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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  
  
COASTAL MEETING ROOM  
  
1001 I STREET  
  
SECOND FLOOR  
  
SACRAMENTO CALIFORNIA  
  
PART 2 REBUTTAL

Tuesday, August 14, 2018  
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Reported By: Deborah Fuqua, CSR No. 12948  
(a.m. session)  
Candace Yount, CSR No. 2737  
(p.m. session)

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1	I N D E X	
2		PAGE
3	Opening Remarks by Co-Hearing Officer Doduc	1
4		
5	PART 2 REBUTTAL WITNESSES CALLED BY PETITIONERS, PANEL 2:	
6		
7	KRISTEN WHITE	
8	NANCY PARKER	
	CHANDRA CHILMAKURI	
	ERIK REYES	
9	CROSS-EXAMINATION BY:	PAGE
10	MS. MESERVE (resumed)	3
11		
12	PART 2 REBUTTAL WITNESSES CALLED BY PETITIONERS, PANEL 3:	
13		
14	CHRIS EARLE, LENNY GRIMALDO, and MICHAEL BRADBURY	
15	DIRECT EXAMINATION BY:	PAGE
16	MR. MIZELL	77
17		
18	CROSS-EXAMINATION BY:	PAGE
19	MS. NIKKEL	95
20	MS. MESERVE	100
21	MR. JACKSON	137
22	MS. DES JARDINS	194

23

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1 Tuesday, August 14, 2018 9:30 a.m.

2 PROCEEDINGS

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4 CO-HEARING OFFICER DODUC: Good morning,  
5 everyone. Welcome back to the Coastal Hearing Room and  
6 welcome back to this Water Right Change Petition  
7 Hearing for the California WaterFix project.

8 I am Tam Doduc. To my right is Board Chair  
9 and Co-Hearing Officer Felicia Marcus. I believe we  
10 will be joined shortly by Board Member DeeDee D'Adamo,  
11 who will be sitting to the Chair's right. To my left  
12 are Andrew Deeringer and Conny Mitterhofer. We are  
13 also being assisted today by Mr. Long and Ms. Rasisis.

14 Our usual three announcements. If an alarm  
15 sounds, we will evacuate. We will take that stairs  
16 down to the first floor and meet in the park. If you  
17 are not able to use the stairs, flag one of the  
18 security people, and you will be directed somewhere  
19 else.

20 Secondly, please speak into the microphone  
21 when providing your comments today, and make sure that  
22 it's turned on and that the green light is lit. And  
23 begin by stating your name and affiliation.

24 Thirdly and most importantly, please take a  
25 moment to put all your noise-making devices to silent,

1 vibrate, do not disturb.

2 Any housekeeping matters? All right.

3 I believe we will begin today with Ms. Meserve  
4 completing her cross-examination of this panel. Then  
5 we will ask petitioners if they would like to request  
6 any redirect. And after that, we will then go to  
7 presentation of petitioners Panel 3 witnesses, which I  
8 believe Mr. Mizell has estimated to take about an hour.  
9 And then after that, I will ask for those who wish to  
10 conduct cross-examination to come up and provide me  
11 with a time estimate. And based on that, we will plan  
12 out the next few days, perhaps even the rest of this  
13 week.

14 So with that, Ms. Meserve, the mike is yours.

15 MS. MESERVE: Good morning, Osha Meserve for  
16 LAND and Friends of Stone Lakes.

17 I'm going to go ahead and begin with some  
18 questions regarding the 1143 2nd Revised.

19 CO-HEARING OFFICER DODUC: And, actually,  
20 since I've now being ruled, can you go ahead and give  
21 us an outline of the remainder of your cross? So 1143?

22 MS. MESERVE: 1143 2nd Revised. And some of  
23 these may also go to the Supplemental EIR as areas that  
24 were permitted to be asked about, each of the new  
25 information.

1 CO-HEARING OFFICER DODUC: And Ms. Meserve,  
2 you need to please speak into the microphone.

3 THE REPORTER: Yes, please.

4 CO-HEARING OFFICER DODUC: I see Debbie making  
5 faces at me.

6 THE REPORTER: Sorry.

7 MS. MESERVE: Okay, great. And so all the  
8 questions go to that and the modeling assumptions. And  
9 I'm not quite sure which of the panelists will be  
10 answering them, honestly. So. . .

11 CO-HEARING OFFICER DODUC: All right.

12 MS. KRISTEN WHITE, DR. NANCY PARKER,

13 DR. CHANDRA CHILMAKURI and

14 MR. ERIK REYES,

15 called as Part 2 Rebuttal Panel 2

16 witnesses by the petitioners, having

17 been previously duly sworn, were

18 examined and testified further as

19 hereinafter set forth:

20 CROSS-EXAMINATION BY MS. MESERVE (Resumed)

21 MS. MESERVE: So to begin with -- for

22 Ms. White, to begin with, I think, was the Bureau

23 involved in developing DWR-1143 2nd Revised?

24 WITNESS WHITE: We were certainly involved in

25 developing all the assumptions, but we did not

1 specifically draft the table.

2 MS. MESERVE: But the Bureau reviewed the  
3 table prior to its submittal?

4 MS. AUFDEMBERGE: Objection. This is beyond  
5 the scope of Ms. White's testimony.

6 CO-HEARING OFFICER DODUC: It goes to 1143.  
7 Overruled.

8 WITNESS WHITE: I definitely reviewed the  
9 table. I don't know that data was submitted and  
10 whether or not that was before. I apologize.

11 MS. MESERVE: I'm sorry. I couldn't hear you.

12 WITNESS WHITE: I said I definitely reviewed  
13 it. I don't recall whether or not I was reviewing it  
14 prior to it being submitted or not.

15 MS. MESERVE: So at some point you reviewed  
16 the DWR 2nd Revised, but you're not sure when in the  
17 time frame of submittal?

18 WITNESS WHITE: Correct.

19 MS. MESERVE: Is it your understanding that  
20 DWR-1143 2nd Revised assumes that the Bureau would  
21 comply with the new criteria in the proposed action on  
22 Pages 3 through 6 of that table?

23 WITNESS WHITE: Can you repeat that question  
24 and bring up what pages you're talking about?

25 MS. MESERVE: Sure. So DWR-1143 2nd Revised,



1 if we can bring that up, and then Pages 3 through 6 are  
2 labeled "New Criteria Included in Proposed Action."

3 So the question is is it your understanding  
4 that DWR-1143 2nd Revised assumes that the Bureau would  
5 comply with these new criteria that are included in the  
6 proposed action, Pages 3 through 6?

7 MS. AUFDEMBERGE: Objection. We're headed  
8 somewhere way beyond the scope of Ms. White's  
9 testimony. Ms. White is here to talk about storage and  
10 release restrictions on the CVP reservoirs on the Delta  
11 and support of Ms. Parker's analysis of that.

12 MR. MIZELL: And if I might add, DWR-1143 was  
13 finalized by DWR, and in our submission cover letter, I  
14 indicated that the witnesses who would best be able to  
15 speak to the content of 1143 are Dr. Chilmakuri and  
16 Mr. Reyes.

17 CO-HEARING OFFICER DODUC: So noted. But the  
18 intent of DWR-1143 is to convey or at least help all of  
19 us better understand the operating assumptions for the  
20 proposed project which is to be jointly operated by  
21 both petitioners. So I believe it's fair game for  
22 Ms. Meserve to ask Ms. White or Ms. Parker, for that  
23 matter, these questions.

24 And answer to the best of your ability,  
25 recognizing that you did not perhaps have a specific

1 role in developing the actual document itself.

2 I believe Ms. Meserve's question goes towards  
3 the -- to better understand how or to what extent you  
4 agree with these proposed operating criteria that were  
5 submitted on behalf of both petitioners.

6 WITNESS WHITE: My understanding is that  
7 Reclamation and DWR will jointly operate the WaterFix  
8 and their main system to comply with all applicable  
9 regulations including those in this proposed action.

10 MS. MESERVE: And then on Page 7 of that  
11 table, there are existing Delta criteria listed.

12 And is it your understanding that the Bureau  
13 would also comply with those existing criteria?

14 MR. BERLINER: Objection, asked and answered.  
15 We've been through this multiple times regarding D1641,  
16 et cetera.

17 CO-HEARING OFFICER DODUC: Ms. Meserve, it is  
18 at least my assumption and based on now Ms. White's  
19 answer that, indeed, both petitioners are proposing  
20 jointly these criteria to which they will operate.

21 Are you trying to get at something else?

22 MS. MESERVE: Well, I'd like to test that  
23 using the Exhibit NRDC-204, which is a letter from the  
24 Bureau, if we could look at that, on Page 3. It's a --  
25 and it states on Page 3 that State Water Board -- in

1 the middle of the page -- does not have unfettered  
2 discretion to impose regulatory constraints that  
3 interfere with the Congressional authorized purpose of  
4 the Reclamation project.

5 MR. MIZELL: To the extent that Ms. Meserve  
6 wants to test whether or not Reclamation is actually  
7 proposing the operational criteria indicated in  
8 DWR-1143, her question could get to that answer.

9 When it comes to asking questions about  
10 federal preemption opinions of the Department of the  
11 Interior, that is well beyond the scope of 1143, the  
12 supplemental document, or any of the testimony of the  
13 witnesses before you.

14 MS. AUFDEMBERGE: And I would like to add this  
15 is a letter regarding the San Joaquin system, and we  
16 went over that in great detail yesterday about whether  
17 or not the San Joaquin system is relevant to this  
18 hearing.

19 MS. MESERVE: I think my questions are a bit  
20 more broad, actually, where I'm testing the ability of  
21 the Bureau in this hearing -- the ability and intent of  
22 the Bureau to comply with State Water Board  
23 requirements, given the statements that have been made  
24 in this recent letter which, although the subject  
25 matter may be a standard that is in the San Joaquin

1 system, it makes some very broad statements regarding  
2 the Water Board's ability to impose requirements on the  
3 Bureau.

4           And we've been told throughout this hearing  
5 that the Bureau would comply with all applicable  
6 requirements. So that's why I'm bringing up this  
7 issue.

8           CO-HEARING OFFICER DODUC: How are you tying  
9 it specifically to 1143 or to something that is within  
10 the scope of rebuttal testimony of this Part 2 Rebuttal  
11 phase?

12           I understand we had this sort of discussion  
13 yesterday, Ms. Meserve, and you will appreciate that,  
14 as much as I don't make up the rules that govern these  
15 proceedings, I must adhere to them. And one of the  
16 rules is that the scope of rebuttal cross-examination  
17 must be within the scope of rebuttal or, in this case,  
18 we have identified that to be rebuttal testimony,  
19 DWR-1143 2nd Revision or the Supplemental EIR/EIS.

20           MS. MESERVE: Correct. So the 1143, 2nd  
21 Revised spends several pages on new criteria that are  
22 proposed to be included in the proposed action and that  
23 would likely become conditions that the Water Board  
24 would impose in a permit granted, and then in addition,  
25 it lists existing criteria that come from the Water

1 Board. So I believe 1143 includes this idea that the  
2 Water Board has authority to impose requirements on the  
3 Bureau. And if the Bureau's position is if that is not  
4 true, then I think we all need to know about that.

5 CO-HEARING OFFICER DODUC: All right. Hold  
6 on. Let me hear from Ms. Morris first, and then I will  
7 get to you, Mr. Mizell.

8 MS. MORRIS: Thank you. Just a couple of  
9 points. I would join the objections. This is beyond  
10 the scope. This letter is dealing with water quality.

11 CO-HEARING OFFICER DODUC: I'm sorry,  
12 Ms. Morris. When you say "beyond the scope," you are  
13 saying beyond the scope of rebuttal?

14 MS. MORRIS: Correct. And it's beyond the  
15 scope of rebuttal. In addition, the water quality  
16 control questions are different than what's in 1143.

17 1143 contains criteria related to Biological  
18 Opinions, which are separate. And Ms. Meserve is  
19 trying to conflate water -- what goes in water permits  
20 versus water quality standards, which this letter  
21 clearly is only talking about water quality standards  
22 and the applicability to the federal government.

