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BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

CALIFORNIA WATERFIX WATER )  
RIGHT CHANGE PETITION )  
HEARING )

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

PART 2 - PRE-HEARING CONFERENCE

Thursday, October 19, 2017

9:30 1

Volume 1

Pages 1 - 74

Reported By: Candace Yount, CSR No. 2737, RMR, CCRR  
Certified Realtime Reporter

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APPEARANCES

CALIFORNIA WATER RESOURCES BOARD

Division of Water Rights

Board Members Present:

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

Staff Present:

Dana Heinrich, Senior Staff Attorney  
Nicole Kuenzi, Staff Attorney  
Conny Mitterhofer, Supervising Water Resource Control Engineer  
Greg Brown, Senior Environmental Scientist

PART 2

For Petitioners:

California Department of Water Resources:

James (Tripp) Mizell  
Thomas M. Berliner

The U.S. Department of the Interior:

Amy L. Aufdemberge, Esq.

INTERESTED PARTIES:

For The City of Roseville, Sacramento Suburban Water District, San Juan Water District, The City of Folsom, Yuba County Water Agency and The City of Roseville:

Ryan Bezerra

For North Delta Water Agency & Member Districts and Tehama-Colusa Canal Authority & water service contractors in its service area:

Meredith Nikkel

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INTERESTED PARTIES (Continued):

For The Environmental Justice Coalition for Water, Islands, Inc., Islands, Inc., Local Agencies of the North Delta, Bogle Vineyards/Delta Watershed Landowner Coalition, Diablo Vineyards and Brad Lange/Delta Watershed Landowner Coalition, Stillwater Orchards/Delta Watershed Landowner Coalition, Brett G. Baker and Daniel Wilson, SAVE OUR SANDHILL CRANES, Friends of Stone Lakes National Wildlife Refuge, The County of Yolo:

Osha Meserve

For Friends of the River & Sierra Club of California:

Joseph Walski

For San Joaquin Tributaries Authority, The (SJTA), Merced Irrigation District, Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, and City and County of San Francisco:

Tim O'Laughlin

For Save the California Delta Alliance; Janet & Michael McCleary; Frank Morgan; and Captain Morgan's Delta Adventures, LLC:

Michael Brodsky

For East Bay Municipal Utility District (EBMUD):

Jonathan Salmon

For California Water Research:

Deirdre Des Jardins

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

Michael Jackson

For The Placer County Water Agency, The City of Stockton, Sacramento Regional County Sanitation District:

Kelley Taber

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INTERESTED PARTIES (Continued):

For State Water Contractors:

Stefanie Morris

For Nevada Irrigation District (NID), Butte Water District (BWD), Richvale Irrigation District (RID), Anderson - Cottonwood Irrigation District, Plumas Mutual Water Company (PMWC), Reclamation District 1004, South Feather Water and Power Agency, Western Canal Water District (WCWD), Paradise Irrigation District:

Dustin C. Cooper

1 Thursday, October 19, 2017 9:30 a.m

2 PROCEEDINGS

3 ---000---

4 CO-HEARING OFFICER DODUC: (Banging gavel).

5 Good morning, everyone. My clock says 9:30, so  
6 we're going to begin.

7 All right. Welcome back for those of you who  
8 participated in Part 1 and welcome to the new faces about  
9 to participate in Part 2.

10 I am State Water Board Member and Co-Hearing  
11 Officer Tam Doduc. To join us shortly, because I see  
12 their stuff here, to my right will be Board Chair and  
13 Co-Hearing Officer Felicia Marcus, and then to the  
14 Chair's right will be Board Member Dee Dee D'Adamo.

15 To my left are Staff Attorney Dana Heinrich,  
16 also another attorney Nicole Kuenzi. Sorry. Welcome to  
17 the Team, Nicole. Supervising Water Resources Control  
18 Engineer Conny Mitterhofer and Senior Environmental  
19 Scientist Greg Brown. We also have other staff assisting  
20 us today.

21 Just to make sure you're all in the right  
22 place, today we are holding the Pre-Hearing Conference  
23 for Part 2 of the California WaterFix Project Water Right  
24 Change Petition hearing.

25 I don't see a mass exodus, so . . .

1           The agenda for today's meeting was distributed  
2           on November -- October 16th.

3           And we'll now be joined by Board Member Dee Dee  
4           D'Adamo.

5           In suggesting topics for this Pre-Hearing  
6           Conference, a number of parties raised issue that we want  
7           to respond to with clear direction today. In addition to  
8           addressing new issues, we will also go over some of the  
9           issues that have been addressed previously.

10          All of the parties are expected to have read  
11          the October 30th, 2015, Hearing Notice and our previous  
12          rulings for this hearing and, very importantly, to adhere  
13          to those procedures and ruling.

14          To assist you, we have provided a guidance  
15          document as an enclosure to today's agenda that  
16          summarizes some of the hearing procedures and issues  
17          addressed in prior rulings. The agenda and guidance  
18          documents are available on our website and there are some  
19          extra copies in the back of the room.

20          We want to ensure that all the parties  
21          understand our prior rulings and understand how to  
22          proceed in Part 2 of this hearing. We may update the  
23          guidance document following this Pre-Hearing Conference.

24          So let me just give you a rough outline of the  
25          topics we'll be covering today. As usual, there'll be

1 the exciting general three announcements that those of  
2 you who participated in Part 1, I know, cannot wait to  
3 hear again, followed by a brief background on the water  
4 rights Petition process.

5 Then we'll cover procedural and evidentiary  
6 motions, the scope of Part 2 and related issues.

7 Then we'll discuss the order of presentation  
8 and group consolidations.

9 Next, we'll be hearing time limits.

10 Then we'll cover instructions on how to offer  
11 exhibits into evidence and Settlement Agreements.

12 Let the record note that we have now also be  
13 joined by Board Chair and Co-Hearing Officer Felicia  
14 Marcus.

15 After providing instructions on these topics, I  
16 will give the parties an opportunity to come up and ask  
17 any clarifying questions. This is not an opportunity to  
18 raise arguments about our rulings. It is not an  
19 opportunity to further discuss other topics. It is to  
20 ask clarifying questions if there is any additional  
21 confusion regarding the direction and instructions that  
22 I'm about to give.

23 All right. With that, let's go ahead and get  
24 to these exciting safety announcements and other  
25 housekeeping matters.

1           First of all, please take a look around and  
2       identify the exit closest to you. In the event of an  
3       emergency, an alarm will sound and we will evacuate this  
4       room immediately. Please take your valuables with you  
5       and use the stairways, not the elevators, down to the  
6       first floor and exit to the relocation site across the  
7       street in the park.

8           If you're not able to use the stairs, please  
9       flag down one of the safety people who will be wearing  
10      orange fluorescent-colored clothing -- can't miss them --  
11      and you'll be protected -- you'll be directed to a  
12      protective area.

13           Also, as you may have noticed coming into the  
14      building, today is the Great California ShakeOut in which  
15      we will be participating at 10:19 this morning.  
16      Hopefully, we will be on a break during that time.

17           But during this exercise, we will practice how  
18      to protect ourselves in the event of an earthquake, a  
19      serious matter. We urge you to participate the drill on  
20      your own which should only take a few minutes. And if  
21      we're off during the break, and I do believe the cameras  
22      will be off and you will not be recorded.

23                                   (Laughter.)

24           CO-HEARING OFFICER DODUC: The safe response to  
25      an earthquake is to drop, cover, and hold on. Drop to



1 the floor on your hands and preferably below the seats,  
2 cover your head and neck with one arm.

3 Take cover under a sturdy desk or table if one  
4 is handy and hold on until the shaking stops. If no  
5 table is nearby, drop to the floor near an interior wall  
6 and cover your head and neck with your arms and hands.

7 Stay away from windows and mirrors.

8 Do not leave the building during the  
9 earthquake.

10 If you have mobility impairments and cannot  
11 move, protect your head and neck with a sturdy object or  
12 your arms if you are able.

13 Okay. Next exciting announcement.

14 This Pre-Hearing Conference is being Webcasted  
15 and recorded. Both the audio and video portions are  
16 being recorded, so when you come up to the podium, speak  
17 clearly into the microphone and begin by stating your  
18 name and affiliation.

19 It has been a while. I might have forgotten  
20 you.

21 A court reporter is present today and will be  
22 preparing a transcript of this Pre-Hearing Conference.

23 Thank you, Candace, for coming back.

24 The transcript will be posted on the State  
25 Water Board's California WaterFix Petition Hearing

1 website as soon as possible. If you would like a receive  
2 the transcript sooner, you may make arrangements with the  
3 court reporter.

4 All right. We'll see how today goes. I'll try  
5 to take the morning break for the court reporter and, if  
6 necessary, an afternoon break, as well as a lunch break.

7 We have a lot to cover but I'm hopeful that we  
8 can be efficient and cover it all in one day. Not that I  
9 wouldn't be thrilled to see all of you again tomorrow but  
10 efficiency is always best.

11 And then, finally, my most important  
12 announcement of the day.

13 Please take a moment, because it has been a  
14 while -- You know how I am about this. Please take a  
15 moment and turn off or mute your cellphones and all other  
16 noise-making devices. Even if you think they're already  
17 off, please take a moment and double-check.

18 Everyone is double-checking. All right.

19 So, then, I'm about to go into a somewhat brief  
20 but detailed background on water rights hearings.

21 All right. Before we begin with the agenda  
22 items, we want to provide some background information on  
23 how this type of water right proceeding is different from  
24 the State Water Board's usual public meetings. This is a  
25 recap for most of you but we may have some new

1 participants here today who are not familiar with the  
2 difference between the Water Right Hearings and our usual  
3 public policy meetings. So please bear with us.

4 A Water Right Hearing is a -- Maybe I should  
5 make one of you come up and test you on this.

6 (Laughter.)

7 CO-HEARING OFFICER DODUC: A Water Right  
8 Hearing is a quasi-judicial proceeding, a formal hearing  
9 conducted by the State Water Board to develop a record of  
10 evidence relevant to the key issues identified in the  
11 Hearing Notice. We will rely on this evidentiary record  
12 to make our decision.

13 While it is a public meeting, participation in  
14 a Water Right Hearing is limited to designated parties.  
15 Parties are those who intend to offer evidence and call  
16 witnesses, conduct cross-examination, make objections and  
17 legal arguments, and otherwise participate in the  
18 evidentiary portion of the hearing.

19 Witnesses called by designated parties to offer  
20 evidence into the record are subject to cross-examination  
21 by other parties.

22 The deadline to submit a Notice of Intent to  
23 Appear in order to participate as a party has passed.

24 Interested persons are those who plan to  
25 present Policy Statements and not be actively involved in

1 the evidentiary portion of the hearing.

