

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

CALIFORNIA WATERFIX WATER)
RIGHT CHANGE PETITION)
HEARING)

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
SIERRA AUDITORIUM
1001 I STREET
SECOND FLOOR
SACRAMENTO, CALIFORNIA

FRIDAY, SEPTEMBER 23, 2016
9:00 A.M.

PART 1A

VOLUME 18
PAGES 1 - 215

Reported by: Megan Alvarez, RPR, CSR No. 12470
Certified Shorthand Reporter

1 APPEARANCES

2 CALIFORNIA WATER RESOURCES BOARD

3 Division of Water Rights

4 Board Members Present:

5 Tam Doduc, Co-Hearing Officer
6 Felicia Marcus, Chair & Co-Hearing Officer
7 Dorene D'Adamo, Board Member

8 Staff Present:

9 Diane Riddle, Environmental Program Manager
10 Dana Heinrich, Senior Staff Attorney

11 PART I

12 For Petitioners:

13 California Department of Water Resources:

14 James (Tripp) Mizell
15 Thomas M. Berliner

16 INTERESTED PARTIES:

17 State Water Contractors:

18 Rebecca Sheehan, Esq.

19 Tehama-Colusa Canal Authority & Water Service
20 Contractors in its Service Area:

21 Meredith Nikkel, Esq.

22 San Luis & Delta-Mendota Water Authority:

23 Rebecca R. Akroyd, Esq.

24 Westlands Water District:

25 Philip Williams, Esq.

- 1 INTERESTED PARTIES (Continued):
- 2 The City of Roseville; Sacramento Suburban Water
- 3 District; San Juan Water District; the City of Folsom;
- 4 Yuba County Water Agency:
- 5 Ryan Bezerra, Esq.
- 6 For Brett G. Baker, Local Agencies of the North Delta,
- 7 Bogle Vineyards/Delta Watershed Landowner Coalition,
- 8 Diablo Vineyards and Brad Lange/Delta Watershed
- 9 Landowner Coalition, Stillwater Orchards/Delta Watershed
- 10 Landowner Coalition, Islands, Inc., SAVE OUR SANDHILL
- 11 CRANES and Friends of Stone Lakes National Wildlife
- 12 Refuge, City of Antioch:
- 13 Osha Meserve, Esq.
- 14 Central Delta Water Agency, South Delta Water Agency
- 15 (Delta Agencies), Lafayette Ranch, Heritage Lands Inc.,
- 16 Mark Bachetti Farms and Rudy Mussi Investments L.P.:
- 17 Dean Ruiz, Esq.
- 18 North San Joaquin Water Conservation District:
- 19 Jennifer Spaletta, Esq.
- 20 County of San Joaquin, San Joaquin County Flood Control
- 21 and Water Conservation District, and Mokelumne River
- 22 Water and Power Authority:
- 23 Thomas H. Keeling, Esq.
- 24 Contra Costa County and Contra Costa County Water
- 25 Agency:
- 26 Stephen Siptroth, Esq.
- 27 City of Antioch:
- 28 Matthew Emrick, Esq.
- 29 ///

1 INTERESTED PARTIES (Continued):

2 California Sportfishing Protection Alliance (CSPA),
3 California Water Impact Network (C-WIN), and
4 AquAlliance:

5 Michael Jackson, Esq.

6 North Delta C.A.R.E.S.:

7 Suzanne Womack

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 I N D E X

2 PETITIONER'S WITNESSES:

3

4 PANEL FIVE:

5 MAUREEN SERGENT (LEAD, DWR-53)

6 RAY SAHLBERG (LEAD, DOI-3)

7 ROBERT COOKE (PANEL, DWR-60)

8 Cross-Examination by Ms. Nikkel (Resumed)2

9 Cross-Examination by Ms. Meserve30

10 Cross-Examination by Ms. Womack58

11 Cross-Examination by Mr. Ruiz66

12 Cross-Examination by Ms. Spaletta106

13 Cross-Examination by Mr. Keeling137

14 Cross-Examination by Mr. Siptroth159

15 Cross-Examination by Mr. Emrick166

16 Cross-Examination by Mr. Jackson189

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS

CROSS-EXAMINERS EXHIBITS

EXHIBIT		IDEN	EVID
NSJ-1	Water Transfer Approval Assuring Responsible Transfers, Dated July 2012	115	
NSJ-2	Bureau of Reclamation protest letter	133	

1 SEPTEMBER 23, 2016 - FRIDAY 9:00 A.M.

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

3 --o0o--

4 CO-HEARING OFFICER DODUC: Good morning,
5 everyone. Welcome back to the WaterFix Water Right
6 petition hearing. I apologize for the delay in starting
7 due to technical difficulties.

8 I'm Tam Doduc, board hearing officer. To my
9 right, Felicia Marcus and co-hearing officer. To her
10 right, board member DeDe D'Adamo. To my left, senior
11 staff counsel, Dana Heinrich, as well as Kyle
12 Ochenduszko. We are assisted by other staff as well.

13 The usual announcement. Exit closest to you,
14 please identify. In the event of alarm, we will
15 evacuate. Either meet us across the street, taking the
16 stairs down to the first floor or taking refuge in one
17 of the vestibules in the stairways.

18 Second announcement is this meeting is being
19 Web-casted, finally. So when you provide your comments,
20 please speak into the microphone and begin by stating
21 your name and affiliation for the record.

22 Most important, please take a moment and
23 ensure that all your noise-making devices are on silent
24 or vibrate.

25 Thank you. Okay.

1 MS. NIKKEL: Can you tell me your general
2 understanding of what this document is?

3 WITNESS SERGENT: This document is an
4 agreement between North Delta Water Agency and
5 Department of Water Resources to provide dependable
6 water supply of certain quality to the diverters within
7 the boundaries of the North Delta Water Agency.

8 MS. NIKKEL: Thank you. So it's your
9 understanding that DWR is obligated to assure specified
10 water quality, water level, and water supply for use
11 within North Delta, right?

12 WITNESS SERGENT: Yes. With certain other
13 conditions and provisions, yes.

14 MS. NIKKEL: So specifically I want to focus
15 on the water quality criteria. Is it your understanding
16 that there's certain water quality criteria that must be
17 met at certain locations throughout North Delta Water
18 Agency?

19 MR. BERLINER: Yes.

20 MS. NIKKEL: Is it also your understanding
21 that pursuant to a 1997 amendment to the contract, one
22 of the locations is located at Three Mile Slough?

23 WITNESS SERGENT: Yes.

24 MS. NIKKEL: Are you aware of any analysis
25 that has been done by DWR or anyone associated with the

1 project to determine whether the California WaterFix
2 Project will increase the number of days in which DWR is
3 out of compliance with this contract?

4 WITNESS SERGENT: I reviewed the modeling
5 done, and it does not indicate any greater or lesser
6 ability to provide the water at both locations of
7 suitable quality.

8 MS. NIKKEL: And which locations are you
9 thinking of specifically?

10 WITNESS SERGENT: Each of the locations in
11 the -- in the agreement.

12 MS. NIKKEL: And I think I heard you yesterday
13 testify that you looked at not only the modeling results
14 that were included within the testimony and exhibits
15 offered by DWR, but you also looked at other modeling
16 results; is that right?

17 WITNESS SERGENT: I looked at -- it's still
18 the same modeling. It's just -- I asked modelers,
19 subsequent to reviewing the -- the information that was
20 provided in the exhibit, I asked them if they could
21 provide a similar graphical representation at each of
22 the North Delta Water Agency locations.

23 MS. NIKKEL: So you specifically looked at
24 results of the modeling for each of the locations,
25 including Three Mile Slough?

1 WITNESS SERGENT: That's correct.

2 MS. NIKKEL: And have those been offered into
3 the record here?

4 CO-HEARING OFFICER DODUC: They have not.

5 MS. NIKKEL: Are you aware of any analysis
6 that has been done to determine whether any increases
7 and exceedances of the 1981 contract would impact
8 farmers in the North Delta?

9 WITNESS SERGENT: I believe, as I indicated,
10 the modeling did not show any significant increase in
11 exceedances of those objectives.

12 MS. NIKKEL: I want to speak a little more
13 specifically about the modeling results that have been
14 offered as part of DWR's case in chief.

15 In particular, Dr. Nader Tehrani testified
16 that the modeling shows that there will be an 18 to
17 19 percent increase in EC at Emmaton. Is that your
18 understanding?

19 WITNESS SERGENT: In two months. And as we
20 indicated, that Emmaton is not the compliance location
21 for the North Delta contract.

22 MS. NIKKEL: And where is Emmaton in relation
23 to Three Mile Slough, one of the compliance points under
24 the contract?

25 WITNESS SERGENT: It's downstream on the

1 Sacramento.

2 MS. NIKKEL: So if a similar 18 to 19 percent
3 increase -- we'll use the 18 to 19 percent at Emmaton
4 that was offered. If that were to occur upstream at
5 Three Mile Slough and resulted in exceedances of the
6 water quality criteria in the 1981 contract, would that
7 result in injury to North Delta water user?

8 WITNESS SERGENT: I'd like to clarify that, as
9 I indicated, just to confirm my perception, I asked
10 Dr. Nader to provide me with the modeling results for
11 Three Mile Slough.

12 It indicated that in only one month did the
13 proposed project result in a slightly greater or a
14 slightly higher EC -- that was September -- at
15 Three Mile Slough.

16 And in looking at those results and looking at
17 the criteria in the North Delta Water Agency contract,
18 it doesn't show any indication that the objectives --
19 there would be any increase in the objectives.

20 And, in addition, the contract has provisions
21 for emergency drought conditions. And so there are
22 provisions in the agreement to address those very dry
23 years when -- such as last year, when the department may
24 not be able to meet the objectives in the contract due
25 to severe hydrology.

1 MS. NIKKEL: Do you recall with any more
2 specificity what the increase the modeling results that
3 you looked at showed for September at Three Mile Slough?

4 WITNESS SERGENT: I don't. It was much
5 smaller than at Emmaton, but I don't know the percent.

6 MS. NIKKEL: Can you estimate?

7 WITNESS SERGENT: It looked like it might have
8 been a third of the increase at Emmaton. But, again, it
9 was still within the water quality provisions contained
10 in the contract. That increase was within the water
11 requirements contained in North Delta contract.

12 MS. NIKKEL: Do you recall if that increase
13 was an average number?

14 WITNESS SERGENT: It was based on annual
15 average.

16 MS. NIKKEL: Have you done any analysis of
17 what the impact of even that level of an increase would
18 be on a farmer in North Delta?

19 WITNESS SERGENT: I did not, because the
20 contract specifies that there are certain water quality
21 requirements to be met. And if those -- if the
22 agreement is in effect and if the department is in
23 compliance with the agreement, that North Delta consents
24 to the diversions of the department from -- through the
25 State Water Project facilities.

1 MS. NIKKEL: So, in your view, the -- an
2 increase in EC would not result in injury so long as it
3 is within the terms of the contract; is that right?

4 WITNESS SERGENT: That's my belief, yes.

5 MS. NIKKEL: What if that increase in EC
6 nonetheless resulted in adverse effects to a farmer in
7 North Delta?

8 WITNESS SERGENT: The water quality
9 requirements that were specified in the agreement were
10 established to be protective of the users within
11 North Delta Water Agency, and the department is in
12 compliance with that agreement and is operating to meet
13 those objectives.

14 MS. NIKKEL: So --

15 WITNESS SERGENT: I don't believe -- I'm not
16 aware of any provision in the contract that entitles the
17 users within North Delta to a better water quality than
18 what is contained in the agreement.

19 MS. NIKKEL: As a matter of water rights and
20 within your expertise as a water rights expert, would an
21 impact to a user in North Delta that does not -- does
22 not exceed or violate the contract result in injury if
23 that impact caused an adverse affect to the use of that
24 water?

25 MR. BERLINER: Objection. Asked and answered.

1 MS. NIKKEL: I'm not sure I heard an answer to
2 that question, which is why I was asking it again in a
3 slightly different way.

4 CO-HEARING OFFICER DODUC: Well, answer it one
5 more time even though I could probably provide your
6 answer by now. Go ahead, Ms. Sergeant.

7 WITNESS SERGENT: That the agreement was
8 negotiated between both parties?

9 MS. NIKKEL: I'm not asking about the
10 agreement. I'm asking about -- because I've heard your
11 testimony that this is not -- that the increase that you
12 saw would not result in a violation of agreement.

13 I'm asking about, as a matter of water rights,
14 whether an adverse impact to a user in North Delta would
15 result in injury, in your opinion.

16 WITNESS SERGENT: It's not my understanding
17 that meeting the water quality objectives in the
18 contract would result in an adverse effect on one of the
19 users. Those were the water quality criteria that were
20 determined to be reasonable, and we're meeting those
21 objectives. I don't agree with it. There would be
22 impact if there was a change that was within the
23 provisions of the contract.

24 MS. NIKKEL: Can you explain why the results
25 that you looked at with respect to the North Delta

1 contract were not included in the exhibits that were
2 offered by DWR?

3 WITNESS SERGENT: We provided the information
4 that -- at the locations that typically control within
5 the Delta, and we were trying to demonstrate that we
6 could continue to meet the requirements in D-1641. We
7 have settlement agreements with North Delta Water Agency
8 and other entities in the Delta.

9 And we are committed to continuing to meet
10 those objectives, and we felt that because we're meeting
11 the conditions of those contracts, that we are
12 protecting those water users that are within the
13 boundaries of those agencies. And so we felt that those
14 were addressed. We were focused more on showing those
15 water quality objectives that are typically controlling.

16 MS. NIKKEL: Preparing for this hearing,
17 Ms. Sergeant, did anybody advise you on what would
18 constitute an injury under water rights law, especially
19 with respect to injuries that are within a contract?

20 WITNESS SERGENT: No. This is what I
21 routinely do as a part of my work for DWR.

22 MS. NIKKEL: And do you know whether any
23 permanent crops within North Delta would result in
24 impact if there was an exceedance in EC?

25 WITNESS SERGENT: My answer, I believe, is the

1 same.

2 MS. NIKKEL: What is that answer? Do you
3 know?

4 WITNESS SERGENT: I'm not an agronomist -- or
5 I'm not aware of the demands of particular crops. We
6 are meeting the objectives and we're meeting the D-1641
7 objectives. We believe that that's protective.

8 MS. NIKKEL: So, you don't know?

9 WITNESS SERGENT: No.

10 MS. NIKKEL: Did you or anyone affiliated with
11 the DWR personally conduct an investigation of all
12 existing diversions located within North Delta?

13 WITNESS SERGENT: We did not.

14 MS. NIKKEL: So you have no way of knowing
15 whether there's existing diversions operated by using a
16 gravity siphon or some method of diversion?

17 WITNESS SERGENT: Not at this time, no.

18 MS. NIKKEL: So you don't know if those
19 gravity siphons would be affected by water level changes
20 resulting from the project?

21 WITNESS SERGENT: As Dr. Nader testified and
22 his information shows, that based on the information
23 provided, we feel there will be very limited changes in
24 water levels. They are limited to the main stem of the
25 Sacramento River from, essentially, the location of the

1 intakes to just above -- some point above Rio Vista.

2 And if there -- so there was no impact shown
3 to any of the other water levels throughout the other
4 regions of the North Delta Water Agency. And there is a
5 provision in the contract that would address any
6 potential issues related to water levels, so there's a
7 mechanism to address issues if there were diverters who
8 expressed a --

9 MS. NIKKEL: I've listened to the modeling
10 testimony as well. I've also reviewed the modeling, and
11 thank you for that explanation.

12 But since nobody with DWR has done any
13 analysis or investigation of the methods of diversion
14 located within North Delta, there's no way to know
15 whether those results would actually result in an
16 impact; is that right?

17 WITNESS SERGENT: Again, we haven't done an
18 analysis of every diverter, but we have a mechanism in
19 place through the North Delta Water Agency contract. If
20 a diverter can demonstrate that the extent of the water
21 level changes or the effect changes the natural flow at
22 their location would result in a difficulty and a
23 problem with them being able to divert, then we can
24 address it through the North Delta Water Agency process.

25 MS. NIKKEL: Then, with respect to water

1 quality, since nobody at DWR has gone out and
2 investigated water -- individual points of diversion
3 within North Delta, there's no way to know whether those
4 individual points of diversion would be affected by
5 changes in water quality; is that right?

6 WITNESS SERGENT: Again, outside the small
7 changes shown at Three Mile Slough, there were no
8 changes indicated on any of the modeling at any of the
9 other compliance locations in North Delta Water Agency.

10 And the small changes shown at
11 Three Mile Slough were still within the objectives in
12 the agreement under which North Delta Water Agency
13 consents to the diversions by the project.

14 MS. NIKKEL: Did anybody at DWR make a
15 specific analysis of any of the effects of those changes
16 at any particular point of diversion in North Delta?

17 MR. BERLINER: We did not, because we were
18 meeting the objectives.

19 MS. NIKKEL: Thank you. That's all I have.

20 CO-HEARING OFFICER DODUC: Do you have any
21 questions for Mr. Sahlberg on behalf of North Delta?

22 MS. NIKKEL: I do not.

23 CO-HEARING OFFICER DODUC: We can consider the
24 cross-examination by Group 9 completed.

25 Now we go back to Group 8.

1 MS. NIKKEL: Switch back to another contract.

2 Mr. Sahlberg, thank you for coming back today.

3 Have you had any further discussions with
4 Westlands or San Luis & Delta-Mendota Water Authority
5 about the subject of your testimony?

6 WITNESS SAHLBERG: No, I have not.

7 MS. NIKKEL: Thank you.

8 I understand that you're familiar with the
9 testimony that was offered by Mr. Munevar with respect
10 to the modeling that was done for this project. Is that
11 correct?

12 WITNESS SAHLBERG: That's correct.

13 MS. NIKKEL: And are you also familiar with
14 the testimony that Mr. Munevar offered that
15 approximately -- I'm sorry -- that there -- that there's
16 an estimated 5 percent reduction in water service
17 deliveries north of the Delta in certain year types?

18 WITNESS SAHLBERG: Can we see DWR-514?

19 MS. NIKKEL: I was looking at a different
20 exhibit, but I'll be interested to see where we go with
21 this one.

22 The testimony I was referring to was in his
23 written testimony.

24 WITNESS SAHLBERG: Okay. Let's take a look at
25 that. It would be page 10. You tell me which year

1 types you're referring to.

2 MS. NIKKEL: So I believe in the written
3 testimony offered by Mr. Munevar, it was referring to
4 generally north of Delta water service contracts, and it
5 was 5 percent in dry and critical dry years.

6 WITNESS SAHLBERG: Under which scenario?

7 MS. NIKKEL: If we pull up DWR-71, I could
8 tell you. I think we're talking past each other because
9 we're looking at different exhibits.

10 CO-HEARING OFFICER DODUC: Let's pull up --

11 MS. NIKKEL: DWR-71.

12 CO-HEARING OFFICER DODUC: Thank you.

13 MS. NIKKEL: I believe it was page 4, but
14 let's look. Thank you. Page 20.

15 I don't have a line number. It's probably the
16 third or fourth bullet. Thank you. The second bullet.

17 WITNESS SAHLBERG: It starts: "Simulated
18 long-term average."

19 MS. NIKKEL: Correct. So it looks from the
20 testimony that it was Boundary 2 and H4 scenarios for
21 some year types.

22 WITNESS SAHLBERG: Yes. It says year type
23 reductions were always less than 5 percent.

24 MS. NIKKEL: So your understanding is that in
25 certain year types, there's a 5 percent reduction under

1 some scenarios?

2 WITNESS SAHLBERG: Less than 5 percent.

3 MS. NIKKEL: Less than 5 percent. Okay.

4 So would that less than 5 percent reduction in
5 deliveries to north of Delta water service contractors
6 be the kind of condition of shortage -- thinking about
7 what we talked yesterday -- that falls within
8 Article 12B of the Tehama-Colusa Canal Authority water
9 service contracts?

10 WITNESS SAHLBERG: It could fall under that,
11 yes.

12 MS. NIKKEL: And what circumstances are you
13 thinking of that it would fall under that?

14 WITNESS SAHLBERG: It -- well, any reduction
15 in the delivery -- excuse me -- in the contract total
16 represents a condition of shortage, under 12B, says we
17 are not liable for conditions of shortage caused by the
18 factors listed in 12B.

19 And I would like to say that yesterday you
20 asked if a shortage caused by the operation of the
21 California WaterFix facility would be covered under
22 Article 12B. And I would say that the WaterFix is a
23 facility -- would be a facility of the projects just as
24 all the other facilities of the projects.

25 And let's say we -- the reclamation diverted

1 water at the Tehama-Colusa Canal at Red Bluff which
2 resulted in a shortage -- lower delivery at -- to our
3 south of Delta contractors. If that is a condition of
4 shortage not covered by the shortage provision, then any
5 operation of a facility that results in a
6 reapportionment of water does not fall under that. And
7 I don't believe that's the intent of that article.

8 MS. NIKKEL: So in there I heard you say
9 "south of Delta allocations." Did you mean that, or
10 were you talking about a reduction to a delivery to a
11 north of Delta user?

12 WITNESS SAHLBERG: Let's say it resulted in a
13 reduction of reallocation to south of Delta contractors,
14 the diversion of water at Red Bluff. Same scenario as
15 what you were referring.

16 MS. NIKKEL: And neither would fall within
17 12B?

18 WITNESS SAHLBERG: If a condition of shortage
19 caused by the operation of the WaterFix doesn't fall
20 under 12B, then neither did any other operation. And
21 that's not the intent of the article.

22 MS. NIKKEL: What's your understanding of the
23 intent of the article?

24 WITNESS SAHLBERG: The intent of the article
25 is to protect or insulate the United States from

1 liability caused by a condition of shortage.

2 MS. NIKKEL: Isn't a condition of shortage
3 only under certain circumstances like we talked about
4 yesterday?

5 WITNESS SAHLBERG: And just now.

6 MS. NIKKEL: And those conditions -- those
7 circumstances of conditions of shortage do not include
8 voluntary choices and projects undertaken by
9 reclamation, correct?

10 WITNESS SAHLBERG: Reclamation has the ability
11 to apportion water amongst its contractors during
12 conditions of shortage, according to Article 12C of
13 the -- as you referred to the TCCA contract.

14 MS. NIKKEL: And would this estimated less
15 than 5 percent reduction be inconsistent with the
16 requirement of Article 12A that reclamation use all
17 reasonable means to guard against a condition of
18 shortage?

19 WITNESS SAHLBERG: It would not be -- it would
20 be -- I'm sorry. Can you rephrase that question?

21 MS. NIKKEL: Can I try restating it? And then
22 you can help me where you're -- tell me where you're
23 struggling with it.

24 WITNESS SAHLBERG: Sure.

25 MS. NIKKEL: Would the estimated less than

1 5 percent reduction be inconsistent with the requirement
2 of Article 12A that reclamation use all reasonable means
3 to guard against a condition of shortage?

4 WITNESS SAHLBERG: A less than 5 percent
5 reduction in deliveries is within reclamation's
6 reasonable efforts to guard against the condition of
7 shortage.

8 MS. NIKKEL: So are you saying that a less
9 than 5 percent reduction is not a -- or is not
10 unreasonable?

11 WITNESS SAHLBERG: It is not unreasonable.

12 MS. NIKKEL: Have you or anybody at
13 reclamation studied the effects of a reduction that
14 would be even a less than 5 percent reduction on water
15 users within Tehama-Colusa Canal Authority?

16 WITNESS SAHLBERG: I have not.

17 MS. NIKKEL: Have you done -- you or anybody
18 at reclamation done any analysis of the effects of a
19 5 percent reduction on any particular types of crops?

20 WITNESS SAHLBERG: I have not.

21 MS. NIKKEL: Are you aware of anybody at
22 reclamation that has done such an analysis?

23 WITNESS SAHLBERG: I am not aware of anyone.

24 MS. NIKKEL: You don't know whether permanent
25 crops will be adversely affected by the estimated less

1 than 5 percent reduction?

2 WITNESS SAHLBERG: I do not know.

3 MS. NIKKEL: Have you or anyone at reclamation
4 conducted a personal investigation of exiting diversions
5 within Tehama-Colusa Canal Authority?

6 WITNESS SAHLBERG: I have not.

7 MS. NIKKEL: Mr. Sahlberg, are you familiar
8 with the cost allocation among water service contractors
9 utilizing CVP water?

10 MR. BERLINER: Objection. Relevance.

11 CO-HEARING OFFICER DODUC: Ms. Nikkel?

12 MS. NIKKEL: I'm interested in whether there's
13 any relationship between cost under water service
14 contract and injury under the water code and how those
15 costs could affect the use of a contract right.

16 CO-HEARING OFFICER DODUC: All right.

17 Proceed.

18 WITNESS SAHLBERG: I am not familiar with any
19 details of any cost allocation studies.

20 MS. NIKKEL: So are you familiar more
21 generally with how costs are allocated amongst CVP water
22 service contractors?

23 MR. BERLINER: Same objection.

24 CO-HEARING OFFICER DODUC: Same?

25 MS. NIKKEL: Same answer.

1 CO-HEARING OFFICER DODUC: Please answer if
2 you can.

3 WITNESS SAHLBERG: I am -- I am aware of the
4 basics. Basically, the costs are allocated based on the
5 amount of water you get in and the facilities you use.

6 MS. NIKKEL: Is it also your understanding,
7 based on that general understanding, that water that is
8 delivered to south of Delta refuges is a cost that is
9 allocated among all water service contractors including
10 those north of Delta?

11 MR. BERLINER: Same objection.

12 MS. NIKKEL: Same answer?

13 CO-HEARING OFFICER DODUC: I'll give you a
14 little more leeway.

15 MS. NIKKEL: I only have a few more questions.

16 CO-HEARING OFFICER DODUC: Go ahead.

17 WITNESS SAHLBERG: I'm sorry. I'm not aware
18 of that.

19 MS. NIKKEL: Okay. Well, let's assume that a
20 south of Delta delivery to -- if there's an increase to
21 a south of Delta refuge, the cost of that is imposed
22 upon all water service contractors, including those
23 north of the Delta, which is my understanding, and
24 that's where I'm headed with that question.

25 CO-HEARING OFFICER DODUC: But is that your

1 understanding, Mr. Sahlberg?

2 WITNESS SAHLBERG: I do not know.

3 CO-HEARING OFFICER DODUC: He does not know.

4 MS. NIKKEL: Can I ask more generally about if
5 a result of the project, the proposed project, is an
6 increase in cost to water service contractors north of
7 the Delta, would that result in adverse impact that
8 would be a water right injury, in your opinion?

9 MR. BERLINER: Objection. Totally irrelevant.

10 CO-HEARING OFFICER DODUC: Why is it
11 irrelevant, in your opinion?

12 MR. BERLINER: Because these are contract
13 issues between the department and its contractors. The
14 department does all kinds of activities that increase
15 costs, and it's well within the bounds of the contract.

16 So if we're going to debate contract terms and
17 what can be passed on to the contractors, I don't think
18 this is the forum that is appropriate to have that
19 discussion. We're talking physical impacts,
20 environmental impacts of the WaterFix. We're not
21 talking about how the economics of the CVP are
22 administered.

23 MR. MIZELL: It should be noted that
24 California WaterFix doesn't propose to change any of the
25 cost allocation rules that are in place today.

1 CO-HEARING OFFICER DODUC: Ms. Nikkel?

2 MS. NIKKEL: So I would disagree; that we're
3 actually here talking about not just physical
4 environmental impacts. We're actually talking about a
5 water right injury. And if a water right holder has a
6 water right by a virtue of a contract and a project
7 results in the increase of the costs of that contract
8 that is so significant as to prevent any -- any
9 reasonable water user from accessing that right, I think
10 we have a water right injury question.

11 CO-HEARING OFFICER DODUC: Thank you. I agree
12 with Ms. Nikkel.

13 Mr. Bezerra, do you wish to add anything,
14 knowing that I just agreed with Ms. Nikkel?

15 MR. BEZERRA: No, Ms. Doduc.

16 CO-HEARING OFFICER DODUC: Please answer to
17 the best of your ability.

18 WITNESS SAHLBERG: What was the question
19 again? I'm sorry. With all that back and forth...

20 MS. NIKKEL: Sure. I'll rephrase that
21 slightly based on that exchange.

22 Would an increase in cost under a water
23 service contract that prevents a water user from -- that
24 contractor from being reasonably able to afford it be an
25 adverse effect that constitutes injury, in your opinion?

1 MR. BERLINER: Same objection. And I'll also
2 object on grounds that it lacks foundation. There's no
3 evidence of any ability to pay within the TCCA related
4 to this project.

5 CO-HEARING OFFICER DODUC: So noted.

6 Let's -- before everyone jumps up, I'm making
7 a distinction here between discussing costs associated
8 with the construction, maintenance, whatever, of the
9 WaterFix and the costs that might result to a water
10 contractor based on the change in deliveries that is
11 possibly -- recognizing -- and I assure the petitioners
12 I do as well, that this less than 5 percent which you've
13 been referring to is based on a simulated modeling
14 result which does not take into account all the
15 operational flexibilities that Mr. Leahigh and others,
16 Mr. Milligan, has assured us that they would utilize in
17 order to achieve all they can under the contract.