23 CO-HEARING OFFICER DODUC: Mr. Mizell,  
24 anything to add?

25 MR. MIZELL: Yeah, I'd like to add that, to

1 the question Ms. Meserve is asking, Ms. White has  
2 already given a very direct answer. So I believe it's  
3 asked and answered. Again, to the federal preemption  
4 issue and what is raised by this, it's a legal  
5 conclusion that does go beyond the scope of any of the  
6 witnesses' testimony.

7 CO-HEARING OFFICER DODUC: Ms. Aufdemberge.

8 MS. AUFDEMBERGE: And I would just like to add  
9 that this letter is also specifically pointed at  
10 New Melones, and Ms. Meserve is painting with extremely  
11 broad brushes about the meaning of the other statements  
12 in this letter.

13 CO-HEARING OFFICER DODUC: Anyone else wanting  
14 to weigh in?

15 Ms. Meserve, last words?

16 MS. MESERVE: Well, I mean, I think that, if  
17 we look at the existing Delta criteria, the modeling  
18 assumptions column on Page 7 is referring to D1641.  
19 And, again, I think all the new criteria would likely  
20 become part of a permit that would -- could be issued  
21 by this Board.

22 So it's a very real concern about whether the  
23 Bureau, as stated in this letter, may have the -- would  
24 have the U.S. Attorney take action against the Water  
25 Board rather than comply with requirements that the

1 Water Board had imposed for this project.

2 CO-HEARING OFFICER DODUC: All right,

3 Ms. Meserve, thank you.

4 Thank you all for your input.

5 As I said yesterday, this is outside of the  
6 scope that we have framed for Part 2 Rebuttal and,  
7 therefore, outside of the scope for cross-examination.

8 However, as I mentioned when Mr. Jackson  
9 eloquently talked about this yesterday, you've  
10 certainly raised an issue that we will be considering.  
11 It is not appropriate for cross-examination during this  
12 rebuttal phase, but we will give it some thought. We  
13 will take it under consideration, and at some point, we  
14 will be addressing it.

15 But for now, the objections are sustained.

16 Please continue with your next line of  
17 questioning, Ms. Meserve.

18 MS. MESERVE: Thank you.

19 With respect to Ms. Parker's testimony on the  
20 third paragraph of the first page, you refer to the  
21 regulatory requirements -- let me see if can I get  
22 there -- including its regulatory obligations, rather.

23 And my question is, if DWR 2nd Revised does  
24 not account for the split between the CVP and the SWP,  
25 as was discussed yesterday, how will DOI ensure that

1 the diversions in the proposed North Delta area are  
2 within DOI's water rights permit limits?

3 MS. AUFDEMBERGE: Objection, beyond the scope  
4 of -- who was that question for?

5 MS. MESERVE: It could be anyone. I had tried  
6 to tie it to Ms. Parker's testimony. It's really an  
7 1143 question.

8 CO-HEARING OFFICER DODUC: Help me understand  
9 the question.

10 MS. MESERVE: Yesterday there was discussion  
11 in the context of the float, the split. And Ms. Parker  
12 was discussing the fact that the model doesn't care  
13 where the water comes from.

14 And so my question is how to -- how does the  
15 model or how would the project ensure that the  
16 diversions are within the water rights permit limits of  
17 the Bureau if there's no information in the model about  
18 where that water is coming from.

19 CO-HEARING OFFICER DODUC: Ms. Parker.

20 MR. MIZELL: I'd like to also object.

21 The operations, day-to-day operations that  
22 monitor the quantities of water and the places from  
23 which that water is diverted are not a subject that's  
24 before you with this rebuttal testimony. 1143 goes to  
25 the operating criteria, which are conditions proposed



1 on the project; it goes to modeling assumption as to  
2 how the model interpreted those criteria; and it talks  
3 about permit conditions from the fish agencies.

4 In no form does it go into how the operations,  
5 on a daily basis, account for the water that is  
6 diverted from the existing projects or under the  
7 California WaterFix.

8 CO-HEARING OFFICER DODUC: How does the  
9 modeling account for it?

10 MR. MIZELL: Well, this goes to the float  
11 issue. So the extent to which the model estimates --

12 CO-HEARING OFFICER DODUC: Are you testifying  
13 or -- let me ask Mr. Reyes that.

14 MR. MIZELL: I'm explaining my objection. My  
15 objection is it's beyond the scope. I'm happy to  
16 elaborate if you need it.

17 CO-HEARING OFFICER DODUC: It's not beyond the  
18 scope because we're trying to understand what is  
19 encompassed in 1143 and what isn't.

20 So Mr. Reyes or Dr. Chilmakuri, now that I  
21 finally can say your last name, can one of you answer  
22 that question?

23 WITNESS CHILMAKURI: The model is complying  
24 with all the regulatory criteria, including the water  
25 rights.

1 MS. MESERVE: So it's built in?

2 WITNESS CHILMAKURI: Yes.

3 MS. MESERVE: So does it include, then, a  
4 maximum amount that can be diverted under a CVP label  
5 in a given day?

6 WITNESS CHILMAKURI: In a month, yes.

7 MS. MESERVE: And is that -- do you know where  
8 that reference would be if I wanted to follow up on  
9 that?

10 WITNESS CHILMAKURI: What specifically were  
11 you looking for?

12 MS. MESERVE: Where's that assumption in the  
13 model so we could be assured that it's true that  
14 there's some kind of limit in the model? Because the  
15 discussion yesterday from Ms. Parker made me think  
16 maybe there wasn't, and that's why I asked the  
17 question.

18 WITNESS CHILMAKURI: You can look at the  
19 Biological Assessment, Appendix 5A.

20 MS. MESERVE: Of the Final EIR?

21 WITNESS CHILMAKURI: Biological Assessment.

22 MS. MESERVE: Okay. Now, on 1143, both  
23 Footnote 29 and 38 refer to changes under adaptive  
24 management that we've discussed a little bit.

25 Doesn't the ITP state that all criteria are

1 subject to change under adaptive management?

2 WITNESS CHILMAKURI: Could you point us to  
3 that, please.

4 MS. MESERVE: So that would be in SWRCB-107,  
5 top of Page 67.

6 CO-HEARING OFFICER DODUC: And your point in  
7 asking this question relative to 1143 is?

8 MS. MESERVE: So the issue is that there are  
9 two footnotes, one with respect to -- for an outflow  
10 and one with respect to South Delta operations that  
11 talk about changes under adaptive management. And my  
12 questions go to the issue of what all is subject to  
13 adaptive management.

14 CO-HEARING OFFICER DODUC: So you're asking  
15 whether or not other criteria as proposed in 1143 might  
16 also be subject to adaptive management?

17 MS. MESERVE: Yes.

18 CO-HEARING OFFICER DODUC: Let's ask that  
19 rather than pulling up the ITP again.

20 MS. MESERVE: Okay. Yes.

21 So I guess, Dr. Chilmakuri, is it your  
22 understanding that all the criteria in DWR-1143 2nd  
23 Revised would be subject to change under adaptive  
24 management?

25 WITNESS CHILMAKURI: Yes.

1 MS. MESERVE: So just to be clear, it's not  
2 limited to South Delta operations and spring outflow?

3 WITNESS CHILMAKURI: That's my understanding,  
4 that all the criteria are subject to adaptive  
5 management. It's all-encompassing.

6 MS. MESERVE: So does DWR and the Bureau  
7 intend to correct DWR 2nd Revised to reflect that more  
8 clearly?

9 MR. MIZELL: Objection, argumentative.

10 DWR-1143 2nd revised applies to -- states  
11 which criteria are currently considered within adaptive  
12 management processes indicated in the fish agency  
13 permits. I don't believe anywhere in 1143 it says that  
14 that is exclusive.

15 CO-HEARING OFFICER DODUC: Dr. Chilmakuri,  
16 your response to Ms. Meserve's question regarding  
17 adaptive management -- adaptive management?

18 WITNESS CHILMAKURI: Could you state --

19 CO-HEARING OFFICER DODUC: Your understanding,  
20 how is that reflected in 1143, Revised -- Revision 2?

21 WITNESS CHILMAKURI: It's -- there are -- as  
22 Ms. Meserve pointed out, there are two footnotes that  
23 are specific to -- to criteria. But as I understand  
24 adaptive management -- and I'm in no means an expert on  
25 adaptive management. But my understanding of it is it

1 encompasses everything. If the best available science  
2 indicates a change is necessary, I think adaptive  
3 management is the proper -- is providing a way to adapt  
4 the criteria. And in my opinion, all the criteria are  
5 subject to it.

6 CO-HEARING OFFICER DODUC: You've made your  
7 point, Ms. Meserve.

8 MS. MESERVE: Okay.

9 Footnote 38 refers to the DFW concurrence and  
10 coordination with Fish and Wildlife Service and NMFS  
11 with respect to changes in spring outflow.

12 Is there any role for the State Water Board in  
13 making a change to spring outflow requirements using  
14 adaptive management?

15 WITNESS CHILMAKURI: Again, I'm not fully  
16 familiar with the composition of the group who would  
17 make those decisions, but you can follow up with  
18 Mr. Earle -- or Dr. Earle, who is coming up in the next  
19 panel.

20 MS. MESERVE: And just to be clear, we would  
21 be permitted to ask Dr. Earle questions about DWR-1143  
22 Revised?

23 CO-HEARING OFFICER DODUC: And the question  
24 specifically was?

25 MS. MESERVE: Whether there would be a role

1 for the State Water Board in making changes to spring  
2 outflow requirements.

3 CO-HEARING OFFICER DODUC: How does that -- I  
4 mean, that's a question with or without 1143.

5 MS. MESERVE: I mean, for me, it's related to  
6 1143 because I noticed, like we've talked about --  
7 usually in legal proceedings, we only put --

8 CO-HEARING OFFICER DODUC: Let me put it this  
9 way, Ms. Meserve. That question, yes. I don't want to  
10 open 1143 to everybody on Panel 3, so depending on the  
11 circumstances.

12 MS. MESERVE: Okay. Thank you.

13 Is anyone on this panel aware of any role for  
14 the State Water Board in any other changes that may be  
15 sought through the adaptive management process?

16 (No response)

17 MS. MESERVE: There's no answer.

18 WITNESS WHITE: Well, can I add I think it  
19 just depends on what it is that's changing. I mean, a  
20 lot of these criteria are kind of overlapping with  
21 other criteria that already exist. So I think it would  
22 really depend on specifically what we're talking about.  
23 But possibly Panel 3 would be able to expand on it  
24 further.

25 MS. MESERVE: Okay. So if we could look at

1 Page 7 of 1143 Revised on the last row. And this is  
2 looking at the export-to-inflow ratio. And it's  
3 defined the Sacramento River flow as flows downstream  
4 of the North Delta diversions such that the North Delta  
5 diversions are not included in the calculation.

6 Doesn't this move the compliance point for  
7 calculating inflow for export to inflow from Freeport  
8 to downstream of the North Delta Diversions?

9 CO-HEARING OFFICER DODUC: Ms. Morris?

10 MS. MORRIS: Objection, misstates the  
11 testimony. It doesn't say that it's moving compliance  
12 points. It says specifically on there that they're --  
13 they are requesting or suggesting, which is different  
14 than saying they're moving the compliance point.

15 CO-HEARING OFFICER DODUC: All right. We'll  
16 caveat it that way.

17 MR. BERLINER: I have another objection. This  
18 was discussed extensively in Part 1. I believe Armin  
19 Munevar attested at great length about the  
20 export-import inflow ratio. So this has already been a  
21 topic of cross-examination for quite --

22 CO-HEARING OFFICER DODUC: Thank you. I  
23 recognize that, but now it's being asked in the context  
24 of 1143.

25 So, Ms. Meserve, please repeat the question,

1 noting the caveat that Ms. Morris reminded us of.

2 MS. MESERVE: Certainly. So this  
3 export-to-inflow ratio that is listed under key  
4 existing criteria of the table would actually be a  
5 change from the current calculation of export-to-inflow  
6 at Freeport, wouldn't it?

7 WITNESS CHILMAKURI: If you can bring up  
8 D1641, I don't believe this is a change in how the  
9 E-to-I ratio is calculated.

10 All we are saying is that the -- not the --  
11 for Sacramento River inflow, the flow should be  
12 downstream of the intakes, given that there are other  
13 predictive criteria for the entrainment, such as the  
14 bypass flows for the North Delta Diversion and Old and  
15 Middle River flow requirements for the South Delta  
16 intakes.