2 Unlike witness testimony, Policy Statements are  
3 not evidence and the State Water Board will not rely on  
4 Policy Statements in support of the factual  
5 determinations in its decision.

6 Also, unlike witnesses who testify on behalf of  
7 parties, interested persons are not subject to  
8 cross-examination.

9 Written Policy Statements will be accepted via  
10 e-mail throughout Part 2 of the Change Petition hearing.

11 The next opportunity for interested persons to  
12 present their Policy Statements early will be on  
13 January 18th, 2018.

14 Unlike a general public meeting, a Water Right  
15 Hearing has a tightly structured format. Participants  
16 are expected to adhere to specific requirements,  
17 including but not limited to deadlines and specifications  
18 for written submissions, time limits, order of  
19 participation, distribution of documents and other  
20 matters that we will discuss in this Pre-Hearing  
21 Conference.

22 As Hearing Officers, Chair Marcus and I act  
23 much like judges to ensure that the hearing is conducted  
24 in an orderly fashion.

25 Following the hearing, we will provide guidance

1 to the Hearing Team in preparing the draft order to be  
2 considered by all State Water Board members at a future  
3 Board meeting. The public will have an opportunity to  
4 comment on the draft order before the Board meeting.

5 For the State Water Board to approve a Water  
6 Right Change Petition, the Petitioners must establish,  
7 and the Board must find, that the proposed change will  
8 not injure any other legal user of the water involved or  
9 unreasonably affect fish and wildlife.

10 In addition, a special provision contained in  
11 the Delta Reform Act of 2009 requires the Board to  
12 include appropriate Delta flow criteria as a condition of  
13 any approval in the Water Right Change Petition for the  
14 California WaterFix Project.

15 The Board will also consider whether the  
16 project is in the public interest.

17 All right. That is the Water Right Hearing 101  
18 for the day.

19 With that, let's now turn to the first item on  
20 the agenda for today's Pre-Hearing Conference, and that  
21 would be procedural and evidentiary motions.

22 First, we will not be reconsidering procedural  
23 issues that we have already ruled upon.

24 Let me repeat that: We will not be  
25 reconsidering procedural issues that we have already

1 ruled upon.

2 We have already ruled that the Proposed Project  
3 described by Petitioners in Part 1 and the environmental  
4 documents for the project are adequate to proceed with  
5 Part 2 of the hearing.

6 We have also already ruled that completion of  
7 other regulatory processes is not necessary for us to  
8 proceed with Part 2 of our hearing.

9 We acknowledge the Protestants' interest in  
10 understanding whether and to what extent the Bureau of  
11 Reclamation intends to participate in the project, but  
12 Petitioners have not proposed any amendments to the  
13 Petition, so we will proceed based on the project as it  
14 has been described in this hearing.

15 We will rule on procedural motions as  
16 appropriate and necessary. We may request a party to  
17 promptly respond to a motion. That includes verbally  
18 during the course of the hearing. We are committed to  
19 providing a fair and open process in this hearing and  
20 will provide parties ample opportunities to be heard and  
21 to participate.

22 That said, excessive motion practice is  
23 discouraged, strongly discouraged. Due to the number of  
24 parties, we strongly discourage the flurries of  
25 unsolicited correspondence, followup comments on rulings,

1 and duplicative motions or requests on issues already  
2 addressed.

3           It bears emphasis that we generally disfavor  
4 motions for reconsideration of our procedural rulings.  
5 We may not respond to duplicative comments, motions or  
6 requests moving forward in this hearing.

7           The parties should also read and follow the  
8 guidance we have provided concerning evidentiary  
9 objections in the guidance document enclosed with today's  
10 agenda, and on Pages 13 to 15 of our August 31st, 2017,  
11 ruling.

12           We expect parties to be judicious in making  
13 evidentiary objections. As a reminder, we have already  
14 ruled that parties should not make any objections to the  
15 admissibility of testimony before the hearing resumes for  
16 presentation of Part 2 cases in chief. We will review  
17 the written testimony carefully before the hearing  
18 resumes to ensure that the testimony is relevant, is  
19 within the scope of Part 2, and sufficiently reliable to  
20 be admissible.

21           All right. Let's move on to the scope of Part  
22 2 and related issues.

23           In suggesting topics for the Pre-Hearing  
24 Conference, a number of parties raised questions about  
25 the scope of Part 2, and the extent to which Part 1

1 issues may be addressed in Part 2.

2 The hearing issues to be addressed in Part 2  
3 are listed in the Hearing Notice and on Pages 12 and 13  
4 of our August 31st, 2017, ruling.

5 Evidence presented during a party's case in  
6 chief must be relevant to the Part 2 key hearing issues.  
7 We particularly encourage parties to submit proposed  
8 permit terms and conditions that would resolve issues  
9 raised in the protest as part of your case in chief.

10 With respect to cross-examination, rebuttal and  
11 revisiting Part 1 issues, cross-examination of witnesses  
12 is not limited to the scope of the witness' direct  
13 testimony if the questions are relevant to Part 2 issues.

14 We will also allow cross-examination of  
15 witnesses on Part 1 issues as long as the line of  
16 questioning directly relates to the witness' direct  
17 testimony in Part 2.

18 Let me repeat that: Cross-examination of  
19 witnesses is not limited to the scope of the witness'  
20 direct testimony if the questions are relevant to Part 2  
21 issues. And we will allow cross-examination of witnesses  
22 on Part 1 issues as long as the questioning directly  
23 relates to the witness' direct testimony in Part 2.

24 Moving on. During rebuttal, parties may  
25 present evidence that directly responds to another



1 party's case in chief.

2 Parties may present rebuttal evidence that is  
3 in the scope -- is within the scope of either Part 1 or  
4 Part 2 if it is in direct response to another party's  
5 Part 2 case in chief. For example, rebuttal is the  
6 appropriate time to present evidence of potential injury  
7 to legal users from a term or condition presented in  
8 another party's case in chief in Part 2.

9 So, again, during rebuttal, parties may present  
10 rebuttal evidence that is within the scope of either  
11 Part 1 or Part 2 if it is in direct response to another  
12 party's Part 2 case in chief.

13 Since we are allowing parties the opportunity  
14 to address Part 1 issues through cross-examination or  
15 rebuttal in Part 2, they will have to make a strong  
16 showing that they were not able to raise a Part 1 issue  
17 in cross-examination or rebuttal in Part 2 in order to  
18 revisit a Part 1 issue after Part 2 of the hearing has  
19 concluded.

20 All right. Let's move on to -- Not yet,  
21 Mr. Bezerra.

22 (Laughter.)

23 CO-HEARING OFFICER DODUC: Although I  
24 appreciate the break.

25 Let's move on to the scope of the hearing and

1 environmental documentations -- or environmental  
2 documents.

3           Some parties have asked for clarification about  
4 the relationship between the key hearing issues and the  
5 environmental documents for the project.

6           The purpose of this proceeding is for the Board  
7 to gather evidence and act upon the Petition for Changes  
8 to Petitioners' water rights. The accuracy of the Final  
9 EIR and other environmental documents for purposes of  
10 CEQA is not a key hearing issue. The Board is not the  
11 lead agency responsible for preparation of the Final EIR  
12 or other environmental documents for the WaterFix  
13 Project. The Board is not required to certify that the  
14 documents comply with environmental laws.

15           Although the Board must comply with CEQA in  
16 connection with its decision on the Change Petition, and  
17 the Board must ensure that the Final EIR is adequate for  
18 this purpose, the Board is not required to hold an  
19 evidentiary hearing on issues concerning CEQA compliance,  
20 and the parties may not present testimony or other  
21 evidence on those issues.

22           However, it is appropriate for parties to test  
23 the validity of specific data and conclusions in the  
24 Final EIR and other documents for purposes of the Board's  
25 consideration of the potential impacts of the project and

1 the findings that the Board must make under the Water  
2 Code before we may approve the Water Right Change  
3 Petition.

4 Again, it is appropriate for parties to test  
5 the validity of specific data and conclusions in the  
6 Final EIR and other documents for the Board's -- for the  
7 purposes of the Board's consideration of potential  
8 impacts and for the findings that we must make under the  
9 Water Code.

10 Providing that any testimony or other evidence  
11 concerning the validity of specific information contained  
12 in the environmental documents is relevant to the key  
13 hearing issues, these are substantive issues that may be  
14 raised during the hearing.

15 Let me move on while you are all jotting down  
16 questions that you will be bringing up, I'm sure.

17 Let's talk about Delta flow criteria.

18 Some parties have also asked how the Board will  
19 develop Delta flow criteria for purposes of this  
20 proceeding.

21 Let's be very clear here: Board staff will not  
22 be presenting evidence in this proceeding, so it is up to  
23 the parties to present proposals and supporting evidence  
24 for appropriate Delta flow criteria.

25 The Board will determine what Delta flow

1 criteria are appropriate to include as conditions of any  
2 approval of the Change Petition based on the entire  
3 Administrative Record, including the parties' proposals  
4 and evidence, the 2010 Flow Criteria Report, and the  
5 scientific basis report for Phase 2 of the Bay-Delta Plan  
6 Update, provided that the report is included in the  
7 record.

8 We also addressed this issue in our  
9 August 31st, 2017, ruling.

10 All right. I've covered quite a bit.

11 Mr. Bezerra, would you like to kick off the  
12 questioning session?

13 And, again, I remind you we're not seeking for  
14 feedback or arguments about what I just delivered.

15 But any questions to clarify any remaining  
16 confusion?

17 MR. BEZERRA: Yes.

18 CO-HEARING OFFICER DODUC: You may present them  
19 now.

20 MR. BEZERRA: Thank you. Thank you for  
21 allowing me to kick this off, I -- I suppose.

22 CO-HEARING OFFICER DODUC: Have you turned on  
23 your microphone?

24 MR. BEZERRA: Yeah, it is -- it is on. I guess  
25 I need to just speak closer to it.

1 I've got a couple of questions about what you  
2 said, as demonstrated by the fact I popped right up.

3 First, on the issue about -- As I understood  
4 what you said, it was, if we wanted to present evidence  
5 after Part 2 on Part 1 issues, we have to show that we  
6 were unable to do so via cross or rebuttal.

7 CO-HEARING OFFICER DODUC: That is correct.

8 MR. BEZERRA: Okay. And so my -- my  
9 question -- and, you know, we've been through this issue  
10 a little bit previously -- is:

11 There is modeling associated with the  
12 Biological Opinions that has not been addressed in this  
13 hearing at all, has not been presented.

14 You know, we in the Sacramento Valley Water  
15 Users asked to extend Part 1 in order to deal with that  
16 modeling and the -- our motion was denied essentially on  
17 the grounds that we could deal with it later. So I have  
18 a real quandary as to what exactly we should do at this  
19 point.