18 So, recognizing that this is all very
19 hypothetical, I do appreciate the fine point Ms. Nikkel
20 made, which is different than the over cost of the
21 project itself, with respect to cost to the water
22 agencies as a result of potential changes in deliveries.
23 And I think that's where you were going.

24 MS. NIKKEL: I'm actually asking about both.
25 I'm moving away from the 5 percent. I realize there's

1 going to be reduction resulting from that 5 percent if
2 it were to materialize.

3 But there is also the risk of a cost increase
4 as a result of the additional costs of constructing and
5 operating this project for nonproject beneficiaries.

6 And I also understand that this witness may
7 not have the foundation or the understanding of that
8 those facts.

9 However, I am asking a hypothetical question
10 to an expert regarding if those costs, those
11 construction and operation costs of the proposed
12 project, are somehow imposed upon a nonbeneficiary of
13 the project in a way that results in an unreasonable
14 increase --

15 CO-HEARING OFFICER DODUC: I'm not willing to
16 go there just yet. For now, I'm going to limit your
17 question to the aspects as associated with the water
18 deliveries and the changes to the water being delivered
19 under your contract.

20 MS. NIKKEL: Okay.

21 CO-HEARING OFFICER DODUC: And we will note
22 Mr. Berliner and Mr. Mizell's objections for the record.

23 Mr. Bezerra?

24 MR. BEZERRA: Thank you, Ms. Doduc.

25 Ryan Bezerra for Cities of Roseville, Folsom,

1 San Juan Water District and Sacramento Suburban Water
2 District. Three of those entities also are CVP water
3 service contractors who cannot possibly benefit from the
4 construction and operation of the California WaterFix.

5 CO-HEARING OFFICER DODUC: We're not going
6 there, Mr. Bezerra.

7 MR. BEZERRA: Just making a point.

8 But Mr. Berliner's relevance objection
9 requires the State Board to essentially make a
10 determination that Water Code 1702 cannot possibly
11 include any cost concerns and -- because it simply
12 states that --

13 CO-HEARING OFFICER DODUC: And now is not the
14 time to make that argument.

15 MR. BEZERRA: Okay. Thank you very much.

16 CO-HEARING OFFICER DODUC: Mr. Jackson?

17 MR. JACKSON: I have a different form of
18 objection, comment, request for instructions.

19 We're here to deal with injury, some of which
20 you've recognized could be economic. But because of the
21 bifurcation of what we're dealing with and the planning,
22 we can't go into the environmental injury yet. And I
23 understand that.

24 However, you have a public interest that you
25 are exercising for the people of the state of California

1 and many of those are economic. And so where do we go
2 to do the individual public interest arguments? That, I
3 think, was what the contractors were going into at this
4 point.

5 Is it Part I, Part II, Part III, or all of
6 them?

7 CO-HEARING OFFICER DODUC: Hold on,
8 Mr. Jackson. Having received and glanced through some
9 of the objections that have been filed, both for Part I
10 and Part IB, I expect this is an issue that we will be
11 discussing and ruling on. Today, though, is not the
12 appropriate time upon which to have that discussion.

13 MR. JACKSON: Well, I simply -- I won't ask
14 the questions based upon this ruling when it's my turn,
15 but I don't want to lose the issue --

16 CO-HEARING OFFICER DODUC: I don't think it's
17 possible to lose the issue.

18 Thank you, Mr. Jackson.

19 All right, Ms. Nikkel. What can of worms did
20 you just open?

21 MS. NIKKEL: Very good one. An interesting
22 one, as you can tell.

23 CO-HEARING OFFICER DODUC: Let's see if you
24 can get back to the question for Mr. Sahlberg. And, for
25 now, just limit it in scope.

1 MS. NIKKEL: Okay. Would you like me to
2 repeat the question, Mr. Sahlberg?

3 WITNESS SAHLBERG: Sure.

4 MS. NIKKEL: Would a cost increase that
5 results from this project that prevents a water user
6 with a water service contract from reasonably being able
7 to afford that water result in an adverse impact that
8 constitutes an injury, in your opinion?

9 WITNESS SAHLBERG: I am not aware of any
10 statute, case law, or other holding that would state
11 that.

12 MS. NIKKEL: In your opinion as an expert, can
13 you opine whether or not that kind of an increase in
14 cost would result in an injury?

15 WITNESS SAHLBERG: I really can't.

16 MS. NIKKEL: Thank you. I have nothing
17 further.

18 CO-HEARING OFFICER DODUC: Thank you,
19 Ms. Nikkel.

20 Mr. Aladjem has requested that
21 cross-examination by the City of Brentwood, No. 10, be
22 moved to next week. Is there anyone else here
23 representing Group No. 10?

24 MS. NIKKEL: Meredith Nikkel again. I do
25 represent Group 10. I can represent that only

1 Mr. Aladjem will be cross-examining on behalf of
2 Group 10. Thank you for rescheduling him.

3 CO-HEARING OFFICER DODUC: Thank you.
4 Group 11, the water farm, is not here.
5 Number 12, Colusa? Not here.
6 13, Sacramento Regional County San. District?
7 Not here.
8 14, Yolo?
9 15, East Bay MUD? Not here.
10 16 is not here.
11 17? Mr. O'Laughlin went yesterday. All
12 right.
13 18?
14 19? Ms. Meserve.
15 MS. MESERVE: Well, that came up fast.
16 CO-HEARING OFFICER DODUC: Why don't we go
17 ahead and take a short five-minute break while
18 Ms. Meserve gets ready.
19 We'll resume at 9:55.
20 (Off the record at 9:50 a.m. and back on
21 the record at 9:55 a.m.)
22 CO-HEARING OFFICER DODUC: Ms. Meserve, your
23 outline of topics?
24 MS. MESERVE: Good morning.
25 ///

1 --o0o--

2 CROSS-EXAMINATION

3 MS. MESERVE: Osha Meserve for Land and other
4 parties in Group 19. I believe I will be the only
5 person here for Group 19 today, although Mr. Van Zandt
6 could state otherwise at some point.

7 CO-HEARING OFFICER DODUC: Will you also be
8 conducting cross-examination for Group 20?

9 MS. MESERVE: Yes, to the extent he would have
10 anything, it would be included.

11 CO-HEARING OFFICER DODUC: Including Group 19?

12 MS. MESERVE: Yes. I hadn't heard anything
13 from Mr. Van Zandt about that. I appreciate the slight
14 delay to get my PowerPoint together.

15 I'm going to be touching on the opinions
16 offered with respect to water rights. Most of my
17 questions are for Ms. Sergent. And then about a little
18 bit about the -- let's see -- groundwater issues,
19 touching on water transfers, how the water rights
20 conclusions are based on the modeling.

21 That's about it. So I think I will need
22 around half hour to 45 minutes.

23 CO-HEARING OFFICER DODUC: All right. Please
24 proceed.

25 MS. MESERVE: First of all, I wanted to look

1 at DWR-3, Slide 6.

2 I can start with Ms. Sergeant.

3 You've stated in your materials that you are
4 an expert on water rights, is that right, but not water
5 law; is that fair?

6 WITNESS SERGENT: I'm not an attorney, but
7 I've worked with water rights at the department for some
8 time.

9 MS. MESERVE: And are you aware, Ms. Sergeant,
10 that water rights holders throughout the Delta hold both
11 pre-1914 and riparian rights in addition to any
12 contractual rights that might apply?

13 WITNESS SERGENT: I'm aware that there are
14 diversions in the Delta that hold various types of
15 rights. I couldn't give you an opinion on any
16 particular right.

17 MS. MESERVE: Now, with respect to within the
18 North Delta agency area which we were discussing with
19 Ms. Nikkel, did you consider in your analysis effects on
20 other rights held by that group of water users other
21 than the contract?

22 WITNESS SERGENT: I believe that the
23 North Delta Water Agency contract was executed to cover
24 the department's responsibility for diversions, both the
25 protections and the considerations in that contract, for

1 diverters within the entire North Delta Water Agency.

2 MS. MESERVE: Yes. You are aware, however,
3 that there's nearly a thousand diversions within the
4 North Delta or more -- I'm not clear on the number --
5 and they all file statements of diversion and use that
6 reflect their obligations and pre-'14 and riparian right
7 holders, correct?

8 WITNESS SERGENT: I'm aware that there are
9 diverters in the North Delta Water Agency that file
10 individual statements with the Water Board.

11 MS. MESERVE: Is it your opinion they wouldn't
12 need to file such statements because they have the
13 contract?

14 WITNESS SERGENT: It is not.

15 MS. MESERVE: Okay. In your opinion, based on
16 your experience, and if there was no contract in place,
17 when would an injury to these type of water right
18 pre-'14 and riparian occur?

19 WITNESS SERGENT: It's my understanding just
20 in general that a riparian water right holder is
21 entitled to the water that would be the natural flow
22 that would exist, his correlative share of the nature
23 flow, or the quality that would exist as a result of his
24 correlative share of the nature flow.

25 Pre-'14 water right holder would be entitled

1 to natural flow or abandoned flow and the water quality
2 that would exist absent any project storage releases.

3 MS. MESERVE: So it would be possible to have
4 an injury of a water right even if a contract term
5 wasn't violated, correct?

6 WITNESS SERGENT: And I'd like to add to the
7 last response that they also would be entitled to the
8 water quality that is necessary to put that water to
9 beneficial use which is consistent with the reasoning
10 used by the State Water Board in recent orders as well.
11 So to -- and used by the board in recent orders as well.

12 MS. MESERVE: Going to the graphic shown here
13 on DWR-3, Slide 6, did you make this graphic?

14 WITNESS SERGENT: The graphic, I did not.

15 MS. MESERVE: Do you know who made --

16 WITNESS SERGENT: Are you talking about the
17 little --

18 MS. MESERVE: Yes.

19 WITNESS SERGENT: -- graphic on the side?

20 It's one of the California WaterFix graphics.

21 MS. MESERVE: Do you know who made it?

22 WITNESS SERGENT: I don't.

23 MR. MIZELL: Objection. Relevance.

24 MS. MESERVE: Do you know if it's accurate?

25 MR. MIZELL: Objection. Relevance.

1 WITNESS SERGENT: The 9,000 CFS is accurate.
2 Are you talking about the PowerPoint slide or the
3 graphic on the slide?

4 MS. MESERVE: At this point, I'm just asking
5 about the picture. There's been questions about
6 documents put forth and whether they're accurate
7 depictions, and I'm wondering what this is a picture of
8 because I thought they were three 3,000 CFS intakes per
9 post.

10 MR. MIZELL: The department will stipulate to
11 the fact that this drawing may not be an accurate
12 representation of the design characteristics of the
13 project being set forth. It is merely an illustration
14 developed for PR and to make the slide less boring.

15 CO-HEARING OFFICER DODUC: Yes. Thank you.

16 MS. MESERVE: I would move to strike it from
17 evidence, then, because it's just for PR and it doesn't
18 depict what you're proposing.

19 CO-HEARING OFFICER DODUC: Mr. Mizell, just
20 remove the graphics.

21 MR. MIZELL: I will concede that we can strike
22 the graphic from the record.

23 CO-HEARING OFFICER DODUC: Thank you.

24 MS. MESERVE: Okay. Now, with respect to you
25 mentioned -- when we were talking about riparian and

1 pre-'14 rights, you mentioned that they would be
2 entitled to the unrelated flow of the river. Is that
3 what you said? Could you repeat that, please?

4 WITNESS SERGENT: There's a distinction
5 between riparian and pre-'14 appropriative --
6 essentially, between riparian and appropriative water
7 right holders. Riparian is only entitled to -- is my
8 understanding they're only entitled to the natural flow,
9 their correlative share of the natural flow.

10 And appropriators are entitled to the natural
11 flow or any abandoned flow. They would not be entitled
12 to any storage releases.

13 MS. MESERVE: Okay. Now, who makes the
14 determination about what natural and abandoned flow is?

15 WITNESS SERGENT: Who makes -- well, the
16 State Water Board is the entity that determines whether
17 there is water available to appropriate under any
18 particular permit.

19 MS. MESERVE: When the Department of Water
20 Resources makes determinations about whether there's
21 natural or abandoned flow, is that a public process?

22 MR. MIZELL: Objection. Misstates the
23 witness's testimony. And there's no foundation laid
24 that the department makes any determinations as to
25 what's available in natural or abandoned conditions.

1 CO-HEARING OFFICER DODUC: Ms. Meserve, would
2 you like to restate?

3 MS. MESERVE: Yes. Thank you.

4 Let me go just to the testimony page here.
5 That will help.

6 I believe in the PowerPoint which is
7 Slide 9 -- if we could go there. The -- at the top
8 follow-up point says: "The availability of unregulated
9 flow to legal users will not be diminished."

10 What I'm asking is: How was that determined
11 by DWR when you made that opinion?

12 WITNESS SERGENT: DWR -- sorry. DWR makes
13 sure that the inflow to the Delta and the water quality
14 objectives in D-1641 are being met. All diverters
15 downstream of those facilities continue to have the
16 ability to divert. And we assume that all diverters
17 there, there are minimum flows maintained in the
18 Feather River below Oroville Dam. And there are, you
19 know, continuous flows in the Sacramento River.

20 All other diverters that have a water right
21 continue to be able to divert at their locations. And
22 if we are maintaining the outflow and the water quality
23 objectives in the Delta, it would indicate that all
24 other legal users of water are able to put water to
25 beneficial use.

1 MS. MESERVE: Does DWR make a determination
2 when it stores water? How do you decide whether you are
3 able to store water or whether it must be released up in
4 near reservoirs like, say, Oroville?

5 WITNESS SERGENT: Again, it's the same
6 process. We have certain instream flows that we have to
7 maintain below Oroville. There are water quality
8 objectives in the Delta. And if we have to release
9 water to maintain any of those, we can't store water.

10 If we are in what's called excess
11 conditions -- Mr. Leahigh went into that a little bit --
12 all the requirements in the Delta are being met, all of
13 the demands are being met, and the department can retain
14 water in storage at that time.

15 MS. MESERVE: When the department makes those
16 decisions, are they reported anywhere in a place that
17 the public can access?

18 WITNESS SERGENT: All of the department's --
19 the water quality data collected is on CDEC. All of the
20 information, the gauge information, storage levels, that
21 is all uploaded to CDEC.

22 MS. MESERVE: I'm going to move on to another
23 area we'll just touch on. With respect to the changes
24 that you would think would be expected from the
25 WaterFix, you testified that the water levels were small

1 changes, were small in size and duration; is that
2 correct?

3 WITNESS SERGENT: That is correct. I -- I
4 indicated that Dr. Nader Tehrani's modeling results
5 showed that.

6 MS. MESERVE: Did you consider -- and that was
7 an average, a monthly average, that you were looking at;
8 is that correct?

9 WITNESS SERGENT: Those were exceedance plots
10 that included all of the data. They were not monthly
11 averages.

12 MS. MESERVE: It boiled down into averages, if
13 I'm not mistaken.

14 WITNESS SERGENT: Those water levels are on
15 exceedance plots.

16 MS. MESERVE: Correct.

17 Are you aware when a diverter is diverting
18 from the channel, however, that they're not operating
19 according to an average; their diversion is fixed in
20 place and only can operate when the levels are within a
21 certain range?

22 WITNESS SERGENT: Yes.

23 MS. MESERVE: Did you -- when you were looking
24 at the data from Dr. Nader Tehrani, did you consider
25 whether the change to the water levels intersected with

1 the irrigation season?

2 WITNESS SERGENT: Dr. Nader Tehrani's chart is
3 an exceedance plot that essentially shows elevations.
4 And it's -- it would -- I would typically consider that
5 the lower flow periods would be during the irrigation
6 season. And so it's expected that the changes in water
7 levels would be lowest at those -- during those low flow
8 periods.

9 MS. MESERVE: So would it be possible that a
10 diverter wouldn't be able to divert during the low flow
11 period with the addition of even a small change in the
12 water level?

13 WITNESS SERGENT: As Dr. Nader Tehrani
14 testified, this area is subject to tidal influence,
15 which is, I believe he said, in the range of 2 to
16 4 feet. The changes that are expected in the low flow
17 periods range from half a foot immediately downstream of
18 the intake to zero at Rio Vista. And he did not see any
19 water level changes outside -- any significant water
20 outside the main stem portion of the Sacramento River.

21 So it's very small compared to the tidal
22 amplitude at those locations, so it would lead me to
23 believe that there would be -- and, again, he said they
24 were very small in duration and very small as far as
25 number of days. I believe he said it was about five

1 days out of the year that they would even be at that
2 magnitude. So it would seem reasonable to me that any
3 irrigation facility that was intended to operate in that
4 tidal area would -- would be able to accommodate a
5 change of a couple of inches.

6 MS. MESERVE: Wouldn't that only be the case
7 if the intake was deep enough to go that extra couple of
8 inches?

9 WITNESS SERGENT: Again, it would only
10 occur -- that level, the couple of inches, would only
11 occur for a very short period of time during the day,
12 any particular day, and for a very few number of days.
13 And I would assume that given the normal operations of a
14 farming on the -- that they would easily be able to work
15 around that.

16 But as I indicated earlier, if there is
17 someone, I mean, within North Delta Water Agency, within
18 that stretch, that could demonstrate a change in water
19 level below -- a change in the natural flow below a
20 certain point that would impact there, there's a process
21 in the North Delta Water Agency to address it.

22 MS. MESERVE: And what if the diverter was not
23 within North Delta Water Agency? What would that
24 process be?

25 WITNESS SERGENT: The water level changes

1 were -- there was no indication of any change in water
2 levels to an area that was outside the North Delta Water
3 Agency.

4 MS. MESERVE: But you testified earlier that
5 neither -- you testified that you were not an expert in
6 water diversions in the Delta nor had you investigated
7 any specific diversions in the Delta, correct?

8 WITNESS SERGENT: I don't know whether it
9 would be helpful to put up the North Delta Water Agency
10 contract with the map and maybe show the locations where
11 the water level changes were indicated and where they
12 were not.

13 That was the basis of my conclusions, is that
14 the North Delta Water Agency encompasses the entire area
15 in which the modeling showed any change in water levels.

16 MS. MESERVE: Let's --

17 CO-HEARING OFFICER DODUC: Your answer to
18 Ms. Meserve's question is no?

19 MS. MESERVE: Regarding the expertise in the
20 investigation of specific diversions within the Delta.

21 WITNESS SERGENT: We did not investigate
22 individual diversions. I believe I mentioned that
23 earlier.

24 CO-HEARING OFFICER DODUC: Let's note that to
25 everyone. They did not investigate individual

1 diversions.

2 Ms. Meserve?

3 MS. MESERVE: Yes, moving right along.

4 When -- in the cross-examination of

5 Mr. Nader Tehrani, I asked him a question. Were you

6 here for his testimony?

7 WITNESS SERGENT: I was not here. I was

8 listening to most of it.

9 MS. MESERVE: I had asked him about the

10 southern tip of Brier Island as a specific concern area

11 we have. He mentioned that he had looked at that, and

12 he, like you, didn't think it was significant.

13 Did you look at that node of the modeling that

14 was prepared by your modelers for you?

15 WITNESS SERGENT: I did not.

16 MS. MESERVE: Siting here today, you couldn't

17 say whether the southern tip of Brier Island would be

18 what you would call a significant change?

19 WITNESS SERGENT: Again, I did not look at

20 every individual point within North Delta.

21 MS. MESERVE: And are you equating a

22 significant change with an injury? Is that how you're

23 determining injury, by looking at significant?

24 WITNESS SERGENT: No.

25 MS. MESERVE: Okay. What is -- what would be?

1 Because you've said that -- let's go back over this.
2 You've said that there were changes but they were not
3 significant, and, therefore, you determined there was no
4 injury.

5 MR. MIZELL: Objection. Misstates the
6 witness's testimony.

7 CO-HEARING OFFICER DODUC: Ms. Sergeant, how
8 would you characterize, again, your determination of no
9 injury?

10 WITNESS SERGENT: That the maximum changes
11 during the low flow period were about, I believe, half a
12 foot at immediately downstream of the intakes. And by
13 the time it got to Rio Vista, there were no observable
14 changes in water levels. Those maximum changes occurred
15 for very short periods of time during the day and a very
16 limited number of days. And, therefore, it would be
17 within the normal operating range of what I would assume
18 would be the normal operating range for diversion
19 facilities.

20 And, in addition, if there was a diverter
21 within North Delta Water Agency that could demonstrate
22 that the project was diverting natural flow to the
23 extent where it was causing a water level concern,
24 there's a process to address that through the
25 North Delta Water Agency contract.

1 CO-HEARING OFFICER DODUC: By "that," you mean
2 address that injury as demonstrated?

3 WITNESS SERGENT: That impact.

4 CO-HEARING OFFICER DODUC: Okay.

5 MS. MESERVE: Did you consider the information
6 that was provided to you by the DWR modelers that was in
7 addition to the information presented in the case in
8 chief? Was that essential to your determination
9 regarding no injury that was in your testimony?

10 WITNESS SERGENT: No.

11 MS. MESERVE: So, as you sit here today, you
12 believe you could make that determination without
13 looking at any specific nodes other than the compliance
14 points shown in the DWR's case in chief?

15 WITNESS SERGENT: Yes.

16 MS. MESERVE: I just want to touch on water
17 quality in addition.

18 Along the same lines as we talked about for
19 the water levels, did you consider how what you
20 characterized as minor water quality changes would
21 intersect with the irrigation season?

22 WITNESS SERGENT: I did.

23 MS. MESERVE: And what did you consider to be
24 the irrigation season?

25 WITNESS SERGENT: For the North Delta Water

1 Agency contract, there are requirements that are
2 year-round.

3 MS. MESERVE: Did you consider any other water
4 quality parameters besides salinity in your analysis?

5 WITNESS SERGENT: I used only the -- I used
6 the -- looked at the D-1641 objectives for salinity in
7 those locations.

8 MS. MESERVE: Did you consider whether water
9 temperature changes that would lead to increased growth
10 of weeds or algae could potentially cause an injury to
11 water users?

12 MR. MIZELL: Objection. Assumes facts not in
13 evidence. There's been no foundation laid that links
14 water temperatures to increased weed growth or algae
15 blooms.

16 CO-HEARING OFFICER DODUC: Please rephrase,
17 Ms. Meserve.

18 MS. MESERVE: If we're getting into where
19 we're going to go in our case in chief -- I think I'll
20 just leave it there. She's testified that she didn't
21 look at temperature, so they didn't investigate that
22 type of injury. So I'll leave it at that.

23 I just to clarify. Did you consider any other
24 possible injury other than could occur under D-1641
25 violations or exceedances and the contract exceedances

1 in your analysis?

2 WITNESS SERGENT: My analysis was limited to
3 the evaluation of the contract as well as the objectives
4 established by the Water Board.

5 MS. MESERVE: In your analysis, did you
6 consider the state's antidegradation policy?

7 WITNESS SERGENT: I did not.

8 MS. MESERVE: Looking at the -- let's see.
9 This has to do with the Army Corps inflow into
10 Clifton Court Forebay. The operations modeling assumes
11 that the Army Corps limits on inflow to Clifton Court
12 will not apply if the WaterFix is built; is that
13 correct?

14 WITNESS SERGENT: That was Mr. Leahigh's
15 testimony.

16 MR. MIZELL: I'm going to object that that
17 also misstates Mr. Leahigh's testimony. There were --
18 there was a distinction drawn between what would apply
19 to Clifton Court Forebay and what would apply on the
20 North Delta diversions that are proposed, and
21 Ms. Meserve's question didn't make that distinction.

22 CO-HEARING OFFICER DODUC: So noted.

23 Let's go ahead and get to the question,
24 please.

25 MS. MESERVE: Certainly.

1 In making -- were you involved in the decision
2 about what to assume in terms of the inflow limitations
3 into Clifton Court?

4 WITNESS SERGENT: I was not.

5 MS. MESERVE: Mr. Sahlberg, were you involved
6 in that discussion in terms of what limitations would
7 apply at Clifton Court?

8 WITNESS SAHLBERG: I was not.

9 MS. MESERVE: We'll lay those questions aside,
10 then.

11 We could look at what we have called Land 10
12 in the slide I just gave you today. This is a graph
13 prepared by Richard Denson [phonetic] comparing the
14 draft BA 16-year average outputs and the draft BA --
15 using the 82-year modeling. This is used with
16 information presented that was made available by DWR,
17 not necessarily evidence in this hearing, is my
18 understanding. However...

19 So are you aware, Ms. Sergent, that DWR
20 modeling relied on 16 years of data and not -- and did
21 not look at the 82-year averages in examining water
22 quality changes?

23 WITNESS SERGENT: I'm not the person to ask
24 about the specifics of the modeling between the BA and
25 any other -- I'm not -- I'm not familiar with the

1 water -- the modeling done specific for any BA -- change
2 BA.

3 MS. MESERVE: In your capacity in the things
4 you do work on, did you discuss the decision about
5 whether to rely on 16 years of data or whether to look
6 at 82 years?

7 MR. MIZELL: Objection. Asked and answered.

8 WITNESS SERGENT: I did not. I believe that
9 was discussed extensively by the modeling panel.

10 MS. MESERVE: Okay. I would note for the
11 record that the outputs are quite different and
12 different average, I guess.

13 CO-HEARING OFFICER DODUC: You are not
14 testifying, Ms. Meserve. Let's move on, please.

15 MS. MESERVE: Yes.

16 I know what I'm missing. Groundwater. Find
17 that page.

18 In your work at DWR, do you do any work around
19 groundwater rights?

20 WITNESS SERGENT: I do not work groundwater
21 rights, no.

22 MS. MESERVE: Okay. Are you -- do you agree
23 that a water user can have a right, an overlying right,
24 to groundwater?

25 WITNESS SERGENT: I understand the general

1 principles between -- about groundwater use.

2 MS. MESERVE: Would you please put up Land 58.

3 In your analysis of injury to water users, did
4 you consider injury to groundwater uses at all?

5 WITNESS SERGENT: I did not. I looked at the
6 information in the recirculated EIR, and it didn't
7 indicate that there would be any significant change in
8 groundwater levels as a result of this. And I spoke to
9 the individual that -- Gwen Buchholz, and she confirmed
10 that the groundwater modeling did not indicate any
11 significant impact to groundwater levels as a result of
12 the operations of the project.

13 MS. MESERVE: I don't have the EIR with me,
14 but I believe there was a significant and unavoidable
15 impact on groundwater, if I'm not mistaken, in the draft
16 EIR.

17 MR. MIZELL: Objection. That's -- there's no
18 question pending. She's making a statement.

19 Also, I'd like to object to discussion --
20 discussions of groundwater impacts at this point.

21 The witness has indicated that she relied upon
22 the testimony of Gwen Buchholz, and Ms. Meserve had
23 ample opportunity to ask Ms. Buchholz and did ask
24 Ms. Buchholz many questions about groundwater impact at
25 this point. And Ms. Buchholz indicated a distinction

1 between the statement Ms. Meserve just made and what is
2 actually proposed.

3 CO-HEARING OFFICER DODUC: Thank you. I'm
4 mindful of that.

5 Ms. Meserve, keep that in mind, and focus your
6 questions to Ms. Sergent to the extent that she can,
7 because we've already gone down the groundwater path.

8 MS. MESERVE: Okay. Let me check with
9 Mr. Sahlberg, if you considered groundwater uses when
10 you made your opinions regarding injury to water users
11 as a result of this project?

12 WITNESS SAHLBERG: I did not.

13 MS. MESERVE: Sticking with Mr. Sahlberg, if
14 in your experience there was an interference with
15 groundwater use, would you consider that to be an
16 injury?

17 WITNESS SAHLBERG: It would depend on the
18 facts.

19 MS. MESERVE: Mr. Sahlberg, did you consider
20 whether injuries or interferences with water delivery or
21 drainage systems could constitute injury to water users
22 in your analysis?

23 WITNESS SAHLBERG: I did not.

24 MS. MESERVE: Ms. Sergent, did you consider
25 whether injury could occur if there was interference

1 with delivery or drainage systems?

2 WITNESS SERGENT: I did not. Because I -- I
3 believe the -- as the engineering panel discussed
4 extensively, the department has mitigation measures to
5 address any potential impact associated with drainage or
6 water deliveries.

7 MS. MESERVE: All right. Could we put up
8 Land 60, please?

9 Are you -- this is an example of an injury to
10 a water delivery and drainage system at what is termed
11 Intake 2 in California WaterFix.

12 What you see there are diversions that are
13 labeled just as they are in the DWR exhibit showing the
14 directly impacted diversions from the footprint of the
15 diversion. And just to ask you the same -- what the --
16 what this is trying to show and what I'd like to ask
17 about is if a diversion was taken out by, for instance,
18 the -- is that the right one? I'm sorry. Let me get my
19 list.

