. That 38 square feet over there is worthless to
9 us. You are paying per square foot.
10 Let me tell you something. If you are going to
11 put a new floor in your kitchen and you are paying 38
12 cents for each little tile, when you get them home,
13 what do you do? You count the tiles, because they
14 cost you 38 cents apiece.
15 That's exactly what the developer does, every
16 square foot of usable space. If you don't think the
17 ship container facility business is not cutthroat,
18 holy cow. They are down to pennies and pennies and
19 pennies, and they are fighting all the time.
20 So when you say we haven't seen increases, I mean,
21 the increase since 1978 in ship container facility at
22 that time was a nickel for the best you could get. We
23 have moved all the way to six cents, big increase.
24 So, I mean, I understand what you are doing, and I do
25 respect it. Sorry. It doesn't work in the real

1 world.
2 Q. In the real world, Mr. Hester, that 4,900 a month is
3 this owner getting a handsome return on the value that
4 the owner has in this case?
5 A. Let me tell you something. It's your own figure. I
6 am going to gross, after I spent umpteen millions of
7 dollars, all my carrying costs, went through three
8 years of permits, did all of that work, put my house,
9 my cats, my dogs, everything up for hock, I leased
10 this property. I built that ship container facility.
11 I leased it to Itel.
12 You did not put up one dime, nor did you in turn
13 put up any risk, and you are now getting, out of the
14 15,000, 30 percent of the gross. I don't mean the
15 net. I don't mean after expenses. I don't mean
16 profit. I mean more than 30 percent of the gross
17 dollars, not taking into account vacancy rate.
18 I mean, the month that one guy moves out and it's
19 three months before you get somebody else in, you guys
20 I am assuming still want your check. I got no income.
21 You are getting more than 30 percent. We are almost,
22 although I will not -- We are almost partners. You
23 are getting half. My goodness sakes.
24 I'm sorry. But it really annoys me that everybody
25 feels they are getting cheated. Man, I will trade

1 places with you any day of the week. Holy cow.
2 MR. INSLEE: Thank you, Mr. Hester.
3 MR. DIJULIO: Can I ask one question of
4 Mr. Hester?
5 THE WITNESS: I will calm down.
6 FURTHER EXAMINATION
7 BY MR. DIJULIO:
8 Q. Mr. Hester, with all due respect, you did not give --
9 You asked specifically that the trust not participate
10 in the risk of this loan, did you not, or of this
11 lease?
12 A. I'm sorry. You are going to have to ask it again.
13 Q. The lease terms that were proposed specifically
14 precluded the trust from bearing or participating in
15 the risks of this lease?
16 A. You are absolutely right. We made an agreement, and
17 we have held up our side of the agreement 100 percent.
18 What I am trying to do is I want to change the
19 agreement.
20 Q. We can't participate in the risk of the lease, can we?
21 A. No, you do not. Whether you can't, you don't.
22 Q. You are fully in control?
23 A. That's correct.
24 MR. DIJULIO: I have nothing further.
25 A. And I am using the property at the absolute highest

1 and best use, heavens knows.

2 FURTHER EXAMINATION

3 BY MR. INSLEE:

4 Q. Was Mr. Shefelman a reasonably prudent person back in
5 '77 when this lease was entered into?

6 MR. DIJULIO: I will stipulate to Harold
7 Shefelman.

8 A. I look back at that gentleman and I have to say that I
9 wish my wheels were moving as fast as his when he was
10 90.

11 Q. If we were going to rewrite the lease today to
12 accomplish any more clearer intent, is there anything
13 more we could have done than to add we really mean it?

14 A. No. I have always believed it was very clear.

15 MR. KELLING: Mr. Hester, you needn't
16 apologize for making your point. You are not hostile.

17 MR. INSLEE: Well, I think we did pretty
18 good.

19 MR. KELLING: Let's stay on the record a
20 moment.

21 The arbitrators would be available Monday or
22 Tuesday to walk the site with Mr. Anderson and
23 Mr. Hester.

24 MR. HESTER: Could I coordinate that with
25 you? Believe it or not, I have no keys to get in. I

1 have to make arrangements to have somebody let us in
2 the gates.
3 MR. KELLING: Could you give us a telephone
4 call?
5 MR. HESTER: We can do it at your
6 convenience. I just need to --
7 MR. KELLING: From what I understand among
8 our end of the table here, we could do it Monday or
9 Tuesday; is that correct?
10 MR. SAFER: Either day is fine.
11 MR. DIJULIO: In terms of scheduling, because
12 of Mr. Safer's return, would it be better to
13 coordinate, do it on Tuesday so we have Monday to work
14 with?
15 MR. KELLING: I don't care. He said he would
16 be back on Monday.
17 MR. SAFER: I will be back on Sunday. I am
18 flexible. I just need a voice mail message in terms
19 of time.
20 MR. HESTER: I will call you tomorrow at your
21 convenience.
22 MR. KELLING: Thank you. You can call any
23 one of the three of us.
24 MR. INSLEE: Why don't you call Verne.
25 (Off-the-record discussion.)