20 I assume that -- I noticed that Reclamation at  
21 least designated modelers as witnesses. I believe DWR  
22 did as well. I, therefore, expect that we'll see new  
23 modeling results as part of the Petitioners' case in  
24 chief.

25 I don't know exactly where we go from there. I

1 mean, I suppose that those of us who are concerned about  
2 water supply impacts theoretically could present rebuttal  
3 testimony on Part 1 issues in Part 2. That's not ideal,  
4 I think.

5 CO-HEARING OFFICER DODUC: You may also  
6 question those modeling experts during your  
7 cross-examination.

8 MR. BEZERRA: Oh, yes, we absolutely can do  
9 that.

10 But the -- the modeling is so technical and so  
11 involved that in order to do an adequate job explaining  
12 what it means, that really requires technical testimony,  
13 and I don't feel I can get all of the potential points  
14 out on cross. And, frankly, I don't know that you want  
15 to sit through me trying to do that.

16 So I'm trying to understand at what point in  
17 this hearing, if there is new modeling based on the  
18 Biological Opinions, Protestants will be able to present  
19 testimony about the water supply impacts.

20 So that's -- that's one question. I'm happy to  
21 delay my next question, or I can state my next question  
22 now.

23 CO-HEARING OFFICER DODUC: You may go ahead and  
24 state your next question.

25 However, just to clarify for my understanding

1 of your question, if you're not able to get to the  
2 questions that you need to have addressed through  
3 cross-examination or through present -- or presentation  
4 of your rebuttal, you will have an opportunity to  
5 demonstrate or at least to present arguments as to why  
6 you were not able to do that and why additional  
7 revisiting of that issue is necessary before we move  
8 forward into this hearing.

9           So at some point during the next, I guess, six  
10 months or so of Part 2 in 2018, you will have the  
11 opportunity -- you and other parties will have the  
12 opportunity to demonstrate or at least to provide  
13 arguments as to why certain issues, perhaps the one that  
14 you just provided, were not able to be raised and  
15 addressed during cross-examination or rebuttal and we  
16 will make that determination at that point.

17           MR. BEZERRA: Okay. And just trying to  
18 speculate as to where this ends up.

19           I mean, those of us who are Protestants, I  
20 think, based on this guidance, we may have to assume that  
21 we need to present very substantial rebuttal testimony on  
22 Part 1 issues in Part 2, and I don't know if that's where  
23 you want to go with this or not.

24           And so at some point some additional clarity as  
25 to how you would like to proceed would be great. And it

1 seems like we can't really have that conversation until  
2 after November 30th because we won't see Petitioners  
3 testimony till then. But shortly after that, I think we  
4 will have to have a conversation about how to deal with  
5 that issue.

6 CO-HEARING OFFICER DODUC: So noted,  
7 Mr. Bezerra.

8 MR. BEZERRA: Okay. The second question I have  
9 is: You stated there towards the end about the various  
10 reports that the Board has prepared or Board staff has  
11 prepared on Delta flows, including scientific basis  
12 reports.

13 How do you expect those will be involved in  
14 this hearing? I heard you state clearly State Board  
15 staff will not be testifying. So are you . . .

16 Will those reports be part of the record even  
17 if witnesses don't testify to them? I mean, it's a very  
18 important issue because we have to . . .

19 If a scientific basis report is part of this  
20 record, we may have to present substantial testimony at  
21 some point. So I -- So clarity as to how those reports  
22 are involved in this hearing would be very useful.

23 CO-HEARING OFFICER DODUC: Thank you,  
24 Mr. Bezerra.

25 Ms. Nikkel.



1 MS. NIKKEL: Good morning. Meredith Nikkel on  
2 behalf of numerous Protestants. Should I state them?

3 CO-HEARING OFFICER DODUC: Miss Nikkel, if it  
4 will help your back --

5 MS. NIKKEL: It will.

6 CO-HEARING OFFICER DODUC: -- or it will help  
7 me because I'm in pain looking at your back, you could  
8 move to the taller microphone.

9 MS. NIKKEL: I'm not usually the tallest one in  
10 the room.

11 Do I need to state the Protestants upon whom  
12 I'm appearing or --

13 CO-HEARING OFFICER DODUC: I don't believe  
14 that's necessary for now.

15 MS. NIKKEL: Okay. A point of clarification  
16 regarding the statement I heard regarding motions to  
17 reconsider being discouraged, which I understand.

18 For purposes of exhaustion of administrative  
19 remedies, is it necessary to bring a motion for  
20 reconsideration?

21 CO-HEARING OFFICER DODUC: Ms. Heinrich?

22 MS. HEINRICH: No, I don't believe it is.

23 MS. NIKKEL: Thank you.

24 CO-HEARING OFFICER DODUC: Ms. Meserve, thank  
25 you for waiting.

1 MS. MESERVE: Good morning. Yeah, I wasn't  
2 going to go to the other one. I learned that the hard  
3 way.

4 I'm here on behalf of LAND, Yolo County,  
5 Friends of Stone Lakes, and several other parties. And I  
6 have a couple of easy questions and one maybe that will  
7 take further thought and others may want to weigh in on.

8 The first question I had was with respect to  
9 the status of the Final EIR as evidence.

10 As we're working with our Part 2 witnesses,  
11 obviously the Final EIR and the Notice of Determination  
12 documents will be referenced quite a bit.

13 And so it's my understanding that the Final EIR  
14 is not yet in evidence and I would like to know whether I  
15 am required to bring forth the parts of the EIR that my  
16 witnesses are relying upon or whether the Petitioners or  
17 the Board will be placing that, you know, in the  
18 evidentiary process.

19 CO-HEARING OFFICER DODUC: Does Petitioner wish  
20 to respond?

21 MS. MESERVE: And I guess I would add the other  
22 permits that have been issued this summer, I think I'd  
23 have the same question.

24 CO-HEARING OFFICER DODUC: Mr. Mizell.

25 MR. MIZELL: Good morning. Tripp Mizell, DWR.

1           Simple answer would be yes, the Department does  
2     intend to submit the final environmental document as an  
3     exhibit, as evidence.

4           We will probably be referencing the staff  
5     exhibit number since that was provided for us, and that's  
6     how we will be referencing it when submitting it into  
7     evidence.

8           MS. MESERVE: So it would be SWRCB-3, and that  
9     would be inclusive of the Final EIR?

10          I think for citation purposes, we'll want to  
11     make clear what part of the set of documents.

12          MR. MIZELL: It was my understanding of the  
13     Exhibit List that there was one exhibit for the draft and  
14     there was one exhibit for the final.

15          I can review the Exhibit List again and see if  
16     there needs to be any modifications to my answer, but  
17     we'll be using the staff exhibit number if it's  
18     appropriate to do so. Otherwise, we'll enter it in as a  
19     DWR exhibit.

20          MS. MESERVE: And then that would be the same  
21     for the State-issued ITP and the Biological Opinions?

22          MR. MIZELL: To the extent that we relied upon  
23     those documents, we'll be using them as exhibits, yes.

24          MS. MESERVE: It would be quite -- I think it  
25     would help a lot to the hearing record to maybe clarify

1       that point and then -- and get it as one exhibit number  
2       for each of those items.

3                   CO-HEARING OFFICER DODUC:   Go on, Miss Meserve.

4                   MS. MESERVE:   Thank you.

5                   The other question I had was:   I have several  
6       clients that were noticed for Part 1 but not Part 2.

7                   And so I understand the issue about being able  
8       to bring up Part 1 issues with respect to cross-exam and  
9       rebuttal evidence.   And I take that to mean, but want to  
10      clarify, that if those types of issues come up that have  
11      to do with water user Part 1 issues, that those  
12      participants -- those Protestants could come forth at  
13      that time even though they're not noticed for Part 2.

14                   CO-HEARING OFFICER DODUC:   That's a good point,  
15      Miss Meserve.   We will definitely consider your  
16      participation in Part 2 for the purposes of addressing  
17      Part 1 issues, yes.

18                   MS. MESERVE:   Thank you.

19                   Yeah.   It's something I mentioned to the  
20      hearing staff and I was assured that there, you know --  
21      at least generally that there shouldn't be an issue with  
22      that but I just want to make sure because, obviously, I  
23      don't think folks could have anticipated necessarily the  
24      way things have turned out with the Part 1 issues.

25                   Then, last:   I heard you say this morning that

1 the -- that the Water Board will proceed on the project  
2 as described in this hearing.

3 And it's a major effort, private and public, to  
4 participate in this hearing and present evidence in  
5 response to the petitions that were submitted in 2015.

6 And I would like clarification, for the sake of  
7 the resources being put into this process, that only the  
8 project described in the Petition is being considered in  
9 this hearing process, and that any different project  
10 would need to be reflected in a new or revised Petition  
11 describing that different project so that we could  
12 prepare responsive testimony and exhibits and evidence  
13 for that.

14 CO-HEARING OFFICER DODUC: And you are seeking  
15 that clarification.

16 MS. MESERVE: Yes, I am.

17 CO-HEARING OFFICER DODUC: Thank you. We will  
18 note that.

19 MS. MESERVE: Thank you.

20 CO-HEARING OFFICER DODUC: Next?

21 MR. WALSKI: Morning. Thank you.

22 My name is Joseph Walski. I'm here with the  
23 Sierra Club California and Friends of the River.

24 Just asking for a little more clarification on  
25 the issue of -- that we're not allowed -- the parties

1 aren't allowed to question the sufficiency of the Final  
2 EIR.

3 (Adjusting microphone.)

4 Parties aren't allowed to question the  
5 sufficiency of the Final EIR but one of the key issues is  
6 whether it should be entered into the Administrative  
7 Record.

8 So I was wondering if you could just clarify a  
9 little more what would be allowed in regards to  
10 questioning, whether it should be entered without  
11 discussing its validity as a document.

12 CO-HEARING OFFICER DODUC: Miss Heinrich, that  
13 sounds like a legal question.

14 MS. HEINRICH: So, the adequacy of the  
15 environmental document for purposes of CEQA is not a key  
16 hearing issue, but it will be offered by the Department  
17 as an exhibit.

18 So the validity of the information in the  
19 document for purposes of the findings that the Water  
20 Board needs to make under the Water Code and, you know,  
21 to the extent that any of the information in the document  
22 is relevant to the key hearing issues, then that is  
23 within the scope of the evidentiary hearing.