17 MS. MESERVE: And the ITP defines the Delta  
18 inflow as including that water that goes down the Yolo  
19 Bypass also, doesn't it?

20 WITNESS CHILMAKURI: Again, you have to show  
21 me where and what context that was discussed or  
22 defined.

23 MS. MESERVE: If we -- if we need to go to the  
24 ITP, that's SWRCB-107, Page 181. And on that page, it  
25 states that the Delta inflow is defined as the sum of



1 the Sacramento River flow downstream of the North Delta  
2 intakes, and the Yolo Bypass flow is included there.

3 At the bottom of the page, yes.

4 Do you see that?

5 WITNESS CHILMAKURI: Yes. That is the  
6 existing definition of the inflow in 1641, I believe.

7 MS. MESERVE: Right. So are you aware that,  
8 under implementation of the RPAs for the 2009  
9 Biological Opinion, that it is proposed for more water  
10 to be put down the Yolo Bypass than currently goes down  
11 the Yolo Bypass?

12 MR. MIZELL: Objection.

13 CO-HEARING OFFICER DODUC: Mr. Mizell.

14 MR. MIZELL: Beyond the scope of the testimony  
15 in 1143 and the Supplemental.

16 CO-HEARING OFFICER DODUC: So link it back to  
17 1143, Ms. Meserve.

18 MS. MESERVE: Well, I'm focusing on the  
19 export-to-inflow ratio.

20 CO-HEARING OFFICER DODUC: Yes, but that  
21 question. . .

22 MS. MESERVE: And digging into that, using the  
23 ITP, it's assuming that also downstream of the North  
24 Delta Diversions would be any water that went down the  
25 Yolo Bypass. And so I want to ask Dr. Chilmakuri or

1 Mr. Reyes about whether the model accounts for the  
2 increased flows down the Yolo Bypass that are going to  
3 occur under implementation of the 2009 Biological  
4 Opinion requirements.

5 CO-HEARING OFFICER DODUC: How does that tie  
6 back to 1143?

7 MS. MESERVE: Because 1143 lists these adopted  
8 project criteria in the modeling assumptions, and my  
9 questions go to whether the modeling assumptions  
10 include that increase in flow down the Yolo Bypass,  
11 which is well underway.

12 CO-HEARING OFFICER DODUC: As depicted in 1143  
13 as a proposed criterion?

14 MS. MESERVE: Yes.

15 CO-HEARING OFFICER DODUC: Okay. Ms. Morris.

16 MS. MORRIS: I would just like to add the  
17 objection that this has been asked and answered, that  
18 the criteria for this export-inflow ratio has not  
19 changed throughout the proceedings. So there has been  
20 no change from what's in 1143 as to what Mr. Munevar  
21 already testified to and explained to you in Part 1.

22 CO-HEARING OFFICER DODUC: I understand. But  
23 one of the purposes of 1143 is to help all of us better  
24 understand the complexity of what's being proposed,  
25 especially the operating criteria and the modeling

1 assumptions. So I'm going to give her a little bit of  
2 leeway on that.

3 Please answer. It's not like she's reopening  
4 everything in Part 1. So this is an important point.

5 Dr. Chilmakuri.

6 WITNESS CHILMAKURI: The No Action and the  
7 WaterFix modeling that was kind of presented to you in  
8 this hearing both include a change to the existing  
9 Fremont Weir. It assumes there would be a new notch  
10 and that there would be higher flows that -- going into  
11 Yolo Bypass through that notch at lower Sacramento  
12 River flows. So the modeling includes that, a  
13 representation of the action that's being considered.

14 I wouldn't say that the action that was  
15 included in the modeling is exactly the proposed action  
16 for that project. I don't know the proposed action  
17 exactly. As far as -- we have a representation of that  
18 project in our modeling.

19 MS. MESERVE: Isn't it true, Dr. Chilmakuri,  
20 that the modeling assumes only up to 6,000 cfs going  
21 through the Yolo Bypass?

22 CO-HEARING OFFICER DODUC: Ms. Morris.

23 MS. MORRIS: It's vague and ambiguous as to  
24 the time or the -- I mean, that could differ. So if  
25 she could be specific as to what time frame she's

1 asking about, that would be helpful.

2 CO-HEARING OFFICER DODUC: Ms. Meserve.

3 MS. MESERVE: I'm trying to avoid bringing up  
4 a lot of documents here.

5 Period of inundation in the modeling, doesn't  
6 it include December 1st through April 30th, maximum of  
7 6,000 cfs?

8 WITNESS CHILMAKURI: That's through the notch,  
9 and the -- the water would spill over, under -- over  
10 the current weir still. So if there is sufficient flow  
11 in the river, the spills would be much greater than  
12 6,000. The 6,000 is only to the -- it's the limit to  
13 the amount of flow that would be allowed through the  
14 notch.

15 MS. MESERVE: Isn't it true that the Yolo  
16 Bypass project is considering a flow up to 12,000 cfs  
17 over a longer time period?

18 WITNESS CHILMAKURI: I don't know.

19 MS. MESERVE: Are you aware of whether the  
20 modeling attempted to track the development of the  
21 implementation of this portion of the NMFS Biological  
22 Opinion?

23 WITNESS CHILMAKURI: Yes, I would agree. I  
24 would say that we were attempting to include a  
25 representation of that action from the NMFS Biological

1 Opinion. However, as far as I know, the Yolo Bypass  
2 process, I believe they just released their Draft EIR  
3 earlier this year or late last year. So we were much  
4 far ahead with respect to WaterFix, and we had to make  
5 an assumption as to what that action would be. And  
6 let's just say that this assumption was developed in  
7 coordination with the fish agencies within the WaterFix  
8 context.

9 MS. MESERVE: But it's possible that the  
10 amount of flow going through the Yolo Bypass could be  
11 higher than was assumed in the modeling; isn't that  
12 correct?

13 MS. MORRIS: Objection, calls for speculation.

14 CO-HEARING OFFICER DODUC: And now you're  
15 getting into way, way details that are beyond the scope  
16 of 1143, Ms. Meserve.

17 MS. MESERVE: The reason why I'm asking these  
18 questions goes back to the water rights questions  
19 because, if the water quality is different in the  
20 modeling outputs than is likely under the  
21 implementation of a requirement of the 2009 Biological  
22 Opinion, that will affect water quality for all the  
23 water users downstream of the Yolo Bypass.

24 CO-HEARING OFFICER DODUC: I appreciate that,  
25 but that is beyond, 1143 and it's also not in anyone's

1 rebuttal testimony. And I don't think it's part of the  
2 change in the EIR Supplemental. So you have exhausted  
3 the three options here.

4 MS. MESERVE: Although the relationship I did  
5 think of with respect to the Supplemental EIR is that  
6 both the water quality -- the water supply and the  
7 Chapters 5 and 6 include no further discussion,  
8 including of cumulative impacts.

9 And in the time period since the certification  
10 of the Final EIR, there has been more certainty about  
11 the -- moving forward of this Yolo Bypass project. And  
12 so I believe --

13 CO-HEARING OFFICER DODUC: That's still  
14 outside the scope.

15 MS. MESERVE: I thought we were able to ask  
16 questions about the Supplemental EIR. And my  
17 question --

18 CO-HEARING OFFICER DODUC: And the changes as  
19 reflected in the footprint.

20 MS. MESERVE: I think my question goes to  
21 whether there should have been a revised cumulative  
22 impact analysis, given the moving forward of the Yolo  
23 Bypass project.

24 CO-HEARING OFFICER DODUC: Outside the scope.

25 Ms. Womack.

1 MS. WOMACK: I would concur with Ms. Meserve.  
2 Our impact of water quality since we're now put -- now  
3 that our ranch is not being taken, our water quality,  
4 we worry about a great deal and all of the impacts from  
5 all of the things. So I would appreciate having more  
6 details about the water quality.

7 There wasn't much in the supplemental that I  
8 could glean that was going to -- how it was going to  
9 change -- you know, improve my water quality.

10 Water -- my -- I am a licensed, you know, user  
11 of water, a legal user of water. And my water quality  
12 is -- I haven't seen where I'm assured that my water  
13 quality is not going to suffer.

14 So I appreciate Ms. Meserve's questioning.

15 CO-HEARING OFFICER DODUC: Your appreciation  
16 is noted. However, it is still outside the scope of  
17 rebuttal cross-examination. Okay.

18 MS. MESERVE: I'm going to move on to some  
19 questions about the regulatory requirements in  
20 DWR-1143.

21 If we could -- for -- I believe, Ms. Parker,  
22 the San Luis rule curve that you discuss in your  
23 testimony, it reflects a discretionary element of  
24 project operations, doesn't it?

25 CO-HEARING OFFICER DODUC: Before you object,

1 Ms. Aufdemberge -- I know we've been through this. So  
2 I'm sure Ms. Meserve has a point that she'll get to  
3 very quickly.

4 WITNESS PARKER: Would you please tell me  
5 where in my testimony you're looking? Remind me of  
6 that.

7 CO-HEARING OFFICER DODUC: I think it was more  
8 in your response to cross-exam rather than your  
9 testimony, as I remember it.

10 WITNESS PARKER: I'm sorry. Would you refresh  
11 my memory as to my comment?

12 MS. MESERVE: I believe that it was discussed  
13 that the rule -- the San Luis rule curve is a  
14 discretionary element of the project operations for the  
15 Bureau.

16 WITNESS PARKER: Okay. I remember that now.  
17 So please repeat your question.

18 MS. MESERVE: Just that it is a discretionary  
19 element. I'm just --

20 CO-HEARING OFFICER DODUC: Asked and answered.  
21 Your next question.

22 MS. MESERVE: And so that relates to moving  
23 water from north to south.

24 WITNESS PARKER: The rule curve is a model  
25 mechanism that governs how the model moves water from



1 north to south. It's not a -- an explicit  
2 representation of Central Valley operations, actual  
3 real-time operations.

4 MS. MESERVE: Okay. I'd like to put up an  
5 exhibit, FSL-60. This is a letter of interest in  
6 funding regarding WIFIA, and I'm specifically referring  
7 to Page 23 of that document. And I have paper copies  
8 that I can supply for some of the witnesses.

9 CO-HEARING OFFICER DODUC: What is WIFIA?

10 MS. MESERVE: The Water Infrastructure  
11 Financing program.

12 CO-HEARING OFFICER DODUC: Ms. Morris.

13 MS. MORRIS: I would just object that this  
14 document is outside the scope. This has to deal with a  
15 letter of intent that's submitted by a finance GPA,  
16 none of which is --

17 CO-HEARING OFFICER DODUC: Ms. Morris, I don't  
18 know yet what her intent is to bring this up. So let's  
19 let her ask the question, and then I will listen to any  
20 objections.

21 MS. MESERVE: Okay. So I'm looking at the  
22 third paragraph on Page 23. If -- if Ms. Parker  
23 could -- and Ms. White could take a look at that  
24 paragraph, that discusses an agreement being  
25 negotiated.

1 CO-HEARING OFFICER DODUC: And make the  
2 linkage for me, Ms. Meserve, in terms of how this  
3 relates to either their rebuttal testimony, 1143, or  
4 the Supplemental EIR.

5 MS. MESERVE. I think the relationship is that  
6 this is -- has to do with the model logic that was in  
7 1143 and omitted from 1143, so -- such as the rule  
8 curve and setting the export allocations. So we're  
9 trying to look at what the operational discretion is  
10 going to be in this project. Back to our issue of  
11 what's included in 1143 and what's not, I think this is  
12 an example of something that's not included in 1143  
13 that appears to bear on the operations.

14 CO-HEARING OFFICER DODUC: Okay.

15 MR. MIZELL: I'd like to object as to the  
16 assertion Ms. Meserve is making, that a financing GPA  
17 proposal that we have no knowledge as to whether or not  
18 it's been accepted or incorporated into the project has  
19 absolutely no bearing on what the existing rule curve  
20 assumptions are in the modeling.

21 CO-HEARING OFFICER DODUC: Ms. Morris.

22 MS. MORRIS: And I would object as this lacks  
23 foundation. There's no basis. There's been no showing  
24 that these witnesses are familiar with provided  
25 information or that that statement is, in fact, based

1 on any modeling.