20 MR. MIZELL: Waiting for the question, I'll
21 simply object to the representation that this is exactly
22 what the department submitted in its evidence. I don't
23 believe that's the case.

24 CO-HEARING OFFICER DODUC: Ms. Meserve, what
25 is the correct graphics?

1 MS. MESERVE: This is a graphic based on the
2 data provided in the CER prepared by the DHCCP which DWR
3 has submitted into evidence for Part I. And I've
4 submitted into evidence Volume II of that as well. And
5 that's what BSK based all their maps on, which -- so
6 this is exactly what DWR has proposed. It's a graphical
7 representation. It's not made from Google Maps; it's
8 made from data that was prepared by DHCCP.

9 MR. MIZELL: And the statement Ms. Meserve
10 made was that this shows impacts to diversions and
11 drainage facilities -- or injury, I believe, is what she
12 said, to diversion and drainage facilities. The
13 department, I don't believe, used anything in the DCE as
14 a definitive source of information on injuries to
15 diversions and drainage facilities.

16 CO-HEARING OFFICER DODUC: So noted.

17 MS. MESERVE: Point taken.

18 CO-HEARING OFFICER DODUC: Ms. Meserve, what
19 is your question?

20 MS. MESERVE: My question is --

21 CO-HEARING OFFICER DODUC: Without making any
22 assertions.

23 MS. MESERVE: Yes. Thank you.

24 If there was -- one of these diversions here
25 fed the green area which we've added in, which is the

1 RD744 delivery and drainage system, if one of the
2 intakes labeled with a S served that system and was
3 destroyed, how would you think that that same system
4 could be supplied with water to the east?

5 MR. BERLINER: Objection. Asked and answered.

6 We went through this with the other panel at great
7 length.

8 CO-HEARING OFFICER DODUC: We did,
9 Ms. Meserve.

10 MS. MESERVE: Okay. I shall move on.

11 Okay. Could we pull up what we called Land 9
12 today?

13 This is, again, a graphic prepared using DWR's
14 modeling data showing inflow into the Freeport area
15 under the proposed California WaterFix. You testified
16 yesterday, Ms. Sergent, that there would not be any
17 reduction in inflow into the Delta.

18 This -- can you explain why this graph would
19 show reduction -- when you actually plot the data, there
20 is a reduced -- did you ever discuss whether -- when you
21 made -- strike that.

22 When you said --

23 CO-HEARING OFFICER DODUC: Before you even
24 ask, help me understand. What is the source of data for
25 this graph? Which I assume --

1 MS. MESERVE: CalSim.

2 CO-HEARING OFFICER DODUC: Okay.

3 MS. MESERVE: CalSim data presented by DWR,
4 and he's graphed the inflow into Freeport. And
5 Ms. Sergeant testified yesterday that there was no
6 reduction in inflow into Freeport, and I wanted to know
7 what that was based on.

8 CO-HEARING OFFICER DODUC: Ms. Sheehan?

9 MS. SHEEHAN: Becky Sheehan with the State
10 Water Contractors.

11 Could we clarify which CalSim? Is this from
12 the EIR data or from BA data or from the data
13 provided --

14 CO-HEARING OFFICER DODUC: Hold on. Hold on.

15 Before you do that, Ms. Meserve, I believe you
16 had a question that I believe is not dependent on this
17 graph. Let's ask that again and then, Ms. Sergeant,
18 respond.

19 MS. MESERVE: Okay. So you testified that
20 there wouldn't be any reduction in inflow into Freeport,
21 I believe yesterday I heard; is that correct?

22 WITNESS SERGENT: Actually, that's not
23 entirely correct. What I indicated was that during
24 those periods of time -- and let's just clarify. I'm
25 talking about natural flows. There may be some changes

1 in storage releases.

2 But I believe what I was addressing that
3 you're referring to was the question as to whether or
4 not I felt Term 91 would be -- would go into effect any
5 earlier as a result of this. And I had indicated that
6 in those periods just prior to Term 91 going into
7 effect, there would be -- they're typically outflow
8 controlled and during those periods of time, there would
9 be no decrease in the natural inflow at -- to the Delta.

10 MS. MESERVE: So your testimony is that there
11 could be change -- reductions in inflow that would occur
12 because of other reasons like reservoir operations?

13 WITNESS SERGENT: No, no. That's not what I
14 said.

15 MS. MESERVE: Okay. All right. You said --
16 I'm trying to get clear on this, because what I'm trying
17 to ask about is that it looks like the data is showing
18 that the inflow actually is being reduced. And I'm
19 wondering if that's something that you discussed in your
20 examination of the evidence.

21 MR. MIZELL: I'd like to reiterate
22 Ms. Sheehan's objection. We don't have nearly enough
23 information on that graph to --

24 CO-HEARING OFFICER DODUC: Mr. Mizell, we will
25 strike out the first part of the question and ask

1 Ms. Sergeant whether she discussed or evaluated any of
2 the monitoring data. As a result of that, did you make
3 any conclusions with respect to reduced inflow?

4 WITNESS SERGENT: Did I evaluate the
5 monitoring data?

6 CO-HEARING OFFICER DODUC: I think she's
7 talking about modeling data.

8 MS. MESERVE: Yes. Thank you.

9 WITNESS SERGENT: Modeling, I'm sorry. I
10 didn't -- I'm not aware of the -- I'm not sure what
11 you're referring to as far as changes in the inflow, and
12 I did not evaluate the modeling at, say, Freeport.

13 MS. MESERVE: If there were reduced inflows as
14 a result of WaterFix and also there were the diversions
15 that would occur there, wouldn't that result in even
16 less water being in the Delta to meet the in-Delta
17 demands?

18 WITNESS SERGENT: Again, DWR only diverts
19 water under its water rights at times when the outflow
20 objectives are being met, the water quality requirements
21 are being met. And then once natural flow is not
22 sufficient to meet those objectives, DWR releases
23 previously stored water to maintain those.

24 So DWR, at a time when inflow to the Delta is
25 not sufficient to meet those demands, we are not

1 appropriating any water under our water rights.

2 MS. MESERVE: But the exception would be when
3 you're operating under a TUCP, correct?

4 WITNESS SERGENT: No, that's not correct.

5 MS. MESERVE: Are you saying you would not
6 ever divert when you're not meeting requirements?

7 That's --

8 WITNESS SERGENT: That's not the question you
9 asked. DWR is not diverting water under its water
10 rights. It is rediverting storage releases. And during
11 the period of time when a TUCP is in effect, we are only
12 making storage releases for diversion. The diversions
13 are at a minimum level and all of the diversions that we
14 are making are coming out of previously stored water.

15 MS. MESERVE: And according to your testimony
16 earlier, DWR makes the determination of whether it's
17 stored water or not, correct?

18 WITNESS SERGENT: Storage levels are
19 decreasing and water is being taken out of storage. So,
20 yes, we are diverting previously stored water.

21 MS. MESERVE: I have nothing further.

22 CO-HEARING OFFICER DODUC: Thank you.

23 Ms. Meserve, let's go ahead and take our
24 morning break for the court reporter. And we'll resume
25 at -- I'm having trouble adding -- 10:50.

1 Wait. We'll resume at 10:55. I did
2 shortchange the court reporter.

3 (Off the record at 10:38 a.m. and back
4 on the record at 10:55 a.m.)

5 CO-HEARING OFFICER DODUC: All right. It is
6 10:55. We are resuming. And we're making a slight
7 change in the order of cross-examination.

8 Ms. Womack of Group No. 43 only has a few
9 questions. So please go ahead and pull the microphone,
10 turn it on.

11 --o0o--

12 CROSS-EXAMINATION

13 MS. WOMACK: First of all, I wanted to thank
14 both chairs and everyone here for letting me go early.

15 I'm a second grade teacher; I'm not a lawyer.
16 And I represent my family farm, and I appreciate that.

17 Could I have DWR-3, page 5, up on the screen,
18 please? Could I ask that we blow up the Clifton Court
19 area?

20 CO-HEARING OFFICER DODUC: Okay.

21 MS. WOMACK: Oh, yes. Blow that. Well,
22 wouldn't that be nice.

23 Ms. Sergent, the striped area and gray and
24 white directly below Clifton Court Forebay -- well,
25 let's just get to the point. That's my farm. Am I

1 going to be able to use my senior water rights?

2 CO-HEARING OFFICER DODUC: Let's rephrase it.

3 In your expert opinion --

4 MS. WOMACK: Yes.

5 CO-HEARING OFFICER DODUC: -- how, if there

6 are any impacts to Ms. Womack's water rights, how will

7 she be impacted?

8 WITNESS SERGENT: Well, I think there was a

9 considerable amount of discussion as to whether or not

10 all or a portion of it would be acquired. And the

11 remaining portion, I don't know what uses you have for

12 them. But you would certainly retain your senior water

13 rights to whatever portion was remaining.

14 MS. WOMACK: I have -- I have license to

15 4500 acre feet. Am I going to have that? I've been

16 told by water experts that that's very valuable. Am I

17 going to have access to that?

18 CO-HEARING OFFICER DODUC: Now, Ms. Sergeant

19 has previously testified that they did not evaluate

20 specific rights or points of diversions or whatnot.

21 So I guess I will ask Ms. Sergeant. Did you

22 specifically analyze the water rights impacts for

23 Ms. Womack's property?

24 MS. WOMACK: Thank you.

25 WITNESS SERGENT: I did not. That would be

1 part of the right-of-way or real estate acquisition
2 process.

3 MS. WOMACK: But you're saying you're not
4 going to injure any rights and yet I -- you're talking
5 about taking my property. So how is that not injuring
6 my rights?

7 MR. MIZELL: Objection. There's assertions
8 included in that question. And also this is the exact
9 line of questioning that Ms. Womack had an opportunity
10 to discuss with our engineers, and they indicated that
11 there is a mitigation list of options to main diversions
12 to properties within the Delta.

13 If we need to, we can refer back to that
14 mitigation list. But at this point --

15 MS. WOMACK: How would I --

16 MR. MIZELL: -- it's asked and answered.

17 CO-HEARING OFFICER DODUC: One at a time,
18 Ms. Womack.

19 MS. WOMACK: How can I possibly mitigate?
20 This is 635 acres. It's on the river. It had flood
21 gates. It -- it -- it's prime property, beautiful
22 property. I don't know anywhere anything else on the
23 Delta where this is available for sale. I can't
24 mitigate this.

25 CO-HEARING OFFICER DODUC: Ms. Womack?

1 MS. WOMACK: Sorry.

2 CO-HEARING OFFICER DODUC: Your question?

3 MS. WOMACK: I'm asking. He says I can
4 mitigate. How can I mitigate? How is this going to be
5 moved somewhere? Isn't that what mitigation is, moving
6 somewhere? I don't -- I don't know where that is.

7 And then how is it that not -- if I can't be
8 mitigated, then it must be an injury.

9 CO-HEARING OFFICER DODUC: Ms. Sergeant?

10 WITNESS SERGENT: All I can say is that
11 through the -- there will be properties that are
12 acquired as part of this project, and that would be
13 handled by our real estate office. There -- whatever
14 remaining portion of the property that is left would
15 retain the water rights that are associated with that
16 property.

17 And we are not -- none of the modeling for the
18 California WaterFix indicates that there would be any
19 change associated with the WaterFix at those locations.
20 And so Ms. Womack would be able to continue to divert
21 under that water right, to the extent of the property
22 remaining, that is attached to that water right.

23 But I can't speak to what the property
24 acquisition process would be or what compensation for
25 the property would be. That's outside my area of

1 expertise.

2 MS. WOMACK: I guess I'm just wondering why is
3 my property being taken not an injury.

4 MR. BERLINER: Objection. Argumentative.

5 MS. WOMACK: Absolutely. Sorry.

6 CO-HEARING OFFICER DODUC: Ms. Womack, I don't
7 believe Ms. Sergent can provide you additional
8 clarification, regretfully.

9 MS. WOMACK: It is, because this is our water
10 expert, and I -- this is a water issue. I want to be
11 able to use my water rights, my full water rights. I
12 don't want them taken away.

13 CO-HEARING OFFICER DODUC: So noted.

14 MR. MIZELL: I'm going to object to that not
15 having proper foundation and misstating testimony.
16 There's been absolutely no evidence shown that she is
17 having her water rights taken away.

18 To the extent Ms. Womack does not like the
19 results of the conversations, the numerous conversations
20 she's had between herself and the department on the
21 property acquisition aspects of this project --

22 MS. WOMACK: I'm sorry.

23 MR. MIZELL: This is not a forum nor the time
24 to discuss those. If she has specific impacts to her
25 diversions, that is, of course, properly before the

1 board and can be asked of this witness, and I will not
2 object to it.

3 But this continued narrative about her
4 frustrations with the property acquisition process is
5 well beyond the scope of this hearing.

6 CO-HEARING OFFICER DODUC: Noted, Mr. Mizell.

7 Mr. Jackson?

8 Ms. Womack, hold on.

9 MS. WOMACK: Okay. Sure.

10 MR. JACKSON: The question that Ms. Womack is
11 asking -- and you may find me out of order for trying to
12 interfere here to help -- is about why is it not legal
13 injury. Whatever they're going to do in terms of
14 condemnation or -- that's a different question.

15 So the question that she's asking is how --
16 how -- how did they come to the conclusion that there's
17 no legal injury for anyone in the Delta given the
18 circumstances and facts that Ms. Womack is going to lose
19 her land by this transfer -- I mean, by the change in
20 point of diversion of the California WaterFix.

21 MR. MIZELL: Same objection I'll lodge to
22 Mr. Jackson's question.

23 The acquisition of property isn't before us
24 today. What is, is that they can show that there are
25 actual impacts to their diversions, we're happy to

1 discuss those. Otherwise, if it's asking about what
2 Maureen Sergent has relied upon to make her conclusion
3 on no injury, she has stated that time and again, and
4 she did just about five minutes ago.

5 CO-HEARING OFFICER DODUC: Thank you.

6 MR. MIZELL: That there's no injury in her
7 expert opinion.

8 CO-HEARING OFFICER DODUC: All right. Thank
9 you, Mr. Jackson, Mr. Mizell.

10 Ms. Womack?

11 MS. WOMACK: I'm done then. I don't know
12 where else to go. But it's -- I appreciate being able
13 to come before the hearing and ask the question very
14 directly, because -- I teach second grade. And it's
15 very straightforward there's an injury. And I would
16 certainly -- were this not to come up, our farming
17 operation would continue. We have beautiful land,
18 beautiful property.

19 MR. MIZELL: I'd like to move to strike.

20 CO-HEARING OFFICER DODUC: Enough. Enough.

21 Mr. Mizell, your objection is on the record.

22 Ms. Womack, thank you for your time, your
23 investment in this proceeding. Your voice is very
24 important. We have your concern on the record.

25 We will explore ways to, perhaps do briefings

1 or through other avenues, to try to explore this. But I
2 agree with Mr. Mizell; land acquisition is not something
3 that is pertinent, at least right now for us.

4 MS. WOMACK: It all leads here.

5 CO-HEARING OFFICER DODUC: Your concerns are
6 on the record.

7 MS. WOMACK: Thank you so much.

8 CO-HEARING OFFICER DODUC: With that, we are
9 now back to Group No. 21. Mr. Ruiz, even though
10 Mr. Herrick is so appropriately dressed today...

11 MR. RUIZ: Give me one second.

12 CO-HEARING OFFICER DODUC: While Mr. Ruiz is
13 setting up, let me assure all of the attorneys that when
14 I say "casual dress" on Friday, I do mean that. I will
15 not take offense, Ms. Meserve and others, if you choose
16 to dress as Mr. Herrick did today, very colorful.

17 Mr. Ruiz, your topic areas that you'll be
18 exploring?

19 MR. RUIZ: My topic areas are -- and I was not
20 here yesterday, but I was mindful, I did try to watch
21 most of it. So I will try not to repeat, but there are
22 some things, some of the questions with regard to
23 modeling but only in a general sense and some
24 hypotheticals related to that.

25 CO-HEARING OFFICER DODUC: Oh, Ms. Sergeant

1 loves hypotheticals.

2 MR. RUIZ: And then I want to get into some of
3 the -- with regard to her testimony that she's -- DWR
4 complies with all statutory regulations. I know there's
5 a lot of that, but I have specific questions that I
6 don't think I heard yesterday.

7 Then I have some questions with respect to
8 compliance with existing permits. Then just a couple
9 miscellaneous that I've been checking off as I go
10 listening to others. I don't think -- it's 25 minutes
11 maybe.

12 --o0o--

13 CROSS-EXAMINATION

14 MR. RUIZ: Good morning. Dean Ruiz on behalf
15 of the South Delta Water Agency and Central Delta Water
16 Agency parties.

17 These questions are only for Ms. Sergeant, as
18 most of them have been so far.

19 So, I know that it's your testimony and
20 opinion that California WaterFix has not resulted in
21 injuries to other legal users of water, correct?

22 WITNESS SERGENT: Correct.

23 MR. RUIZ: And the determination that no such
24 injury is made to other users of the water is necessary
25 to approve or support the requested change petition,

1 correct?

2 WITNESS SERGENT: The board must make a
3 finding that the change will not injure other legal
4 users of water.

5 MR. RUIZ: And in your role, if you did, in
6 fact, have an opinion in your role as the DWR, that
7 there was injury to other legal users of water, you
8 couldn't then support a request -- request the change
9 petition; is that correct?

10 MR. BERLINER: Objection. Relevance.
11 Witness's personal view on this is irrelevant to this
12 proceeding.

13 CO-HEARING OFFICER DODUC: What is your
14 professional view?

15 WITNESS SERGENT: My professional view is that
16 if the modeling shows that there was a potential injury,
17 modifications would be made to operations or something
18 else to address that. It would not mean that the entire
19 project could not be supported.

20 MR. RUIZ: Is it your -- the department's
21 position, then, that there is -- there is a condition
22 for any injury that can deal with or address the injury
23 that might such that the petition should be granted?

24 WITNESS SERGENT: If you're asking as to
25 whether or not the department has proposed particular

1 permit condition, I believe that's been discussed at
2 length. So we don't at this time have any particular
3 permit conditions.

4 MR. RUIZ: That probably wasn't a good
5 question. My question is: Is there injury that you
6 could foresee that would result in your -- the
7 department not recommending or not supporting the change
8 petition and, in fact, requiring or recommending that a
9 new water right application be applied for?

10 WITNESS SERGENT: I guess I'm confused by your
11 question, because we're putting a project forward before
12 the board to -- as part of this petition that we have
13 analyzed and we believe does not result in an injury to
14 other legal users. We're not proposing any other
15 project at this time. So I'm not clear what you...

16 MR. RUIZ: Right. Your opinions and
17 conclusions set forth in testimony thus far are at least
18 in part based on your understanding of the modeling and
19 analysis and conclusions and opinions of Mr. Munevar and
20 Dr. Tehrani, correct?

21 WITNESS SAHLBERG: That was one complement of
22 my review.

23 MR. RUIZ: I did catch a portion of your
24 testimony yesterday, I think, in response to -- right
25 before lunch, I think you were listing some other

1 components that you considered. I believe you mentioned
2 the EIR, EIS, and some of those documents; is that
3 correct?

4 WITNESS SERGENT: I looked at the information
5 that was contained in the recirculated draft. I also
6 relied on operations information as well as some of the
7 information in Mr. Bednarski's as it related to the
8 intakes -- or the diversions at the intake locations.

9 MR. RUIZ: Is it a fair statement or fair
10 assessment that -- that your opinions and conclusions in
11 this matter, though, are at least somewhat dependent on
12 the modeling analysis and opinions of Dr. Munevar -- or,
13 Dr. Tehrani and Mr. Munevar with respect to this
14 petition?

15 MR. BERLINER: Objection. Asked and answered.

16 CO-HEARING OFFICER DODUC: The answer is yes?

17 WITNESS SERGENT: Yes.

18 MR. RUIZ: In your reliance or to the extent
19 you relied on the work done by those two gentlemen, I
20 assume that you have assumed that the methodology they
21 employed and the analysis they did with respect to this
22 project is connect and appropriate; is that correct?

23 WITNESS SERGENT: Yes.

24 MR. RUIZ: Now, with respect to that, I'm
25 just -- with respect to that, what is your understanding

1 of what Dr. Tehrani and Mr. Munevar, what their opinion
2 is with respect to changes in salinity in the
3 South Delta as a result of the subject project?

4 WITNESS SERGENT: I believe the modeling
5 results presented by Dr. Nader Tehrani, DSM2 results,
6 showed that there was no change in salinity as a result
7 of the WaterFix with the exception -- I believe it was
8 Boundary 2 and which he attributed to the operation of
9 the permanent gate.

10 MR. RUIZ: And that's your understanding of
11 the only change in salinity to the South Delta?

12 WITNESS SERGENT: That's my understanding.

13 MR. RUIZ: Is it your understanding -- is it
14 your understanding that they -- when I say "they," those
15 two gentlemen I was talking about, Dr. Tehrani and
16 Mr. Munevar. It was your understanding that they used a
17 15-year period of analysis?

18 MR. BERLINER: Objection. Asked and answered.

19 CO-HEARING OFFICER DODUC: Yes, you have been
20 there, Mr. Ruiz.

21 MR. RUIZ: I understand that. I'm just --

22 CO-HEARING OFFICER DODUC: If you could just
23 get to directly the point you're trying to pursue with
24 Ms. Sergeant.

25 MR. RUIZ: Do you believe that or is it your

1 opinion that salinity levels change in the South Delta
2 in as little as 15-minute intervals?

3 MR. BERLINER: Objection. Asked and answered.
4 We've been through all the modeling.

5 CO-HEARING OFFICER DODUC: Mr. Ruiz, again,
6 what is --

7 MR. RUIZ: I have -- I'm trying to get her
8 understanding of some of the things -- some of the
9 assumptions that she's adopted on behalf of the modeling
10 panel, and I just have a couple other foundational
11 questions.

12 CO-HEARING OFFICER DODUC: Skip the
13 foundational questions. She relied on their expertise.
14 She used their analysis. Let's not go into what she
15 understands to be their conduct of the modeling.

16 MR. RUIZ: Let me ask you, then, a couple of
17 hypotheticals.

18 For the purposes of this question, I'd like
19 you to assume that salinity levels in the South Delta,
20 and particularly at the Old River Tracy Boulevard
21 location, show an increase of as much as 30 percent on
22 average during the growing season, which is from
23 April 1st through September, during the 16-year period
24 in which the DWR modelers did their analysis. I'd like
25 you to assume that. Can you do that?

1 WITNESS SERGENT: Can you clarify? You're
2 talking about a 30 percent increase --

3 MR. RUIZ: 30 percent of the time during the
4 growing season that I just mentioned, that there is an
5 increase in salinity levels at that location that I
6 mentioned in the South Delta, as compared to the
7 no-action alternative because of the -- this project.
8 Could you make that assumption for me?

9 WITNESS SERGENT: With respect to the
10 modeling? You said the modeling shows --

11 MR. RUIZ: Let's assume -- let me strike that.
12 Let's assume --

13 CO-HEARING OFFICER DODUC: This is a
14 hypothetical. Okay.

15 Mr. Ruiz, what is -- what is the question?
16 Forget the assumption and the hypothetical. Where are
17 you going? What is the specific question?

18 MR. RUIZ: The question is: If the modeling
19 correctly shows or modeling correctly show that at least
20 30 percent of the time the salinity level of the
21 South Delta at the station I mentioned to you is
22 increased during that growing season because of this
23 project, would you consider that a significant impact?

24 MR. BERLINER: I'm going to object as an
25 incomplete hypothetical. We don't know how much of an

1 increase.

2 MR. RUIZ: I'm asking any increase.

3 WITNESS SERGENT: My understanding of how the
4 project would operate, it's unclear to me how the
5 project cause an increase of 30 percent in the
6 South Delta.

7 However, with respect to any increase, if the
8 objectives are met, and the projects are not causing a
9 change or an exceedance of those objectives, then I
10 would not consider that an adverse effect.

11 MR. RUIZ: Same hypothetical but assume that
12 the salinity levels are increased 50 percent of the time
13 as a result of the project. Would you consider that a
14 significant impact?

15 CO-HEARING OFFICER DODUC: Mr. Ruiz, how has
16 one of the board members making the decision, how does a
17 hypothetical scenario help me make that decision?

18 MR. RUIZ: Well, hypothetical could help you
19 make that decision if, in fact, the -- an appropriate
20 way of looking at the modeling or analyzing the data
21 shows that during the growing season at least 50 -- 30,
22 40, 50 percent of the time of the days during that
23 period salinity is increased at those locations or that
24 location because of this project.

25 If that's the case --

1 CO-HEARING OFFICER DODUC: So as a decision
2 maker, as one decision maker, I can tell you that if
3 evidence is provided that shows that kind of impact, it
4 would be hard-pressed to then say that there is no
5 impact regardless of what Ms. Sergeant may or may not
6 think in terms of that hypothetical situation.

7 So I'm trying to, I guess, understand why
8 leading Ms. Sergeant, in particular, into a hypothetical
9 which she's very reluctant to respond to is providing
10 value to the record at this time.

11 MR. RUIZ: She's the expert from DWR who is
12 essentially opining on the ultimate question, ultimate
13 issue in this matter. She's opining there's no injury,
14 there's no new water right. So, therefore, it should
15 be -- the petition should be granted.

16 I'm asking her that -- so her opinion and
17 everything that she relied on to reach that opinion, I
18 think, is fair game. And I'm just trying to ask her and
19 find out if there is, in fact, modeling results,
20 appropriate modeling results as I've described in this
21 hypothetical, whether or not if that's the case, that
22 she would then also continue with her testimony that
23 there's no injury.

24 CO-HEARING OFFICER DODUC: We've been here
25 yesterday, because many other attorneys have tried this

1 in previous cross-examination, and I believe
2 Ms. Sergeant, in response to some of my questions says
3 that as to injury, that she certainly would evaluate all
4 new data and all new information and use that as a basis
5 for whatever recommendation or technical determination
6 she makes.

7 But if you're -- you're trying to get a
8 witness from the petitioner to say something that she's
9 not going to say, in my opinion.

10 MR. RUIZ: No, I'm actually not trying to get
11 her to say something she wouldn't say. I'm just asking
12 her, under those assumptions, which are, you know,
13 happen to be based on the modeling and the data that DWR
14 ran, based on those -- those assumptions, I'm just
15 asking her if her opinion would be different.

16 But I understand what you're saying. And
17 you've said something important, I think, that --

18 CO-HEARING OFFICER DODUC: What should be more
19 important is what she says.

20 So let's move on.

21 MR. RUIZ: Okay.

22 I believe you testified earlier you're not an
23 agronomist, correct?

24 MR. BERLINER: Objection. Asked and answered.

25 MR. RUIZ: That's why I said I believe you

1 said it yesterday. I'm just clarifying, make sure --

2 CO-HEARING OFFICER DODUC: Yes, we have.

3 Let's move on.

4 MR. RUIZ: Therefore, you do not have the
5 ability, the technological expertise to determine
6 whether or not an increase in salinity as applied to
7 crops would have a negative impact on those crops,
8 correct?

9 MR. BERLINER: Same objection, and also
10 relevance.

11 CO-HEARING OFFICER DODUC: Let's just move on
12 now, please.

13 MR. RUIZ: Here's another area that I know has
14 been gone through to some degree in that short statement
15 in your testimony that DWR complies with all statutes
16 and regulations.

17 CO-HEARING OFFICER DODUC: What's your
18 question?

19 MR. RUIZ: Well, I have several questions with
20 respect to that.

21 CO-HEARING OFFICER DODUC: Skip the
22 foundational. Ask your questions.

23 MR. RUIZ: Is it your position that DWR met
24 all statutory and regulatory requirements imposed on it
25 in 2009 before it satisfied delivery obligations?

1 MR. BERLINER: Objection. Relevance. Has
2 nothing to do with WaterFix.

3 MR. RUIZ: This witness has testified clearly
4 as to -- and been brought out by other examiners, that
5 in managing the SWP to provide water to its contractors,
6 it operates its facilities to meet all statutory and
7 regulatory requirements imposed on it prior to
8 satisfying these obligations.

9 I think I'm entitled to ask about those
10 situations where that might not be the case and also to
11 ask about statutes and regulations that may not have
12 been asked about so far.

13 CO-HEARING OFFICER DODUC: Go ahead.

14 WITNESS SERGENT: DWR operates first to meet
15 regulatory requirements and then to meet our deliveries.
16 I can't tell you any specific. And if you're going to
17 ask me about a day, I think you can ask me to request
18 that. I believe we always operate to first meet our
19 regulatory obligations before we export water to our
20 contractors.

21 MR. RUIZ: I wasn't going to ask you about a
22 specific day. I'm asking you about 2009.

23 Did DWR satisfy all regulatory and statutory
24 requirements specifically in February of 2009 before
25 attempting to satisfy delivery operations or

1 obligations?