24 MR. WALSKI: Thank you.

25 CO-HEARING OFFICER DODUC: Does that help?

1 MR. WALSKI: A little. Thank you.

2 CO-HEARING OFFICER DODUC: Mr. O'Laughlin.

3 MR. O'LAUGHLIN: Good morning again. Tim  
4 O'Laughlin, San Joaquin Tributaries Authority.

5 I have two questions regarding appropriate  
6 Delta flow criteria.

7 So, if I'm understanding you correctly,  
8 basically every party to the proceeding in regards to  
9 their case in chief in Phase 2 should put forward what  
10 they believe the appropriate Delta flow criteria should  
11 be pursuant to the Water Code for the approval of the  
12 Petition; is that correct?

13 CO-HEARING OFFICER DODUC: If you have a  
14 proposal to make, we would like to hear it.

15 MR. O'LAUGHLIN: Okay. So, I'm just trying to  
16 figure out how this process plays out over time.

17 So everybody makes their appropriate Delta flow  
18 criteria proposals. We cross-examine all the various  
19 proposals that are being made. And then at some later  
20 point in time, what happens?

21 CO-HEARING OFFICER DODUC: The Board will make  
22 a decision to include what we determine to be appropriate  
23 flow criteria should we approve this Petition. It will  
24 go into a draft order which will then be distributed and  
25 we will hold a Board hearing on it, our usual water

1 rights order consideration process.

2 MR. O'LAUGHLIN: Well, I think that's where the  
3 problem lies.

4 So, here -- here's the concern that I have with  
5 that approach. I thought that would be your answer.

6 So, there's a missing step in there.

7 So, right now, we have a Petition in front of  
8 you that has a very specific set of proposed criteria,  
9 based on their September letter, detailing how they were  
10 looking at operating the project; okay?

11 And basically it's D-1641 flows plus the OCAP  
12 yield. I know there are other nuances to it, but  
13 basically that's it.

14 So, everybody makes these appropriate Delta  
15 flow criteria reports. You go back and do whatever it is  
16 that you guys do. And you come up and you say: No, we  
17 don't like that. We have something that is totally  
18 different for appropriate Delta flow criteria and it's  
19 not D-1641 and it's not the Biological Opinions.

20 Well, the problem is, if this Petition is  
21 premised on these Petitioners' water rights, and you go  
22 back in and change what is proposed as far as Delta  
23 inflow, Delta bypass and Delta outflow, then that can  
24 change how reservoir operations operate upstream and the  
25 availability of water for senior water right holders.



1           So my concern is that you haven't defined yet  
2           in this process that, if the numbers change, how is it  
3           that we're going to make sure or have a process to  
4           identify that senior legal users of water are going to be  
5           protected?

6           And then this also goes to the point that, if  
7           you do come up with a draft appropriate Delta flow  
8           criteria proposal, are the Petitioners even going to  
9           accept it? Because, yes, we don't know.

10           So -- So that's the other component about the  
11           problem with appropriate Delta flow. You're leaving us  
12           no place to go. You're going to issue a draft order and  
13           then say, "Well, we're -- we're done. You can comment on  
14           this draft order," but that doesn't get back to the  
15           hearing record that we may need in order to protect  
16           Phase 1.

17           And we talked about this previously -- it's in  
18           all my letters to you previously -- and I keep restating  
19           the same thing.

20           So I think you need to think -- a suggestion --  
21           think a little bit more about how you see appropriate  
22           Delta flow criteria proceeding forward. I get that we  
23           should put it in our documents coming up on  
24           November 30th, but think about the process unfolding from  
25           there to ensure that the due process rights of the water

1 right holders are protected.

2 CO-HEARING OFFICER DODUC: Thank you,  
3 Mr. O'Laughlin.

4 And since you were so articulate, I will ignore  
5 the fact that you are critiquing our ruling, which I  
6 admonish people not to do, but it's a good point and we  
7 will take that under consideration.

8 MR. O'LAUGHLIN: Thank you.

9 I have one other point and it was previously  
10 mentioned by the previous speaker.

11 I'm very much concerned with the admission --  
12 admission of reports into evidence without a witness.

13 So, I would get -- I would totally understand  
14 if, let's say, NR -- I'll use NRBC or The Bay Institute.  
15 And let's say they want to put in evidence in Phase 2 and  
16 they use your Delta Flow Criteria Report from 2010. And  
17 they say: We're going to use this as part of our basis  
18 about why the Petition doesn't have appropriate Delta  
19 flow criteria. Totally understanding. I get it.

20 They'll have a witness there. The witness will  
21 testify what they glean from that document and how they  
22 view that document and how it should be treated by the  
23 Board.

24 The problem with admitting a document without  
25 cross-examination on behalf of the Board, is, there is no

1 witness. There is no cross-examination. And it appears  
2 that it's being submitted for the truth of the matter  
3 asserted, whatever the truth of the matter asserted is.

4 So, I think you should be careful about  
5 admitting those reports. In fact, I will just tell you  
6 ahead of time, we will -- we will move to exclude them if  
7 you do move to admit them because it's incumbent on the  
8 parties out here that, if they want to use those reports  
9 and criteria, they can. And, quite honestly, I can't  
10 think of an exception in the Evidence Code or anywhere  
11 else --

12 CO-HEARING OFFICER DODUC: And now you are  
13 starting to make your argument, Mr. O'Laughlin.

14 MR. O'LAUGHLIN: Okay. So, basically, I think  
15 you should reconsider your thought process on that one in  
16 regards to how you admit those specific documents and  
17 maybe rely on the parties instead, that if they think  
18 they're valuable and have information that should be  
19 submitted, they should do it in that fashion.

20 CO-HEARING OFFICER DODUC: All right.

21 MR. O'LAUGHLIN: Thank you.

22 CO-HEARING OFFICER DODUC: What time is it?  
23 It's 10:12. And what time is the shakeout? I don't mean  
24 to interrupt you, Mr. Brodsky.

25 The shake out is at 10:19.

1           All right. Let's take another five minutes and  
2 we will take a break.

3           Mr. Brodsky.

4           MR. BRODSKY: Thank you, Madam Hearing Officer.  
5 Michael Brodsky on behalf of Save the California Delta  
6 Alliance.

7           I want to just be a little bit more specific  
8 about the points that Mr. O'Laughlin and Miss Meserve  
9 raised.

10           As far as Miss Meserve's point about, you know,  
11 we sort of at this point have a placeholder project  
12 description, and the Petitioners are in the process of  
13 reformulating what they want to do. It doesn't appear  
14 that three intakes and two tunnels are on the table  
15 anymore; that, if anything, it'll probably be one intake  
16 and one tunnel.

17           So, we are -- Save California Delta Alliance is  
18 a very small organization with limited resources. We've  
19 held pancake breakfasts and golf tournaments and costume  
20 parties and everything you can think of to raise money.  
21 And we're spending about \$400,000 on experts to show to  
22 you what the impacts on Delta recreation of three intakes  
23 and two tunnels are.

24           So if, three weeks from now, Petitioner decides  
25 that it's one intake and one tunnel, given the

1 circumstances, we feel we should be compensated for the  
2 money that we wasted because Petitioner didn't have their  
3 project description ready.

4 And I guess, in terms of you considering what  
5 you said you were going to consider from Miss Meserve,  
6 I'd appreciate it if you could consider that problem  
7 also.

8 CO-HEARING OFFICER DODUC: I'm sorry. Now  
9 you've lost me.

10 We were considering her participation on behalf  
11 of parties who did not seek to participate in Part 2 but,  
12 however, may want to revisit some Part 1, meaning injury  
13 issue, as -- during the course of Part 2.

14 MR. BRODSKY: Right. Yeah. I was referring to  
15 the second half of Miss Meserve's point, which was that  
16 the Board is only considering in these proceed --  
17 proceedings the project that is described in the -- in  
18 the Petition, which is three --

19 CO-HEARING OFFICER DODUC: Yes.

20 MR. BRODSKY: -- intakes and two tunnels.

21 And you said you would take under consideration  
22 what happens if, a week or two from now, Dw decide -- DWR  
23 decides that's not the project they want to build.

24 CO-HEARING OFFICER DODUC: Okay.

25 MR. BRODSKY: And as a part of you taking that

1 under consideration, I'd like you to take under  
2 consideration that DWR should compensate us for the money  
3 we've spent on experts to critique a project --

4 CO-HEARING OFFICER DODUC: You'll have to work  
5 that out with DWR, Mr. Brodsky.

6 MR. BRODSKY: Okay. So is it futile, then, for  
7 me to make a motion for you to hold that?

8 We believe the Board is obligated to issue an  
9 order --

10 CO-HEARING OFFICER DODUC: You may make that  
11 argument later. This is not the time.

12 MR. BRODSKY: Okay. Thank you.

13 CO-HEARING OFFICER DODUC: That does not mean  
14 we would grant it but --

15 MR. BRODSKY: You'll consider it. Okay.

16 The second point is on appropriate Delta flow  
17 criteria.

18 Since there are no operating criteria for the  
19 project -- right? -- there's no -- nothing in the project  
20 description, nothing in the project that's before the  
21 Board that is being proposed: That there's any bypass  
22 flow; they're not agreeing to leave any amount of flow in  
23 the Sacramento River; they're not agreeing to limit what  
24 amount of water they'll take at what time of year during  
25 various flow conditions. The only operating criteria are

1 that they'll operate the project as to meet D-1641.

2 So, if we're to propose appropriate Delta flow  
3 criteria, then aren't we really proposing the outcome of  
4 Phase 2 of the update of your Water Quality Control Plan?

5 If the only operating criteria that are a part  
6 of the project is, "We'll meet D-1641," then what is it  
7 that we're proposing as appropriate flow criteria? Flow  
8 standards throughout the Delta? Or do you want us to  
9 propose operating criteria for the project that DWR  
10 didn't propose?

11 In other words, would it --

12 CO-HEARING OFFICER DODUC: Whatever you believe  
13 would address the potential injury that you perceive to  
14 result as the outcome of this project.

15 MR. BRODSKY: Okay. So that's very broad,  
16 then.

17 Okay. Thank you very much.

18 CO-HEARING OFFICER DODUC: Thank you,  
19 Mr. Brodsky.

20 And with that, we will take a break until  
21 10:30.

22 And remember to do the Great California  
23 ShakeOut.

24 (Recess taken at 10:18 a.m.)

25 ///

1 (Proceedings resumed at 10:30 a.m.)

2 CO-HEARING OFFICER DODUC: All right. If  
3 everybody can take their seat. It's 10:30 and we'll get  
4 back to any clarifying questions people may have.

5 Let me ask you to do something right now,  
6 especially Miss Meserve -- Actually, no, you would not be  
7 on this list.

8 Staff has compiled information received on the  
9 Supplemental Notice of Intent to Appear forms for each  
10 party, and there are copies of this information in the  
11 back of the room. This information was also posted on  
12 our website yesterday.