2 CO-HEARING OFFICER DODUC: Everyone just hold  
3 on.

4 Ms. Meserve, what is your question?

5 MS. MESERVE: My questions have do with  
6 whether the DOI witnesses or others on the panel are  
7 familiar with the agreement referenced here.

8 CO-HEARING OFFICER DODUC: All right. Anyone?  
9 Ms. Morris.

10 MS. MORRIS: I would object on the basis  
11 that -- to the extent any of the discussion regarding  
12 this agreement are confidential.

13 CO-HEARING OFFICER DODUC: Okay. We won't get  
14 into confidential matters.

15 MS. MESERVE: This is a public document.

16 CO-HEARING OFFICER DODUC: Again, is anyone  
17 familiar with this document and this. . .

18 WITNESS WHITE: I have never seen this  
19 document.

20 WITNESS REYES: I'm not familiar with it, no.

21 WITNESS CHILMAKURI: Me neither.

22 WITNESS PARKER: I'm not familiar with it.

23 CO-HEARING OFFICER DODUC: All right.  
24 Ms. Meserve, it doesn't seem like anyone is familiar  
25 with it.

1           Mr. Bezerra.

2           MR. BEZERRA: I think the question actually  
3 was whether any of the witnesses are familiar with the  
4 ongoing negotiation between DWR and Reclamation that's  
5 described here.

6           And I believe at least Ms. Parker, in the  
7 past, has previously stated she is familiar with that.  
8 And I believe in her previous cross-examination  
9 responses, she stated that the results of that could  
10 affect how operational discretion is exercised in  
11 relation to WaterFix.

12           CO-HEARING OFFICER DODUC: Yes, but this  
13 specific document references financing.

14           MS. MESERVE: Well, yes. The questions don't  
15 refer to financing. They refer to an agreement that is  
16 establishing, apparently, criteria -- new criteria  
17 about avoiding impacts to CVP water operations.

18           So again, back to 1143, we're trying to  
19 understand whether 1143 really represents the entirety  
20 of the requirements that this project is proposing to  
21 meet.

22           MR. MIZELL: And I'd object as mis- --

23           CO-HEARING OFFICER DODUC: So to your  
24 knowledge, people sitting there, does 1143 reflect all  
25 the operational criteria being proposed by the

1 projects?

2 MR. MIZELL: Hearing Officer Doduc, I'd like  
3 to be very clear with the answers the witnesses will  
4 give to your question as we want you to have all the  
5 information that you are seeking. However, they've all  
6 indicated they have no knowledge of this document.

7 It will be extremely hard for them to answer  
8 without speculating as to whether or not specifics  
9 contained in a document they're unaware of are  
10 contained in the model.

11 CO-HEARING OFFICER DODUC: Understood.

12 Ms. Taber, you've been jumping up and down.

13 MS. TABER: I just want to make sure I  
14 understand, when we're talking about this document and  
15 the witness's familiarity with this document, if  
16 Mr. Mizell is referring to the document on the screen  
17 or the agreement referenced in that document.

18 It's my understanding that Ms. Meserve's  
19 questions go to their familiarity with the agreement  
20 that is -- DWR has represented in this document as  
21 being negotiated. And so I'm not sure that we're all  
22 talking about the same document.

23 CO-HEARING OFFICER DODUC: All right.

24 MS. TABER: Maybe Ms. Meserve could make that  
25 clear.

1 CO-HEARING OFFICER DODUC: Ms. Meserve,  
2 actually, what is your question? I appreciate that  
3 counsels have the right to object and others have the  
4 right to jump in, but it does confuse the matter when  
5 I'm trying to understand the point you are trying to  
6 get at, Ms. Meserve.

7 MS. MESERVE: Right. Well, I mean, I think in  
8 general I'm trying to understand how to square the  
9 statements in this document and the discussions that  
10 appear to be underway according to the representations  
11 in this document, and --

12 CO-HEARING OFFICER DODUC: Okay. Stop, stop,  
13 stop. When you say "this document," you mean?

14 MS. MESERVE: FSL-60, which is the WIFIA loan  
15 application --

16 CO-HEARING OFFICER DODUC: Okay.

17 MS. MESERVE: -- is referring to a  
18 negotiation.

19 CO-HEARING OFFICER DODUC: Okay. Go on.

20 MS MESERVE: And then I'm trying to understand  
21 what the status of that negotiation is.

22 CO-HEARING OFFICER DODUC: When you say "that  
23 negotiation," are you referring to the financing aspect  
24 of that negotiation?

25 MS. MESERVE: No. The WIFIA application

1 discusses an agreement being negotiated that would  
2 establish criteria to avoid possible impacts to CVP.

3 CO-HEARING OFFICER DODUC: And where is that?

4 MS. MESERVE: That's at the bottom of the  
5 screen, that full paragraph.

6 CO-HEARING OFFICER DODUC: Okay.

7 MS. MESERVE: So going back to the questions,  
8 do the witnesses know who is involved in negotiating  
9 this agreement?

10 MR. BERLINER: Objection. That's a different  
11 question.

12 CO-HEARING OFFICER DODUC: Then let's hear the  
13 answer.

14 MR. BERLINER: In that case, object as to  
15 relevance.

16 CO-HEARING OFFICER DODUC: I think Ms. Meserve  
17 has established that she's trying to make the linkage,  
18 and let's see if there is a linkage to be made.

19 MR. MIZELL: I'd also like to object based  
20 upon the fact that what Ms. Meserve is referencing in  
21 this document seems to reference ongoing COA  
22 negotiations. COA has been thoroughly discussed or,  
23 I'd say, asked and answered.

24 MS. MESERVE: I think in the context of COA,  
25 though, we've been discussing it in terms of something

1 that's already said. And this is introducing a concept  
2 that's --

3 CO-HEARING OFFICER DODUC: So, Ms. Meserve, I  
4 appreciate where you are trying to go, but I, one,  
5 question whether there is value in pursuing it with  
6 these witnesses who don't seem very familiar with the  
7 specifics that are being negotiated and also, because  
8 it is under negotiation, it's subject to change.

9 So where is the value in us trying to  
10 understand this particular phase of negotiations?

11 MS. MESERVE: Well, I think what we're  
12 interested in knowing is what kinds of impacts to the  
13 CVP this document is referring to avoiding and then how  
14 that would affect operations.

15 CO-HEARING OFFICER DODUC: Well, one, these  
16 witnesses are not familiar with this document and the  
17 statement about things being avoided. And, second,  
18 because the negotiations are still ongoing and not yet  
19 concluded, how would they or we, sitting here today,  
20 determine what the impacts might be?

21 MS. MESERVE: Well, I think part of the record  
22 I want to create is that it doesn't appear that there's  
23 a set project with respect to the CVP at least.

24 CO-HEARING OFFICER DODUC: So is your point,  
25 then, that 1143 is subject to change based on what



1 is -- or potentially could be changed based on the  
2 outcome of the agreements being discussed here?

3 MS. MESERVE: Correct.

4 CO-HEARING OFFICER DODUC: And I think we've  
5 got that, and I think you've made that point and it's  
6 in the record.

7 MS. MESERVE: I didn't quite catch -- I heard  
8 the witnesses answer that they were not familiar with  
9 this particular document, and I think the part that  
10 maybe I missed in the answer was whether they were  
11 involved in the discussions about the impacts to the  
12 CVP that are references in the document.

13 CO-HEARING OFFICER DODUC: Let's get this over  
14 with.

15 Mr. Bezerra.

16 MR. BEZERRA: Just a quick point. I think  
17 it's a fairly simple subject. It's how much of this  
18 project is outside of the regulatory requirements that  
19 are described in 1143. What else is subject to the  
20 petitioners' discretion?

21 CO-HEARING OFFICER DODUC: Yes, and you all  
22 may make that point in your closing briefs, but it's  
23 not something that can be resolved with these witnesses  
24 and during this scope of -- the scope of this  
25 cross-examination.

1           Mr. Jackson.

2           MR. JACKSON: Yes, the point that I think is  
3 relevant here is that the material that is required  
4 under your regulations to be in the permit is still not  
5 -- according this document, is still not in final form.

6           This -- all the way through this, we've been  
7 responding, you've been allowing the prove-up of the  
8 material that should have been in the petition to start  
9 the hearing so that we knew what was inside the  
10 operational criteria that they're relying on and what  
11 was outside. And we still don't know.

12           CO-HEARING OFFICER DODUC: And that is an  
13 argument we've heard before.

14           MR. JACKSON: It would be helpful if we could  
15 ask questions that are related to -- I don't know what  
16 they mean by "currently." There's only one contractual  
17 arrangement that might affect operation of the  
18 WaterFix.

19           CO-HEARING OFFICER DODUC: And since these  
20 witnesses are not familiar with this document, they  
21 cannot possibly answer that question. Next.

22           MS. DES JARDINS: I would just like to say  
23 that I did make -- citing the example in Decision 990,  
24 which was when the first coordinated operating  
25 agreement was made, it's absolutely fundamental to the

1 agreement between the projects how they share unstored  
2 water given the -- given that the Bureau's petition  
3 assumed the entire unimpaired flow of the Feather River  
4 and DWR's application also assumed that there's some  
5 fundamental agreement about both sharing of shortages  
6 and obligation for in-basin --

7 CO-HEARING OFFICER DODUC: And your point is?  
8 Because you surely are not testifying.

9 MS. DES JARDINS: My point is I would like to  
10 get it on request [sic] that I made that as a request  
11 and that the Hearing Officers follow the example in  
12 Decision 990 and recess the hearing until an agreement  
13 was made.

14 This agreement shows how difficult it is to  
15 get any details on what is going to be absolutely  
16 fundamental to whether the water quality plan  
17 requirements are met in the future.

18 CO-HEARING OFFICER DODUC: We have received,  
19 considered numerous motions to wait until things are  
20 further developed. Our ruling stands on that. Your  
21 request is denied.

22 Ms. Morris.

23 MS. MORRIS: Mine is an objection to the  
24 question that was just revised. And that is to the  
25 extent that it calls for a confidential settlement

1 discussion as well as speculative as this document  
2 clearly says "may impact" --

3 CO-HEARING OFFICER DODUC: Understood.

4 MS. MORRIS: And it says "if any" --

5 But the question was revised. Sorry.

6 Apologize.

7 CO-HEARING OFFICER DODUC: Ms. Meserve, there  
8 is no further value to be added by this. Move on.

9 Your point, if it was the point, that 1143 is  
10 subject to change depending on a lot of things,  
11 including adaptive management, including ongoing  
12 negotiations on the COA and other agreements is noted.

13 MS. MESERVE: And so am I permitted to ask the  
14 witnesses whether they agree that the -- that the  
15 operations may be changed based on the discussions  
16 about avoiding impacts to CVP, or am I permitted to ask  
17 no further questions regarding this?

18 CO-HEARING OFFICER DODUC: I think you will  
19 get an objection about the phrasing of that question,  
20 so let's not go there.

21 But I think -- would anyone on the panel --  
22 well, actually, I will request all or anyone on the  
23 panel to state whether or not your understanding, which  
24 I think at least Dr. Chilmakuri has already stated,  
25 that the criteria being proposed in 1143 is subject to

1 change pending a variety of other factors. Does anyone  
2 disagree with that?

3 WITNESS CHILMAKURI: I just said -- I want to  
4 be clear. My testimony was the criteria in 1143 was  
5 subject to change under Adaptive Management Plan. I  
6 didn't say there was anything else that's going to  
7 affect.

8 CO-HEARING OFFICER DODUC: So is it your  
9 testimony that, to your knowledge, no other factors may  
10 impact the proposed criteria in 1143 except adaptive  
11 management?

12 WITNESS CHILMAKURI: That I'm aware of, yes.

13 CO-HEARING OFFICER DODUC: Okay. I stand  
14 corrected.

15 MS. MESERVE: I would be interested in the  
16 Bureau witnesses' response to your question.

17 CO-HEARING OFFICER DODUC: Ms. White,  
18 Ms. Parker?

19 WITNESS WHITE: I think it's hard to -- I  
20 agree with Dr. Chilmakuri. Biological Opinions are  
21 always subject to change based on the trigger  
22 conditions. So it's difficult to say that nothing else  
23 could change this.

24 I think we, in our Biological Opinion for Fish  
25 and Wildlife Service, there's already an expectation to

1 consult. So I would imagine those also would have  
2 potential to change some of the operating criteria.

