

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

In the Matter of Manual Code 3565.1 for the Approval  
Authorizing the Department of Natural Resources to Grade  
More Than 10,000 Square Feet on the Bank of North Lake,  
Install a Boat Ramp Structure and Two Outpost Structures  
on the Bed of North Lake, Install Four Culvert Crossings  
Over Wetlands, Fill Up To .16 Acres of Wetlands for  
Construction of a Public Boat Launch on North Lake and  
Adjacent Property Located in the Town of  
Merton, Waukesha County

Case Nos. IP-SE-2009-68-05745 through 05750

Jeffrey Boldt  
Administrative Law Judge, Presiding

Hearing held September 19, 2011

Waukesha, Wisconsin

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- 1 APPEARANCES (Continued)
- 2 WISCONSIN WILDLIFE FEDERATION, by
- 3 George Meyer, Executive Director
- 4
- 5 WAUKESHA COUNTY CONSERVATION ALLIANCE, by
- 6 Ronald Gray, President

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- 1 APPEARANCES
- 2 WISCONSIN DEPARTMENT OF NATURAL RESOURCES, by
- 3 Attorney Edwina C. Kavanaugh
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- 8 NORTH LAKE MANAGEMENT DISTRICT, by
- 9 Attorney Donald P. Gallo
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- 16 Attorney William C. Gleisner
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- 20 and by
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1 ALJ BOLDT: Good morning. We're on the  
 2 record. My name is Jeffrey Boldt,  
 3 Administrative Law Judge, Division of Hearings  
 4 and Appeals which is a neutral State agency  
 5 attached to the Department of Administration for  
 6 budgeting purposes. I believe today is  
 7 September 19th, 2011 and I know that we're here  
 8 at the State Office Building in Waukesha and  
 9 that we're here for the Class 1 contested case  
 10 proceeding relating to In the Matter of Manual  
 11 Code 3565.1 for the approval authorizing the  
 12 Department of Natural Resources to grade more  
 13 than 10,000 square feet on the bank of North  
 14 Lake, install a boat ramp structure and two  
 15 outpost structures on the bed of North lake,  
 16 install four culvert crossings over wetlands,  
 17 fill up to .16 acres of wetlands for  
 18 construction of a public boat launch on North  
 19 Lake and adjacent property located in the Town  
 20 of Merton here in Waukesha County. The captions  
 21 are IP-SE-2009-68-05745 through 05750.

22 The appearances today for the Department of  
 23 Natural Resources, Attorneys Edwina Kavanaugh  
 24 and Megan Correll appear. For North Lake  
 25 Management District, Attorneys Don Gallo and

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1 Conservation Alliance several hundred if not a  
 2 thousand members in southeastern Wisconsin, many  
 3 in Waukesha County. People that are avid  
 4 fishermen fish the lakes of this county and are  
 5 seeking a quality boat launching access on North  
 6 Lake and, as such, we are seeking party status.

7 ALJ BOLDT: And, Mr. Gray, would you want  
 8 to be heard as well or just reiterate what  
 9 Mr. --

10 MR. GRAY: I'm just here to support --

11 MR. MEYER: The Waukesha County Alliance is  
 12 one of our affiliates and therefore we are  
 13 representing them.

14 ALJ BOLDT: Okay. Understood. Mr.  
 15 Gleisner?

16 MR. GLEISNER: Thank you, Judge. I believe  
 17 I speak also for the NLMD. We strenuously  
 18 object to this Section 227.42 right of hearing  
 19 says that any person filing a written request  
 20 with an agency for hearing shall have the right  
 21 to a hearing which shall be treated as a  
 22 contested case hearing. Judge, this matter was  
 23 originally referred to the Department of  
 24 Administration on March 7th of 2011. There have  
 25 been many proceedings in this matter. Discovery

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1 Carolyn Sullivan appear. For the Redland  
 2 Neighborhood -- or let me get it right, Redland  
 3 Road Neighborhood Association, Incorporated,  
 4 Attorneys William Gleisner and William Harbeck  
 5 appear. Also entering an appearance today is  
 6 Mr. George Meyer from -- the Executive Director  
 7 of Wisconsin Wildlife Federation, as well as  
 8 Mr. Ronald Gray, is that right?

9 MR. GRAY: Yes.

10 ALJ BOLDT: And Mr. Gray is here as  
 11 President of Waukesha County Conservation  
 12 Alliance. Is there anybody else who wants to  
 13 enter an appearance today? Okay.

14 MR. GLEISNER: Judge, I have a request.  
 15 The two individuals you named last, are they  
 16 appearing as parties?

17 ALJ BOLDT: Are you seeking party status  
 18 Mr. Meyer and Mr. Gray?

19 MR. MEYER: Yes, we are seeking status  
 20 pursuant to Minsch v. Public Service Commission,  
 21 261 Wis. 492, and let me state the basis for  
 22 that. Wisconsin Wildlife Federation is  
 23 comprised of 170 hunting, fishing, trapping and  
 24 other related groups in the State of Wisconsin  
 25 and we have between us and the Waukesha County

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1 has been taken and Your Honor entered a  
 2 pre-hearing Order on April 12th of this year  
 3 indicating who the parties were. We're  
 4 surprised by this. If this agency or  
 5 organization is allowed to intervene, then I  
 6 think we have to request a postponement because  
 7 we have not had an opportunity to anticipate  
 8 this is any way.

9 ALJ BOLDT: Anybody want to be heard on  
 10 that point? Mr. Meyer?

11 MR. MEYER: I would. I believe the Minsch  
 12 case is directly on point where the outside  
 13 party appeared at a water regulatory hearing of  
 14 the Department in regard to a dam in  
 15 northwestern Wisconsin. We do not intend to  
 16 call witnesses and that we believe pursuant to  
 17 that and NR 2.08 that we have authority and in  
 18 fact the Public Trust Doctrine gives us the  
 19 right to appear and intervene at this hearing as  
 20 a party.

21 ALJ BOLDT: Okay. Mr. Harbeck? And we  
 22 should try to keep it so that it's one attorney  
 23 speaking on each issue, but go ahead. In this  
 24 instance we'll do that and the same applies for  
 25 DNR and North Lake Management as well. Go

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1 ahead.

2 MR. HARBECK: Yeah, I was just going to ask  
3 if they don't intend to present witnesses then  
4 what do they intend to do at the hearing because  
5 that may govern whether or not we have an  
6 objection.

7 MR. MEYER: Our intent is to cross-examine  
8 witnesses, all parties to the matter, to make  
9 sure that our interests and the interest of our  
10 members are being protected during the course of  
11 this proceeding.

12 MR. GLEISNER: Judge?

13 ALJ BOLDT: Yes, sir.

14 MR. GLEISNER: Thank you, Judge. Your  
15 Honor made it very clear last Friday, and we  
16 accept that, that we have to get our case in, in  
17 one day and the NLMD in one day and then the DNR  
18 in one day. If we are going to have another  
19 party added who's going to be cross-examining  
20 witnesses, that's going to present -- that's  
21 going to exponentially increase the amount of  
22 time that is going to be required and we have no  
23 idea why this should be allowed at this very,  
24 very late date. This is the first day of the  
25 hearing, Judge. Thank you, Judge.

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1 know, publication notice. I don't believe a  
2 publication notice was required in this context.  
3 And so then NR 2.08(6) references that the  
4 Department or Administrative Law Judge shall  
5 identify and maintain a list of persons who are  
6 recognized as parties to the contested case  
7 hearing. A person does not need to be  
8 represented by legal counsel. This list may be  
9 adjusted by the Department or the Administrative  
10 Law Judge as necessary through the course of the  
11 hearing. And it does say the list of parties  
12 required by NR 2.1553 for purposes of review  
13 under 227.53 may differ from the list required  
14 by this section.

15 And then in general we interpreted that to  
16 mean that parties are generally bound by the  
17 terms of a scheduling order in a -- if they  
18 don't enter an appearance at a pre-hearing  
19 conference. In that regard, with respect to  
20 they're not calling any witnesses so I think  
21 Mr. Harbeck's point is -- or his suggestion. It  
22 wasn't his point, it's my point, that that makes  
23 some difference in terms of there's  
24 no -- there's not going to be any expert witness  
25 surprise-type situation here.

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1 ALJ BOLDT: Okay.

2 MS. KAVANAUGH: Judge, I can give you the  
3 cite.

4 ALJ BOLDT: I'm sorry?

5 MS. KAVANAUGH: I can give you the  
6 citation. It's NR --

7 ALJ BOLDT: No, I've got NR 2.08, for one,  
8 relating to the contested case proceeding  
9 process. Sub (1), "In addition to the party,  
10 any member of the public may participate in any  
11 Department contested case hearing." That's  
12 NR 2.08(1). And then (2) reads, "Any person  
13 desiring to participate in a Department  
14 contested case hearing whether on his or her own  
15 behalf or as an authorized agent or attorney  
16 shall enter an appearance in person" and so  
17 forth and that's what these sheets represent.  
18 "A person may enter his or her appearance either  
19 prior to or at the commencement of a contested  
20 case hearing." And it does say under  
21 NR 2.08(5), "The Department or Administrative  
22 Law Judge may require persons who wish to be  
23 parties to attend a pre-hearing conference" and  
24 it goes forward in that context, referencing if  
25 a notice is required. In this instance -- you

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1 However, there was a discovery order  
2 entered and I think it would be fair at some  
3 point if these new parties want to participate,  
4 even as witnesses, if you all want to do -- I  
5 don't know if you took depositions in this  
6 matter or not. If you want to do in essence a  
7 voir dire deposition or something like that  
8 outside the presence of everyone else here, I  
9 think that's your right as well in terms -- up  
10 to and including a postponement if it's  
11 necessary.

12 MR. GLEISNER: Well, Judge, you know, we  
13 are in a difficult position because we had  
14 intended to make a very good faith effort to get  
15 our evidence in, in one day and this is a  
16 serious complication.

17 ALJ BOLDT: I understand and I appreciate  
18 that effort, you know, and that was reflected by  
19 everyone being here in such a timely manner.  
20 You were here -- we arrived an hour early and  
21 they were already here and set up and I was very  
22 impressed. But for that -- you know, if for  
23 some reason the hearing drags on because of one  
24 other person cross-examining -- I should note  
25 too that NR 2 provisions also indicate that

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1 actual party status is determined after the  
 2 contested case proceeding and not before and if  
 3 there are factors there to consider and one of  
 4 them is whether or not they participate in  
 5 cross-examining witnesses and so forth -- and I  
 6 can get that cite and I will get it at a break  
 7 here. I don't want to waste the time on it  
 8 right now, but I'm certain in that understanding  
 9 that it comes out afterwards. So I think it is  
 10 kind of a gray area and what our consistent  
 11 practice has been since even before I took the  
 12 job, and I've been doing it for 20 years, is  
 13 people are bound by the scheduling order, but we  
 14 do follow the NR 2.08 and the other one that  
 15 says your ultimate list of parties is decided  
 16 after the contested case proceeding. So I think  
 17 you have the right, but that's how I'm balancing  
 18 that out is to say that you guys have the right  
 19 to take a deposition if you want to.

20 And as far as this timing, if we -- for  
 21 some reason it goes another day, we're going to  
 22 have to try to get that on as fast as we can,  
 23 but for now we'll issue the ruling that they're  
 24 allowed to participate and they're allowed to  
 25 cross-examine witnesses.

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1 ALJ BOLDT: Yes, sir.  
 2 MR. MEYER: If I may, I'd like to make a  
 3 motion and I'll just say not expecting a ruling  
 4 at this time, but to preserve the record and to  
 5 maybe -- well, in fact, have this issue an issue  
 6 briefed at the conclusion. The Wisconsin  
 7 Wildlife Federation and Waukesha County  
 8 Conservation Alliance would like to move for  
 9 dismissal of this proceeding for lack of  
 10 jurisdiction, and the premise being that we'd be  
 11 very willing to brief at the conclusion is in  
 12 fact Section 227.42 of the Statutes is not  
 13 applicable to a manual code review under  
 14 Section 3565.1.

15 ALJ BOLDT: Okay. Thank you, Mr. Meyer.  
 16 Yeah, that's something we can address in  
 17 post-hearing briefs. The Department took a  
 18 different position when it granted the contested  
 19 case proceeding --

20 MR. MEYER: Understood.  
 21 ALJ BOLDT: -- and specifically referenced  
 22 227.42, but certainly a legal argument that's  
 23 available to all parties.

24 MS. CORRELL: Your Honor, along the  
 25 jurisdictional lines, DNR did reserve the right

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1 MR. GLEISNER: Judge, if we could just have  
 2 a clarification?

3 ALJ BOLDT: Sure.

4 MR. GLEISNER: So that means, in other  
 5 words, while we'll make a very good faith  
 6 effort, and we still intend to do that, both the  
 7 NLMD and the RNA to get their cases in, in one  
 8 day, should we not -- pardon me?

9 MR. HARBECK: Two days.

10 MR. GLEISNER: Two days, yeah, ours today  
 11 and the NLMD's tomorrow. Should we not be able  
 12 to do that, you will take that into  
 13 consideration in terms of extending the hearing?

14 ALJ BOLDT: Sure, sure, I think I have to.

15 MR. GLEISNER: Thank you, Judge.

16 ALJ BOLDT: I mean and part of that will be  
 17 how much did the addition of one other set of  
 18 questions slow things down.

19 MR. GLEISNER: Sure.

20 ALJ BOLDT: All right. To go back on track  
 21 here then --

22 MS. KAVANAUGH: Judge, I do have that cite  
 23 if you want it. It's NR 2.155(3).

24 ALJ BOLDT: Thank you, Counsel.

25 MR. MEYER: Your Honor?

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1 to argue the jurisdictional issue today and  
 2 we're prepared to do so. I understand that  
 3 there is concern about time management here  
 4 today. I think we can very easily figure out a  
 5 way that's fair, you know, compute a number of  
 6 hours to a day and each party would have a fair  
 7 and equal amount of hours. I don't think  
 8 there's any effort to use other people's days.  
 9 That's not the purpose of it.

10 ALJ BOLDT: Okay. Well, let's -- let me  
 11 get through my standard spiel here and then  
 12 we'll see where we're at.

13 Okay. The background, as I understand it,  
 14 that brings us all here today is that the  
 15 Department of Natural Resources prepared a  
 16 project application for approval under the  
 17 Manual Code of Department of Natural Resources  
 18 3565.1. As I understand it, the proposed  
 19 project is located in North Lake in Waukesha  
 20 County in the Town of Merton and that in general  
 21 the purpose of the project would be to provide  
 22 adequate public access to North Lake.

23 On September 9th, 2010, the Department  
 24 issued a notice of public informational hearing  
 25 for the proposed North Lake public access and

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1 held a publication informational hearing -- or  
2 held a public informational hearing. The  
3 Department approved the activities noted above  
4 for North Lake boat launch by the Manual Code I  
5 referenced earlier. An approval was issued on  
6 November 4th, 2010.

7 On November 22nd, 2010, the Department  
8 received a petition for a contested case hearing  
9 and a request for a stay from Attorneys  
10 William Gleisner and Mr. Harbeck on behalf of  
11 the Redland Road Neighborhood Association and 40  
12 citizens and property owners who reside on  
13 Redland Road.

14 Further, on December 3rd, 2010, the  
15 Department received a petition for a contested  
16 case hearing from North Lake Management District  
17 by letter dated December 13th, 2010. The  
18 Department partially granted and partially  
19 denied the petitions for contested case  
20 proceedings for both parties and we'll take that  
21 up maybe in more detail, maybe not.

22 But this is a Class 1 contested case  
23 proceeding which means that the fair play  
24 provisions of Chapter 227 apply. This means  
25 that all testimony presented will be presented

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1 represented by counsel so I don't think that'll  
2 be an issue in this proceeding.

3 The specific legal standards that we  
4 referenced in the notice were the substantive  
5 requirements of Wisconsin Statutes 30.01(4m),  
6 30.10(1) and (2), 30.12(1), (3m) and (c), as  
7 well as the Manual Code that we referenced  
8 earlier.

9 Just so that everyone has some  
10 understanding of those, 30.01 provides a  
11 definition of navigable waters or navigable  
12 waterway which means any body of water which is  
13 navigable under the laws of the State. 30.10(1)  
14 says that, with respect to lakes, "Declarations  
15 of navigability. All lakes wholly or partly  
16 within the State which are navigable in fact are  
17 declared to be navigable and public waters and  
18 all persons have the same rights therein and  
19 thereto as they have in and to any other  
20 navigable or public waters. Sub (2) of that  
21 relates to streams and says that except as  
22 provided in (4)(c) and (d) which (c) is farm  
23 drainage ditches and (d) is drainage districts  
24 located in Duck Creek Drainage District. "All  
25 streams (inaudible) and marsh outlets which are

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1 under oath and will be subject to  
2 cross-examination. It also means that  
3 we'll -- we're making a record. As I mentioned  
4 off the record, that's what the microphones are  
5 all about. They don't amplify our voices. Let  
6 us know if you can't hear. We're making a  
7 record today so we can't accept any phone calls  
8 or letters or anything like that after-the-fact.

9 We're not strictly bound by the rules of  
10 evidence, but we follow Section 227.45 which  
11 says in part that, "The agency or hearing  
12 examiner shall admit all testimony that has a  
13 reasonable probative value, but shall exclude  
14 immaterial, irrelevant or unduly repetitious  
15 testimony." Further, that basic principles of  
16 relevancy, materiality and probative force shall  
17 govern the proof of all questions of fact and  
18 that basic objections to evidentiary offers and  
19 offers of proof shall be made and noted in the  
20 record and that we should give effect to the  
21 rules of privilege recognized by law.

22 Further, there is case law to the effect  
23 that we may not base a finding of fact which is  
24 part of the decision solely on uncorroborated  
25 hearsay evidence. All the parties are

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1 navigable in fact for any purpose whatsoever are  
2 declared navigable to the extent that no dam,  
3 bridge or other obstruction shall be made in or  
4 over the same without the permission of the  
5 State."

6 Then 30.12(1) says that, "Unless an  
7 individual or a general permit has been issued  
8 under this section, no person may do the  
9 following", and that includes depositing  
10 material or placing a structure on the bed of  
11 any navigable water where no bulkhead line has  
12 been established or deposit any material or  
13 place any structure upon the bed of any  
14 navigable water beyond a lawfully established  
15 bulkhead line.

16 And, again, these are the substantive  
17 requirements that the Department has imposed  
18 upon itself. Among those are (3m) relating to  
19 individual permits. Again, I'm all under 30.12.  
20 "For a structure that is not exempt and that is  
21 not subject to a general permit and for a  
22 structure deposit for which the Department  
23 requires an individual permit, a riparian owner  
24 may apply to the Department for the individual  
25 permit that is required under sub. (1) in order

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1 to place the structure."

2 And then it sets forth standards in sub.  
3 (c). "The Department shall issue an individual  
4 permit to a riparian owner for a structure or a  
5 deposit pursuant to an application under  
6 paragraph (a) if the Department finds that all  
7 of the following apply." And these are -- we're  
8 getting to the heart of the -- "The structure or  
9 deposit will not materially obstruct navigation,  
10 the structure or deposit will not be detrimental  
11 to the public interest, and the structure or  
12 deposit will not materially reduce the flood  
13 flow capacity of a stream."

14 Okay. And then we have had some prior  
15 dealings with respect to the jurisdiction and  
16 the extent of the issues in this matter. First  
17 of all, the Department did deny the request for  
18 hearing with respect to the following, and these  
19 are not part of the contested case proceeding.  
20 Number one, the present location and delineation  
21 of wetlands, proposed storm water sewer systems  
22 on the DNR property, other environmental and  
23 engineering conditions on the DNR property,  
24 planning of development of the DNR property,  
25 hydraulics and so forth.

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1 waters on the site invalid? Sub. (4), Will the  
2 Department's proposal impact navigable waters  
3 located on the site? Does the Manual Code  
4 approval identify navigable waters impacted by  
5 the activities approved in a Manual Code  
6 approval with sufficient specificity? Did the  
7 DNR understate the proposal's impact on  
8 navigable waters at the site? Did the DNR fail  
9 to properly identify which portions of the site  
10 are navigable and lakebed and, if yes, does the  
11 additional impact on navigable waters under the  
12 Manual Code approval of the proposed activities  
13 in navigable waters on the site render that  
14 Manual Code approval invalid? And then,  
15 finally, did the DNR fail to consider additional  
16 navigable waters at the site which would have  
17 been factored into the DNR's decision with  
18 respect to the application of other permits?

19 Now, that was what we identified on a  
20 preliminary basis and I'm prepared to just go  
21 forward with the hearing and I think ultimately  
22 this may well be something that we have to sort  
23 out in post-hearing briefs. I don't think it's  
24 frankly that productive. We spent an  
25 hour-and-a-half on Friday, I believe it was

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1 And so the issues for hearing that were  
2 granted were all related to whether or not there  
3 was some disconnect in terms of the Department's  
4 understanding of the navigable waters at the  
5 site and some error in that context. And so  
6 after granting largely the Department's  
7 motion -- and I would note that the wetlands  
8 issue, there was even a formal stipulation in  
9 our prior dealing that those were not part of  
10 the proceeding.

11 On a working basis, what we listed as the  
12 issues for this hearing were set forth by  
13 Attorney Don Gallo in his brief on this question  
14 and that was as follows. And this is our  
15 operating assumption that these are the issues  
16 for hearing. Was DNR correct when it determined  
17 that there are no navigable water bodies on or  
18 adjacent to the site except for North Lake, an  
19 unnamed ditch, swale, stream on the north side  
20 of the site and a large wetland complex west of  
21 the site? Does the area circled in orange or in  
22 Exhibit D contain navigable waters? If yes,  
23 does the presence of navigable waters within the  
24 orange circled area render the Manual Code  
25 approval of proposed activities in navigable

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1 Friday, trying to sort through this. I think  
2 that's a good faith effort to understand what  
3 was encompassed in the hearing requests that  
4 were granted and we'll go forward. It may well  
5 be that some of these issues -- it's a  
6 question-by-question of a witness of what's  
7 relevant and what's not. I think what we'll  
8 need to do is rule on those individually and  
9 ultimately consider all of that in the context  
10 of the decision and in post-hearing briefing.  
11 So --

12 MS. CORRELL: Your Honor, DNR respectfully  
13 objects to not being able to at least place its  
14 argument on the record. This is a --

15 ALJ BOLDT: You did on Friday, Counsel.

16 MS. CORRELL: -- jurisdictional rather an  
17 evidentiary issue.

18 ALJ BOLDT: Pardon me?

19 MS. CORRELL: This is a jurisdictional  
20 rather than an evidentiary issue so it doesn't  
21 have to do with the relevance, it has to do with  
22 whether or not wetland information and wetland  
23 impacts are going to be entered into evidence  
24 that are outside the scope of jurisdiction. I  
25 understand that the attorneys have stipulated

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1 that they won't speak to wetlands, but the  
2 navigable waters that they are arguing are  
3 lakebed impacts are located in wetlands and  
4 there's no distinction with how DNR regulates  
5 those wetlands. We regulate them as wetlands  
6 even if they're navigable.

7 ALJ BOLDT: Okay. And --

8 MS. KAVANAUGH: And it's the same thing.

9 ALJ BOLDT: I mean, I think we --

10 MS. CORRELL: It's the same activity so we  
11 don't require both permits of applicants in a  
12 wetland, we require a water quality  
13 certification.

14 ALJ BOLDT: So now the  
15 Department -- for -- that there was .16 acres of  
16 wetlands that were filled. Is the other side  
17 arguing that there's more than that that's going  
18 to be filled?

19 MR. GLEISNER: We don't think it's relevant  
20 today to deal with that, Your Honor. We're  
21 going to respect the navigability issue. We do  
22 think that navigable waters can exist within a  
23 wetland and that may be another issue.

24 MS. CORRELL: Your Honor, our argument  
25 goes --

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1 primarily North Lake we believe based on the  
2 exhibits that the evidence that they will be  
3 presenting is to show that there are navigable  
4 water impacts in a wetland complex. So I think  
5 it's limited to the North Lake petition, but I'm  
6 not positive. We don't know the strategy and we  
7 don't know exactly how they'll present it and,  
8 quite frankly, I don't know which of the issues  
9 they will argue a navigable water impact is  
10 located where. I can't parse that out.

11 ALJ BOLDT: Okay. Well, to me that proves  
12 the point that we just -- we have to have  
13 something to rule on. If you don't know what  
14 they're doing and I -- you know, let's -- when  
15 we get there -- when you have a jurisdictional  
16 concern, raise it. I'll address it to the  
17 extent that it's obvious now. I'll address it  
18 to the extent that it's ambivalent or ambiguous  
19 or whatever in the post-hearing briefing and in  
20 the decision. I think that's really all we can  
21 do. I mean, I listed these nine issues on  
22 Friday. The Department had plenty of time to  
23 present its arguments then. If you're willing  
24 to -- if you want to say -- if you want to argue  
25 jurisdiction, that's the framework that I think

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1 MR. GLEISNER: May I just finish?

2 MS. CORRELL: I apologize, I thought you  
3 were finished.

4 MR. GLEISNER: Sorry, Counsel. And we  
5 believe, Your Honor, that the Judge struck the  
6 right tone a moment ago. I think this is an  
7 evidentiary gathering venture and if the parties  
8 have an issue with regard to jurisdiction and  
9 we've gone too far, that's on us and it's a  
10 problem, or if the facts are gathered and it  
11 turns out that there's a -- the Judge doesn't  
12 see a relevancy issue but discovers one during  
13 post-hearing briefing, that would be a good way  
14 to deal with it. I would respectfully suggest  
15 that we have an opportunity to put on our  
16 evidence and deal with those issues later on or  
17 as the evidence comes.

18 ALJ BOLDT: Okay. Here's what I'm going to  
19 propose. I just went through the nine part  
20 breakdown of those navigability issues which I  
21 said on a preliminary basis I was following.  
22 Which of those does the Department object to on  
23 jurisdictional grounds?

24 MS. CORRELL: Quite frankly, Your Honor,  
25 we're not prepared to know what -- it's

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1 we need to get at, is which of those are you  
2 saying are outside the scope of our  
3 jurisdiction.

4 MS. CORRELL: Any of the navigable waters  
5 that are actually located in the wetland complex  
6 and I don't know what the other party is going  
7 to present with respect to navigable waters.

8 ALJ BOLDT: Okay. Well, I think that does  
9 prove the point that we just need to get on to  
10 taking evidence. If it comes up, you'll have  
11 every opportunity to jump on it and to be heard,  
12 but I don't think it's -- we're going to  
13 accomplish anything more than we did on Friday  
14 frankly.

15 MS. CORRELL: I believe that, you know, it  
16 will probably cost more in judicial economy for  
17 us to continue to object to evidence that can't  
18 be entered into the record because it's outside  
19 the scope, but that's obviously your prerogative  
20 to rule so --

21 ALJ BOLDT: Yeah, I mean I think --

22 MS. CORRELL: -- we've prepared  
23 information that would make it very clear that  
24 the regulation authority at issue is in fact  
25 wetland authority in large parts of the record.

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1 ALJ BOLDT: And you're certainly -- you can  
2 present that as part of your case or you can  
3 present it in terms of your counsel's arguments  
4 on the jurisdiction. Okay. Why don't we get to  
5 opening statements. Would you like to make an  
6 opening statement, Mr. Gleisner?

7 MR. GLEISNER: In the interest of time,  
8 we'll waive an opening statement and call our  
9 first witness with the Judge's permission.

10 ALJ BOLDT: Okay. Does anybody else want  
11 to make an opening statement at this time?  
12 Okay, then we'll get to Mr. Gleisner.

13 MR. GLEISNER: We'll call Mr. Powers,  
14 Judge.

15 ALJ BOLDT: Do you swear to tell the truth,  
16 the whole truth and nothing but the truth, so  
17 help you God?

18 MR. POWERS: I do.

19 ALJ BOLDT: Please have a seat.

20 DIRECT EXAMINATION

21 BY MR. GLEISNER:

22 Q Mr. Powers, before we begin I'm going to ask you to  
23 look to your left and tell me if you have any  
24 difficulty seeing the TV?

25 A No, I can see it fine.

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1 Q And when you say licensed, does that mean you're a  
2 certified surveyor?

3 A State licensed, yes.

4 Q And how are you employed?

5 A I work for Lake Country Engineering in the Oconomowoc  
6 area.

7 Q And how long have you been with Lake Country?

8 A Eleven years.

9 Q And were you previously employed as a surveyor at  
10 some other company?

11 A Yes, I was with Welch Hanson and Associates for 24  
12 years, 16 of those years, 17 of those years licensed.

13 Q And is Welch Hanson still in business?

14 A They were bought out by a firm called Yaggy Colby and  
15 the name was officially changed from Welch Hanson to  
16 Yaggy Colby, oh, about seven years or so ago.

17 Q I'm now going to ask you to turn to Page 1R20 of the  
18 book in front of you and that is 1R0-020. The  
19 exhibit is 1R-020.

20 A Yes.

21 Q Is that your resume?

22 A Yes, it is.

23 Q Is that resume accurate and current?

24 A Yes.

25 MR. GLEISNER: I move the admission of that

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1 Q And can you see that easel over there okay?

2 A Yes.

3 Q Now, I'm going to put before you --

4 ALJ BOLDT: Sorry, do we get his name  
5 and --

6 MS. CORRELL: Mr. Gleisner --

7 MR. GLEISNER: Oh, I'm sorry, I was just  
8 going to --

9 Q What is your full name, sir?

10 A Mark Powers.

11 Q And I'm going to give you a listing or a book of  
12 exhibits and some coloring pens and I'm just going to  
13 put it near you.

14 ALJ BOLDT: Can you get where he lives and  
15 so forth?

16 MR. GLEISNER: Sure.

17 Q Where do you reside, Mr. Powers?

18 A I live in the Town of Oconomowoc. Address do you  
19 want?

20 Q Yes, please.

21 A W398 N5967 Autumn Woods Drive.

22 Q And what is your profession?

23 A I'm a licensed land surveyor.

24 Q And how long have you been a surveyor?

25 A I've been licensed for 29 years.

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1 resume at this time, Your Honor.

2 ALJ BOLDT: Okay. I'm just -- yeah, I'm  
3 trying to track with your numbering system here.  
4 So this is Exhibit 1-020?

5 MR. GLEISNER: Yes.

6 MR. HARBECK: 1R-020.

7 MR. GLEISNER: 1R-020.

8 MS. KAVANAUGH: It's got some tabs behind  
9 the 1's.

10 MR. GLEISNER: It's in the book of exhibits  
11 that we furnished, Your Honor.

12 ALJ BOLDT: Okay. Yeah, no, I see that,  
13 I'm just trying to -- on your list, I don't see  
14 that on there, so -- but that portion of Exhibit  
15 1 -- the R -- 1R-20 is received.

16 Q While at Welch Hanson did you have occasion to work  
17 for any municipal corporations?

18 A Yes, as part of our jobs with Welch Hanson we  
19 represented several communities as their consulting  
20 engineer and surveyor -- City of Delafield, Village  
21 of Hartland, Village of Oconomowoc Lake, Town of  
22 Summit.

23 Q And what did you do for those municipalities  
24 yourself?

25 A My job was to provide technical review of certified

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1 survey maps and subdivision maps. I also prepared  
 2 legal descriptions of easements and any other areas  
 3 that needed to be described for legal documents.  
 4 Q And what type of surveying have you done throughout  
 5 your career in general?  
 6 A I've done pretty much everything from private  
 7 residential work, marking lot lines, taking houses to  
 8 designing subdivisions. I've worked for several  
 9 large corporations over the years, Kwik Trip, GE.  
 10 You pretty much name it, I've pretty much worked for  
 11 them.  
 12 Q Have you done work for any banks?  
 13 A Several, yes.  
 14 Q And have you done any work for the American -- or in  
 15 connection with the American Land Title Association?  
 16 A Only in preparing the ALTA/ACSM land title surveys.  
 17 Q Your partner is a civil engineer, correct?  
 18 A Correct.  
 19 Q Now, what kind of work have the two of you done  
 20 together?  
 21 A Well, I'm a licensed land surveyor, he's the licensed  
 22 civil engineer, so between the two of us we can  
 23 handle anything that comes up in a land development,  
 24 designing strip malls, subdivisions, things like  
 25 that.

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1 the Krause site owned by a Fritz and Margo Hanson  
 2 (phonetic)?  
 3 A Yes.  
 4 Q And approximately when?  
 5 A I surveyed the property probably 20 years ago and  
 6 then I did some additional work on the property for  
 7 the North Lake Management District a couple years ago  
 8 and, again, on September 2nd was the last time I was  
 9 on that property.  
 10 MR. GLEISNER: Your Honor, we'll at this  
 11 time move the admission of Exhibit 2-001 which  
 12 is the plat of survey that is up on the screen  
 13 and also in our book at -- following Tab 2.  
 14 ALJ BOLDT: Any objection? Hearing none,  
 15 the exhibit is received.  
 16 MR. GLEISNER: Now, sir, would you put up  
 17 Chart 5, please?  
 18 Q I'm going to direct your attention again to Tab 2 in  
 19 the exhibit book and when you surveyed the Hanson  
 20 property and when you visited the Krause site, did  
 21 you have occasion to observe any survey pipes on the  
 22 property?  
 23 A Yes.  
 24 Q And those survey pipes, sir, do you see them on  
 25 Exhibit 2-001?

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1 Q Have you helped design and set up golf courses?  
 2 A Yes.  
 3 Q And have you done any work for GE?  
 4 A Yes.  
 5 Q And are you also President of the -- or past  
 6 President, excuse me, of the Southeast Chapter of the  
 7 Wisconsin Land Surveyors?  
 8 A Yes, I was.  
 9 Q I now call your attention in the book in front of you  
 10 to Exhibit 2-001 --  
 11 A All right.  
 12 Q -- which I'm calling up on the TV to our right here.  
 13 Can you identify that, sir?  
 14 A That is a plat of survey done by Welch Hanson and  
 15 Associates in January of 2005 of the property that  
 16 the DNR is currently trying to develop.  
 17 Q And, sir, are you familiar with what is called the  
 18 Krause (phonetic) site in the Town of Merton?  
 19 A Yes.  
 20 Q Have you visited that site?  
 21 A Yes.  
 22 Q Did you visit that site recently?  
 23 A The last time I was out there was September 2nd of  
 24 this year.  
 25 Q And have you ever visited a property to the south of

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1 A Yes, I do.  
 2 Q Okay. Now, I'm going to -- if you'll look at the TV,  
 3 I'm going to zoom in on an area to the east of the  
 4 Krause property and do you see a survey pipe denoted  
 5 there?  
 6 A Yes.  
 7 Q Where is that?  
 8 MS. CORRELL: I apologize, I can't see what  
 9 you're referring to.  
 10 MS. KAVANAUGH: If you point it out --  
 11 MS. CORRELL: Well, I think if the TV was a  
 12 little to the left --  
 13 MR. GLEISNER: My pleasure, Counsel. Tell  
 14 me when you can see it.  
 15 MS. CORRELL: Well, when you sit back down  
 16 I'll be able to tell you whether I can see it.  
 17 MR. GLEISNER: Fair enough, Counsel.  
 18 MR. HARBECK: How's this?  
 19 MS. CORRELL: Perfect.  
 20 ALJ BOLDT: And feel free to get up and  
 21 approach everybody -- other parties.  
 22 (Discussion off the record)  
 23 Q So that pipe that you see there in the blow-up is  
 24 next to North Lake, is that correct?  
 25 A Yes, there's actually several pipes shown in this

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1 survey.  
 2 Q Would you please -- the pipe that I'm interested in  
 3 is the pipe that leads to the second pipe on that  
 4 survey.  
 5 A Okay.  
 6 Q Do you see the one I'm referring to?  
 7 A Yes, the southern-most pipe --  
 8 Q Right.  
 9 A -- at the lakeshore, yes.  
 10 MS. KAVANAUGH: Could you guys point, like  
 11 use a -- I don't know if you've got a laser  
 12 thing or touch it?  
 13 MR. GLEISNER: A laser doesn't work on the  
 14 TV, but I'll be glad to point, Counsel.  
 15 Q This is the pipe you're referring to right here?  
 16 A No, I'm referring to the one furthest down?  
 17 Q Right here?  
 18 A Nope, next one down.  
 19 Q This one?  
 20 A Yes.  
 21 Q Okay.  
 22 ALJ BOLDT: You know, we're going to have  
 23 to do something to -- this one, this one. We're  
 24 going to have to identify which those are.  
 25 MR. GLEISNER: We're going to do that right

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1 there's a notation for this pipe that I think  
 2 you're referring to saying one-and-a-half  
 3 iron -- one-and-a-half inch iron pipe. That's  
 4 the second one you pointed to, correct?  
 5 Q Could you go to the legend in the lower corner down  
 6 here?  
 7 A Okay. According to the survey, any white circle was  
 8 an existing iron pipe found and the survey map will  
 9 indicate the size of the pipe.  
 10 MS. CORRELL: Correct.  
 11 A A black circle was a pipe that was set by the  
 12 surveyor in the course of doing the survey. So if we  
 13 could go back to the main map and maybe zoom in on  
 14 this area here --  
 15 Q Certainly.  
 16 A -- for the benefit of people? Okay. Down at the  
 17 lake there was an iron pipe found and the surveyor  
 18 who surveyed the DNR property set a new iron pipe six  
 19 feet north of that. I'm approximating here,  
 20 but -- and the pipe that I referred to as P1 was the  
 21 pipe that was set for the DNR survey. The same thing  
 22 here. There was an iron pipe that was found almost  
 23 seven feet south and the surveyor, in the course of  
 24 doing the DNR survey, set his own pipe to the north  
 25 of that and that's the one that I'm referring to

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1 now, Your Honor.  
 2 ALJ BOLDT: And on the hard copy.  
 3 MR. GLEISNER: We're going to do that right  
 4 now, Your Honor.  
 5 Q We're going to ask him to take a blue marker and on  
 6 Exhibit 2-001 would you please mark P1 and put your  
 7 initials after it?  
 8 A On this small copy here?  
 9 Q Yes. And draw an arrow to it so that we're sure that  
 10 we know what you're talking about.  
 11 A I circled it.  
 12 Q Very good. Now, is there also another pipe to the  
 13 west of that that you were referring to a moment ago?  
 14 A Yes.  
 15 Q And do you see that pipe on this diagram?  
 16 A Would you like me to stand up and point it out?  
 17 Q I would like you to very much.  
 18 A Sure. I believe you're referring to this pipe here  
 19 which is a bend point on the south line of the  
 20 property.  
 21 Q That's the second pipe. And do you see a third pipe  
 22 in those --  
 23 A Yes.  
 24 MS. CORRELL: Could you refer to the pipes  
 25 as they're indicated on the plat survey, meaning

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1 because I'm -- for the purposes of my testimony  
 2 here --  
 3 Q Could you read out the legend that is next to that  
 4 pipe -- Number 2?  
 5 A This one here? It says that he found a  
 6 one-and-one-half inch iron pipe 6.8 feet south and  
 7 nine-tenths of a foot west of his corner or what he  
 8 establishes as the DNR corner.  
 9 MS. CORRELL: Is that 5.8? That's what  
 10 you're calling Number 2, correct?  
 11 THE WITNESS: It could be 5.8, it could be  
 12 6.8. The one at the lake was 6.6. I'll take  
 13 them -- I can just as easily accept 5.8. I know  
 14 that's physically out there. There are two  
 15 pipes about six feet apart.  
 16 MS. CORRELL: Yep, I just want to know  
 17 which one is which.  
 18 Q And now I'd you to mark on Exhibit -- remain standing  
 19 because I'm going to ask you to go back up there. On  
 20 Exhibit 2-001 in the exhibit book, mark a P2 next to  
 21 the second pipe you've just identified and put your  
 22 initials by it.  
 23 A Okay.  
 24 Q Now I'd like you to return to the screen up here and  
 25 is there a third pipe west of the second pipe that

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1 you've just mentioned?  
 2 A Yes, that's the pipe here.  
 3 Q Okay. I'm going to zoom in on that a little further.  
 4 And is there any identifying mark by that pipe?  
 5 A According to the legend that was an iron pipe set by  
 6 the surveyor when he did the 2005 survey.  
 7 Q And would you return to your book and please put P3  
 8 next to that pipe?  
 9 A Okay.  
 10 Q And now return to the screen again, please. Do you  
 11 see a fourth pipe anywhere that is relevant to what  
 12 you were doing out at the site?  
 13 A I didn't use it when I was out there September 2nd,  
 14 but I had found it and used it when I did work for  
 15 the North Lake Management District a couple years ago  
 16 and that would be this pipe here.  
 17 Q Do you see any identifying information next to that  
 18 pipe?  
 19 A Just the symbol that it's an iron pipe set by the  
 20 surveyor in 2005.  
 21 Q Could you return to the Exhibit 2-001 and place a P4  
 22 next to that? Now, I'm going to ask you  
 23 again -- we'll go back to the full view. I'm going  
 24 to ask you again to take a look at Exhibit 2-001 and  
 25 do you see any easement denoted on that plat of

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1 A Okay.  
 2 Q I'm referring to right here.  
 3 MR. GLEISNER: Can everyone see what I'm  
 4 referring to?  
 5 A Okay.  
 6 Q Now I'm going to ask you if you would, and you can  
 7 remain seated for this --  
 8 A That's fine.  
 9 Q Thank you very much. I'm going to ask you to look at  
 10 the northeast corner of this plat of survey and right  
 11 under the words of the plat of survey does it  
 12 indicate who that survey was done for?  
 13 A Yes, it was done for the Wisconsin Department of  
 14 Natural Resources.  
 15 Q And you know from your own experience that Welch  
 16 Hanson was a competent surveying company?  
 17 A Yes.  
 18 Q Now, I'm going to direct your attention once more to  
 19 Exhibit 2-001. You can orient yourself on the  
 20 exhibit in the exhibit book first of all. Do you see  
 21 anything that has been marked as a gravel road or  
 22 drive or a lane?  
 23 A Yes. The only spot I see -- I see it marked in two  
 24 spots.  
 25 Q Okay.