13 I need the parties present to review the  
14 summary carefully to be sure that it properly reflects  
15 your party's participation in Part 2. And later on  
16 today, we'll give you time to bring any errors to our  
17 attention.

18 All right. Let's turn back and, Mr. Mizell,  
19 did you -- No. You were just moving up closer. Okay.

20 MR. SALMON: Good morning. Jonathan Salmon  
21 here on behalf of East Bay Municipal Utility District.

22 I have a question about the flow criteria  
23 hearing issue for Part 2.

24 Is it permissible to introduce evidence on  
25 Delta flow criteria in Part 2 that relates to Part 1



1 issues?

2 CO-HEARING OFFICER DODUC: As part of your  
3 rebuttal?

4 MR. SALMON: As part of the case in chief for  
5 Part 2.

6 CO-HEARING OFFICER DODUC: Case in chief in  
7 Part 2 is focused on the key hearing issues for Part 2.

8 MR. SALMON: And my question is, given that  
9 Delta flow criteria is stated as a Part 2 issue --

10 CO-HEARING OFFICER DODUC: Um-hmm.

11 MR. SALMON: -- and not a Part 1 issue, can the  
12 evidence that's introduced on that issue in a Part 2 case  
13 in chief relate to protecting or responding to concerns  
14 that a party has raised in Part 1? Injury to legal user  
15 of water, for example.

16 CO-HEARING OFFICER DODUC: Will it also address  
17 potential injury -- well -- to fisheries and other  
18 resources? Or is it specific to just addressing injury  
19 to water user?

20 MR. SALMON: Would it be permissible to propose  
21 Delta flow criteria for the WaterFix Project and support  
22 that with evidence as to why those flow criteria are  
23 needed to protect against a Part 1 impact?

24 CO-HEARING OFFICER DODUC: Yes.

25 MR. SALMON: Would it be permissible to

1 introduce new evidence regarding those impacts to legal  
2 users of water if it directly relates to supporting the  
3 proposed Delta criteria?

4 CO-HEARING OFFICER DODUC: Is there a legal  
5 concern with that, Miss Heinrich?

6 As you can attest, during the course of this  
7 hearing we've been very open to the introduction of  
8 potential terms, conditions, criteria, so I at this point  
9 don't see an issue with that.

10 MR. SALMON: Okay. Thank you.

11 CO-HEARING OFFICER DODUC: Miss Des Jardins.

12 MS. DES JARDINS: Yeah. I as an analyst have  
13 been trying to find what I might look at for operating  
14 the project to Decision 1641 criteria, because those are  
15 the only criteria that are not speculative.

16 And I did go back and look at the EIR by the  
17 Board for Decision 1641 and looked at the EIR for the  
18 Water Quality -- or the SED for the Water Quality Control  
19 Plan.

20 And impacts of this project just aren't  
21 addressed. And I'm not seeing the kind of analysis of  
22 operating the project just to these criteria with or  
23 without the exemption from the export inflow.

24 And I did raise these issues in comments on the  
25 environmental documents, but, you know, what do I do if I

1 feel that there isn't adequate documentation even to  
2 support the Board's consideration of this Petition to  
3 adopt the project under Decision 1641?

4 CO-HEARING OFFICER DODUC: That's what we are  
5 here to determine. I mean, this hearing is being  
6 conducted to obtain information so that we might act on  
7 the Petition before us.

8 If you have arguments specific to the validity  
9 not of the document themselves but of specific facts that  
10 this Board would be considering, you should make that as  
11 part of your case in chief.

12 MS. DES JARDINS: I'm just not seeing the kind  
13 of analysis -- CEQA analysis that I would suspect that --  
14 expect.

15 There was such a CEQA analysis, for example,  
16 when the Board cons -- adopted Decision 1641. The Board,  
17 and the EIR, there were analyses of the impact of the  
18 demanding water rights for the Joint Point of Diversion  
19 and with the specific regulatory criteria.

20 And I --

21 CO-HEARING OFFICER DODUC: The Decision --

22 MS. DES JARDINS: -- don't think we have the  
23 resources necessary to produce that.

24 CO-HEARING OFFICER DODUC: The Decision 1630  
25 (sic) was our decision. We were responsible for

1 developing the final document for that decision.

2 MS. DES JARDINS: About 1641? Because you just  
3 said --

4 CO-HEARING OFFICER DODUC: Yes.

5 MS. DES JARDINS: Yeah.

6 CO-HEARING OFFICER DODUC: As we have stated  
7 numerous times, we are not the lead responsible agency  
8 for preparing the environmental documents for the  
9 WaterFix.

10 MS. DES JARDINS: For the WaterFix Project.

11 But I did -- I did submit arguments that the  
12 Board's -- for the Board's adjudicatory proceeding. And  
13 in processing Decision 1641, the Board did have this  
14 document, and there's no subsequent document to Decision  
15 1641 for me to look at the analysis and evaluate it in  
16 this -- an enormous -- It's a fairly large amount of  
17 modeling to do to look at the project as operated to  
18 Decision 1641 criteria.

19 Furthermore, as far as Tim's -- Tim  
20 O'Laughlin's point where he said, you know, the Board  
21 isn't testifying on the Board's modeling, in Decision  
22 1641, the Board presented a witness with the Board's EIR,  
23 and people were able to ask about --

24 CO-HEARING OFFICER DODUC: So are you  
25 concurring with Mr. O'Laughlin's question?

1 MS. DES JARDINS: Yeah. Yeah. It's -- It's  
2 just a question of, I would like to at least be able to  
3 provide some testimony on the -- you know, what I see as  
4 the gap in the CEQA analysis for the Board's decision.

5 There's supposed to be a series of  
6 documentation of the Board's consideration of  
7 alternatives, and I'd like something that's adequate  
8 enough to look at and analyze.

9 MR. O'LAUGHLIN: We've been conversing about  
10 this back and forth for some time. And, actually, it's a  
11 good point.

12 I'm going to try and make it in a different  
13 way, so I think it might be a little easier to digest.

14 So, this goes back to the appropriate Delta  
15 Flow Criteria Report again.

16 So, currently, you have in front of you all  
17 these environmental documents, so you have the EIR,  
18 you've got Biological Opinions, you've got all this  
19 wonderful stuff in front of you.

20 And you're exactly right. You're not the lead  
21 agency on the project. You don't have to do any of that.  
22 Totally agree with that.

23 But here's my question for you and your staff  
24 again:

25 So if we get down to a point later on down the

1 line and you decide appropriate Delta flow criteria is X  
2 plus 10 and it's not in an Environmental Impact Report  
3 for the project -- okay? -- then you're going to have to  
4 do a Supplemental EIR or your own EIR to support your  
5 discretionary act on an appropriate Delta flow criteria.

6 That's what she's trying to say, I think.  
7 That's been the discussion that we've been having.

8 Because, clearly, we -- Well, I don't want to  
9 get into argument.

10 CO-HEARING OFFICER DODUC: Okay. Your point is  
11 made, Mr. O'Laughlin.

12 MR. O'LAUGHLIN: Thanks.

13 CO-HEARING OFFICER DODUC: You're not finished,  
14 Miss Des Jardins?

15 MS. DES JARDINS: I just want to add: Not  
16 seeking to increase work for the Board, but in terms  
17 of --

18 CO-HEARING OFFICER DODUC: Too late.

19 MS. DES JARDINS: -- limited resources of  
20 parties, having an analysis to look at is really  
21 important in the environmental analysis that's adequate.

22 CO-HEARING OFFICER DODUC: All right.

23 Mr. Mizell and then Mr. Jackson.

24 MR. MIZELL: Good morning again. Tripp Mizell,  
25 DWR.

1           In reviewing the Notice of Intent to Appear and  
2 the witness subject matter list over the last, you know,  
3 several days, it's -- it comes to mind that there is a  
4 lot of overlap, which you would expect with a lot of the  
5 same parties. But also there's a lot of overlap in terms  
6 of topics we've already discussed in Part 1.

7           Is there any additional guidance that you can  
8 give us as to whether or not wholly repetitive testimony  
9 and exhibits will be permitted to come into Part 2 that  
10 we've already reviewed in Part 1 but now are being  
11 presented under the guise of public interest?

12           CO-HEARING OFFICER DODUC: We will consider  
13 that. Obviously, we want to discourage duplicative  
14 filing of documents as well as presentation of testimony.

15           But to the extent that it presents new aspects  
16 or there's new arguments to be made based on public  
17 interest, then, certainly, it belongs in Part 2.

18           It might be a matter of we'll recognize it when  
19 we see it. It's kind of hard to appreciate at this point  
20 with -- just from the NLI.

21           MR. MIZELL: Thank you.

22           And just one additional question.

23           Earlier, Miss Meserve talked about Part 1  
24 parties that did not file an NOI for Part 2 coming in  
25 during the course of Part 2.

1                   And I'll just pose the question: Is it not  
2 more appropriate for those Part 1 non-noticed parties to  
3 petition the Board in the -- in the manner in which you  
4 spoke of earlier during the procedure -- procedure  
5 guidance you gave us:

6                   At the end, if their issues have not been  
7 addressed by the parties who have filed NOIs, then they  
8 would have the opportunity at that time to state the  
9 reasons why their issues have not been covered and then  
10 look for a limited reopener of Part 1.

11                   But to, I guess -- It's very difficult, then,  
12 to understand what the -- what the scope of the  
13 opportunity is for parties who've not filed an NOI to now  
14 come in if we simply say, it's a second opportunity to  
15 voice your concerns?

16                   CO-HEARING OFFICER DODUC: Mr. Mizell, let me  
17 clarify.

18                   Miss Meserve, and I believe perhaps only one or  
19 two other parties, were parties who participated in  
20 Part 1 that did not file NOIs to participate in Part 2.

21                   We're not talking about opening the floodgates  
22 for everyone to come in and participate in Part 2. It's  
23 only for those who participated who were Part 1 parties  
24 who need to now, because we are expanding portions of  
25 Part 2 through cross-examination and rebuttal, to revisit



1 Part 1 issues that will be considered for participation.

2 And we're not talking about a lot. I think  
3 there are, what, three?

4 (Board members confer.)

5 CO-HEARING OFFICER DODUC: Oh, okay. Well,  
6 maybe half a dozen.

7 But, so far, I believe Miss Meserve is the only  
8 one who has voiced her request.

9 MR. MIZELL: Okay. Thank you for that  
10 additional clarification.

11 I would, again, just suggest you -- you  
12 outlined already a procedure that would account for that  
13 possibility, and thank you for -- thank you for the  
14 clarification.

15 MR. JACKSON: Michael Jackson on behalf of  
16 C-WIN, CSPA, AquAlliance.

17 We were Part 1 parties; we intend to be Part 2  
18 parties. And I've got three sort of requests for some  
19 kind of further instruction.