3 MS. MESERVE: But the discussions about  
4 avoiding impacts to CVP could also change the operating  
5 criteria as well, couldn't they?

6 CO-HEARING OFFICER DODUC: No. They have  
7 testified -- I mean "no," I'm not answering for them.  
8 I'm answering -- I'm telling you no, that we've gone  
9 down this path. They are not familiar with this  
10 document, this negotiation, whatever the underlying  
11 purpose is for what's being reflected in this document  
12 that they have not seen. So we are not going to go  
13 there, and you are out of time.

14 MS. MESERVE: Yes, but I think -- I don't  
15 think the Bureau witnesses ever agreed with your  
16 statement that they're not familiar --

17 CO-HEARING OFFICER DODUC: They don't have  
18 to --

19 MS. MESERVE: Wait a minute. Just to be  
20 clear, they said they weren't familiar with the  
21 document. They did not say they were not familiar with  
22 the negotiations.

23 CO-HEARING OFFICER DODUC: Are you familiar  
24 with the negotiations described in this document that  
25 you've not seen before?

1           WITNESS WHITE: I'm not really familiar with  
2 what this document is stating, so it's hard for me to  
3 answer that. I guess I can say I'm generally aware  
4 there's discussions going on between Reclamation and  
5 DWR. That's been testified to numerous times.

6           I'm not a negotiator for the Department or for  
7 Reclamation, so. . .

8           MS. MESERVE: That concludes my questions.  
9 Thank you.

10          MR. MIZELL: Hearing Officer Doduc, I'd like  
11 to make a legal clarification. You have the answers of  
12 the witnesses as to what is subject to change.

13          As a legal matter, as the attorney for the  
14 Department here, I need to assert as well that we  
15 recognize the continuing jurisdiction of the State  
16 Water Board. And as we've said in our filings, we are  
17 subject to your ongoing authority and any changes that  
18 may come out of that.

19          CO-HEARING OFFICER DODUC: All right.

20          Thank you, Ms. Meserve.

21          Any redirect, Mr. Mizell?

22          MR. MIZELL: No redirect.

23          CO-HEARING OFFICER DODUC: What I would like  
24 to do before you all leave is take a break. And when  
25 we come back we, the Hearing Officers, the Hearing

1 Team, may have questions for you. So don't leave just  
2 yet. We will return at 10:45.

3 (Recess taken)

4 CO-HEARING OFFICER DODUC: Okay. Everyone  
5 please take a seat. It is 10:45. We are back. And we  
6 have some questions for these witnesses.

7 And we'll begin with Mr. Deeringer.

8 MR. DEERINGER: Good morning, everybody.

9 In advance, I just want to apologize in case  
10 this question ends up treading on some ground that  
11 we've already covered. I think you heard Hearing  
12 Officer Doduc acknowledge this is a pretty complex  
13 hearing, and we're all just trying to understand it.

14 So our reading of the October-November OMR  
15 flow criteria is that, as was mentioned yesterday,  
16 they're going to be determined based on real-time  
17 operations and protection of the D1641 San Joaquin  
18 two-week pulse.

19 And we're curious what the modeling  
20 assumptions were. Those are the operating criteria as  
21 we read them. We're curious what the modeling  
22 assumptions were for October-November OMR flow.

23 WITNESS CHILAMKURI: There is no OMR  
24 restriction in the WaterFix or the No Action models.

25 MR. DEERINGER: Okay. Thank you.



1 CO-HEARING OFFICER DODUC: Let's make the  
2 lawyer ask engineering questions.

3 MR. DEERINGER: That was a great lead in.

4 So the last bullet on the South -- excuse me  
5 one second. I believe it's the last -- could we pull  
6 up DWR-1143 2nd Revision, please?

7 Great. Thank you.

8 In the months of July, August, and September,  
9 it appears that the OMR flow constraints were  
10 suggested. Did you have any limits supposed in the  
11 modeling?

12 WITNESS CHILAMKURI: No.

13 MR. DEERINGER: Okay. Great.

14 CO-HEARING OFFICER DODUC: This is my favorite  
15 question, so I get to ask it.

16 Have you analyzed the effects of the two  
17 different E-to-I ratio calculations for water supply  
18 and Delta outflow?

19 WITNESS CHILAMKURI: Yes. It was presented in  
20 Part 1, actually.

21 CO-HEARING OFFICER DODUC: And remind me how  
22 the results were.

23 WITNESS CHILAMKURI: In general -- I'm talking  
24 from my memory right now. But in most months it should  
25 not differ, the outflows or the exports.

1           The changes -- main changes that are in June  
2 months -- a majority of changes are in June; there were  
3 some years where it was also changing operations in  
4 May. And the effect is that there are increased  
5 exports if we did not include the North Delta Diversion  
6 as part of the EI calculation in June. But there is a  
7 corresponding change in the subsequent months as to  
8 whether exports would go down relatively.

9           So, but overall, though, in long -- when you  
10 look at the long-term average exports, there is a very  
11 minimal change. That's what I remember.

12           CO-HEARING OFFICER DODUC: Your question?

13           CO-HEARING OFFICER MARCUS: Yes. This one may  
14 be the most general of all, at a higher level. And it  
15 may be -- just forgive me for having to ask it.

16           Part of the reason we asked for this is you  
17 all know this so well; it's in your head, and you have  
18 the expectation of how you do things, whether it's the  
19 modeling assumptions or how real-time operations work.  
20 And you've done a nice job explaining in the real world  
21 how that might happen.

22           But there are modeling assumptions -- you'll  
23 remember from Part 1 -- modeling assumptions about how  
24 you would operate, operating assumptions that  
25 Mr. Leahigh testified to, say, for how you would

1 operate the system largely when you have a year in  
2 excess and have -- there's a lot of flows.

3           Are those -- are there any of the modeling  
4 assumptions that you were talking about and assumptions  
5 about operations that aren't operating criteria? I'm  
6 not suggesting they all should be, but we have to  
7 consider ultimately, as we go through this process --  
8 there will be a lot more discussion and argument all of  
9 that before we close. Folks are going to be arguing to  
10 us which things we need to add conditions on.

11           And it's not to say we're going to button it  
12 up into, like, "here's what you do every minute"  
13 because that's just not possible. So I'm looking at  
14 that broader scale area, sort of the difference between  
15 how you say you've modeled and you'd operate, and then  
16 there's how, for example, Mr. Bourez says you could  
17 operate.

18           And I'm just looking for where, in here, it  
19 may constrain you somewhat or not at all, to what the  
20 modeling assumption were. I'm just picking the Sac  
21 Valley issue because we spent a lot of time on that.

22           So is there anything really big in the  
23 modeling assumptions that's not seen here? Again, I'm  
24 not saying there should be or shouldn't be. I just  
25 want to -- we just need to understand how to parse that

1 out. And, I'm sorry, I'm looking -- anybody can  
2 answer. I assumed Dr. Chilmakuri --

3 WITNESS CHILAMKURI: Yeah, I can start, and  
4 please add as -- I think, I mean, again, we talked  
5 about this at length, as you said.

6 The -- in my opinion, the San Luis rule curve  
7 and the export estimate that Sac Valley Users keep  
8 bringing up, the changes or lack of changes that were  
9 between the two scenarios, the No Action and the  
10 WaterFix scenario, do not raise up to the level to be  
11 included in the DWR-1143 2nd Revision.

12 The reason for my opinion is that the -- with  
13 or without WaterFix, the projects are required to  
14 operate to the many, many, many, regulatory  
15 requirements which control their releases, their  
16 storages. And they do have -- once they meet those  
17 requirements, they do have discretion to use their  
18 water available to meet other obligations, and that's  
19 not changing with WaterFix or not.

20 What WaterFix brings in is a flexibility as to  
21 when and where the water could be taken in the Delta  
22 and nothing beyond. They're both -- working in the  
23 WaterFix, the projects still can be engineered to be  
24 required to operate to all the different requirements.

25 So therefore, it is my opinion that the rule

1 curve or the export estimate assumptions being made in  
2 WaterFix modeling are reasonable and representative of  
3 what the operation philosophy is of the projects.

4 WITNESS PARKER: I'll add just a little bit to  
5 what Dr. Chilmakuri said.

6 My understanding is that the criteria that are  
7 detailed in DWR-1143 2nd Revision are exactly that.  
8 They're operating criteria.

9 Your question, Chair Marcus, was about whether  
10 that was modeling criteria that was also operating  
11 criteria. To my knowledge, there are not elements in  
12 DWR-1143 2nd Revision that are -- that are not  
13 operating criteria.

14 There are many, many, other criteria in the  
15 model that are not operating criteria. And that's what  
16 Dr. Chilmakuri was just talking about.

17 CO-HEARING OFFICER MARCUS: As to why they  
18 don't need to be operating criteria in particular?

19 WITNESS PARKER: Right. And so why they  
20 didn't belong.

21 CO-HEARING OFFICER MARCUS: Thank you. What  
22 I'm trying to focus -- there will be legal argument on  
23 all of this, and there will be proposed conditions.  
24 I'm just trying to sort it out because I think people,  
25 understandably, either because they may -- it's

1 complicated or because they have a point of view that  
2 it's all getting -- what I'm trying to do is separate  
3 it out in the hopes that we get to more focused -- the  
4 more focused arguments we are going to see later on.

5 CO-HEARING OFFICER DODUC: So let me follow up  
6 on what you just said Ms. Parker. Those modeling  
7 criteria that are not operational criteria, are any of  
8 them limiting factors in the modeling analysis that  
9 would have an impact on the results that have been  
10 presented during this hearing? Are any of those the  
11 driving factor, the limiting factor in the various  
12 calculations and analyses but are not presented in 1143  
13 as an operational criteria?

14 Is there a modeling factor that is a critical  
15 constraint for the impact analysis that is not  
16 reflected in 1143 as an operational criteria?

17 WITNESS PARKER: I would say there is no  
18 single or even small group of modeling criteria that  
19 drove the result of the difference between the proposed  
20 action and the No Action Alternative. One of the  
21 points that I tried to make in my rebuttal analysis is  
22 that the proposed action is depicted by the imposition  
23 of the North Delta Diversion.

24 So we have a diversion. And there are  
25 operating criteria associated with that diversion. All

1 of the other modeling criteria, some of which is  
2 operational, some of which is -- they're modeling  
3 devices. And I can rattle off balancing rules,  
4 allocation, San Luis curve, the export estimate curve,  
5 all these things that people talked about; that set of  
6 modeling, of modeling devices, did not change between  
7 No Action and the proposed action.

8 Rule curve did change. But that, in and of  
9 itself, did not drive the answers that we have taken  
10 from this study.

11 CO-HEARING OFFICER DODUC: And you are sure  
12 that the things that did not change -- the modeling  
13 assumptions that did not change between the No Action  
14 and the proposed project are appropriately constant,  
15 meaning the things that you are changing as a result of  
16 the WaterFix would not affect those assumptions that  
17 you insist are constant?

18 WITNESS PARKER: I do agree with that. I  
19 believe that the modeling that was done for this  
20 project was appropriate. Both the No Action and the  
21 proposed action, as we have tried to describe in this  
22 proceeding, reflect an operational philosophy of the  
23 CVP, speaking for Reclamation, that we feel is  
24 consistent with current operations.

25 The modeling criteria in both the No Action

1 and the proposed action are consistent with that  
2 operating philosophy.

3 CO-HEARING OFFICER DODUC: Any other  
4 questions?

5 WITNESS CHILMAKURI: Just one thing to add.  
6 And I totally agree with Ms. Parker. And just to say  
7 that it's not changing between No Action and WaterFix.  
8 In our modeling, we have the same level of assumptions  
9 between No Action and WaterFix scenarios.

10 CO-HEARING OFFICER DODUC: All right. Thank  
11 you. Thank you for your patience with us. Thank you  
12 for the extra work that you have put into 1143.

13 As Chair Marcus says, these are things that  
14 are well familiar to you but very complicated to the  
15 rest of us. So it should come as no surprise that we  
16 have a lot of confusion, and therefore, we're always  
17 seeking additional explanation and clarity. So thank  
18 you.

19 All right. With that, we will ask,  
20 Mr. Mizell, for you to bring up your third panel. And  
21 we will do direct presentation for about an hour, you  
22 said. That means we will take our lunch break at noon.