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1 survey?  
 2 A Yes.  
 3 Q I'll blow it up. Well, first of all, give us the  
 4 general area. Just give us the general area.  
 5 A Okay. It starts down here on Redland Road and goes  
 6 northerly and easterly up this strip of land and  
 7 through the property and appears to terminate  
 8 approximately here.  
 9 Q And through the property. Are you referring to the  
 10 Hanson property?  
 11 A Both parties.  
 12 Q Okay. Now I'm going to blow this area up and I'm  
 13 going to ask you why you know that that -- that  
 14 broken line that you're referring to, why you know  
 15 that that is an easement?  
 16 A It's labeled on the survey as an ingress egress  
 17 easement with the recording data from the courthouse.  
 18 Q Does it tell how wide the easement is?  
 19 A Sixty foot.  
 20 Q All right. Now I'd like you to return to your  
 21 Exhibit 2-001 and with a red pen please draw the  
 22 boundaries east and west --  
 23 MR. GLEISNER: Thank you, Judge.  
 24 Q -- east and west from the point at which the  
 25 easement turns east.

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1 A I see it marked here and I see it marked up here.  
 2 Q Now, I'm going to zoom in on the area where you  
 3 indicated that it was up here, in other words, as it  
 4 crosses the easement. It indicates a gravel drive  
 5 midway between the point at which the easement turns  
 6 east and where the easement appears to terminate, is  
 7 that correct?  
 8 A That's correct.  
 9 Q Okay. Now, I'd like you to go back to your book and  
 10 with a light blue pen --  
 11 A I've already used the light blue.  
 12 Q Okay. Well, then use the dark blue.  
 13 A Okay.  
 14 Q I'm not that way. Please fill in -- and I'll show  
 15 you up here and then I'd like you to do it if you  
 16 agree with it. I'd like you to show the gravel drive  
 17 from the point at which it turns east until the point  
 18 at -- it's known as Circle 15 on the survey. Do you  
 19 see where I mean?  
 20 A Yep. All right.  
 21 Q Thank you very much.  
 22 ALJ BOLDT: And, again, if anybody wants to  
 23 approach and look at this, what he's done,  
 24 you're certainly welcome to do so.  
 25 Q I'm now going to hand you what has been marked in our

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1 book of exhibits, Judge, as Exhibit 3 and these are  
 2 the original drawings. We also have them in our  
 3 book, all of them, and ask -- I'm sorry, that doesn't  
 4 belong there. And ask if you have ever seen these  
 5 before?  
 6 A Yes, I have.  
 7 Q And what are they, if you know?  
 8 A They're a set of construction plans for the proposed  
 9 construction of the boat launch and access road.  
 10 Q And who is the author of them or who was that done  
 11 for?  
 12 A It was done for the State of Wisconsin. You asked me  
 13 for --  
 14 Q Yes.  
 15 A -- or by who?  
 16 Q And then by who?  
 17 A It was done by Kapur and Associates.  
 18 Q And now I'm going to ask you what's the date of those  
 19 drawings?  
 20 A December 22nd, 2010.  
 21 Q Now, will you turn to Drawing C-116, please?  
 22 MR. GLEISNER: Please put up Chart 1.  
 23 Q Do you recognize that drawing?  
 24 A Yes, I do.  
 25 Q Now, would you please at this time go to your book

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1 drawing.  
 2 Q Then I would like you to, if you wouldn't mind, come  
 3 up to the screen here and let's do the same thing we  
 4 did with regard to 2-001. I'm going to blow in on  
 5 this drawing and ask you if you see any pipe that you  
 6 might have worked with?  
 7 A I'd have to look at the whole thing. I do not  
 8 believe there is any symbol indicating an iron pipe  
 9 on this construction drawing, not that I've ever  
 10 seen.  
 11 Q Do you know where the pipe would be located on this  
 12 drawing -- the Pipe 1?  
 13 A Approximately here. That would be the one I  
 14 previously labeled P1.  
 15 Q Would you go back to the book of exhibits and would  
 16 you please put P1 with your initials at the  
 17 approximate location of Pipe 1?  
 18 A Sure. Same color I used on the other exhibits?  
 19 Q Please.  
 20 MS. KAVANAUGH: Could he point it out on  
 21 the screen too so we'll be able to see it?  
 22 MR. GLEISNER: Certainly.  
 23 THE WITNESS: Sure.  
 24 MR. GLEISNER: Can you see, Counsel?  
 25 THE WITNESS: It'd be approximately here.

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1 and -- close the drawings that you have in front of  
 2 you. Thank you very much. And go to your book and  
 3 call up Exhibit 002-005 -- that's 2-005.  
 4 A All right.  
 5 Q Is that drawing that is now on the screen and in  
 6 front of you in that book the C-116 you've just  
 7 identified within what is our Exhibit 3?  
 8 A Yes.  
 9 Q Now, I'm going to ask you to turn the page if you  
 10 will and go to Exhibit 2-006 which is now up on the  
 11 screen. Do you see that?  
 12 A Yes.  
 13 Q All right. Now, I'd like to ask you some questions  
 14 about this, but first of all I'd like to ask you how  
 15 did you -- did you do that drawing?  
 16 A I did the color rendering on -- overlaying over  
 17 the -- a TIF (phonetic) of the C-116 original  
 18 drawing, yes.  
 19 Q And at whose request did you do that?  
 20 A You.  
 21 Q And that overlay that is there, has it in any  
 22 way -- any of the coloring, any of the overlay or any  
 23 of the objects that appear in 2-006, has that in any  
 24 way altered the underlying C-116 drawing?  
 25 A No, the underlying drawing is a TIF of that actual

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1 MS. KAVANAUGH: Okay.  
 2 Q Now I'm going to go back to the full drawing here and  
 3 I'm going to ask you to come up here again and tell  
 4 me if you can see where the location of the second  
 5 pipe would be on this survey.  
 6 A It would be at the bend point here.  
 7 Q Would you please -- first of all, did you see that?  
 8 Let me blow it up for you.  
 9 MS. KAVANAUGH: Yes, would you do it one  
 10 more time?  
 11 MR. GLEISNER: Sure, I'll be pleased to.  
 12 Q Will you show that again?  
 13 A It'd be here.  
 14 Q And there's actually a pipe emblem there?  
 15 A No, the symbols you're seeing here, the line and  
 16 circle, I believe are for a proposed wooden fence.  
 17 Q Would you please go back to Exhibit 2-005 and  
 18 indicate with a P2 the approximate location of Pipe 2  
 19 on that survey?  
 20 A Okay.  
 21 Q Now, I'm going to ask you to return to the screen one  
 22 more time, please, and I'm going to ask you if you  
 23 can locate the approximate location of the third pipe  
 24 that you identified on 2-001?  
 25 A Yes, it would be right there.

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1 Q Let me blow that up for the benefit of the audience.  
 2 A And that'd be there.  
 3 Q I'm now going to ask you to return to your exhibit  
 4 and again place a P3 and your initials at the  
 5 approximate location of the third pipe. I'm now  
 6 going to ask you again to return to the drawing and  
 7 first of all, without blowing anything up, do you see  
 8 the approximate location of the fourth pipe?  
 9 A Yes, it'd be right here.  
 10 Q I'm going to blow that up.  
 11 A In here.  
 12 Q Now, I'd ask you to return to your exhibit book again  
 13 and if you would, please, put a P4 and your initials  
 14 next to that pipe.  
 15 ALJ BOLDT: And all of these are going on  
 16 2-006?  
 17 MR. GLEISNER: Yes, they are Your Honor.  
 18 ALJ BOLDT: Thank you.  
 19 MR. GLEISNER: That is correct.  
 20 Q I'm going to back up for a moment and ask you to take  
 21 a look at 2-001 and 2-002 just so --  
 22 MR. GLEISNER: I'm just doing some  
 23 housekeeping, Your Honor. Just a moment.  
 24 Q And I'm calling up 2-002 at this time. Tell me when  
 25 you've had an opportunity to look at those.

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1 ALJ BOLDT: Okay. Exhibit 3 is received as  
 2 well as Exhibit 2-5, 6 and 4.  
 3 MR. GLEISNER: I think it was 2-005, 006  
 4 and 002, Your Honor and Exhibit 3. Not 4 yet.  
 5 ALJ BOLDT: Okay. 2 then instead of 4 of  
 6 Exhibit 2.  
 7 MR. GLEISNER: It's a little confusing,  
 8 Your Honor.  
 9 ALJ BOLDT: Yes, it is.  
 10 MR. GLEISNER: And I apologize for that,  
 11 that's the nature of the beast.  
 12 ALJ BOLDT: No, that's all right.  
 13 Q Okay. Now, sir, drawing your attention again --  
 14 MR. GLEISNER: Excuse me for that. I'll  
 15 get that right back up.  
 16 Q -- to Exhibit 2-006. You've placed certain overlays  
 17 on this C-116 drawing, have you not?  
 18 A Yes, I did.  
 19 Q Would you please explain to me what the purple line  
 20 on C-116, Exhibit 2-006, represents?  
 21 A The purple line is marking the southern boundary line  
 22 of the DNR lands.  
 23 Q And what lies south of that purple line? Who owns  
 24 the land south of that?  
 25 A To the south and east would be Hanson.

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1 A Yep, I've got both of them.  
 2 Q Okay. 2-001 was previously identified by you as a  
 3 plat of survey done by Welch Hanson of the Krause  
 4 property in 2005, is that correct?  
 5 A That's correct.  
 6 Q Except for the drawings that have been placed on  
 7 Exhibit 2-002, is there any difference between the  
 8 drawing that's represented in 2-001 and the drawing  
 9 which is represented in 2-002?  
 10 A None that I can see. They both have the same  
 11 surveyor's stamp and date on them so I --  
 12 MR. GLEISNER: I would move the admission  
 13 of 2-002 at this time, Your Honor.  
 14 ALJ BOLDT: Any objection there? Hearing  
 15 none, Exhibit 2-002 is received.  
 16 MR. GLEISNER: I'm going to, just for  
 17 the -- again, in the interest of housekeeping,  
 18 Your Honor, move the admission of Exhibits 3,  
 19 Exhibit 2-005 and Exhibit 2-006.  
 20 ALJ BOLDT: Any objection on those?  
 21 MS. CORRELL: Exhibit 3? The entire  
 22 Exhibit 3?  
 23 MR. GLEISNER: I am moving the admission of  
 24 the entirety of Exhibit 3. It's a DNR document.  
 25 MS. CORRELL: No objection.

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1 Q Okay. Now, you have also placed some red broken  
 2 marks on Exhibit 2-006. Could you explain to the  
 3 Judge what those are?  
 4 A The red dash lines are highlighting the existing  
 5 ingress egress easement that we've mentioned earlier  
 6 from the survey.  
 7 Q Now, I'm going to direct your attention to a light  
 8 blue line, a wide light blue line, that you have  
 9 placed on Exhibit 2-006 and ask if you can identify  
 10 that, please?  
 11 A That's delineating the proposed road from the  
 12 construction plans.  
 13 Q And how do you know that's the proposed road?  
 14 A Besides all the other plans -- besides all the other  
 15 lines -- I'd have to look at the map. It doesn't  
 16 actually state proposed road anywhere, but if I  
 17 follow the line work from the parking island and  
 18 follow the line work back, it just is. I mean common  
 19 sense tells you that.  
 20 Q Now, do you see a sign that you have put on that?  
 21 A Yes.  
 22 Q Have you seen that sign before anywhere?  
 23 A Yes, I have, out on the site.  
 24 Q And did you see that sign out on the site on  
 25 September 2nd?

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1 A Yes.  
 2 Q And you've indicated -- well, first of all, let's go  
 3 to Exhibit 2-007 and I'll ask you what that is and  
 4 I'll put it up on the screen.  
 5 A All right.  
 6 Q Is that a close-up?  
 7 A Yes, that's a blow-up of the previous exhibit that we  
 8 were looking at.  
 9 Q No difference in terms of what is shown here from  
 10 what is shown on 2-006 except that 2-007 is a focused  
 11 or a zoom?  
 12 A Right, correct.  
 13 Q Okay. Now, you have located that sign in a  
 14 particular place. How did you -- first of all, where  
 15 did you locate it?  
 16 A Using the iron pipes as reference monuments, the iron  
 17 pipes we talked about earlier, I located the -- both  
 18 ends of the sign using survey equipment.  
 19 Q I'm going to blow that up and where is that sign?  
 20 First of all, on whose property is that sign located?  
 21 A The vast majority of it, if not all of it, is on the  
 22 Hanson property.  
 23 Q And how can you be certain to a reasonable degree of  
 24 professional certainty -- and all of the questions  
 25 that I'm going to be asking you now are to a

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1 you were able to ascertain the boundary lines or the  
 2 dimensions of that grove of trees?  
 3 A Yes.  
 4 Q And how did you do that, sir?  
 5 A Again, using survey equipment and the reference  
 6 monuments I talked about earlier, I located -- by  
 7 angle and distance, I located the outer drip line of  
 8 the -- of the grove, then connected all the dots with  
 9 a poly line to create the shape.  
 10 Q And is that how you would normally measure the size  
 11 or the dimensions of a tree -- a body of trees?  
 12 A That or anything else, yes. Especially using the  
 13 outer drip line as the limits of the trees, yes.  
 14 Q This is -- in your book of exhibits, this is 2-007.  
 15 Would you confirm that for me?  
 16 A Yes.  
 17 MR. GLEISNER: I would at this time move  
 18 the admission of Exhibit 2-007, Your Honor?  
 19 ALJ BOLDT: Any objection there?  
 20 MR. MEYER: Your Honor, can I approach and  
 21 read what the sign says?  
 22 MR. GLEISNER: Sure.  
 23 ALJ BOLDT: Sure.  
 24 MR. GLEISNER: I'm sorry, Your Honor, I  
 25 didn't mean to speak for you.

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1 reasonable degree of professional certainty. To a  
 2 reasonable degree of professional certainty, how can  
 3 you be certain that sign is located where you have  
 4 indicated it?  
 5 A Using the iron pipe monuments which were set in 2005,  
 6 I tied in those four monuments, their angular and  
 7 distance relationship, to each other, checked to  
 8 within a reasonable degree of accuracy, and then I  
 9 located the sign in relationship to them.  
 10 Q Now, I'm going to go back out and I see a green  
 11 polygon or whatever there. Do you see that?  
 12 A Yes.  
 13 Q And can you identify what that is, if you know?  
 14 A That is a grove of trees that I was asked to locate  
 15 on that same day that I -- on September 2nd.  
 16 Q Now, I'm going to zoom in on that grove of trees and  
 17 ask you several questions about it. Underneath that  
 18 alleged grove of trees do you see a map reference of  
 19 some sort?  
 20 A Yes.  
 21 Q What is that that is displayed there?  
 22 A I'm seeing the proposed parking lot covering probably  
 23 a little over half of the -- the northerly half of  
 24 the tree grove.  
 25 Q And to a reasonable degree of professional certainty

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1 ALJ BOLDT: Sure, in terms of no objection.  
 2 MR. GLEISNER: Yes, that's what I meant,  
 3 Your Honor. Thank you.  
 4 ALJ BOLDT: You bet.  
 5 MR. MEYER: Thank you.  
 6 ALJ BOLDT: Okay. And Exhibit 02-07 is  
 7 received at this time.  
 8 Q Now, I would like you to go to your exhibit book  
 9 there, if you would please, and if you would call up,  
 10 just a moment here, Chart 3, please? I'm going to  
 11 call up Exhibit 2-004A. Can you find that in your  
 12 book?  
 13 A Yes.  
 14 Q Is that the same as is represented on the screen at  
 15 this time?  
 16 A Yes, it is.  
 17 Q Would you please explain to me what that is?  
 18 A That is a detail according -- using the information I  
 19 was able to take off the plat of survey, I was able  
 20 to do a detail map showing the dimensions and area of  
 21 that portion of the Hanson property that is covered  
 22 by the 60-foot ingress egress easement.  
 23 Q Now, that is a scalene triangle, correct, it has  
 24 different lengths for each side?  
 25 A Yes.

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1 Q Now, that triangle -- can you approach so that it'll  
 2 be easier for the people to see what you're doing and  
 3 tell us what the shortest side of the triangle  
 4 measures?  
 5 A The shortest side measures 81.48 feet.  
 6 Q And the second longest side measures what?  
 7 A That would be the north line. That was 280.88 feet.  
 8 Q And the south line of the triangle?  
 9 A That measures 330.07.  
 10 Q And in that exhibit I see you performed -- or  
 11 apparently at my direction, performed some  
 12 calculations, did you not?  
 13 A Yes. You also asked me to provide the area of that  
 14 easement.  
 15 Q And of that triangle?  
 16 A Yes.  
 17 Q And what is the -- in square feet what is the area of  
 18 that triangle?  
 19 A 9,833 square feet.  
 20 Q And how many acres does that translate to?  
 21 A 0.225.  
 22 Q Acres?  
 23 A Acres.  
 24 MR. GLEISNER: And I move the admission of  
 25 Exhibit 2-004A at this time, Your Honor.

1 Q And the bottom or the lower side of the triangle is  
 2 calculated by reference to the southern boundary of  
 3 the easement?  
 4 A That's correct.  
 5 Q Okay. Now, I would like you to go back to  
 6 Exhibit 2-007 and I would like you to take an orange  
 7 pen and about an inch above that scalene triangle I'd  
 8 like you to put your initials and the letter S.  
 9 A Okay.  
 10 Q Okay. Now, what you have done is you've actually  
 11 pointed on Exhibit 2-007 to the location of the  
 12 scalene triangle that appears in detail in  
 13 Exhibit 2-004A, is that correct?  
 14 A That's correct.  
 15 MS. CORRELL: Objection, foundation.  
 16 MR. GLEISNER: I laid quite a foundation, I  
 17 thought.  
 18 MS. CORRELL: On Exhibit 2-004A, none of  
 19 the identifying metrics on the easement detail  
 20 are consistent with those on 2-007 such that I  
 21 can identify that in fact that triangle is in  
 22 that same location.  
 23 MR. GLEISNER: He's testifying to it,  
 24 Counsel.  
 25 ALJ BOLDT: Let's see if you can put more

1 ALJ BOLDT: Any objection. 4A is received  
 2 as well from Exhibit 2.  
 3 Q Now, I would like you to go back for a moment, if you  
 4 would -- having in mind Exhibit 2-004A, I would like  
 5 you to please go back to Exhibit -- let's go to  
 6 2-007. I have now put that up on the screen and --  
 7 MR. GLEISNER: Put Chart 2 up, please.  
 8 Q Now, I would like you to first of all come to the  
 9 screen up here and show just in general where that  
 10 scalene triangle is that you just measured.  
 11 A It would run from this point to this point and then  
 12 to this point.  
 13 Q Okay. I'm going to zoom in on that and do it again  
 14 so the Judge can see. Step back a little bit.  
 15 ALJ BOLDT: Yeah, maybe do it on the  
 16 exhibit also.  
 17 MR. GLEISNER: Oh, we will, Your Honor. We  
 18 will, Your Honor.  
 19 A Again, it runs from this point over to here and then  
 20 back to this point.  
 21 Q Now, the scalene triangle that you have just  
 22 identified, two sides of it are calculated by  
 23 reference to the pipes that you talked about, is that  
 24 correct?  
 25 A That's correct.

1 foundation in, in terms of how he's made that  
 2 judgment.  
 3 MR. GLEISNER: Okay.  
 4 Q Let's go back to Exhibit 2-004A for a moment.  
 5 A Okay.  
 6 Q Which I am going to put up on the screen.  
 7 MR. GLEISNER: Yes, thank you.  
 8 Q How did you arrive at the calculations of lengths  
 9 here? Did you actually do a field survey on that?  
 10 A Not on the easement itself, no. Again, I tied in the  
 11 lot corner pipes and confirmed the angular and  
 12 distance relationship between the pipes according to  
 13 the survey and then scaling, I used -- using a scale,  
 14 I scaled the location of the easement off of the 2005  
 15 plat of survey.  
 16 Q So, in other words, you took two sides to calculate  
 17 the third side which is the easement side, is that  
 18 correct?  
 19 A Yes.  
 20 Q And is that customary in your business?  
 21 A Depending on what the desired result is. I mean if  
 22 someone was looking for the exact exact, I wouldn't  
 23 have scaled it, I would have gotten the easement deed  
 24 from the courthouse and reproduced everything, going  
 25 back, tying in the section line and all that work.

1 Q To a reasonable degree of professional certainty, is  
2 your detail in Exhibit 2-004A at least or maybe even  
3 more accurate than the scalene triangle that appears  
4 on Exhibit 2-007?  
5 A I assume mine is probably a little more accurate  
6 since I don't know what effort Kapur and Associates  
7 put into showing the easement accurately on the  
8 construction drawings.  
9 Q And that easement --  
10 MR. GLEISNER: Strike that, I'm sorry.  
11 Q That triangle which is a scalene triangle that you've  
12 shown detail for in 2-004A and the scalene triangle  
13 that appears in 2-007, that scalene triangle does in  
14 fact represent the northwest side of the Hanson  
15 property, correct?  
16 A More accurately, the south line of the DNR property,  
17 yes.  
18 Q And is there any reason that you doubt that the  
19 diagram that you have done in 2-004A is the same as  
20 the scalene triangle identified now by you with your  
21 initial and the letter S on Exhibit 2-007?  
22 A No, I have no reason to believe that these are  
23 substantially any different whatsoever except for  
24 their alignment on paper. This oriented to actual  
25 north -- this exhibit, the north arrow was actually

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1 appears in Exhibit 2-004B?  
2 A Yes, it is.  
3 Q At my direction did you --  
4 MR. GLEISNER: Strike that.  
5 Q Again, relate to the Judge how you calculated the  
6 parameters or the -- the outside dimensions of that  
7 grove of trees.  
8 A Every bend point you see around this exterior is a  
9 field shot that we took using angles -- measuring  
10 angles and distances and establishing the points on  
11 the ground using the iron pipes that are out there as  
12 reference points. And then by connecting up all  
13 those field shots together, I was able to create an  
14 outline of the tree grove that I then calculated the  
15 area on.  
16 Q And how does the drip line that you were referring to  
17 a moment ago factor into that?  
18 A I used that as my -- you know, a tree is a 20 or  
19 30-foot wide object. The traditional methods, when  
20 you're locating trees, is generally for primary  
21 environmental corridor or something like that and the  
22 rule of thumb is to use the outer edge of the trees  
23 called the drip line.  
24 Q And did you calculate the area of that grove of  
25 trees?

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1 cocked to the northeast to be able to fit it on paper  
2 better, but other than that no substantial  
3 difference.  
4 MR. GLEISNER: I think I move the admission  
5 of Exhibit --  
6 MR. HARBECK: You already did.  
7 MR. GLEISNER: Yeah.  
8 Q Moving on, please go to 2-004B in your exhibit book.  
9 MR. GLEISNER: And that I would ask you to  
10 bring that up over there.  
11 Q Now, the detail that you have here in 2-004B in the  
12 exhibit book, is that the same detail that we see on  
13 the screen?  
14 A Yes, it is.  
15 Q And what is portrayed on Exhibit 2-004B?  
16 A It is a detail of the same grove of trees colored  
17 green on the map over there, just in greater detail.  
18 It shows the property line between the two properties  
19 and it gives the area in square feet and acreage of  
20 the tree growth.  
21 Q Now, let me just direct your attention back to  
22 Exhibit 2-007 and on that exhibit, which I'll call up  
23 for the benefit of the people who are watching, is  
24 that grove of trees that is appearing on that  
25 Exhibit 2-007 in green, is that the detail that

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1 A Yes, I did.  
2 Q And in square feet what is it?  
3 A 7,874.  
4 Q And what does that translate to in acres?  
5 A 0.1807 acres. Eighteen-hundredths of an acre.  
6 ALJ BOLDT: I'm sorry, could you say that  
7 again, please? Zero point --  
8 THE WITNESS: 0.1807 or eighteen-hundredths  
9 of an acre.  
10 ALJ BOLDT: Thank you.  
11 MR. GLEISNER: I move the admission of  
12 Exhibit 2-004B.  
13 MR. MEYER: Can I approach, Your Honor?  
14 ALJ BOLDT: Sure.  
15 MS. CORRELL: I need a clarification of  
16 which exhibits in 2 you have moved because you  
17 have quite a few exhibits in each of your  
18 exhibits.  
19 MR. GLEISNER: Certainly. I'll be happy to  
20 do that, Counsel, and maybe it would be better  
21 for the Judge --  
22 UNIDENTIFIED SPEAKER: One at a time,  
23 please, one at a time.  
24 MR. GLEISNER: Sorry, sorry.  
25 ALJ BOLDT: Okay. But any objection to 4B

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1 while we're on that?  
 2 MS. CORRELL: 4B. That's the grove of  
 3 trees?  
 4 ALJ BOLDT: Right.  
 5 MS. CORRELL: No objection for what it  
 6 depicts.  
 7 ALJ BOLDT: Okay. 4B is received. I  
 8 believe we have 1, 2 -- or of Exhibit 2 we have  
 9 001, 002, we have 4A and B --  
 10 MS. CORRELL: For all of those exhibits DNR  
 11 would object to their relevance. All of these  
 12 easement issues had been clarified in a judicial  
 13 court case and resolved.  
 14 MR. GLEISNER: May I be heard, Your Honor?  
 15 ALJ BOLDT: Sure.  
 16 MR. GLEISNER: We're not offering these for  
 17 the proof of the easement, we're offering them  
 18 for another matter, Your Honor, and that other  
 19 matter would be to provide identifiers or to  
 20 assist in identifying the scalene triangle that  
 21 crosses the northwest corner of the Hanson  
 22 property. We're not contesting the easement, in  
 23 other words.  
 24 MS. CORRELL: Objection for relevance still  
 25 stands.

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1 MS. CORRELL: I apologize. He just  
 2 identified that it's an exhibit that he  
 3 prepared? Exhibit F, is that correct?  
 4 THE WITNESS: No, I was just asked if I had  
 5 seen it before.  
 6 MS. CORRELL: Oh, okay.  
 7 Q And there's one other question --  
 8 ALJ BOLDT: I'm sorry, is there an  
 9 objection to Exhibit 12 then?  
 10 MS. CORRELL: Are you moving it?  
 11 MR. GLEISNER: I did.  
 12 MS. CORRELL: You've seen it. Okay. On  
 13 that basis, no objection.  
 14 Q I would like to -- one last --  
 15 ALJ BOLDT: All right. Exhibit 12 is  
 16 received.  
 17 MR. GLEISNER: Thank you, Your Honor.  
 18 Q One other matter. Let's just go back to existing  
 19 Exhibit 2-006. Do you have any basis for comparing  
 20 where the so-called gravel drive would go in  
 21 relationship to the proposed road?  
 22 A Are you asking me if I can show where the existing  
 23 gravel drive is?  
 24 Q Yes.  
 25 A Yes, I can, but on this particular exhibit you can

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1 ALJ BOLDT: Sure. In terms of -- we have  
 2 spent a lot of time on this. How does it relate  
 3 to the navigability issues?  
 4 MR. GLEISNER: I will tie that in very  
 5 shortly, Your Honor.  
 6 ALJ BOLDT: Okay. Well, let's get there.  
 7 MR. GLEISNER: Next witness, Your Honor.  
 8 ALJ BOLDT: Okay.  
 9 Q I'm just going to ask you to go to one other exhibit  
 10 if you would please and that would be Chart 8. And  
 11 that would be Exhibit 10 in your book, Mr. Powers.  
 12 Excuse me, I misspoke, that's Exhibit 12 in your book  
 13 and ask if you have seen that before?  
 14 A Yes, I have.  
 15 Q That purports to be the parking lot of the DNR  
 16 overlaid on an aerial photograph?  
 17 A That's correct.  
 18 Q Are the dimensions that are shown on Exhibit 12  
 19 accurate?  
 20 A Yes, they substantially conform to the construction  
 21 plans here in front of me.  
 22 Q In Exhibit 3?  
 23 A Okay, yes.  
 24 MR. GLEISNER: And I move the admission of  
 25 Exhibit 12, Your Honor.

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1 only see a very small stretch. Right down here at  
 2 the southern edge of the existing gravel drive is  
 3 running from here to here.  
 4 Q Go back to your exhibits and just take a red -- no,  
 5 take a purple pen and mark where that little portion  
 6 of the existing road --  
 7 A On 2.006?  
 8 Q Oh, yeah, don't use purple, use black.  
 9 MS. KAVANAUGH: Can you clarify what he's  
 10 marking?  
 11 MR. GLEISNER: He's marking the -- if  
 12 there's any indication on Exhibit 2-006 or C-116  
 13 of the existing gravel road.  
 14 MS. KAVANAUGH: Based on his visualization  
 15 of it or based on being identified on that or  
 16 what?  
 17 Q Do you want to answer that?  
 18 A I guess based on my ability to look at construction  
 19 documents and interpret them.  
 20 MS. KAVANAUGH: No, I guess are you asking  
 21 as to gravel identified on that or are you  
 22 identifying where it is on that based on where  
 23 you've seen it on site?  
 24 THE WITNESS: Yeah, I believe both. He's  
 25 asking me if I can see where the existing gravel

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1 drive is on this exhibit and I answered yes and  
 2 then he asked me to delineate where I could see  
 3 it.  
 4 MS. KAVANAUGH: And the existing gravel  
 5 drive is the existing gravel drive that you've  
 6 personally seen?  
 7 THE WITNESS: Yes.  
 8 MR. GLEISNER: I have no further questions,  
 9 Your Honor.  
 10 THE WITNESS: And I assume -- I just want  
 11 to say I assume you don't want me to mark the  
 12 existing gravel drive back on this?  
 13 MR. GLEISNER: That's right.  
 14 THE WITNESS: Okay.  
 15 ALJ BOLDT: Okay.  
 16 THE WITNESS: Do I need to initial this?  
 17 MR. GLEISNER: Yes, please do.  
 18 ALJ BOLDT: Yes, and indicate what it is  
 19 too.  
 20 MR. GLEISNER: Gravel drive. Just write  
 21 down gravel drive.  
 22 MS. CORRELL: And just to clarify, the  
 23 Exhibit 2-006 does not identify the location of  
 24 the gravel drive? You're marking --  
 25 THE WITNESS: I'm sorry.

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1 MS. KAVANAUGH: Well, but the --  
 2 MS. CORRELL: Okay.  
 3 ALJ BOLDT: Okay.  
 4 MS. CORRELL: Objection to relevance as  
 5 well. We'll move on.  
 6 ALJ BOLDT: Well, Exhibit 2, we'll see if  
 7 it's tied to the navigability issue so all of  
 8 those that were received were received for the  
 9 limited purpose of -- what's the purpose, to tie  
 10 them into where the navigability --  
 11 MR. GLEISNER: We're providing a roadmap so  
 12 that when we provide other evidence it will be  
 13 clear where the various aspects of the proposed  
 14 project lie and how they interrelate with or  
 15 impact on the navigable water, Your Honor. This  
 16 was a necessary foundation witness, Your Honor.  
 17 ALJ BOLDT: Okay. So those are all -- were  
 18 received for that limited purpose. Mr. Gallo,  
 19 any questions of this witness?  
 20 MR. GALLO: Yes.  
 21 CROSS-EXAMINATION  
 22 BY MR. GALLO:  
 23 Q Is it okay if I call you Mark?  
 24 A Sure.  
 25 Q Mark, North Lake Management District hired you to

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1 MS. CORRELL: -- what your recollection  
 2 is, is that correct?  
 3 THE WITNESS: No, I'm marking what is shown  
 4 on this Exhibit 2-006.  
 5 MS. KAVANAUGH: Where does it say gravel  
 6 drive?  
 7 MR. HARBECK: Is this cross-examination or  
 8 what?  
 9 MS. CORRELL: It's underneath your blue  
 10 line, correct?  
 11 MR. GLEISNER: Your Honor, we're willing to  
 12 surrender the witness. Are they going to start  
 13 cross? Is this cross?  
 14 MS. KAVANAUGH: Well, I mean if you don't  
 15 want us to --  
 16 MS. CORRELL: If you want to enter the  
 17 exhibit for identifying the gravel drive, I need  
 18 to know what's being identified.  
 19 MS. KAVANAUGH: And you said you were  
 20 identifying it based on what's on the exhibit  
 21 plus your recollection and yet I don't see where  
 22 it says gravel anywhere on here.  
 23 THE WITNESS: It doesn't, just like the  
 24 proposed road didn't say proposed road. The  
 25 line work is there.

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1 conduct an elevational survey, is that correct, of  
 2 the Krause property?  
 3 A That's correct.  
 4 Q And it was a fairly limited survey. Can you explain  
 5 in your own words the work that you did and the scope  
 6 of the elevational survey?  
 7 A Sure. We were asked to verify some of the elevations  
 8 that were shown on the Kapur design drawings. We  
 9 used the same benchmark that Kapur did and we ran a  
 10 series of elevations from the lake to the existing  
 11 culverts which are -- they're shown on the  
 12 construction plans to be removed at approximately  
 13 Station 21, I believe.  
 14 Q You're looking at a --  
 15 A I'm sorry, I'm looking at Exhibit 2-006. But I was  
 16 hired to run a series of elevations, ground  
 17 elevations, approximately every 50 feet through  
 18 the -- what could be called the channel of that  
 19 wetlands.  
 20 Q Okay. When you did that, were you familiar with, in  
 21 your book, RNA Exhibit 16-001?  
 22 A I'm sorry, which one is that?  
 23 Q Exhibit 16-001.  
 24 A Okay.  
 25 UNIDENTIFIED SPEAKER: Would you like me to

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1 call that up for you Counsel?  
 2 MR. GALLO: Yeah, thank you, and also  
 3 Exhibit 8.  
 4 UNIDENTIFIED SPEAKER: Well, one at a time,  
 5 Counsel.  
 6 A 16-008 or just --  
 7 Q 001.  
 8 A Yeah, 16-001 and --  
 9 Q Now, this exhibit is -- just for an explanation, this  
 10 is a Kapur and Associates Engineering drawing. It  
 11 has (inaudible) and contour maps. Are you familiar  
 12 with this map?  
 13 A Yes, I have seen this before.  
 14 Q And you looked at that before you conducted the  
 15 elevation survey?  
 16 A Yes, I was looking for a vertical datum benchmark on  
 17 this set of plans that I could use to go out there  
 18 and shoot elevations in relation just so that I'm on  
 19 the same datum as the design engineer was.  
 20 Q Thank you. Can you describe for me, starting from  
 21 the left-hand side of the drawing, approximately  
 22 where we are on the proposed (inaudible)? Is  
 23 this -- for example, is this the outlet to the  
 24 lake -- North Lake?  
 25 A On the right-hand -- on the right-hand side is the

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1 MR. GALLO: 129 is a North Lake Management  
 2 District exhibit.  
 3 MS. CORRELL: Right. So -- okay, I thought  
 4 we were going to stick to one party per day.  
 5 (Discussion off the record)  
 6 Q Mark, did you prepare this drawing?  
 7 A Yes, I did.  
 8 Q And is this a fair representation of the work that  
 9 you did for --  
 10 A Yes.  
 11 Q -- North Lake Management District on the Krause site  
 12 and in the area of the proposed project?  
 13 A Correct.  
 14 Q Can you describe for us what these various elevations  
 15 represent?  
 16 A These are all existing ground elevations in the  
 17 locations that we located them using our survey  
 18 equipment.  
 19 Q And you have the word channel under a number of the  
 20 elevations, and was the intent of the survey to  
 21 measure essentially the bottom of the channel?  
 22 A Yes, we weren't trying to define the edges of the  
 23 channel, we were just trying to run a series of  
 24 elevations up the channel. So they're not  
 25 necessarily on one side or the other or up the

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1 outlet to the lake, yes.  
 2 Q Okay. And this -- between the blue lines -- and I'm  
 3 not asking you to verify this, but you can see under  
 4 the blue lines there are contours?  
 5 A Yes.  
 6 Q That, I believe, identify the banks of the unnamed  
 7 tributaries that --  
 8 A Yes, there is -- physically out there, there is a  
 9 defined channel.  
 10 Q Okay. And this -- if you proceed to the west, then  
 11 this goes up this channel to the end of the drawing  
 12 which is approximately where on the project side? Is  
 13 this the area that eventually --  
 14 A It's hard to tell, but it looks like it would be the  
 15 kind of -- the best landmark I could give is about  
 16 the west end of the proposed parking area.  
 17 Q Okay. Thank you. Could you look at Exhibit 8?  
 18 MR. GALLO: Thank you.  
 19 Q This is (inaudible) Exhibit 8 marked -- have you seen  
 20 this drawing before?  
 21 A No, I haven't.  
 22 Q Okay. This is a drawing of spot elevations. Okay.  
 23 And then you prepared a drawing and I have this as  
 24 Exhibit 129. If you could take a look at --  
 25 MS. CORRELL: I apologize, in RNA exhibits?