1 MR. KELLING: Let's try and do it on Tuesday,
2 if that's better for you. Are you thinking still
3 9:00?
4 MR. ALLEN: It was 9:30, I think, was the
5 last time.
6 MR. KELLING: 9:30 is what Bruce wants, if
7 that's all right.
8 MR. SAFER: That would be the 19th?
9 MR. KELLING: Tuesday.
10 MR. SAFER: Tuesday the 19th, 9:30.
11 MR. INSLEE: Mr. Hester will let us know.
12 MR. HESTER: I am sure I can anytime, but I
13 just have to coordinate and get keys.
14 MR. KELLING: Now, the keys, I haven't been
15 there, so why do we need keys?
16 MR. HESTER: There is a front electric gate,
17 and I have to get a card for it. Then there is keys
18 to several other gates that we are going to want to go
19 down to. I have to borrow one or get one. Those are
20 the only keys.
21 MR. KELLING: Thank you very much. We'll see
22 you at 9:30 next Tuesday at the site.
23 MR. INSLEE: Yes, subject to Mel confirming
24 to Mr. Kelling.
25 MR. KELLING: If I am not available or my

1 voice mail goes bonkers, call Bruce Allen.
2 Does anyone else have anything to offer today?
3 MR. DIJULIO: Is it my understanding that the
4 panel will keep the hearing open until you complete
5 your review of the property?
6 MR. KELLING: That is the understanding.
7 MR. DIJULIO: You will advise counsel whether
8 you wish to have closing argument written, oral or not
9 at all?
10 MR. KELLING: We are just recessing the
11 hearing. After we do the inspection, or possibly even
12 before, the panel is going to meet. If we have
13 additional requests, we will get in touch with both
14 parties very promptly.
15 If it occurs that we would need to open the
16 hearing in a meeting forum again, will people be
17 around next week? That's a terribly general question.
18 We will have to ask you if you will be around. We
19 will let you know promptly.
20 MR. DIJULIO: Thanks.
21 MR. INSLEE: I guess I think we have both
22 given our closing arguments. So if you aren't going
23 to give them to us, you can tell us. The submission
24 agreement says we have the opportunity, but I am not
25 insistent on it.

1 MR. KELLING: It could be that after the
2 arbitrators meet we will have some specific questions
3 of both sides. We might submit those questions to you
4 in writing even. We might ask you --
5 MR. INSLEE: The difficulty with that is that
6 when I give an answer he has the right to look at it.
7 I am going to suggest to you that the written thing
8 ain't going to work unless you are going to put down
9 two or three weeks to review, answer and correspond
10 back. I would rather spend the time to come on down
11 here and have the witness tell you, because then we
12 get it all done at once. We will both have rebuttal
13 and cross-examination.
14 MR. KELLING: I am sure we will be amenable
15 to do it the way that is most agreeable to both
16 parties.
17 MR. INSLEE: It would be my suggestion that
18 we don't get into three-way letter writing.
19 MR. DIJULIO: The other point, for the
20 record, is I understand that to the extent that any
21 information such as the title report is provided to
22 the appraisal panel, it will be provided to the other
23 party, as well.
24 MR. KELLING: Well, the hearing is closed and
25 the record is off.

1 MR. ALLEN: We are recessed.
2 MR. KELLING: Today's session of the hearing
3 is closed. We are going into recess.
4 ARBITRATION AT RECESS: 5:25 p.m.
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DFT 000556

C-E-R-T-I-F-I-C-A-T-E

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, MARY A. GANZ, a duly authorized Notary Public in and for the State of Washington, do hereby certify that the foregoing witnesses were called as witnesses; were first duly sworn on oath to testify the truth, the whole truth, and nothing but the truth in said cause; that the oral examination of said witnesses was recorded in shorthand and later reduced to typewriting; that the above and foregoing is a true and correct transcription of the testimony given by said witnesses; and that signature thereto was waived.

I do further certify that I am not a relative of, employee of, or counsel for either of said parties or otherwise interested in the event of said proceedings.

I HAVE HEREUNTO set my hand and affixed my official seal this 3rd day of April, 1995.

Mary A. Ganz

Mary A. Ganz, Notary Public
in and for the state of
Washington, residing at
Woodinville.

DFT 000557

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Seattle, WA 98101
(206) 622-6661

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BEFORE APPRAISERS KELLING, ALLEN AND SAFER

IN THE MATTER OF THE APPRAISAL OF THE DESIMONE/DUWAMISH MARINA PREMISES LEASE	)	NOTICE OF SERVICE OR FILING OF SEALED ORIGINAL TRANSCRIPT

The sealed original transcripts as stated below are today being filed with the attorney of service:

WITNESS: (Arbitration Proceedings)

REPORTER: Mary A. Ganz, CSR

ATTORNEY OF SERVICE: P. Stephen DiJulio

DATE OF DEPOSITION: July 13, 1995

SIGNATURE: W
(W-Waived; NS-Not signed; S-Signed; SC-Signed with correction sheet)

DATE OF DELIVERY: April 5, 1995
(C-Couriers; B-Bucky; HD-Hand delivered; FX-FedExpress; CM-Certified mail; O-Other)

cc: All Counsel
File

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