2 WITNESS SERGENT: I'm not aware of any
3 requirements that were not met.

4 MR. RUIZ: Do you know whether or not DWR
5 violated outflow standards in February 2009?

6 WITNESS SERGENT: I believe Mr. Leahigh went
7 over the --

8 CO-HEARING OFFICER DODUC: Just answer what
9 you know.

10 WITNESS SERGENT: I have to look at
11 Mr. Leahigh's chart, so I can't say specifically --

12 MR. RUIZ: Were you in your current position
13 in 2009?

14 CO-HEARING OFFICER DODUC: Hold on.

15 Ms. Sergeant.

16 WITNESS SERGENT: -- if there was any
17 exceedance in 2009.

18 MR. RUIZ: Thank you.

19 Were you in your current position in 2009?

20 WITNESS SERGENT: I was.

21 MR. RUIZ: Do you know whether or not DWR
22 applied for a TUCP in February of 2009?

23 WITNESS SERGENT: I believe that Mr. Leahigh
24 indicated that we had. I am not involved in every
25 application that is made.

1 MR. RUIZ: Okay. So you don't have any
2 recollection whether or not -- you don't know personally
3 whether or not or recall personally whether or not DWR
4 applied for a TUCP in 2009?

5 WITNESS SERGENT: I was not involved in
6 preparation of the TUCP in 2009.

7 MR. RUIZ: All right. Do you know from your
8 department who would have been, other than Mr. Leahigh
9 if he was?

10 CO-HEARING OFFICER DODUC: Is there a
11 particular question regarding TUCP you want to ask
12 Ms. Sergeant?

13 MR. RUIZ: Yes. I'm asking those questions
14 with regard to TUCP. There was a violation in 2009.
15 DWR continued to --

16 CO-HEARING OFFICER DODUC: Of which she said
17 she's not aware of.

18 MR. RUIZ: Right. That's -- I'm just
19 exploring that, whether she's not aware of that. She
20 said that they operate to satisfy all statutory and
21 regulatory requirements, and I think the February 2009
22 outflow requirement is one of those. And I'm asking her
23 if she's aware of that. If she's not aware of that, I'm
24 okay with that.

25 CO-HEARING OFFICER DODUC: She's already

1 said --

2 WITNESS SERGENT: I would like to clarify that
3 an exceedance is not necessarily a violation of a
4 regulation or -- there are numerous reasons that
5 Mr. Leahigh went into at great length --

6 MR. RUIZ: Well --

7 WITNESS SERGENT: -- when an objective may be
8 exceeded.

9 MR. RUIZ: Well, Mr. Leahigh is not here, and
10 I appreciate that.

11 What's your understanding of how a -- or a
12 scenario when an exceedance wouldn't necessarily be a
13 violation? What are you referring to?

14 WITNESS SERGENT: If -- I think Mr. Leahigh
15 discussed this as well. If the projects find that there
16 is an exceedance on an objective, they notify the
17 State Water Resources Control Board with the reason as
18 to why the objective was exceeded.

19 And the State Water Resources Control Board is
20 the one that determines whether or not that would be a
21 violation of the D-1641.

22 MR. RUIZ: And if the State Water Board so
23 finds that there's a violation of D-1641, then you
24 consider that to have been an exceedance?

25 WITNESS SERGENT: The exceedance is whether or

1 not the objective level is exceeded. Again, the
2 Water Board is the one that determines whether or not
3 that would be a violation.

4 MR. RUIZ: I'm sorry. You're right. Wrong
5 term, wrong question. I didn't mean to confuse you.

6 So if the Water Board considers or determines
7 an exceedance to have been a violation, that's when it's
8 a violation; otherwise, in your opinion, it's not?

9 WITNESS SERGENT: That's correct.

10 MR. RUIZ: Are you familiar with the
11 Delta Protection Act of 1959?

12 WITNESS SERGENT: I have read it.

13 MR. RUIZ: Have you read it in conjunction
14 with preparation of your testimony in this matter?

15 WITNESS SERGENT: I did not read it before my
16 testimony. Just immediately before it. Been some time.

17 MR. RUIZ: Did you read it at all in
18 conjunction with the preparation, your written
19 testimony, in this case?

20 WITNESS SERGENT: I read it after my testimony
21 was submitted.

22 MR. RUIZ: What's your understanding of the
23 significance of that statute?

24 MR. BERLINER: Objection. Relevance.

25 MR. RUIZ: With respect to -- with respect to

1 California WaterFix.

2 WITNESS SERGENT: Directly with respect to
3 California WaterFix, my understanding of that provision
4 is that the -- there's a provision to maintain or
5 requirements to maintain our salinity protection and
6 protection of the beneficial uses in the Delta.

7 MR. RUIZ: Is that statute a statute or
8 regulation that you feel DWR is obligated to adhere to
9 before --

10 MR. BERLINER: Objection.

11 MR. RUIZ: I'm sorry. I wasn't quite done.
12 -- prior to satisfying delivery obligations as
13 you set forth in your testimony?

14 MR. BERLINER: Objection. Witness's feelings
15 are irrelevant.

16 MR. RUIZ: Is it the department's position as
17 you know, if you know, whether or not that is a statute
18 that the department has to satisfy before beginning to
19 satisfy delivery obligations as set forth in your
20 testimony?

21 WITNESS SERGENT: I believe that we do operate
22 to satisfy the salinity requirements in the Delta before
23 exporting water to our contractors.

24 MR. RUIZ: Okay. And do you believe that the
25 proposed project, California WaterFix Project, is

1 consistent with that -- that statute as well?

2 WITNESS SERGENT: I do.

3 MR. RUIZ: I just want to go through a couple
4 provisions of that statute quickly. And I have that on
5 the flash drive, and I think I marked that as SDWA 252.

6 Just calling your attention to the yellow
7 highlighted section. Do you see that under twelve two
8 zero one?

9 WITNESS SERGENT: I do.

10 MR. RUIZ: I'll just -- I don't want to read
11 that, but if you could just look at the yellow section
12 quickly.

13 Do you see that?

14 WITNESS SERGENT: I do.

15 MR. RUIZ: And is it your testimony that
16 California WaterFix is consistent with that, in
17 particular with respect to the maintenance of an
18 adequate water supply in the Delta sufficient to
19 maintain and expand agriculture?

20 WITNESS SERGENT: I believe the WaterFix is
21 consistent with that.

22 MR. RUIZ: You believe that -- and you
23 testified there was some reduction in the water quality
24 as a result of the WaterFix?

25 WITNESS SERGENT: There are changes in water

1 quality, small changes in water quality, at certain
2 changes in the Delta as a result of the WaterFix. Those
3 changes are still within the water quality objectives in
4 D-1641.

5 MR. RUIZ: I just want to refer you to what's
6 been marked as SDWA 253, which is also on the flash
7 drive, which is Bulletin 76 from December of 1960.

8 Are you familiar with that document?

9 WITNESS SERGENT: I've seen it. It's been a
10 long time since I looked at it.

11 MR. RUIZ: Okay. I just want to refer you to
12 the last page, the highlighted section of the document
13 which I'll ask be -- ask to be pulled up now.

14 Do you see that section?

15 WITNESS SERGENT: I do.

16 MR. RUIZ: I'm just going to read the last
17 sentence of it which states: "In 1959, the state
18 legislature directed that water shall not be diverted
19 from the Delta for use elsewhere unless adequate
20 supplies for the Delta are first provided."

21 Do you see that?

22 WITNESS SERGENT: I do.

23 MR. RUIZ: And do you -- would you consider
24 this -- well, Bulletin 76 is something prepared by the
25 Department of Water Resources, correct?

1 WITNESS SERGENT: It was, yes. It was
2 prepared by the Department of Water Resources in 1960.

3 MR. RUIZ: Would you consider this language
4 existing in this bulletin to have been a contemporaneous
5 interpretation of the Delta Protection Act statute?

6 WITNESS SERGENT: I don't have an opinion on
7 that.

8 MR. BERLINER: Objection.

9 MR. RUIZ: I want to refer you to -- trying to
10 move through these fairly quick -- SDWA 251, which is
11 provisions of the Delta Reform Act of 2009.

12 CO-HEARING OFFICER DODUC: And your question
13 on this?

14 MR. RUIZ: I just want to get that up.

15 My question is: Are you familiar with the
16 Delta Reform Act?

17 WITNESS SERGENT: I have read portions of it.

18 MR. RUIZ: Have you read it or did you review
19 it in connection with the preparation of your testimony
20 in this case?

21 WITNESS SERGENT: Not in the preparation of my
22 testimony.

23 MR. RUIZ: I want to refer you to
24 Section 85020 of the act which --

25 CO-HEARING OFFICER DODUC: On what page?

1 WITNESS SERGENT: I believe it's the second
2 page of the flash drive.

3 MR. RUIZ: I've highlighted Sections B, C, and
4 E.

5 Do you see that?

6 WITNESS SERGENT: I do.

7 MR. RUIZ: And Section B -- go through
8 quickly -- provides that for the protection and
9 enhancement of the unique cultural, recreational,
10 agricultural values of the California Delta as an
11 evolving place.

12 Is it your -- do you have an opinion as to
13 whether or not the California WaterFix is consistent
14 with that directive?

15 MR. MIZELL: Objection. Relevance. This
16 portion of the Delta Reform Act does not apply to this
17 hearing or the project proposed before the Water Board.
18 And if South Delta Water Agency has something to take up
19 with this, it can be done with Delta's stewardship
20 council.

21 CO-HEARING OFFICER DODUC: Mr. Ruiz?

22 MR. RUIZ: Yes. Well, my question is: Is
23 this a statute or regulation that -- relevant to her
24 testimony, that she feels that she -- rather, that DWR
25 is obligated to satisfy or comply with?

1 MR. MIZELL: Calls for --

2 CO-HEARING OFFICER DODUC: Hold on. Just one.

3 Ms. Sergeant, what is your understanding of
4 these provisions as applied to the water figures?

5 WITNESS SERGENT: My understanding of this
6 provision is a general discussion of policy. There are
7 other provisions -- it's my understanding there are
8 other provisions that do talk about the WaterFix but
9 this section does -- does not do that.

10 MR. RUIZ: So is it something -- is it a
11 statute that then you don't feel is one that DWR -- that
12 DWR feels it doesn't need comply with before beginning
13 to satisfy its delivery obligations?

14 CO-HEARING OFFICER DODUC: Mr. Ruiz, that's
15 not what she said. So ask your question without trying
16 to interpret her position.

17 MR. RUIZ: I'm sorry. That wasn't my
18 intention. It was meant to be a separate question.

19 Is it DWR's position that this section, this
20 portion of the Delta Reform Act, is not a statute that
21 the department has to comply with prior to satisfying
22 delivery obligations?

23 MR. MIZELL: I'm going to object to that. It
24 calls for a legal conclusion from the Department of
25 Water Resources, and that's not a role that Ms. Sergeant

1 plays in the department.

2 CO-HEARING OFFICER DODUC: Ms. Sergeant may say
3 so.

4 WITNESS SERGENT: Yes, I don't have an opinion
5 on this one.

6 MR. RUIZ: Well, Ms. Sergeant is providing
7 testimony in this case, as I said before, with respect
8 to the ultimate issue. And everything that she
9 understands and relies on has gone into, presumably, to
10 her opinion. She's relied on modeling. She relied on
11 other things in her opinion that this is not tantamount
12 to a new water right and thus should be approved.

13 So I think it is something that is fair game
14 in terms of what her understanding as to whether or not
15 she -- DWR needs to comply with this.

16 CO-HEARING OFFICER DODUC: And you've asked
17 and she said she has no opinion. Please move on.

18 MR. RUIZ: Please look at Section E --
19 Subsection E of this section, which states: "Improve
20 water quality, protect human health, and the environment
21 consistent with achieving water quality objectives in
22 the Delta."

23 Do you see that?

24 MR. BERLINER: I do.

25 MR. RUIZ: Is it your testimony that the

1 California WaterFix, to the extent that you've
2 acknowledged there is some reduction in water quality in
3 the Delta, is consistent with that subsection?

4 MR. BERLINER: Same objection as imposed
5 before.

6 WITNESS SERGENT: Again, this is a section of
7 the act that addresses general policy of the state.
8 Doesn't specifically address the State Water Project.
9 There are other sections of this that do relate to the
10 WaterFix, and so I don't have an opinion on relevance of
11 this particular section to the California WaterFix.

12 MR. RUIZ: I wasn't asking if you had an
13 opinion as to the relevance. I was asking if you feel
14 that language is consistent with the reduction in water
15 quality and the -- as set forth or as a result of the
16 California WaterFix.

17 WITNESS SERGENT: Again, I believe I answered
18 that. I don't have an opinion with respect to this
19 section.

20 MR. RUIZ: I have one more question -- or a
21 couple of questions with respect to another act. I
22 think it's the next page, 85021, and there's some
23 highlighted section of that.

24 You see that, what's up on the screen?

25 WITNESS SERGENT: I do.

1 MR. RUIZ: And that states clearly that "The
2 policy of the State of California is to reduce reliance
3 on the Delta in meeting California's future water supply
4 needs."

5 That's the portion I've highlighted, do you
6 see that?

7 WITNESS SERGENT: I do.

8 MR. RUIZ: Do you feel that the purpose of the
9 California WaterFix is consistent with that policy as
10 set forth in the screen?

11 MR. BERLINER: Multiple objections here. A,
12 the witness's feelings are irrelevant; B, this is
13 calling for a legal conclusion and interpretation of the
14 state statute which is beyond the scope of area of this
15 witness's expertise. This is not relevant to the
16 WaterFix and all the grounds we've been through before.

17 I don't know how this leads to anything useful
18 to the board because grilling these witnesses over the
19 contents of this particular statute or others, if it's
20 not the basis for their opinion, I don't see how it
21 leads to anything useful.

22 CO-HEARING OFFICER DODUC: Noted,
23 Mr. Berliner, without acknowledging one way or the other
24 your issue about relevancy to WaterFix.

25 I will just remind Mr. Ruiz that Ms. Sergent

1 has repeatedly said she does not have an opinion.

2 Ms. Sergeant, with respect to -- you've said
3 that you are familiar with this. Are there, at least to
4 your knowledge, any portions of this act that you are
5 willing to testify to with respect to its applicability
6 to your analysis for the WaterFix?

7 MR. BERLINER: There are sections that -- that
8 specifically speak to the WaterFix and --

9 CO-HEARING OFFICER DODUC: And are you
10 intending, Mr. Ruiz, to address your questions to
11 Ms. Sergeant on those sections or other sections?

12 MR. RUIZ: No. That was -- that was the last
13 section that I had with respect to questions for her on
14 that.

15 CO-HEARING OFFICER DODUC: So let's move on to
16 your next line of questioning.

17 MR. RUIZ: Are you familiar with -- well,
18 first of all, I'll start with the federal
19 antidegradation statutes. Are you familiar with the
20 federal antidegradation statutes?

21 MR. BERLINER: I am not.

22 MR. RUIZ: Are you familiar with the state
23 antidegradation policy and/or statutes?

24 WITNESS SERGENT: I have read the statute.
25 I've read the policy.

1 MR. RUIZ: And did you read it in connection
2 with this case or this -- I keep calling it "case." In
3 connection with this project?

4 Did you read it in connection with preparing
5 your testimony on -- for this project?

6 WITNESS SERGENT: I did not.

7 CO-HEARING OFFICER DODUC: And she did not
8 consider it in her analysis. That was already asked and
9 answered as well.

10 MR. RUIZ: I missed that. I'm sorry.

11 What's your understanding of the significance
12 or importance of the state antidegradation statute? If
13 you have one.

14 WITNESS SERGENT: My -- and my understanding
15 is that it relates to discharges and the protection of
16 water quality.

17 I don't -- I don't work routinely with
18 antidegradation statutes.

19 MR. RUIZ: I just want to put up SDWA 254,
20 which is State Water Board Resources Control Special
21 Resolution 68-16, referring to the third "Whereas"
22 clause. I'll just go through that very quickly where it
23 states: "The quality of some waters in the state is
24 higher than that established by the adopted policies,
25 and it is the intent and purpose of this board that such

1 higher quality shall be maintained to the maximum extent
2 possible consistent with the declaration of the
3 legislature."

4 Do you think or do you have -- does DWR have a
5 position or an opinion as to whether or not a reduction,
6 even slight as you indicate, in salinity levels on the
7 Delta is consistent with this policy and resolution of
8 the State Board?

9 MR. MIZELL: Objection. Well beyond the
10 expert testimony as well as expertise. This is a policy
11 issue. Calls for a legal conclusion. Asked and
12 answered. I can go on.

13 CO-HEARING OFFICER DODUC: Fine.

14 Mr. Herrick, I thought you were not going to
15 be speaking today.

16 MR. HERRICK: I wasn't, but I would like to
17 make one point or respond to the objection.

18 I realize we're trying to expedite this and
19 move along quickly, but --

20 CO-HEARING OFFICER DODUC: It's not a matter
21 of expediting, Mr. Herrick. It's a matter of adding
22 value to the record in terms of the board's decision.

23 And what -- I appreciate where you're going
24 with this, but I also appreciate that Ms. Sergent is a
25 very strong witness who knows what she knows and will

1 say what she knows.

2 And she has said with respect to this
3 particular document that she is somewhat familiar with
4 it. She did not consider it -- analyze it or consider
5 its implication to her determination of injury with
6 respect to water rights.

7 So, again, I go back to: Where is the value
8 in pursuing this line of questioning given what she has
9 already repeatedly answered for the record?

10 So, with that, Mr. Herrick.

11 MR. HERRICK: I appreciate that. The DWR and
12 the bureau, they've offered witnesses. And this witness
13 said in her testimony, "DWR operates its facilities to
14 meet all statutory and regulatory requirements imposed
15 upon it prior to satisfying delivery obligations."

16 And every time somebody asks a question
17 regarding the statute or regulatory obligation, counsel
18 objects and says, "You're trying to get a legal
19 conclusion. It's not within her field of expertise."

20 It is important that the parties are able to,
21 without wasting too much time, go over things that they
22 think are relevant for future arguments so that there
23 are answers.

24 I don't think it's appropriate for the board
25 to allow somebody who's offering an opinion on statutory

1 compliance to avoid answering the question by saying,
2 "Well, I don't really have an opinion on that."

3 That's why they're offered here as experts.
4 And this is their language, not ours. So I believe
5 there should be at least some leeway in allowing
6 cross-examiners to cover various statutes without
7 avoiding them by counsel saying, "Well, that calls for a
8 legal conclusion." They made the legal conclusion and
9 we're trying to examine.

10 Thank you very much.

11 CO-HEARING OFFICER DODUC: It's on the record.
12 Objection's on the record.

13 And Ms. Sergeant has repeatedly said she does
14 not have opinion and she is -- well, I'm sure continue
15 to provide the answers that she feels is appropriate.

16 MR. RUIZ: Well, I think you can cover the
17 record pretty simply at this point, which is that I want
18 to just be clear you did not review the state
19 antidegradation statute and consider that with respect
20 to preparation of your testimony for this project,
21 correct?

22 WITNESS SERGENT: That's correct.

23 MR. RUIZ: And you did not review the federal
24 antidegradation statute with respect to the preparation
25 of your testimony for this project, correct?

1 MR. BERLINER: I'm not familiar with the
2 federal statute.

3 MR. RUIZ: And I believe you looked at before,
4 but you did not review or consider the State Board
5 Resolution 6816 that states the antidegradation -- the
6 State Board's antidegradation policy in connection with
7 preparing your testimony for this project, correct?

8 WITNESS SERGENT: That's correct.

9 MR. RUIZ: Mr. Sahlberg, did you prepare --
10 I'm sorry. Did you consider or review the federal
11 antidegradation statute in connection with your
12 preparation for testifying in this matter?

13 WITNESS SAHLBERG: No, I did not.

14 MR. RUIZ: Are you familiar with that statute?

15 WITNESS SAHLBERG: No, I am not.

16 MR. RUIZ: It is the language of the -- what I
17 believe to be the language of the federal statute and
18 that's SDWA 256.

19 Moving down to the highlighted section. Under
20 131, Sub 12 of the antidegradation policy, the
21 highlighted section says: "Existing instream water uses
22 and the level of water quality necessary to protect the
23 existing uses shall be maintained and protected."

24 Have you ever seen that language in the
25 statute before?

1 WITNESS SAHLBERG: No.

2 MR. RUIZ: Do you -- does this department or
3 the -- your department have an opinion -- or do you have
4 a -- strike that.

5 Do you have an opinion as an expert, water
6 rights expert, proffering your testimony in this case as
7 to whether or not the California WaterFix, to the extent
8 that it reduces water quality in the Delta, is
9 consistent with the language of the statute?

10 WITNESS SAHLBERG: I don't have an opinion.

11 MR. RUIZ: I'd like to move down to the next
12 highlighted section.

13 That language, Sub 3 says: "Where
14 high-quality waters constitute an outstanding national
15 resource, such as waters of national state parks and
16 wildlife refuges and waters of exceptional recreational
17 and ecological significance, that water quality shall be
18 maintained and protected."

19 Do you consider the Delta to be an outstanding
20 national resource?

21 WITNESS SAHLBERG: The purposes of this
22 statute is --

23 MR. RUIZ: Excuse me?

24 WITNESS SAHLBERG: I'm asking you -- for the
25 purposes of this statute, it says "high-quality waters."

1 Is that -- what is the high-quality water? If you're
2 asking me --

3 MR. RUIZ: I was asking you specifically if
4 you consider the Delta to be a place of outstanding
5 national resource.

6 MS. AUFDEMBERGE: Object for relevance.

7 CO-HEARING OFFICER DODUC: Hold on.

8 Mr. Sahlberg, just answer the question. If
9 you do not know, you don't know.

10 WITNESS SAHLBERG: I don't know.

11 MR. MIZELL: I'd like to make the record
12 clear. This is not a statute; it's a regulation.

13 MR. RUIZ: I have a few more questions for
14 Ms. Sergeant.

15 Referring you to -- I've show you this
16 highlighted portion of your testimony several times.
17 I'm just going to do it very quickly. Page 6, line 19.
18 DWR-53.

19 It's actually on the flash drive that I
20 provided you, the highlighted portion is.

21 MS. McCUE: This is from DWR-53?

22 MR. RUIZ: Correct. Page 6, line 19.

23 It states -- or you stated in your testimony:
24 "DWR filed a petition of time extension on
25 December 31st, 2009, with the State Water Board to

1 extend the time for completion of construction and full
2 beneficial use in the permits."

3 What was -- what is the purpose and the point
4 of the time extension you're referencing there?

5 WITNESS SERGENT: The existing permits contain
6 times by which the water is to be put to beneficial use
7 in the construction's going to be -- to be completed,
8 and the department has been attempting or working to
9 complete these facilities. And there are other
10 facilities that that the department is currently working
11 on within the State Water Project. And so the petition
12 for time extension was requested to allow development of
13 the full beneficial use and the construction -- to
14 extend the construction requirements in those permits.

15 MR. RUIZ: Based on those permits, when was
16 the construction supposed to have been completed by?

17 WITNESS SERGENT: I believe completion of
18 construction was 2000.

19 MR. RUIZ: Construction of all -- all the
20 facilities that -- to which the permit applies, correct?

21 WITNESS SERGENT: That's correct.

22 MR. RUIZ: And has -- and construction
23 obviously hasn't been completed for all of them?

24 WITNESS SERGENT: That's correct.

25 MR. RUIZ: Has DWR received an extension of

1 time to complete the construction for full beneficial
2 use?

3 WITNESS SERGENT: We have not. We have a
4 petition before the board. In that petition, we
5 indicated -- that was a petition for short-term
6 extension. We indicated that we would be filing a
7 petition for a longer term extension following
8 completion of the documents related to the BDCP.

9 MR. RUIZ: Is it your position or, rather,
10 your testimony that even though the time extension
11 hasn't been granted and the construction hasn't been
12 completed, that DWR is still in compliance with its
13 permits?

14 WITNESS SERGENT: It is. It's fairly common
15 for petitions for time extension to be requested.

16 MR. RUIZ: Do you know why it wasn't requested
17 until 2009?

18 WITNESS SERGENT: That was the date at which
19 full beneficial use was listed in the permit.

20 MR. RUIZ: That's what I thought. There was
21 one in 2000 and one in 2009. I thought you testified it
22 was to be constructed by 2000.

23 WITNESS SERGENT: There are two different
24 dates contained in the permit. One is completion of
25 construction. One is putting the water to full

1 beneficial use.

2 MR. RUIZ: So you -- or DWR requested the time
3 extension at or about the time that the construction was
4 supposed to have been completed?

5 WITNESS SERGENT: We requested the time
6 extension in 2009, which was the date at which water was
7 to be put to full beneficial use.

8 And I'd just like to clarify that it's not
9 uncommon at all to request a time extension, and it's
10 not uncommon to have that time extension request at a
11 date that is beyond the date of the permit.

12 MR. RUIZ: Did DWR, in conjunction with the
13 project and this request, submit a companion petition
14 for the time allowed to complete the construction of the
15 North Delta portion of the authorized permit?

16 WITNESS SERGENT: We did not. As we stated in
17 the petition for time extension, we were going to -- we
18 will request a time extension when the documents are
19 completed. So that will follow the final documents.

20 MR. RUIZ: I'm sorry. I just didn't quite
21 understand that. You will request the time extension
22 when?

23 WITNESS SERGENT: We -- as we stated in the
24 petition for time extension that we submitted in 2009,
25 we intend to submit a petition for a long-term time

1 extension following completion of the BDCP documents.

2 Or in this case, it would be the California WaterFix

3 documents.

4 MR. RUIZ: Just let me look over my notes for

5 a few minutes.

6 I don't have anything further.

7 CO-HEARING OFFICER DODUC: Thank you,

8 Mr. Ruiz.

9 Just making sure: Is City of Stockton

10 Group 22 here? I see.

11 How about 23? Stockton East?

12 All right. Ms. Spaletta, do you have

13 cross-examination for Group 24?

14 MS. SPALETTA: We do.

15 CO-HEARING OFFICER DODUC: Okay. Unless

16 Group 21 -- or I'm sorry -- Group 22 or 23 shows up, we

17 will resume after lunch at 1:00 o'clock with

18 Ms. Spaletta.

19 Ms. Meserve, did you have a question before we

20 break?

21 MS. MESERVE: I just wanted to note for

22 Michael Brodsky that he was hoping to cross on Tuesday

23 morning. I believe you have another cross scheduled for

24 that morning. I think he sent an e-mail, but he asked

25 me to check so he didn't miss his time.

1 CO-HEARING OFFICER DODUC: Thank you.

2 With that, we'll take a lunch break and we'll
3 resume at 1:00 o'clock.

4 (Whereupon the luncheon recess was taken
5 at 11:57 a.m.)

6 --o0o--

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 SEPTEMBER 23, 2016 AFTERNOON SESSION 1:00 P.M.

2 --o0o--

3 CO-HEARING OFFICER DODUC: Good afternoon,
4 everyone. It's 1:00 o'clock. Welcome back.

5 We're resuming the cross-examination of the
6 water rights panel. Let me check in to make sure.

7 Group 22?

8 23?

9 All right, Ms. Spaletta.

10 MS. SPALETTA: Thank you.

11 CO-HEARING OFFICER DODUC: And Mr. Keeling.

12 MR. KEELING: Thank you.

13 MS. SPALETTA: Good afternoon.

14 Are we waiting for Mr. Sahlberg?

15 CO-HEARING OFFICER DODUC: Okay. While we're
16 waiting for him, please run down your list of topics
17 you'll be exploring.

18 MS. SPALETTA: Sure. My name is Jennifer
19 Spaletta. I'm counsel for North San Joaquin Water
20 Conservation District. I will be exploring a couple
21 follow-up questions from some questioning that was
22 already done. I'm going to take great care not to be
23 asking anything that's already been asked.

24 I have questions about the water quality
25 testimony of Ms. Sergent in her written testimony. I

1 have some questions about her incidental benefit
2 testimony.

3 I have some questions about the specific terms
4 of the water rights permits of both the Department of
5 Water Resources and the Department of Interior which are
6 subject to petition to change which go to the source of
7 water.

8 And I also have some questions about the
9 purpose of the locations of points of diversion and
10 points of storage under those permits and the timing of
11 the permits.

12 CO-HEARING OFFICER DODUC: Mr. Keeling, your
13 areas?

14 MR. KEELING: Tom Keeling on behalf of the
15 County of San Joaquin, San Joaquin County Flood Control
16 and Water Conservation District, and Mokelumne River
17 Water and Power Authority.

18 I will be asking Ms. Sargent about some
19 questions -- or about some statements made in her
20 written testimony, asking her to go into further
21 explanation of no injury and about statements she made
22 about D-1641, about some of her statements regarding
23 construction-related impacts, no-injury conclusion, and
24 the definition of some of the terms she uses both in her
25 PowerPoint and in her testimony.

1 CO-HEARING OFFICER DODUC: All right. Let's
2 go ahead and begin with questions for --

3 Here comes Mr. Sahlberg.

4 You may begin, Ms. Spaletta.

5 MS. SPALETTA: Thank you.

6 --o0o--

7 CROSS-EXAMINATION

8 MS. SPALETTA: My first question is:

9 Ms. Sergeant, your no-injury opinion in your written
10 testimony, which version of the California WaterFix is
11 the opinion based on?