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1 middle, just -- you know, that was a pretty brushy  
 2 area and we're just trying to work our way through  
 3 this -- as much of a defined channel as there was.  
 4 Q Okay. And then just for purposes of orienting  
 5 ourselves with respect to the questioning of  
 6 Mr. Gleisner, on the left-hand side of the  
 7 drawing -- I'm going to --  
 8 A Point here?  
 9 Q Yeah, if you don't mind.  
 10 A Sure.  
 11 Q Can you show us the right-of-way dash line?  
 12 A Yes, it's faint on this view, but the easement is the  
 13 line, the dash line, here and the dash line here.  
 14 Q Do you mind marking that on your exhibit? This is  
 15 Exhibit 129.  
 16 A Sure.  
 17 Q And, actually, it's represented by a red dash line,  
 18 is that correct?  
 19 A Correct. Should I just label it easement?  
 20 Q Yes, thank you.  
 21 ALJ BOLDT: Now, are these duplicates  
 22 basically, that one and this one?  
 23 MR. GALLO: Yes.  
 24 ALJ BOLDT: Okay.  
 25 MR. GLEISNER: Do you want to put on the

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1 record which one he's talking about?  
 2 MR. GALLO: Exhibit 129.  
 3 ALJ BOLDT: And the same as 2008?  
 4 MR. GLEISNER: Yes, Your Honor.  
 5 MR. GALLO: Oh, I'm sorry.  
 6 ALJ BOLDT: Is that right, Mr. Witness?  
 7 THE WITNESS: 2.008? I'd have to check.  
 8 ALJ BOLDT: Is that -- the one that was up  
 9 there, is that the same as this one?  
 10 THE WITNESS: Yes, it is.  
 11 ALJ BOLDT: Okay. Thank you.  
 12 MR. GALLO: I didn't realize we had  
 13 different numbers on this exhibit.  
 14 MS. CORRELL: Exhibit 129, can I see that  
 15 exhibit --  
 16 THE WITNESS: Sure, sure.  
 17 MS. CORRELL: -- because we only had one  
 18 copy. We had to give it to our expert who is not  
 19 here.  
 20 THE WITNESS: It's easier for me to come  
 21 over there.  
 22 MS. CORRELL: Okay. So can we choose an  
 23 exhibit to refer to for clarity?  
 24 MR. GALLO: I think it's the same exhibit.  
 25 North Lake Management District 129 and RRNA

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1 right. I think she makes a very good point  
 2 though that we should -- why don't we just refer  
 3 to one and not get a bunch of duplicates in the  
 4 record. So which one would you prefer? Do you  
 5 want him to mark on -- did we already take in  
 6 Number 8?  
 7 THE WITNESS: No, we never did.  
 8 ALJ BOLDT: All right. Well, then let's  
 9 just stick with 129.  
 10 MS. CORRELL: And are you moving it? I  
 11 lost where we were.  
 12 MR. GALLO: I'm moving it into the record.  
 13 MS. CORRELL: And I would object to  
 14 relevance again.  
 15 ALJ BOLDT: And what's the relevance?  
 16 MR. GALLO: The relevance is to show the  
 17 connectivity of North Lake through the unnamed  
 18 stream to the area of the navigational fill  
 19 that's part of the proposed project. And, first  
 20 of all, the connectivity is one thing and then,  
 21 secondly, the elevations show that the channel  
 22 and the bottom is lower than the lake's ordinary  
 23 high water mark and therefore, under the Trudeau  
 24 case, and provided we can provide testimony that  
 25 the water goes back and forth, this channel and

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1 Exhibit --  
 2 MR. GLEISNER: 2-008.  
 3 MR. GALLO: -- 2-008. It's the same map.  
 4 ALJ BOLDT: I think it's a good point  
 5 though that in general let's just try to stick  
 6 with one copy or the record will get very  
 7 confusing.  
 8 MS. CORELL: And also I guess I have a  
 9 question regarding the use of exhibits submitted  
 10 by other parties. Is that -- I mean on this  
 11 particular one it doesn't matter because it  
 12 appears to be duplicates. Are there other  
 13 exhibits that are going to be swapped back and  
 14 forth between the petitioners?  
 15 MR. GALLO: Yes, yes, we had agreed to that  
 16 for reduction of paperwork. We didn't want to  
 17 make multiple copies.  
 18 ALJ BOLDT: That's fine, they can --  
 19 MS. CORRELL: I understand. It's just a  
 20 little confusing when we have separate days for  
 21 separate petitioners.  
 22 MR. GALLO: Well, we intend to split our  
 23 two days between the two petitioners and then  
 24 handle each witness in succession.  
 25 ALJ BOLDT: That's fine. That's your

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1 the proposed fill area is lakebed.  
 2 ALJ BOLDT: Okay. Why don't we -- I'm not  
 3 sure that that's clear from the testimony that  
 4 I've heard so far in terms of what -- you know,  
 5 let's get some more on 129 that would  
 6 demonstrate that connectivity and so forth.  
 7 Q First of all, I'd like to have the witness look at  
 8 Exhibit 104 -- North Lake Management 104.  
 9 A All right.  
 10 Q This is an email from DNR person James Morrissey to  
 11 the Army Corp person Dale Feifel (phonetic) in  
 12 response to a question that the Army Corps raised  
 13 with respect to the ordinary high water mark being  
 14 three different numbers.  
 15 MS. CORRELL: Don, if you're going to call  
 16 exhibits in different binders, you have to give  
 17 me a minute to get the exhibit.  
 18 MR. GALLO: Sure, sure. It's Exhibit 104.  
 19 MS. CORRELL: Exhibit 104. It's an email,  
 20 okay.  
 21 MR. GALLO: That's right.  
 22 Q At the top email, Mr. Morrissey states to Dale,  
 23 here's a corrected copy of the Plan Sheet Number  
 24 102-2. It depicts the correct ordinary high water  
 25 mark on the sheet as 897.76. So based on this email

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1 and the DNR's interpretation of the ordinary high  
2 water mark at the lake --  
3 A Uh-huh.  
4 Q -- being 897.76, were you able to, through your  
5 elevational survey, determine that the channel bottom  
6 of the stream and into the navigable waterways of the  
7 roadway as it bends out --  
8 A Uh-huh.  
9 Q -- within the roadway easement, were all those  
10 elevations below the ordinary high water mark?  
11 A Yes, they were.  
12 Q Okay. Can you also identify on this Exhibit 129 the  
13 existing roadway? And if you can, do you want to use  
14 a blue marker to --  
15 A All right.  
16 Q -- mark that within your exhibit?  
17 ALJ BOLDT: Sir, can I get the number again  
18 that 104 says is the DNR's interpretation of the  
19 ordinary high water mark?  
20 MR. GALLO: Yes.  
21 ALJ BOLDT: What elevation is that?  
22 MR. GALLO: 897.76.  
23 ALJ BOLDT: Okay. Thank you. Okay. And  
24 can I ask Mr. Powers a question?  
25 MR. GALLO: Yes.

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1 Q And if you could mark the SC in a different color --  
2 A Okay. Yeah, I've marked the road --  
3 Q -- so that your bench -- go ahead.  
4 A And the road as depicted on this map is the road that  
5 we located I believe two years ago when we did some  
6 other work on the Hanson property for North Lake  
7 Management.  
8 MS. CORRELL: Can I approach? What is it?  
9 What are you marking?  
10 THE WITNESS: 129.  
11 MS. CORRELL: Where is this located on  
12 another exhibit that shows the entire project?  
13 MR. GALLO: For example, right here.  
14 MS. CORRELL: Can you tie this in?  
15 THE WITNESS: Sure. You mean where is this  
16 detail here?  
17 MS. CORRELL: Correct.  
18 THE WITNESS: Well, where this corner of  
19 the dark black line is here is the upper most  
20 purple bend point.  
21 MR. GALLO: Right.  
22 THE WITNESS: Right. And then the bend  
23 point that I show -- the next bend point I show  
24 here is at P2 and this would be P1 down here.  
25 (Discussion off the record)

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1 ALJ BOLDT: Are we sure that we're talking  
2 about the same elevations in terms of how the  
3 datum was put together and so forth?  
4 THE WITNESS: Yes. The Kapur drawings show  
5 that the section corner monument which I've got  
6 labeled on the drawing, it's not real clear, but  
7 it has a code SC, has an elevation of 898.31 on  
8 it. That's the same elevation on the Kapur  
9 drawings. I checked the Sewer Pac (phonetic)  
10 section corner tie sheets. They have an  
11 elevation of 898.34 on it so I don't know if  
12 they changed their elevation after Kapur did  
13 their design work or I can't explain the  
14 three-hundredths of a foot discrepancy, but I  
15 used the Kapur so that my elevations were on the  
16 exact same datum as theirs.  
17 Q Mark, if you --  
18 ALJ BOLDT: And do we know what that is,  
19 you know, in terms of how they -- isn't there  
20 like a U.S. Army Corps kind of datum or  
21 something? How do you --  
22 THE WITNESS: No, there's really just USGS.  
23 ALJ BOLDT: USGS?  
24 THE WITNESS: Yes.  
25 ALJ BOLDT: Okay.

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1 THE WITNESS: This point is here. This  
2 bend point at the end of the red dash line is  
3 here.  
4 ALJ BOLDT: Okay. We're going to have to  
5 get a microphone a little closer to the witness.  
6 Maybe Mr. Gallo's? That does snap off there if  
7 you want.  
8 THE WITNESS: Anything else I can help you  
9 with as far as getting oriented?  
10 MS. KAVANAUGH: I guess I'd ask him where  
11 the channel -- where you're saying this  
12 channel --  
13 THE WITNESS: Again, we were not hired to  
14 define the edges of the channel, simply to take  
15 shots somewhere within the channel so these are  
16 not implying to be specifically the center of  
17 the channel or one edge or the other.  
18 MS. KAVANAUGH: But they'd be running  
19 across?  
20 THE WITNESS: Yes, they'd be running  
21 diagonal, crossing the corner of the Hanson  
22 property.  
23 MS. KAVANAUGH: Pretty much this way?  
24 THE WITNESS: Yes.  
25 MS. KAVANAUGH: Okay.

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1 THE WITNESS: In fact, on this map I show  
2 the sign and I show the same sign here as  
3 another help.

4 MR. GALLO: This may help.  
5 Q Mark, this symbol is the edge of the waterway,  
6 right -- this right here?

7 A Which symbol?

8 Q This jagged symbol?

9 A No, that's a symbol for the edge of woods.

10 Q Oh, I see.

11 A The existing driveway is running between the two  
12 edges of wood here.

13 MR. MEYER: Your Honor, may I object.  
14 We're talking -- you know, there are -- we're  
15 not laying out evidence right now, we're  
16 pointing to a map and -- which is not being  
17 described correctly in the record.

18 MR. HARBECK: He's just responding to  
19 questions that the DNR asked him in terms of  
20 orienting them so --

21 ALJ BOLDT: It's almost like voir dire  
22 really and that's -- and you certainly can have  
23 a chance to make sure that everybody understands  
24 it as well.

25 A And I've marked the section corner.

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1 MS. CORRELL: Objection, calls for  
2 speculation.

3 MR. GALLO: I'll withdraw.

4 ALJ BOLDT: Okay. Thank you.

5 Q Mark, there's a culvert on the left-hand end of your  
6 drawing. I think -- is that a correct statement,  
7 this dashed line --

8 A Yes.

9 Q -- under the existing driveway? And those  
10 elevations are below -- also below the ordinary high  
11 water mark, is that correct?

12 A Yes, those are invert elevations. Those are  
13 elevations of the bottom of the pipe and they are  
14 both below the ordinary high water mark.

15 Q Mark, when -- I'm going to move to the other end, the  
16 lakeshore end, of the drawing.

17 A Okay.

18 ALJ BOLDT: Which is the right-hand side of  
19 Exhibit 129, is that right?

20 MR. GALLO: I'm sorry, yes, the right-hand  
21 side or the east side of Exhibit 129.

22 Q There are three different elevations there. There's  
23 896.46, 890 -- I'm sorry, 897.46, 897.65 and 897.4.  
24 I'm not sure what the --

25 A Yeah, it's 47 I think maybe. I could --

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1 Q Okay. That's your benchmark?

2 A Yes.

3 Q You mentioned a different number that was I think  
4 .03?

5 A .34 versus .31.

6 Q So it's .03 hundredths higher?

7 A About three-eighths of an inch, yeah.

8 Q Would it make any difference if you used that  
9 benchmark whether or not the elevations in the  
10 channel were --

11 A No.

12 Q -- below the ordinary high water mark of the lake?

13 A No. Even if I adjusted all my elevations to the  
14 current Sewer Pac elevation, all my shots would still  
15 be below the ordinary high water mark of 897.76.

16 Q Just roughly, on that map can you draw in the  
17 proposed location of the access road?

18 A I can try. I'm marking this in purple.

19 ALJ BOLDT: On Exhibit 129?

20 THE WITNESS: Correct.

21 Q Okay. If I -- the purpose of this proposed access  
22 road relocation as to the existing driveway is to  
23 move the road onto the easement and off private  
24 property, is that correct?

25 A The best I can ascertain --

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1 Q That's okay. All three of those elevations are below  
2 the ordinary high water mark of the North Lake?

3 A That's correct.

4 Q And what do those locations represent?

5 A They were simply shots in the channel where we could  
6 get openings. I'm not sure specifically what you're  
7 trying to ask.

8 Q Well, we took those shots because they were specific  
9 channels -- three different channels. The first two  
10 were open channels and the third was a channel that  
11 was essentially to the south. There's an elevation  
12 on the far right edge --

13 A Uh-huh.

14 Q -- and that's -- it's marked end pipe and to sand.  
15 What's that elevation?

16 A That was the end of a pipe that was out in the water  
17 that is my understanding is the outfall end or the  
18 intake end of the pipe that -- there's actually  
19 somewhat of a berm along the shoreline, even though  
20 that berm itself does not get higher than the  
21 ordinary -- that one shot, the 897.65, was the top of  
22 the berm so -- and then the pipe runs underneath that  
23 berm and daylights in the channel behind the berm or  
24 west of the berm.

25 Q Okay. And is that elevation below the ordinary high

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1 water mark of the lake?  
 2 A Yes, it is.  
 3 Q And you mention a berm at the edge of the lake. Do  
 4 those -- do you know from personal observation where  
 5 those channels cut through that berm?  
 6 A I walked up in that area and looked at it. I could  
 7 see the berm -- that the berm parallels the  
 8 shoreline.  
 9 Q Uh-huh.  
 10 A I could see the berm and then I could see that the  
 11 elevations dropped back off on the west side of the  
 12 berm, if that answers your question.  
 13 Q Okay. Thank you.  
 14 MR. GALLO: Nothing further.  
 15 MR. GLEISNER: Don, do you want to move,  
 16 again, 129 and 104?  
 17 MR. GALLO: Yeah, I'm sorry. I need to  
 18 move Exhibit 129 and Exhibit 16.001.  
 19 MR. GLEISNER: 104.  
 20 MR. GALLO: 104. Oh, I'm sorry, and  
 21 Exhibit 104. Thank you.  
 22 MS. CORRELL: Objection to relevance and  
 23 probative value. You moved 129, which I only  
 24 have a copy of 2-008 which is the same, and you  
 25 also moved which other exhibits, 16?

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1 finish this witness, and then break for lunch?  
 2 MR. GLEISNER: We'd like that.  
 3 ALJ BOLDT: That was my target here all  
 4 along so is everybody good with that? I know we  
 5 are close to needing a break here, but I'd  
 6 prefer to just break for lunch if we can.  
 7 CROSS-EXAMINATION  
 8 BY MS. CORRELL:  
 9 Q Almost good afternoon, Mr. Powers. Did you identify  
 10 bed and banks of the channel that you were hired to  
 11 survey?  
 12 A I'm sorry, could you --  
 13 Q Did you identify bed and banks of the quote, unquote,  
 14 channel that you were --  
 15 A No, I'm not qualified to do that.  
 16 Q What points did you survey?  
 17 A We visually tried to find the lowest point, the -- I  
 18 guess the best way to describe it, just the lowest  
 19 point in a given area, not an isolated hole, but just  
 20 the -- we tried to identify the bottom as best as we  
 21 could visually.  
 22 Q So could you identify who you mean when you refer to  
 23 we?  
 24 A My field partner and I. He, Rob Davey (phonetic),  
 25 went into the brush with the prism pole while I

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1 MR. GALLO: 16.001.  
 2 ALJ BOLDT: I'm sorry, what was 16.001?  
 3 MR. GALLO: This is a Kapur elevation.  
 4 ALJ BOLDT: Okay. Well, Exhibit 129 is  
 5 received over objection. 16.001?  
 6 MS. CORRELL: No objection.  
 7 ALJ BOLDT: Is received --  
 8 MR. MEYER: Could I observe that exhibit,  
 9 please?  
 10 ALJ BOLDT: Pardon me?  
 11 MR. MEYER: Can I take a look at that  
 12 exhibit?  
 13 ALJ BOLDT: Sure. And was there an  
 14 objection to 104?  
 15 MS. CORRELL: 104. That's a North Lake --  
 16 MS. KAVANAUGH: Email.  
 17 MS. CORRELL: Email. No objection.  
 18 ALJ BOLDT: Okay. 104 is received. Any  
 19 objection to the 16.001?  
 20 MS. CORRELL: None.  
 21 ALJ BOLDT: Okay, that's received. I was  
 22 looking for Mr. Meyer. Do you have any --  
 23 MR. MEYER: No objection.  
 24 ALJ BOLDT: Okay. I'll leave it to  
 25 Counsel. Do you want to proceed with the cross,

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1 stayed at the gun. He would hold the prism pole and  
 2 prism in a certain location. I would locate or shoot  
 3 that prism by angle and distance to establish the XYZ  
 4 coordinates of that particular spot. So he was  
 5 actually down in the channel, I was working the  
 6 survey instrument.  
 7 Q And you stated that Mr. Davey was a professional  
 8 engineer, is that correct?  
 9 A He's a licensed civil engineer, yes.  
 10 Q Does he have any experience in identifying navigable  
 11 waterways?  
 12 A No.  
 13 Q Is he a biologist?  
 14 A No.  
 15 Q Geologist?  
 16 A Nope.  
 17 Q Soils expert?  
 18 A Nope.  
 19 Q Horticulturist?  
 20 A No.  
 21 Q Again, it was Mr. Davey who located and then you  
 22 would shoot the survey point, is that correct?  
 23 A That's correct.  
 24 MS. CORRELL: Just a moment.  
 25 Q And, again, I believe you testified that you located

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1 roughly what you determined to be the bottom of the  
 2 channel your partner identified by view, is that  
 3 correct?  
 4 A That's correct.  
 5 MS. CORRELL: I have no other questions for  
 6 you.  
 7 ALJ BOLDT: Okay. Mr. Meyer?  
 8 MR. MEYER: Yes.  
 9 CROSS-EXAMINATION  
 10 BY MR. MEYER:  
 11 Q Mr. Powers, thank you for your work on this project.  
 12 A Sure.  
 13 Q Referring to Exhibit 16.001, do you have that before  
 14 you?  
 15 A All right.  
 16 Q On Exhibit 16.001 there's two blue lines that you've  
 17 drawn?  
 18 A If you're referring to the blue lines, I didn't draw  
 19 those.  
 20 Q Okay. Who drew those lines?  
 21 A No idea.  
 22 Q The -- you did some survey work in the area between  
 23 the two blue lines, is that correct?  
 24 A That's correct.  
 25 Q What distance was there between the points that you

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1 that channel a point that's referred to as 0.50?  
 2 A Yes.  
 3 Q If you would go northeast of that point at roughly,  
 4 say, at two o'clock --  
 5 A Yes.  
 6 Q -- there's a point called -- there's a cross with  
 7 the number 897.78 --  
 8 A Uh-huh.  
 9 ALJ BOLDT: Is that yes?  
 10 Q -- and it says KYZ?  
 11 THE WITNESS: I'm sorry, yes.  
 12 Q KYZ? Do you observe that?  
 13 A Yes, I do.  
 14 Q Is that a point that you either measured or  
 15 confirmed?  
 16 A No, I did not specifically try and set that or any  
 17 other point out.  
 18 Q Do you know from this document who might have done  
 19 that?  
 20 A Based on the title block I have to assume that it was  
 21 Kapur and Associates who shot all the shots that are  
 22 on this map.  
 23 Q Is it your testimony that there is no point between,  
 24 not the points that you surveyed, but any point where  
 25 there's an elevation between the eastern edge, which

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1 surveyed?  
 2 A No particular distance. We were working in a very  
 3 brushy area so we were simply wherever we  
 4 could -- wherever we had an opening in the brush  
 5 where we could take a shot, we took a shot. No  
 6 specific 30 feet or 50 feet, anything like that.  
 7 Q How many reference points did you -- or how many  
 8 points did you survey between the two ends of what  
 9 you've testified to as a channel?  
 10 A I didn't get that question because of the paper,  
 11 sorry.  
 12 ALJ BOLDT: Can you repeat the question,  
 13 Counsel?  
 14 Q How many survey points did you take, Mr. Powers,  
 15 between the two ends of the channel that you've  
 16 described between the two blue lines?  
 17 A Approximately 22.  
 18 Q And what is the distance between the two ends of the  
 19 blue lines roughly would you estimate?  
 20 A You mean on Exhibit 16.001?  
 21 Q That is correct.  
 22 A About 300 feet.  
 23 Q Can we -- can I refer you then to Exhibit 16.001?  
 24 A All right.  
 25 Q Go easterly. Do you see towards the westerly end of

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1 is purported to be the edge of North Lake, and the  
 2 data point 0.00, is it your testimony there is no  
 3 point that is higher than elevation 897.76 at any  
 4 point in the cross section?  
 5 A No, that's not my testimony.  
 6 Q Okay.  
 7 A I can only certify the shots I took in the locations  
 8 that I took them.  
 9 Q And there may be a cross section of the area --  
 10 MR. GALLO: Calls for speculation.  
 11 ALJ BOLDT: It's fair cross.  
 12 Q There may be a cross section across that between the  
 13 two blue lines at which the elevation is consistently  
 14 above 897.76?  
 15 A Not that I -- not that I visually saw.  
 16 Q Did you measure all the areas between the two lines?  
 17 A I'm sorry, measure all the areas. I'm not --  
 18 Q Measure the full distance?  
 19 A Just what I represent on the map here.  
 20 Q So it's possible there is such a cross section?  
 21 A That is possible, yes.  
 22 Q Thank you.  
 23 ALJ BOLDT: Is it likely?  
 24 THE WITNESS: I'm pretty much matching up  
 25 with what Kapur shot. I never saw -- I mean

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1 it's in the area -- the closest elevation I have  
 2 to that is I have it on my -- I have two shots,  
 3 897.29, 897.32, and I see that he has on his  
 4 drawing -- well, he has an 897.09, 897.3. Some  
 5 shots seem to compare good, some shots -- again,  
 6 I never saw this high point here. I didn't see  
 7 it.  
 8 Q But on that map I think you pointed out or concurred  
 9 there's an 897.78?  
 10 A Yes, I see it on the map.  
 11 Q And if you go southeast of there, there's a point  
 12 that is very similar, although slightly  
 13 less -- 897.69?  
 14 A Correct.  
 15 MR. MEYER: No further questions.  
 16 MS. CORRELL: I neglected to ask just two  
 17 questions, if I may?  
 18 ALJ BOLDT: Go ahead.  
 19 CROSS-EXAMINATION  
 20 BY MS. CORRELL:  
 21 Q Mr. Powers, what was the date of your field  
 22 investigation?  
 23 A September 2nd of this year.  
 24 Q Less than a month ago, is that correct?  
 25 A That's correct.

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1 Q And there seems to be a contour that's 897.45?  
 2 A Oh, yes, I -- yeah, just east of Station one plus 00.  
 3 Q And a contour line does run through this narrow area  
 4 as if to be a channel, is that correct?  
 5 MS. CORRELL: Objection, outside the scope  
 6 of his expertise.  
 7 MR. GALLO: I'm sorry?  
 8 MS. CORRELL: Objection.  
 9 MR. GALLO: And what was your --  
 10 MS. CORRELL: Outside the scope of his  
 11 expertise. He's just identified that he did not  
 12 locate a channel. He surveyed in low points.  
 13 MR. GALLO: I'll rephrase the question.  
 14 MS. CORRELL: Thank you.  
 15 Q From your interpretation of these contours, does it  
 16 depict a channel?  
 17 A Yes, a swale, if you'd rather call it that.  
 18 Q A swale being -- explain a swale. Is it a low point  
 19 as in a ditch?  
 20 A Yeah, a swale is like a -- is a defined channel that  
 21 would carry water so yes, the contours would depict  
 22 some sort of a swale that would channel the water  
 23 from one point to another.  
 24 Q So is it your testimony that in reviewing the  
 25 contours of this Kapur and Associates drawing labeled

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1 Q And how many times have you been to the site? Did  
 2 you shoot these elevations in one day?  
 3 A Yes. Yes, all the elevations shown on Exhibit 129  
 4 were all shot on September 2nd?  
 5 Q Okay.  
 6 MS. CORRELL: Thank you.  
 7 MR. GALLO: Redirect?  
 8 ALJ BOLDT: Yeah, go ahead and then we'll  
 9 go back to redirect with Mr. Gleisner.  
 10 CROSS-EXAMINATION  
 11 BY MR. GALLO:  
 12 Q Mike, with respect to Exhibit 16.001 and the high  
 13 point that Attorney Meyer was questioning you on,  
 14 from your reading of this contour maps -- and are you  
 15 experienced with contour maps? Have you --  
 16 A Yes.  
 17 Q Have you prepared contour maps?  
 18 A Yes, I have.  
 19 Q And can you tell -- I understand that the blue line  
 20 is in your way, but at the edge of the steep part or  
 21 the bank of this unnamed tributary, there are  
 22 elevations below the ordinary high water mark of  
 23 897.76. Can you determine any of those? Mr. Meyer  
 24 pointed out that one was 897.69?  
 25 A Yes.

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1 as Exhibit 16.001, there appears to be a swale that  
 2 would be below the ordinary high water mark of  
 3 North Lake?  
 4 A Yes, based on the elevations that I took.  
 5 Q Okay. And also based on -- is it correct to say  
 6 based on the contour map that is provided in front of  
 7 you?  
 8 A Could you ask the question again?  
 9 Q Okay. You know, based on your review of this contour  
 10 map, and I realize that you're just looking at this,  
 11 and the discussion that we had with regard to -- you  
 12 mentioned a swale in this area, is it your conclusion  
 13 that the bottom of this swale or channel, if you may,  
 14 is below the ordinary high water mark of North Lake  
 15 of 897.76?  
 16 A No, it can't because of this one elevation of 897.78.  
 17 Q Okay. I'm sorry, I'll rephrase that. I'm not  
 18 talking about that elevation --  
 19 A Okay.  
 20 Q -- and I acknowledge that as a high point above the  
 21 ordinary high water mark. What I'm talking about is  
 22 the swale that you -- I'm not talking about the  
 23 total --  
 24 A Okay.  
 25 Q -- total unnamed stream, but I'm talking about the

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1 south edge that we just discussed.  
 2 A Oh, all right, yes.  
 3 Q Can you -- let me rephrase that question then.  
 4 A Yes.  
 5 Q Based on the swale or channel that we just talked  
 6 about --  
 7 A Uh-huh.  
 8 Q -- being below the ordinary high water mark, is it  
 9 your conclusion, based on these contours and this  
 10 map --  
 11 A Uh-huh.  
 12 Q -- provided by DNR and their --  
 13 MS. CORRELL: Objection, foundation.  
 14 MR. GLEISNER: Just finish your question,  
 15 Don.  
 16 ALJ BOLDT: Yeah, go ahead, finish the  
 17 question.  
 18 Q Is it your testimony that this swale is below the  
 19 ordinary high water mark of North Lake of 897.76?  
 20 ALJ BOLDT: Any objection?  
 21 MS. CORRELL: Foundation, relevance,  
 22 probative value. He asked a question that was a  
 23 series of assumptions and a leading question and  
 24 received a one word response.  
 25 MR. MEYER: I would also object on grounds

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1 say, Mike, that this is a contour map?  
 2 A Yes.  
 3 Q And you've already stated that you're knowledgeable  
 4 as to reading contour maps?  
 5 A Yes.  
 6 Q Okay. And is it -- as you read this contour map, is  
 7 there -- we're looking at Station 0 plus 75, I  
 8 believe, or 0 plus 80 by this baseline. Can you see  
 9 where I'm talking about?  
 10 A Yes, I can.  
 11 Q Okay. Is it your interpretation of this contour map  
 12 that there -- at a channel below North Lake  
 13 elevation -- ordinary high water mark elevation  
 14 897.76 --  
 15 A Yes.  
 16 Q -- exists in this area?  
 17 A Yes.  
 18 ALJ BOLDT: Anything further, Mr. Gallo?  
 19 MR. GALLO: Nothing.  
 20 ALJ BOLDT: Mr. Gleisner, redirect?  
 21 MR. GLEISNER: Your Honor, a little  
 22 redirect. Thank you very much, Your Honor.  
 23 REDIRECT EXAMINATION  
 24 BY MR. GLEISNER:  
 25 Q I'm going to call up Exhibit 16.001 and I'm going to

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1 of foundation on behalf of the Federation.  
 2 There has not been any data established to  
 3 establish any data points through that area.  
 4 MS. KAVANAUGH: And in terms of  
 5 vagueness --  
 6 MR. GALLO: This is a drawing.  
 7 ALJ BOLDT: I think it goes to weight  
 8 rather than admissibility, but I also think it  
 9 was a leading question so it's sustained as  
 10 leading. See if you can ask the question again.  
 11 MS. KAVANAUGH: And, Don, could you clarify  
 12 what part of the channel because earlier we  
 13 talked --  
 14 MR. GALLO: Yes.  
 15 MS. KAVANAUGH: -- about channels down  
 16 near the -- near that triangle near the  
 17 easement, but this looks like the channel up on  
 18 the north part of the property on here.  
 19 MR. GALLO: That's correct.  
 20 MS. KAVANAUGH: So when you're talking  
 21 about channel, if you would identify where it  
 22 is, please.  
 23 Q I'm, first of all, looking at Exhibit 16-001 and this  
 24 is the north channel profile prepared by Kapur and  
 25 Associates. There's no date on it and is it fair to

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1 ask, if you would, to come to the board for a moment,  
 2 Mr. Powers, and I'm going to zoom in on a portion of  
 3 the swale here. Where the mark of 897.78 is  
 4 concerned, is that like a high area as compared to  
 5 the swale?  
 6 A Yes, that seems to be a high point in the swale or  
 7 channel.  
 8 Q Now, based on your knowledge of contour maps and your  
 9 ability to read them, to a reasonable degree of  
 10 professional certainty does that contour map show  
 11 that the swale moves south around that high point?  
 12 A Yes, yes, it does. This -- it shows that it  
 13 would -- that the water would narrow down. There's  
 14 an elevation here of 897.69.  
 15 Q Okay.  
 16 A So the water would narrow down as it goes south of  
 17 this little knob and flow through this narrow channel  
 18 and then continue on its way.  
 19 Q Okay. Now, there's a blue line in the middle that  
 20 was put in there by a deposition so I'm going to zoom  
 21 in a little more, get a little more definition, and  
 22 I'm going to ask you to put this on the map that is  
 23 in your book in a moment, but before we do that would  
 24 you point for the Judge to where 897.78 exists?  
 25 A Here.

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1 Q Okay. And would you point to where 897.69 exists?  
 2 A Here.  
 3 Q And would you please point to the boundary of the  
 4 swale as it approaches those two points? How does  
 5 the swale flow?  
 6 A This would be the -- this line here would approximate  
 7 the northern edge of the water that would flow  
 8 through there and this next line south would be the  
 9 southern edge of any water that flowed through.  
 10 Q Now, I'm going to direct your attention --  
 11 MS. CORRELL: Objection again as to  
 12 relevance and also outside the scope of your  
 13 expertise in the personal information that you  
 14 gathered on your one survey day.  
 15 MR. GLEISNER: Yeah, I just want one more  
 16 question --  
 17 MS. KAVANAUGH: You're not a hydrologist.  
 18 MR. GLEISNER: -- Your Honor, if I may.  
 19 Just make one more question.  
 20 ALJ BOLDT: Well, we've got to rule on this  
 21 objection first, don't we?  
 22 MR. GLEISNER: Your Honor, it strikes me  
 23 that he has testified that he is schooled in  
 24 reading these contour maps. He has testified  
 25 that he -- as to two elevations and he's

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1 I just wanted to clarify the record, Your Honor,  
 2 unless you would like me to have this moved in  
 3 addition to --  
 4 MR. HARBECK: No, it's in.  
 5 MR. GLEISNER: No, we didn't have 16 in.  
 6 ALJ BOLDT: We do have 16.01.  
 7 MR. GLEISNER: We do have 16.01?  
 8 Q Oh, then please remove -- return to your book please,  
 9 sir, and on 16.001 would you please, with an A, mark  
 10 the location of what is the 897.78 marking.  
 11 A All right.  
 12 Q And then with a B would you show the location of the  
 13 879.69 location?  
 14 A Okay.  
 15 Q And then with a C would you show the location of the  
 16 879.11 location?  
 17 A All right.  
 18 Q Okay. And now with a red pen could you show the  
 19 approximate -- based on the contours, to a reasonable  
 20 degree of professional certainty, based on your  
 21 ability to read contour maps, could you show where  
 22 the swale is located with reference to those two high  
 23 points that you just identified?  
 24 A It looks like it runs right down the actual  
 25 stationing line.

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1 explained where the swale or the contours run  
 2 with respect to those high areas, the 897.78 and  
 3 the 89.69.  
 4 MS. KAVANAUGH: But he hasn't established  
 5 expertise in water -- in how water moves. You  
 6 know, water generally does flow, you know, from  
 7 low -- from high to low, you know, depending on  
 8 what else is going on in this channel.  
 9 MR. GLEISNER: Well, I'll withdraw the  
 10 question. I'll just ask where the swale is  
 11 then, Judge, is that okay? All right.  
 12 Q All right. Now, I would like you to take a close  
 13 look at the blue line here. I'm going to actually  
 14 zoom in a little further because it's hard to see.  
 15 Is there an 897.11 mark in there? Can you see that?  
 16 A No, I can't.  
 17 Q Take a look at Exhibit 16.  
 18 MS. CORRELL: Objection, relevance to  
 19 navigability.  
 20 A All right. Now, I can see it, yes. I think the blue  
 21 line covered it up, but I believe it's this number  
 22 right here, .11 -- 897.11.  
 23 Q Now, will you return to your -- well, I don't want to  
 24 confuse the record.  
 25 MR. GLEISNER: He's already -- 129 is in so

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1 Q And would you please initial all of those, the A, B,  
 2 C and the last line that I asked you to put in?  
 3 MR. GLEISNER: No further questions, Your  
 4 Honor.  
 5 MS. CORRELL: Objection to the entire line  
 6 of questioning. The swale is located within the  
 7 wetlands and DNR will also testify that there  
 8 are navigable portions of water within those  
 9 wetlands. As to the lower channel, DNR has not  
 10 so made a determination.  
 11 ALJ BOLDT: Okay.  
 12 MS. CORRELL: The channel that I believe is  
 13 depicted on Exhibit 129. I guess the southerly  
 14 channel and the northern channel could be a way  
 15 to clearly identify the two.  
 16 ALJ BOLDT: So you're -- let me get this  
 17 straight. The -- is there a dispute on this?  
 18 You're saying the swale is located within the  
 19 wetlands?  
 20 MS. CORRELL: Yes.  
 21 ALJ BOLDT: And within the area identified  
 22 as part of the wetland fill?  
 23 MS. CORRELL: Not within the area that has  
 24 been filled -- or has -- is in the proposed  
 25 project, no.