23 (Pause in proceedings)

24 CO-HEARING OFFICER DODUC: All right.  
25 Mr. Keeling.



1           MR. KEELING: Thank you. Tom Keeling, San  
2 Joaquin County. With, respect to process in this  
3 proceeding, I wanted to give you a heads up that we  
4 want to make a motion to strike -- "we," Ms. Meserve  
5 and I, will be moving to strike the testimony of two of  
6 the witnesses on this panel.

7           CO-HEARING OFFICER DODUC: Please do.

8           MR. KEELING: We understand that you wanted us  
9 to make such a motion before they testify but before  
10 they introduce evidence. So I'm asking you what you  
11 would prefer we do.

12          CO-HEARING OFFICER DODUC: Do it now, please.

13          MR. KEELING: I'm going to make the motion to  
14 strike the testimony of Dr. Hanson. Ms. Meserve will  
15 be making the motion to strike the testimony of  
16 Dr. Hutton.

17          Dr. Hanson's written testimony, which is  
18 DWR-1223, purports to rebut opinions and statements  
19 within the protestants' testimony, of course; it's  
20 rebuttal; they're supposed to.

21          However, when we turn to the cited portions of  
22 protestants' testimony that we are told are being  
23 rebutted, the opinions and statements supposedly being  
24 rebutted are not there. This is not rebuttal  
25 testimony.

1           The witness first attributes to the other side  
2 a statement or position they never made and then offers  
3 testimony to rebut the statement or position that was  
4 never made -- the typical, classic straw dog exercise.

5           On Pages 2 and 3 of DWR-1223 -- and if it  
6 would assist, perhaps Mr. Long could put that up.

7           CO-HEARING OFFICER DODUC: Please do.

8           MR. KEELING: On Pages 2 through 3, you will  
9 find in the list of protestants' testimony Dr. Hanson's  
10 opinion or intent -- is intended, it says, "rebutts."  
11 You'll see it starting at around Line 23. Actually, up  
12 at Line 18 and then continuing with the rest of the  
13 page and then again on the top of Page 3 down to  
14 Line 13 of Page 3.

15           And then on Page 3 he identifies his rebuttal  
16 opinions that he's about to give. And you can see that  
17 they take two forms, first, those five bullet points  
18 called "Summary of Testimony," continues on up the --  
19 yes.

20           And then up at the top, going back up to the  
21 top, Mr. Long.

22           It says, "Also I am responding to several  
23 parties whose experts suggested that the Board's 2010  
24 flow criteria report and the Board's Phase 2 technical  
25 basis report should be adopted -- accepted without

1 modification." So those are the opinions that he's  
2 going to give.

3 And then in his conclusion, on Page 27, he  
4 repeats, I think, verbatim the bullet point opinions  
5 that he says on Page 3 he's going to give.

6 It's classic. You tell the audience what  
7 you're going to say, and then you say it, and then you  
8 tell them what you just said. So it follows that form.

9 Let's take a look at what I'm talking about  
10 here. Let's go back to Pages 2 and 3.

11 In fact, Page 3, Line 25 and following, the  
12 witness states in his -- states his opinion that,  
13 quote, "Multiple authors have concluded that flow alone  
14 cannot be used to restore the Delta." Then he states  
15 that the Delta -- this point, he continues, "The Delta,  
16 as it existed before large-scale alteration by humans,  
17 cannot be recreated."

18 And he adds at the end of the bullet point,  
19 paragraph, "Buchannan, et al., also concluded that  
20 increased flow alone will not be sufficient to resolve  
21 the low salmonid survival in the Delta."

22 But none of the protestants' testimony cited  
23 on Pages 2 and 3, Mr. Hanson's testimony, states that  
24 flow alone can be used to restore the Delta or that  
25 flow alone will be sufficient to resolve the low

1 salmonid survival in the Delta. And none of that  
2 testimony, none of that testimony states that the Delta  
3 as it existed before large-scale alteration by humans  
4 can be recreated.

5 CO-HEARING OFFICER DODUC: Hold on. I know  
6 you're on a roll, but I'm going to stop you so that I  
7 can better understand this.

8 My understanding of this bullet that you just  
9 focused on starting on Line 25 is that it is actually  
10 his rebuttal testimony; it's not the testimony to which  
11 he is rebutting.

12 MR. KEELING: I understand that, too. But  
13 what does this respond to if that's his rebuttal  
14 testimony? Nobody stated those opinions that he's  
15 rebutting.

16 CO-HEARING OFFICER DODUC: So let's backtrack  
17 because I think you're moving ahead here. Are you  
18 alleging that -- on pages -- at the bottom of Page 2  
19 and beginning of Page 3, that, where there is citation  
20 of testimony to which Dr. Hanson is rebutting, that  
21 that -- those citations are incorrect, that he's  
22 somehow misinterpreted the rebuttal -- the testimony to  
23 which he is rebutting?

24 MR. KEELING: I don't think he's  
25 misinterpreted anything. They're not there. The

1 statements that he is rebutting do not exist there or  
2 anywhere else. Can you imagine any -- you sat through  
3 this for two years. Have you ever heard any witness  
4 say in writing or orally that flow alone is sufficient?

5 And I was curious, so I went back and read  
6 every word of the testimony he cites. It's not there.  
7 Have you ever heard a witness in this proceeding say,  
8 "We think the Delta could be recreated the way it was  
9 before" --

10 CO-HEARING OFFICER DODUC: Hold on. Hold on,  
11 Mr. Keeling.

12 MR. KEELING: It's not there.

13 CO-HEARING OFFICER DODUC: Let's look at  
14 Page 3, beginning of Page 3 where he says that he's  
15 responding to parties that suggest the flow criteria  
16 report and the Phase 2 technical report should be  
17 accepted without modification.

18 Do you disagree that there are experts who  
19 testified in this proceeding who've made that  
20 suggestion regarding the flow criteria report and  
21 technical basis report?

22 MR. KEELING: Absolutely I disagree. I've  
23 searched every word. There is not a single sentence or  
24 statement in any of this.

25 Let's go through -- if you want to go through

1 each one of these, we can do this. Let's go through --  
2 for example, he cites CSPA-202, which CSPA-202 Errata  
3 is Mr. Shutes' testimony. All right? He cites Pages 7  
4 through 11.

5           When you go to CSPA-202 Errata, we find  
6 Mr. Shutes opining that, because the services, the  
7 federal services, are not at this hearing, it becomes  
8 essential to review what CDFW, USFWS, and NMFS have  
9 already said and that their analysis in the 2010  
10 informational Delta flow criteria proceeding is of  
11 particular importance. That's what he says. And then  
12 he goes on to summarize a few of the services'  
13 discussions. Nothing about accepting wholesale or  
14 whole-hog the 2001 report.

15           He goes on to Page 9, where he continues his  
16 summary of some of the services' comments and analyses,  
17 never opining that the whole- -- wholesale adoption  
18 without modification of the report.

19           It goes on on Pages 10 and 11 with the same,  
20 continue -- just summarizing the -- and 10, 11, and 12,  
21 summarizing these analyses.

22           CO-HEARING OFFICER DODUC: So, Mr. Keeling,  
23 your assertion is that Dr. Hanson either misunderstood  
24 or misrepresented the testimony of your and other  
25 protestants' witnesses to which he then rebuts?

1           MR. KEELING. Yes. Whether he misinterpreted  
2 or anything else doesn't matter. The question that the  
3 Hearing Officers have addressed when this came up in  
4 prior rebuttal was does the rebuttal testimony actually  
5 rebut the testimony it's supposed to be rebutting.

6           Now, I can walk us through, for example, he --

7           CO-HEARING OFFICER DODUC: Hold on. I'm not  
8 asking you to walk us through every one of them. I'm  
9 just trying to understand the crux of your motion.

10          MR. KEELING: All right. On top of that --

11          CO-HEARING OFFICER DODUC: Okay?

12          MR. KEELING: -- based on prior rulings from  
13 the Hearing Officers on rebuttal being stricken as not  
14 proper rebuttal, the Hearing Officers have demanded  
15 more than an attenuated amorphous or purely subjective  
16 interpretation. You know, it's one thing for witnesses  
17 to say, "Well, in my view, so-and-so's testimony sort  
18 of suggested that," so then --

19          CO-HEARING OFFICER DODUC: I understand our  
20 ruling, Mr. Keeling.

21          MR. KEELING: All right. Now I'm making an  
22 offer of proof. I'm going to walk here right now  
23 through every single piece of testimony cited. But  
24 I -- if you don't want me to do that, I won't.

25          We can do -- what I would also offer, if you

1 prefer, to do voir dire of the witness on this. So  
2 that is my -- the basis of my motion to strike.

3 We can go down some of these other bullet  
4 points, but it's the same. And I believe Ms. Meserve  
5 is making a motion with respect to Dr. Hutton.

6 CO-HEARING OFFICER DODUC: All right. Let's  
7 hear from Ms. Meserve, and then I'll ask Mr. Mizell or  
8 Mr. Berliner to respond.

9 MS. MESERVE: Good morning. Yes, there's --  
10 many of the same citations are used as a basis for  
11 Dr. Hutton's testimony as well that are in the Hanson  
12 testimony. But --

13 CO-HEARING OFFICER DODUC: That would be 1224?

14 MS. MESERVE: Yes. Which -- so, similar to  
15 the Hanson testimony, citations are provided to which  
16 rebuttal is supposedly being provided, but when one  
17 looks for the statements in the cited testimony, those  
18 statements aren't there.

19 And so my understanding is that the -- from  
20 our February 21st, 2017 ruling, that the rebuttal  
21 evidence should be responsive to evidence presented in  
22 connection with the case in chief. And it appears that  
23 both the Hutton and the Hanson papers appear to be  
24 material that the petitioners would like to have the  
25 hearing consider but aren't specifically tied to pieces



1 of testimony.

2           And so the focus of the Hutton piece is  
3 apparently that he believes that the diversion of  
4 freshwater and the alteration of natural flow patterns  
5 in recent years and decades -- that's what he's  
6 addressing and does a very long paper about, but none  
7 of the rebuttal -- sorry, the case in chief testimony  
8 he cites is making the assertion he's apparently  
9 rebutting.

10           So, you know, again, we could kind of go  
11 through the details, but it's a lot of the same cites.  
12 And it's kind of disturbing because, you know, some of  
13 the citations provided in both Hanson and Hutton are,  
14 for instance, a transcript where the flow report is  
15 mentioned; there's no assertion made whatsoever.

16           Like for both the cross-examination of  
17 Dr. Rosenfeld and Mr. Baxter that are mentioned in both  
18 of these witnesses' testimony, there's mentions of a  
19 flow report, not a whole -- there's no urging of a  
20 wholesale adoption of a flow report.

21           So it appears that both of these testimonies  
22 are improper rebuttal. And there's insufficient  
23 information in the testimony itself, with respect to  
24 Hutton, to show that the materials, which go some 38  
25 pages long, are responding to -- to testimony in the

1 case in chief. So that's the basis.

2 CO-HEARING OFFICER DODUC: And Ms. Meserve and  
3 Mr. Keeling, does -- is that also -- the incorrect  
4 citation that you speak of, does that apply to both the  
5 references to transcripts as well as references to  
6 exhibits?

7 MS. MESERVE: Yes. I was focusing on --  
8 there's some citations on Page 2, Line 17 through 24 in  
9 Hutton that are the same list of citations that's  
10 provided in Hanson.

11 And so Mr. Keeling and I have looked at those  
12 citations, and we don't find that they make the  
13 statements that either witness is rebutting.

14 CO-HEARING OFFICER DODUC: All right. Anyone  
15 else want to speak up in support of the motion before I  
16 hear petitioners?

17 MR. JACKSON: Yes. On behalf of CSPA, since  
18 we've been mentioned regularly in there, I would object  
19 to the introduction of any evidence from either person.

20 It's -- we have been very -- the Board has  
21 been -- the Hearing Officers have been very consistent  
22 throughout this hearing of limiting opportunity to go  
23 beyond the scope of the case in chief testimony that  
24 they are rebutting. In this particular circumstance,  
25 there are all -- all number of newer, sometimes,

1 documents that are being admitted as exhibits to  
2 support testimony in rebuttal of statements that were  
3 not made.