20 The first one is that the -- We went through  
21 Part 1 limited to evidence in regard to effects on legal  
22 users of water. The same activities -- In fact, a number  
23 of my witnesses had portions struck as they tried to draw  
24 the conclusion that there were public trust problems,  
25 that there were public interest problems, that there were

1 unreasonable effects on fish and wildlife problems.

2 That's going to be pretty repetitive  
3 information but it's for three different subjects that  
4 need to be covered in this hearing.

5 CO-HEARING OFFICER DODUC: Um-hmm.

6 MR. JACKSON: So I -- In trying to determine  
7 what to put in in terms of testimony, I want to be sure  
8 that the parts that were moved to Part 2 are still usable  
9 in --

10 CO-HEARING OFFICER DODUC: Part 2.

11 MR. JACKSON: -- in Part 2.

12 CO-HEARING OFFICER DODUC: Correct.

13 MR. JACKSON: And that additional information  
14 on the other three items, and perhaps back to Item  
15 Number 1, affect on legal water users, are still possible  
16 in order to cover the range of the issues we're trying to  
17 follow here.

18 So if testimony gets repetitive, I'm hoping  
19 that you will all look at it from the point of view of,  
20 well, we could have done it all together in the first  
21 place and done all four, and so it has to be repetitive.

22 CO-HEARING OFFICER DODUC: That was a very  
23 subtle admonition. Thank you, Mr. Jackson.

24 MR. JACKSON: Well, I'm trying to learn. I  
25 have reviewed some of my Part 1 attitudes and I

1 thought --

2 CO-HEARING OFFICER DODUC: No, it's --

3 MR. JACKSON: -- I'd start --

4 CO-HEARING OFFICER DODUC: Very well done. And  
5 we will certainly be receptive to that.

6 MR. JACKSON: Thank you.

7 And I can think of one instance in which I  
8 appreciate you being receptive after my performance.

9 The second question goes back to, again, the  
10 sort of moving Operations Plan. I mean, in -- in looking  
11 at the -- But now with a specific reason in mind.

12 The first is the Delta Reform Act requirement  
13 that you set up appropriate flows.

14 The . . . The permit request, the Operations  
15 Plan for the original permit, seems to have moved through  
16 all of Part 1 and is now in the process of moving through  
17 the environmental documents, and I -- it causes a couple  
18 of questions.

19 Do you want the testimony to cover everything  
20 from category -- from the range that -- It started out as  
21 H3, H4, some category like that in the project  
22 description and has now reached a thing where it goes  
23 from 1.2 million acre-feet of water less than they're  
24 getting today to 1.3 million acre-feet of water more than  
25 they're getting today.

1           And how do we develop a . . . a flow schedule  
2 without knowing which one it is? How do we recommend to  
3 you what the flow schedule we -- should be, what the most  
4 efficient flow schedule would be for all of the uses when  
5 we don't really know how it's going to be operated, and  
6 where adaptive management makes this year's operation  
7 potentially different than next year's?

8           And I'm having trouble with my witnesses,  
9 trying to get a handle on that because they can't figure  
10 out what the Ops Plan is.

11           We're giving flexibility because it might help,  
12 but it doesn't seem to mesh very well with what the Delta  
13 Reform Act required, which is some sort of consistent  
14 standard for flow.

15           And I don't find guidance for that yet in the  
16 rulings, and I'm wondering if you could take a look at  
17 that again, which leads me to my third question, which  
18 is:

19           Let's assume that you, based on the testimony,  
20 the evidence in the record, the environmental document as  
21 applied to your responsible agency requirements, result  
22 in something that's simply within the range of what's now  
23 the proposal, 1.2 million acre-feet less than you've  
24 taken on average, or 1.3 million acre-feet more than  
25 you've taken on average in the past.

1                   And how do we determine and when do we  
2 determine who supplies the water one way or the other?

3                   In every hearing since 1987 when I started  
4 coming to these hearings, this has been established --  
5 the flow has been established in the Water Quality  
6 Control Plan.

7                   This is new. And the Water Quality Control  
8 Plan had stages that got to the point of, okay, here's  
9 the standard. Who supplies it? How does it mesh with  
10 the water rights system?

11                   And I think that's the elephant in the room  
12 with -- with a lot of the confusion, because everybody  
13 wants to know whether we're -- you know, whether this is  
14 only water supplied by the -- by the Petitioners or  
15 which -- or whether this may be water supplied by people  
16 that the Petitioners' water rights outrank.

17                   And so is there going to be a determination of  
18 who supplies the water in this hearing, or do we really  
19 have to wait until the Water Quality Control Plan -- This  
20 new addition by the Delta Reform Act is -- is interesting  
21 and I think it requires some attention.

22                   I don't know whether we need a -- as we did in  
23 the Water Quality Control Plan that I think was a  
24 Phase IV that D-1641 came out of, but the -- the question  
25 here is, we're going to have to make this decision before

1 we address who's responsible for delivering the water.

2 I can't do a public interest analysis clearly  
3 until I know what that is. I certainly can't do a public  
4 trust analysis until I know what that is. And I don't  
5 know with the sort of wide-ranging Ops authority how to  
6 determine what's unreasonable for fish and wildlife.

7 And so I could -- I guess my request is for  
8 somebody in the legal staff to take a look at this and --  
9 and maybe opine. At least I would know what the rules  
10 were before November 30th.

11 CO-HEARING OFFICER DODUC: I'm curious -- Those  
12 are good points, Mr. Jackson. I'm curious, though.

13 Within the range of operations that have been  
14 discussed throughout this hearing, are you saying that  
15 you are unable to offer an opinion as to what you believe  
16 the Operation Plan should be?

17 MR. JACKSON: Well . . . no. I have a default  
18 position, which is, I'm -- I would take the default  
19 position that your alternative -- the alternative of -- I  
20 think it's Boundary 2, while not the alternative that the  
21 State Board asked them to look at in terms of  
22 Alternative 8, is the closest to the 2010 document that I  
23 can get, because that -- that would be the process I  
24 would go through. That's not going to give you very much  
25 in terms of how to streamline it.

1           And I thought, you know -- I mean, it seems  
2 what you're looking for is as much clarity as possible  
3 from the witnesses. And, you know, given the  
4 environmental document problem, given adaptive  
5 management, and given a very wide-ranging operational  
6 situation, you know, all away from the Trinity River down  
7 to the San Joaquin, it's going to have significant  
8 differences both on fish and wildlife, on the public  
9 interest and on the public trust, so . . .

10           CO-HEARING OFFICER DODUC: Thank you,  
11 Mr. Jackson.

12           I like to new helpful Mr. Jackson a lot.

13                                       (Laughter.)

14           MR. BRODSKY: Michael Brodsky, save the  
15 California Delta Alliance, very briefly.

16           Just to make sure that the Hearing Officers and  
17 the Board and the staff understand that, as far as DWR is  
18 concerned, the application for the project that's before  
19 this Board that they're asking you to approve has no  
20 description at all of how much water is going to be  
21 diverted, when it's going to be diverted, under what  
22 conditions it's going to be diverted. And you believe  
23 that, under those circumstances, Protestants have enough  
24 information to put on their cases in chief.

25           CO-HEARING OFFICER DODUC: That's what we have

1 said.

2 MR. BRODSKY: Okay. Thank you.

3 As far as, just procedurally, and Mr. Mizell's  
4 concern, we intend -- we have a few witnesses listed.  
5 They're all experts. They're all highly qualified.

6 We intend to keep our oral presentation very  
7 brief, to present panels and, for the most part, to rely  
8 on written testimony and that the witnesses are here  
9 basically in case Board Members have questions and for  
10 cross-examination. So we're going to keep it short.

11 CO-HEARING OFFICER DODUC: You have become one  
12 of my favorites, Mr. Brodsky.

13 Miss Des Jardins.

14 MS. DES JARDINS: I just have a -- brief  
15 followup comments on -- Mr. Jackson commented on the  
16 water quality --

17 CO-HEARING OFFICER DODUC: Not a comment.  
18 Perhaps a request for clarification.

19 MS. DES JARDINS: Request, yes.

20 So the initial Hearing Notice indicated that  
21 this Board would adopt only inflow criteria in this  
22 proceeding and that the more permanent flow criteria  
23 would be considered in the Water Quality Plan update.

24 But what I saw of the Phase 2 Draft Scientific  
25 Basis Report, they're only considering near term



1 operations, and there's no consideration of the WaterFix,  
2 although it was noticed for consideration there.

3 And it would be helpful if the Board would  
4 clarify whether the Board still plans to consider and  
5 adopt flow criteria -- more long-term flow criteria in  
6 the Water Quality Plan update, because there is a concern  
7 that it won't be adequately addressed in either process.

8 CO-HEARING OFFICER DODUC: Thank you,  
9 Miss Des Jardins.

10 Any other questions based on what I've said so  
11 far?

12 Thank you for those very helpful points that  
13 you've all raised and that we will be considering.

14 Let me move on, then. I've already asked  
15 everyone to take a look at the summary that staff  
16 prepared with respect to the parties' participation in  
17 Part 2.

18 Let me move on to, then, discussing order of  
19 presentation and move consolidations.

20 As we did in Part 1 of the hearing, we will  
21 provide a list of parties in Part 2 in a specific order  
22 for presentation of direct testimony and  
23 cross-examination purposes, beginning with the  
24 Petitioners.

25 During the hearing -- During the hearing,

1 parties will be required to present their testimony when  
2 their party is called or coordinate with another party to  
3 take their place.

4 We will do our best to provide estimates for  
5 when parties should be ready, but these estimates are  
6 tentative and subject to change.

7 Parties should not rely on these tentative  
8 estimates as a commitment of the Hearing Officers on a  
9 date certain to present their cases in chief. It is  
10 particularly important for those parties who did not  
11 participate in Part 1 and so may not be aware of these  
12 procedures.

13 If a party cannot present on a particular day,  
14 it is that party's responsibility to coordinate with  
15 another party to take their place and give at least three  
16 days' notice to the Hearing Officers and the Service  
17 List.

18 We will not accept Notices of Unavailability  
19 from parties with scheduling conflicts that could have  
20 been avoided or parties who provide late notice of  
21 scheduling conflicts and do not arrange a change in the  
22 order of presentation so the hearing can proceed without  
23 interruption.

24 Proposals to present out of order are subject  
25 to approval by the Hearing Officers and should be

1 presented again at least three days in advance.

2 With so many party -- I'm sorry.

3 With so many participating parties, grouping  
4 among parties is highly encouraged. We encourage parties  
5 with common interest and common witnesses to work  
6 together to make the hearing process much more efficient.