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1 ALJ BOLDT: Okay. And what's -- how does  
2 this tie in?  
3 MR. GLEISNER: Well, Your Honor, I'll defer  
4 to Mr. Gallo on this, but the point is that the  
5 location of these elevations goes to the matter  
6 of lakebeds and I'll turn it over to Mr. Gallo  
7 at that point.  
8 MR. GALLO: Your Honor, several locations  
9 on the DNR site are legally classified as  
10 either -- I would say and wetlands, lakebed  
11 fill, navigable waterway and impacts to a  
12 navigable waterway. This hearing is about  
13 navigable waterway and impacts to navigable  
14 waterway as it relates to the Manual Code  
15 approval and specifically DNR's failure to  
16 identify lakebed impacts as they result in the  
17 impacts to navigable waterways. This entire  
18 area can be both called wetlands and navigable  
19 waters. In fact, DNR has admitted that this  
20 stream channel and the wetlands on both sides of  
21 the access road are navigable waters. Their  
22 project has an impact to navigable waters and  
23 that's what we're challenging. Whether the DNR  
24 accurately quantified the impacts to navigable  
25 waters and where this goes, where this

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1 navigable or not --  
2 MR. GALLO: They are the same.  
3 MS. CORRELL: -- under its water quality  
4 cert or 281.36 authority?  
5 MR. GALLO: They are one and the same.  
6 MS. CORRELL: Correct.  
7 MR. GALLO: They have been delineated as  
8 wetlands, but DNR has admitted they are  
9 navigable waters.  
10 MS. CORRELL: Yes.  
11 MR. GALLO: They have not recognized that  
12 this is lakebed. They didn't notice that in the  
13 Manual Code notice, we'll prove that at trial,  
14 and this is deficient.  
15 MS. KAVANAUGH: Don, if we've stipulated  
16 that it's a navigable water body --  
17 MS. CORRELL: This goes to the  
18 jurisdictional issue, Your Honor. There's no  
19 need for the testimony. We evaluated the  
20 practical alternatives analysis and the impacts  
21 to public interest.  
22 MR. GALLO: It goes to --  
23 MS. KAVANAUGH: For the wetland.  
24 MR. GALLO: -- 18E which was part of the  
25 grant of this hearing that deals with impacts to

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1 ultimately goes, is to the test on the validity  
2 of the Manual Code. There's a three-part test.  
3 The DNR must consider factual information about  
4 the following legal standards in deciding to  
5 issue, modify or deny the approval. You read  
6 this at the beginning of this hearing. Whether  
7 navigation is materially obstructed, whether  
8 there was a detriment to the public interest and  
9 whether the flood flow capacity of a stream is  
10 materially reduced. This testimony, first of  
11 all, goes to the issue that the area of fill  
12 where the proposed roadway is, is lakebed.  
13 They've already said that area is navigable and  
14 we're talking about impacts to the navigable  
15 waterway that were underestimated as a part of  
16 this permit application.  
17 MS. KAVANAUGH: Which gets you back to the  
18 wetland fill, Don, which you stipulated you  
19 wouldn't talk about.  
20 MR. GALLO: I understand, but this is not  
21 about wetlands.  
22 MS. KAVANAUGH: It's the same fill.  
23 MR. GALLO: This is about --  
24 MS. CORRELL: How is not about wetlands if  
25 DNR takes jurisdiction in wetlands, whether

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1 navigable waterways and the underestimate of  
2 those impacts and we're prepared to put on  
3 testimony showing that.  
4 ALJ BOLDT: Okay.  
5 MR. HARBECK: If I can just --  
6 ALJ BOLDT: Mr. Harbeck, sure.  
7 MR. HARBECK: Yeah, just, again, this is a  
8 hearing to take evidence. We've heard them now  
9 maybe for five times make the same objection.  
10 You've ruled on it a couple times. You know, if  
11 they have an issue they want to raise in the  
12 briefing, the post-trial briefing, as to whether  
13 or not there's navigable water impacts and they  
14 want to call it wetlands, we can have that fight  
15 in the briefing, but we're here to take evidence  
16 and every time we have this fight it slows us  
17 down.  
18 MS. CORRELL: Your Honor, with all due  
19 respect, to respond to Mr. Harbeck, the reason  
20 that the DNR objects to issues outside the  
21 jurisdictional scope is for judicial economy.  
22 Both parties have stipulated to not bring in  
23 wetlands, yet they're bringing in wetlands  
24 through the backdoor. We do not regulate  
25 wetlands, never have, for any applicants as fill

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1 in a lakebed. It doesn't matter if those  
2 wetlands -- and I'm prepared to present  
3 testimony on that. I offered that at the  
4 beginning because it would save quite a bit of  
5 time rather than going through each one of these  
6 issues when, in fact, what the scope of the  
7 hearing that DNR thought it was granting, and  
8 DNR has the authority to make that  
9 determination, is that whether there were  
10 navigable waters that DNR failed to identify.  
11 We don't usually place an ordinary high water  
12 mark on a wetland because we know we have  
13 jurisdiction. The point of placing an ordinary  
14 high water mark for Chapter 30 or other  
15 authorities is jurisdictional. Here we had  
16 jurisdiction clearly. We evaluated those issues  
17 and when interested parties raised the issue of  
18 navigability, we went out and did additional  
19 work to agree that they are navigable, but it  
20 doesn't make a regulatory distinction.

21 MS. KAVANAUGH: And when they raised it,  
22 Judge, on Page 28 of the North Lake Petition,  
23 saying that the decision -- that when they were  
24 talking about the specific supporting facts, the  
25 disputed facts, that the decision states, "WDNR

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1 have made this comment since 2008 and I will be  
2 prepared in our exhibits to show you in numerous  
3 places where I objected in the public comment  
4 period that DNR was filling lakebed. And this  
5 is not about wetlands, this is about impacts on  
6 navigability and that's what this hearing is  
7 about. And we said in -- on Page 29, Item E,  
8 did the DNR understate the proposal's impact on  
9 navigable waters at the Department's site.  
10 That's granted in the hearing.

11 MS. CORRELL: Yes, Don, but you also  
12 stipulated that wetlands would not be an issue  
13 at this hearing.

14 MS. KAVANAUGH: And you identified  
15 those --

16 MR. GALLO: That's correct.

17 MS. KAVANAUGH: -- navigable waters on  
18 Page 28 as being outside the wetlands.

19 MR. GALLO: Wetlands? I'm not talking  
20 about the regulation of wetlands, I'm talking  
21 about the regulation of navigable waters under  
22 Chapter 30, 30.12, placement of fill on the  
23 bed --

24 MS. KAVANAUGH: You're talking about  
25 placement of fill in a water body where wetlands

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1 considered navigable waters, but the WDNR's  
2 finding is impermissible, vague and invalid and  
3 failed to identify and consider additional  
4 navigable waters at the Department site,  
5 parentheses, and they're located outside the  
6 wetland complex." And then Paragraph C, "The  
7 additional navigable waters will be filled and  
8 destroyed by the parking lot and the roadway to  
9 be constructed over the navigable waters. The  
10 DNR identified some of the wetlands as being in  
11 a navigable water body." So those are  
12 identified navigable waters. So when  
13 Attorney Gallo states his petition like that,  
14 it's -- this is why we thought the issue was  
15 additional navigable waters outside the wetland  
16 that were not identified. And I think  
17 there's -- there might be two Page 28s --

18 MS. CORRELL: DNR would say that the, what  
19 I'll call the southerly channel that we just  
20 heard about today that was -- data that was  
21 taken in September of this year, less than a  
22 month ago, is a new issue.

23 MS. KAVANAUGH: Yes.

24 MS. CORRELL: And I guess we have --

25 MR. GALLO: No, it isn't, Your Honor. I

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1 exist and that fill is the same fill that the  
2 water quality certification was granted  
3 for -- the wetland. That is the same action.

4 MR. GALLO: That's a true statement, but  
5 it's navigable.

6 ALJ BOLDT: I'm sorry, that's a true  
7 statement?

8 MR. GALLO: That that area is delineated as  
9 wetlands.

10 MS. KAVANAUGH: That is the same fill.  
11 It's the same action.

12 MR. GALLO: That's not what we're about  
13 here. This is about impacts to navigable  
14 waters. We're not raising the delineation or  
15 the calculation of wetland fill, we're talking  
16 about the impediment of natural -- or, I'm  
17 sorry, navigable waters and the issuance of a  
18 Chapter 30 permit for the DNR's proposed project  
19 and the secondary and cumulative impacts of that  
20 project that were not accounted for. We'll put  
21 on testimony and prove -- I'll be arguing about  
22 that as well.

23 MR. GLEISNER: Judge --

24 MS. KAVANAUGH: And we're not subject to  
25 Chapter 30. You can fight at your judicial

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1 review. If these issues are not heard here,  
2 Judge, there was a simultaneous petition for  
3 judicial review where the issues of law, you  
4 know, can be heard, you know, whether this is  
5 lakebed, whether, you know, placing fill,  
6 that's, you know, regulated as wetland fill also  
7 constitutes -- also should be regulated  
8 separately by DNR as placing fill on the bed of  
9 a navigable body -- water body.

10 MR. GALLO: DNR granted this letter  
11 granting our contested case hearing,  
12 acknowledged paragraphs within our petition. I  
13 just read 18E and that is the grant of the scope  
14 of this hearing.

15 MS. KAVANAUGH: The parentheses --

16 ALJ BOLDT: I think this goes to really the  
17 heart of the dispute between the parties and I  
18 think we've gone down this road. I mean I think  
19 really ultimately there may be some truth in  
20 saying some of these are issues of law and  
21 matters of law that ultimately might well be  
22 determined in the briefing and after like a  
23 review of all the evidence, but I do think that  
24 it's within the four quarters of the grant of a  
25 hearing request, particularly the 29 -- Page 29E

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1 they are. They don't want you to see some of  
2 the evidence that we're going to start  
3 presenting this afternoon.

4 MS. KAVANAUGH: I object.

5 MR. GLEISNER: And I really think we  
6 have --

7 MS. CORRELL: Argumentative.

8 MR. GLEISNER: -- should have an  
9 opportunity to make our record, Your Honor.  
10 There can't be judicial review and this is our  
11 only chance to make a record. We want to have  
12 an opportunity to make a record, that's all.

13 MS. KAVANAUGH: You've got inches and  
14 inches of paper in records in the environmental  
15 assessment --

16 MR. GLEISNER: This is our first  
17 evidentiary hearing, Counsel.

18 MS. KAVANAUGH: -- in the judicial review  
19 and the informational -- a lot of the stuff  
20 that's here has been submitted already.

21 ALJ BOLDT: All right.

22 MS. CORRELL: Your Honor, if I may, just to  
23 circle back. This is a jurisdictional issue,  
24 not an evidentiary issue, thus DNR has the  
25 gatekeeper authority under statute and code.

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1 of the Petition, did the WDNR understate the  
2 proposal's impact on navigable waters at the  
3 Department's site.

4 MS. KAVANAUGH: But, Judge, you have to  
5 read that in conjunction with Page 28 where  
6 they're identifying those additional navigable  
7 waters in Paragraph B as waters outside the  
8 wetland.

9 ALJ BOLDT: I agree. One of them does and  
10 one of them doesn't, do you agree with me?

11 MS. KAVANAUGH: But if you're going  
12 to -- if you're going to take the numbers, my  
13 citation to paragraphs, and say that that is  
14 incorporated into my sentence, why isn't his  
15 statement of what the disputed facts are  
16 incorporated into his second sentence?

17 ALJ BOLDT: I think there's two paragraphs.  
18 One of them says that and one of them doesn't,  
19 right?

20 MS. KAVANAUGH: One of them talks about  
21 issues, one of them talks about facts.

22 MS. CORRELL: Your Honor, if I may --

23 MR. GLEISNER: If it please the  
24 court -- yeah, thank you, Your Honor. Judge, I  
25 can understand why the DNR is reacting the way

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1 ALJ BOLDT: No, I agree with that in terms  
2 of the hearing request --

3 MS. CORRELL: DHA doesn't have that  
4 authority.

5 ALJ BOLDT: -- but once the pleadings are  
6 sent to us, it's our job to interpret what  
7 the --

8 MS. CORRELL: Correct, but I guess I would  
9 offer, Counsel had argued that to rely upon a  
10 contractual provision that it should be  
11 construed against the drafter. I think since  
12 we've gone round on this it's understandable  
13 that I believe the petition and my colleagues,  
14 with all due respect, are both ambiguous. So I  
15 think it's more akin to statutory construction  
16 where if you were to look for what was meant,  
17 DNR clearly meant navigable waters that had not  
18 been identified as present. That was the issue  
19 that was stipulated by all the parties, we'll  
20 only bring in issues of navigable waters. Well,  
21 if DNR only regulates navigable waters located  
22 in wetlands, what is the point of spending three  
23 days and how many hours and dollars preparing  
24 expert testimony and all this legal battle for  
25 an issue that you were not granted a hearing on?

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1 MR. GLEISNER: It's called due process. We  
2 want to make a record. We just want to make a  
3 record.  
4 MS. CORRELL: Due process means you have to  
5 plead it correctly to get your appeal and you  
6 still have the remedy of redress with the  
7 judicial review. All parties agree that they're  
8 not going to bring in wetlands and then you  
9 continue to bring in wetland issues.  
10 MR. GLEISNER: We're not going to bring in  
11 wetlands.  
12 MR. GALLO: No.  
13 MR. GLEISNER: And, Your Honor --  
14 MS. KAVANAUGH: The fill is fill in a  
15 wetland.  
16 MR. GALLO: There are different areas of  
17 law that there are alleged violations for.  
18 We're not complaining about violations of  
19 wetland fill, we're complaining about violations  
20 of navigable water fill. That's totally --  
21 ALJ BOLDT: Filling lakebed, right?  
22 MR. GALLO: Yes.  
23 ALJ BOLDT: So now --  
24 MS. CORRELL: However, North Lake  
25 Management District doesn't have authority to

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1 navigable waters, you know, and I'm allowing the  
2 petitioners to make their record on this point.  
3 On the other hand, we are spending a whole lot  
4 of time on issues that are just like tying  
5 things together in a way that does make me a  
6 little bit concerned and frankly of like how  
7 we're going to get through this even in the  
8 three days. But, at any rate, let's -- the  
9 objection is overruled for now based on the  
10 earlier preliminary ruling. Let's take a break  
11 and -- for lunch and reconvene at 1:30.  
12 (Lunch Recess Taken)  
13 ALJ BOLDT: We're back on the record.  
14 MR. MEYER: And this is clearly based on  
15 Attorney Gleisner's and Attorney Gallo's  
16 redirect.  
17 RE CROSS-EXAMINATION  
18 BY MR. MEYER:  
19 Q Mr. Powers, referring back to Exhibit 16.001 --  
20 A Okay.  
21 Q -- refer to Point B that you put on that map.  
22 A Yes.  
23 Q And I believe the data point is 897.69?  
24 A Yes.  
25 Q I think you described that area at a point where

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1 regulate those waters and DNR has always done it  
2 a certain way. You could argue that perhaps we  
3 should have issued two permits to you when you  
4 applied for navigable wetland fill, but that's  
5 not what we've done. We don't double count.  
6 MR. GALLO: We're not objecting to anything  
7 to do with wetlands or wetland fill, we're  
8 objecting to the Manual Code approval,  
9 Chapter 30 approval, of navigable waters.  
10 ALJ BOLDT: All right. I think we're  
11 pretty much where we've been at since we -- you  
12 know, I appreciate Ms. Correll saying that  
13 frankly both the petition and the grant of the  
14 hearing request are somewhat ambiguous. I think  
15 that's fair. It may well be that some of these  
16 are jurisdictional legal issues. I'm afraid  
17 that we have to sort them out though on the  
18 record. It may be that the Department will  
19 present a witness who describes -- I mean you're  
20 making assertions this is how the Department has  
21 historically done it. You know, it may be that  
22 there's some testimony that you provide that,  
23 you know, provides the missing link that we  
24 don't have right now. Right now what I have is  
25 the issues that were granted, the right to

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1 there is a narrowing of the bottom of the swale, is  
2 that correct?  
3 A That's a good way to describe it, yes.  
4 Q Now, 897.78 is the ordinary high water mark of  
5 North Lake, is that correct?  
6 A No, 897.76.  
7 Q .76. Thank you for correcting me. So we're talking  
8 about that data point being .07 hundredths of a foot  
9 difference?  
10 A Two-hundredths higher. About a quarter of an inch  
11 higher than the ordinary high water mark.  
12 Q .69 --  
13 A I'm sorry, the .69 yeah, that'd be almost an inch  
14 lower than the ordinary high.  
15 Q Three-quarters of an inch would you give me?  
16 A Sure.  
17 Q Okay. I'm trying to picture this contour. I mean  
18 this area really narrows down from looking at the  
19 closeness of the contour lines, is that correct?  
20 A Yes. It's hard to tell exactly how narrow, but I  
21 would -- just looking at the map, I'd say as little  
22 as a few feet.  
23 Q Is it possible in the vicinity of that 897.69 the  
24 bottom elevation across that cross-section of that  
25 bottom of the channel could be 897.76 or higher?

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1 A Not according to their cross-section which is across  
2 the top of Exhibit 16.  
3 Q Did they measure continuously in that area?  
4 A They have a line running through the middle of this  
5 swale channel station from 0.00 to 3 plus 00.  
6 Q What is this distance in data points though --  
7 A I don't know the distance in data points, but  
8 according to the cross-section the baseline that he  
9 ran didn't go any higher than 897.5.  
10 Q There are no data points shown on the map to come up  
11 with a higher contour, isn't that correct?  
12 A No, these would be straight line shots between  
13 whatever shots they took.  
14 Q So there could well be a point above that, that may  
15 not -- a data point may not have been reflected in  
16 the contour map?  
17 A I have no knowledge of that.  
18 Q Okay.  
19 MR. MEYER: Thank you.  
20 ALJ BOLDT: Okay. With that, let's go off  
21 the record.  
22 (Recess Taken)  
23 ALJ BOLDT: Okay. We're back on the  
24 record, folks. Anybody want to be heard before  
25 we get back on the record?

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1 later date.  
2 ALJ BOLDT: Okay. The motion is noted for  
3 the record and I think we're still in the same  
4 spot we were before --  
5 MR. MEYER: Sure.  
6 ALJ BOLDT: -- that the hearing request  
7 came over and unfortunately both the petition,  
8 which was -- all the petitions were very long  
9 and the -- you know, the Department made its  
10 call and then I've had to make my call with what  
11 we've got here. So --  
12 MR. MEYER: I understand, Your Honor.  
13 ALJ BOLDT: So with that then, let's go on.  
14 Are you ready to call your next witness?  
15 MR. GLEISNER: Yes I am, Your Honor. I  
16 call Page Hanson.  
17 ALJ BOLDT: Would you raise your right  
18 hand, please? Do you swear to tell the truth,  
19 the whole truth and nothing but the truth, so  
20 help you God?  
21 MS. HANSON: I do.  
22 DIRECT EXAMINATION  
23 BY MR. GLEISNER:  
24 Q Would you please state again your name for the  
25 record.

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1 MR. MEYER: Yes, Your Honor.  
2 ALJ BOLDT: Go ahead, Mr. Meyer.  
3 MR. MEYER: And I'm doing this for the  
4 purpose of the record subject to further  
5 briefing. I'd like to make a motion to dismiss  
6 once again on jurisdictional grounds. As we've  
7 heard this morning, the testimony is largely as  
8 to whether or not navigable waters are affected  
9 by the filling for the construction of this boat  
10 launch which the purpose obviously and I have  
11 stated is to then confer the authorities of  
12 Chapter 30 and the standards of Chapter 30 on  
13 the, what I would call, a totally discretionary  
14 decision of the Department of Natural Resources.  
15 And it's our belief that the Department is not  
16 subject to Chapter 30 or any other State agency  
17 except to the extent the Department of  
18 Transportation is by a separate specific  
19 statute, and our point being that if it's not  
20 subject to Chapter 30, this hearing on the  
21 navigability issue is not appropriate or  
22 necessary and there is no jurisdiction in the  
23 Division of Hearings and for the basis for this  
24 hearing. And, once again, I think it's  
25 obviously something that should be briefed at a

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1 A Page Hanson.  
2 Q And where do you reside?  
3 A I have two residences. The first one is 651 Patrick  
4 Lane, Hartford, Wisconsin and W322 N7574 Redland  
5 Road.  
6 Q How long have you lived on Redland Road?  
7 A My whole life.  
8 Q And have you any occupation at the present time?  
9 A I'm a full-time student at Winona State University.  
10 Q In Minnesota?  
11 A Yes.  
12 Q Now, I'm going to direct your attention to June 23rd  
13 of 2010. Do you have any reason to recall that date?  
14 A Yes, I participated in taking video evidence of  
15 helping prove that the river by my house is a  
16 navigable waters.  
17 Q Okay. Did a videotape -- or was a videotape shown of  
18 you at that time?  
19 A Yes.  
20 Q And you've seen that videotape?  
21 A Yes.  
22 Q Is that an accurate representation of what you saw  
23 when you were there?  
24 A Yes, it is.  
25 Q And at the time that you participated in this

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1 videotape, how much did you weigh?  
 2 A 110.  
 3 Q And did you have any kind of watercraft that you  
 4 utilized in connection with this test?  
 5 A Yes, a kayak that was 14 feet long and 55 pounds.  
 6 Q And did you have occasion to enter the water at any  
 7 particular point?  
 8 A Yes.  
 9 Q I'm going to direct your attention over to what has  
 10 been marked earlier today as Exhibit 2000 -- or 2-006  
 11 and 7. Do you see a sign on that?  
 12 A Yes.  
 13 Q Have you ever seen that sign before?  
 14 A I have seen that sign.  
 15 Q And I'm now going to show -- with the court's  
 16 permission, I'm going to play a videotape. Okay.  
 17 Now, is this you?  
 18 A Yes, that is.  
 19 Q Okay. Describe what you're doing.  
 20 A I am paddling down the river.  
 21 Q Is that near your house?  
 22 A Yes.  
 23 Q Is that on your property or near your property?  
 24 A It's not on our property, it's on the Krause site.  
 25 Q Okay. And is that sign that you're paddling by

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1 surrounding you. Do you happen to know what that is?  
 2 A Yeah, that's duckweed.  
 3 Q And how do you know what duckweed is?  
 4 A Well, I've lived on the lake my whole life and it's  
 5 there every year so I asked what it was and I got --  
 6 Q And I see that there are some channels or what  
 7 appears to be -- over beyond your boat to what would  
 8 be your left in that picture, was there water up that  
 9 way too?  
 10 A Yes, there was.  
 11 Q Could you have paddled that way?  
 12 A Yeah.  
 13 Q And why didn't you?  
 14 A Because you can tell that there's branches and bushes  
 15 in there and I didn't really want to paddle through  
 16 those bushes.  
 17 Q And how deep is the water where you were?  
 18 A At that point it was about two feet. It was up to my  
 19 knees.  
 20 Q And did you have occasion at that time to determine  
 21 how far you had paddled in one direction?  
 22 A Yeah, it was a good probably like 80 feet.  
 23 Q And is there like a road or a path that had been  
 24 there for a long time next to this?  
 25 A Yeah -- yes.

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1 now --  
 2 ALJ BOLDT: I'm sorry, now who was that?  
 3 Whose property?  
 4 MR. GLEISNER: The Krause site.  
 5 THE WITNESS: Yeah.  
 6 MS. KAVANAUGH: The DNR property.  
 7 ALJ BOLDT: Okay. The DNR site.  
 8 Q Now, that sign that you're paddling by, is that the  
 9 sign that appears in Exhibits 2-006 and 007?  
 10 A Yes.  
 11 Q And why didn't you paddle further at this point?  
 12 A I stopped there because if you can see, there's a  
 13 tree right there and there were branches hitting my  
 14 face so I didn't think I wanted to go any further and  
 15 get hit in the face.  
 16 Q Could you see water ahead of that where you could  
 17 have gone?  
 18 A Yes, you definitely can.  
 19 Q Did you happen to observe the flow of water around  
 20 you?  
 21 A Yeah. You can't really see in the video too well,  
 22 but when I was there you can see that there's a  
 23 slight current coming from the lake from east to  
 24 west.  
 25 Q And I see that there is a good deal of green

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1 MR. GLEISNER: This is Exhibit 17N, Your  
 2 Honor, and I move the admission of this exhibit.  
 3 ALJ BOLDT: 17N?  
 4 MR. GLEISNER: Yes, Your Honor.  
 5 MS. KAVANAUGH: And what was the date, July  
 6 what?  
 7 MR. GLEISNER: Oh, I'm sorry, June 23rd,  
 8 2010.  
 9 MS. KAVANAUGH: Oh, because you were  
 10 talking about July.  
 11 MR. MEYER: 2010?  
 12 MR. GLEISNER: Yes.  
 13 ALJ BOLDT: June 23rd, 2010, is that your  
 14 memory?  
 15 THE WITNESS: Yes, yes.  
 16 ALJ BOLDT: Okay. Mr. Gallo, any  
 17 questions?  
 18 MR. GALLO: Yes.  
 19 MR. GLEISNER: Okay. Go ahead. Actually,  
 20 I'm not done. I have two other videos, Your  
 21 Honor.  
 22 ALJ BOLDT: Oh, with this witness?  
 23 MR. GLEISNER: Yes.  
 24 ALJ BOLDT: Oh, okay. Any objection to the  
 25 exhibit? I'm sorry, I thought that was --

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1 MR. GLEISNER: I understand, Your Honor.  
 2 ALJ BOLDT: -- her testimony. And I have  
 3 a copy of the disk --  
 4 MS. CORRELL: Again, just a standing  
 5 objection to relevancy.  
 6 MR. GLEISNER: You have a videotape in  
 7 there, Your Honor -- in yours. I'm sorry, I  
 8 apologize.  
 9 ALJ BOLDT: No, that's --  
 10 MS. CORRELL: And this is 17N?  
 11 MR. GLEISNER: N.  
 12 MS. CORRELL: Okay.  
 13 MR. GLEISNER: A CD, Your Honor.  
 14 ALJ BOLDT: Okay.  
 15 MS. CORRELL: Because there were quite a  
 16 few videos on that exhibit 17.  
 17 MR. GLEISNER: And I'm only moving the  
 18 admission of three.  
 19 MS. CORRELL: Okay.  
 20 ALJ BOLDT: Okay. 17N is received.  
 21 MR. GLEISNER: Thank you, Your Honor.  
 22 Q I'm now going to show you what has been marked as  
 23 Exhibit 17I and what was the date of this one?  
 24 A This one was June 23rd too I think it would have  
 25 been.

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1 Honor. I apologize for that, but I didn't think  
 2 it was too serious of leading.  
 3 Q What was stopping you from paddling further than what  
 4 is indicated in this video?  
 5 A The trees.  
 6 Q The trees?  
 7 A Yes.  
 8 Q You're going to have to speak up so the gentlemen  
 9 over there can hear you.  
 10 A I'm sorry.  
 11 Q Pull that mic a little toward you.  
 12 MR. GLEISNER: Thank you, Judge. I move  
 13 the admission of Exhibit 17I, Your Honor.  
 14 That's another video.  
 15 MS. CORRELL: I'm sorry, objection, just as  
 16 to relevance again.  
 17 ALJ BOLDT: Okay. 17I --  
 18 MS. CORRELL: And foundation. It's not  
 19 clear to me where on the property this is.  
 20 MS. KAVANAUGH: Yes, we'd like to  
 21 get -- we'd like her to mark a map, you know, if  
 22 she's going to --  
 23 ALJ BOLDT: All right. I'll withhold  
 24 ruling on those until we get that.  
 25 MR. GLEISNER: Okay. Very good, Your

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1 Q Okay. Now, I'm going to --  
 2 A Yeah.  
 3 Q What is that -- that newspaper is dated June 23rd?  
 4 A Yes.  
 5 Q Now, where was this video shot?  
 6 A This was taken on the Krause property on that river  
 7 and the lake is to the right about --  
 8 Q Can you see the lake through the trees there?  
 9 A Yeah, you can. It's a few feet off, yeah.  
 10 Q And what's to the north of where you're entering the  
 11 water here? Is that where Mr. Peters lives?  
 12 A Tom Peters lives there, yes.  
 13 Q Okay. And how deep was the water at this location?  
 14 A Well, you'll see in the video it's about waist deep.  
 15 Q Is that Mr. Mabus (phonetic) who is leading the way  
 16 there?  
 17 A Yes, he falls in.  
 18 Q He falls in, right. Now, if there hadn't been a berm  
 19 or brush, could you have paddled from this river out  
 20 to the lake?  
 21 A Oh, yeah, definitely, for sure.  
 22 MS. CORRELL: Objection to leading  
 23 questions.  
 24 ALJ BOLDT: Try not to lead.  
 25 MR. GLEISNER: Yes, I understand, Your

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1 Honor. If I could just complete the video and  
 2 then we'll go to a map?  
 3 ALJ BOLDT: Sure, sure.  
 4 MR. GLEISNER: Okay.  
 5 Q I'm now going to show you what has been marked as  
 6 Exhibit 17F and this is another video and do you know  
 7 the date of this video?  
 8 A Yeah, July 15th.  
 9 Q 2010?  
 10 A Uh-huh.  
 11 Q And do you know where this video is shot?  
 12 A Yes, it was in the circle of trees. It's on the  
 13 Krause site.  
 14 Q Okay. And I'm going to play that video. Is this in  
 15 the grove of trees?  
 16 A Yes.  
 17 Q And is this you?  
 18 A Yes.  
 19 Q And what is the problem there?  
 20 A There's trees and bushes.  
 21 Q And how deep is the water in the woods there?  
 22 A It's probably just on our shins right there, about a  
 23 foot.  
 24 Q Now, are you -- you're walking the boat at this  
 25 point. Could you have continued to paddle it?

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1 A Yes, but there -- you can see that there's grass  
2 right there so I couldn't paddle in the grass that  
3 well but then right there you can start paddling  
4 again.  
5 Q You could paddle quite a ways after that?  
6 A Yeah, you can see that.  
7 MR. GLEISNER: I'll move the admission of  
8 Exhibit 17F.  
9 MS. CORRELL: No new objections.  
10 ALJ BOLDT: Okay. And, again, we're going  
11 to withhold until we get these on the site.  
12 MR. GLEISNER: Right, exactly, Your Honor.  
13 I understand that.  
14 ALJ BOLDT: You bet.  
15 MS. CORRELL: 17I was 6/23/10 also or 11?  
16 MR. GLEISNER: Yes, and I'm sorry, I  
17 apologize, Counsel. The first two videos, N and  
18 I, were dated 6/23/10 and the third video was  
19 7/15/10.  
20 MS. CORRELL: Got it. I just -- there were  
21 videos 6/23 both years so I wanted to clarify.  
22 MR. GLEISNER: I understand.  
23 MS. CORRELL: Thank you.  
24 MR. GLEISNER: No, I understand. You're  
25 right about that, that's true.

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1 remember where that was?  
2 A That was --  
3 Q Why don't you move over and actually --  
4 A It was right about here because the lake is right  
5 here.  
6 Q Now, if you could move aside so the Judge can see  
7 where you were.  
8 A Like right there.  
9 ALJ BOLDT: Thank you.  
10 Q And the grove of trees, the third video, where was  
11 that located?  
12 A We went in -- we started paddling about right in  
13 there.  
14 MR. GLEISNER: Judge, would you like me to  
15 mark where it is on that? Okay. Very good,  
16 Your Honor.  
17 ALJ BOLDT: Yeah, it's on 2006.  
18 Q Very good. On 2 --  
19 ALJ BOLDT: I'm sorry, 2-006.  
20 MR. GLEISNER: Yes, Your Honor.  
21 Q Would you on -- take a pen, any pen --  
22 THE WITNESS: Thank you.  
23 Q -- and would you please -- what are your initials,  
24 Page?  
25 A P-H.

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1 Q Okay. Now, I am going to go back here and I'm going  
2 to call up what has been marked in these proceedings  
3 as Exhibit 2-006. Now, if you could stand up,  
4 Ms. Hanson, and come to the map. Can you point to  
5 where the first video was shot, the one that had you  
6 near the sign?  
7 A Yeah, (inaudible).  
8 ALJ BOLDT: I'm sorry, where was that?  
9 THE WITNESS: Oh, right there.  
10 ALJ BOLDT: Okay. Thank you.  
11 THE WITNESS: Yeah.  
12 Q So you passed to the -- that is a map and so as  
13 customary you can see in the upper right-hand corner  
14 a north, south sign, right here? Do you see that?  
15 A Yeah.  
16 MS. KAVANAUGH: What exhibit is that, Bill?  
17 MR. GLEISNER: I apologize?  
18 MS. KAVANAUGH: What exhibit is that?  
19 MR. GLEISNER: That is 2-006, Counsel.  
20 MS. KAVANAUGH: Okay.  
21 Q Okay. And so you would have passed to the south of  
22 that sign at that location, is that correct, in your  
23 boat?  
24 A Yeah.  
25 Q Okay. And the second video was where? Do you

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1 Q P-H? Would you put P-H above where --  
2 MR. GLEISNER: Sorry, Counsel.  
3 MS. KAVANAUGH: I just want to see what  
4 she's marking.  
5 MR. GLEISNER: Sure, of course.  
6 Q Would you put P-H above where you went into the water  
7 the first time?  
8 MR. HARBECK: Do P-H1, Bill?  
9 MR. GLEISNER: P-H1 yes, thank you.  
10 Q P-H1. Now, to make sure the record is good here, can  
11 you -- is that right next to where you were in the  
12 water?  
13 A Yeah, that's this -- oh, no, I was right there,  
14 but --  
15 Q Okay. Well, take -- draw a line from P-H1 to where  
16 you were.  
17 A Right in there.  
18 Q Okay. Now, put a --  
19 MR. GLEISNER: Sorry, Your Honor, if I may?  
20 ALJ BOLDT: Yeah, that's fine.  
21 Q Show me where P-H2 is.  
22 A The second video?  
23 Q Yes, the second -- I'm sorry, the second video.  
24 A It was right about in here because that's the lake  
25 and Tom Peters lives here so kind of in here.

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1 Q Put your initials in there and P-H2. And the third  
2 video you say was started in the middle of the grove  
3 of trees?  
4 A Yeah.  
5 Q Put your initials in there, then please P-H3.  
6 A Where we entered the trees?  
7 Q No, where we started the video from which was when  
8 you were in the trees.  
9 A Okay. About right here. P-H3?  
10 Q Uh-huh.  
11 MR. GLEISNER: No further questions of this  
12 witness, Your Honor.  
13 ALJ BOLDT: Thank you.  
14 MR. GLEISNER: Hold on, Your Honor, I'm  
15 sorry. We're going to --  
16 MS. KAVANAUGH: Can we have her mark her  
17 route too? You know, she marked where she  
18 entered --  
19 THE WITNESS: Oh, okay.  
20 MR. GLEISNER: Well, I think she testified  
21 to that though, Counsel.  
22 MS. KAVANAUGH: But I'd like to see the  
23 direction.  
24 MR. GLEISNER: Okay.  
25 Q Counsel has asked -- I think this map is perhaps too

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1 satisfied with that or do you want to also have  
2 something by the lake?  
3 MS. KAVANAUGH: Yes, we may as well finish  
4 the other one.  
5 MR. GLEISNER: Okay. Well, that's what  
6 we'll do then.  
7 Q You'll have to go back --  
8 MR. GLEISNER: Excuse me, I'm sorry.  
9 Q Now, by P-H2 could you -- from where your name is,  
10 show the direction in which you were generally  
11 paddling on that day.  
12 A Kind of like that.  
13 MR. GLEISNER: Is that satisfactory,  
14 Counsel?  
15 MS. KAVANAUGH: Yes, thank you.  
16 ALJ BOLDT: Yeah, thank you.  
17 MR. GLEISNER: Move the admission of  
18 Exhibits -- I think I already have moved the  
19 admission and they've been accepted, but  
20 Exhibit 7 --  
21 ALJ BOLDT: N, F and I?  
22 MR. GLEISNER: Yes.  
23 ALJ BOLDT: Yeah, I think we have that  
24 foundation that was missing before so I'm  
25 prepared to receive -- 17N, F and I are received

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1 small to do that. Why don't we go to Exhibit --  
2 MR. GLEISNER: May I, Your Honor, approach  
3 the witness?  
4 ALJ BOLDT: Sure, sure.  
5 Q -- 2-007. Turn over the next page here and open  
6 that one up. Would you, with an arrow, mark the  
7 direction that you paddled in P-H1?  
8 A (Inaudible)?  
9 Q Yes, ma'am.  
10 A (Inaudible)?  
11 Q Sure, use the green one again.  
12 ALJ BOLDT: Any color.  
13 MS. KAVANAUGH: And from where to where?  
14 A And put a line in the direction I was paddling?  
15 Q Yes, exactly. And then put P-H1 before  
16 that -- before that. Yes, exactly, right there.  
17 Thank you. Now, the same with regard to -- we'll  
18 move this over.  
19 MR. GLEISNER: We can't quite see P-H2  
20 here, Your Honor, and so we'll go to Page 3  
21 first.  
22 Q Put where you were -- where you started paddling from  
23 at P-H3. And then an arrow from -- in the direction  
24 you were traveling.  
25 MR. GLEISNER: Counsel, will you be

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1 and there's an ongoing objection I understand.  
2 MR. GLEISNER: Your Honor, do you want to  
3 have -- I mean when there are additions made, is  
4 it your preference to have us re-move the  
5 admission or is it okay to keep them as is then?  
6 ALJ BOLDT: No, we'll keep them -- as long  
7 as the record is clear of what's getting put on  
8 the exhibit, that's fine.  
9 MR. GLEISNER: No further questions, Your  
10 Honor.  
11 ALJ BOLDT: Mr. Gallo, any questions of  
12 Ms. Hanson?  
13 CROSS-EXAMINATION  
14 BY MR. GALLO:  
15 Q Ms. Hanson, when you were doing these tests --  
16 A Uh-huh.  
17 Q -- could you detect any current and, if so, what  
18 direction was it -- was the water flowing?  
19 A Yes, I could tell there was a current and I was  
20 paddling about northeast towards the lake and the  
21 water was coming from the lake towards me so I was  
22 going from east to west.  
23 Q So, just to be clear, it was going from the lake to  
24 the west and to --  
25 A The wetland.

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1 Q -- the stream and the wetland?  
 2 A Yes, it was.  
 3 Q Thank you.  
 4 A Yeah.  
 5 ALJ BOLDT: Is that all? Okay. DNR  
 6 Counsel?  
 7 CROSS-EXAMINATION  
 8 BY MS. CORRELL:  
 9 Q I just have a couple of questions for you, Ms.  
 10 Hanson. I know you have a lot of binders in front of  
 11 you. Do you have a white binder that has DNR  
 12 exhibits in front of you starting with the Number  
 13 200?  
 14 MR. GLEISNER: I don't think so, Counsel.  
 15 ALJ BOLDT: I think it might even be blue.  
 16 Q Oh, your copy might be blue. Sorry. Okay. Could  
 17 you please refer to what's been marked Exhibit 218 in  
 18 that binder?  
 19 ALJ BOLDT: Okay. The witness is before  
 20 the -- the exhibit is before the witness.  
 21 Q And Exhibit 218 is information regarding rain data  
 22 and could you locate -- this is only for the year of  
 23 2010. Could you locate 6/23/2010 on this exhibit?  
 24 A Yes.  
 25 Q And isn't that the third highest peak of rainfall

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1 MR. GLEISNER: Objection, she's not  
 2 qualified to answer that. She's not an expert.  
 3 Q Do you see hash mark areas in the areas that you  
 4 paddled on the DNR property?  
 5 ALJ BOLDT: Can you describe what you mean  
 6 by hash marks?  
 7 Q This is a color diagram and there is blue for the  
 8 location of the lake, white for the upland or  
 9 landscaped areas and overlaid on top of that there  
 10 are some crosshatched areas in red. Do you see any  
 11 of the red crosshatched areas in the location of the  
 12 areas in which you paddled on the DNR site?  
 13 A Are these the properties?  
 14 ALJ BOLDT: Would you approach, Counsel,  
 15 just so that we make sure you're tracking.  
 16 MS. CORRELL: Yes, I can.  
 17 Q It's Parcel No. 0356963, I believe is the DNR  
 18 property.  
 19 A Okay. And then are these lines that --  
 20 MR. GLEISNER: I object, Your Honor, the  
 21 record speaks for itself and she hasn't been  
 22 qualified to read maps either.  
 23 MS. CORRELL: I'm just asking her to  
 24 indicate if the areas that she paddled in on  
 25 this site, on this map, are marked as hash

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1 data on this graph for June through July 31st of  
 2 2010?  
 3 A Yes.  
 4 MS. CORRELL: Just a moment, I have to  
 5 locate another exhibit.  
 6 (Discussion off the record)  
 7 ALJ BOLDT: That's just 218, Counsel.  
 8 MR. GLEISNER: I'm sorry, was there a  
 9 motion to admit? I'm sorry.  
 10 MS. CORRELL: I will move that, but we'll  
 11 be testifying to it later as well.  
 12 MR. GLEISNER: And we would object, there's  
 13 no foundation at this point. There is going to  
 14 be --  
 15 MS. CORRELL: Correct, and there will be.  
 16 MR. GLEISNER: Well, there will be weather  
 17 data coming from us too so at this point there  
 18 is no foundation.  
 19 MS. CORRELL: Oh, here it is.  
 20 Q Could you refer to Exhibit 205? This is a FEMA flood  
 21 plain map and I'll give you a minute to get your  
 22 bearings.  
 23 ALJ BOLDT: Okay, she has 205.  
 24 Q Isn't it correct that all three of the areas that you  
 25 paddled in are flood plain?