12 WITNESS SERGENT: It's based on the proposed
13 project between H3 and H4.

14 MS. SPALETTA: And you are not expressing an
15 opinion on any other operational scheme for no-injury
16 purposes?

17 WITNESS SERGENT: Well, I believe the
18 department has put forth modeling at the request of the
19 Water Board to assess the broader range project being
20 proposed, and the petition that was submitted is based
21 on the project H3 to H4.

22 MS. SPALETTA: And your opinion of no injury
23 is based on the H3 to H4 project description?

24 WITNESS SERGENT: For our project, yes. I
25 believe that we submitted the other testimony to

1 demonstrate that it could be operated in a broader range
2 without also injuring other legal users.

3 MS. SPALETTA: But that's not the basis of the
4 opinion that you put in your written testimony, is it?

5 WITNESS SERGENT: I guess my opinion is that
6 the project proposed by the department can be approved
7 without injury to other legal users of water. That's
8 what mine is based on.

9 MS. SPALETTA: Mr. Sahlberg, same question?

10 WITNESS SAHLBERG: My opinion is based on --
11 my answer is the same as Ms. Sergent's.

12 MS. SPALETTA: Mr. Sahlberg, is it within the
13 control of the Bureau of Reclamation to request the
14 pending petition for change?

15 WITNESS SAHLBERG: Pardon me?

16 MS. SPALETTA: Is it within the control of the
17 Bureau of Reclamation to have requested the pending
18 petition for change?

19 MR. BERLINER: Objection. Beyond the scope of
20 this witness's expertise. And that's a policy matter
21 for the Bureau of Reclamation.

22 CO-HEARING OFFICER DODUC: What do you mean by
23 your question, Ms. Spaletta?

24 MS. SPALETTA: Are you being forced to
25 participate in the petition for change to build the

1 California WaterFix or is that a decision that the
2 Bureau of Reclamation has made?

3 WITNESS SAHLBERG: It's a decision the bureau
4 has made.

5 MS. SPALETTA: And to the extent that the
6 project is built, will it be within the control and
7 decision-making protocol of the Bureau of Reclamation to
8 decide when and how to operate the facilities?

9 WITNESS SAHLBERG: I don't know.

10 MS. AUFDEMBERGE: Objection. Assumes facts
11 not in evidence. There's no determination that the
12 United States will be an owner-operator of the facility.

13 CO-HEARING OFFICER DODUC: Well, the witness
14 has already answered that he does not know.

15 MS. SPALETTA: Well, let me ask maybe a
16 clearer question.

17 It was my understanding that some of the
18 Bureau of Reclamation's water rights were subject to the
19 petition for change.

20 WITNESS SAHLBERG: That's correct.

21 MS. SPALETTA: And that the Bureau of
22 Reclamation is asking for a petition from the
23 State Water Resources Control Board to be able to use
24 the three new North Delta intakes to either directly
25 divert or redivert water; is that correct?

1 WITNESS SAHLBERG: Yes, we are asking the
2 board to amend our permits to include those three points
3 of diversion.

4 MS. SPALETTA: To the extent that that
5 petition is granted, will the Bureau of Reclamation then
6 be able to make discretionary decisions about how and
7 when to utilize those new points of diversion and
8 rediversion or are there laws or other constraining
9 things that require the bureau to use them in any
10 particular way?

11 MR. BERLINER: Objection. Compound question.

12 CO-HEARING OFFICER DODUC: Let's break down
13 that question, Ms. Spaletta.

14 MS. SPALETTA: So will it be within the
15 control and discretionary authority of the Bureau of
16 Reclamation how and when to use the new North Delta
17 points of diversion, assuming that this petition is
18 granted?

19 WITNESS SAHLBERG: The facilities will be
20 essentially a DWR facility. So it would certainly not
21 be within the unilateral control of the bureau on how to
22 handle and when they were used.

23 MS. SPALETTA: Will it be subject to some
24 agreement?

25 WITNESS SAHLBERG: I would assume so.

1 MS. SPALETTA: But you don't know as you sit
2 here today?

3 WITNESS SAHLBERG: That is correct.

4 MS. SPALETTA: Ms. Sergeant, I wanted to ask
5 you a few questions about your testimony, which is
6 DWR Exhibit 53. And I want to go page 13, line 18,
7 please.

8 Okay. The statement that I want to ask you
9 about says: "A reduction in water quality that is
10 within the objectives contained in D-1641 would not
11 interfere with the ability of other legal users to put
12 water to beneficial use."

13 I just want to be clear that it is your
14 opinion that only a reduction in water quality that
15 results in exceeding a D-1641 standard is an injury to a
16 legal user of water. Is that your opinion?

17 WITNESS SERGENT: The whether -- or not it
18 would be an injury would depend on whether or not the
19 water right holder had a riparian or appropriated right
20 and what the natural flow conditions would be rather
21 than if it was an exceedance of the objective, however,
22 storage releases are being made to support that level of
23 water quality. Then I would not consider that an
24 injury.

25 MS. SPALETTA: I believe that was a yes-or-no

1 question, so let's try this again.

2 You have said that a reduction in water
3 quality within the objectives contained in D-1641 would
4 not interfere with the ability of other legal users to
5 put water to beneficial use.

6 So I'm clarifying that it is your opinion that
7 as long as the reduction in water quality does not get
8 below a D-1641 objective, it is your opinion that there
9 is no injury?

10 WITNESS SERGENT: You mean if there is a
11 change that is below the objectives?

12 MS. SPALETTA: I'm asking about a change in
13 water quality that does not get below the objective.

14 So it's reduction in water quality, but the
15 water quality is still above the D-1641 objective. So
16 it's still better than the D-1641 objective.

17 WITNESS SERGENT: I just want to clarify.
18 When you say "above the objective," "above" would mean
19 exceeding the objective. So you're saying that if there
20 is a change below the objective?

21 MS. SPALETTA: Right. So the change that the
22 water quality is better than --

23 WITNESS SERGENT: We are still meeting the
24 objectives.

25 MS. SPALETTA: So is it your opinion that as

1 long as the water quality still meets the objective, you
2 can have a reduction in water quality that does not
3 result in an injury?

4 WITNESS SERGENT: Yes.

5 MS. SPALETTA: There is also a statement
6 towards the bottom of page 13 that "The projects make
7 storage releases that result in water quality in the
8 Delta that is better than would exist without the
9 project releases, providing an incidental benefit."

10 Do you see that?

11 CO-HEARING OFFICER DODUC: Line 24?

12 WITNESS SERGENT: Yes.

13 MS. SPALETTA: Okay. And that's your opinion?

14 WITNESS SERGENT: Yes.

15 MS. SPALETTA: Isn't it also true that the
16 projects' storage of water at other times of the year
17 provides an incidental detriment to water quality in the
18 Delta?

19 WITNESS SERGENT: It depends on the hydrologic
20 conditions.

21 MS. SPALETTA: But that is one of the possible
22 circumstances, is it not?

23 WITNESS SERGENT: There are times when storage
24 can change the salinity.

25 MS. SPALETTA: And it can adversely affect the

1 salinity?

2 WITNESS SERGENT: It can increase to some
3 extent the salinity.

4 MS. SPALETTA: So to be clear, there are both
5 kinds of circumstances that result from the operation of
6 the projects. You have both times when release of the
7 stored water of the projects can improve salinity in the
8 Delta compared to what would otherwise exist, and you
9 also have times where the operation of the projects to
10 store water can impair salinity in the Delta, correct?

11 WITNESS SERGENT: It can change the salinity
12 in the Delta. That's still within the objectives that
13 the Water Board has determined are necessary to meet
14 beneficial uses. And it's all part of the balancing of
15 the various demands upon the system.

16 MS. SPALETTA: Okay. And so that's consistent
17 with what you just testified to earlier, that the
18 projects at times may actually degrade salinity
19 conditions in Delta; but, in your view, as long as that
20 degradation doesn't get to the D-1641 floor, there's no
21 injury?

22 WITNESS SERGENT: As long as we're meeting
23 objectives, that's correct.

24 MS. SPALETTA: You then go on to explain in
25 your testimony at the bottom of 13 and the top of

1 page 15 that "The Delta diverters don't have a right to
2 continued incidental benefits from storage releases."

3 How is this relevant to the pending petition
4 for change?

5 WITNESS SERGENT: Well, it was to illustrate
6 that while there may be changes, if those changes are
7 supported by storage releases -- and there may be a
8 water quality that is better than what would exist
9 absent those storage releases -- any change associated
10 with the different export location for those storage
11 releases would not impact other water right holders
12 because the system is being improved above what would
13 exist otherwise.

14 MS. SPALETTA: So I want to make sure I
15 understand this part of your testimony because I think
16 it's very important.

17 My understanding is that you are saying it's
18 very possible that, as a result of the California
19 WaterFix and the use of these new North Delta diversion
20 facilities, that the incidental benefits that the
21 project has provided to the Delta may be reduced, but as
22 long as we're still meeting the standards, we're not
23 going to consider a reduction in the incidental benefits
24 an injury?

25 WITNESS SERGENT: That's correct.

1 MS. SPALETTA: Are you familiar with a
2 document that DWR has posted on its Web site entitled
3 "Water Transfer Approval Assuring Responsible
4 Transfers"?

5 WITNESS SERGENT: The -- are you referring to
6 what's commonly called the white paper?

7 MS. SPALETTA: No.

8 WITNESS SERGENT: I'm sorry.

9 MS. SPALETTA: I'm referring -- we'll give you
10 a copy. Mr. Keeling will pass a copy out to you and
11 your counsel, and we have a paper copy for the hearing
12 officers. I also have an electronic copy that I've
13 provided that can be brought up on the screen. I think
14 they need a copy.

15 I'll represent for the record that we will be
16 marking a document that we will mark as
17 North San Joaquin Exhibit 1. It's entitled "Water
18 Transfer Approval Assuring Responsible Transfers," dated
19 July 2012," and I obtained this document off of DWR's
20 website.

21 (Whereupon Exhibit NSJ-1 marked for
22 identification)

23 WITNESS SERGENT: I'm familiar with this
24 document.

25 MS. SPALETTA: Ms. Sergeant, I'll give you a

1 minute to look over the document.

2 Who authored this document?

3 WITNESS SERGENT: That would be Dave Anderson.

4 MS. SPALETTA: Who is Mr. Anderson?

5 WITNESS SERGENT: Mr. Anderson is a staff

6 counsel. He's a retired annuitant with DWR.

7 MS. SPALETTA: Did you assist him with this
8 document?

9 WITNESS SERGENT: I did not help him write it.
10 I can't recall. I may have reviewed it and provided
11 comments, but I -- I don't remember.

12 MS. SPALETTA: I'll have you go ahead and turn
13 to the table of contents so you can just refresh your
14 memory on the contents of this document.

15 Do you see the section Roman numeral III-C
16 entitled "The Concept of Legal Injury"?

17 WITNESS SERGENT: I do.

18 MS. SPALETTA: And the three subparts?

19 WITNESS SERGENT: Yes.

20 MS. SPALETTA: And are you familiar with this
21 concept of legal injury as articulated by the Department
22 of Water Resources in this document?

23 WITNESS SERGENT: Well, I have read the
24 document.

25 MS. SPALETTA: Okay. And do you agree that

1 the concept of legal injury as articulated in this
2 document represents DWR's view?

3 WITNESS SERGENT: I believe it does.

4 MS. SPALETTA: And does it represent your
5 view?

6 WITNESS SERGENT: Like I said, it's been some
7 time since I read it, but I believe so.

8 MS. SPALETTA: Okay. I would like to turn
9 your attention to the bottom of page 5. And the last
10 paragraph on the page starts with "A. Transfer," and
11 I'll just read it quickly.

12 "A. Transfer: A use involving a change in
13 the place or purpose of use or point of diversion of the
14 existing right is simply a new use under an existing
15 right."

16 Do you agree with that?

17 WITNESS SERGENT: I'd like to clarify that
18 this again involves a transfer. The project being
19 proposed today is not a transfer.

20 MS. SPALETTA: Ms. Sergeant, isn't it true that
21 a transfer generally involves either a change in point
22 of diversion or a change in place of use or a change in
23 purpose of use?

24 WITNESS SERGENT: That's correct. It's the
25 change is necessary to take water from the existing

1 place of use and move it to a new place of use. So it
2 is taking water from the area in which it is currently
3 permitted and it is moving it to an area outside of its
4 historic use.

5 The Department of Water Resources is not
6 changing its place of use; it is simply providing a new
7 diversion location for a originally proposed facility.
8 And the water is being used within our existing place of
9 use. We are not selling a portion of our water to any
10 other water users. So it's totally distinct from a
11 water transfer.

12 MS. SPALETTA: Ms. Sergeant, is it your
13 position that the no-injury analysis required for a
14 change in point of diversion for a transfer is different
15 from the no-injury analysis required in a change of
16 point of diversion under a water right petition?

17 WITNESS SERGENT: The -- in order to analyze
18 the change in point of diversion for, say, a water
19 transfer, someone is proposing to move water from their
20 existing place of use water that would be diverted and
21 returned and in a particular location.

22 So you look at what would be the with and
23 without so that the downstream users see the same amount
24 of water in their -- in the system.

25 If you are looking at a water right, a new

1 water right change is -- you would look to see if that
2 change is affecting the -- would affect the amount of
3 water available to any other water user under their --
4 their right and whether or not that change would
5 diminish the amount of water that would be available to
6 another water right holder.

7 It's -- there are many parallels because if
8 you are, say, a water right holder somewhere on the
9 Sacramento Valley, you divert water, you return water,
10 you have a right to use a certain quantity within your
11 authorized place of use and the demand that you have
12 established. And the downstream users would have a
13 right to, say, the abandoned flow below your point of
14 diversion. And so you would look to see if there is a
15 net reduction in the amount of water that would have
16 been consumed in that case.

17 In this case, we are moving water that is
18 under the control of the department. We are diverting
19 water only at a time when all other water rights are
20 being met, and we are meeting all of our contractual
21 obligations.

22 MS. SPALETTA: Respectfully, Ms. Sergent, your
23 answer was not responsive to my question. I move to
24 strike it. My question was a yes-or-no question.

25 CO-HEARING OFFICER DODUC: Ms. Spaletta, what

1 was your question again, please?

2 MS. SPALETTA: My question was whether it was
3 the department's position that the no-injury analysis
4 required for a transfer that involves change in point of
5 diversion is different from the no-injury analysis that
6 is required for the change in point of diversion in this
7 petition. It's a yes-or-no question.

8 WITNESS SERGENT: I don't believe it is simply
9 a yes-or-no question.

10 The injury analysis depends on the particular
11 change being evaluated. But in the sense that we look
12 to see that no other water user would be injured, their
13 ability to use water under their own water right would
14 not be impaired. That's the same whether it's a
15 petition for transfer or a petition for change.

16 MS. SPALETTA: Thank you.

17 I would like to move Exhibit North
18 San Joaquin 1 into evidence as an admission of a party
19 opponent.

20 CO-HEARING OFFICER DODUC: Hold on,
21 Ms. Spaletta. I think our current practice right now is
22 to mark documents for identification purposes for now
23 and move them at a later time.

24 MS. SPALETTA: That's fine.

25 MS. McCUE: What would be your acronym? NSJ?

1 MS. SPALETTA: NSJ is fine. Thank you.

2 MS. McCUE: Okay.

3 MS. SPALETTA: Let's turn to DWR-330, please.

4 Let's see. While we're getting there,

5 Ms. Sergeant, what is the source of water that DWR will

6 be diverting at the new North Delta facilities?

7 MR. BERLINER: Objection. Asked and answered.

8 CO-HEARING OFFICER DODUC: Let's answer it one

9 more time.

10 WITNESS SERGENT: The source of water is water

11 from the Feather River as well as water in the

12 Sacramento-San Joaquin Delta channels.

13 MS. SPALETTA: Are you aware that the

14 operators of both the State Water Project and

15 Central Valley project have testified differently?

16 WITNESS SERGENT: I am not aware of that.

17 MS. SPALETTA: That's one of the things that's

18 a little bit confusing. Mr. Leahigh and Mr. Milligan

19 testified that the source of water that would be

20 diverted at the new North Delta facilities would be

21 Sacramento River water, which caused me to ask the

22 question: Why Permits 16481 and 16482, which do not

23 include the Feather River or the Sacramento River, were

24 included in this petition for change?

25 WITNESS SERGENT: The Sacramento-San Joaquin

1 Delta channel includes that section of the
2 Sacramento River within the legal Delta. And those
3 permits currently include an authorized point of
4 diversion in the location near Hood. They were
5 always -- it was always anticipated that there would be
6 a diversion facility at this location. The information
7 was provided to the board in the original applications
8 and was included in the permits when they were first
9 issued.

10 MS. SPALETTA: Okay. So Mr. Leahigh and
11 Mr. Milligan testified that the primary purpose of the
12 North Delta diversion facilities is to divert the excess
13 unregulated flow of the Sacramento River during high
14 flow periods.

15 Are you familiar with that testimony?

16 WITNESS SERGENT: I am.

17 MS. SPALETTA: Okay. And during that time
18 period, is it your testimony that the source of water
19 that would be diverted at the new North Delta is the
20 Sacramento-San Joaquin channel water or something
21 different?

22 WITNESS SERGENT: It could be either water
23 that's available to Feather River. The permits provide
24 that we can divert the water that's available on the
25 Feather River either at Oroville at the

1 Oroville-Thermalito complex or from the Delta. So it
2 could be a combination of water available on the
3 Feather River or water available in the Delta.

4 MS. SPALETTA: When you say "water available
5 in the Delta," are you including in that definition
6 unregulated Sacramento and Feather River flows?

7 WITNESS SERGENT: I am.

8 MS. SPALETTA: When does the source of water
9 change from being Feather River water to being
10 Sacramento-San Joaquin Delta channel water?

11 WITNESS SERGENT: The source of the water
12 doesn't change. We have the ability to -- to operate to
13 take up to 10,300 CFS at maximum combined under all four
14 permits.

15 MS. SPALETTA: Actually, let's stop there
16 because I want to be very, very specific about this.

17 According to your chart, the rights of DWR to
18 directly divert from the Feather River are a total of
19 2,760 CFS.

20 WITNESS SERGENT: That's correct.

21 MS. SPALETTA: It is my understanding DWR does
22 not have right to directly divert water from the
23 Feather River in excess of 2,760 CFS.

24 Is that your understanding as well?

25 WITNESS SERGENT: That is my understanding.

1 MS. SPALETTA: What is going to be the state
2 share of the capacity of the three new North Delta
3 intakes?

4 WITNESS SERGENT: I don't know that that's
5 been decided.

6 MS. SPALETTA: What's the total capacity?

7 WITNESS SERGENT: 9,000 CFS.

8 MS. SPALETTA: Now, the water source at the
9 North Delta intakes, is that the same water that the
10 department currently diverts from the South Delta export
11 pumps?

12 WITNESS SERGENT: It's all the same source.

13 MS. SPALETTA: So it's your testimony today
14 and it's DWR's position that as long as a point of
15 diversion is anywhere within the Sacramento-San Joaquin
16 River channel, that point of diversion is diverting the
17 same source of water?

18 WITNESS SERGENT: The -- we aren't proposing
19 to have a point of diversion anywhere else in the Delta.

20 But my testimony is that the water that would
21 be diverted at the North Delta intakes would be either
22 water that's available in the Delta up to 6185 CFS plus
23 2115 CFS.

24 If we are diverting water in excess of that
25 and that water is available -- that quantity of water is

1 available on the Feather River, that component could
2 also be diverted at those locations.

3 MS. SPALETTA: If I'm understanding your
4 testimony correctly, DWR could characterize the water at
5 the North Delta diversion facility as either
6 Feather River water or Sacramento-San Joaquin Delta
7 channel water, depending on what it needed to do to fall
8 within the diversion amount of its permits?

9 WITNESS SERGENT: Depending on what is
10 available under each one of those permits, yes.

11 MS. SPALETTA: Now, the reports of permittee
12 that DWR submits for its water rights listed here on
13 Table 1, do they discriminate between the sources of
14 water that have been directly diverted to each year?

15 WITNESS SERGENT: Separate quantities are
16 reported for each one of those permits, yes.

17 MS. SPALETTA: I know they're reported for
18 each permit. I'm asking whether they are reported for
19 each source.

20 For example, for Permit No. 16479 where there
21 are two sources, the Feather River and the
22 Sacramento-San Joaquin Delta channels, by looking at
23 your report of permittee, how can the interested party
24 determine how much you have historically diverted under
25 each of those sources?

1 WITNESS SERGENT: They are not reported
2 separately.

3 MS. SPALETTA: So, if we look at DWR-324 --
4 let's pull that up.

5 This is an exhibit that you prepared in
6 response to the hearing officers' request that
7 information necessary for them to rule on the petition
8 for change be put in a concise exhibit, correct?

9 WITNESS SERGENT: Correct.

10 MS. SPALETTA: Okay. So if we turn to page 2,
11 the first criteria that you addressed was from Title 23,
12 Section 794(a)(1).

13 And the criteria asks for the amounts of water
14 which would have been diverted, consumptively used, or
15 stored under the water right in the absence of the
16 proposed change during the period for which the change
17 is requested or in a maximum year if the change is
18 permanent.

19 Where did you supply the information showing
20 how much water would have been diverted and used under
21 each of these water rights going forward absent the
22 change?

23 WITNESS SERGENT: They are not reported. We
24 didn't report information individually by water right.
25 The project is operated as a whole. And when we look

1 at -- I mean, we look at the amount of water that we
2 divert for modeling purposes and for the purposes of
3 identifying how much water would be moved through the
4 system. We don't look at the individual water right at
5 that time. They all work together.

6 MS. SPALETTA: So that is consistent with what
7 I found in your documents, and I just want to be clear
8 that I'm not missing something.

9 Even though Exhibit 330, which is the
10 description of each of DWR's water rights, has a
11 specific direct diversion limitation by source, DWR has
12 not supplied information to illustrate the amount of
13 water that is directly diverted by source in the past
14 nor has it provided the amount of water that it will
15 directly divert by source in the future?

16 WITNESS SERGENT: DWR provides information
17 every year in bulletins and the reports on how much
18 water we divert under our permits. And we have provided
19 information on how much water we propose to divert under
20 this system. It is not segmented by individual water
21 right. I don't know that that would add any value to
22 the analysis to have it segmented by individual water
23 right.

24 And it would be -- if I could just add. It's
25 not -- given the complexity of our operation in our

1 water rights, it wouldn't be possible, I don't think, or
2 informative in a modeling analysis to go through and try
3 to allocate to an individual water right as the projects
4 are operated as a whole.

5 CO-HEARING OFFICER DODUC: So your answer is
6 no?

7 WITNESS SERGENT: No. I mean, I want to make
8 sure I understood the question because she indicated
9 that we haven't provided information on how much water
10 we have diverted or are going to divert.

11 CO-HEARING OFFICER DODUC: By source.

12 WITNESS SERGENT: I didn't hear the "by
13 source" in the latest question.

14 MS. SPALETTA: Okay. I think the answer is
15 no.

16 WITNESS SERGENT: If I can clarify. One of
17 the reasons is the source may be the Feather River. The
18 authorized point of diversion is the Delta.

19 So if it is available at that location, it may
20 be sourced at the Feather but it is available in Delta.

21 MS. SPALETTA: That's an important point
22 because we've been in this room for other matters where
23 parties have taken the position that a water right
24 holder may not change their point of diversion to
25 another location in the Delta because it would be a

1 different sort of water.

2 So I just want to be clear that it's the DWR's
3 position that regardless of the number of miles between
4 its existing Delta diversion in the South Delta and its
5 proposed new North Delta diversion facilities, that it
6 is diverting the same source of water at both locations.

7 WITNESS SERGENT: I just would like to clarify
8 that the Department of Water Resources permits currently
9 include an authorized point of diversion for those
10 permits at Hood -- for all four permits. So the
11 Water Board also considers that the sources of water
12 that we would propose to divert at that location are the
13 appropriate sources of water that are available at that
14 location.

15 MS. SPALETTA: However, the Department of
16 Water Resources has never diverted a drop of water at
17 this Hood location, correct?

18 MR. MIZELL: Objection. Relevance.

19 CO-HEARING OFFICER DODUC: Just answer the
20 question, Ms. Sergeant.

21 MR. BERLINER: We have not. There are no
22 facilities currently constructed there.

23 MS. SPALETTA: Is one of the authorized
24 purposes of use under any of the permits that you listed
25 on DWR-330 groundwater recharge?

1 WITNESS SERGENT: It's not included as a
2 distinct purpose of use in our permits, no.

3 MS. SPALETTA: Is one of the authorized
4 methods of storage underground storage?

5 WITNESS SERGENT: It is not specifically
6 listed, no.

7 MS. SPALETTA: And, Ms. Sergeant, based on what
8 Mr. Leahigh and Mr. Milligan described as the timing and
9 the type of water that would likely be diverted from the
10 North Delta intakes, isn't it true that a portion of
11 that water will be delivered to contractors who will put
12 it in underground storage?

13 WITNESS SERGENT: There are contractors who
14 have underground storage facilities, and that was
15 described in D-1275 and that has not changed since the
16 initial permits were issued.

17 MS. SPALETTA: And given the nature of the
18 excess flows that are going to be diverted with these
19 new North Delta facilities, wouldn't you agree that the
20 amount of water that will be put to underground water
21 storage will actually likely increase if the petition
22 for change is approved?

23 WITNESS SERGENT: It's possible there will be
24 more water at times available for individual contractors
25 to put to underground storage. The department does not

1 have any underground storage and does not place any of
2 its diversions to underground storage.

3 MS. SPALETTA: And so, effectively, what's
4 happening now and what will happen if this petition is
5 approved is that State Water Project water will be
6 placed to underground storage even though none of the
7 permits for the State Water Project allow underground
8 storage, correct?

9 MR. MIZELL: Objection. That's irrelevant.
10 We're not changing the purpose of the use of any of the
11 permits. To the extent that Ms. Spaletta is trying to
12 question the validity of existing -- the facilities'
13 existing purposes of use, that's beyond what we're here
14 to discuss.

15 CO-HEARING OFFICER DODUC: Ms. Spaletta?

16 MS. SPALETTA: I represent North San Joaquin
17 Water Conservation District who filed a petition for
18 change in 2007. I was required by the State Water
19 Resources Control Board to include an underground
20 storage supplement in order to do the precise activities
21 the State Water Project is proposing to do here. And we
22 drew numerous prototypes and spent 11 years resolving
23 them. And I find it rather incredible that the State
24 Water Project and Bureau of Reclamation are not required
25 to follow that same rules everyone else is.

1 And so to the extent that this project is
2 going to increase the amount of water that is put to
3 underground storage and not accounted for on a detailed
4 beneficial use basis, I think we need have to the
5 department and the bureau answer for it.

6 MR. BERLINER: I'll object to the statement by
7 Ms. Spaletta and ask it be stricken from the record. It
8 has no relevance to this permit. That fact that her
9 client was treated one way in one proceeding is not
10 precedence as to how the board deals with it in any
11 other proceeding. If the department or the bureau is
12 violating some water right, that's a totally separate
13 question that is not before the board at this time.

14 CO-HEARING OFFICER DODUC: Thank you. I will
15 note the objections and again give consideration, but I
16 will allow Ms. Spaletta, regardless of her situation in
17 the past, to continue with this line of questioning.

18 MS. SPALETTA: So at this particular time the
19 Department of Water Resources does not keep track of how
20 water that is placed in underground storage by its
21 contractors is ultimately put to beneficial use,
22 correct?

23 WITNESS SERGENT: The water that is diverted
24 under DWR's water rights and delivered to our
25 contractors can only be used within the State Water

1 Project place of use.

2 MS. SPALETTA: But DWR does not keep track of
3 how a contractor who has placed water in underground
4 storage ultimately uses that water, does it?

5 WITNESS SERGENT: We do not account for the
6 individual contractor's use, however, there are
7 conditions that require the water be used within the
8 State Water Project place of use.

9 MS. SPALETTA: Mr. Sahlberg, I have the same
10 question for you: Do any of the Bureau of Reclamation
11 permits allow water to be placed in underground storage?

12 WITNESS SAHLBERG: No, they do not.

13 MS. SPALETTA: And some of the water that will
14 be delivered through the North Delta diversion points,
15 will it be delivered to contractors for underground
16 storage?

17 WITNESS SAHLBERG: It's a possibility.

18 MS. SPALETTA: Mr. Sahlberg, I'd like to have
19 you look at a document, North San Joaquin Exhibit 2.
20 It's a protest letter from the Bureau of Reclamation.

21 (Whereupon Exhibit NSJ-2 marked for
22 identification)

23 MS. SPALETTA: Mr. Sahlberg, are you familiar
24 with the Bureau of Reclamation protest to
25 North San Joaquin petition for change to add underground

1 storage to its water rights to enable it to fully
2 utilize an existing permitted diversion rate?