4           So it would seem to me that what's really  
5 happening is we are now seeing a second case in chief.

6           CO-HEARING OFFICER DODUC: Ms. Des Jardins.

7           MS. DES JARDINS: I wanted to join in the  
8 motion to strike by County of San Joaquin and  
9 Mr. Keeling and Ms. Meserve for Local Agencies of the  
10 North Delta.

11           And specifically, I wanted to note that the  
12 Board has already ruled that the entire 2010 Delta flow  
13 criteria report is not a subject for rebuttal. It has  
14 to be tied -- rebuttal in the San Joaquin Tributaries  
15 Authority, striking a large part of their case because  
16 there wasn't very specific testimony that it was tied  
17 to.

18           I also wanted to add I do have a motion to  
19 strike portions of Acuna's testimony, Exhibit DWR-1214,  
20 because on Page 2, at 24 to 25, it's the exact same  
21 language, "I am also responding to several parties  
22 whose experts suggested that the SWRCB's 2010 Flow  
23 Criteria Report and Phase 2 Technical Basis Report,"  
24 and citing the exact same citations.

25           And, again, this is vastly expanding the scope

1 of rebuttal. It cites a large number of documents and  
2 studies that are not cited by any of the experts. It  
3 would require a significant expansion -- it would  
4 require significant time to consider all this evidence  
5 that should have been presented in the Protestants --  
6 in DWR's case in chief.

7           The Hearing Officers have limited  
8 cross-examination -- for example, on the Vernalis  
9 standards, it's not an example -- it's not to open up  
10 questions, any cross on Vernalis. It has to be very  
11 specific; it has to be tied to something they say; it  
12 has to be tied to the specific study that they cite.  
13 And that standard needs to be applied also to this  
14 rebuttal by DWR.

15           CO-HEARING OFFICER DODUC: So I got lost on  
16 that long statement. Are you making a new motion to  
17 strike something?

18           MS. DES JARDINS: Yes. It's for Acuna Exhibit  
19 DWR-1214. And I do have --

20           CO-HEARING OFFICER DODUC: I'm sorry. Hold  
21 on. Are you moving to strike the entirety of  
22 Dr. Acuna's testimony?

23           MS. DES JARDINS: No. There are specific  
24 sections which I could bring up and explain. But it  
25 is -- there are -- are, for example, Opinion 1.

1 CO-HEARING OFFICER DODUC: What is the basis  
2 for that motion?

3 MS. DES JARDINS: First -- first, that he says  
4 he's responding to several parties whose experts  
5 suggested that the 2010 flow criteria report and the  
6 Phase 2 technical basis report, there's the same  
7 citation as in Hanson.

8 CO-HEARING OFFICER DODUC: So are you not --  
9 it's not that it's the same citation. Are you  
10 asserting that Dr. Acuna's testimony is also  
11 inappropriate because it is not responsive to  
12 case-in-chief testimony that is referenced?

13 MS. DES JARDINS: There are specific sections.

14 Example 1, statement says, "Many studies  
15 demonstrate current status of Delta smelt is the result  
16 of multiple factors." There's no reference --

17 CO-HEARING OFFICER DODUC: The fact that --

18 MS. DES JARDINS: -- to any testimony by  
19 any -- any testimony that it's rebutting. It's --  
20 rebuttal is not an opportunity to --

21 CO-HEARING OFFICER DODUC: I understand what  
22 rebuttal is and isn't. So I will note that you have  
23 now made a motion to strike Dr. Acuna's testimony from,  
24 what I understand, based on the same grounds that  
25 Ms. Meserve and Mr. Keeling made for Dr. Hanson's and

1 Dr. Hutton's testimony in that you believe Dr. Acuna's  
2 rebuttal testimony incorrectly cites case-in-chief  
3 testimony to which he is rebutting.

4 MS. DES JARDINS: And there's also some that's  
5 very vague. It would be specifically Opinion 1 at 321  
6 to 412.

7 CO-HEARING OFFICER DODUC: We're not arguing  
8 his opinion.

9 MS. DES JARDINS: Okay. So -- so there's  
10 specific sections -- 321 to 412, 413 to 425,

11 CO-HEARING OFFICER DODUC: What about them?

12 MS. DES JARDINS: Those are the the sections  
13 that I'm moving to strike.

14 CO-HEARING OFFICER DODUC: Okay.

15 MS. DES JARDINS: 5, 9 -- 5 at 9 to 5 at 25.  
16 Again, these are all because they're not not linked  
17 in -- they're not clearly linked in witnesses'  
18 testimony.

19 CO-HEARING OFFICER DODUC: Okay.

20 ATTY AT PODIUM: 9 at 11 to 9 at 21, and 10 at  
21 4 to 10 at 7, and 10 at 11 to 10 at 9 and 12 at 5 to 6.  
22 And all because they're not linked to any witness --  
23 there's no clear link to any witness's testimony, and  
24 there's no indication that they're within the scope of  
25 rebuttal to specific testimony.

1 CO-HEARING OFFICER DODUC: Mr. Herrick.

2 MR. HERRICK: Thank you, John Herrick for  
3 South Delta parties.

4 I'd like to join in Mr. Keeling and  
5 Ms. Meserve's motion to the degree that she's objecting  
6 to Dr. Hutton's testimony relating to the flow report  
7 and Phase 2 technical basis report.

8 I would just add -- everything's been said. I  
9 think that the San Joaquin Tributaries Association were  
10 admonished to not try to go over the specifics for  
11 verif -- the veracity of the report because it should  
12 have been in their case in chief.

13 In this instance, we believe that Mr. Hutton's  
14 testimony is rebutting nothing because nobody we want  
15 into the 2010 flow report or whether it was good or  
16 bad. The basis for it was mentioned a number of times.

17 And the result of the rulings and this  
18 approach, so to speak, is that only the petitioners  
19 will then be able to question the veracity of the  
20 report unless we have some sort of surrebuttal because  
21 nobody's able to rebut his testimony.

22 And I don't think -- it doesn't play out  
23 correctly in that it's -- it's rebutting something that  
24 wasn't asserted. So anyway, thank you. Sorry I talked  
25 so long.

1 CO-HEARING OFFICER DODUC: Thank you,  
2 Ms. Herrick.

3 Mr. Berliner, Mr. Mizell?

4 MR. MIZELL: I believe that the witnesses have  
5 provided copious citations in the multiple testimonies  
6 that were just discussed. It's -- without going into  
7 specifics because there was quite a lengthy list of  
8 them, and I would have to review the transcript to get  
9 precision in that.

10 But generally speaking, it strikes me that, if  
11 three experts read the transcripts and the testimony of  
12 other parties and come to similar conclusion about what  
13 is being asserted, that that gives a certain weight to  
14 that reading of the testimony.

15 It was expressed at some length in Part 2 case  
16 in chief with regard to NRDC's witnesses. And I  
17 believe you had to put up with an extensive line of  
18 objections from the Department with regard to NRDC's  
19 testimony over existing conditions that these witnesses  
20 are now responding to.

21 I believe that, by allowing NRDC's  
22 case-in-chief testimony, it has provided the basis for  
23 all of these witness's rebuttals.

24 CO-HEARING OFFICER DODUC: I'm sorry. Help me  
25 understand. How did the discussion on existing



1 conditions lead to the testimony in question if that  
2 testimony is not in response to direct testimony in  
3 case in chief?

4 MR. MIZELL: Yes, I'm sorry if I confused the  
5 matter.

6 CO-HEARING OFFICER DODUC: Yes, you did.

7 MR. MIZELL: It is in direct response to  
8 case-in-chief testimony so far as I'm aware.

9 CO-HEARING OFFICER DODUC: Okay.

10 MR. MIZELL: I'm indicating that the citations  
11 go to a number of different parties including NRDC.  
12 And I'm using that as an example in my response here.  
13 Generally speaking, NRDC's case in chief went to  
14 exploring the existing conditions and the reasonable  
15 protection of those existing conditions.

16 The 2010 flow criteria report was cited by  
17 NRDC's witnesses as an example. And whether or not the  
18 2010 flow criteria report represents reasonable  
19 protection is, generally speaking, what these witnesses  
20 are here to discuss. So it would be indirect response  
21 to another party's case in chief and appropriate  
22 rebuttal.

23 However, I recognize there are a number of  
24 specific citations that have been provided. I think we  
25 would need time to see those specific citations and

1 consider a response to each of them.

2 CO-HEARING OFFICER DODUC: Anything else  
3 before I turn to Ms. Morris?

4 MR. MIZELL: If we were to try and respond, I  
5 believe that we would need more information from  
6 Ms. Meserve. So if the objecting parties could list  
7 the challenged provisions of the -- the challenged  
8 portions of the testimonies in writing, then we would  
9 be able to address them specifically.

10 CO-HEARING OFFICER DODUC: Ms. Morris?

11 MS. MORRIS: Thank you. I would join in the  
12 objection and specifically, not only through direct  
13 testimony and the citations there, the 2010 flow  
14 criteria report was brought up. And there's extensive  
15 discussion of the Hearing Officer with the CSPA about  
16 how it will and it is going to be considered and how  
17 important it is.

18 And in response to that, on -- and on top of  
19 the existing exhibits -- and I disagree with  
20 Mr. Mizell. I don't think this requires documentation  
21 because, if we just go to PCFFA-145, which is -- it's  
22 cited in all of these testimonies. It is a 55-page  
23 report that was submitted as direct evidence by PCFFA  
24 regarding -- and this is the title of it, "Sacramento  
25 and San Joaquin Flows, Flood Plains, Other Stressors in

1 Adaptive Management."

2 And if you go to first page of that, it talks  
3 about inflows and the strong influence on the quality  
4 of water, productivity of the Delta ecosystem,  
5 abundance, growth, and survival of many Delta species.  
6 And all of this evidence that has been presented by the  
7 three witnesses that there are objections to respond to  
8 that.

9 So this report alone opens up the door to all  
10 of this rebuttal testimony, in my opinion.

11 CO-HEARING OFFICER DODUC: All right.

12 Mr. Bezerra.

13 MR. BEZERRA: Yes, thank you. Surprisingly  
14 enough, I'd like to support the Department's position  
15 on this. I think this is a pretty simple matter. In  
16 NRDC --

17 CO-HEARING OFFICER DODUC: Actually, I'm not  
18 surprised at all.

19 MR. BEZERRA: Okay. Well, so much for that.

20 NRDC's -- in NRDC-58 Errata, Dr. Rosenfeld  
21 proposed a number of terms and conditions, including on  
22 Page 42, proposed Term and Condition 2A is about  
23 maintaining December-through-Jan- -- June unimpaired  
24 flows. These witnesses are clearly attempting to  
25 demonstrate that that will not be an effective term and

1 condition.

2 In addition, in CSPA-202, Mr. Shutes cited not  
3 only the -- this Board's 2010 Delta flow criteria  
4 report but a whole laundry list of materials, including  
5 CDFW's 2010 flows informational document that I believe  
6 also deals with unimpaired flows.

7 Again, these witnesses are responding to those  
8 items. So I think it's pretty clearly within the scope  
9 of rebuttal.

10 CO-HEARING OFFICE DODUC: Final word,  
11 Mr. Keeling, since you started all this? Or would you  
12 like Mr. Jackson to have his say first and then you may  
13 have the final words?

14 MR. KEELING: Why don't you take it.

15 MR. JACKSON: The 2010 flow hearing document  
16 is in the record. As I understand it, it was a  
17 document produced by the Board. We assumed that --  
18 that it was a document that, after the conversation  
19 between the Chair and Mr. Jennings, that was  
20 appropriate for case in chiefs.

21 We did not mention the document as the reason  
22 for you making a determination. The -- as I understand  
23 these particular documents that have been put out here,  
24 they're new. The arguments are new. The attack on the  
25 2010 document is new. And we would have, the way this

1 lines up, a -- we would need a long time for  
2 surrebuttal.

3           So what I'm asking for is that it be stricken  
4 because it was appropriate in their case in chief.  
5 They knew about the 2010 document; they knew about the  
6 other work that the Board had done; and they chose not  
7 to put it into their direct testimony.

8           To bring it up now with a procedural advantage  
9 is going to consume an awful lot of time as we begin to  
10 rebut the rebuttal. We've had no opportunity to do  
11 that under this procedural gotcha game.