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1 marked here. I think she can identify colors.  
 2 That's all I'm asking her to do.  
 3 A Yeah, these -- it's either right here and right here  
 4 that I did, but I don't know if it was further down  
 5 here. I don't know if this is the correct -- like  
 6 was I down here or was I here?  
 7 ALJ BOLDT: And by down here, you're  
 8 referring to the left --  
 9 THE WITNESS: Yes.  
 10 ALJ BOLDT: -- or the western --  
 11 A Like was I -- is this our property and if this is our  
 12 property and that's the Krause site, then I was  
 13 either over here or right here. So it's --  
 14 MS. CORRELL: Can I identify what the  
 15 properties are?  
 16 ALJ BOLDT: Yeah, you better. Yeah, thank  
 17 you.  
 18 MS. CORRELL: Sorry for the reach and you  
 19 can tell me if I'm correct, Mr. Gleisner.  
 20 A Like where --  
 21 Q I believe this is the DNR property --  
 22 A Yes.  
 23 Q -- and this is your family's property.  
 24 A Yes, yes.  
 25 ALJ BOLDT: Could you -- shall we mark

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1 those?  
 2 Q I believe all the areas that you just testified that  
 3 you navigated were on DNR property?  
 4 A Where is that sign on here?  
 5 MR. GLEISNER: She clearly can't read that  
 6 map, Counsel.  
 7 A Well, I understand that I paddled over here on  
 8 June 23rd, that was the second video, and the grove  
 9 of trees is right here which was July 15th which I  
 10 also was in, but if the sign is in here or in here, I  
 11 don't know because I paddled --  
 12 ALJ BOLDT: And you're indicating within  
 13 the pink area or is it a crosshatched area and  
 14 off the map --  
 15 THE WITNESS: Yes.  
 16 Q Can you identify the approximate, to the best of your  
 17 ability?  
 18 A Approximately?  
 19 Q I understand there aren't landmarks on this map.  
 20 A The July 15th, somewhere in here.  
 21 Q In blue or something, just put a dot where you think  
 22 roughly you paddled?  
 23 A Sure, around there.  
 24 Q And then there was --  
 25 A And then the June 23rd, which was our second video,

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1 BY MR. MEYER:  
 2 Q Ms. Hanson, thank you very much for being here today  
 3 and sharing your firsthand experiences and it's  
 4 always great to see somebody kayaking. Have you been  
 5 kayaking a long time?  
 6 A Yeah, my whole life.  
 7 Q Is that your kayak in that video?  
 8 A Yes, it is.  
 9 Q You looked like you had used it a few times before,  
 10 that's for sure.  
 11 A Yep.  
 12 Q You go Winona State? What field are you pursuing  
 13 there, please?  
 14 A Right now I'm thinking elementary education, but I  
 15 have not decided fully yet.  
 16 Q Okay. And you said you had dual residency and I  
 17 understand being away at school --  
 18 A Yes.  
 19 Q -- but otherwise you live at this -- on the property  
 20 that's been identified in this proceeding as the  
 21 Hanson property?  
 22 A Yes.  
 23 Q Okay. And you've lived there all your life?  
 24 A Yeah, my grandmother owned it and I was with her most  
 25 of my time.

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1 was right about here, I'm guessing. And the first  
 2 video was either off the map or right there. I don't  
 3 know where that sign is.  
 4 Q That's fine. Thank you.  
 5 ALJ BOLDT: Thank you.  
 6 Q In large rain events have you ever seen standing  
 7 water on Redland Road?  
 8 A Yes. Yes, I have.  
 9 Q On the days that you paddled, did you also see  
 10 standing water on Redland Road?  
 11 A Yes.  
 12 Q Okay.  
 13 MS. CORRELL: I have nothing further.  
 14 MS. KAVANAUGH: Was the water on Redland  
 15 Road deep enough to paddle?  
 16 ALJ BOLDT: I'm sorry, yeah, you can write  
 17 your co-counsel a note, but one attorney per  
 18 witness. Okay. Redirect?  
 19 MR. GLEISNER: Thank you, Your Honor.  
 20 MR. MEYER: I'd like to do some  
 21 cross-examination.  
 22 ALJ BOLDT: Oh, I'm sorry, I apologize,  
 23 Mr. Meyer.  
 24 MR. MEYER: Sure.  
 25 CROSS-EXAMINATION

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1 Q Excellent. Kayaked out on North Lake?  
 2 A Yes.  
 3 Q Okay. How deep is the draft of your kayak, would you  
 4 say?  
 5 A It's probably just under my knees. I can't give you  
 6 an exact --  
 7 Q How shallow water -- maybe I'll ask it a different  
 8 way. That was not a very good question. How shallow  
 9 water have you been able to freely float and -- in  
 10 the kayak?  
 11 A Well, our pier goes out -- I don't know how far it  
 12 goes out, but we usually drag it in and then we have  
 13 to get in the water to about our knees to get in the  
 14 kayak to go kayaking, so our knees.  
 15 Q Where was the wind coming from, if you recall?  
 16 A I have no clue.  
 17 Q Okay. Could it have been coming from the east?  
 18 A I don't know.  
 19 Q Okay. Thank you. Your neighbor, the Krause  
 20 property, have you ever been on that property or any  
 21 portions of that property in a kayak previous to,  
 22 say, June 23rd of 2010?  
 23 A On the Krause site?  
 24 Q Yes.  
 25 A No.

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1 Q Okay. Having lived in this part of the State for  
 2 your years, have you ever seen news articles in local  
 3 papers or on TV of areas that are inundated with  
 4 water that are being boated that are not normally  
 5 known as a lake or a river?  
 6 A Around this area?  
 7 Q Right, on TV or --  
 8 A Yeah.  
 9 Q Even like the streets of some cities --  
 10 A Yeah.  
 11 Q -- at times?  
 12 A Yeah.  
 13 Q And they'd be areas that you would not consider to be  
 14 a lake or a river or a stream?  
 15 A Yeah.  
 16 Q Okay. Let's go to the grove site, you know, the  
 17 grove of trees -- that area. If you can recall, I  
 18 think that was -- the video was 17F, but just assume  
 19 for my question it was. You mentioned there were  
 20 some grasses and you couldn't navigate those grasses  
 21 and they were sort of -- they were pretty plainly --  
 22 A Yeah.  
 23 Q -- visible on the video. Do you know what kind of  
 24 grasses those were, by any chance?  
 25 A (Inaudible).

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1 A Yeah.  
 2 MR. GLEISNER: No further, Your Honor.  
 3 ALJ BOLDT: Okay. Thank you very much.  
 4 THE WITNESS: Yes, thank you.  
 5 ALJ BOLDT: And I'm sure folks appreciate  
 6 your missing school to be here.  
 7 MR. GLEISNER: She's very happy she is  
 8 missing school, Your Honor.  
 9 ALJ BOLDT: Okay. Are you ready to call  
 10 your next witness?  
 11 MR. GLEISNER: I am, Your Honor. We call  
 12 Mr. Andy Hudak adversely.  
 13 ALJ BOLDT: Swear to tell the truth, the  
 14 whole truth and nothing but the truth, so help  
 15 you God?  
 16 MR. HUDAK: I do.  
 17 DIRECT EXAMINATION  
 18 BY MR. GLEISNER:  
 19 Q Hello again, Mr. Hudak.  
 20 A Hello, Mr. Gleisner.  
 21 Q Sir, would you please state again and spell your name  
 22 for the record.  
 23 A It is Andrew Hudak, H-U-D-A-K.  
 24 Q And how are you employed, Mr. Hudak?  
 25 A I'm employed throughout this project as a Water

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1 Q Do you have similar grasses on your property?  
 2 A We don't really have grass like that on our property.  
 3 Q Okay.  
 4 A We have well-cut grass so --  
 5 Q So it's longer on the Krause property? It's not  
 6 maintained as well as yours?  
 7 A Yeah, yeah.  
 8 Q Okay. I'll ask a question that hasn't been asked.  
 9 Some days could you navigate your kayak on Redland  
 10 Road?  
 11 A Yeah. Yeah, I could have.  
 12 Q Thank you.  
 13 A Yeah.  
 14 ALJ BOLDT: Now let me go back. Any  
 15 redirect?  
 16 MR. GLEISNER: Just a little, Your Honor.  
 17 REDIRECT EXAMINATION  
 18 BY MR. GLEISNER:  
 19 Q How often have you seen the water as high as it was  
 20 in the grove of trees?  
 21 A In the grove of trees?  
 22 Q Yes.  
 23 A We have that water usually every year or close to  
 24 every year.  
 25 Q And same in the other areas?

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1 Management Specialist with the Wisconsin Department  
 2 of Natural Resources.  
 3 Q And can you describe briefly what your  
 4 responsibilities are in that capacity?  
 5 A Sure. The Water Management Specialist is in charge  
 6 or entrusted with identifying projects that may have  
 7 jurisdiction associated with navigable waterways or  
 8 wetlands.  
 9 Q And, Mr. Hudak, have you been associated with the  
 10 Krause site in some capacity?  
 11 A Yes.  
 12 Q Okay. And for how long?  
 13 A Since about 2008 would be my guess, 2009.  
 14 Q How long have you been with the DNR, Mr. Hudak?  
 15 A Since January -- or, I should say, since the early  
 16 spring of 2006.  
 17 Q And may I inquire, how old are you?  
 18 A I am 29 now.  
 19 Q Mr. Hudak, now there's a white book in front of you.  
 20 There's a lot of confusion in front of you actually,  
 21 but you see the white book?  
 22 A Yes.  
 23 Q That would be our exhibit book. I'm going to ask you  
 24 some questions from that, if I may. I'm going to  
 25 start by asking you to look at Exhibit 1A-001. Do

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1 you see that one?  
 2 A Yes.  
 3 Q Now, just so we're clear on the parameters of your  
 4 responsibility and so that the record is clear going  
 5 forward, as I did at the deposition I would  
 6 respectfully ask that you read into the record what  
 7 it is that you -- that that item says that your  
 8 counsel prepared that you are responsible for at the  
 9 site.  
 10 A "Mr. Hudak is the DNR" --  
 11 MS. CORRELL: Objection, relevance. This  
 12 is a notice of what witnesses will be attending  
 13 a hearing on behalf of the DNR. What --  
 14 MR. GLEISNER: Counsel, this is the  
 15 representation that Ms. Kavanaugh made as to  
 16 what he would be testifying to. I simply want  
 17 to set the --  
 18 MS. KAVANAUGH: That he may testify to.  
 19 MR. GLEISNER: He may testify to. I  
 20 simply -- this is my adverse witness. I simply  
 21 want to set the parameters of what it is that he  
 22 was represented to us as being capable of  
 23 testifying about.  
 24 MS. CORRELL: And I would argue that it is  
 25 not limited to those items listed specifically

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1 and applicable activities that are associated with a  
 2 project as it relates to navigable waterways or  
 3 wetlands.  
 4 Q And were you responsible for processing and analyzing  
 5 the application for a Manual Code approval in this  
 6 case?  
 7 A Yes.  
 8 Q And were you responsible for determining the location  
 9 and extent of navigable waterways of the State on and  
 10 adjacent to the DNR property formerly known as the  
 11 Krause property?  
 12 A Yes.  
 13 Q And were you responsible for determining the  
 14 implementation of DNR procedures generally to  
 15 determine the location and extent of navigable waters  
 16 of the State on and adjacent to the Krause property?  
 17 MS. CORRELL: Objection, what do you mean  
 18 by adjacent?  
 19 MR. GLEISNER: Well, I guess I'd ask you.  
 20 That's what was used in this document.  
 21 MS. CORRELL: You're asking a question  
 22 right now. Again, this is just a witness list  
 23 general notice of who will be appearing.  
 24 MR. GLEISNER: Okay.  
 25 Q Did you understand my question?

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1 on the witness list. If you want to have that  
 2 discussion, the one sentence that was listed for  
 3 each of the witnesses for the petitioners is  
 4 quite deficient.  
 5 MR. GLEISNER: Well granted, Your Honor, I  
 6 simply want to -- I want to get down on the  
 7 record what it is that he is supposed to -- and  
 8 he's testified at his deposition he was supposed  
 9 to be doing at the site and I just want to get  
 10 that on the record.  
 11 MS. CORRELL: That's a different question  
 12 and that's fine.  
 13 ALJ BOLDT: It is a different question.  
 14 MR. GLEISNER: Oh okay, Your Honor, I  
 15 apologize. I'll withdraw --  
 16 ALJ BOLDT: Pose that one and we'll --  
 17 MR. GLEISNER: Okay.  
 18 Q What were you -- let's do it this way. What were you  
 19 supposed to be doing at the site?  
 20 ALJ BOLDT: Can you answer that? Maybe  
 21 that's too vague now.  
 22 MR. GLEISNER: I know, Your Honor.  
 23 A I'll give a general description, that the Water  
 24 Management Specialist is entrusted with receiving and  
 25 reviewing an application to ascertain jurisdiction

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1 A No, I did not. Please repeat it.  
 2 Q Okay. Were you responsible for implementing DNR  
 3 procedures in connection with the Krause site in  
 4 terms of navigable water?  
 5 A I was entrusted with reviewing site conditions and  
 6 applicable plans to assert DNR jurisdiction on the  
 7 site as it relates to navigable waterways.  
 8 MR. GLEISNER: Move the admission of  
 9 Exhibit 1A-001, Your Honor.  
 10 ALJ BOLDT: I don't think it's evidence.  
 11 MS. CORRELL: No objection, it's not an  
 12 exhibit.  
 13 MR. GLEISNER: Okay, that's fine, Your  
 14 Honor.  
 15 Q I'm going to ask you or direct your attention to  
 16 Exhibit 1 in that packet of materials -- 1001- -- I'm  
 17 sorry, 1-001. Did you find that?  
 18 A Yes.  
 19 Q That is a document that consists of five pages, is  
 20 that correct?  
 21 A Yes.  
 22 Q Could you please identify that for the record?  
 23 A This is a Manual Code approval issued to (inaudible)  
 24 for the construction of the North Lake boat launch on  
 25 the DNR site.

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1 Q And who signed that?  
 2 A It would have been signed by Jim McNelly (phonetic),  
 3 our Southeast Region Water Leader, and  
 4 Gloria McCutcheon (phonetic), the Southeast Region  
 5 Director.  
 6 Q And did you actually author that?  
 7 A Yes. As you can indicate, I initialed it at the  
 8 very -- on Page 1 that this was a document drafted  
 9 from myself to (inaudible).  
 10 Q I'm going to ask you now to, as I did at the  
 11 deposition, tell me where the word navigable is used  
 12 in that document, if you can?  
 13 A The first occurrence I see is under Findings of Fact  
 14 Number 2.  
 15 Q Okay. I'm going to bring that up on the screen here,  
 16 but while I'm doing that would you see if there's any  
 17 other place that navigable appears in that document?  
 18 A Under Findings of Fact 8L.  
 19 Q On what page?  
 20 A 3 of 5. Number 14.  
 21 Q On what page?  
 22 A Page 4 of 5.  
 23 Q What was the number again?  
 24 A 14. And I believe that would be all.  
 25 Q Let's go backwards. 14 does not relate to the

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1 Fact Number 2 which I'm going to call up and that's  
 2 on Page 1-002, correct, Paragraph Number 2?  
 3 A What page?  
 4 Q Page 2. And that occurs Exhibit 1-002, does it not?  
 5 A Yes.  
 6 Q Okay. Now, that Paragraph 2 reads in part, "North  
 7 Lake and portions of its wetland complex are  
 8 navigable in fact at the project site and are  
 9 impacted by the proposed project." Is there any  
 10 document at DNR or anything associated with this  
 11 Manual Code approval that identifies what waters are  
 12 navigable in fact?  
 13 A Can you read the first part of that question again?  
 14 Q I'll be happy to. Is there any document at the DNR  
 15 or any document that has been prepared in connection  
 16 with this Manual Code approval that is now before us  
 17 that identifies specifically which navigable waters  
 18 will be impacted by the project? Did that question  
 19 make sense?  
 20 A There is no specific document that provides an exact  
 21 depiction of the extent of navigable waterways on the  
 22 DNR site.  
 23 Q Thank you.  
 24 MR. GLEISNER: At this time we will move  
 25 the admission of Exhibit 1-001 through 1-005,

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1 project site as such, right, it refers to navigable  
 2 waters being the North Lake as a navigable water in  
 3 the State of Wisconsin, is that correct?  
 4 A It relates to North Lake being a navigable water of  
 5 the State.  
 6 Q Thank you. And now, was it M that you said next on  
 7 the previous page? No, L, right, on Page 3?  
 8 A Correct.  
 9 Q And with regard to L it says, "Construction of a  
 10 parking lot (inaudible) will result in filling  
 11 navigable waters." Does it define which navigable  
 12 waters?  
 13 A It does not.  
 14 Q Is there any document that you are aware of that the  
 15 DNR prepared prior to November 10th, 2004 that  
 16 identified where the navigable waters would be  
 17 located?  
 18 A I'll relate that 8L is a listing of specific criteria  
 19 brought forth during a public comment period and  
 20 nothing developed by the Department.  
 21 Q Thank you. So, in other words, L is actually a  
 22 public comment? It's one of the summaries of the  
 23 public commentary, correct?  
 24 A That would be correct.  
 25 Q Okay. Now, let's go back to Number -- Finding of

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1 the Manual Code approval in this matter, Judge.  
 2 ALJ BOLDT: I assume there's no objection  
 3 there?  
 4 MS. CORRELL: I'm sorry, you said -- oh,  
 5 yes, no objection.  
 6 MR. GLEISNER: I'm glad to hear that.  
 7 ALJ BOLDT: Okay. Exhibit 1 --  
 8 MR. GLEISNER: Dash.  
 9 ALJ BOLDT: -- 001 through 00 --  
 10 MR. GLEISNER: 5.  
 11 ALJ BOLDT: -- 5.  
 12 MR. GLEISNER: 001 is the -- 1-001 is the  
 13 document, the first page of the document, but  
 14 I'm just being complete by referencing all five  
 15 pages of it.  
 16 ALJ BOLDT: Uh-huh.  
 17 Q Now, prior to November 4th -- let me just back up.  
 18 You were the one -- you were the man who was  
 19 responsible for determining the existence of  
 20 navigable waters on the Krause site, is that correct?  
 21 A I would say that I was responsible for reviewing the  
 22 application and it's impact to navigable waterways at  
 23 the time of the application, but I was not the person  
 24 that was involved with the pre-planning and any work  
 25 that may have been taken prior to the application

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1 being submitted to me.  
 2 Q And who would have done that?  
 3 A Preliminary work would have been conducted by I  
 4 believe Bob Winkman (phonetic) and the extent of work  
 5 he had completed prior to the submittal is limited,  
 6 in my understanding, to the ordinary high water mark  
 7 of North Lake.  
 8 Q So all he would have done would have been to  
 9 determine the ordinary high water mark?  
 10 A I can't say that that's all he would have done, but I  
 11 believe that's -- to my knowledge that's what he was  
 12 responsible for.  
 13 Q Did you at any time do a navigability -- was --  
 14 MR. GLEISNER: Strike that.  
 15 Q Was a navigability test ever done on the Krause site  
 16 prior to November 4th, 2010?  
 17 A Can you define what you're referring to navigability?  
 18 MS. CORRELL: Objection, he just  
 19 stated -- it's a vague question. Was a  
 20 navigability test done for what water body?  
 21 MR. GLEISNER: Anywhere on the Krause site  
 22 is what I said actually so I didn't say a water  
 23 body, but fair enough.  
 24 Q Let's go to -- if you would turn to Exhibit 1B and  
 25 I'm specifically referring to Exhibit 1B011.

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1 ending points, date, start-up and finishing time.  
 2 Two, the water level." Three is going to be -- well,  
 3 let me back up. Now, highlight this. This is  
 4 turning the page now. "Three, the relation of the  
 5 water level to the ordinary high water mark. Four,  
 6 estimated or measured flow. Five, photographs,  
 7 particularly with navigator in boat at narrow, normal  
 8 and obstructed sites. Six, any interruption or  
 9 obstacles to navigation such as fallen trees, brush,  
 10 etc." Does that refresh your recollection of the  
 11 test for navigability in fact recommended by the DNR  
 12 handbook on navigability?  
 13 A That is a correct portrayal of using a navigability  
 14 test for in fact navigability, the best evidence to  
 15 show a navigable water (inaudible).  
 16 Q Now, I ask you again, did you ever do a navigability  
 17 test at the DNR site?  
 18 A I had not completed an in fact navigability test.  
 19 The navigability investigations were conducted using  
 20 opinion-based observations.  
 21 MR. GLEISNER: The original deposition  
 22 please, Mr. Mabijs, and a copy of it. The  
 23 original goes to the Judge.  
 24 ALJ BOLDT: I'm opening it, as I'm allowed  
 25 to do. It gives me great pleasure.

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1 MS. KAVANAUGH: 011?  
 2 MR. GLEISNER: Yeah.  
 3 Q This is part of the wetland handbook. And to refresh  
 4 your recollection, you testified several times at  
 5 your deposition that this was one of the main ways in  
 6 which you determined whether there were navigable  
 7 waters and this was the handbook that you used for  
 8 the purposes of determining navigable waters. Do you  
 9 recall that?  
 10 A Yes.  
 11 Q Okay. Now, I'm going to ask you to go to -- I'm  
 12 going to highlight the bottom part of Page 1B001 and  
 13 I'm going to bring up what's called procedure and it  
 14 states basically as follows. You correct me if I've  
 15 said something wrong here. "In the field, the best  
 16 evidence of navigability is whether a lake or a  
 17 stream is navigable in fact. The test of  
 18 navigability is whether you can float a canoe or duck  
 19 skiff down the stream. Obstacles or interruptions to  
 20 navigation such as brush, fallen trees, tight  
 21 meanders, do not make a stream not navigable in fact  
 22 by themselves. Take thorough notes and gather  
 23 information that will help you support your  
 24 determination. One, size of the boat or canoe, your  
 25 weight and that of any partners, your starting and

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1 MR. GLEISNER: No, no, no, no, the  
 2 other -- there's a deposition transcript over  
 3 there --  
 4 ALJ BOLDT: He can look at this one if you  
 5 tell me the page.  
 6 MR. GLEISNER: Oh, sure. Thank you, Your  
 7 Honor. I'm going to be referring to Page 26 and  
 8 27 and I'm going to be referring to Lines 24 to  
 9 25 on Page 26 and Lines 1 through 4 on Page 27,  
 10 Your Honor.  
 11 UNIDENTIFIED SPEAKER: Is this an exhibit?  
 12 MR. GLEISNER: No, it's a deposition. I  
 13 believe that once the original has been opened  
 14 it becomes part of the record, doesn't it Judge?  
 15 ALJ BOLDT: Yes, sir.  
 16 MS. KAVANAUGH: What page?  
 17 MR. GLEISNER: Certainly. It's Pages 26 to  
 18 27.  
 19 Q Did you find it?  
 20 A Yes.  
 21 Q And may I just -- I have a (inaudible) version. I  
 22 just want to come over and look over your shoulder.  
 23 Yes, that's right. I would respectfully ask that you  
 24 read into the record, after I make some preliminary  
 25 comments, Lines 24, 25 on Page 26 and Lines 1, 2, 3

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1 and 4 on Page 27.  
 2 MS. KAVANAUGH: Are you going to ask  
 3 questions or make preliminary comments, Counsel?  
 4 MR. GLEISNER: I'm not -- no, here's what  
 5 I'm going to do, Counsel.  
 6 Q You were deposed on August 25th of 2010 by me, was  
 7 that correct?  
 8 A That would be correct.  
 9 Q And I asked you certain questions and you gave me  
 10 certain answers on that date, is that correct?  
 11 A It was question answer.  
 12 Q Yes. I'm going to represent that you were answering  
 13 one of my questions at Line 24. Would you read that  
 14 into the record, please?  
 15 A Line 24 states, "There were no in fact navigability  
 16 tests done prior to the 2010 decision. During the  
 17 field visits prior to the decision there were  
 18 professional judgment observations documented that  
 19 led to the ultimate areas of potential navigability."  
 20 Q Thank you very much.  
 21 MS. CORRELL: Objection, relevance. Is  
 22 there any dispute as to the navigability of  
 23 North Lake, sir?  
 24 MR. GLEISNER: I was not asking about  
 25 North Lake, Counsel. If you take a look at the

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1 Q Is this the wetland complex?  
 2 ALJ BOLDT: I think the record -- the  
 3 record speaks for itself, but go ahead.  
 4 A Can you repeat the question?  
 5 Q Okay.  
 6 MR. GLEISNER: You can't read back so I  
 7 can't ask you to do that, but I lost the  
 8 question.  
 9 Q I'll ask you again. Is this water located on the  
 10 Krause site?  
 11 A I can testify that the location of that sign is in  
 12 very close proximity to the location where the access  
 13 road would be located.  
 14 Q And there will be testimony later that water does not  
 15 accumulate algae and duckweed in a short period of  
 16 time, it takes several weeks. How many visits did  
 17 you make to the Krause site?  
 18 A Seven.  
 19 Q And did you ever observe water in the location where  
 20 that boat was rowing?  
 21 A Yes.  
 22 Q And where did you note that fact before November 4th,  
 23 2010?  
 24 A The decision document states that there are portions  
 25 contained within the wetland complex that have

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1 deposition transcript, I was asking about the  
 2 Krause site.  
 3 Q I'd like to just, if I may, play a video that we  
 4 played a moment ago and as it's playing maybe you  
 5 could answer some questions for me about it.  
 6 ALJ BOLDT: Okay. Which one, Counsel?  
 7 MR. GLEISNER: I'm sorry, I apologize, Your  
 8 Honor, 17N. I'm playing Exhibit 17N.  
 9 ALJ BOLDT: Okay. Continue.  
 10 Q Did you ever see water like that at the Krause site?  
 11 A It's very vague. I don't know the depth, the extent,  
 12 how high that comes up onto the bank, but I have seen  
 13 water in that location at the Krause site.  
 14 Q Is that going to be where the proposed road is going  
 15 to go?  
 16 MS. CORRELL: Objection, relevance. Doesn't  
 17 the Manual --  
 18 MR. GLEISNER: I would say it has a lot of  
 19 relevance.  
 20 MS. CORRELL: Doesn't the Manual Code  
 21 decision that you just had him walk through  
 22 state that the wetland complex is navigable?  
 23 MR. GLEISNER: Not with specificity.  
 24 MS. KAVANAUGH: It does. It's navigable in  
 25 fact.

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1 navigability characteristics. That would be where it  
 2 would be located.  
 3 Q But there's no report or no memo or any kind of  
 4 memorialization that you did observe water at that  
 5 location?  
 6 MS. KAVANAUGH: I guess objection --  
 7 MS. CORRELL: Objection, what's the legal  
 8 requirement to create such a memo if DNR has  
 9 jurisdiction?  
 10 ALJ BOLDT: It's an adverse exam and I  
 11 think it's similar to cross and obviously in an  
 12 adverse exam you can also ask leading questions  
 13 so I think it's fair cross.  
 14 Q You would say that the water that we observed was  
 15 navigable, wouldn't you?  
 16 A I would say based on the video evidence that there  
 17 was a person navigating.  
 18 ALJ BOLDT: And is that consistent with the  
 19 determination that some of the wetland areas  
 20 were navigable in fact?  
 21 THE WITNESS: Yes, it is.  
 22 ALJ BOLDT: Is that the area you were  
 23 referencing when, in the decision document that  
 24 you drafted, that it said some of those wetland  
 25 areas were navigable in fact?

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1 THE WITNESS: Yes, it is.  
 2 Q But you don't specify whether it's the access road,  
 3 the parking lot or where that water might be located,  
 4 do you? I'm now referring --  
 5 A Finding of Fact Number 2 I think states for itself  
 6 that I had just identified wetland complexes are  
 7 navigable in fact throughout the project site.  
 8 ALJ BOLDT: Is it unusual that some wetland  
 9 complexes are navigable at certain times of the  
 10 year?  
 11 THE WITNESS: No, I've often observed other  
 12 wetland areas that have periods of inundation,  
 13 obviously during spring time, that in certain  
 14 locations, certain times of year, you could put  
 15 a skiff in, put a small kayak in and float.  
 16 Q I'm not going to refer your attention to another  
 17 exhibit. This is one we referenced a lot in the  
 18 deposition and it is located at 2-002 in your  
 19 materials.  
 20 MS. KAVANAUGH: I'm sorry, what page, Bill?  
 21 What page, Bill, I'm sorry?  
 22 MR. GLEISNER: Oh, I'm sorry, I apologize.  
 23 It is Exhibit 2-002. I'm sorry.  
 24 Q Do you recall that exhibit?  
 25 A Yes.

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1 Q And then on Exhibit 2-002 there is also a blue line  
 2 that you placed on that exhibit on the 25th of  
 3 August. Do you recall what that was supposed to  
 4 show?  
 5 A There's five different blue lines, can you indicate  
 6 which one you want me to talk about?  
 7 Q No, I'm referring to this blue line up here to the  
 8 north of this orange line.  
 9 A Okay.  
 10 Q I think these other are purple actually, but it could  
 11 be blue. Do you see what I'm referring to now?  
 12 A And repeat the question?  
 13 Q And the question was do you recall what you said that  
 14 was?  
 15 A I considered that to be a swale with navigability  
 16 characteristics -- wetland area with navigability  
 17 characteristics.  
 18 Q Now, in fact, that gravel trail is not exactly where  
 19 the proposed road is going to go, is that correct?  
 20 A It's pretty close with -- minus the expansion of the  
 21 road. It's (inaudible) general alignment.  
 22 Q All right. Well, let me just ask you this. Take a  
 23 look at the 2005 exhibits that you have in front of  
 24 you. Do you see a date on that exhibit?  
 25 A January 3rd, 2005.

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1 Q Do you recall providing testimony concerning the two  
 2 areas you circled in green?  
 3 A Yes.  
 4 Q Do you recall saying that both of those areas contain  
 5 navigable water?  
 6 A Yes.  
 7 Q And there's a -- I'm going to point to it and I'll  
 8 certainly be happy to have the exhibit altered to  
 9 reflect your testimony, but there's a thin area  
 10 between the two green circles, do you see that there?  
 11 There's a northern green circle and a southern green  
 12 circle and then there's like a blank space in  
 13 between, do you see that?  
 14 A Yes.  
 15 Q And what is that space?  
 16 A Based on the labeling of this plan, it's labeled as a  
 17 gravel drive.  
 18 Q And I would ask you if you know is that where the  
 19 proposed road generally is supposed to go?  
 20 A To the best of my knowledge, that's the approximate  
 21 location of the proposed access road.  
 22 Q Were any navigability tests done on that road?  
 23 A On the road itself?  
 24 Q Yes.  
 25 A No.

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1 Q That's correct. And --  
 2 ALJ BOLDT: And we're talking about  
 3 Exhibit 2-002?  
 4 MR. GLEISNER: Yes we are, Your Honor.  
 5 ALJ BOLDT: Okay.  
 6 MR. GLEISNER: That is correct.  
 7 Q Now, the orange area, what is that?  
 8 A I believe I indicated that as a very approximate  
 9 location of the parking lot and disturbed areas of  
 10 the site.  
 11 Q And what is -- do you know what the arrow means  
 12 pointing backwards from that orange area?  
 13 A No.  
 14 Q Now, you've discussed navigability characteristics.  
 15 Would you please elaborate on what that means?  
 16 A Throughout the wetland complexes and the wetland  
 17 swale along the northern portion of the property,  
 18 identified areas that appear to have a defined bed  
 19 and bank and had evidence to show and support that  
 20 water could be present to allow for an in fact  
 21 navigability test.  
 22 Q With a water craft?  
 23 A Correct.  
 24 Q And did you in fact state that characteristics of  
 25 navigability is the same thing as saying navigable?

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1 A I guess I don't understand your question. Can you  
2 repeat that or rephrase it?  
3 Q Do you remember discussing what navigability  
4 characteristics meant at the deposition?  
5 A I believe what I'd testified to at the deposition was  
6 very similar to my description of navigability  
7 characteristics here today.  
8 Q Well, let me refresh your recollection. I asked you  
9 the question -- and I will be happy to turn to the  
10 page if it's necessary, but I asked you the question  
11 and you gave the following answer on Page 39 of the  
12 deposition transcript. "I want to understand more  
13 about this term navigability characteristics, if you  
14 could please elaborate?" And you answered, "As  
15 having a defined bed and bank with capability of  
16 having enough water on a recurring basis to float a  
17 water craft." Do you recall that?  
18 A Yes.  
19 Q And then you also stated at Page 41 that the area to  
20 the north in the green circle that you've drawn there  
21 and the area to the south had navigability  
22 characteristics. I asked you all of it, and you said  
23 yes, all of it. Do you remember that?  
24 A Yes.  
25 Q And I asked you, "Before the decision date, that

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1 Q "Where you float a skiff, etc. There were no  
2 navigability studies done on the Krause property, am  
3 I correct?" Answer, "That is correct." Question,  
4 "And the extent of any navigability tests that were  
5 done anywhere on the Krause property prior to  
6 November 4th, 2010 comprised professional  
7 observations, was that your word?" Answer,  
8 "Professional judgment and observations of waterways,  
9 water courses and potential navigable waterways."  
10 Question, "Who made those judgment calls, Mr. Hudak?"  
11 Answer, "That would have been me." Do you still  
12 agree with that?  
13 A Yes.  
14 Q Okay.

15 MR. GLEISNER: Give me just a couple  
16 minutes, Your Honor, I think I can move this  
17 along.  
18 Q I'm going to direct your attention to Page 62 of your  
19 deposition and, again, to speed things along, if I  
20 say this wrong, please let me know. I asked you the  
21 question, "Where are the navigable waterways on this  
22 property", referring to the Krause site. You  
23 answered, "The area indicated in blue and green."  
24 Now, that would be the areas circled in green, the  
25 upper circle in green by you and the lower circle in

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1 being November 4th, 2010, was anything done to test  
2 those areas that had navigability characteristics,"  
3 and you answered, "The green areas, no"?  
4 A Correct.  
5 Q Okay. Do you still believe today that the areas that  
6 you identified on Exhibit 2-002 and circled in green  
7 are in fact navigable today?  
8 A I still contend today that the areas located in green  
9 do have navigability characteristics of a defined bed  
10 and bank and have the ability to float a water craft  
11 on a recurring basis.  
12 Q Okay. I'm going to ask you some more questions  
13 again, and to speed things along I'm going to  
14 represent certain questions and answers. You're free  
15 to check my questions and answers and if you disagree  
16 with them, please let me know. Going down to Page 44  
17 of your deposition transcript, I asked you, "There  
18 were no navigability tests such as the  
19 Menomonee Falls v. DNR case" --  
20 MR. GLEISNER: That's a case dealing with  
21 navigability.  
22 ALJ BOLDT: Know it well.  
23 MR. GLEISNER: Oh, thank you, Your Honor.  
24 I'm sorry. I'm sure you do. I'm sorry, I  
25 apologize.