7 In Part 1, some parties presented a  
8 consolidated case in chief or coordinated with other  
9 parties to present direct testimony from the same witness  
10 or group of witnesses as part of their case in chief to  
11 promote efficiency. Additional time for parties that  
12 consolidate all or portions of their cases may be  
13 allowed.

14 Parties must submit any proposed groupings with  
15 their Part 2 testimony and exhibits no later than noon,  
16 November 30th, 2017. We will review the proposed  
17 groupings and issue a posted order of presentation after  
18 November 30th but before January 18th.

19 Let's talk about time limits. You know how  
20 much I love time limits. We plan to enforce time limits.

21 Parties are encouraged to be efficient in  
22 presenting their testimony. And, Mr. Brodsky, thank you  
23 again. Follow Mr. Brodsky's example. And they're also  
24 encouraged to be efficient in conducting  
25 cross-examination.

1           Since written testimony will be submitted in  
2     advance of the hearing, it is unnecessary and unwise for  
3     witnesses to provide lengthy and detailed oral summary  
4     presentations.

5           Time limits are subject to some feasibility --  
6     I'm sorry -- some flexibility if there is good cause  
7     demonstrated in an offer of proof. Parties must include  
8     any requests for additional time with their written  
9     testimony and exhibits.

10          So a reminder of these time limits:

11          Generally, parties will have up to 20 minutes  
12     per witness and up to one hour per party to summarize  
13     their case in chief testimony. Parties will have up to  
14     one hour to cross-examine each witness or witness panel.

15          Let's talk about when to offer exhibits into  
16     evidence and about objections.

17          Parties should be prepared to offer their  
18     testimony and exhibits into evidence immediately at the  
19     conclusion of their direct testimony, cross-examination,  
20     and any recross and redirect.

21          Any objections to the admissibility of  
22     testimony and exhibits must be made early or in writing  
23     during the hearing when the testimony and exhibits are  
24     offered into evidence, or earlier. This is similar to  
25     the process we undertook during the -- I believe it was

1 the rebuttal phase of Part 1.

2 Oh, here it is.

3 Consistent with the practices established in  
4 Part 1 of this hearing, parties must update their Exhibit  
5 Identification Indices to include any exhibits introduced  
6 during cross-examination.

7 The parties are not required to offer  
8 cross-examination exhibits into evidence but, if they  
9 elect to do so, they must formally offer their  
10 cross-examination exhibits into evidence by the deadline  
11 that we will establish later in the hearing process.

12 Any questions with respect to time limits?

13 Mr. Brodsky.

14 MR. BRODSKY: I'm not sure if I heard you say  
15 it, but it's 20 minutes for the opening statement also  
16 per -- per party?

17 CO-HEARING OFFICER DODUC: Oh, yes. I had  
18 forgotten about that. Yes, you're also allowed opening  
19 statement.

20 MR. BRODSKY: Okay. And then we have three  
21 parties on one protest, so we would not intend to use  
22 three hours, but would that mean that our limit was three  
23 hours?

24 CO-HEARING OFFICER DODUC: If absolutely  
25 critical and necessary, although I'm sure you will be

1 more succinct than that.

2 MR. BRODSKY: We will. Thank you.

3 CO-HEARING OFFICER DODUC: Ms. Meserve.

4 MS. MESERVE: Quick question:

5 I believe in Part 1, once we finished  
6 presenting our evidence -- our witnesses' cross,  
7 redirect, we were given one week to submit the Exhibit  
8 List after that point, and I know there were certain  
9 times in which the couple days was necessary to figure  
10 out which exhibits should indeed be offered and what not.  
11 So I think you had said just now immediately, and I'm not  
12 sure that's what we did.

13 CO-HEARING OFFICER DODUC: If I recall  
14 correctly, it was our process -- procedure that you  
15 verbally submit into the record the exhibits that you  
16 intend to introduce so that others may voice any  
17 objections at that time.

18 And I believe we allowed, was it a whole week?  
19 I thought it was 24 hours. We were that generous? Okay.

20 MS. HEINRICH: I think it varied based on the  
21 circumstances. But as a general rule, the parties should  
22 be prepared to offer their exhibits into evidence when  
23 they're done presenting their case in chief.

24 There may be instances where there's some  
25 confusion, or things need to be renumbered, or a party is

1 reconsidering whether to offer all of their exhibits in  
2 evidence, in which case more time would be warranted.

3 MS. MESERVE: Yes. And updating the Exhibit  
4 List. So, anyway, I'm sure we'll work it out, but I just  
5 wanted to be reminded of what we can do.

6 CO-HEARING OFFICER DODUC: Mr. Bezerra and then  
7 Mr. Berliner.

8 MR. BEZERRA: Yes. Thank you.

9 I want to make sure I can clarify the window  
10 for submitting evidentiary objections, because I have to  
11 admit I was a little -- a little confused by it at times  
12 in Part 1.

13 So, what you said earlier today was, please  
14 don't submit any evidentiary objections immediately, that  
15 you will look at the --

16 CO-HEARING OFFICER DODUC: With respect to  
17 admissibility --

18 MR. BEZERRA: Okay.

19 CO-HEARING OFFICER DODUC: -- of testimony.

20 MR. BEZERRA: Okay. And, see, I -- I consider  
21 all evidentiary objections to be to the admissibility,  
22 for the most part.

23 So the way I understand the process going  
24 forward is, we'll submit our evidence, you will then  
25 consider it, we'll get some kind of ruling as we did in

1 Part 1, that some things shouldn't be included, and what  
2 have you, and then testimony will begin.

3 And so it sounds like January 18th is the  
4 opening of the window for evidentiary objections. Is  
5 that accurate?

6 CO-HEARING OFFICER DODUC: In terms of written  
7 objections, you mean?

8 MR. BEZERRA: Yes.

9 CO-HEARING OFFICER DODUC: Okay.

10 MR. BEZERRA: And, then, so we --

11 CO-HEARING OFFICER DODUC: Yes.

12 MR. BEZERRA: We would open that window and  
13 then --

14 CO-HEARING OFFICER DODUC: We would.

15 MR. BEZERRA: -- people would testify. And at  
16 the end of their testimony, potentially, they would offer  
17 exhibits into evidence.

18 CO-HEARING OFFICER DODUC: And if you recall,  
19 during the rebuttal phase, at that time, I also asked for  
20 any remaining objections to be voiced.

21 MR. BEZERRA: Okay. So going forward, we  
22 would -- we would have from January 18th to the close of  
23 any given party's evidence to submit written evidentiary  
24 objections.

25 Once somebody says, "I hereby offer Exhibits 1



1 through 2", being optimistic, is that the close of the  
2 window? I mean, once somebody says those magic words,  
3 are we unable to object any further?

4 CO-HEARING OFFICER DODUC: Well, let me ask you  
5 to go back and read the transcript of the rebuttal phase,  
6 because my recollection is, at that time, I asked if any  
7 parties have any objection. I allowed for those  
8 objections to be voiced and, if necessary, depending on  
9 the circumstances, parties were given some time --

10 MR. BEZERRA: Okay.

11 CO-HEARING OFFICER DODUC: -- to submit more  
12 extensive written objections and responses, depending on  
13 the circumstances.

14 MR. BEZERRA: Oh, okay. And that's -- that's  
15 very helpful.

16 So basically we have -- If you want to submit  
17 written objections, you should do so between January 18th  
18 and the close of any given party's testimony, and then  
19 you will ask at that time, "Are there any further  
20 objections," which might be based on cross-examination at  
21 that point.

22 And then that's, then, the close, and maybe  
23 we'd have 24 hours or what have you to support those  
24 objections.

25 CO-HEARING OFFICER DODUC: Depending on the

1 objections.

2 MR. BEZERRA: Okay. That's very helpful.

3 Thank you very much.

4 CO-HEARING OFFICER DODUC: I don't believe it's  
5 changed that much in the rebuttal phase.

6 MR. BEZERRA: I think -- I think that's  
7 accurate. I just wanted to be very clear in my own mind  
8 as to how this would work because there were times in  
9 rebuttal we were moving fast and I wasn't entirely clear  
10 exactly what the procedure was, and I don't think anybody  
11 got hurt by the procedure. I just want to make sure I  
12 understand.

13 CO-HEARING OFFICER DODUC: I'm sure I would  
14 have heard due process complaints if that was the case.

15 MR. BEZERRA: I have little doubt about that.

16 CO-HEARING OFFICER DODUC: Mr. Berliner.

17 MR. BERLINER: Thank you.

18 Good morning. Tom Berliner on behalf of the  
19 Department of Water Resources.

20 I have a concern about the practice we did  
21 adopt in Part 1 about changing when a party might be  
22 testifying and given three-days' notice.

23 It was a very -- It was a big improvement in  
24 Part 1 to get the three days as opposed to essentially  
25 real-time notice, but, frankly, it was a pretty big

1     burden when you had a party come up with multiple  
2     witnesses.

3             We were preparing cross of another party,  
4     which -- and it takes a long time to prepare cross. And  
5     that's not something you do in an hour. It takes weeks  
6     for the big panels, for the technical stuff.

7             If we have three days, really, we are already  
8     getting ready for that next week to two weeks' worth of  
9     cross.

10            If you get three days and all of a sudden  
11    you've got three or four witnesses coming up, you really  
12    can't do an adequate job to prepare cross. And the  
13    burden falls on multiple parties who are trying to get  
14    ready for that.

15            I would -- If it was an individual witness,  
16    fine, we can get ready for a single witness in three  
17    days, everything being equal.

18            I'm sure there could be an extraordinary  
19    witness where you would say they're testifying as to so  
20    much it would be next to impossible.

21            What I'm wondering is if we could have a longer  
22    period of time when you have a party with multiple  
23    witnesses that are going to switch.

24            And I under -- I think it's great that parties  
25    can switch. It's just it would be extremely helpful to

1 have more than three-days' notice. I would recommend a  
2 week.

3 CO-HEARING OFFICER DODUC: Especially for the  
4 larger parties --

5 MR. BERLINER: Yeah.

6 CO-HEARING OFFICER DODUC: -- with more  
7 witnesses. Hmm.

8 Any concerns with that request? Or any joinder  
9 to that request?

10 Mr. Bezerra and Miss Taber.

11 MR. BEZERRA: Yeah. I do object to that. I  
12 mean, we have moved very rapidly at times in this  
13 hearing. We've done our best to schedule witnesses as  
14 we've rolled along.

15 We honestly don't have three days at times to  
16 figure out what the schedule's going to be. Three days  
17 is in and of itself a little tight given that, you know,  
18 you've -- you're trying to schedule multiple witnesses  
19 potentially across multiple days. Parties that are later  
20 in the cycle, all of these scheduling uncertainties tend  
21 to accumulate.