3 WITNESS SAHLBERG: No, I am not.

4 MS. SPALETTA: I want to bring to your
5 attention the last paragraph of the first page. "By
6 this letter, reclamation formally protests the subject
7 petition based on interference of prior water rights
8 held by the United States for their operation of this
9 CVP and adverse impacts on the environmental health of
10 the Delta."

11 It continues: "The protest may be dismissed
12 provided that the State Water Resources Control Board
13 finds that water is available as requested by the
14 applicant, the appropriation of that water would not
15 contribute to further decline at the Delta's
16 environmental health, and that the permit issued
17 pursuant to Application 29657 be conditioned with
18 standard permit terms 80, 90 and 91."

19 Are you familiar with the Bureau of
20 Reclamation's position with respect to other water right
21 holders to propose to fully utilize their existing water
22 rights to challenge any petition for change that would
23 reduce flows to the Delta?

24 WITNESS SAHLBERG: I'm sorry. You're going to
25 have to rephrase that question.

1 MS. SPALETTA: Sure. In this letter, it's the
2 position of reclamation that North San Joaquin's
3 petition for change would cause a reduction in the
4 amount of water that would flow to the Delta because
5 North San Joaquin's petition for change would allow it
6 to more fully utilize its existing water rights just as
7 the project's current petition for change would allow it
8 to more fully utilize its existing water rights.

9 So my question is: Are you aware of the
10 Bureau of Reclamation's position to protest this type of
11 petition for change?

12 WITNESS SAHLBERG: This is a seven-year-old
13 letter. I'm not familiar with the circumstances under
14 which it was written or what the background of it was,
15 so I really can't answer your question.

16 MS. SPALETTA: Then look at the second page
17 for me.

18 Who signed this letter?

19 WITNESS SAHLBERG: Richard Stevenson.

20 MS. SPALETTA: Richard Woodland?

21 WITNESS SAHLBERG: Richard Stevenson signed it
22 for Richard Woodland.

23 MS. SPALETTA: So you recognize that as the
24 signature of Mr. Stevenson?

25 WITNESS SAHLBERG: Correct.

1 MS. SPALETTA: And you recognize this as
2 official Department of Interior letterhead?

3 WITNESS SAHLBERG: I believe, it's bureau
4 letterhead.

5 MS. SPALETTA: Do you have any reason to doubt
6 the authenticity of this letter?

7 WITNESS SAHLBERG: No, I don't.

8 MS. SPALETTA: At the appropriate time, I'll
9 be moving that North San Joaquin Exhibit 2 be admitted
10 into evidence as an admission of a party opponent.

11 CO-HEARING OFFICER DODUC: Let's go ahead --
12 okay, identify it. And I have it as 2.

13 MR. BERLINER: And just as a point of order,
14 the request is to admit this as an admission of party
15 opponent. I'm not aware that there's any admission in
16 this letter at all. It didn't contradict the witness's
17 testimony in any way. Whether it's admissible on other
18 grounds, I'm not directing myself to that. But for this
19 ground, I think it's inappropriate.

20 CO-HEARING OFFICER DODUC: We'll address that
21 when we consider moving things into the record. For
22 now, we'll just identify it for continued purposes.

23 MR. BERLINER: No objection, then.

24 MS. SPALETTA: Can I have just one moment to
25 check my notes?

1 CO-HEARING OFFICER DODUC: Sure.

2 MS. SPALETTA: Okay. Can't let you off the
3 hook that easy.

4 I did ask Ms. Sergeant, but I want to ask you
5 as well. Ms. Sergeant explained that her opinion of no
6 injury was based upon the concept that if the California
7 WaterFix results in a degradation of water quality that
8 does not reach the level of violating a D-1641 standard,
9 that that was still no injury. Is that also your
10 opinion?

11 WITNESS SAHLBERG: Yes, it is.

12 MS. SPALETTA: I don't have any further
13 questions at this time. Thank you.

14 CO-HEARING OFFICER DODUC: Thank you.

15 Mr. Keeling?

16 --o0o--

17 CROSS-EXAMINATION

18 MR. KEELING: Thomas Keeling.

19 I'd like to go back to Exhibit DWR-53,

20 page 13, lines 18 through 20 again.

21 That's the sentence that reads: "A reduction
22 in water quality that is within the objectives contained
23 in D-1641 would not interfere with the ability of other
24 legal users to put water to beneficial use."

25 My question to you, Ms. Sergeant: What did you

1 mean when you used the term "other legal users" in that
2 sentence?

3 MR. OCHENDUSZKO: Mr. Keeling, can you please
4 repeat your citation?

5 MR. KEELING: Page 13, lines 18 through 20.

6 MR. OCHENDUSZKO: This is of DWR-53?

7 MR. KEELING: Yes, sir.

8 MR. OCHENDUSZKO: Thank you very much.

9 WITNESS SERGENT: I was referring to other
10 diverters with a water right.

11 MR. KEELING: It did not -- that phrase, as
12 you used it, did not encompass anyone who is not a
13 diverter of water?

14 MR. BERLINER: That would be correct.

15 MR. KEELING: Like a subsistence fisherman?

16 WITNESS SERGENT: I was not thinking of
17 fisheries at the time. These are referring to the
18 objectives for agricultural and municipal use.

19 MR. KEELING: So marinas and boaters, they
20 would not be included in your -- as you use the term
21 here?

22 WITNESS SERGENT: I'm not aware of objectives
23 directed at fishing and boating.

24 MR. KEELING: I'd like you to take a look at
25 Exhibit -- we're still on Exhibit DWR-53.

1 Now, we're at page 24, lines 14 through 16,
2 which read: "Construction-related potential adverse
3 effects to existing legal users of water, including
4 impacts to existing any diverters with existing
5 facilities within the footprint of the CWF facilities
6 will be mitigated."

7 Do you see that sentence?

8 WITNESS SERGENT: I do.

9 MR. KEELING: What was your basis for that
10 statement?

11 WITNESS SERGENT: That was the engineering
12 panel's information.

13 MR. KEELING: Did you speak to Mr. Bednarz?

14 WITNESS SERGENT: Bednarski.

15 MR. KEELING: Did you speak to anyone else
16 about that?

17 WITNESS SERGENT: Yes, I did. And,
18 unfortunately, I don't work directly with the
19 engineering group very often, so I could not give you
20 any specific names, the DWR employees that work in this
21 division of engineering.

22 MR. KEELING: I appreciate that. Thank you.

23 So did you do any independent analysis on this
24 question beyond speaking, of course, to the construction
25 panel?

1 WITNESS SERGENT: I did not.

2 MR. KEELING: In this sentence we just looked
3 at, what did you mean by the term "existing local users
4 of water" in that sentence?

5 WITNESS SERGENT: It would be the same.

6 MR. KEELING: Encompassed only diverters?

7 WITNESS SERGENT: It would include the legal
8 users -- the diverters, it would include the districts
9 or those with AG. For the purpose -- this purpose, it
10 would be AG and M&I diverters.

11 CO-HEARING OFFICER DODUC: Ms. Sergeant, would
12 you like to stand up at the microphone?

13 WITNESS SERGENT: I was hoping we might be
14 able to get through this one first.

15 MR. KEELING: We could take a very short
16 break, if you like.

17 WITNESS SERGENT: How long do you think you
18 still have left?

19 MR. KEELING: I would love to say hours and
20 hours, but it's not true. Why don't we take a
21 five-minute break.

22 WITNESS SERGENT: If we get through this one
23 and then take a break, that will be fine. As long as I
24 can stand a little bit.

25 CO-HEARING OFFICER DODUC: That's fine. If

1 you go to the podium there, it might be helpful.

2 MR. KEELING: To be very clear, when you made
3 this statement we just referred to about
4 construction-related potential adverse effects, you were
5 not encompassing in the sentence effects on businesses
6 and residents in the Delta?

7 WITNESS SERGENT: I am not. I believe those
8 sorts of impacts were addressed in the environmental
9 documents. I was referring primarily to the impacts to
10 diverters.

11 MR. KEELING: So your view, the concept of no
12 injury for purposes of a petition for change in the
13 point of diversion would not encompass impacts on those
14 other people?

15 WITNESS SERGENT: Those are addressed in a
16 different form.

17 MR. KEELING: Was that a "Yes, that's
18 correct"?

19 WITNESS SERGENT: I -- that was -- it was not
20 included. Those were outside the scope of my analysis.

21 MR. KEELING: Regarding the question of
22 operations under the proposed California WaterFix, who
23 did you talk to in forming your opinion about no injury?

24 WITNESS SERGENT: Primarily, John Leahigh.

25 MR. KEELING: You relied on Mr. Leahigh's

1 testimony?

2 WITNESS SERGENT: I routinely work with the
3 operations staff, and I have done so for years and
4 years. So I had many, many conversations over the years
5 about the issues related to operations.

6 MR. KEELING: Many conversations with staff or
7 Mr. Leahigh or both?

8 WITNESS SERGENT: Both.

9 MR. KEELING: Anyone else?

10 WITNESS SERGENT: Well, I'm confused. Anyone
11 else other than operations staff and Mr. Leahigh related
12 to operations?

13 MR. KEELING: Right.

14 WITNESS SERGENT: Well, I mean, operations are
15 discussed at -- at many DWR meetings that would also
16 include management or staff from other offices. I'm not
17 sure what you're looking for.

18 MR. KEELING: Well, let me ask you this way:
19 Did you do any independent analysis of proposed
20 operations under the California WaterFix in reaching
21 your opinion of no injury?

22 WITNESS SERGENT: I did not do any independent
23 analysis of WaterFix options.

24 MR. KEELING: Did you do any independent
25 analysis or research with respect to modeling? By

1 "independent," I mean other than speaking to the
2 modeling panel.

3 WITNESS SERGENT: I am not a modeler. I did
4 not do any modeling.

5 MR. KEELING: Is that a "no"?

6 WITNESS SERGENT: No, I did not do any
7 modeling.

8 MR. KEELING: Take a look at DWR-53, page 11,
9 lines 10 through 13, which read: "Although there may be
10 changes in SWP/CVP storage levels or releases with a
11 site, this would not injure other legal users because it
12 is my understanding that water users do not have a right
13 to stored water releases from the SWP/CVP."

14 Do you see that?

15 WITNESS SERGENT: I do.

16 MR. KEELING: I believe you were asked about
17 this earlier and you confirmed that this is, indeed,
18 your opinion.

19 WITNESS SERGENT: Yes, it is.

20 MR. KEELING: And if I recall correctly,
21 yesterday you testified that the term "other legal
22 users" in this context means any diverter downstream of
23 the reservoirs. Am I right?

24 WITNESS SERGENT: Yes.

25 MR. KEELING: I had that right?

1 WITNESS SERGENT: Yes, that's correct.

2 MR. KEELING: So it would include settlement
3 contractors?

4 MR. BERLINER: That's correct.

5 MR. KEELING: Including Feather River
6 settlement contractors?

7 MR. BERLINER: Objection. Asked and answered.
8 We've been through this ad nauseam.

9 CO-HEARING OFFICER DODUC: Yes, we have,
10 Mr. Keeling. So let's move on from the foundational
11 questions to what exactly you want to ask her.

12 MR. KEELING: Would it include in-Delta
13 diverters?

14 MR. BERLINER: Same objection.

15 MR. KEELING: You testified earlier that you
16 are familiar with the 1959 Delta Protection Act, right?

17 CO-HEARING OFFICER DODUC: Yes.

18 WITNESS SERGENT: Yes.

19 MR. KEELING: Isn't it true -- and I'm
20 referring to the sentence -- isn't it true that in order
21 to comply with the Delta Protection Act's protective
22 provisions, there are, in fact, situations in which
23 in-Delta diverters do have a right to releases of stored
24 water?

25 WITNESS SERGENT: I don't agree with your

1 premise. I don't believe that the Delta Protection Act
2 conveys a water right to anyone who does not currently
3 hold a water right.

4 MR. KEELING: I never said anything about
5 conveying a water right.

6 WITNESS SERGENT: Well, I guess I interpreted
7 your statement as an entitlement to storage releases.

8 MR. KEELING: Let me restate the question.
9 Listen carefully. I'm not talking about water rights.

10 CO-HEARING OFFICER DODUC: No back and forth,
11 please. Just ask the question.

12 MR. KEELING: Isn't it true that in order to
13 comply with the Delta Protection Act's protective
14 provisions, there are, in fact, situations in which
15 in-Delta diverters have a right to releases of stored
16 water?

17 MR. MIZELL: Objection. Calls for a legal
18 conclusion. He's asking the witness to determine what
19 somebody's legal rights are in the Delta.

20 MR. KEELING: The legal conclusion was that of
21 the petitioners. This is their language. This is their
22 statement, not mine.

23 CO-HEARING OFFICER DODUC: Ms. Sergent, just
24 answer the best of your ability as a water rights
25 expert, not as an attorney.

1 WITNESS SERGENT: The department maintains
2 water quality in the Delta through releases of stored
3 water consistent with the requirements under D-1641.

4 It is not my understanding that that therefore
5 conveys any particular right to any individual user
6 within the Delta. The project does maintain water
7 quality at a level that allows those users to put that
8 water to beneficial use.

9 MR. KEELING: Do you agree that to the extent
10 that the projects abandon stored water such as through a
11 flood control release, an appropriator may divert that
12 abandoned water subject to that appropriator's water
13 right?

14 WITNESS SERGENT: Flood releases are never
15 appropriated in the first place. They're flood
16 releases. So I -- anyone downstream at a point where
17 there are flood releases can divert all the water they
18 need because the system is clearly in excess, and no one
19 is -- the department doesn't restrict anyone from
20 diverting those flood releases downstream.

21 MR. KEELING: Did you analyze the impacts in
22 the proposed California WaterFix to any other human user
23 of water that is not a water diverter?

24 MR. MIZELL: Objection. We're talking about a
25 scoping issue here. Board made it clear this hearing

1 has many parts. I believe one of the rulings
2 distinguished between some human uses that are properly
3 included in Part I and some human uses that are included
4 in Part II. I'd like Mr. Keeling to be very specific as
5 to which of those he's referring.

6 CO-HEARING OFFICER DODUC: Mr. Keeling?

7 MR. KEELING: Well, for example, did you
8 consider the impacts of California WaterFix on
9 residential users of water within the Delta?

10 WITNESS SERGENT: Individual users, no. We
11 did consider the impact on those users with diversions.
12 And if a diverter receives water from a district,
13 they -- that would be included in the consideration in
14 protecting the beneficial uses of that municipal
15 diverter.

16 MR. KEELING: I believe you said you did
17 not -- did you consider the impact on subsistence
18 fishermen?

19 WITNESS SERGENT: I believe that I answered
20 that already, that I did not.

21 MR. KEELING: In another context, but I'm
22 asking more generally did you consider it?

23 WITNESS SERGENT: Just to be clear, my
24 analysis was limited to other legal users, diverters --
25 which I consider diverters in the Delta. I did not

1 evaluate impacts associated with subsistence fishermen.

2 CO-HEARING OFFICER DODUC: Or anything else
3 related to the environment?

4 WITNESS SERGENT: That is correct.

5 MR. KEELING: So recreational users, swimmers,
6 they would not be included?

7 MR. MIZELL: I would object to that.
8 Recreation is a scope issue for Part II.

9 I would also like to note for the record that
10 it was allowed that DWR would respond to other human
11 uses of water through rebuttal if we did not include it
12 in our case in chief, and that was something completely
13 appropriate.

14 CO-HEARING OFFICER DODUC: So noted.

15 MR. KEELING: Did you analyze any potential
16 increases in in-Delta residents' times that might result
17 from the WaterFix?

18 WITNESS SERGENT: I did not look at resident
19 times.

20 MR. KEELING: Did you consider any potential
21 increases in Delta water temperatures that might result
22 from the WaterFix?

23 WITNESS SERGENT: I did not look at water
24 temperatures.

25 MR. KEELING: Mr. Sahlberg, in connection with

1 the opinions of no injury in connection with the
2 operations, did you do any independent research or
3 analysis into operations under the proposed WaterFix?

4 WITNESS SAHLBERG: No, I did not.

5 MR. KEELING: But you did reach an opinion
6 about no injury?

7 WITNESS SAHLBERG: Yes, I did.

8 MR. KEELING: Who did you rely on with respect
9 to operations?

10 WITNESS SAHLBERG: The testimony of
11 Mr. Leahigh and Mr. Milligan.

12 MR. KEELING: With respect to construction
13 impacts, did you also reach an opinion as to no injury?

14 WITNESS SAHLBERG: No, I did not.

15 MR. KEELING: With respect to --

16 CO-HEARING OFFICER DODUC: I'm sorry. No, you
17 did not? You did not reach a conclusion regarding no
18 injury?

19 MR. KEELING: I was going to leave that alone,
20 Your Honor.

21 MS. AUFDEMBERGE: That's --

22 CO-HEARING OFFICER DODUC: Please. You just
23 confused me. Please ask your question again.

24 MR. KEELING: You understood the question.

25 CO-HEARING OFFICER DODUC: I did, and I was

1 confused by the answer.

2 So, Mr. Keeling, please ask your question
3 again.

4 MR. KEELING: The first thing a lawyer learns
5 is when you like the answer, don't go back and reask the
6 question again.

7 CO-HEARING OFFICER DODUC: You're talking to
8 an engineer here.

9 Mr. Keeling, your question again?

10 MR. KEELING: Mr. Sahlberg, did you reach a
11 conclusion with respect to no injury regarding
12 construction impacts in the proposed project?

13 MS. AUFDEMBERGE: Objection. Assumes facts
14 not in evidence. The United States is not constructing
15 this project.

16 CO-HEARING OFFICER DODUC: Mr. Sahlberg,
17 please answer.

18 WITNESS SAHLBERG: I did not reach an opinion
19 on construction.

20 CO-HEARING OFFICER DODUC: Did you consider
21 any aspect of the construction being proposed?

22 WITNESS SAHLBERG: No, I did not.

23 CO-HEARING OFFICER DODUC: Okay.

24 MR. KEELING: And you did no independent
25 analysis of construction impacts?

1 WITNESS SAHLBERG: No, I didn't.

2 MR. KEELING: Okay.

3 CO-HEARING OFFICER DODUC: How much additional
4 time do you need, Mr. Keeling?

5 MR. KEELING: Very little.

6 CO-HEARING OFFICER DODUC: I'm taking that to
7 be five minutes?

8 MR. KEELING: Yes.

9 CO-HEARING OFFICER DODUC: Thank you.

10 MR. KEELING: No, ten minutes, because I don't
11 have control over the answers.

12 CO-HEARING OFFICER DODUC: All depends on the
13 question you ask.

14 MR. KEELING: Mr. Sahlberg, maybe I can cut
15 through a lot of this. You heard Ms. Sergent's
16 testimony about those whom she included in her thinking
17 about legal users of water and those who are not
18 included.

19 When it came to the term "legal users of
20 water," is your testimony and is the scope of your
21 testimony the same as Ms. Sergent's?

22 WITNESS SAHLBERG: Yes, it is.

23 MR. KEELING: I cut through six or seven,
24 maybe eight questions.

25 CO-HEARING OFFICER DODUC: There's hope for a

1 Stanford man after all.

2 MR. KEELING: Ms. Sergeant, could you please
3 take a look at DWR No. 3, which is your PowerPoint, I
4 believe, at page 8.

5 You see the sentence that reads: "DWR and
6 reclamation divert water only after all their regulatory
7 requirements are met"?

8 WITNESS SERGENT: Yes, I do.

9 MR. KEELING: Did I read that correctly?

10 WITNESS SERGENT: I believe so.

11 MR. KEELING: Did you write that sentence?

12 WITNESS SERGENT: I did.

13 MR. KEELING: Was your choice of present tense
14 declarative in that sentence deliberate?

15 WITNESS SERGENT: Yes.

16 MR. KEELING: So you intended as a statement
17 of fact occurring now; is that correct?

18 WITNESS SERGENT: Yes. I believe that DWR and
19 reclamation divert water only after we are meeting all
20 of our regulatory obligations.

21 MR. KEELING: Once again, you used the present
22 tense. You're not talking about what happened in the
23 past or what might happen tomorrow. I'm asking you
24 about why you used the present tense in this declarative
25 sentence. Are you saying that this is a statement of

1 fact that is correct now?

2 WITNESS SERGENT: I believe so.

3 MR. KEELING: All right. What is your basis
4 for saying that, your factual basis?

5 WITNESS SERGENT: I believe I described before
6 how DWR makes decisions at -- as to what to release from
7 Oroville or what it can divert in the Delta depending on
8 what particular regulatory requirements are in place at
9 the time, what D-1641 requirements may be controlling,
10 whether there is sufficient water in the Delta to exceed
11 all of the objectives in D-1641, whether biological
12 opinion, the conditions may be controlling, what the
13 instream flow requirements are on the Oroville.

14 The operators look at all of those various
15 requirements and then, if water is necessary to meet any
16 of those, DWR does not divert that water.

17 If there is water that is necessary to meet
18 those and there's not sufficient water naturally in the
19 system, we release stored water.

20 MR. KEELING: Ms. Sergent, that response
21 sounds a description of policy or protocol or procedure.
22 I'm not asking you about that.

23 I'm asking you: What is your factual basis
24 for the declarative present tense sentence that I just
25 read? What is your basis factually for saying that --

1 that DWR and reclamation divert water only after all
2 their regulatory requirements are met?

3 That sounds like a statement of policy, like
4 that's the policy. I'm asking you what's your factual
5 basis for the statement.

6 MR. BERLINER: Objection. Asked and answered.
7 The witness may choose to characterize the answer as
8 policy, but I'm reading it. It looks pretty factual to
9 me.

10 CO-HEARING OFFICER DODUC: Mr. Keeling, help
11 me understand the significance of your line of
12 questioning.

13 MR. KEELING: Well, very simple. This looks
14 to me like a policy statement, not a factual statement.

15 Now, the witness can't possibly know or tell
16 this hearing -- these hearing officers, that that is a
17 true statement in the after -- after the WaterFix unless
18 she's talking about a policy. "It is our policy to do
19 this."

20 But she didn't frame it as a policy statement;
21 she framed it as a declaration of fact in the present
22 tense. That's my point.

23 CO-HEARING OFFICER DODUC: Let -- Ms. Sergent,
24 if you would indulge me and answer that question again.
25 I was too distracted by the graphics of the -- whatever

1 that is on the right.

2 MR. MIZELL: That water drop is not drawn to
3 scale.

4 WITNESS SERGENT: I will stipulate that I did
5 not add the graphic.

6 If I can be clear, it is not just a policy
7 that the department operates at. Those are the
8 operational criteria under which DWR operates. And I
9 believe Mr. Leahigh and Mr. Milligan went over this
10 extensively. We have certain requirements on the
11 projects, and that is what we operate to.

12 CO-HEARING OFFICER DODUC: And that is your
13 understanding based on conversations with Mr. Leahigh
14 and your understanding of the operation of the project?

15 WITNESS SERGENT: That's right.

16 MR. KEELING: So if I understand you
17 correctly, this sentence is a statement that reflects
18 the operating criteria, but not your own analysis of the
19 empirical evidence about how, in fact, it's being
20 operated?

21 CO-HEARING OFFICER DODUC: I'm not sure I
22 quite understand the question that you're asking.

23 But did you do any independent analysis to
24 confirm that first sentence?

25 WITNESS SERGENT: Well, as part of my routine

1 job, I file the annual reports every year to the
2 Water Board. As part of that, I look to see if there
3 were any exceedances of the objectives. And so I
4 routinely work with operations staff as to -- I work
5 with transfers, so I'm involved -- I -- I discuss issues
6 related to availability of conveyance capacity at banks.

7 On a number of occasions throughout my work, I
8 work directly with operations. And so it's based on my
9 familiarity with past operations as well as discussions
10 with the operations staff.

11 MR. KEELING: Well, I believe you were asked
12 earlier about the history of exceedances and compliance
13 and the scope of regulations, statutes, and rules and so
14 on that constitute the term "regulatory requirements,"
15 so I won't redo that.

16 But are you saying to me now that you've done
17 your own empirical analysis for purposes of this
18 testimony?

19 WITNESS SERGENT: No, that's not what I said.

20 MR. KEELING: This sentence as you meant --
21 did this mean to suggest that this is a statement of
22 what will happen as well as what is happening?

23 MR. BERLINER: I believe Mr. Leahigh also
24 extensively discussed the fact that we will continue to
25 operation to meet all of these regulatory requirements.

1 MR. KEELING: I was here for Mr. Leahigh's
2 testimony. Beyond what Mr. Leahigh testified about, do
3 you have any independent analysis or investigation to
4 add?

5 CO-HEARING OFFICER DODUC: She has already
6 added based on her filing of annual reports and what
7 notes. So let's move on, please, Mr. Keeling.

8 MR. KEELING: I can take a hint.

9 Can you give us just one minute? Thank you.

10 We're fine.

11 CO-HEARING OFFICER DODUC: With that, then, we
12 will go ahead and take a 15-minute break. In fact, I
13 might actually extend that further and we will resume at
14 2:30.

15 (Off the record at 2:12 p.m. and back on
16 the record at 2:30 p.m.)

17 CO-HEARING OFFICER DODUC: All right,
18 everyone. Take your seats. It's 2:30. We're going to
19 resume, but because I am still mellow from my vacation,
20 we're going to try to break a little early today.

21 Let's do a time check. We're now on to
22 Group 25, County of Solano. Any cross-examination?

23 MR. SIPTROTH: Stephen Siptroth for
24 Contra Costa County and Contra Costa Water Agency.

25 Solano County will not be present or examining

1 today.

2 CO-HEARING OFFICER DODUC: But will you be for
3 Contra Costa?

4 MR. SIPTROTH: Yes.

5 CO-HEARING OFFICER DODUC: And how much time
6 do you think you'll need?

7 MR. SIPTROTH: I think it should be pretty
8 brief, maybe 15 minutes.

9 CO-HEARING OFFICER DODUC: Okay.

10 Group No. 26, are you here?

11 Group NO. 27?

12 MR. EMRICK: Here. City of Antioch,
13 20 minutes, half an hour. Matthew Emrick, City of
14 Antioch.

15 CO-HEARING OFFICER DODUC: And 28?

16 29?

17 And I know that Mr. Brodsky has requested to
18 do his on Tuesday.

19 Mr. Jackson intends to cross-exam for about
20 30 minutes or so. So at most we'll get to today is
21 Mr. Jackson, but I'm hoping to break no later than 3:30
22 today. So we'll see.

23 Unless anyone objects?

24 CO-HEARING OFFICER MARCUS: I was just
25 surprised.

1 CO-HEARING OFFICER DODUC: This is the kinder,
2 gentler Tam.

3 With that, then, we will now turn to Group 25,
4 Contra Costa County.

5 --o0o--

6 CROSS-EXAMINATION

7 MR. SIPTROTH: Good afternoon. Stephen
8 Siptroth for Contra Costa and Contra Costa Water Agency.

9 I can go through the list of areas that I'll
10 cover with the questions, but my questioning will be
11 very brief.

12 So I want to talk -- or ask some questions
13 about Rio Vista flows and then flows at Sutter and
14 Steamboat Sloughs, the application of the Army Corps of
15 Engineers inflows at Clifton Court Forebay to the
16 project, just a question about south of Delta storage,
17 and I just have a clarifying question for Mr. Sahlberg.

18 Mr. Sahlberg, in your testimony, DOI 4, I
19 believe on page 2, you list the original facilities of
20 the Central Valley project.

21 Contra Costa Canal was not listed, but just
22 for clarification, is it your understanding that
23 Contra Costa Canal was one of the original facilities?

24 WITNESS SAHLBERG: Yes, it is.

25 MR. SIPTROTH: Thank you.

1 Ms. Sergeant, did I pronounce your name
2 correctly?

3 WITNESS SERGENT: It's close enough.

4 MR. SIPTROTH: Sergeant, okay. I want to get
5 it right.

6 It's Contra Costa's understanding that the
7 modeling for the California WaterFix project included an
8 input for Rio Vista flow criteria of 3,000 CFS from
9 January to August. Is that your understanding?

10 WITNESS SERGENT: Specific numbers -- with
11 regard to the specific different flow criteria, I would
12 have to refer to the list of the criteria that's the
13 modeling criteria. I'm not...

14 MR. SIPTROTH: Okay. Are you aware of any --
15 does DWR intend to propose a permit term that would add
16 flow criteria for January to August at Rio Vista?

17 WITNESS SERGENT: I believe the same reply as
18 before. We're not, right now, prepared to propose any
19 flow criteria at this time. That will be the result of
20 this hearing process.

21 MR. SIPTROTH: And, Mr. Sahlberg, is the
22 bureau proposing any flow criteria for January to August
23 of Rio Vista?

24 WITNESS SAHLBERG: No.

25 MR. SIPTROTH: All right. Thank you.

1 Ms. Sergeant, without -- currently the
2 State Water Project can typically divert 66 --
3 6,680 cubic feet per second most of the year at the
4 South Delta pumps; is that correct?