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1 green by you and the blue line you put in, is that  
2 correct?  
3 A Correct.  
4 ALJ BOLDT: On Exhibit 2 --  
5 MR. GLEISNER: On Exhibit 2-002. Sorry,  
6 Your Honor. Thank you.  
7 Q I then asked you the question, "So both the northern  
8 green circle, southern green circle and the blue line  
9 which denotes the stream, are navigable waterways?"  
10 Answer, "Navigable that would meet the definition of  
11 the State, correct." Did you give -- receive those  
12 questions and give those answers?  
13 A Yes.  
14 Q Are they accurate?  
15 A To the best of my knowledge.  
16 Q Okay. Thank you. Now, I'm going to reference bottom  
17 of Page 62, beginning at Line 22 and following over  
18 into Line 16. I asked the following question, "Now,  
19 you defined the green areas on Exhibit 2 and the blue  
20 area on Exhibit 2 as navigable waters. I'm curious.  
21 Are you saying that there's bed and bank present  
22 there or what are you saying exactly?" Answer, "I'm  
23 saying that through the investigations that I've  
24 conducted, both pre and post November decision, all  
25 features of these waterways could be determined as

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1 meeting the State's definition of having defined bed  
 2 and bank with capacity to float a boat." Question,  
 3 "Now, forgive me, but I want the record to be really  
 4 clear here. The area in blue in Exhibit 2, the area  
 5 encompassed by the top green circle on Exhibit 2, and  
 6 the area encompassed by the large green circle on  
 7 Exhibit 2, all have -- all are navigable waters that  
 8 meet the State definition of navigable?" Answer,  
 9 "That would be correct." Did you receive that  
 10 question -- or questions and give those answers?  
 11 A Yes.  
 12 Q I then asked you on Page 75 at 14 to 17, "Can a  
 13 stream or an area of navigable water be navigable a  
 14 couple or three times a year and still be navigable  
 15 within the meaning of Wis. Stat. Section 30.10(2)?"  
 16 Answer, "Yes, it can." Do you disagree with that?  
 17 A Can you point me to a line on Page 75 before I can  
 18 even get the --  
 19 Q I certainly can. I apologize. My question started  
 20 at Line 14. "Can a stream of a navigable water". Do  
 21 you see that?  
 22 A Yep.  
 23 Q Do you see your answer? "Can a stream or an area of  
 24 navigable water be navigable a couple or three times  
 25 a year and still be navigable within the meaning of

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1 court's -- or the Judge's recollection here,  
 2 this is a portion of the wetland manual that the  
 3 DNR uses.  
 4 Q And I'm going to call up that onto the screen and I'm  
 5 going to read the following to you. Quote, "The real  
 6 issue to be considered when evaluating lakes and  
 7 ponds, including wetlands, is whether they are  
 8 navigable in fact by the above criteria. Although  
 9 one might argue that should be some minimum cutoff  
 10 size for a body of water to be considered navigable,  
 11 any body of water capable of floating a canoe is  
 12 valuable and should be considered navigable. To  
 13 support this conclusion, consider the resource value  
 14 associated with even a tiny spring pond or isolated  
 15 wetland pond. They have fishery and/or wildlife  
 16 values and preserving these values is in the public  
 17 interest even if they are not readily accessible to  
 18 the public." Do you remember me asking you about  
 19 that at the deposition?  
 20 A Yes.  
 21 Q I asked you if you agree or disagree with that  
 22 statement and you said you agree with that statement,  
 23 is that correct?  
 24 A Yes, I do.  
 25 Q I also asked you on Page 90, with reference to the

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1 30.10(2)?" Answer, "Yes, it can." Did you -- did I  
 2 give you that question and did you give that answer?  
 3 A Yes.  
 4 Q Page 76, 17 -- Line 17 to 25. "Have you ever  
 5 attempted to float" -- this is a question. "Have you  
 6 ever attempted to float a skiff or any type of canoe  
 7 or boat in that area, meaning the Krause area?"  
 8 Answer, "I have not." Question, "In fact, as I  
 9 understand your testimony, there's never been an  
 10 effort to float a skiff or a boat anywhere on the  
 11 former Krause property, is that correct?" Answer,  
 12 "That is correct." Is that your testimony?  
 13 A Yes. I'll kind of expand that to say that as it  
 14 relates to a DNR employee.  
 15 Q I'm going to then direct your attention with that  
 16 answer to Line 25 on Page 76 to the top of 77 to  
 17 Line 4. Question, "So all we really have to answer  
 18 for whether or not or to the extent to which  
 19 navigability exists anywhere on the Krause property  
 20 would be your judgment?" Answer, "That would be  
 21 correct." Stand by that?  
 22 A Yes.  
 23 Q I'm going to refer your attention back to Exhibit 1B  
 24 and specifically I'd like you to call up 1B-016.  
 25 MR. GLEISNER: And to refresh the

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1 document that is contained in Exhibit 1B, I asked  
 2 you, "I'm not just referring to Pages 15 or 16. Is  
 3 it safe to say that this document", the Manual  
 4 Code --  
 5 MR. GLEISNER: Strike that. I apologize  
 6 for that.  
 7 Q The wetland handbook. "Is it safe to say that this  
 8 document is the primary manual that you utilize if  
 9 you have a question about navigability?" Answer, "I  
 10 would say that would be correct." Do you see that  
 11 question and answer on Page 90, starting at Line 12?  
 12 A Yes.  
 13 MR. GLEISNER: I move the admission of the  
 14 entirety of Exhibit 1B at this time, Your Honor.  
 15 That's the wetland -- sorry, strike that. The  
 16 handbook --  
 17 ALJ BOLDT: The waterway and wetland  
 18 navigability --  
 19 MR. GLEISNER: Yes, Your Honor, that one.  
 20 ALJ BOLDT: -- handbook. Any objection  
 21 there? Okay. 1B is received.  
 22 MR. GLEISNER: Thank you, Your Honor. We  
 23 did move the admission of 2-002 already, didn't  
 24 we, Your Honor? I think we did.  
 25 ALJ BOLDT: Yes.

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1 Q Now, I'm going to direct your attention back to  
2 Exhibit 2-00 -- let's go to 2-007. 2-007, which has  
3 been moved and admitted already into evidence and I'm  
4 going to direct your attention to the green area on  
5 that. Do you know what that area stands for?  
6 A I believe the green polygon is referenced by you in  
7 quite a bit of documents as the grove of trees.  
8 Q Thank you. At Page 98 you said, and I quote,  
9 beginning at -- sorry, not quote. I'm going to refer  
10 to Line 7 at Page 98 through Line 12. Question, "Did  
11 you ever see water standing at any depth in those  
12 trees? At any depth. I'm not trying to be cute  
13 here." Answer, "I couldn't speculate if I've ever  
14 seen zero or six inches of water. I don't have any  
15 recollection of that area and water depth in that  
16 particular area." Did you give that answer to that  
17 question?  
18 A I believe I did.  
19 Q Referencing Page 99, beginning at Line 23 to Line 19,  
20 question, "I'm curious about the concept of bed and  
21 bank and I heard you use that term and I see it is in  
22 the DNR and I understand the concept in general, but  
23 when you're talking bed and bank, how high/low is the  
24 bed and bank? Are we talking about something that's  
25 got to be six inches high or a foot or two? Could it

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1 Q I'm going to ask you to turn to Exhibit 21 in the  
2 white book, Mr. Hudak. Are you there?  
3 A Yes.  
4 MS. CORRELL: Could you give me a minute,  
5 Mr. Gleisner? I'm having trouble with your  
6 binder here.  
7 MR. GLEISNER: Oh, certainly Counsel, I'll  
8 be happy to give you a minute.  
9 MS. CORRELL: You're at Exhibit 21, is that  
10 what you said?  
11 MR. GLEISNER: No, I'm -- thank you,  
12 Counsel, I am -- I am sorry, I am at 21.  
13 MS. CORRELL: Okay.  
14 MR. GLEISNER: I apologize. Are you there?  
15 MS. CORRELL: I'm waiting.  
16 MR. GLEISNER: Oh, I'm sorry, I apologize.  
17 Q At the deposition did I ask you to make certain marks  
18 on this exhibit?  
19 A Yes, you did.  
20 Q And what's the green mark around -- on that exhibit?  
21 A I believe the green mark indicates the area you asked  
22 me to identify where trees were present.  
23 Q And what's the red mark on Exhibit 21?  
24 A I believe the red mark, you asked me to do an  
25 approximation of the location of the parking lot for

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1 be as low as an inch or two? I'm wondering."  
2 Answer, "I can relate to historic sites I've seen and  
3 the bed and bank can be any discernible change in  
4 substrate and whether that's an elevation of zero  
5 inches or whether that's an elevation of six feet,  
6 it's highly variable per se." Do you remember  
7 getting that question and receiving that -- and  
8 giving that answer?  
9 A Yes.  
10 Q Now, turning to Page 103 of the deposition  
11 transcript, Lines 10 to 18, "Where those trees were,  
12 was there any effort" -- meaning the grove of trees  
13 now, I apologize. "Where those trees are, was there  
14 any effort made by you or anyone at the DNR to  
15 determine if there was a substrate change between the  
16 area in those trees and the area surrounding those  
17 trees?" Answer, "There was no investigation made by  
18 me, I don't believe anyone else at the DNR, to  
19 specifically identify the substrate change with the  
20 area below the grove of trees and outside the area of  
21 trees." Do you remember getting that question and  
22 giving that answer?  
23 A Yes.  
24 Q Now, I'm going to call up a couple of other exhibits.  
25 MR. GLEISNER: I'm almost done, Your Honor.

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1 the DNR access site.  
2 MR. GLEISNER: Move the admission of  
3 Exhibit 21, Your Honor.  
4 ALJ BOLDT: Any objection there?  
5 MS. CORRELL: None, other than relevance.  
6 ALJ BOLDT: Hearing none, Exhibit 21 is  
7 received.  
8 Q And then to complete that picture I'm going to call  
9 up Exhibit 22 so just turn the page if you would,  
10 Mr. Hudak. Now, this is interesting, Mr. Hudak.  
11 There are several things going on in this exhibit.  
12 The green line, again, represents what?  
13 A The location of tree growth.  
14 Q And the red area represents what?  
15 A An approximation of the location of the parking lot  
16 for the access site.  
17 Q And the blue area -- the blue line, excuse me, on  
18 Exhibit 22 represents what?  
19 A The blue line would be an approximate location that I  
20 had identified as having navigability  
21 characteristics.  
22 Q And the orange line that's branching out there, what  
23 did that represent?  
24 A Again, a very crude approximation of the wetland  
25 complex located west of the DNR access site that

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1 would have navigability characteristics.  
 2 Q So the blue line is the channel, is that correct,  
 3 Mr. Hudak?  
 4 A The blue line would be a channel, swale, very broad  
 5 terminology, using either one of those.  
 6 Q Just to orient the Judge and us, this is imposed on  
 7 an aerial photograph, I believe they call it a Bing  
 8 photograph, and is there a home up there, north of  
 9 that blue line?  
 10 A Yes, there is.  
 11 Q And is that the Peters' house?  
 12 A I believe that would be owned by the Peters. I don't  
 13 know the exact property owner, but I believe that is  
 14 the house immediately north of the DNR parcel.  
 15 Q And where that green line is, shall we say the  
 16 southern boundary of the green line that you've drawn  
 17 around the trees, that comes right up hard against  
 18 another house. Who does that house belong to, do you  
 19 know?  
 20 A I believe my previous testimony, that would be owned  
 21 by the Hansons.  
 22 Q Now, did you testify at the time --  
 23 MR. GLEISNER: I'm just going to get up  
 24 here, if I may, Your Honor.  
 25 Q -- that this stream reached this point and then it

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1 the swale itself, is considered wetland from the  
 2 wetland delineation. However, that is where there is  
 3 a definitive or in a very approximate location of a  
 4 confined swale near a strip of wetland along the  
 5 northern portion of the DNR property and where it  
 6 becomes much more wide and expansive on the west, as  
 7 you head west, away from the North Lake.  
 8 Q Thank you very much, Mr. Hudak. Now, Mr. Hudak, I'm  
 9 going to refer you back to something I overlooked  
 10 here at Page 35, excuse me, in your deposition  
 11 transcript. Now, we know, and I'll just state for  
 12 the record, that Section 30.10(2) says that if a  
 13 stream, slough, bayou or marsh outlet are navigable  
 14 in fact, for any purpose whatsoever they're  
 15 navigable, is that correct?  
 16 A I do remember testifying to a portion of 30.10 that  
 17 had those language, those words, in the portion of  
 18 that definition.  
 19 Q To move this along, if you go to Page 35, beginning  
 20 at Line 12, "Do you happen to know how the DNR  
 21 defines slough, S-L-O-U-G-H?" And your answer, "To  
 22 my understanding, there's no regulatory definition of  
 23 a slough." Question, "And how about a marsh?"  
 24 Answer, "To my knowledge, there's no regulatory  
 25 definition for a marsh for navigable waters."

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1 branched out into the wetlands, is that correct?  
 2 A I don't believe I used that exact wording. I believe  
 3 that at that junction point was a location where you  
 4 had not as well a defined bed and bank within a swale  
 5 channel location, but if you said branched out in the  
 6 wetland, that's probably not inaccurate.  
 7 Q I believe you testified at Pages 114 to 115 in your  
 8 deposition that that orange location represents where  
 9 the navigable portion of the wetlands are, is that  
 10 correct? And you can certainly look at your --  
 11 A Can you reference me to my deposition?  
 12 Q Sure. I'm sorry, I apologize, I got distracted.  
 13 Pages 114 to 115. I said at Line 24, "Take your  
 14 orange -- if you wouldn't mind, take your orange  
 15 marker and am I correct that blends into what appears  
 16 to be another vantage point of the wetland?" Answer,  
 17 "I will draw on the map in the orange location where  
 18 the navigable portion of wetlands would likely  
 19 begin." Did you receive that answer? Did you  
 20 testify to that? And so that's just -- that orange  
 21 area is just where the wetlands start, right,  
 22 according to your --  
 23 A No.  
 24 Q Okay.  
 25 A That orange and blue demarcation is -- the channel,

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1 Question, "And how about a bayou? Similarly." Do  
 2 you remember receiving those questions and giving  
 3 those answers?  
 4 A Yes.  
 5 Q And I asked you at Page 37, beginning at Line 16, "Do  
 6 you know, as we're sitting here, whether or not a  
 7 marsh outlet has a bed and bank?" Answer, "I would  
 8 define a marsh outlet", excuse me, "as a  
 9 characteristic between two different types of  
 10 systems, whether it be a system of a lake or a system  
 11 of a stream and having in that situation a difficult  
 12 bed and bank determination because of the  
 13 characteristics and nature of the aquatic plants that  
 14 would be growing in that particular setting." Do you  
 15 remember getting that question and giving that  
 16 answer?  
 17 A Yes.  
 18 MR. GLEISNER: I move the admission of  
 19 Exhibit 22, Your Honor.  
 20 ALJ BOLDT: I assume there's no objection?  
 21 MS. CORRELL: No.  
 22 ALJ BOLDT: 22 is received.  
 23 MR. GLEISNER: Thank you, Your Honor.  
 24 Q Now, I'm going to ask you just a couple more  
 25 questions and then my co-counsel said he had

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1 something. Was there ever any effort made -- I'm  
2 going to get up now and we can do this on another  
3 exhibit if this one isn't clear enough for you. Was  
4 there ever any effort made to determine how this area  
5 that's surrounded in green --

6 MS. KAVANAUGH: Could you step back a  
7 little bit, Counsel?

8 MR. GLEISNER: I'm sorry. I'm sorry,  
9 Counsel.

10 MS. KAVANAUGH: I'm sorry. Oh, behind it  
11 or something? Thank you.

12 MR. GLEISNER: I apologize. Can you see  
13 now?

14 MS. KAVANAUGH: Yes, got it.

15 MR. GLEISNER: Okay.

16 Q Can you see? Okay. All right. This area in green,  
17 was there ever any effort made to determine how that  
18 might communicate with the stream up here? And I'm  
19 referring now to the green circle on Exhibit 22 and  
20 the purple line which denotes, by your previous  
21 testimony, the stream.

22 MR. MEYER: Objection --

23 MS. KAVANAUGH: I'll object to vagueness.  
24 Clarify communicate. I mean they don't talk.

25 MR. MEYER: Yeah, the word communicate.

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1 A To the best of my ability of the date of this survey  
2 that that would give a location of where the access  
3 drive was located when the DNR purchased the  
4 property.

5 MR. GLEISNER: Bill, anything else?

6 Q Ah, yes, Mr. Hudak, Dr. O'Reilly has a question I'm  
7 going to voice, I hope, accurately. How does this  
8 green circle --

9 MR. MEYER: Can you step to the side again  
10 please, sir?

11 MR. GLEISNER: I'm sorry. I apologize.  
12 I'm very sorry.

13 MR. MEYER: No problem.

14 MR. GLEISNER: I keep forgetting. I  
15 apologize.

16 Q This green circle and this green circle, how do they  
17 join together? How do they -- do they interrelate?  
18 Is there some way in which they join together?

19 ALJ BOLDT: I'm sorry, you were talking  
20 about the two green areas?

21 MR. GLEISNER: I am --

22 ALJ BOLDT: Okay.

23 MR. GLEISNER: -- and I'm referring  
24 specifically to Exhibit 2-002.

25 ALJ BOLDT: Sure, uh-huh.

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1 MR. GLEISNER: Okay. That's fine.

2 Q That there was any relationship of any kind, that  
3 there was any kind of water flowing back and forth  
4 between the two, any kind of way in which one area  
5 here might affect the other area or vice versa.

6 MR. GLEISNER: Is that clear enough?

7 A I can testify that I have no personal knowledge of  
8 being on the site during conditions where there was  
9 connection occurring between those two.

10 Q Thank you.

11 MR. GLEISNER: Your Honor, I think I'm just  
12 about done. I'm just going to confer with my  
13 co-counsel. One last question, Your Honor.

14 Q I'm going to return your attention to Exhibit 2-002  
15 which I'm calling up now and I'm going to stand up  
16 and get out of Counsels' way and I'm going to point  
17 here to what appears to be a causeway or a breach or  
18 a space between what has been circled by you as the  
19 upper or northern green circle and the lower or  
20 southern green circle. And, first of all, do you see  
21 what I'm referring to?

22 A Yes.

23 Q Okay. Is that the existing roadway or path or trail  
24 or gravel drive or whatever that was there when the  
25 DNR purchased the property?

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1 Q Is there some connection?

2 A Based on my observations and review of what had been  
3 identified to me in previous plans, there is an  
4 existing culvert that exists underneath that roadway.

5 Q That being the area that we've identified as  
6 causeway, gravel drive, or whatever running between  
7 the two, is that correct?

8 A That'd be correct.

9 Q And did you determine or have you determined or are  
10 you aware of whether or not a determination has been  
11 made at DNR as to how these green areas relate to  
12 this blue area up here, in other words, the northern  
13 green circle on Exhibit 2-002 and the southern green  
14 circle on 002? How at all do they relate to, connect  
15 to, the blue line which you testified is a swale  
16 containing a stream, I believe?

17 A Can you rephrase that question? I didn't quite  
18 understand what you're --

19 Q I'll try again. This blue line up here you testified  
20 is a navigable stream?

21 A Correct.

22 Q Okay. And that is the blue line to the north of the  
23 orange circle on Exhibit 2-002. All this marking was  
24 done at the deposition on August 25th. Let's take,  
25 first of all, the green circle to the north of the

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1 causeway. Is there any connection between that green  
2 circle navigable water and the blue line navigable  
3 water?  
4 A I would say based on water elevations at some point  
5 they do connect.  
6 Q And water elevations, can you explain what that  
7 means?  
8 A It means at some point when that wetland or navigable  
9 water receives enough water to inundate it and it  
10 gets to a certain elevation and similar water is  
11 present in the swale along the northern portion of  
12 that property, they would eventually at some point  
13 ultimately connect.  
14 Q Did DNR ever do any testing to determine what that  
15 connection might be?  
16 A Can you expand upon testing?  
17 Q Did you do anything to determine how the northern  
18 green circle related to, connected to, became  
19 involved with, the blue line at various times of the  
20 year?  
21 A To the best of my knowledge, the only work that was  
22 conducted in that vicinity would have been a spot  
23 topo map through Kapur and Associates.  
24 Q And the green circle to the south would have to go  
25 through the green circle to the north to get to the

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1 THE WITNESS: Thanks.  
2 Q Can you comment on your post-high school education?  
3 A Yes. I graduated from the University of  
4 Wisconsin-Stevens Point in December of 2005 with a  
5 bachelor's degree in water resources with an emphasis  
6 in hydrology and watershed management with minors in  
7 soils and chemistry.  
8 Q Okay. During your deposition -- I want to turn to  
9 your deposition on Page 17. I'm looking at Lines 14  
10 through 19 and I'll just read these. "The only  
11 answer that I can provide is that a water management  
12 specialist is entrusted to enforce Chapter 30 and  
13 wetland rules with projects that may impact, be  
14 adjacent to, in proximity to wetlands, or navigable  
15 waterways of the State." Is that a true statement  
16 and do you still agree with that statement?  
17 A Yeah, and I'm trying to understand the context of the  
18 question.  
19 Q Let's see, Mr. Gleisner -- Attorney Gleisner asked  
20 the question -- it's on Page 16, bottom of the page.  
21 I'm asking you that in the same circumstance where  
22 the DNR is seeking Manual Code approval and a private  
23 citizen is seeking the same kind of approval of a  
24 different piece of land where all things are equal  
25 except that one case you're seeking Manual Code

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1 blue line, is that a fair assumption?  
2 A That is one alternative.  
3 Q What's the others?  
4 A It may flow portions, have exits, to the south or the  
5 east.  
6 Q And what lies to the east of this large area of  
7 navigable water?  
8 A Redland Road and the residents along the lake.  
9 MR. GLEISNER: No further questions, Your  
10 Honor.  
11 ALJ BOLDT: Okay. Mr. Gallo? And, again,  
12 this is an adverse exam so we're just asking  
13 clarifying questions.  
14 CROSS-EXAMINATION  
15 BY MR. GALLO:  
16 Q Okay. In the way of foundation, Mr. Hudak, I believe  
17 you've testified that you're 29 years old?  
18 A Just recently, yes.  
19 Q Congratulations.  
20 ALJ BOLDT: Happy Birthday to both you and  
21 Mr. Gleisner.  
22 MR. GLEISNER: Yeah, I just turned 65 today  
23 so --  
24 THE WITNESS: Mine was a week ago.  
25 MR. GLEISNER: Happy Birthday.

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1 approval for DNR property and in another case a  
2 private citizen is seeking a permit from you as an  
3 enforcement agency. Who or what in the DNR ensures  
4 that the DNR plays by the same --  
5 MR. MEYER: Objection, and I could be  
6 wrong, but I don't know --  
7 MR. GLEISNER: Can he finish the question?  
8 Let him finish the question, sir.  
9 MR. MEYER: Okay.  
10 ALJ BOLDT: Yeah, and then don't give the  
11 answer. And can you speak up too, Mr. Gallo  
12 MR. GALLO: Sure.  
13 ALJ BOLDT: Some people in the back are  
14 having a hard time.  
15 Q Who or what in the DNR ensures that the DNR plays by  
16 the same rules as the private citizen?  
17 MS. CORRELL: Objection, what's the  
18 relation to navigability at issue in this case?  
19 MR. MEYER: And I would object that it  
20 isn't, based on the cross-examination by  
21 Mr. Gleisner. It went beyond it.  
22 MR. GALLO: I'm just going to read his  
23 answer to the question. It's on Line 14 -- the  
24 witness. "The only answer that I can provide is  
25 that a water management specialist is entrusted

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1 to enforce Chapter 30 and wetland rules with  
2 projects that may impact, be adjacent to, in  
3 proximity to, wetlands or navigable waterways of  
4 the State." This has to do --

5 MR. MEYER: Then I'll withdraw my  
6 objection.

7 MR. GALLO: Thank you.

8 ALJ BOLDT: And I think unless the question  
9 was objected to at the deposition, the rule is a  
10 deposition of a party can be used for any  
11 purpose at any time.

12 Q And I ask the question only for the purpose of trying  
13 to better understand what you do as a water  
14 management specialist. During your time in the  
15 southeast region, it's my understanding and it's been  
16 my experience working with you on a number of  
17 projects that you've managed a number of Chapter 30  
18 waterway permits for navigable waterways, is that a  
19 fair statement?

20 A That's a fair statement.

21 Q In the review process for a Chapter 30 permit, do you  
22 have to read and review design plans and technical  
23 reports?

24 A Often.

25 Q And over the past five or six years that you've been

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1 MS. KAVANAUGH: There will be direct exam  
2 on that.

3 MR. GALLO: -- the -- as part of his job,  
4 when he reviews a permit application, he has to  
5 determine what impacts on the navigable  
6 waterways have as to that particular project and  
7 the construction process implementing that  
8 project and those are things that --

9 ALJ BOLDT: First of all, do you agree with  
10 that, sir?

11 THE WITNESS: Yes.

12 ALJ BOLDT: Okay.

13 MR. GALLO: And I think -- that's all I'm  
14 trying to get at, that --

15 ALJ BOLDT: Okay. So --

16 MR. MEYER: Ask the question.

17 ALJ BOLDT: It's in there. Yeah, let's go  
18 on.

19 MR. GALLO: Okay. That's good enough then.

20 Q Have you worked on similar navigable waterway  
21 projects such as the access road constructed through  
22 navigable waters?

23 A Yes.

24 Q Okay. As part of your job in reviewing these

25 applications, is it a correct statement to say that

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1 doing this, is it a fair statement or would you  
2 concur that you've developed a certain level of  
3 experience and knowledge with regard to reading and  
4 reviewing design drawings and plans submitted with  
5 the -- these types of applications?

6 A Yes.

7 Q Does your job include enforcement activities and also  
8 site reviews during construction in the  
9 implementation phase of projects?

10 A Projects that have Chapter 30 or water quality cert  
11 authority, yes.

12 Q Yeah, I'm sorry, I meant to limit it to that. When  
13 you -- in essence the question is, when you issue a  
14 permit or you approve a permit, then do you follow  
15 through on that permit and project to observe that  
16 the (inaudible) of the permit complies with the  
17 standards --

18 MR. MEYER: Objection, I don't see the  
19 relevance to this proceeding or the  
20 cross-examination.

21 ALJ BOLDT: Yeah, I mean --

22 MR. GALLO: I'm trying to establish the  
23 scope of his duties and the skills that he has  
24 to have or has in reviewing permit applications.  
25 And it goes to the question of --

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1 you have to anticipate problems and challenges and  
2 make sure that there are protective measures in place  
3 when you're issuing these kinds of permits?

4 A Yes.

5 Q Such as erosion control measures?

6 A Yes.

7 Q What happens when you have a project where it's not  
8 going according to plan and it goes -- and it impacts  
9 a much larger area? How do you respond to that?

10 MS. KAVANAUGH: I'd object to the form, you  
11 know, in terms of when it's going. I mean are  
12 you talking about after he's issued a permit,  
13 when he's reviewing it and the information and  
14 data changes?

15 MR. GALLO: Sure, thank you.

16 Q You've already stated that after you've issued a  
17 permit you may make site visits to observe the  
18 construction process to determine whether or not -- I  
19 guess the question is, what's the purpose of your  
20 construction site visit?

21 A To ensure compliance with the applicable permit  
22 that's issued in that -- for that activity.

23 Q Okay. That they are in fact within the terms and  
24 conditions of the permit that's been issued?

25 A Correct.

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1 Q Now the question is, what do you do when you come  
 2 upon a construction site and realize that a project  
 3 is not in compliance with the terms and conditions?  
 4 A There is a standard enforcement process that is  
 5 utilized on a case-by-case basis, taking into  
 6 consideration all the facts of the case, the degree  
 7 of environmental harm that may have occurred, the  
 8 degree of non-compliance. Based on those conditions,  
 9 it will dictate what level of enforcement I may  
 10 pursue on that project.  
 11 Q Okay. Thank you. So, in essence, I think your  
 12 answer is that there's -- is it correct that there  
 13 are a range of possibilities that you may do upon  
 14 seeing a project that's not in conformance with plans  
 15 and specs?  
 16 ALJ BOLDT: And where are we going with  
 17 this compliance stuff? It's not --  
 18 MR. MEYER: It's real beyond the scope --  
 19 ALJ BOLDT: Yeah, I think we need to  
 20 move --  
 21 MR. GALLO: Okay. I'll withdraw the  
 22 question.  
 23 Q When you're reviewing an application, do you take  
 24 into account the direct impacts of the project as  
 25 well as secondary impacts and cumulative effects?

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1 MS. KAVANAUGH: And could you  
 2 clarify -- you're talking about substantively,  
 3 procedurally, because, you know, we say --  
 4 MR. GALLO: Substantively, I'm sorry.  
 5 Thank you.  
 6 A Yes.  
 7 Q When you evaluated the Manual Code approval  
 8 materials, did you take into account public comments  
 9 that were made during public comment periods?  
 10 MR. KAVANAUGH: And I guess that's vague  
 11 too. When you say take into account, what do  
 12 you mean? Do you mean read them, evaluate them,  
 13 investigate them, answer them?  
 14 Q Did you read them, evaluate them and determine  
 15 whether or not to take action on those comments?  
 16 A In all of my projects that involve the public comment  
 17 and notice period, yes.  
 18 Q And did you do the same for the Manual Code approval  
 19 that you reviewed and approved on November 4th, 2010?  
 20 A Yes.  
 21 Q So that was a little bit vague. I'm saying did you  
 22 review the public comments that were made prior to  
 23 your approval on November 10th, 2010?  
 24 A Yes.  
 25 Q Thank you. The Manual Code approval memorandum was

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1 MR. MEYER: Isn't this the same line of  
 2 questioning? Objection.  
 3 ALJ BOLDT: No, this is part of the -- if  
 4 it was subject to Chapter 30 and the substantive  
 5 standards apply so I think it is relevant as  
 6 part of a Chapter 30 review process.  
 7 A So through the course of Chapter 30 and/or water  
 8 quality certification project review, take into  
 9 consideration direct impacts, cumulative impacts,  
 10 impacts that may be associated with permanent or  
 11 temporary conditions.  
 12 ALJ BOLDT: Does it also involve a  
 13 balancing of public rights and private rights or  
 14 public rights and other public rights?  
 15 THE WITNESS: It does revolve around a  
 16 balance between the public rights and the  
 17 private riparian rights in light of the  
 18 applicable standards.  
 19 Q Are the standards the same for when you're reviewing  
 20 a Manual Code approval as opposed to a private party  
 21 permit?  
 22 A Whether it's a Manual Code approval or whether it's a  
 23 private application, we review the activity in light  
 24 of the applicable standard.  
 25 Q So the same project is treated identically the same?

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1 addressed to Lynette Check (phonetic), Southeast  
 2 Regional Natural Resources Engineer in Milwaukee. Is  
 3 she the person within the DNR responsible for the  
 4 design and construction of the proposed project?  
 5 A In general terms, yes.  
 6 Q So to be a little bit more specific, did -- I  
 7 understand that the project was designed by a  
 8 subcontract engineer, Kapur and Associates, but  
 9 Lynette would be the person that would coordinate  
 10 with that engineer in the design of this project, is  
 11 that correct?  
 12 A To the best of my knowledge of Lynette's daily  
 13 duties, she coordinates with both the Department  
 14 Administration and also project engineers to develop  
 15 plans, prepare an application for a project that may  
 16 impact waterways or wetlands.  
 17 Q Did you have conversations with Lynette regarding the  
 18 proposed project and did you ask Lynette any specific  
 19 questions regarding the designs for the Krause  
 20 property proposed project?  
 21 A Yes.  
 22 Q What kind of questions and discussions did you have  
 23 with Lynette?  
 24 A Extensive. Things relating to design elements,  
 25 specifically, in this project alternatives that have

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1 been evaluated as far as wetland impact.  
 2 Q Did you specifically have discussions with regard to  
 3 impacts to navigable waters?  
 4 A Sorry, I -- could you repeat that?  
 5 Q I'll repeat it. Did you specifically have  
 6 discussions with Engineer Lynette Check with regards  
 7 to impacts on navigable waters?  
 8 A Yes.  
 9 Q What was the nature of those discussions?  
 10 A I can recollect a few discussions pertaining to the  
 11 actual placement of the launch pad on the bed of  
 12 North Lake and the design elements of that particular  
 13 pad as it relates to the standards and, to a certain  
 14 degree, the impacts of the proposed road on wetlands  
 15 that I do consider navigable.  
 16 Q Did you have discussions with Engineer Lynette Check  
 17 with regard to the GESTRA soil boring reports?  
 18 A No, I did not.  
 19 Q I think earlier in your deposition you stated that  
 20 you did not review or thoroughly review the GESTRA  
 21 report?  
 22 A That's correct.  
 23 Q Did you do any evaluations with regard to the issue  
 24 of lakebed fill with respect to the construction of  
 25 the proposed access road?

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1 Associates regarding the design of the access road  
 2 within the navigable waterway?  
 3 A Not directly.  
 4 Q And did you have any discussions with persons from  
 5 GESTRA Engineering with regard to geotechnical  
 6 considerations relating to the construction of the  
 7 access road within the navigable waterway?  
 8 A Not directly.  
 9 Q Your conclusion, upon approval of the Manual Code  
 10 application, was that the project met standards and  
 11 therefore you saw it appropriate to approve the  
 12 project?  
 13 A My final approach to the project was that it was a  
 14 project that would meet State standards, not have a  
 15 detrimental impact to the public interest, not have  
 16 significant adverse environmental impacts to wetlands  
 17 or wetland functional values.  
 18 Q So at no point during this approval process did you  
 19 consider impacts to navigable waterways relating to  
 20 lakebed fill?  
 21 A The process of review for lakebed fill would have  
 22 only been associated with the direct placement of the  
 23 boat ramp on North Lake.  
 24 Q Okay. I'd like to look -- draw your attention to  
 25 Exhibit 213. It's the DNR exhibit.

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1 A Can you just repeat the first part of that question  
 2 again?  
 3 Q Sure. Did you do any investigations or analysis with  
 4 regard to lakebed fill in the area of the proposed  
 5 access road as it is proposed to be constructed  
 6 within navigable waters?  
 7 A As it relates to lakebed fill, no, as I hadn't  
 8 considered it a portion of North Lake or lakebed.  
 9 The majority of the discussions as far as impacts  
 10 were related to functional values of wetlands and  
 11 associated impacts that can include the majority of  
 12 the public interest of navigable waterways.  
 13 Q Did you confer with Lynette Check with regard to  
 14 construction sequence and constructability of the  
 15 access road in the navigable -- in the area of the  
 16 navigable waters?  
 17 A I would say the majority of those conversations took  
 18 place with our storm water engineer who also reviewed  
 19 this site for erosion control. And although I was  
 20 party to those conversations, I believe I allowed the  
 21 storm water engineer to take the lead as far as the  
 22 requirements and requests to changes or alterations  
 23 to the construction sequence or erosion control  
 24 measures on site.  
 25 Q Did you have discussions with persons from Kapur and

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1 A I'm not sure where that is.  
 2 ALJ BOLDT: Looking for a number, any  
 3 number.  
 4 A Okay.  
 5 Q Is this an accurate and true copy of the notice of  
 6 public informational hearing for the proposed  
 7 North Lake public access?  
 8 A Yes.  
 9 Q And did you sign this notice?  
 10 A Yes, I did.  
 11 Q Did you review the notice?  
 12 A Prior to issuance or just right now?  
 13 Q Prior to issuance. I'm sorry.  
 14 A Yes.  
 15 Q Okay. And as I read this, is there anyplace in this  
 16 notice that you provided notice of lakebed fill other  
 17 than at the top, Item 2, construction and placement  
 18 of a boat ramp on the bed of North Lake, but is there  
 19 any notice of lakebed fill for the construction of  
 20 the access road through navigable waters?  
 21 A No, that would be included within the discharge of  
 22 fill in 0.16 acres of the wetland to construct the  
 23 access road.  
 24 MS. CORRELL: Continued objection to the  
 25 line of questioning regarding the jurisdictional

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1 determination in this case and the  
2 scope -- adjacent to the access road or  
3 wetlands.  
4 MR. GALLO: I'm sorry. Adjacent to the  
5 access road, is that what you're objecting to?  
6 MS. KAVANAUGH: No, she's saying if there  
7 are wetlands there and you said wetlands were  
8 off the table.  
9 MR. GALLO: I'm sorry, I thought I said  
10 with regard to navigable water.  
11 MS. CORRELL: Correct, you did. Those  
12 navigable waters, again, are located in  
13 wetlands. I'm not objecting every time, but  
14 I -- a continued objection to the line of  
15 questioning that is outside the jurisdictional  
16 scope.  
17 ALJ BOLDT: Okay. Do you have any reason  
18 to believe that that is a lakebed fill in that  
19 wetland area?  
20 THE WITNESS: I do not.  
21 ALJ BOLDT: Okay. So he's using the term  
22 lakebed fill for the area that the Department is  
23 using the term wetland complex, is that a fair  
24 statement?  
25 THE WITNESS: Lakebed fill and wetland

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1 determined to be navigable water.  
2 MS. KAVANAUGH: But not a stream?  
3 MR. GALLO: That's correct.  
4 MS. CORRELL: And the flood flow capacity  
5 criteria is only applicable to streams under  
6 Chapter 30.12(3m) and I believe those are the  
7 bullet point standards here so it's not  
8 relevant.  
9 ALJ BOLDT: That's the way I recall the  
10 standards that I enunciated at the beginning of  
11 the hearing.  
12 MR. MEYER: I've got the statute out and it  
13 says stream.  
14 Q As to bullet number one, whether navigation is  
15 materially obstructed, did you do any analysis with  
16 regard to this first bullet?  
17 A Yes.  
18 MR. GALLO: I'd like to move this exhibit  
19 into evidence.  
20 ALJ BOLDT: Okay.  
21 MS. CORRELL: I'm sorry, which exhibit are  
22 we moving?  
23 MR. GALLO: 213.  
24 MS. CORRELL: Sure, no objection.  
25 ALJ BOLDT: Any objection?

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1 complex in the location of realignment of the  
2 access road, correct. I believe that's how  
3 they're -- the difference of opinion there.  
4 ALJ BOLDT: Okay.  
5 Q In the center of the first page of the notice --  
6 A Uh-huh.  
7 Q -- there are legal standards identified by the three  
8 bullets?  
9 A Correct.  
10 Q Did you do an analysis of these legal standards in  
11 your approval of the Manual Code permit?  
12 A Yes, I did.  
13 Q Okay. And did you -- as to the third bullet, did you  
14 conduct any flood flow studies with regard to fill  
15 within the navigable waterways?  
16 A No, I did not.  
17 Q Okay. So the question is, where the standard is,  
18 whether the flood flow capacity of a stream is  
19 materially reduced and so there was no evaluation, to  
20 your knowledge, of flood flow capacity being affected  
21 by filling of navigable waters?  
22 MR. MEYER: Objection, can we clarify what  
23 navigable waters you're referring to, Mr. Gallo?  
24 MR. GALLO: The access road is being  
25 constructed through an area that has been

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1 MS. CORRELL: No objection.  
2 ALJ BOLDT: 213 is received, if I didn't  
3 say that.  
4 Q Exhibit 104, this is a North Lake exhibit.  
5 A North Lake exhibit. Okay.  
6 Q Okay. This is an exhibit that has emails, the top  
7 email being from Jim Morrissey to Dale Feifel at the  
8 Army Corps and you're copied --  
9 A Uh-huh.  
10 Q -- on this. Are you -- did you receive this email  
11 and are you aware of this determination?  
12 A I see that I was copied on the cc'd -- this email and  
13 I was aware of the content.  
14 Q So do you agree that the ordinary high water mark of  
15 North Lake is 897.76?  
16 A I would agree.  
17 Q Thank you. Exhibit RRNA16 --  
18 MR. GALLO: I'd like to move this, I'm  
19 sorry, 104, into evidence.  
20 MR. HARBECK: It's in.  
21 ALJ BOLDT: It's in.  
22 MR. GALLO: Okay.  
23 A What was the exhibit?  
24 Q 16.  
25 A 16.

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1 Q Mr. Hudak, are you familiar with this plan sheet?  
 2 A Yes.  
 3 Q And what --  
 4 MR. GLEISNER: I'm sorry, what exhibit are  
 5 you on, 16?  
 6 MR. GALLO: 16-001.  
 7 MR. GLEISNER: Thank you very much.  
 8 MS. CORRELL: Just a moment, I've got the  
 9 wrong binder here.  
 10 MR. GALLO: Sure.  
 11 Q Have you -- you said that you were familiar with this  
 12 drawing. Have you inspected the unnamed stream on  
 13 field visits?  
 14 MS. KAVANAUGH: And I guess I'd object, are  
 15 we talking about the northern stream or the one  
 16 you say is going through the wetland?  
 17 MR. GALLO: I'm sorry, the --  
 18 MS. KAVANAUGH: The swale at the top?  
 19 Q The drawing is oriented as north going up?  
 20 A Correct.  
 21 Q And at the top of the stream there's an area that is  
 22 between the two blue marks and those blue marks I  
 23 think were put on there by Pete Wood (phonetic) so  
 24 you can ignore those, but that's the area that I'm  
 25 asking you questions about.