22 And so -- I mean, I certainly understand that  
23 the Petitioners, you know, have a lot of witnesses to  
24 cross-examine, but the scheduling becomes quite  
25 difficult. And hopefully this is not a problem, but

1 three days is in and of itself a little tough when you're  
2 trying to schedule a panel of, you know, five witnesses.

3 So, yeah, I think more than three days is  
4 inappropriate.

5 CO-HEARING OFFICER DODUC: Miss Taber.

6 MS. TABER: I just would like to join in  
7 Mr. Bezerra's comments, and especially given that the  
8 hearing isn't continuous. There are gaps of days, and it  
9 jumps over. It's just too difficult to predict with any  
10 certainty, and I think three days is tough but a  
11 reasonable compromise.

12 CO-HEARING OFFICER DODUC: Any other joinder to  
13 Mr. Bezerra and Miss Taber's concerns?

14 MR. O'LAUGHLIN: Tim O'Laughlin, San Joaquin  
15 Tributaries Authority.

16 Yeah. I don't understand the request, because  
17 my understanding currently as this is set out, all the  
18 testimony is coming out on November 30th and the hearing  
19 doesn't start until January 18th. And given that they're  
20 probably going to put their case on for two weeks, they  
21 have two months to prepare for cross-examination.

22 So I think this is one of those little  
23 facetious things that are being thrown out to --

24 CO-HEARING OFFICER DODUC: No commentary,  
25 Mr. O'Laughlin.

1 Miss Des Jardins.

2 MR. BERLINER: Before we --

3 CO-HEARING OFFICER DODUC: Hold on,  
4 Mr. Berliner. Let me hear all those who would voice  
5 their concerns before I give you a chance to respond.

6 MR. BERLINER: Well, I -- I think --

7 CO-HEARING OFFICER DODUC: Mr. Berliner, hold  
8 on.

9 Miss Des Jardins --

10 MR. BERLINER: I want to clarify --

11 CO-HEARING OFFICER DODUC: I'm sorry?

12 MR. BERLINER: I wanted to clarify my request.

13 CO-HEARING OFFICER DODUC: Later.

14 Miss Des Jardins.

15 MS. DES JARDINS: I just wanted to say, we did  
16 have some mobility issues.

17 As -- Coming as a party toward the end of the  
18 schedule, there's a very limited number of other parties  
19 to switch with, and I jumped through extraordinary hoops  
20 and called everybody. And it's difficult to even find  
21 someone at the last -- at -- at -- at -- who would  
22 testify after us if there are issues that arose.

23 So I think that it's entirely reasonable.  
24 There's only a limited number of parties coming up  
25 towards the end. So I don't think this is as big an

1 issue.

2 And, as Mr. O'Laughlin pointed out, for parties  
3 that are coming early in the -- earlier in the  
4 Protestants' list, there is extensive time to prepare for  
5 the hearing.

6 CO-HEARING OFFICER DODUC: Miss Meserve.

7 MS. MESERVE: I would just suggest three days.  
8 And, obviously, if we have more notice, we should provide  
9 it out of fairness.

10 I think there were issues even with DWR's  
11 witnesses at the end where they switched around pretty  
12 quick and I didn't have three-days' notice.

13 So, you know, I mean, we should do whatever we  
14 can to give people enough time. But more than three  
15 days' requirement, it would be very hard to do.

16 CO-HEARING OFFICER DODUC: Mr. Brodsky.

17 MR. BRODSKY: I think Mr. Berliner's concerns  
18 are valid, you know. You prepare for cross-examining a  
19 big panel and you put weeks into it and, all of a sudden,  
20 it changes.

21 But for us, we have witnesses flying in from  
22 out of state and people with teaching schedules and all  
23 sorts of things.

24 So, I mean, to the extent the Board is willing  
25 to allow for gaps in the hearings, we can be a lot more

1 flexible in terms of when we present our witnesses, or if  
2 we knew well in advance.

3 If I knew today my panel was going to be on  
4 January 20th, then I'd have them all here for sure on  
5 January 20th. But we don't know until a day or two  
6 sometimes before we're going to go on that that's when  
7 we're going to go on.

8 So, if at that point, to be fair to  
9 Mr. Berliner, we might need to have a day or two gap in  
10 the hearings. That would be a way to accommodate  
11 everybody, to give him time and allow us to get our  
12 witnesses here.

13 CO-HEARING OFFICER DODUC: All right. Do you  
14 wish to clarify now, Mr. Berliner --

15 MR. BERLINER: Yes, please.

16 CO-HEARING OFFICER DODUC: -- before  
17 Miss Morris?

18 MR. BERLINER: Thank you.

19 So I'm not concerned about a witness being  
20 available or not available on a Tuesday, a Wednesday or  
21 Thursday. We're flexible. We can take those witnesses  
22 whenever they're available.

23 I'm not concerned about, gosh, we thought so  
24 and so was going to testify on Tuesday and now they're  
25 going to testify on Friday. That's fine.



1           What I'm concerned about is, you have a typical  
2 witness or party in this proceeding with five, six  
3 witnesses who are scheduled to testify and, let's say,  
4 it's group -- just picking a number, I don't know what  
5 groups these are -- Number 20 decides to switch with  
6 Number 10 and you were getting ready for 10, 11, 12 and  
7 now 20 is now going to get three-days' notice and you're  
8 working on four or five parties that you have to cross.

9           I have to drop everything and refocus what  
10 you're doing and going for that other party and there are  
11 a lot of witnesses on those panels.

12           So Mr. O'Laughlin's correct. We will have two  
13 months to get ready. But we have two months to get ready  
14 for a lot of parties.

15           And we all know. I mean, the lawyers that do  
16 this, we all know you don't -- you can't get ready for  
17 everybody ahead of time. You're getting your own  
18 witnesses ready. You're making sure their testimony is  
19 sound. You're starting to do cross and figure it out.  
20 But when you do cross, you spend a lot of time on the  
21 technical stuff. It just takes time.

22           So I'm concerned about major changes where  
23 you've got a party -- not within a party -- or not a day  
24 or two or three here or there. All that stuff's fine.  
25 I'm concerned when you are preparing for Party 10 and all

1 of a sudden Party 10 moves way back and parties -- other  
2 parties come up and you've got three-days' notice and  
3 it's -- you get notice on a Friday and you're going on  
4 Tuesday.

5 CO-HEARING OFFICER DODUC: Okay. Ms. Morris,  
6 did that address your concern?

7 MS. MORRIS: (Nodding head.)

8 CO-HEARING OFFICER DODUC: I'm coordinating  
9 with our Co-Hearing Officer on the fly here that we  
10 remain with the three days, but obviously we will take  
11 unique circumstances into consideration if that happens.

12 All right. Moving on, then.

13 We had advised in our agenda that was sent out  
14 on Monday that we wanted to get an update on where  
15 settlement discussions are. So, as you know, we  
16 encourage parties to attempt to resolve outstanding  
17 issues through settlement.

18 So, Petitioners, please update us on whether  
19 there are any ongoing settlement discussions with any of  
20 the parties and what that current status is.

21 MR. MIZELL: Well, the Department remains open  
22 to considering settlements with anybody and everybody who  
23 wishes to speak with us.

24 At the moment, there is no update to be given  
25 about status of the settlements that were initiated.

1       Primarily those settlements have not -- not progressed  
2       nearly since the last time we spoke.

3               And the focus has been principally on CEQA  
4       settlements at this time. Those CEQA settlements are  
5       proceeding, but there's -- they're from a different  
6       process, so they're not necessarily precisely on point  
7       for this hearing.

8               To the extent that they have overlapping  
9       issues, some issues may be resolved through the CEQA  
10      process.

11              CO-HEARING OFFICER DODUC: Anything to add,  
12      Miss Aufdemberge?

13              MS. AUFDEMBERGE: No, nothing to add.

14              CO-HEARING OFFICER DODUC: All right. All  
15      right. So, earlier, I asked you to review the status  
16      summary of the parties participating in Part 2.

17              Does the information accurately reflect the  
18      submitted Supplemental Notice of Intent to Appear?

19              Does anyone have any concerns with the summary?  
20      Any clarification, any corrections?

21              Please come up.

22              MR. COOPER: Good morning. Dustin Cooper.

23              I spoke with Mr. Baker. There's a minor typo  
24      as to the draft party witness list. Three of my clients  
25      are participating just under Cross-X and as rebuttal that

1 are not listed. Those are Nevada Irrigation District,  
2 Paradise Irrigation District and South Feather River  
3 Water and Power Agency.

4 CO-HEARING OFFICER DODUC: Thank you.

5 Anyone else?

6 For anyone who may not be here today, let's  
7 give you until noon tomorrow to notify the staff and the  
8 Service List of any corrections that need to be made to  
9 this.

10 All right. Then it seems like we will be  
11 wrapping up before lunch.

12 A transcript of this Pre-Hearing Conference  
13 will be made available on our WaterFix hearing website as  
14 soon as possible.

15 We will take under consideration the requests  
16 for clarifications that were stated together and we will  
17 issue some additional direction shortly.

18 Keep in mind that all of the notices and ruling  
19 letters issued to date are still in effect unless  
20 modified by us and are available on our Petition Hearing  
21 website.

22 We remind you again of the guidance document  
23 that was provided as an enclosure to today's agenda. It  
24 summarizes the hearing procedures and issues addressed in  
25 prior rulings.

1           And also a reminder that the prohibition on  
2     ex-parte communication is also still in effect, which  
3     generally means that all substantive hearing  
4     communications need to include all members of the Service  
5     List. The most current version of the Service List is  
6     also available on our website.

7           With that, thank you all for participating  
8     today. We will see you when Part 2 of the hearing  
9     resumes on January 18th, 2018.

10           (Proceedings adjourned at 11:23 a.m.)

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1 State of California )  
2 County of Sacramento )

3

4 I, Candace L. Yount, Certified Shorthand Reporter  
5 for the State of California, County of Sacramento, do  
6 hereby certify:

7 That I was present at the time of the above  
8 proceedings;

9 That I took down in machine shorthand notes all  
10 proceedings had and testimony given;

11 That I thereafter transcribed said shorthand notes  
12 with the aid of a computer;

13 That the above and foregoing is a full, true, and  
14 correct transcription of said shorthand notes, and a  
15 full, true and correct transcript of all proceedings had  
16 and testimony taken;

17 That I am not a party to the action or related to a  
18 party or counsel;

19 That I have no financial or other interest in the  
20 outcome of the action.

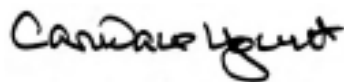
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22 Dated: October 22, 2017

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Candace L. Yount, CSR No. 2737