5 WITNESS SERGENT: Generally, there are
6 provisions in the Corps of Engineers permit that will
7 allow for increased diversions depending the San Joaquin
8 River inflow, but that's the extent of my knowledge with
9 respect to the Corps part.

10 MR. SIPTROTH: Thank you.

11 And if the California WaterFix change petition
12 is approved, that would allow for 9,000 CFS to be
13 diverted at the North Delta intakes; is that correct?

14 WITNESS SERGENT: Well, it would depend on the
15 scenario. The design capacity of three intakes is
16 9,000 CFS. But as there's been extensive testimony,
17 it's not proposed to be used at 9,000 CFS at all times.

18 MR. SIPTROTH: Okay. And would that point of
19 diversion be at all limited by the Army Corps of
20 Engineers permit, the current permit?

21 WITNESS SERGENT: I believe Mr. Leahigh
22 already addressed this one. It was his understanding
23 that it would not necessarily relate to the new intakes.

24 MR. SIPTROTH: Okay. Thank you.

25 So unless there's a new permit term limiting

1 total diversions from all points of diversion, wouldn't
2 it be possible for the State Water Project to export up
3 to 10,300 cubic feet per second for both the North Delta
4 intakes and the South Delta intakes under its water
5 rights?

6 WITNESS SERGENT: Under its current water
7 rights, we can divert up to 10,350 CFS at banks.

8 The combined maximum diversion from the Delta
9 will not change. So with the new facilities, we would
10 also able to divert a combined 10,350 CFS if all the
11 terms and conditions of the permits are being met.

12 MR. SIPTROTH: But currently, the Army Corps
13 of Engineers permit limits your diversions to 6,680,
14 correct?

15 WITNESS SERGENT: At times, yes.

16 MR. SIPTROTH: Yes. Thank you.

17 And so if the California WaterFix project is
18 approved, the State Water Project could export more than
19 the current limit of 6,680 cubic feet per second?

20 WITNESS SERGENT: Again, the limit in the
21 Corps permit is 6,600 -- well, 6680 CFS. At times,
22 there are other times when the diversions can exceed
23 that depending on San Joaquin River inflow. And it is
24 true that with the -- one of the purposes of the new
25 intakes is to be able to capture some of those excess

1 flows that occur on the Sacramento side of the Delta.

2 MR. SIPTROTH: So if the change petition is
3 approved, the State Water Project could export more than
4 6,680 cubic feet per second, most of the --

5 CO-HEARING OFFICER DODUC: Let me help.

6 The change petition request or any subsequent
7 approval thereof, does that negate the current
8 obligations with respect to the Corps' requirement?

9 WITNESS SERGENT: It does not.

10 CO-HEARING OFFICER DODUC: Thank you.

11 MR. SIPTROTH: Thank you.

12 And so what I was trying to get at was we have
13 a Corps requirement that applies to the diversions from
14 the South Delta, and that same requirement will not
15 apply to the -- the North Delta diversions. So adding
16 the North Delta diversions increases the amount of water
17 that can be exported up and -- potentially up to the
18 full 10,300 CFS; is that correct?

19 WITNESS SERGENT: At times.

20 MR. SIPTROTH: Thank you.

21 Contra Costa County raised concerns, I believe
22 in its comments on some of the environmental documents,
23 that project-related flow reductions below the
24 North Delta diversion facilities could potentially
25 impact out-migrating salmon using Sutter and

1 Steamboat Sloughs.

2 Has DWR considered whether permit terms should
3 be proposed to add flow requirements for Sutter and
4 Steamboat Sloughs to ensure that out-migrating salmon
5 using those routes are not impacted by the project?

6 CO-HEARING OFFICER DODUC: The answer is no.

7 Move on, please.

8 MR. SIPTROTH: Thank you.

9 Under its -- under its -- if the change
10 petition is approved and DWR were later to create south
11 of Delta storage, would the State Water Project be able
12 to divert water from the Delta to storage south of the
13 Delta under its --

14 WITNESS SERGENT: Can you restate the first
15 part of that?

16 MR. SIPTROTH: Yeah, I'm sorry.

17 If after -- if this change petition is
18 approved, and if at some point in the future new south
19 of Delta storage is constructed by the department, would
20 DWR's water rights allow it to divert water to storage
21 that it exports from the Delta?

22 MR. MIZELL: Objection as to vague. Where
23 would storage be located? It would be within the places
24 of use for the Delta permits, and probably a host of
25 other technical questions would need to be answered

1 before we could properly weigh in on that.

2 MR. SIPTROTH: Are you able the answer if we
3 limit it to storage developed within the place of use?

4 WITNESS SERGENT: Well, I can say that the
5 project is not proposing the construction of any new
6 storage facilities. And if such facilities were
7 proposed, there would be a whole process of review that
8 would have to occur before anything was done.

9 The -- the department's permits currently
10 provide that we can divert certain quantities from the
11 Delta if all those terms and conditions are met. Those
12 flows are currently diverted south of the Delta and
13 placed into storage at our existing south of Delta
14 storage facilities.

15 MR. SIPTROTH: So are you saying that DWR
16 could divert water to storage if the change petition is
17 approved?

18 WITNESS SERGENT: Diversion to storage is a --
19 currently authorized in our -- in our permits. And
20 so -- I mean, we can divert water to storage now, and I
21 assume we can divert water to storage in the future.
22 I'm not speculating as to what new storage facility
23 might be constructed by the project.

24 MR. SIPTROTH: Okay. We talked -- I'm sorry
25 for getting back to this. We talked already about the

1 Army Corps' limit on -- that applies to diversions into
2 Clifton Court Forebay in South Delta. That limit we
3 talked about would not apply to the North Delta --
4 diversions from the North Delta intakes.

5 Do you know whether the Army Corps of
6 Engineers was consulted about whether or not that limit
7 would apply?

8 WITNESS SERGENT: I do not know.

9 MR. SIPTROTH: Okay. I think that's all I
10 have. Thank you very much.

11 Thank you for your time, Mr. Sahlberg.

12 CO-HEARING OFFICER DODUC: Thank you.

13 Group No. 26?

14 27, City of Antioch.

15 MR. EMRICK: Good afternoon, board panel.

16 --o0o--

17 CROSS-EXAMINATION

18 MR. EMRICK: The first questions are for
19 Mr. Sahlberg.

20 CO-HEARING OFFICER DODUC: Just a rough area
21 that you'll be exploring?

22 MR. EMRICK: Yeah. What I'm going to talk
23 about is relation of 1641 to City of Antioch. I'll talk
24 a little bit about -- ask questions about Antioch's 1968
25 agreement; then we'll talk a little bit about

1 Contra Costa Water District's agreement; and then some
2 questions in Ms. Sergent's testimony regarding historic
3 salinity and some conclusions on the agreements that are
4 set forth in her testimony.

5 CO-HEARING OFFICER DODUC: All right. Thank
6 you.

7 MR. EMRICK: I'm going to start with
8 Mr. Sahlberg.

9 Are you -- Mr. Sahlberg, are you aware of any
10 settlement agreement or mitigation agreement between
11 Department of Interior, Bureau of Reclamation, and the
12 City of Antioch?

13 WITNESS SAHLBERG: I'm not aware of any such
14 agreement.

15 MR. EMRICK: And are you aware of the 1968
16 agreement between the City of Antioch and the Department
17 of Water Resources?

18 WITNESS SAHLBERG: I'm sorry. I'm not aware
19 of that agreement.

20 MR. EMRICK: So if I was ask to ask you if you
21 know if the Bureau of Reclamation or the Department of
22 Interior was a party to that agreement, you wouldn't
23 know?

24 WITNESS SAHLBERG: I wouldn't know.

25 MR. EMRICK: Okay.

1 Then I'll turn it over to you, Ms. Sergeant.

2 You've made conclusions regarding harm, injury
3 to legal user based on D-1641 compliance, correct?

4 WITNESS SERGENT: Among other things.

5 MR. EMRICK: And are you aware that with
6 respect to the City of Antioch that DWR doesn't operate
7 to make sure that there's compliance with M&I standards
8 at Antioch?

9 WITNESS SERGENT: I'm aware that the
10 compliance location is at Contra Costa.

11 MR. EMRICK: Okay. And do you know why DWR
12 doesn't operate to under D-1641 to comply with M&I
13 standards at Antioch?

14 WITNESS SERGENT: That's -- no, I do not.

15 MR. EMRICK: Are you familiar with the 1968
16 agreement between the City of Antioch and DWR?

17 WITNESS SERGENT: Yes.

18 MR. EMRICK: How are you familiar with that
19 agreement?

20 WITNESS SERGENT: I have read the agreement
21 and reviewed it as part of my...

22 MR. EMRICK: Were you involved in any of the
23 negotiations between DWR and the City of Antioch over
24 the past five or six years?

25 WITNESS SERGENT: I was not.

1 MR. EMRICK: In your testimony, DWR-53 --
2 maybe we can put that up on the screen. Page 19, second
3 sentence, line 17.

4 You state that: "It is my understanding that
5 the 1968 Antioch agreement mitigates water quality
6 effects to Antioch for the State Water Project
7 operations by reimbursing Antioch for substitute water
8 purchases when water is unusable due to its quality at
9 its San Joaquin River diversion."

10 Is it true that DWR only compensates Antioch
11 one-third of the cost of the city's purchase of water,
12 substitute water? Do you know?

13 WITNESS SERGENT: DWR -- based on the
14 agreement, DWR compensates Antioch for the full amount
15 of what is determined to be the water supply deficiency.
16 And that water supply deficiency is determined based on
17 an equation in one of the provisions of the agreement.

18 MR. EMRICK: So it's your testimony, your
19 understanding that Antioch's fully compensated for all
20 substitute purchases of water that it makes by DWR?

21 WITNESS SERGENT: It's compensated for the
22 full water supply deficiency that's determined to be a
23 result of State Water Project operations as defined in
24 that equation.

25 MR. EMRICK: So if I can maybe just clarify

1 for the record.

2 So there's a determination in the contract, is
3 there not, as to what the contribution is by Department
4 of Water Resources operation of the State Water
5 Project's impacts to Antioch; is that correct?

6 WITNESS SERGENT: I would say that there is a
7 provision that defines how the water supply deficiency
8 is calculated.

9 MR. EMRICK: In fact, there is a calculation,
10 correct?

11 WITNESS SERGENT: That's correct.

12 MR. EMRICK: That's right.

13 What I'm trying to clarify is the city
14 purchases, during times it can't use its own water
15 rights because of deficient water quality, it purchases
16 water primarily from Contra Costa Water District
17 exclusively. And there's a calculation, a
18 determination, is there not, in the 1968 agreement that
19 determines what proportion of that purchase is due to
20 adverse impacts from the State Water Project; is that
21 correct?

22 WITNESS SERGENT: Correct, there's a
23 calculation of the water supply deficiency. And then
24 subsequent in the agreement, there is a description of
25 the compensation for that deficiency.

1 MR. EMRICK: And so if I said that that
2 calculation basically provides that DWR pays one-third
3 the cost of purchasing substitute water, would -- would
4 that be correct or would that be your understanding?

5 WITNESS SERGENT: Well, I believe I would
6 characterize it as the agreement characterizes the
7 deficiency that DWR is responsible for as one-third of
8 the amount of water that is determined to be purchased
9 in those number of days, and then DWR compensates fully
10 for that component.

11 MR. EMRICK: And that proportion that DWR
12 compensates for, that's related to a calculated or
13 determined proportion of harm to Antioch's water rights
14 that was anticipated from the State Water Project?

15 WITNESS SERGENT: I was not involved in the
16 initial negotiations of this contract, so I can't say
17 exactly what went into determining that. But I can
18 assume that both the city and DWR agreed that that was
19 the reasonable representation of the department's
20 responsibility.

21 MR. EMRICK: Maybe it would be easier if I put
22 the 1968 agreement up. It's DWR-304. If I could have
23 you go to page 2, the first "Whereas."

24 "Whereas, in the future, the average number of
25 days per year that usable river water will be available

1 to the city will be caused to decrease, and such
2 decrease will be due in part to the operation of the
3 state water resources development system as defined in
4 Section 12931 of the water code."

5 So in this recital, this is the -- the basis
6 for the determination for the State Board making a
7 payment to help Antioch purchase substitute water; is
8 that correct?

9 WITNESS SERGENT: I believe you meant to
10 say --

11 MR. BERLINER: Objection.

12 WITNESS SERGENT: -- you meant to say "the
13 department" in your question.

14 CO-HEARING OFFICER DODUC: Yes, not the State
15 Board.

16 MR. EMRICK: Right. I'm sorry. Yes, the
17 department.

18 WITNESS SERGENT: I'm assuming that this was a
19 consideration again. I was not involved in the original
20 negotiation, but it appears that there was consideration
21 that some of the degradation may be due to -- or the
22 change may be due to the State Water Project and some
23 due to other causes.

24 MR. EMRICK: Here's where I'm trying to go
25 with this.

1 CO-HEARING OFFICER DODUC: Please, yes.

2 MR. EMRICK: Right now, the -- through
3 Mr. Leahigh's statement -- and it's just a matter of
4 fact that the DWR does not operate its system to meet
5 M&I standards at the City of Antioch.

6 Do you have an understanding of that? Are you
7 aware of that?

8 WITNESS SERGENT: As I said, I understand that
9 the compliance location is Contra Costa, yes.

10 MR. EMRICK: And I think Mr. Leahigh's
11 statement was that the reason they don't do that is
12 because they have this agreement with the City of
13 Antioch. Is that your understanding?

14 WITNESS SERGENT: If that's his testimony,
15 I'll...

16 MR. EMRICK: Well, you've made the
17 determination that there's not going to be any harm to
18 legal users. And I'm just trying to understand, since
19 we've had testimony that the Department of Water
20 Resources doesn't operate M&I standards to Antioch, you
21 have an agreement here saying that there's going to be
22 impacts from the present operations.

23 How did you make a determination with respect
24 to Antioch that there won't be any harm from the
25 WaterFix project?

1 WITNESS SERGENT: One element was the modeling
2 done by Dr. Nader Tehrani showed that there was no
3 increase -- or I should say decrease in the number of
4 days when water would be available. Based on operation
5 of the WaterFix, it showed a very slight increase in the
6 number of days when water of that quality would be
7 available at Antioch. And, therefore, based on the
8 modeling, it didn't show -- it didn't indicate that
9 there would be an impact associated with the operation
10 of this facility.

11 In addition, we have an agreement that does
12 provide for compensation when water of that quality is
13 not available.

14 So I didn't see anything in what I reviewed in
15 the information available that would indicate there
16 would be an impact to Antioch associated with these
17 facilities.

18 MR. EMRICK: Thank you very much.

19 I'm just trying to again clarify. It's based
20 upon the modeling and based upon the existence of this
21 agreement that you made a determination that there's no
22 legal injury to Antioch. Anything else?

23 WITNESS SERGENT: That was primarily the two
24 that...

25 MR. EMRICK: Okay. Were you involved at all

1 with the March 2016 agreement between DWR and
2 Contra Costa Water District?

3 WITNESS SERGENT: I was not.

4 MR. BERLINER: Objection. Relevance.

5 MR. EMRICK: Sure. The relevance is that
6 the -- and I can show you -- is that the --

7 CO-HEARING OFFICER DODUC: Well, before you
8 get to that, she answered she was not involved.

9 MR. EMRICK: Right.

10 CO-HEARING OFFICER DODUC: So are you planning
11 on exploring this further?

12 MR. EMRICK: Yeah, I'm going to ask the second
13 question.

14 CO-HEARING OFFICER DODUC: Which is?

15 MR. EMRICK: "Are you familiar with the terms
16 of this agreement?"

17 WITNESS SERGENT: I have read it.

18 CO-HEARING OFFICER DODUC: All right. Now you
19 may explain the relevance.

20 MR. EMRICK: Thank you.

21 Under the agreement, Section 6.6, Antioch is
22 actually a third-party beneficiary to this agreement in
23 that DWR was -- maybe we can put that up. It's DWR-334,
24 and it's page 26.

25 CO-HEARING OFFICER DODUC: Well, here we go.

1 All right. Please proceed.

2 MR. EMRICK: At the very bottom, 6.6, there's
3 a provision in here in which Department of Water
4 Resources agrees that, within 30 days following the
5 agreement, it would meet with Antioch and diligently
6 pursue negotiations with Antioch regarding potential
7 additional impacts to water quality.

8 Do you know whether that ever occurred?

9 WITNESS SERGENT: I do believe that DWR has
10 had discussions with Antioch. I have not been involved
11 in those.

12 MR. EMRICK: Do you have any understanding as
13 to whether it was actually negotiations?

14 WITNESS SERGENT: I don't. I haven't been
15 involved in them at all.

16 MR. EMRICK: Okay. I think you testified, if
17 I'm not mistaken, that with respect to the operation of
18 the new CCWD agreement, that there are going to be some
19 water quality impacts from the operation of that
20 agreement; is that correct?

21 WITNESS SERGENT: I don't believe I did
22 testify to that.

23 MR. EMRICK: I think it's in your testimony,
24 then. I believe it's DWR-512. Don't put that up. I'm
25 going to stick with your testimony. I'm just trying to

1 find the location of it.

2 WITNESS SERGENT: Are you referring to my
3 reference to Dr. Nader Tehrani's analysis of the --

4 MR. EMRICK: Correct. And that testimony is
5 on page 23, starting at line 17, and it does reference
6 Dr. Tehrani's Exhibit 12.

7 CO-HEARING OFFICER DODUC: Testimony, not the
8 PowerPoint?

9 MR. EMRICK: Not the PowerPoint. Testimony,
10 DWR-53, page 23.

11 The statement is that: "As discussed in the
12 testimony of Dr. Nader Tehrani and DWR Exhibit 512, a
13 modeling analysis of two possible worst-case scenarios
14 representing two extreme implementations of the CCWD
15 agreement were done to demonstrate possible changes in
16 water quality. The analysis shows that changes in
17 monthly EC and for Scenario A show the largest increase
18 in EC at about 2 percent, and for Scenario B, the
19 largest increase, 4 to 5 percent, mostly in the western
20 Delta."

21 Antioch's diversion is in the western Delta;
22 is that correct?

23 WITNESS SERGENT: That's correct.

24 MR. EMRICK: And Antioch's diversion is
25 downstream of Rock Slough, which is one of CCWD's

1 diversions; is that correct?

2 WITNESS SERGENT: That's correct as well.

3 MR. EMRICK: All right.

4 WITNESS SERGENT: Understand.

5 MR. EMRICK: And then if I could have us just
6 briefly go back to DWR-304, which is the 1968 agreement.

7 While you're doing that, I'll ask one more
8 question about the CCWD agreement. Do you know what the
9 water quality -- what the quality of the water that will
10 be delivered to CCWD is under that agreement?

11 WITNESS SERGENT: The water quality that is
12 the -- the quality of the water that is conveyed through
13 the California WaterFix facility? Is that what you're
14 referring to?

15 MR. EMRICK: Yes. That's the subject of this
16 agreement is guaranteed to CCWD.

17 WITNESS SERGENT: I just wanted to clarify we
18 are not providing water to Contra Costa --

19 MR. EMRICK: But you are --

20 WITNESS SERGENT: -- under the agreement.

21 MR. EMRICK: But you are agreeing to provide
22 water of a certain quality?

23 WITNESS SERGENT: We are agreeing to convey
24 water. And there is a provision, I understand, in the
25 agreement that says to the extent we can, that we'll

1 provide water quality of a 30 milligrams per liter at
2 that location.

3 MR. EMRICK: And under the Antioch
4 agreement -- if I could have -- scroll down a little bit
5 on page 1. It's up there right now. Stop.

6 Under the Antioch agreement, compensation is
7 only given to Antioch when water quality exceeds
8 250 parts per million; is that correct?

9 WITNESS SERGENT: That's correct, based on
10 Antioch's historic use and water quality available to it
11 understand its water right.

12 MR. EMRICK: So under the CCWD agreement at
13 30 parts per million, it's much better water quality
14 than Antioch's guaranteed; is that correct?

15 WITNESS SERGENT: That is an indication of the
16 water quality of whatever component is to be conveyed to
17 California WaterFix facilities. It is not an average
18 water quality that's available to Contra Costa.

19 The agreement does not agree to convey all of
20 Antioch or Contra Costa's water through the facility.
21 They will still be diverting at their other locations.
22 So I can't say what is available. But I can say that
23 the two parties are very differently situated in what
24 they have historically had available to them at their
25 points of diversion.

1 The modeling shows that there will be no -- at
2 least no change or no decrease in the number of days
3 that water would be available at Antioch as a result of
4 operating the California WaterFix.

5 MR. EMRICK: What are you basing your
6 statement that water available at Antioch historically
7 was very different than that based at Contra Costa Water
8 District?

9 WITNESS SERGENT: Based on the representations
10 in both original agreements as well as the location of
11 the two very different diversion locations.

12 MR. EMRICK: Isn't the new CCD agreement
13 primarily replacing the 1967 agreement between DWR and
14 CCWD for water at Mallard Slough?

15 WITNESS SERGENT: The agreement will
16 replace -- if the WaterFix facilities are constructed,
17 it's my understanding that the new Contra Costa
18 agreement would replace the Contra Costa agreement, the
19 1967 Contra Costa agreement.

20 MR. EMRICK: And isn't Mallard Slough very
21 similarly situated to Antioch?

22 WITNESS SERGENT: That's not my understanding,
23 but I'm -- I can't represent what the historic situation
24 was. All I can go by is what was represented in the two
25 different agreements.

1 MR. EMRICK: If I could have you scroll down
2 in the "Whereas" part here, "Recitals." I'm sorry. The
3 other way.

4 The first whereas, just for the record, says
5 that for over 100 years, as of 1968, water was diverted
6 from San Joaquin River for municipal and industrial use
7 in and around the area which is now the corporate limits
8 for the city.

9 So it's your understanding that at least for a
10 hundred years prior to this agreement, Antioch was able
11 to divert water under its water rights; is that correct?

12 WITNESS SERGENT: That's correct. And it says
13 further down that the average number of days that that
14 was available was 208. And in certain years it was
15 less, and in certain years it was more.

16 MR. EMRICK: Absolutely.

17 If I can have -- scroll down to page 6 of the
18 Antioch agreement.

19 MS. McCUE: What exhibit number is that?

20 MR. EMRICK: DWR-304.

21 We'll scroll down to Section 10.

22 Section 10 provides that "The state agrees
23 that other municipal and industrial entities in the
24 Delta will not be granted compensation for damages
25 caused by the state water resources development system

1 under substantially more favorable terms than those used
2 to compensate the city hereunder."

3 Are you familiar with that?

4 MR. MIZELL: I'm going to object to this line
5 of questioning at this point.

6 MR. EMRICK: Sure.

7 CO-HEARING OFFICER DODUC: One at a time.

8 Mr. Mizell?

9 MR. MIZELL: I believe it's quite clear that
10 Mr. Emrick is looking for a contract dispute to be
11 brought into the State Water Board's purview. If he has
12 a problem with the contract and DWR's implementation of
13 it, he has other remedies he can pursue. Otherwise, I
14 don't see the relevance of Provision 10 to this hearing.

15 CO-HEARING OFFICER DODUC: Mr. Emrick?

16 MR. EMRICK: Sure.

17 So Antioch -- this is for the purposes of --
18 it's not testimony. This is for the purpose of
19 clarifying my opposition to the objection and just to
20 show the board where I'm going.

21 They do not -- "they" being DWR -- does not
22 operate a system to provide M&I quality water under
23 D-1641 to Antioch. The only thing that is in their way
24 that they say they don't have harm is this agreement.

25 This agreement allows Antioch -- or was

1 negotiated to allow Antioch to have any benefits of
2 another agreement that was negotiated. This all goes to
3 harm. So we're getting a new project, very uncertain as
4 to what the results of that's going to be with respect
5 to water quality. There was testimony that there's
6 actually increases in bromides.

7 One of our remedies, one of the things we have
8 to help us against that harm is Section 10 to get
9 basically what CCWD got, which is --

10 CO-HEARING OFFICER DODUC: That's fine. You
11 don't need to go into detail. I appreciate the context.
12 I certainly appreciate your point. It is now in the
13 record.

14 Go ahead and finish up your line of
15 questioning to Ms. Sergeant.

16 MR. EMRICK: Sure. And then the second part
17 of that is --

18 CO-HEARING OFFICER DODUC: There's no need.
19 Just ask her the question.

20 MR. EMRICK: I was just going to say, the
21 second part of that is, though, that your testimony is
22 that this is actually -- the operation of this agreement
23 will actually lead to higher EC downstream of where this
24 is going to take place. So Antioch will be placed in
25 the situation where we're harmed because we don't get

1 the benefits of the agreement and we're harmed --

2 CO-HEARING OFFICER DODUC: What is your
3 question to Ms. Sergeant?

4 MR. EMRICK: Did you take any of this into
5 account when you were making determination of no harm to
6 Antioch?

7 WITNESS SERGENT: I have to clarify one thing
8 first before I finish the rest of the answer.

9 You stated that I testified that there would
10 be a change or a degradation of water quality as a
11 result of the implementation of that agreement. I
12 believe that misstates my testimony.

13 In my testimony, I summarized
14 Dr. Nader Tehrani's discussion that said he modeled two
15 extreme implementations of those. And even at the
16 extreme implementation, there were changes on the order
17 of 2 to 3 percent or, at the most, 4 to 5 percent,
18 however, they would likely be less.

19 So, in my opinion, I mean -- and I -- and in
20 discussing it with Dr. Nader Tehrani, that is within the
21 modeling error. And so it doesn't appear that there
22 will be an impact to water quality associated with
23 operation of -- or implementation of the agreement.

24 MR. EMRICK: So you agree with Dr. Tehrani
25 that -- and his testimony that some of these showings of

1 harm and increased -- increased EC is just -- goes to
2 the model or problems with the model, not --

3 WITNESS SERGENT: I didn't say it was a
4 problem with the model. I said he modeled two extreme
5 implementations. And even at the extreme
6 implementations, the models showed very small changes,
7 and it -- his assessment was -- is that it would likely
8 be less. But he tried to model the most extreme
9 implementations that he could. Therefore, it's likely
10 that operation of the project will not result in impacts
11 to water quality.

12 MR. EMRICK: What basis -- what is the basis
13 for your determination that a small increase in EC or
14 chloride would not necessarily lead to harm to a
15 domestic drinking water system of 100,000 people?

16 WITNESS SERGENT: All I can say is that -- I
17 would say that a modeled change of an extreme
18 implementation that showed only a couple of percent
19 change would indicate that it could be operated without
20 impacting water quality and it would not affect our
21 ability to continue to meet the municipal objectives.

22 In addition, the modeling of EC showed that
23 there was no decrease -- in fact, a slight increase --
24 in the number of days in which the EC of 250 could be
25 met in Antioch. It was close enough that I would say

1 essentially -- I would also characterize that as
2 essentially that's the same as the no-action
3 alternative.

4 MR. EMRICK: What about with respect to
5 bromides?

6 WITNESS SERGENT: Well, bromides -- can I get
7 back and just reference the testimony that we've done
8 earlier?

9 Bromides were estimated as a function of EC,
10 function of chloride. EC was the primary factor
11 evaluated. If there's no change in the EC or a slight
12 improvement in the EC, the correlation would be there
13 would likely be no change or slight improvement in
14 bromides.

15 MR. EMRICK: But with the -- the analysis and
16 using 250 chlorides and the analysis in the EIR,
17 doesn't -- doesn't that indicate that actually the --
18 the thresholds of significance that are set forth in the
19 EIR will be exceeded for bromides by this project?

20 WITNESS SERGENT: I didn't review any of those
21 issues related to the EIR. All I can say is that we
22 tried to evaluate potential changes due to operation of
23 this project on that location and it did not show any
24 change at the location of Antioch.

25 MR. EMRICK: Now, with respect to your

1 testimony and legal injury argument, does the department
2 admit, do you admit, that the initial burden of
3 showing -- or showing the absence of harm to another
4 legal user of water is initially on the petitioner, on
5 DWR?

6 WITNESS SERGENT: I believe the purpose of our
7 case in chief is to demonstrate that we have done
8 analysis to demonstrate or to show that the board can
9 find there is no injury with the operation of the
10 project.

11 MR. EMRICK: Have you done any independent
12 analysis yourself to determine whether or not the
13 WaterFix project or East Bay MUD facilities that are
14 referenced in the Contra Costa Water District agreement,
15 whether they can actually deliver 30 parts per million
16 water to Antioch -- excuse me -- to CCWD?

17 WITNESS SERGENT: I have not done that
18 analysis.

19 MR. EMRICK: I think that's all I have. Thank
20 you.

21 CO-HEARING OFFICER DODUC: Thank you.

22 Group 28?

23 29?