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1 ALJ BOLDT: And for your purposes when you  
 2 were -- if you were dealing -- this is a  
 3 hypothetical. If you were dealing with a  
 4 hypothetical Chapter 30 project that some areas  
 5 were wetland and were navigable wetlands and  
 6 some portions of that wetland were below the  
 7 ordinary high water mark, would that make any  
 8 difference in terms of how you treated the  
 9 project in terms of whether you would treat it  
 10 under NR103 or under Chapter 30?  
 11 THE WITNESS: I believe the proposed  
 12 activity would dictate how I would assert  
 13 jurisdiction either under Chapter 30 or under  
 14 wetland fill authority.  
 15 ALJ BOLDT: So in this case where the  
 16 Department is building a boat ramp, to you as  
 17 a -- if you were treating this as any other  
 18 project, would it make a difference if some of  
 19 those areas are below the ordinary high water  
 20 mark?  
 21 THE WITNESS: As it relates to this plan  
 22 set no, as there's no defined activity that's  
 23 within this wetland or waterway and granting  
 24 jurisdiction has already been asserted from the  
 25 bank of North Lake.

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1 A Okay.  
 2 Q And I believe we've generally referred to this as an  
 3 unnamed tributary and have you inspected this stream  
 4 at various times during your site visits?  
 5 A I have inspected this watercourse in proximity of  
 6 this plan between the blue lines.  
 7 Q And have you made notes as to the water depth and the  
 8 width of this stream?  
 9 A During a site visit in September of, I believe, 2010  
 10 yes, I had.  
 11 Q Okay. So you took into account -- did you -- I'm  
 12 sorry, did you take into account the elevations that  
 13 are provided for in this map in your Manual Code  
 14 approval?  
 15 MS. KAVANAUGH: And I guess that's sort of  
 16 vague. Can you clarify?  
 17 MR. GALLO: Okay. Thank you.  
 18 Q You said that you are familiar with this drawing and  
 19 that you've looked at it and you've conducted site  
 20 visits. Did this have -- did your knowledge of this  
 21 stream, was that taken into account with regard to  
 22 your Manual Code approval?  
 23 A My Manual Code approval references this area as a  
 24 wetland with navigability characteristics.  
 25 Q Okay. Thank you.

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1 ALJ BOLDT: So it was considered as part of  
 2 the NR103 review process?  
 3 THE WITNESS: This portion or the --  
 4 ALJ BOLDT: Yes. Yeah, that portion.  
 5 THE WITNESS: Yeah, there really aren't any  
 6 impacts to this portion here so there's -- the  
 7 project was reviewed, the project in its  
 8 entirety was reviewed, under NR103 but, again,  
 9 as far as this waterway, navigable wetland area,  
 10 to the north, there weren't any direct impacts  
 11 to that.  
 12 ALJ BOLDT: Okay. And would it be fair to  
 13 say that in some ways the wetland review process  
 14 is more extensive than the Chapter 30 review  
 15 process because you have to consider  
 16 alternatives and because there is not the same  
 17 balancing test?  
 18 THE WITNESS: And that was a very good  
 19 observation of one of the approaches with this  
 20 site is that the NR103 analysis was very  
 21 inclusive, took into consideration all the  
 22 alternatives including significant adverse  
 23 environmental impacts and cumulative impacts, as  
 24 it relates to developing a public access on  
 25 North Lake.

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1 ALJ BOLDT: Okay. Go ahead.  
 2 Q Are you familiar with Chapter 30.12, structures and  
 3 deposits in navigable waters?  
 4 A Yes, I am.  
 5 Q Did you take that into account on your review of the  
 6 Manual Code approval?  
 7 A Yes.  
 8 Q Okay. Does this -- let's go to Exhibit 123,  
 9 North Lake.  
 10 A North Lake?  
 11 Q Yeah.  
 12 ALJ BOLDT: Yeah, we're getting close to a  
 13 break. I'm trying to get through with this  
 14 witness, but I realize we're all probably  
 15 getting a little punchy.  
 16 A 123?  
 17 Q Yeah.  
 18 A I was in Book 3, sorry. I'm trying to find the right  
 19 book here. I just want to make sure I'm looking at  
 20 the right exhibit here. Redland Road 123?  
 21 Q Yes.  
 22 A Okay.  
 23 Q Well, North Lake Management District 123 and turn to  
 24 Exhibit B which is a site map showing photos. Andy,  
 25 did you prepare this map?

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1 A Really, based off these observations, at the date  
 2 when I was on the site there was very little  
 3 connectivity. There was -- the wetland complex on  
 4 that date was what I would consider probably at  
 5 pretty close to being an ordinary high at that  
 6 elevation, borderline high elevation, and it was just  
 7 trickling over some deposit that was located along  
 8 the shores of North Lake through a lot of the  
 9 vegetation. As you can see, I identified vegetation  
 10 that was observed, the flow path, the approximate  
 11 widths, the approximate water depths, that were  
 12 present.  
 13 Q So this was your final documentation prior to your  
 14 approval?  
 15 A That is correct.  
 16 Q Okay.  
 17 MR. GALLO: I'd like to move these  
 18 exhibits, Exhibit B, C, the photos, through to  
 19 Exhibit G into evidence.  
 20 ALJ BOLDT: Those are one -- what are  
 21 those?  
 22 MR. GALLO: 123.  
 23 THE WITNESS: 123B --  
 24 MR. GALLO: B --  
 25 THE WITNESS: -- through G.

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1 A Yes, I did.  
 2 Q And can you explain to us what we're looking at?  
 3 This is a map to correlate photos?  
 4 A That's exactly what it is. I have three different  
 5 sets of photographs, three different dates, that were  
 6 oriented in the vicinity of the parking lot at the  
 7 Department's site.  
 8 Q Okay. If you turn to Exhibit G -- it's behind the  
 9 photos.  
 10 A I have C, D -- oh, okay, E -- okay.  
 11 Q Did you prepare Exhibit G?  
 12 A Yes, I did.  
 13 Q And are these notes your observations on site visit  
 14 September 22nd, 2010?  
 15 A Correct, this is a document I generated after that  
 16 site visit to put down my field notes onto a  
 17 computerized copy.  
 18 Q What was the purpose of this exhibit and these notes?  
 19 Was it to determine navigability?  
 20 A I don't recall the exact purpose of this site visit,  
 21 however, I do know that I was investigating and  
 22 taking a look at the connectivity of the wetland  
 23 complexes and swale with the connection point of  
 24 North Lake.  
 25 Q And what was your conclusion?

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1 MR. GALLO: -- through G.  
 2 ALJ BOLDT: Any objection there?  
 3 MS. CORRELL: Including G, is that right?  
 4 MR. GALLO: Yes.  
 5 MS. CORRELL: No, we don't have an  
 6 objection.  
 7 ALJ BOLDT: B through G?  
 8 MR. GALLO: Yep.  
 9 ALJ BOLDT: Okay. Those are received.  
 10 MR. GALLO: Exhibit 105, and it's the small  
 11 roll of drawings, were these moved into  
 12 evidence? These are the 2008 --  
 13 MR. GLEISNER: Are they the plans?  
 14 MR. GALLO: Yes.  
 15 MR. GLEISNER: 2008 plans? No, the 2010  
 16 plans are moved into evidence as our Exhibit 30.  
 17 Q Andy, I just want you to look over these --  
 18 MR. GALLO: May I approach?  
 19 ALJ BOLDT: Sure.  
 20 Q -- these drawings and the question for you, and  
 21 please take your time, were these the drawings that  
 22 you used to -- in the Manual Code approval process?  
 23 MS. CORRELL: I apologize, what exhibit are  
 24 we on?  
 25 MR. GALLO: 105.

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1 ALJ BOLDT: No apologies necessary. I  
2 don't think we --  
3 MR. GALLO: 105.  
4 ALJ BOLDT: 105? Okay.  
5 A This was a draft of plans. I don't believe, excuse  
6 me, that this is the accurate plan date when I  
7 approved the Manual Code, but I'd have to double  
8 check that back.  
9 Q Let's look at your Manual Code approval because  
10 they -- you reference I think that set of plans.  
11 MR. GALLO: Do we have the list of  
12 exhibits?  
13 MR. GLEISNER: You think it was referenced  
14 in the Manual Code though?  
15 MR. GALLO: Yes, yes.  
16 ALJ BOLDT: Which is 01?  
17 THE WITNESS: Yeah, there should be a date  
18 reference in there as --  
19 A Yeah, it looks like the conditions of this approval  
20 relate to the plans dated October 15th, 2009 and  
21 later revised on September 16th, 2010 so these are a  
22 little old, I believe.  
23 ALJ BOLDT: That's an earlier iteration of  
24 it?  
25 THE WITNESS: Yeah, these are from '08. I

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1 ALJ BOLDT: No, if those are -- it wasn't  
2 clear from your earlier presentation. I just  
3 wanted to double check that. If those are your  
4 originals, keep them, or it's something that you  
5 need to keep those. It does have our sticker on  
6 it, but let's just see --  
7 MR. GLEISNER: And if you need them we can  
8 send them to you.  
9 ALJ BOLDT: No, no, that's the same as the  
10 3 that is in the book --  
11 MR. GLEISNER: It is, Judge.  
12 ALJ BOLDT: -- with the page numbers  
13 marked kind of like a -- okay. We're ready. Go  
14 ahead.  
15 Q Exhibit 108 in the North Lake documents.  
16 A Okay.  
17 Q Are you familiar with this comment?  
18 A Yeah, it looks like a comment directed to Jim Ritchie  
19 (phonetic) regarding the EA that was developed for  
20 the launch.  
21 Q And this comment, your familiarity with this comment,  
22 is it with respect to it's in the DNR record for the  
23 Manual Code of approval?  
24 A I would stipulate to that. I may know more of what's  
25 in here, but without reading the whole document --

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1 don't see any revision dates to be -- reflect  
2 the accurate plan set.  
3 MR. GLEISNER: Just so that I'm clear where  
4 we're at, where in Exhibit 1 was that?  
5 THE WITNESS: This is Exhibit MLND105.  
6 MR. GLEISNER: Right, but where are the  
7 plans referenced in the Manual Code? I  
8 apologize.  
9 THE WITNESS: Under condition approval  
10 Number 1.  
11 MR. GLEISNER: Thank you very much.  
12 Q Let's go to Exhibit 108. We're going to go to  
13 Exhibit 108, a North Lake exhibit.  
14 MR. GLEISNER: It's already in the record,  
15 but do you want this marked too?  
16 ALJ BOLDT: No, we did mark it already.  
17 That's what I just wanted to see, if that was  
18 the same set. Now, that's -- we marked that as  
19 Exhibit 3 based on what you were --  
20 MR. GLEISNER: Just to clarify the record,  
21 Judge, so that everything is hunky dory,  
22 Exhibit 3 exists in our bound exhibits as a  
23 foldout and it exists now also as the large  
24 plans. Do you want to make that an A or  
25 something or --

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1 Q We'll walk through it.  
2 A Okay.  
3 MS. KAVANAUGH: Not the whole thing, I  
4 hope.  
5 Q Let's go to Page 4.  
6 MR. GALLO: We'll finish by 5:00 here. I'm  
7 just kidding.  
8 Q Page 4, Footnote 2, Item 2, in the bold you'll note  
9 lakebed issues are all addressed insufficiently by  
10 (inaudible)?  
11 A This is on Page 5?  
12 Q I'm sorry, Page 4.  
13 ALJ BOLDT: Of what exhibit again? Let's  
14 make sure we get this --  
15 MR. GALLO: 108.  
16 A Page 4, 108, end of the footings --  
17 Q Footnote 2, bottom of the page, Item 2, lakebed  
18 issues are --  
19 A Okay.  
20 Q -- all addressed insufficiently. And at the bottom  
21 of the page, at the end of Note 5, lakebed issues are  
22 all addressed inefficiently?  
23 MS. KAVANAUGH: And, Don, is this going to  
24 link up to navigability because --  
25 MR. GALLO: Yes.

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1 MS. KAVANAUGH: -- the circuit court has  
2 already, you know, ruled that this was an  
3 adequate EA and I know it's at the appeals now.  
4 MR. GALLO: Oh, I understand. This goes to  
5 notice of this issue with regard to impacts on  
6 navigability and that the DNR had notice of our  
7 concerns on lakebed impacts.  
8 MS. KAVANAUGH: Lakebed fill.  
9 Q Again, on Page --  
10 ALJ BOLDT: Okay. Is there a dispute on  
11 that? I mean some of these things are becoming  
12 more clear. You know, I mean the problem with  
13 the debate that we had about jurisdiction was  
14 that it was done in the form of a motion in  
15 limine. I had nothing.  
16 MS. CORRELL: You didn't have any maps.  
17 ALJ BOLDT: I didn't have an affidavit, you  
18 know, as we would with a summary judgment  
19 motion. I didn't have anything like a motion to  
20 dismiss with any documentation. I mean is there  
21 sort of a general agreement that we can reach in  
22 terms of, you know, if a lot of this ultimately  
23 is a legal issue that we can all kind of, you  
24 know, stipulate to? It seems that you've  
25 stipulated wetlands are not part of this hearing

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1 case now.  
2 ALJ BOLDT: Yeah, let's do that and let's  
3 take a short break here. We all need a break  
4 anyway.  
5 (Recess Taken)  
6 ALJ BOLDT: Okay. We're back on the  
7 record. We inquired to see if there was a way  
8 to reach at least some small measure of  
9 stipulation here and I think we do have some and  
10 I believe Mr. Harbeck was going to try to  
11 summarize our very limited stipulation here.  
12 MR. HARBECK: Okay. And I will do it in  
13 reference to Exhibit 2-002. The DNR and the  
14 petitioners have stipulated that the areas in  
15 green, both to the south of the access road  
16 which runs towards the lake and to the north of  
17 the access road, are navigable and also consist  
18 of wetlands, and the area in blue that connects  
19 to the northern green area, which has sometimes  
20 been referred to as a channel, is navigable and  
21 also consists of wetlands. So the areas that  
22 we're talking about are immediately adjacent to  
23 the access road. On either side of the access  
24 road, Area 1 is just north of the access road,  
25 Area 2 starts just south of the access road as

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1 and now you're going into areas that are -- were  
2 treated from a regulatory perspective as  
3 wetlands, you know, and that's -- I understand  
4 everyone is frustrated. You were frustrated  
5 with my ruling, I'm frustrated I had nothing in  
6 front of me, and you're all, you know,  
7 frustrated with what's going on with the DNR's  
8 doing here so -- but, you know, is there any way  
9 to get at this more efficiently?  
10 MS. CORRELL: My proposal was --  
11 MR. GLEISNER: Maybe we can go off the  
12 record and talk between ourselves.  
13 ALJ BOLDT: Yeah, let's take a short break  
14 and I'll talk and see if there is -- you know, I  
15 mean it may be very well that we're -- that what  
16 we have here really ultimately are legal issues.  
17 It'd save everybody money and time if there was  
18 some sort of a way to stipulate.  
19 MR. HARBECK: We just want to make sure  
20 that we have an adequate record if we go up on  
21 judicial review and everything else, that we --  
22 ALJ BOLDT: Right, no, I understand.  
23 MS. CORRELL: And for all your other  
24 reviews.  
25 MR. HARBECK: We'll just talk about this

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1 it passes from west to east. The areas adjacent  
2 to that access road are navigable and we will do  
3 our best to not present cumulative evidence --  
4 MR. GLEISNER: Correct.  
5 MR. HARBECK: -- as onto the navigability  
6 as to that.  
7 MR. GLEISNER: Correct.  
8 MR. HARBECK: Did I get it right?  
9 MS. CORRELL: Perfect.  
10 MR. HARBECK: Okay.  
11 MR. GLEISNER: I can live with it.  
12 MR. MEYER: We would stipulate to it also.  
13 I would ask a question though and I keep on  
14 coming back to Don's point. Going into the  
15 impacts I think is beyond the scope of the  
16 notice at least and I question why we should be  
17 pursuing that.  
18 MR. GALLO: Well, the --  
19 MR. HARBECK: It's an issue. It's an issue  
20 in the hearing.  
21 MR. GALLO: Yeah, it gets back to the issue  
22 that we've been debating, whether or not this  
23 hearing is on impacts to the navigable waterways  
24 as well.  
25 MS. KAVANAUGH: As opposed to just the

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1 existence of them.  
 2 MR. HARBECK: Correct, right.  
 3 MS. KAVANAUGH: The existence of  
 4 undiscovered ones.  
 5 ALJ BOLDT: Okay. With that --  
 6 MR. HARBECK: Is that on the record then,  
 7 Judge?  
 8 ALJ BOLDT: Yes, we're on the record and  
 9 anybody want to be heard further? Okay. Thank  
 10 you all very much. Any further questions of  
 11 this witness?  
 12 MR. GALLO: I just want to move Exhibit 108  
 13 into evidence.  
 14 ALJ BOLDT: Any objection to 108?  
 15 MS. CORRELL: No objection.  
 16 ALJ BOLDT: Okay. Exhibit 108. And,  
 17 again, there's a specific provision in NR2 about  
 18 how you treat environmental assessments and  
 19 environmental impact statements and I'll be  
 20 bound by that NR2 Code provision, but subject to  
 21 that, Exhibit 108 is received.  
 22 MR. GALLO: And Exhibit 105 which was the  
 23 roll of drawings -- the Kapur design drawings.  
 24 ALJ BOLDT: Any objection there?  
 25 MS. CORRELL: No, no objection. They're

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1 detrimental to the public interest and the structure  
 2 or deposit will not materially reduce the flood flow  
 3 capacity of the stream? To your knowledge, is that  
 4 true?  
 5 A Yes.  
 6 Q During the course of your work, you were called upon  
 7 to apply those standards to various applications that  
 8 come before you?  
 9 A Applications that are reviewed under Chapter 30  
 10 permits, correct.  
 11 Q And can you give an appreciation to us of how many  
 12 times you may have been called upon to apply these  
 13 standards in your career -- ball park?  
 14 A Yeah, I believe it's around about 150 permits or so  
 15 the last three years so in the realm of 500 or 600.  
 16 Q And Chapter 30 or Chapter 30.12 -- Section 30.12?  
 17 A I'll lump those into Chapter 30 actually and water  
 18 quality cert permits combined.  
 19 Q Okay. But you're very familiar with applying these  
 20 specific standards?  
 21 A Yes.  
 22 Q The word -- these standards -- for one, the third  
 23 standard applies to flood flow and that's  
 24 specifically related to streams, is that not?  
 25 A As I interpret that, yes.

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1 not relevant. My understanding is they're old  
 2 plans, right?  
 3 ALJ BOLDT: Okay. Verifying questions of  
 4 this witness from DNR?  
 5 MR. MEYER: Your Honor, I've spoken to  
 6 Counsel for the Department and has asked leave  
 7 to precede them due to a commitment I have, if  
 8 that's okay with (inaudible). There are just a  
 9 few.

CROSS-EXAMINATION

11 BY MR. MEYER:  
 12 Q Mr. Hudak, thank you very much for being here today  
 13 and for your service to the citizens of the State.  
 14 MR. MEYER: And for the record, Your Honor,  
 15 I'm not waiving my -- by asking the following  
 16 question, I would like not to waive my -- or our  
 17 position (inaudible) that Section 30.12 is not  
 18 applicable to the actions of the DNR and the  
 19 State of Wisconsin.  
 20 Q Mr. Hudak, I'm going to read something from my phone  
 21 and I'm going to ask you whether or not it's true or  
 22 false. Are these the standards for granting a permit  
 23 under Section 30.12(4) of the statutes, that one, the  
 24 structure or deposit will not materially obstruct  
 25 navigation, the structure or deposit will not be

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1 Q Okay. So let's take the first two standards. Is  
 2 there a balancing test involved in applying those  
 3 standards?  
 4 A Yes, there is.  
 5 Q And these standards don't mean you can't have adverse  
 6 effects on things related to navigable waters and  
 7 their incidents such as habitat or whatever, does it?  
 8 MR. GLEISNER: Objection, leading. This is  
 9 an adverse witness, Your Honor.  
 10 ALJ BOLDT: Pardon me?  
 11 MR. GLEISNER: This is an adverse witness.  
 12 He's leading the witness.  
 13 MS. KAVANAUGH: But he's cross-examining,  
 14 he gets to --  
 15 ALJ BOLDT: I think technically because  
 16 he's not in an adverse position to the witness  
 17 he's allowed to ask clarifying questions. I  
 18 think technically they're supposed to be  
 19 non-leading questions so -- and then he's  
 20 perfectly capable of posing them that way.  
 21 MR. MEYER: For sure.  
 22 Q In the course of that balance, do you weigh -- do you  
 23 or do you not weigh the adverse impacts that may  
 24 apply to public rights and interest in navigable  
 25 waters versus the negative interest?

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1 A Inherently with the majority of the Chapter 30  
 2 permits that I review there are impacts associated  
 3 with those projects in relationship to the waterway  
 4 so it is very routine for me to weigh what are those  
 5 impacts, both are they significant adverse impacts to  
 6 that particular standard and the degree to which they  
 7 are viewed by the resource managers in light of  
 8 making that final permit decision.  
 9 Q All right. Do you or do you not then weigh it  
 10 against the benefits to the navigable body of water  
 11 of that particular application?  
 12 A It is often that balancing act of determining what  
 13 are the benefits associated with that particular  
 14 activity and impact.  
 15 Q Would or would not increased use of a body of water  
 16 for purposes of navigation be viewed as one of the  
 17 positive things that --  
 18 MR. GLEISNER: Objection, leading.  
 19 MR. MEYER: I said would or would not.  
 20 ALJ BOLDT: I don't think it's necessarily  
 21 implying the answer that --  
 22 MR. GLEISNER: Okay, Your Honor.  
 23 ALJ BOLDT: The objection is overruled.  
 24 Q Would or would not a, and I'm speaking on a  
 25 hypothetical basis, a facility that would enable more

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1 Q And is that what you balanced against (inaudible)?  
 2 A I would say the balancing was taken into  
 3 consideration, but the overall approach of this  
 4 review is to make sure there were not significant  
 5 adverse environmental impacts or of a cumulative  
 6 nature.  
 7 Q The Judge asked a question earlier and I'd just like  
 8 to --  
 9 MR. MEYER: This is strictly clarification  
 10 and it may be leading, but I think it was your  
 11 question earlier.  
 12 Q In your mind --  
 13 MR. GLEISNER: Can we object in advance  
 14 then?  
 15 MR. MEYER: No, I just want to make sure I  
 16 didn't mis-hear it and therefore to ask a long  
 17 line of questions.  
 18 Q This review was done under 801.03 and 30.12 is my  
 19 understanding. You looked at -- those were sort of  
 20 the jurisdictional things. In your mind, which has  
 21 the most restrictive -- and restrictive in terms of  
 22 protecting the environment. Which has more  
 23 restrictive standards, the 30.12 or the NR103?  
 24 A In the review of this project and the review of the  
 25 overall approach to achieve an adequate access site

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1 people to get beneficial use of a public navigable  
 2 body of water, would that or would not that be  
 3 something that you'd weigh against potential adverse  
 4 environmental impacts?  
 5 A In the course of the review for an access, we would  
 6 view and quantify the benefits provided for the  
 7 ability to navigate and recreate navigable waterways  
 8 as a benefit in that review process.  
 9 Q Was this or was this not the type of analysis that  
 10 you engaged in, in making this decision?  
 11 MR. GLEISNER: I'm going to object, Your  
 12 Honor, he is leading, even though he's saying  
 13 whether or whether not I mean he's suggesting  
 14 the answer.  
 15 MR. MEYER: Your Honor, I think the witness  
 16 could say no if he didn't. It's not leading.  
 17 ALJ BOLDT: Well, you could say did  
 18 you -- did you -- you know, it might be a little  
 19 less suggestive. I mean did you consider  
 20 those -- you know, did you consider those  
 21 potential benefits of public access as you  
 22 reviewed this under the Manual Code?  
 23 THE WITNESS: Yes, I did.  
 24 Q Are there negative impacts from this project?  
 25 A Yes, there are.

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1 on North Lake, it is my opinion that the water  
 2 quality certification criteria and review under NR103  
 3 was more restrictive and allowed me to conduct  
 4 further review of analyses of alternatives that would  
 5 avoid and minimize impacts to the resources.  
 6 Q I just have one other series of questions totally  
 7 different. The grove of trees area, you're familiar  
 8 with that?  
 9 A Yes.  
 10 Q You were present when Ms. Hanson illustrated her  
 11 video with her kayaking that area and I can't  
 12 believe --  
 13 MR. MEYER: I can't remember which date  
 14 that was on, Mr. Gleisner, but --  
 15 MR. GLEISNER: June 23rd --  
 16 MR. MEYER: June 23rd --  
 17 MR. GLEISNER: -- of 2010.  
 18 MR. MEYER: -- of 2010.  
 19 Q Were you here when that was shown?  
 20 A Yes, I was.  
 21 Q Have you been previously involved in test of  
 22 navigability involving water craft?  
 23 A Yes, I have.  
 24 Q Did you observe the vegetation in that video?  
 25 A All three videos I had observed the vegetation

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1 present.  
 2 Q Okay. I'm just relating to the grove of trees.  
 3 A Okay.  
 4 Q And have you been at that site yourself, independent  
 5 of any -- obviously, you weren't there the day she  
 6 was there. Have you been there at other times?  
 7 A I've been at the site I believe seven different  
 8 times.  
 9 Q Is the vegetation that you observed on that video at  
 10 the times you were there the types of vegetation that  
 11 you would equate with a navigable body of water  
 12 versus, say, flooding upland area?  
 13 A I'm of the opinion that the vegetation present within  
 14 the grove of trees is not conducive to that of a  
 15 navigable water -- navigable body of water.  
 16 Q Okay. And one final question, have you observed  
 17 water craft, kayaks and canoes and even larger boats,  
 18 at times on flooded upland adjacent to lakes and  
 19 streams fairly frequently in southeastern Wisconsin?  
 20 A I have.  
 21 Q Thank you.  
 22 MR. MEYER: No further questions and, Your  
 23 Honor, I apologize, but I did have an evening  
 24 engagement meeting, business meeting, that I  
 25 need to go to.

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1 Q I'd like to refer you back to that. Let me know when  
 2 you get there.  
 3 A What was that again?  
 4 Q Oh, it's -- do you have the right binder?  
 5 A Is it Redland Road binder?  
 6 MR. GLEISNER: Yes, the white one.  
 7 Q Redland Road Binder 1 --  
 8 A Okay.  
 9 Q -- and it's at 1B-011.  
 10 A Okay.  
 11 Q I believe he was referring you to the bottom portion  
 12 of Page 11 of the waterway wetland handbook,  
 13 Chapter 30, and he was referring you to the best  
 14 evidence of navigability regarding navigation in  
 15 fact. Are there any other criteria or factors that  
 16 you see present in the guidance? What type of water  
 17 bodies are we talking about here?  
 18 A The procedure, as is identified in 1B-011, is  
 19 relating to whether it's a lake or a stream as  
 20 navigable.  
 21 Q Whether a lake or a stream is navigable in fact, is  
 22 that correct?  
 23 A That is correct.  
 24 Q So in your experience in the field, have you ever  
 25 used a navigability in fact, meaning placing a water

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1 ALJ BOLDT: Okay, understood. Yeah, these  
 2 are usual work hours here, but you're certainly  
 3 excused and --  
 4 MR. MEYER: I appreciate your work. What  
 5 time may you be convening tomorrow?  
 6 ALJ BOLDT: Probably nine o'clock. We  
 7 haven't gotten that far, but I think everyone  
 8 was able to get here roughly around 9:00 this  
 9 morning so maybe we'll -- if we don't have to  
 10 set up, hopefully nine o'clock.  
 11 MR. MEYER: Thank you very much.  
 12 ALJ BOLDT: Okay. Thank you. And Ms.  
 13 Correll?  
 14 MS. CORRELL: Yes, I just have a couple of  
 15 questions.  
 16 CROSS-EXAMINATION  
 17 BY MS. CORRELL:  
 18 Q Attorney Meyer was referring you to the grove of  
 19 trees area and is navigating a water craft alone  
 20 sufficient to determine navigable waters?  
 21 A I do not believe it is.  
 22 Q I believe it was Attorney Gleisner who referred you  
 23 to Exhibit 1B-011.  
 24 MR. GLEISNER: I did Counsel, that is  
 25 correct.

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1 craft in a stream, to determine if that stream is a  
 2 navigable water?  
 3 A I can reference out of the multiple jurisdictional  
 4 determinations of navigability I've conducted  
 5 throughout my term that only I believe two that I've  
 6 actually placed a water craft in to navigate in fact.  
 7 Q And isn't it true that that would be more appropriate  
 8 in certain circumstances?  
 9 MR. GLEISNER: Objection, leading.  
 10 MS. CORRELL: Excuse me?  
 11 MR. GLEISNER: Objection, leading.  
 12 MS. CORRELL: Leading. I just asked  
 13 him -- what did I say?  
 14 ALJ BOLDT: Isn't it true that --  
 15 MS. CORRELL: Isn't it true that you would  
 16 use it in some circumstances but not others.  
 17 How is that leading?  
 18 MR. GLEISNER: It suggests the answer.  
 19 It's suggesting that isn't it true that you  
 20 would be using it in some circumstances --  
 21 Q Would you use this test in some circumstances rather  
 22 than others?  
 23 MR. GLEISNER: Thank you, Counsel.  
 24 A Yes, I would.  
 25 Q And what are those circumstances?

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1 A Typically, the only in fact navigation that I have  
2 conducted was during dispute of navigation  
3 at -- after an initial opinion or determination was  
4 formed and submitted.  
5 Q And what would the factors be that you would look at  
6 in making the initial determination?  
7 A The initial determinations solely are relied upon  
8 professional judgment and trainings that have  
9 occurred throughout a tenure as a water management  
10 specialist. We would ascertain -- typically, my  
11 approach at doing navigation -- navigability  
12 determinations is initial map review and  
13 investigations in the office to determine the type of  
14 watershed I'm looking at, the extent of it, where  
15 maybe the origin of any particular waterway, are  
16 there any particular ponds or other similar features  
17 that may show up on air photography, prior to me  
18 conducting a site inspection where I would do a  
19 thorough walk-through of the locations that I  
20 initially identified as potentially having navigable  
21 waters to confirm the presence of a bed and bank with  
22 a potential discernible ordinary high water mark to  
23 be able to identify them.  
24 Q Thank you. And with respect to -- I believe the  
25 Judge asked a question along these lines, but just to

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1 Q But you didn't count the wetland fill under those  
2 culverts as an impact?  
3 A No, there's a -- I believe the wetland -- there was a  
4 small portion of wetland fill associated with each of  
5 the culvert crossings and, again, I'm interpreting  
6 that the placement of the actual structure and  
7 potentially some riprap at the outflow would have  
8 been also permitted through -- at least the portion  
9 of that riprap was permitted under water quality cert  
10 as kind of an addition to the cumulative impact of  
11 the wetland fill, but the actual culvert itself, the  
12 placement of it under the road, was not assessed as  
13 wetland fill.  
14 Q Is there a public benefit to placing -- replacing the  
15 culverts that are there today?  
16 A In the course of the review, I believe the benefit of  
17 having four culverts is an allowed movement of water  
18 and any other fish or wildlife species that may be  
19 present at any given in that wetland back and forth.  
20 It's really an ability to keep connectivity between  
21 those two isolated portions of the wetland.  
22 Q I can't remember who asked you the question, but I  
23 think it was Attorney Gleisner asked you about  
24 ordinary high water marks and this may have been in  
25 relation to some of your deposition testimony. Could

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1 clarify, the activity that's involved in the review  
2 that you conduct -- and now I'm talking about the  
3 access road. I'm kind of jumping around. With the  
4 activity that is conducted at the access road, what  
5 would be the regulatory authority that you would  
6 assert as a WMS?  
7 A The two regulatory authorities that I asserted were  
8 fill placed within a wetland and culvert crossings.  
9 Q So the activity governs how DNR regulates  
10 those -- I'm sorry, the activity governs how --  
11 MS. CORRELL: Strike that. I'm getting  
12 tired.  
13 Q The culverts were regulated under Chapter 30 rather  
14 than wetland water quality cert and why is that?  
15 A I asserted Chapter 30 on the culvert crossings as  
16 there was currently an existing culvert crossing that  
17 was present. Again, this site is an historic fill  
18 site with historic road fill and that road was likely  
19 placed over wetlands or navigable waterways at one  
20 time. And I thought it most appropriate to meet the  
21 standards of a culvert permit or culvert authority  
22 for the culvert placement and I also found it most  
23 appropriate to assert wetland fill over the  
24 additional expansion of the road as it crossed that  
25 navigable portion of the wetland.

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1 you clarify a little bit more what the range in bank  
2 might be for the ordinary high water mark  
3 determination?  
4 MR. GLEISNER: I didn't ask about an  
5 ordinary high water mark I don't think, Counsel,  
6 but I did ask about bed and bank.  
7 MS. CORRELL: Okay.  
8 A And I can reference back to my deposition to state  
9 that I believe I gave a range of it can be highly  
10 variable, depending upon waterway, anywhere between  
11 zero inches to six feet. I'm not sure if that's the  
12 right number I threw out. And, really, my approach  
13 at providing that range was if you have a stream  
14 section flowing through any given nature of soil  
15 where you have a high degree of cutting and  
16 depositing, you may have a highly cut, erodible bank  
17 that has two feet of bank on it, but the depositional  
18 part of that stream, there may not be any change in  
19 elevation between the upland and the actual bed of  
20 that waterway. So that's where really the zero  
21 inches to six feet may come into opinion as to  
22 ascertaining the bed and bank of that waterway.  
23 Q So the two banks of the stream might be different?  
24 A Correct.  
25 Q Okay. And I think you've testified that there is

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1 sometimes flood water at the DNR site in certain  
2 areas. Is flood water one of the criteria that you  
3 would assess in your wetland functional values  
4 assessment?

5 A Yes, it is.

6 MS. CORRELL: I don't have any further  
7 questions. Thank you.

8 MR. GLEISNER: A couple questions, Your  
9 Honor?

10 ALJ BOLDT: Sure.

11 MR. GLEISNER: Thank you.

12 REDIRECT EXAMINATION

13 BY MR. GLEISNER:

14 Q Did I understand -- and I don't have a transcript in  
15 front of me and I can't get a read-back so correct me  
16 if I'm wrong. Did you testify that the only type of  
17 water that can be navigable is a stream or a lake  
18 under the section that -- 1B-011 from the Manual?  
19 Did I understand you correctly?

20 A No, I testified to the fact that in the Manual a  
21 procedure indicates the most appropriate approach for  
22 lakes and streams.

23 Q And you do understand --

24 MR. GLEISNER: Strike that.

25 Q What is your understanding of where navigable water

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1 any purpose whatsoever are declared navigable." Is  
2 that your understanding?

3 A As it's taken from Wisconsin Statutes 30.10, correct.

4 Q And you testified at Page 35 of your deposition that  
5 basically you are unaware of any definition of a  
6 slough, of a bayou or of a marsh outlet, is that  
7 correct?

8 A To my knowledge, there is no State definition of  
9 those.

10 Q And so why do you suppose the legislature put that in  
11 there?

12 MS. KAVANAUGH: And that calls for  
13 speculation.

14 MR. GLEISNER: All right. Let's do it this  
15 way. Thank you, Counsel.

16 Q Let's do it this way. What could be a marsh outlet  
17 or what could be a slough or a bayou is something  
18 that the DNR has not defined, is that correct?

19 MS. CORRELL: Objection, relevance.

20 MR. GLEISNER: Okay. I just would like an  
21 answer to that question subject to that  
22 objection, Counsel.

23 MS. CORRELL: No, there's been no  
24 foundation laid that there's a bayou present at  
25 the DNR site or --

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1 can exist, just streams and lakes?

2 MS. CORRELL: We've already stipulated to  
3 navigable waters, why is this relevant?

4 MR. GLEISNER: Well, I'm trying to -- well,  
5 we've stipulated to navigable waters, but it's  
6 important to understand what it is he defines as  
7 navigable waters. I want to understand what the  
8 DNR's understanding of that is. It will relate  
9 to what we're going to be doing with that  
10 stipulation, Your Honor.

11 A As I've been trained to identify navigable waterways,  
12 it would be a feature on the landscape with a  
13 distinguishable bed and bank with the capacity to be  
14 able to float a water craft on a reoccurring basis.

15 Q And that's the DNR's understanding?

16 A I believe that would be the State's definition and  
17 the protection afforded to it.

18 Q Okay.

19 MR. GLEISNER: Now, Your Honor, this is a  
20 foundational question I'm about to ask.

21 Q Take a look up on the screen. There's Section 30.10.  
22 It defines navigable waters in terms of lakes and  
23 then it defines navigable waters in terms of -- it  
24 says streams, but it reads, "All streams, sloughs,  
25 bayous, marsh outlets which are navigable in fact for

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1 MR. GLEISNER: Well, there's a stipulation  
2 in the record and there's a --

3 MS. CORRELL: I don't think we stipulated  
4 that a bayou was present.

5 MR. GLEISNER: But there's also an area  
6 that wasn't covered by that stipulation and that  
7 encompasses or comprises that, for example, the  
8 woods.

9 MS. CORRELL: Grove of trees, correct.

10 MR. GLEISNER: Yes, right.

11 Q So I just want to understand if -- and I'm not trying  
12 to get a legal opinion from you, I just want to  
13 understand is there anything that the DNR has done to  
14 define or give guidance with respect to what is a  
15 bayou, a slough or a marsh outlet?

16 MS. CORRELL: Again, objection. I do think  
17 you're asking for a legal opinion.

18 MR. GLEISNER: No, I'm asking if there's a  
19 definition.

20 ALJ BOLDT: You can ask him if he's aware  
21 of it, but --

22 MS. KAVANAUGH: You ask if there's a  
23 statute.

24 ALJ BOLDT: -- I think he's already asked  
25 and answered that question.

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1 MR. GLEISNER: Okay.  
 2 ALJ BOLDT: Didn't you say you're not aware  
 3 of any?  
 4 THE WITNESS: Yes, I did.  
 5 ALJ BOLDT: Okay.  
 6 MR. GLEISNER: All right. No further, Your  
 7 Honor.  
 8 ALJ BOLDT: Okay. Any other questions of  
 9 this witness? Okay. Thank you.  
 10 MR. GLEISNER: Our next witness, Your  
 11 Honor, is Mr. Tom Peters. We call  
 12 Mr. Tom Peters. And I would ask you to put up  
 13 Chart 7, please.  
 14 ALJ BOLDT: Would you raise your right  
 15 hand. Do you swear to tell the truth, the whole  
 16 truth and nothing but the truth, so help you  
 17 God?  
 18 MR. PETERS: I do.  
 19 DIRECT EXAMINATION  
 20 BY MR. GLEISNER:  
 21 Q Now, I think, Mr. Peters, before you get too  
 22 comfortable, I'd like you to walk over by the -- for  
 23 your testimony I think it would be useful for you to  
 24 be right at the easel, if you wouldn't mind, with the  
 25 Judge's permission.

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1 Drive, Hartland, Wisconsin and a second home in  
 2 Stuart, Florida.  
 3 Q Now, we're going to have you mark some things on this  
 4 Exhibit 10 which appears in the exhibit book in a  
 5 while, but I first want you to orient the Judge to  
 6 anything that you recognize on that exhibit. For  
 7 example, do you see anything that -- do you see a  
 8 familiar home, for example?  
 9 A Yeah, that's my home right here.  
 10 Q All right. And the --  
 11 ALJ BOLDT: Right here.  
 12 MR. GLEISNER: Yes, right here. Here it  
 13 is. I live in the map.  
 14 ALJ BOLDT: No, I'm asking Counsel to have  
 15 you clarify that.  
 16 MR. GLEISNER: Yeah, the Judge has asked a  
 17 very good question.  
 18 THE WITNESS: All right. This home here is  
 19 mine.  
 20 Q Right. You have pointed to the home that is to the  
 21 north of the solid orange line on the exhibit and  
 22 we'll get to that in a moment and have you mark that  
 23 on the exhibit over here.  
 24 MR. GLEISNER: But I just want, Judge, for  
 25 the purposes of giving people a little

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1 UNIDENTIFIED SPEAKER: Are you going to use  
 2 the TV for him?  
 3 MR. GLEISNER: I might, but not right away.  
 4 UNIDENTIFIED SPEAKER: I'll just have him  
 5 use this microphone then. Thank you.  
 6 MR. GLEISNER: Now, I'm putting this  
 7 exhibit up, not to prove anything with regard to  
 8 wetlands, Counsel, before you --  
 9 MS. CORRELL: I'm not objecting, I'm just  
 10 looking because I don't think I've seen this  
 11 exhibit before.  
 12 MR. GLEISNER: Okay.  
 13 ALJ BOLDT: Yeah, what's the number here?  
 14 MS. CORRELL: Or it may be buried in reams  
 15 of paper.  
 16 MR. GLEISNER: That's marked as Exhibit 10,  
 17 Judge.  
 18 MS. KAVANAUGH: Yeah, I think it might have  
 19 been with the EAs.  
 20 MS. CORRELL: I'm sorry, what's the exhibit  
 21 number?  
 22 MR. GLEISNER: 10.  
 23 Q Now, before we go any further, Mr. Peters, can you  
 24 tell us your name and where you live?  
 25 A Thomas Peters. I live W321 N7631 Silver Spring

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1 orientation.  
 2 ALJ BOLDT: Well, you could still say in  
 3 the middle of the picture --  
 4 MR. GLEISNER: You're right, Judge, I sure  
 5 could and I guess I'm getting tired myself. I  
 6 apologize.  
 7 ALJ BOLDT: Okay. Yeah, and no, you've  
 8 done a fine job of doing that so I appreciate  
 9 that.  
 10 MR. GLEISNER: Thank you, Judge.  
 11 Q All right. Now, let's just be a little more  
 12 specific. We'll have you circle it in a moment, but  
 13 the home that you've identified as yours is the one  
 14 that is sitting in the upper third quadrant of the  
 15 picture and just above, maybe a finger or two above,  
 16 an orange line that goes east to west on that map, is  
 17 that correct?  
 18 A That's correct.  
 19 Q Now, that's an aerial photograph, is it?  
 20 A That's correct.  
 21 Q Now, in that aerial photograph do you see anything  
 22 that identifies for you where the southern boundary  
 23 of your property is located?  
 24 A This row of cedar trees right here which we planted  
 25 when we built the house in 2001 or 2.

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1 Q Now, on that diagram, which I should have had matted,  
2 but I unfortunately didn't on this particular one, to  
3 the south of your property or your home, what is the  
4 next home that we run into going south?  
5 A That would be the Hansons which would be directly  
6 south of the DNR property.  
7 Q Okay. Now, you've heard us describe the grove of  
8 trees. Do you see the grove of trees on that  
9 particular exhibit?  
10 A Well, there's -- actually, there's a grove here and  
11 there's a smaller grove or a different grove here  
12 too.  
13 MR. GLEISNER: Now, just so the record is  
14 clear, we're talking about the area, Judge, that  
15 is not subject to the stipulation. That is the  
16 area that is surrounded in orange on  
17 Exhibit 2-002.  
18 Q Now -- go ahead, I'm sorry, you were going to say  
19 something?  
20 A This -- are you talking about -- which area are we  
21 talking about?  
22 Q Oh, no, I'm not asking -- I'm just clarifying the  
23 record for the Judge right now. I apologize.  
24 A Okay.  
25 Q Now, are you familiar with what has been referred to

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1 quite deep so we had to remove the slab in order to  
2 build the house and put in pilings. And the pilings  
3 run along the perimeter of the house, the garage, and  
4 two rows across. There's 45 pilings and they're as  
5 deep as here 48 feet and they diminish to maybe 45  
6 feet in the front here and then they diminish to  
7 about 30 feet in the back and then they come this way  
8 and they get deeper again to about 40 feet. And --  
9 Q Now, what -- I'm sorry, go ahead.  
10 A Yeah, and there's 45 of them.  
11 Q And before we go any further, what's the address of  
12 that house?  
13 A W321 N7631 Silver Spring Lane.  
14 Q And when did you move into that house, sir?  
15 A In '01.  
16 Q 2001?  
17 A Correct.  
18 Q Okay. And were you present when the house was  
19 constructed, sir?  
20 A Oh, yeah, that was my project. I was full-time  
21 there.  
22 Q Have you constructed other homes?  
23 A Yes.  
24 Q Now, when they were putting the pilings in, did they  
25 meet much resistance when they drove the pilings in?

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1 variously this afternoon as an unnamed stream or as a  
2 body of water that flows east to west that was  
3 identified on Exhibit 2-002 as a blue line? Are you  
4 familiar with that?  
5 A Yes.  
6 Q And where would that be located for the benefit of  
7 the Judge and Counsel?  
8 A Well, actually, as far as concerning my property, it  
9 runs from a marker here all the way to the front, but  
10 basically on the DNR property. It's not on my  
11 property.  
12 Q So let the record show that you have identified an  
13 area just to the north of the orange line that  
14 transects the property east to west and just south of  
15 the purple line near the grove -- or near the grove  
16 of trees, near the arborvitae that demark your  
17 southern boundary, is that correct?  
18 A That's correct.  
19 Q Okay. Now, just so we're clear on this also, I'd  
20 like you to describe, if you could, how your house  
21 was constructed?  
22 A Well, to start at the beginning, there was a home  
23 here before. It was built on a concrete slab. The  
24 slab was four feet thick because the underlying  
25 ground is what they call marrow and the marrow is

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1 A Well, when they started out they had to -- they  
2 almost lost the piling because they came down and  
3 struck the piling and it went down like a shot. So  
4 from then on they had to put a chain on the piling to  
5 hold it so that they'd only strike it so far and it  
6 would go down and as they went down they welded the  
7 pipes because they were steel tubes six inches in  
8 diameter.  
9 Q Now, I'm going to make you do a lot of physical work  
10 here and I apologize. I'd like you now to give the  
11 mic back to Attorney Gallo and return to your seat  
12 for a moment, if you would, and let's do some  
13 housekeeping here. If you will turn in that white  
14 book that's open right there on the desk to  
15 Exhibit 10. That's down quite a bit. Maybe I can  
16 help you do that.  
17 ALJ BOLDT: I can show him my copy quick  
18 here too.  
19 MR. GLEISNER: Oh, thank you very much,  
20 Judge, but he's actually going to mark on it so  
21 maybe --  
22 ALJ BOLDT: Yep, yep, you're right.  
23 MR. GLEISNER: Just for the record,  
24 Exhibit 2-001 has become separated. The islets  
25 have been broken so that's not necessarily good.

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1 Maybe if we -- do we have a stapler? DNR?  
 2 ALJ BOLDT: I've got a stapler.  
 3 UNIDENTIFIED SPEAKER: I'll tape it later.  
 4 MR. GLEISNER: Okay. All right.  
 5 Q Now, do you see Exhibit 10 that's up there on the  
 6 easel in your book there?  
 7 A Right, it's the same picture.  
 8 Q Right. Now, I'd like you to take -- if you would  
 9 please, let's take a nice bright red marker and draw  
 10 a circle around the home which you have identified on  
 11 Silver Spring as having been constructed by you in  
 12 2001. And after you've done that would you please  
 13 initial -- put your initials next to that red circle.  
 14 And now I would like you to, in the same way, draw a  
 15 circle around the Hanson house to the south and put  
 16 your initials. Thank you very much.  
 17 MR. GLEISNER: I'm sorry. I apologize,  
 18 Counsel. No, I'm so sorry, I didn't mean to get  
 19 in your way.  
 20 Q Now, I would also like you to take a different  
 21 colored pen -- take this. I think this green pen  
 22 will make a dark enough impression. Draw a thick  
 23 line as to where the stream is that runs south of  
 24 your home.  
 25 A Just as far as on my property?

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1 Hanson home? Have you ever seen accumulated water at  
 2 any time?  
 3 A Quite frequently.  
 4 Q Okay. Now, what I'm going to do at this point is I  
 5 would like to call up -- actually, what I'm going to  
 6 do is ask you to turn in the book that's in front of  
 7 you as I call this up, way to the back behind the tab  
 8 that is marked 35-00 -- or 35 will do it. And I'm  
 9 going to call up on the TV 35-001 and ask if you can  
 10 identify that?  
 11 MR. GLEISNER: Can everyone see that?  
 12 A Yeah, that's a picture I took in 2006 at  
 13 around -- it's either the -- right at the end of  
 14 May -- I mean right at the end of April or --  
 15 MS. CORRELL: Could you wait until we can  
 16 locate 35?  
 17 MR. GLEISNER: Oh, Counsel, certainly. I'm  
 18 sorry.  
 19 MS. KAVANAUGH: I have so many binders.  
 20 MS. CORRELL: No, that's ours.  
 21 MS. KAVANAUGH: Right, it's this one here.  
 22 MR. GLEISNER: No, I think it's right in  
 23 front of Megan there.  
 24 MS. KAVANAUGH: Yeah, this is it.  
 25 MS. CORRELL: It only goes to 34.

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1 Q Just where that stream -- you say on your property.  
 2 That stream actually is --  
 3 A It's not on my property.  
 4 Q Okay. It's just south of your property, correct?  
 5 A Yeah, I'm trying to get this south of the property  
 6 line.  
 7 Q Now, put a --  
 8 MR. GLEISNER: I apologize, Judge, this  
 9 isn't the best background, but I think you can  
 10 see what is being marked here, can you not?  
 11 ALJ BOLDT: Yes, sir.  
 12 Q Okay. Would you please initial that mark? Thank you  
 13 very much.  
 14 UNIDENTIFIED SPEAKER: You could extend it  
 15 into the white so you can see where it would go.  
 16 MR. GLEISNER: Oh, good idea.  
 17 Q Just extend it into the white over here so that the  
 18 Judge can see it when he's looking at it later.  
 19 A Okay. You can tell it's green.  
 20 MR. GLEISNER: There, is that good?  
 21 ALJ BOLDT: Excellent.  
 22 MR. GLEISNER: Okay, great.  
 23 Q Now, I would like you to answer me some questions and  
 24 I'm going to start by asking you whether or not you  
 25 have ever observed water between your home and the

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1 MS. KAVANAUGH: 34, oh.  
 2 MS. CORRELL: I don't see a tab for 35.  
 3 MS. KAVANAUGH: What did you say it was,  
 4 35?  
 5 MR. GLEISNER: 35.  
 6 MS. CORRELL: Yeah, I don't have 35. I  
 7 have 34-04.  
 8 MS. KAVANAUGH: Was that those ones you  
 9 sent -- oh, no, those are the ones he sent  
 10 later.  
 11 MR. GLEISNER: Oh, those are the ones we  
 12 sent later, Judge, remember? We did --  
 13 MS. CORRELL: Okay. Well, we don't have a  
 14 copy of that.  
 15 ALJ BOLDT: It's probably in the book then,  
 16 yeah.  
 17 MR. GLEISNER: Judge, we did send them. I  
 18 think you've got them in the book there.  
 19 MS. KAVANAUGH: Yes, you did send them, we  
 20 just hadn't binded any. I need to find them.  
 21 MR. GLEISNER: Are we good now?  
 22 MS. KAVANAUGH: Yes.  
 23 MR. GLEISNER: Okay.  
 24 Q Now, sir, would you give us perspective as to where  
 25 this -- where you're looking in this picture?

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1 A Well, if you're standing looking directly at the  
2 picture, my back would be to the Hanson property to  
3 the south or to the west, southwest, corner where the  
4 road comes in, Redland Road, looking northeast.  
5 Q Looking northeast? I'm going to now go up here and  
6 do some of the work and you tell me if I'm right on  
7 this. That photograph would then be around here  
8 looking northeast, is that correct, or here?  
9 MS. CORRELL: Objection, leading.  
10 MR. GLEISNER: Well, I'm simply trying to  
11 get him to tell me where he's looking.  
12 MS. CORRELL: Sure, he can do so.  
13 MS. KAVANAUGH: Yeah, maybe he can just  
14 point it out.  
15 MR. GLEISNER: Mr. Peters, the ladies  
16 insist.  
17 MS. KAVANAUGH: Well, it's easier than to  
18 try to describe it.  
19 MS. CORRELL: If the exhibit -- you know,  
20 if you want to mark it in the book then it would  
21 be in the record, correct?  
22 MR. GLEISNER: Well, first of all, you  
23 asked him -- you objected to me showing --  
24 MS. CORRELL: Yeah, showing him where it  
25 was, yeah.

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1 canoe and row across that water?  
2 A I did it a couple times. I had a 12-foot canoe that  
3 I -- when the kids grew up we had two of them, but I  
4 kept one of them and I had it parked on the other  
5 side of the unnamed stream which is adjacent to my  
6 property. And I -- the only way I could get across  
7 the stream was over my boots so I crossed that stream  
8 and then I walked over this hump and I pushed it  
9 across and rowed it with me in it but, you know, it  
10 was a light weight canoe. It weighed 60 pounds  
11 Q And how far did you -- were you able to row it?  
12 A Oh, about here, probably almost to here -- somewhere  
13 in there.  
14 Q Okay. Let's --  
15 MS. CORRELL: Here to here?  
16 ALJ BOLDT: Yeah, we've got to --  
17 MR. GLEISNER: Yeah, that's not going to  
18 work on the record, Judge, I know.  
19 Q Could you come up to the screen here and just show us  
20 where you rowed and then we'll have you --  
21 A Well, I had to come through here and go over this  
22 hump here. Then I got back in the canoe because it  
23 got deep in here and then I went back to where I was  
24 standing where I took this picture.  
25 Q How deep was that water, do you know?

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1 MR. GLEISNER: I was actually trying to  
2 benefit you and that's why I did that.  
3 A It's back here looking across this way -- across  
4 right here.  
5 Q Okay. Now, if you'd return and I'm going to have to  
6 ask you to do this because -- let me just pull --  
7 MR. GLEISNER: Your Honor, with your  
8 permission may I pull these out temporarily?  
9 ALJ BOLDT: Sure.  
10 MR. GLEISNER: Okay.  
11 ALJ BOLDT: As long as you get them back in  
12 there eventually.  
13 MR. GLEISNER: I will, Judge, I promise.  
14 Q Okay. Now, I'd like you to turn back to Exhibit 10  
15 and what you have just done on the map up there,  
16 would you draw a blue line as to where  
17 Exhibit -- where you're looking in Exhibit 35-001?  
18 A That'd be right through here.  
19 Q So the --  
20 A Initial that?  
21 Q Yes, please initial that. Thank you very much. So  
22 that the grove of trees that we've been talking about  
23 would just be off to your right, is that correct?  
24 A That's right, just right off here.  
25 Q Now, did you have occasion at any time to take a

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1 A It was over my boots and I had these like concrete  
2 mason's boots that went up to about here so it was 18  
3 inches or better.  
4 Q And how much do you weigh, sir?  
5 A 180.  
6 Q And how much was your canoe? Do you know how much  
7 your canoe weighed?  
8 A Yeah, they weighed 60 pounds.  
9 Q And it was able to support you the entire way from  
10 that berm area here to where you're standing?  
11 A Yes.  
12 Q And --  
13 MS. CORRELL: Counsel -- oh, thank you.  
14 ALJ BOLDT: Where you're standing when you  
15 took the photo?  
16 MR. GLEISNER: Right, exactly. I'm going  
17 to ask him to return now and make this clear on  
18 the photograph.  
19 Q Could you return now to the -- your table for a  
20 second, sir, and with your blue pen just indicate  
21 where you started rowing and draw a line to  
22 approximately when you stopped rowing.  
23 A On this picture or this --  
24 Q Yes, on the picture. On the picture now yes, sir.  
25 Now, is the water in the grove of trees as deep or

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1 deeper or less deep than the water that you have in  
2 this photograph?  
3 A Well, the part to the northeast where I started, way  
4 up there, it was deeper there and then it got  
5 shallower where you can see the green and then it got  
6 deep again -- deeper.  
7 Q Was it that deep in the grove of trees?  
8 A Well, back in here in the grove you can see where the  
9 water is up in this area here. Yeah, that was  
10 deeper, but in here there were branches and --  
11 Q How about in the grove of trees next to the Hanson  
12 house?  
13 A (Inaudible).  
14 Q And was that as deep?  
15 A I'd have to look at the other picture, but I didn't  
16 really row over that way because I just went the  
17 shortest way across.  
18 Q Could you have rowed that way if you had wanted to?  
19 A Yeah, I could have rowed into the grove. If you go  
20 to the other picture I can show you that.  
21 Q Which picture is that, sir? There should be a number  
22 of them.  
23 A Oh, 2 -- 002.  
24 Q Okay. All right. Go to 002.  
25 ALJ BOLDT: 35-002?

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1 comes backwards into the unnamed -- so-called unnamed  
2 stream and backs up into the wetlands.  
3 Q So now, in other words, sir, you've seen water flow  
4 from North Lake into the area that is exhibited here  
5 on 35-002?  
6 A Yeah, I would call that when they always say a stream  
7 crests, well, the lake crests, you know, because the  
8 water is still coming in like crazy.  
9 Q And then North Lake actually backs up into the  
10 unnamed stream?  
11 A Right.  
12 Q And it backs up into this area that is depicted in  
13 Exhibit 35-002, is that correct?  
14 A That's correct.  
15 Q Now, do you have any knowledge of where that water  
16 goes besides into this Krause property?  
17 MR. GLEISNER: Strike that.  
18 Q Let's just be clear. The area that we're looking at  
19 in Exhibit 35-002, is that what we know is the Krause  
20 site?  
21 A Right.  
22 Q And have you ever seen the water back up into other  
23 areas from that unnamed stream?  
24 A Well, it goes both ways. You know, as you see on  
25 that picture, where my lot line and the road goes up,

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1 MR. GLEISNER: Yes, sir. Yes, Judge.  
2 Q Okay. Now, there is Exhibit 35-002.  
3 A Yeah, this was adequately deep all the way through  
4 here.  
5 Q Is that in the grove of trees? Is that near the  
6 grove of trees?  
7 A That's right in front of the grove of trees, right.  
8 Q Now, how many times, if you know, each year does it  
9 get that deep?  
10 A Well, it varies, you know, year-by-year, but I'd say  
11 every two years there's part of the year that that's  
12 flooded.  
13 Q Now, I'd like to direct your attention, if I may,  
14 back to you and your home. You actually experience  
15 rains that come down, sometimes heavy rains,  
16 etcetera, around North Lake, correct?  
17 A Oh, yeah.  
18 Q Now, when there's a heavy rain, does the area where  
19 the -- that you have taken a photograph of here or  
20 the stream immediately south of your house, does that  
21 immediately fill up with water when it rains?  
22 A No, this is -- probably you can see how beautiful the  
23 weather and the day is on that picture. You know,  
24 the sun was out. It's about three to five days where  
25 the lake rises from the water coming in and then it

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1 it goes in the swamp back there or the wetlands and  
2 it goes to the south also so it goes to the north and  
3 the south.  
4 Q Could you -- if the ladies will permit me, I'll just  
5 point and say very little. Is this what you're  
6 referring to?  
7 A Right, that floods all the way up and it ends in a  
8 lot -- in the middle of that lot. It kind of -- the  
9 next lot. It kind of fades out there. It gets  
10 shallower.  
11 Q Now, would you -- on your copy of Exhibit 10, would  
12 you take an orange pen and would you draw a circle as  
13 to where the wetland is that floods to the north when  
14 the stream is filled by North Lake? Have you done  
15 that, sir?  
16 A Okay. That's to the north of my property line.  
17 Q Okay. And would you mark that with -- let's just use  
18 N1 for navigable. N1 and put your initials next to  
19 that. Now, would you show on Exhibit 10 -- let me  
20 just point. What we've been talking about -- this is  
21 the Krause property right here?  
22 A Correct.  
23 Q Okay. Would you show that orange circle on  
24 Exhibit 30 --  
25 MR. GLEISNER: Sorry, strike that.

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1 Q Exhibit 10, where the water flows into? Make a  
2 circle around that where it goes south into the  
3 Krause property. Am I making sense?  
4 A Where the water from the unnamed stream backs up to  
5 the Krause property?  
6 Q Exactly. When the water backs up from North Lake  
7 onto the unnamed stream, you said some of it goes  
8 north into wetlands which you have circled and marked  
9 with N1 and you said it went south. Now I'm asking  
10 if you would draw an orange circle around where that  
11 south area is on Exhibit 10.  
12 A It's pretty much towards the back where the culvert  
13 is, where it crosses over. See, Krause always filled  
14 that in there. He had a skid steer. Even up until a  
15 couple of years ago, he was still filling in the DNR  
16 property so he could get his truck down there. So he  
17 was down there a lot of times with his truck and with  
18 his skid steer so this was --  
19 Q Did you ever report that to anybody?  
20 A I don't know if I mentioned that or not. I know I  
21 called up Robin (phonetic) once when he was stuck  
22 over in the grove of trees close to her house and he  
23 had to go get his skid steer to get his truck out.  
24 Q How deep did he get stuck in the grove of trees?  
25 A He was up to the axles. He couldn't -- he's got a

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1 Q Okay. I'd like you to take your -- take a black pen  
2 and show me the direction of flow from North Lake  
3 into the area where the grove of trees is. Could you  
4 do that for me?  
5 A How does that flow go? That's pretty hard to depict  
6 because when the water gets to the back of my lot  
7 line, you really can't detect the flow anymore  
8 because it's going like this. You know, it's going  
9 out and then it comes around and comes back and you  
10 really -- it takes a while to do that. It's really  
11 not like a flow.  
12 Q That's a fair statement.  
13 A It's backing up.  
14 Q Can you show me where the water is located when it  
15 comes back from the lake?  
16 A Well, it comes back here and fills this whole area in  
17 here. But that's only I can see is what, you know,  
18 I've observed and that's --  
19 Q And that fills in the Krause area where the parking  
20 lot is going to be?  
21 A And then it would -- it comes this way, yeah.  
22 Q Did anybody from the DNR ever approach you and ask  
23 you about this -- about what you had observed?  
24 A No, I'm not an expert. They don't -- they wouldn't  
25 be interested in what I would say anyway.

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1 4-wheel drive truck and he couldn't get out. He was  
2 right in the grove, right in the middle of it, right  
3 in here somewhere.  
4 Q Is 35-003, does that depict the grove of trees?  
5 A No, this is looking more north, more to the -- as you  
6 would be standing -- where the writing is, where the  
7 orange line curves down into the writing?  
8 Q Uh-huh.  
9 A Just above that it's looking -- just to the right of  
10 the writing by the orange line.  
11 Q Now, just -- okay, very good.  
12 A But the water pretty much had to come around through  
13 the back of the swamp to get over there because that  
14 was higher right alongside the stream on that side.  
15 Q And so it would -- okay. Let me just clarify then so  
16 I understand what you just testified to. The water  
17 would flow west from North Lake and let's just say  
18 that your lot line which you have identified  
19 previously as being the first purple line to the west  
20 of your home, is that correct -- is that about it?  
21 A That's right.  
22 Q That the water would flow in and what didn't go north  
23 would curve around, is that what you're saying? Am I  
24 doing this right?  
25 A It would come back in through that way, yeah.

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1 Q So no one has bothered to ask you about what you  
2 observed in the Krause site?  
3 A No.  
4 Q Until I asked you.  
5 UNIDENTIFIED SPEAKER: You should probably  
6 cover that microphone. I can hear you.  
7 MR. GLEISNER: Oh, no, Mr. Bill, sorry.  
8 ALJ BOLDT: Well, then a transcriptionist  
9 would have a problem of do I include that or  
10 not.  
11 MR. GLEISNER: I understand and I would  
12 have a problem with that too.  
13 ALJ BOLDT: These are very sensitive mics  
14 so --  
15 MR. GLEISNER: Thank you very much for that  
16 tip.  
17 UNIDENTIFIED SPEAKER: You're welcome.  
18 MR. HARBECK: Can we eliminate that from  
19 the transcript, whatever you picked up?  
20 UNIDENTIFIED SPEAKER: I can't.  
21 MR. GLEISNER: That's okay, we weren't  
22 saying anything --  
23 THE WITNESS: I didn't hear it. Was it  
24 interesting?  
25 MR. GLEISNER: Just where we're going for

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1 drinks tonight.  
 2 ALJ BOLDT: Well, it is your birthday.  
 3 MR. GLEISNER: Exactly, Judge, exactly.  
 4 Q Okay. Now, let me ask you this, can you actually see  
 5 the water flow from North Lake into the unnamed  
 6 stream?  
 7 A By the lake you can, yeah, because then you can see  
 8 that -- you know, it's got to come -- it's got to get  
 9 high enough to come over the hump that the waves push  
 10 up.  
 11 Q Is that sometimes, that hump, sometimes referred to  
 12 as a berm?  
 13 A You could call it that, yeah.  
 14 Q And so you actually have observed water from  
 15 North Lake flowing over that berm into the unnamed  
 16 stream?  
 17 A Correct, you can see the current going that way.  
 18 Q And do you see the current going out from the unnamed  
 19 stream?  
 20 A Well, you can hear it. That's kind of -- because you  
 21 hear the gurgling water because it goes out in  
 22 rivulets. It doesn't just go right out, as it gets  
 23 down, you know, lower.  
 24 Q So, in other words -- let me just understand if I've  
 25 got your testimony. The water at the point at which

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1 so all that water that's back there has to soak in or  
 2 evaporate. It doesn't run into the lake.  
 3 MR. GLEISNER: These next series of  
 4 questions, Judge, aren't going to be violating  
 5 the stipulation. They are going to relate  
 6 though to impact and I think they should be part  
 7 of the record so let me just ask them.  
 8 Q Have you any observations with regard to wildlife  
 9 activity in the Krause area?  
 10 A Yeah, that's kind of a nesting grounds for turtles,  
 11 frogs, mallard ducks and geese.  
 12 Q And you've made personal observations of this?  
 13 A Oh, yeah, we have a picture. In fact, I thought it  
 14 was a rare type turtle that was, you know,  
 15 endangered. We picked up an eastern soft shell  
 16 pointed nose turtle that was about this big around.  
 17 Q You're gesturing about a foot in size, would that be  
 18 about right, for the record?  
 19 A Yeah, yeah. In fact, we've got -- I still have  
 20 pictures of that. I'd have to go find them somewhere  
 21 on our DVD because my brother is the one that -- he  
 22 was over and he found it and it was a really unique  
 23 turtle. It's a turtle, but the shell was soft.  
 24 Q Did the DNR ever ask you questions about wildlife?  
 25 A None. I never really talked about --

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1 the unnamed stream intersects with North Lake, the  
 2 water to your personal observation has flowed both  
 3 into and out of North Lake, is that correct?  
 4 A That's correct.  
 5 Q Would you just take a red marker here and on that  
 6 Exhibit 10 show how -- the location of where the  
 7 water flows both ways?  
 8 A It'd be right on the green line. I'll just make a  
 9 line going up here showing right here.  
 10 Q So let me just go up to the map and make sure that I  
 11 have this clear then. You just have marked on the  
 12 map, up in this locality, the water flows in from  
 13 North Lake and it flows out from the stream,  
 14 depending upon --  
 15 A Size of the backwater. See, that was one of the main  
 16 issues I was concerned about because the whole Krause  
 17 property fills with water. Now, if the water doesn't  
 18 go into that Krause or DNR property, it's going to go  
 19 on my property or your property or whoever's property  
 20 lives downstream because the water is going to stay  
 21 in the lake because that'll be -- you know, that  
 22 land -- that pocket won't be there. And that berm in  
 23 the front of the unnamed stream, it holds the water  
 24 back when it gets down to the berm and keeps that  
 25 stream full when it can't run into the lake anymore,

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1 Q Nobody from the DNR ever came and talked to you about  
 2 anything, did they?  
 3 A They only time I've talked to them was about there  
 4 were some dead trees that were leaning towards my  
 5 house and they took care of that so that they  
 6 wouldn't fall on my property.  
 7 MR. GLEISNER: Your Honor, if I could have  
 8 just a minute?  
 9 ALJ BOLDT: Sure.  
 10 MR. GLEISNER: No further questions of this  
 11 witness, Your Honor.  
 12 ALJ BOLDT: Okay.  
 13 THE WITNESS: Can I step down?  
 14 MR. GLEISNER: No, not quite. No, not so  
 15 quick.  
 16 ALJ BOLDT: No, I'm sorry. Mr. Gallo gets  
 17 the first opportunity to ask you questions.  
 18 MR. GALLO: No questions.  
 19 ALJ BOLDT: Okay. Then we'll go to Ms.  
 20 Correll or Ms. Kavanaugh.  
 21 CROSS-EXAMINATION  
 22 BY MS. CORRELL:  
 23 Q Mr. Peters, could you refer to -- sorry to do this to  
 24 you. It's the DNR binder --  
 25 MR. GLEISNER: Oh, move to admit, Your

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1 Honor.  
 2 ALJ BOLDT: Okay. Yeah, we'll --  
 3 MR. GLEISNER: We can take care of that  
 4 later.  
 5 ALJ BOLDT: Let's go ahead, Counsel.  
 6 A What exhibit?  
 7 Q DNR binder 213.  
 8 A I don't know which one that is.  
 9 UNIDENTIFIED SPEAKER: It's the blue one  
 10 right on top.  
 11 MS. KAVANAUGH: The blue one on top, thank  
 12 goodness.  
 13 Q And I apologize, it looks like we didn't number every  
 14 page. 213, Page 6 is the last numbered page. The  
 15 following page should be 213, Page 7. Would you  
 16 refer to that page, please?  
 17 A There's 6 and then we don't have 7.  
 18 ALJ BOLDT: Is it a proof of mailing?  
 19 MS. CORRELL: Correct.  
 20 Q Proof of mailing to Thomas and Etta (phonetic)  
 21 Peters, signed by what I believe to be your  
 22 signature, is that correct.  
 23 A That's correct.  
 24 Q This is proof of specific public notice sent to your  
 25 address regarding the public hearing --

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1 EA? I know it's hard to --  
 2 A That was the first hearing they had.  
 3 Q -- recall. Okay. Is it possible that that had to  
 4 do with the EA that was prepared for this project?  
 5 A Where they had the picture, but everything as far as  
 6 the pictures go and what they were going to do kept  
 7 changing so you really -- I do still have a file with  
 8 what they mailed me so I kept everything that was  
 9 mailed to me from the DNR. But that's -- as far as  
 10 verbal, physical or, you know, personal contact, I  
 11 didn't have anymore contact other than with her about  
 12 the trees and --  
 13 Q Okay. And you don't recall attending the public  
 14 hearing in September of 2010?  
 15 A September of 2010. I might have missed it. I'm not  
 16 sure, but I don't think I went to that one. Is there  
 17 something here that says I did? I don't think I did.  
 18 MS. CORRELL: I didn't hear it.  
 19 MS. KAVANAUGH: Is there something that  
 20 said he did.  
 21 Q Is there something that said you did? Nope. No,  
 22 just something that said you got notice which you  
 23 just identified.  
 24 A As of -- we got notice yes, but as of 2010 we go to  
 25 Florida in October and we probably were busy and

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1 A Yeah, I've got --  
 2 Q -- on the individual -- or on the Manual Code  
 3 decision at issue today --  
 4 A Right, I've gotten those.  
 5 Q -- is that correct?  
 6 A In fact, Lynette I believe called me once even when I  
 7 was in Florida concerning those trees, but as far as  
 8 talking to them about what he said, about wildlife  
 9 and nature and stuff like that, no.  
 10 Q You received a personal call as well? I'm sorry, you  
 11 said Lynette?  
 12 A Yeah, she cut --  
 13 Q Okay.  
 14 A She had some trees cut down and she just -- I wasn't  
 15 in town and I guess she called up to let me know that  
 16 they had done it and it was completed because that  
 17 was one of my concerns, that they were dead and they  
 18 were kind of big.  
 19 Q Oh, right, you wouldn't want them to fall on your  
 20 property?  
 21 A Yeah, I was afraid it would fall my way.  
 22 Q Right. Did you attend the hearing?  
 23 A The first one I did at -- I believe that was here.  
 24 Yeah, I did attend that one.  
 25 Q And that probably would have been with respect to the

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1 didn't -- we didn't go.  
 2 Q Do you recall when you took these photos, the  
 3 specific date and year?  
 4 A I have -- they're in my -- I just found these like by  
 5 accident because I was going through my older camera  
 6 and it's got one of those clip things in there, you  
 7 know, that's got a memory and I was looking at the  
 8 pictures that were in there to see if I wanted to  
 9 copy them and I ran across these. But the pictures  
 10 right next to it were 2005 when my son-in-law -- he  
 11 got sick and passed away so that's how I determined  
 12 these were 2006 because those pictures of him were  
 13 like 23, 4, 5 and these were like 31, 32 on the list  
 14 going up, but for some reason, the camera quit  
 15 marking the dates on them.  
 16 Q That's fine, it gives us a ball park. You talked  
 17 about the flow of water through the swale channel.  
 18 We've been referring to it as unnamed stream, I think  
 19 you might have said, up through the channel and back  
 20 through the wetlands to the west, is that correct?  
 21 A Right.  
 22 Q And then those waters would come back down the  
 23 channel or --  
 24 A Right.  
 25 Q -- would you describe --

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1 A Well, as they -- when they backed up, they would go  
 2 onto that whole wetland area back there which is huge  
 3 and you can't really tell where they're going, but  
 4 it's just that they would be seeping back and the  
 5 water would be going through there and the Krause  
 6 property kept getting fuller. But the water couldn't  
 7 run back to the lake from the Krause property because  
 8 it's higher in the front and it's higher on the south  
 9 side of the unnamed -- I have trouble remembering  
 10 it's an unnamed stream, but anyway you know what I  
 11 mean. It's higher along that side of that unnamed  
 12 stream, as it's higher on my side. It really doesn't  
 13 flow into my property either so it can't get out,  
 14 it's caught in the banks of that stream. So it has  
 15 to go back and when it goes back it gets back as far  
 16 as probably where the culvert is and then it spreads  
 17 both ways.

18 Q Is it possible that at high water levels it flows  
 19 back out? Those high waters would have to be pretty  
 20 high, is what I understand your testimony to be?

21 A Right, the water is high.

22 Q To flow into North Lake?

23 A Well, it's flowing into North Lake probably five  
 24 months almost every year -- or this year is an  
 25 extreme exception, but it's always flowing into

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1 Your Honor.  
 2 ALJ BOLDT: Sure.  
 3 REDIRECT EXAMINATION  
 4 BY MR. GLEISNER:  
 5 Q We discussed -- I'm also very sorry about your  
 6 son-in-law. I know we expressed that previously. We  
 7 discussed the fact that there's no leaves on these  
 8 trees, correct, and I thought you had indicated that  
 9 based on the date of the death of your son-in-law  
 10 that you felt it was in a particular month of 2006,  
 11 do you recall that?

12 A Yeah, I thought it was in April.

13 Q April of 2006?

14 A 2006.

15 MR. GLEISNER: No further questions.  
 16 ALJ BOLDT: Okay. Any other questions?  
 17 All right. Thank you very much, sir.  
 18 MR. GLEISNER: Dr. O'Reilly got me a little  
 19 nervous because I'm going to call him next and  
 20 he disappeared.  
 21 MR. HARBECK: Do we want to take a break,  
 22 Judge, before --  
 23 ALJ BOLDT: Yeah, let's go -- let's figure  
 24 out where we're at.  
 25 (Hearing Adjourned)

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1 North Lake in the first -- anywhere four to five, six  
 2 months of the year most every year.

3 Q But it has to flow over that raised berm?

4 A That's right.

5 Q It's probably, would you say, ice heave or something  
 6 like that?

7 A Well, there's roots in there now so it doesn't wash  
 8 away. Probably at one time it did so now, you know,  
 9 it breaks apart when it comes through there. You can  
 10 hear it when it's running through there because it's  
 11 gurgling over the roots and the stones on the bank.  
 12 I'm assuming -- there's a tremendous ice push on  
 13 North Lake in front of my house. It just -- you  
 14 can't believe the damage that it does. One year I  
 15 left my pier too close to the water and it -- where  
 16 the pipes were. It actually came sideways and  
 17 buckled them over and they weren't even in the water.  
 18 It comes up out of the water, over the top, so  
 19 there's a tremendous ice push there. So that pushes  
 20 soil back up into that opening and tends to make it  
 21 higher. That's why the water just stays in that  
 22 unnamed stream so long.

23 Q Okay.

24 MS. CORRELL: No further questions.  
 25 MR. GLEISNER: Just a couple of redirect,

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1 STATE OF WISCONSIN  
 2 DIVISION OF HEARINGS AND APPEALS  
 3  
 4  
 5

6 In the Matter of Manual Code 3565.1 for the Approval  
 7 Authorizing the Department of Natural Resources to Grade  
 8 More Than 10,000 Square Feet on the Bank of North Lake,  
 9 Install a Boat Ramp Structure and Two Outpost Structures  
 10 on the Bed of North Lake, Install Four Culvert Crossings  
 11 Over Wetlands, Fill Up To .16 Acres of Wetlands for  
 12 Construction of a Public Boat Launch on North Lake and  
 13 Adjacent Property Located in the Town of  
 14 Merton, Waukesha County  
 15  
 16 Case Nos. IP-SE-2009-68-05745 through 05750  
 17  
 18  
 19  
 20  
 21  
 22 I, KRISTINE K. MCCARVILLE, do hereby certify that as  
 23 the duly-appointed transcriptionist, I transcribed the  
 24 proceedings held in the above-entitled matter on the 19th  
 25 day of September, 2011, and that the attached is a true  
 26 and correct transcription of the proceedings so taken.  
 27 Dated this 14th day of November, 2011.  
 28  
 29  
 30  
 31  
 32  
 33

Kristine K. McCarville  
 Notary Public, State of Wisconsin  
 My Commission Expires: 12/11/11

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