24 Mr. Brodsky, he's 30. And he will do his on
25 Tuesday.

1 And that gets to Mr. Jackson.

2 Mr. Jackson?

3 MR. JACKSON: Here on Tuesday.

4 CO-HEARING OFFICER DODUC: Let's do it today.

5 MR. JACKSON: Okay. 45 minutes.

6 CO-HEARING OFFICER DODUC: And we will finish
7 when Mr. Jackson finishes. No pressure.

8 As a reminder, we will reconvene on Tuesday in
9 Byron Sher, and we will begin -- assuming that
10 Mr. Jackson completes his cross-examination today, we
11 will start with Mr. Aladjem, representing Group No. 10,
12 and then Mr. Brodsky, 30. And then we'll resume in
13 order.

14 Mr. Jackson, before you begin, identify,
15 please, the areas you'll be exploring.

16 MR. JACKSON: Sure. The areas that I will be
17 exploring are the purpose of segments of the CVP Act,
18 the purpose segments of the State Water Project, the
19 hierarchy involved in those acts, and how the -- and to
20 establish the facts that are necessary.

21 Then I will move to a discussion about
22 Footnote 2, which was in Ms. Sergent's testimony. Then
23 I will deal with the DWR water rights for the
24 State Water Project, the permits, the authorized Delta
25 point of diversion, the -- the requirements as both of

1 these water rights experts understand them for requested
2 changes to add points of diversion, the permitted rate
3 of diversion, the season of use. Pretty much going
4 straight through No. 53 of DWR.

5 CO-HEARING OFFICER DODUC: Okay. All right.
6 We'll let you get started, and we'll see how it goes.

7 We may break at an appropriate time.

8 MR. JACKSON: Okay.

9 MR. OCHENDUSZKO: And, Mr. Jackson, which
10 parties or groups, entities, are you representing today?

11 MR. JACKSON: I'm representing the California
12 Sportfishing Protection Alliance, the California Water
13 Impact Network, Aqua Alliance, and the counties of
14 Plumas and Trinity.

15 MR. OCHENDUSZKO: Thank you.

16 MR. JACKSON: I'll start with Mr. Sahlberg
17 since he hasn't had a chance to answer questions lately.

18 --o0o--

19 CROSS-EXAMINATION

20 MR. JACKSON: My first question is: What are
21 the legal purposes of this Central Valley Project?

22 MR. BERLINER: Objection. Relevance.

23 MR. JACKSON: They -- the way they deal with
24 the California WaterFix is dependent upon -- and their
25 water is dependent upon how they interpret the hierarchy

1 of the purposes of use, salinity control, for instance,
2 which is going to be changed by -- to some extent, by
3 the operation of the California WaterFix.

4 CO-HEARING OFFICER DODUC: Do we need to -- do
5 we need to -- can you go straight to your question of
6 hierarchy rather than ask foundational questions?

7 MR. JACKSON: Well, yes, I can. I've been
8 sitting here for a long time in this hearing. I haven't
9 heard the questions of what are -- I haven't heard any
10 questions in regard to generally what is the purpose of
11 are the Central Valley Project, and I think it's
12 critical to whether or not the California WaterFix is
13 going to improve the situation or is going to harm the
14 situation.

15 MR. BERLINER: I would respectfully disagree.
16 We've had extensive testimony on the obligations of
17 projects meet salinity control in Delta, fish and
18 wildlife, water supply, flood control, et cetera.

19 It's all clearly spelled out in federal law.
20 I don't know why we need to have testimony on things the
21 board is well aware of.

22 CO-HEARING OFFICER DODUC: All right. I'm
23 going to ask Mr. Jackson to skip those foundational
24 questions.

25 And I will expect, Mr. Berliner and Mr. Mizell

1 and Ms. Aufdemberge, that you will not object that he
2 has not laid the foundation.

3 MR. BERLINER: We agree. In this area,
4 absolutely.

5 MR. JACKSON: All right. Thank you.

6 Mr. Sahlberg, has the bureau done any analysis
7 of whether the California WaterFix will change storage
8 levels at Trinity Reservoir, to your knowledge?

9 WITNESS SAHLBERG: The modeling shows that
10 storage levels at Trinity Reservoir will not change.

11 MR. JACKSON: In regard -- and who did that
12 modeling?

13 WITNESS SAHLBERG: I believe Mr. Munevar did.

14 MR. JACKSON: All right. Does that include
15 the 50,000 acres for Humboldt County area of origin
16 right?

17 WITNESS SAHLBERG: You'd have to ask
18 Mr. Munevar.

19 MR. JACKSON: Do you know whether or not it
20 includes the winter's water rights of the Hoopa tribe?

21 WITNESS SAHLBERG: You'd have to ask
22 Mr. Munevar.

23 MR. JACKSON: Do you know whether it includes
24 the winter's rights of the Yurok tribe?

25 WITNESS SAHLBERG: You'd have to ask

1 Mr. Munevar.

2 MR. JACKSON: Has the bureau analyzed the
3 effects of the CWF -- if I call it that shorthand -- on
4 temperatures of Trinity Reservoir?

5 WITNESS SAHLBERG: You'd have to ask

6 Mr. Munevar.

7 MR. JACKSON: Has the bureau analyzed the
8 effects of the CWF on riparian rights of the Trinity
9 watershed?

10 WITNESS SAHLBERG: Not that I'm aware of.

11 MR. JACKSON: Has the bureau analyzed the
12 effects of the CWF on riparian users south of
13 Shasta Reservoir?

14 WITNESS SAHLBERG: Users south of
15 Shasta Reservoir in-basin demands, they will continue to
16 be met with or without the project.

17 MR. JACKSON: Yeah, I understand that there's
18 a mantra that they will continue to be met. My question
19 is different.

20 Has the bureau done anything to analyze the
21 effects on riparian users below Shasta Dam and above the
22 Delta?

23 WITNESS SAHLBERG: Not that I'm aware.

24 MR. JACKSON: Has the bureau analyzed the
25 effects of the CWF on groundwater users in the

1 Sacramento River Basin?

2 WITNESS SAHLBERG: Not that I'm aware.

3 MR. JACKSON: Has the bureau analyzed the
4 effects of the CWF on pre-1914 water rights holders in
5 the Sacramento Basin?

6 WITNESS SAHLBERG: Pre-'14 water right
7 holders, our in-basin demand will continue to be met
8 under the project.

9 MR. JACKSON: The question again was: Did the
10 bureau do any analysis in regard to the effects of the
11 CWF on those water rights holders?

12 MS. AUFDEMBERGE: I just want to make clear.
13 He's asking about the bureau, and I think Mr. Sahlberg
14 is answering him for himself personally as the water
15 rights officer. So I just want to make sure the record
16 is clear.

17 MR. JACKSON: Well, it's not clear to me. Is
18 Mr. Sahlberg not representing the bureau?

19 MS. AUFDEMBERGE: He's here as the water
20 rights officer. And I think he's explained what his
21 charge was relevant to this project and what he's
22 considered and looked at in his analysis.

23 MR. JACKSON: Mr. Sahlberg, you came to some
24 conclusions as an expert that there would be no legal
25 injury to any of these categories of people, did you

1 not?

2 WITNESS SAHLBERG: To some of the categories,
3 yes.

4 MR. JACKSON: So how did you make that
5 decision if there was no analysis that you're aware of?

6 WITNESS SAHLBERG: I said to some categories.

7 MR. JACKSON: Which ones?

8 WITNESS SAHLBERG: The riparian downstream of
9 Shasta Dam and the pre-'14 appropriators in the
10 Sac Valley.

11 MR. JACKSON: And those were the only ones
12 that were analyzed, to your knowledge?

13 WITNESS SAHLBERG: There are in-basin demands
14 that will continue to be met under the WaterFix.

15 MR. JACKSON: Based upon a promise?

16 WITNESS SAHLBERG: Based upon how we operate
17 the projects.

18 MR. JACKSON: In your consideration coming to
19 the solution that there would be no legal injury to any
20 of these parties that have been mentioned, did you
21 consider the adaptive management program in relation to
22 legal injury?

23 WITNESS SAHLBERG: I looked at the modeling
24 results -- I reviewed the modeling results provided by
25 Mr. Munevar and discussed them with modelers, including

1 Ms. Kristin White, and came to the conclusion that there
2 would be no injury.

3 MR. JACKSON: And what operation did you use
4 to determine no injury?

5 WITNESS SAHLBERG: Looked at the results for
6 the -- both the initial operational range of H3-H4 -- I
7 believe that's what it called -- and then also the
8 boundaries, the Boundaries 1 and Boundaries 2.

9 MR. JACKSON: And what were the differences,
10 insofar as you remember them, between the -- in terms of
11 water diverted from the system between Boundary 1 and
12 Boundary 2?

13 MR. MIZELL: Objection. Asked and answered.

14 The differences in all the scenarios through
15 the modeling, we spent days discussing those graphs, and
16 we had an entire modeling panel answering questions
17 about it. I'm not sure why we're revisiting this issue
18 other --

19 MR. JACKSON: I'll tell you what the modeling
20 panel kept telling us; that there was a legal question,
21 and they weren't going to answer it.

22 CO-HEARING OFFICER DODUC: Go ahead,
23 Mr. Jackson.

24 MR. JACKSON: So how did you come to the
25 conclusion, without the analysis, that there would be no

1 injury to these different categories of people?

2 MR. MIZELL: Objection. To the extent that
3 we've previously answered that it's a legal conclusion,
4 I will reiterate our objection that it is a legal
5 conclusion.

6 CO-HEARING OFFICER DODUC: I want to hear from
7 Mr. Sahlberg how he -- he, as the expert testifying on
8 water rights, reached the conclusion that Mr. Jackson
9 asked.

10 WITNESS SAHLBERG: I reached the conclusion
11 that the information provided would support a conclusion
12 by the board that there will be no legal injury to water
13 right holders based on my review of the modeling results
14 provided by Mr. Munevar.

15 MR. JACKSON: So if Mr. Munevar's modeling
16 results did not include these categories or these
17 geographical areas, you have no basis to find that they
18 are not injured by this -- by the new project?

19 MR. MIZELL: Objection. Misstates the
20 evidence. I don't believe there's been any testimony
21 that the modeling excluded categories of water rights
22 holders. Although I would not be objecting to this
23 statement with regards to the Trinity watershed. I am
24 uncertain about that.

25 WITNESS SAHLBERG: Your question, please.

1 CO-HEARING OFFICER DODUC: Repeat the
2 question, Mr. Jackson.

3 MR. JACKSON: The question is: Insofar as the
4 categories of water users that I've asked about were not
5 covered by the modeling, what other information would
6 you use to come to the conclusion that there would be no
7 injury to the exercise of their water rights?

8 MR. MIZELL: Again, stating that the modeling
9 does not cover certain categories of water users is
10 misstating the evidence. So I object to that
11 characterization of our modeling testimony.

12 CO-HEARING OFFICER DODUC: Are you asserting
13 that your modeling testimony covered all potential
14 users?

15 MR. MIZELL: The modeling testimony analyzed
16 what would take place under the full range of
17 operational scenarios presented and discussed, as
18 Mr. Sahlberg has testified. In-basin users -- in-basin
19 uses, as Ms. Sergent has testified, includes all senior
20 water rights holders, diverters, on the system. So I
21 don't believe that's a correct characterization of the
22 modeling testimony.

23 CO-HEARING OFFICER DODUC: And the modeling
24 testimony upon which these witnesses drew their
25 conclusions of no injury is limited to those users that

1 were analyzed is what you're saying?

2 MR. MIZELL: I'm saying that the testimony
3 provided by these witnesses is that they relied upon a
4 review of the modeling. The modeling has been described
5 by the modeling panel as including all in-basin uses,
6 which includes in-basin water users. So to characterize
7 the modeling as not including any category of in-basin
8 water user is a mischaracterization of the modeling
9 testimony.

10 MR. JACKSON: I don't know exactly -- am I
11 allowed to cross-examine the attorney?

12 I don't believe that anybody has claimed up
13 until this point that anybody analyzed the effects on
14 groundwater in the Sacramento valley.

15 CO-HEARING OFFICER DODUC: I understood that.

16 I mean, Mr. Jackson just went through a list
17 and these witnesses -- or at least Mr. Sahlberg answered
18 no in terms of whether or not these particular users
19 were considered.

20 So, Mr. Mizell, I'm confused by your
21 objection.

22 MR. MIZELL: Mr. Jackson characterized the
23 modeling testimony, not the testimony of Mr. Sahlberg,
24 when he said that it excluded certain categories of
25 water users.

1 If Mr. Jackson would like to characterize
2 Mr. Sahlberg's testimony, we can discuss that. But his
3 question stated that the modeling did not include
4 riparian pre-'14 water users, and that's a misstatement.

5 And I'm not testifying; I'm clarifying my
6 objection for the board. So I object to the
7 characterization of my clarification as testimony.

8 CO-HEARING OFFICER DODUC: Mr. Jackson, could
9 you please rephrase your question without casting an
10 aspersion on the modeling?

11 MR. JACKSON: No. What's -- the point is, I
12 am again asking whether or not -- and I haven't -- I
13 haven't gotten...

14 Ms. Sergeant, you were involved in the 1991
15 groundwater transfer project in Butte County, weren't
16 you?

17 WITNESS SERGENT: 1991 transfer? I was
18 involved in the 1991 Drought Water Bank.

19 MR. JACKSON: That one, yeah.

20 WITNESS SERGENT: Yes.

21 MR. JACKSON: And the 1994 episode, right?

22 WITNESS SERGENT: That's correct.

23 MR. JACKSON: So, to your knowledge, did
24 anybody do groundwater modeling for those areas in
25 Butte County and Tehama County, on the east side of

1 Sacramento, to see whether or not increased water
2 captured in the Sacramento Valley either from the ground
3 or -- or from the streams would cause a decline in
4 water -- in the water table?

5 MR. MIZELL: Objection as to relevance, what
6 the 1991 and 1994 programs have to do with the
7 California WaterFix.

8 CO-HEARING OFFICER DODUC: Mr. Jackson?

9 MR. JACKSON: Yeah. The California WaterFix
10 is operated at a range -- let me bring this up. It was
11 where I'm going next anyway -- is operated at a range
12 according to -- could you put up 53, DWR-53, page 8,
13 lines 17 and 18 and 19?

14 Yeah. Thank you.

15 Ms. Sergeant, under the boundary analysis, you
16 say in your testimony that Mr. Munevar shows that the
17 average annual diversion would be increased by
18 1.2 million acre feet under Boundary 1 or decreased by
19 1.1 million acre feet, Boundary 2. So a range of around
20 2 million acre feet; is that correct?

21 WITNESS SERGENT: In the -- that is the
22 results of Mr. Munevar's modeling for the boundary
23 conditions, that's correct.

24 MR. JACKSON: And to your understanding, is
25 the present proposal from management an adaptive

1 management system over the next 50 years?

2 WITNESS SERGENT: The proposal that was
3 submitted to the board is a diversion between H3 and H4.
4 And within that range there is an adaptive management
5 program that was discussed extensively earlier, and it's
6 done in consultation with the fisheries agencies.

7 So that adaptive management that's being
8 proposed by the department's project is -- the
9 department's project is operated to operate within the
10 range of H3 to H4.

11 MR. JACKSON: And there is no chance that it
12 will be operated between Boundary 1 and Boundary 2 in
13 the future?

14 WITNESS SERGENT: I can't say what would
15 happen in the future. There is -- was a broader range
16 analyzed at the request of the Water Board to have a
17 broader scope. I can say that what the department is
18 proposing is a project between H3 and H4.

19 MR. JACKSON: So at the level between H3 and
20 H4, has there been any analysis of what operations
21 within those parameters would do to the groundwater
22 levels in the Sacramento Valley?

23 WITNESS SERGENT: The modeling doesn't
24 indicate that there would be any impact. The modeling
25 shows that there would be no decrease in deliveries to

1 anyone within that area.

2 There would be a slight increase in some
3 cases, and the water diverted at the excess flows, which
4 is the primary function of the California WaterFix, are
5 flows diverted that are reaching the Delta that are
6 excess to all of the demands upstream. And those flows
7 would have no impact on water quality -- I'm sorry --
8 groundwater levels in the Sacramento Basin.

9 MR. JACKSON: And was there an analysis of
10 whether or not those excess flows that this project is
11 designed to capture is the recharged water for the
12 groundwater in the Sacramento Valley?

13 WITNESS SERGENT: The water is diverted in the
14 Delta, so it's not captured at any point upstream of
15 that. Therefore, it would not affect groundwater levels
16 upstream.

17 There was groundwater modeling done as part of
18 the EIR process that did look at the operation of the
19 California WaterFix facilities in the Delta and -- and
20 showed no change associated with the operation of the
21 water project in the area of influence.

22 MR. JACKSON: And you reviewed the groundwater
23 information in the EIR before you came to your
24 conclusion there's no effect on the groundwater users?

25 WITNESS SERGENT: I looked at the graphics in

1 the EIR, and I also spoke with Gwen Buchholz who worked
2 on the modeling.

3 MR. JACKSON: Drawing your attention to page 9
4 at lines 24 to 28.

5 You included in your testimony a quote from
6 the State Board decision, I guess 2009-0061, which my
7 memory seems to be Woodland and Yuba City or Woodland
8 and Davis, I believe.

9 WITNESS SERGENT: No, that's not correct.

10 MR. JACKSON: That's not correct. What --
11 what order was that?

12 WITNESS SERGENT: It relates to a Santa Clara
13 petition and a protest by -- I believe it was
14 Camp Pendleton. I was more concerned with the reasoning
15 that the board used in its decision.

16 MR. JACKSON: Okay. And did you, for want of
17 a better word, cherry-pick that document?

18 WITNESS SERGENT: I included excerpts that I
19 thought were relevant to the question.

20 MR. JACKSON: That helped make your argument?

21 WITNESS SERGENT: That illustrated the reason
22 that the board used in this decision.

23 MR. JACKSON: I think I'll leave that for
24 follow-up.

25 Now, the quote is that "A fundamental

1 principle of water right law, however, is that a right
2 cannot be changed" -- "so changed that it is, in
3 essence" -- "that it, in essence, constitutes a new
4 right." And that comes out of Title 237,791,
5 Subdivision A.

6 In this regard, EIR is examining a new point
7 of diversion -- or three new points of diversion. And
8 you have talked a little about the purpose of the
9 program is to capture excess water?

10 WITNESS SERGENT: That's one of the purposes,
11 yes.

12 MR. JACKSON: That you cannot capture now with
13 the old diversion and the rules that it operates under.

14 WITNESS SERGENT: There are limitations due
15 to, say, biological opinions or others and -- that do
16 limit the amount of surplus flows that can be diverted.

17 MR. JACKSON: So it says in this part of the
18 statement that you used in your testimony that, for
19 example, an appropriator cannot expand an existing right
20 to appropriate a greater amount of water.

21 WITNESS SERGENT: And the petition is
22 consistent with that. We are not requesting to
23 appropriate any greater quantities than are already
24 authorized in those permits.

25 MR. JACKSON: So it's your -- it was your

1 position when you -- when you decided that this was not
2 a new water rights application, that you were entitled
3 to all the water you can get out of the 4.2 million acre
4 feet?

5 WITNESS SERGENT: My position is that we have
6 limits that are contained in the State Water Project
7 water rights and that we are authorized to divert up to
8 those limits as long as all the terms and conditions in
9 those permits are being met.

10 MR. JACKSON: And so with an adaptive
11 management plan and the -- and the goal of diverting
12 more water in certain time periods, you don't think that
13 that's what Johnson Rancho County Water District and the
14 State Water Rights Board says is a new right?

15 MR. MIZELL: Objection. Calls for a legal
16 conclusion.

17 CO-HEARING OFFICER DODUC: She's a water
18 rights expert.

19 What is your opinion? And I'm sure you've
20 already stated it many times, but let's state it again.

21 WITNESS SERGENT: My opinion is that we are
22 not requesting an increase above the amounts that are
23 already permitted in our water rights.

24 MR. JACKSON: But, in fairness, you are -- you
25 are doing the project in order to get more water?

1 WITNESS SERGENT: At times when it's available
2 in the system and is excess to all the other needs
3 within the basin and all of the other requirements of
4 our water rights are being met.

5 MR. JACKSON: So you go on to say that it's
6 your understanding that the State Water Board further
7 stated that the fundamental difference in an application
8 for new right or change to an existing right -- this is
9 on page 10 -- is that the new right seeks to increase
10 the diversion at a given time.

11 How do you reconcile that with the position
12 you just explained?

13 MR. MIZELL: Objection. Asked and answered.

14 CO-HEARING OFFICER DODUC: Hold on. I'm still
15 reading this.

16 Mr. Jackson, what is your question again?

17 MR. JACKSON: My question is: The words on
18 top of lines 1 through 3 say that the difference between
19 an application for a new right or a change to an
20 existing right is that the new right seeks to increase
21 the diversion at a given time?

22 CO-HEARING OFFICER DODUC: What do you mean,
23 Ms. Sergeant, about "diversion at a given time"?

24 WITNESS SERGENT: I mean that there would be
25 no -- say if we are authorized to divert January through

1 September, we would not request an increase or diversion
2 in October or November. It would not be at a different
3 time that's currently authorized or at a different rate
4 that is currently authorized or a different maximum
5 diversion to storage. It would still be within the
6 water rights restrictions of the existing right.

7 MR. JACKSON: Thank you for that, because I --
8 I think that's going to be important.

9 Right now, you have no ability to divert at --
10 on the lower Sacramento River at all, correct?

11 WITNESS SERGENT: We have a currently
12 authorized point of diversion at Hood that was included
13 as one of the original elements of the State Water
14 Project.

15 MR. JACKSON: All right. So, I guess my --
16 let me finish this, and then we'll move to that.

17 At the location to which you wish to move, you
18 presently divert no water, correct?

19 WITNESS SERGENT: Correct. We are requesting
20 three new points of diversion.

21 MR. JACKSON: And you say there is something
22 in your existing permits that allow you to move your
23 point of diversion and triple the number of the
24 diversion so that you can get more water at a different
25 time of year?

1 MR. MIZELL: Objection. Misstates the
2 witness's testimony in a couple of fundamental manners.

3 I would request that he not try to
4 characterize the witness's testimony but ask his
5 question directly.

6 CO-HEARING OFFICER DODUC: Mr. Jackson?

7 MR. JACKSON: Isn't that what you're trying to
8 do?

9 MR. MIZELL: Objection.

10 CO-HEARING OFFICER DODUC: His objection is
11 well noted, Mr. Jackson. Ms. Sergent has repeatedly
12 testified that, in her opinion, they are not requesting
13 a new right but everything that they're opposing, with
14 the exception of the three new diversion points --

15 MR. JACKSON: Right.

16 CO-HEARING OFFICER DODUC: -- still falls
17 within what's allowed in their current permit including
18 the one point of diversion in the North Delta.

19 MR. JACKSON: Ms. Sergent, do you know that
20 the Sacramento River is listed as a fully appropriated
21 stream?

22 WITNESS SERGENT: I'm aware there's a season
23 on the Sacramento River when there is -- it's determined
24 to be fully appropriated.

25 MR. JACKSON: And so you are not on that

1 stream now at that location. So let's talk a little
2 about the change in location.

3 All right. There was one more part of that.
4 What did you mean when you quoted, "While the capacity
5 of the old point of diversion is no longer a limit on
6 the diversion amount, it is possible to change to a new
7 point of diversion and still maintain the prior limit on
8 diversions as a result of conditions imposed on the
9 approval of the change"?

10 WITNESS SERGENT: I'd like to clarify that
11 that's the board's reasoning.

12 MR. JACKSON: Right.

13 WITNESS SERGENT: That's not something I
14 drafted.

15 MR. JACKSON: So you're not asking the board
16 to get rid of the prior limit on diversions that are
17 attached to your proposal?

18 WITNESS SERGENT: We are not requesting any
19 change in the authorized diversion quantities.

20 MR. JACKSON: And so the fact that you now
21 have capacity at two places instead of one, are -- are
22 you designating -- to your knowledge, are you
23 designating movement of a certain amount of your water
24 right from Clifton Court to these new locations?

25 MR. MIZELL: Objection. I believe the

1 petition speaks for itself in this particular regard.
2 We're proposing to add new three points of diversion and
3 not changing anything else about the permits.

4 CO-HEARING OFFICER DODUC: Mr. Jackson?

5 MR. JACKSON: I'm trying to determine whether
6 or not there will be a limit, as it says in this water
7 rights order, that will not allow them to increase their
8 diversions when they move north.

9 MR. MIZELL: I think it's been --

10 MR. JACKSON: It is possible to change to a
11 new point of diversion and still maintain the prior
12 limits on diversions.

13 CO-HEARING OFFICER DODUC: They're not
14 proposing to change the prior limits in total.

15 MR. JACKSON: Well, didn't you testify a
16 couple of times that it was your understanding that
17 Mr. Leahigh testified that the Corps permit would not
18 be -- that it would not apply to the new point of
19 diversions?

20 MR. BERLINER: Asked and answered.

21 WITNESS SERGENT: I think I'd like to clarify.
22 The Corps permit is not a water rights permit term. The
23 Corps permits relates to operations at Clifton Court
24 Forebay.

25 MR. JACKSON: So you are not committing to --

1 you are not committing to the same amount of diversion
2 that you are physically capable of getting today in the
3 move to a north diversion?

4 MR. MIZELL: Objection. Asked and answered.
5 I believe this point has been extensively explored in
6 this record at this point.

7 CO-HEARING OFFICER DODUC: Go ahead and answer
8 it one more time.

9 WITNESS SERGENT: The current permit -- the
10 Corps of Engineers permit at Clifton Court restricts
11 diversions to 6680. And a portion of the San Joaquin
12 River flow up to -- we have, as, I believe we included
13 in our permits, we have diverted at the maximum rate of
14 10,300 CFS in the past.

15 That restriction in the Corps permit on the
16 operation of Clifton Court, it's my understanding that
17 that would not apply at the North Delta diversions and
18 is not applicable to the North Delta diversions. And we
19 will continue to operate within all the limitations,
20 including quantities of water that are contained within
21 our permits.

22 MR. JACKSON: So Clifton Court will operate
23 within the Corps permit. And the new point of
24 diversions -- rather than the new diversions -- the new
25 point of diversions will operate outside the existing

1 limitations of the State Water Project?

2 WITNESS SERGENT: No.

3 MR. BERLINER: Objection. Misstates her
4 testimony.

5 WITNESS SERGENT: That's not correct.

6 MR. BERLINER: Also misstates the petition.

7 CO-HEARING OFFICER DODUC: Correct.

8 MR. JACKSON: Doesn't one of the things that
9 the petition request is that in terms of the -- in terms
10 of inflow, that the new facility doesn't count water
11 released from upstream by these two components as it
12 simply goes into the tunnels?

13 MR. MIZELL: Objection. That misstates the
14 testimony as well.

15 CO-HEARING OFFICER DODUC: Well, we did
16 discuss the inflow/outflow ratio and how the proposal to
17 divert from the new north points of diversion would, in
18 essence, change that calculation of inflow versus
19 outflow. So is that the direction that you're --

20 MR. JACKSON: That's the direction I'm going.

21 CO-HEARING OFFICER DODUC: Okay. And the
22 point that you would like Ms. Sergeant to address is?

23 MR. JACKSON: Is that we are in -- that this
24 is a new diversion. I mean, the point I'm trying to
25 make is that this is a diversion that allows a greater

1 export than was previously available to them.

2 CO-HEARING OFFICER DODUC: Yet still within
3 their permitted amount.

4 MR. JACKSON: Okay.

5 CO-HEARING OFFICER DODUC: Will you
6 acknowledge that?

7 MR. JACKSON: Yeah. But I don't know that
8 that's what that language means.

9 CO-HEARING OFFICER DODUC: Mr. Jackson, if you
10 have further lines of questioning --

11 MR. JACKSON: I do.

12 CO-HEARING OFFICER DODUC: -- I will suggest
13 for all of our sakes that we go ahead and adjourn for
14 now, and we will resume on Tuesday with fresh minds.
15 And we look forward to you continuing your
16 cross-examination then.

17 MR. JACKSON: Thank you very much.

18 CO-HEARING OFFICER DODUC: Thank you,
19 everyone.

20 Hold on. Before we adjourn, Mr. Williams?

21 MR. WILLIAMS: I apologize. Philip Williams
22 for Westlands.

23 On Wednesday, ma'am, a number of parties
24 submitted objection to Westlands' testimony as well as
25 other parties. I was hoping to get an idea when the

1 State Board would -- a deadline for responses to those
2 objections.

3 CO-HEARING OFFICER DODUC: We will let you
4 know. We are currently reviewing everything that's been
5 submitted to us. Thank you.

6 With that, have a good weekend, everyone.

7 (Whereupon, at 3:56 p.m. the proceedings
8 were concluded.)

9 * * * * *

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, MEGAN ALVAREZ, a Certified Shorthand Reporter, hereby certify that the foregoing proceedings were taken in shorthand by me at the time and place therein stated, and that the said proceedings were thereafter reduced to typewriting, by computer, under my direction and supervision;

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

DATED: _____

MEGAN F. ALVAREZ
RPR, CSR 12470