12           CO-HEARING OFFICER DODUC: Mr. Keeling.

13           MR. KEELING. Thank you. I think Ms. Morris's  
14 citation of one of the alleged sources that the witness  
15 Hanson and I think Hutton are rebutting, PCFFA-145,  
16 Ms. Morris cited. I'm sure she meant to say it, but  
17 perhaps she neglected to say that that isn't new  
18 testimony. That is a February 16, 2010 testimony of  
19 John Cain, Dr. Opperman, and Dr. Tompkins submitted in  
20 the 2010 Delta flow criteria proceeding before this  
21 Board.

22           So to use a few citations, well, somebody  
23 referred to the 2010 report as a platform for a full  
24 set of dozens of pages in these two testimonies  
25 basically attacking the 2010 flow report runs afoul of

1 the precedent that you have set with respect to the  
2 scope of rebuttal.

3 And on that point, Mr. Mizell pointed out that  
4 there were -- his words not mine, copious citations,  
5 end of quote, provided by the witnesses. Absolutely.  
6 And that's why I offered to take the Hearing Officers  
7 through each and every one to show that the opinions  
8 stated by Dr. Hanson, in my case, are not in there.

9 Mr. Mizell went on to say that the witnesses'  
10 interpretation of the testimony -- and he says for the  
11 three of them, it couldn't be wrong with three experts,  
12 after all. The witnesses' interpretation of the  
13 testimony that they are rebutting should be the  
14 governing factor in this determination.

15 The answer is no. The Hearing Officers have  
16 made it very clear in the past in ruling on the scope  
17 of rebuttal that that's not the case, that it's more  
18 objective standard and not a subjective standard.

19 And with that I'll subside.

20 CO-HEARING OFFICER DODUC: All right. Enough,  
21 everybody. Thank you for your contribution.

22 Here's what I would like to do. Mr. Mizell, I  
23 agree that we do need time and more specificity to  
24 respond to these motions.

25 Ms. Meserve, Mr. Keeling, Ms. Des Jardins, you

1 may have until 5:00 p.m. tomorrow to file in writing  
2 your written motions to strike. Mr. Mizell, Berliner,  
3 you and anyone else, Mr. Bezerra, wishing to respond to  
4 those motions may have until 5:00 p.m. Friday to do so.

5 In the meantime, we will proceed with this  
6 panel, with the exception of Dr. Hanson, Dr. Hutton,  
7 and Dr. Acuna.

8 MR. MIZELL: So if I understand, we will not  
9 be presenting the oral summary of those three witnesses  
10 for the time being?

11 CO-HEARING OFFICER DODUC: For the time being.  
12 If necessary, if we wrap up with the remainder of the  
13 panel, we will just have to find another time, should  
14 it be the Board's decision, to bring back these  
15 witnesses out of order.

16 But I would like to proceed with the rest of  
17 your panel today.

18 MR. MIZELL: Okay. Very well. Should we  
19 swear all of them in, then, now pending the ruling?

20 CO-HEARING OFFICER DODUC: That can wait. I  
21 don't want anyone to make any misinterpretation should  
22 we swear them in now.

23 MR. MIZELL: So we can then dismiss?

24 CO-HEARING OFFICER DODUC: We can.

25 Thank you, Dr. Hanson, Dr. Hutton, and

1 Dr. Acuna.

2 With that change, Mr. Mizell, how much time do  
3 you need for direct of the remaining witnesses? If  
4 it's more than 20 minutes, then I suggest we break and  
5 resume after our lunch break.

6 MR. MIZELL: I have one witness for 20 minutes  
7 and one witness for 5 minutes.

8 CO-HEARING OFFICER DODUC: And that's would  
9 that be okay if we go for 25 minutes?

10 THE REPORTER: Yes.

11 CO-HEARING OFFICER DODUC: Okay.

12 I'm checking with the most important person  
13 here, and that is the court reporter. In that case,  
14 then, does any need to take the oath?

15 MR. MIZELL: Both Dr. Grimaldo and --

16 CO-HEARING OFFICER DODUC: Okay. Please stand  
17 and raise your right hand.

18 (Witnesses sworn)

19 DR. LENNY GRIMALDO, DR. CHRIS EARLE,

20 and MR. MICHAEL BRADBURY,

21 called as Part 2 Rebuttal Panel 3

22 witnesses for the petitioners, having

23 been duly sworn, were examined and

24 testified as hereinafter set forth:

25 MR. MIZELL: Thank you. Just going back to



1 the witness structure, Dr. Phillis provided supporting  
2 testimony to one of the witnesses who's been dismissed,  
3 I assume that he can also step away until it is  
4 determined --

5 CO-HEARING OFFICER DODUC: Yes. Thank you,  
6 Dr. Phillis.

7 MR. MIZELL: Thank you very much. With the  
8 remaining witnesses, I'll simply go through our first  
9 introductory questions, and I'll turn it over to  
10 Dr. Earle.

11 DIRECT EXAMINATION BY MR. MIZELL

12 MR. MIZELL: Dr. Earle, is DWR-1003 a true and  
13 correct copy of your statement of qualifications?

14 WITNESS EARLE: Yes, it is.

15 MR. MIZELL: And is DWR-1219 a true and  
16 correct copy of your testimony for rebuttal?

17 WITNESS EARLE: Yes, it is.

18 MR. MIZELL: Mr. Bradbury, is DWR-1201 a true  
19 and correct copy of your statement of qualifications?

20 WITNESS BRADBURY: Yes, it is.

21 MR. MIZELL: And is DWR-1215 a true and  
22 correct copy of your testimony for Part 2 Rebuttal?

23 WITNESS BRADBURY: Yes, it is.

24 MR. MIZELL: Dr. Grimaldo, is DWR-1207 a true  
25 and correct copy of your statement of qualifications?

1 WITNESS GRIMALDO: Yes, it is.

2 MR. MIZELL: And is DWR-1222 a true and  
3 correct copy of your Part 2 Rebuttal testimony?

4 WITNESS GRIMALDO: Yes, it is.

5 MR. MIZELL: Thank you.

6 And with that, we'll turn to Dr. Earle, who  
7 has about 20 minutes. And after that, he will be  
8 followed by Dr. Grimaldo with about five minutes

9 WITNESS EARLE: Thank you, and good morning.

10 I am just going to briefly summarize my  
11 rebuttal testimony. You may recall that when last I  
12 appeared in these chambers in March of this year, I  
13 delivered a series of opinions, cumulatively indicating  
14 the opinion that I believe that the California WaterFix  
15 would be reasonably protective of wildlife species  
16 found in the Delta.

17 My rebuttal testimony addresses the  
18 allegations of a variety of protestants that it would  
19 not be with regard to particular species of concern to  
20 them. And so my rebuttal testimony presents evidence  
21 and affirms that, in fact, I have the opinion that the  
22 WaterFix would be reasonably protective of the black  
23 rail, the white-tailed kite, the greater Sandhill  
24 crane, the lesser Sandhill crane, Swainson's hawk, and  
25 the giant garter snake, along with all the other

1 wildlife species.

2           And there's also an opinion that I express  
3 here indicating that the activities associated with  
4 wildlife movement across the landscape would not be  
5 unduly prevented or interfered with by the California  
6 WaterFix.

7           And, finally, I would like to state that the  
8 administrative Draft Supplemental EIS does not contain  
9 any information that would tend to change that opinion,  
10 that, in fact, it generally indicates project revisions  
11 that are favorable for terrestrial wildlife found in  
12 the Delta.

13           And with that, I'm ready to answer questions  
14 on my testimony. Thank you.

15           MR. MIZELL: Apparently it will be much  
16 shorter than 25 minutes.

17           CO-HEARING OFFICER DODUC: Always keep the  
18 attorney on his toes. Good job, Dr. Earle.

19           WITNESS GRIMALDO: Shall I go? I'm feeling  
20 really lonely now.

21           My name is Lenny Grimaldo. I'm currently  
22 employed as a senior fisheries scientist with ICF.  
23 I've been employed there for the past 4.5 years.

24           Prior to coming to ICF, I worked as a  
25 fisheries biologist with the Department of Water

1 Resources for 15 years and the Bureau of Reclamation  
2 for 5 years. My full CV is attached as DWR  
3 Exhibit-1207.

4 There are three corrections that I'd like to  
5 update the Board on my testimony. The first two are  
6 relatively minor. On Page 9, Line 23 --

7 MR. MIZELL: Dr. Grimaldo, if you could wait  
8 until it comes up on the screen --

9 WITNESS GRIMALDO: Oh, sure.

10 MR. MIZELL: -- so the Chair can follow you  
11 better.

12 WITNESS GRIMALDO: That the word or acronym  
13 "FEIR/S" should read ITP.

14 Let me know when you're ready to move on.

15 Page 3, Line 9, in front of "Delta," it should  
16 read "Bay-Delta Estuary."

17 And then the last one, Page 3, Lines -- Lines  
18 25 through 26, that sentence got really jumbled and  
19 mangled in editing. I would like to read the sentence  
20 as it should be correctly stated:

21 "Flow provides a mechanism for increased  
22 regional abundance of starry flounder into the  
23 San Francisco Estuary as a function of two-layer  
24 gravitational circulation, but it is unknown if flow  
25 affects overall coastal abundance."

1 CO-HEARING OFFICER DODUC: Repeat, please.

2 WITNESS GRIMALDO: "Flow provides a mechanism  
3 for increased regional abundance of starry flounder  
4 into the San Francisco Estuary as a function of  
5 two-layer gravitational circulation, but it is unknown  
6 if flow affects overall coastal abundance."

7 CO-HEARING OFFICER DODUC: And that will  
8 replace that first sentence starting on Line 25 and  
9 ending on Line 27?

10 WITNESS GRIMALDO: Correct. And that same  
11 line is on Page 13, Lines 9 through 12. It's the same  
12 sentence in two places.

13 CO-HEARING OFFICER DODUC: All right.

14 WITNESS GRIMALDO: Okay. If I can continue  
15 with my testimony.

16 Over the past two decades, my research has  
17 focused on food webs, ecology of tidal marsh  
18 environments, and ecology of native fishes and longfin  
19 smelt in the San Francisco Estuary.

20 MR. MIZELL: Dr. Grimaldo, if I might, bring  
21 the pace a little slower for the benefit of the court  
22 reporter.

23 WITNESS GRIMALDO: Okay. I'm here to provide  
24 testimony on behalf of DWR for the California WaterFix  
25 permit application to the Board.

1           In my testimony, I provide updates on the  
2 state of emerging science for longfin smelt, much of  
3 which I'm eager to share with the Board today.  
4 Specifically as discussed in my testimony, I talk about  
5 how this new research pertains to longfin smelt  
6 entrainment risk and spring abundance relationships.

7           I'm also here to rebut testimony provided  
8 during the previous hearing and provide my opinion  
9 about factors that affect longfin smelt in the  
10 San Francisco Estuary. The specifics of my rebuttal  
11 opinions are provided in my written testimony,  
12 DWR-1222.

13           As an overview, my opinions are the following.

14           Entrainment of longfin smelt at the State  
15 Water Project and Central Valley Project does not  
16 represent a significant source of mortality to the  
17 longfin smelt population. This is especially true  
18 under the current Fish and Wildlife and NMFS Biological  
19 Opinions and also during the pre-Biological Opinion  
20 period.

21           Opinion 2. Longfin smelt spawning and rearing  
22 in San Francisco Bay and Bay Area tributary and marshes  
23 is one of several key mechanisms that may explain why  
24 longfin smelt recruitment is higher in years with  
25 higher spring outflow.

1           In my opinion, I recognize that transport  
2 flows can be one mechanism that explains where and how  
3 larval longfin smelt get distributed in the estuary but  
4 do not believe that reduced entrainment from transport  
5 flows to be a key mechanism underlying the spring-fall  
6 outflow relationship.

7           Finally, in light of new research, much of  
8 which was overlooked by previous testimony from NRDC,  
9 it is also my opinion that juvenile longfin smelt have  
10 low -- little dependence on low salinity habitat.

11           My third opinion is the following: Freshwater  
12 harmful algal blooms do not have a significant effect  
13 on longfin smelt because longfin smelt do not reside in  
14 significant abundances when and where freshwater  
15 harmful algal blooms occur.

16           Then finally, starry flounder recruitment into  
17 the San Francisco Estuary during wetter years is due to  
18 two-layer gravitational circulation, but in my opinion,  
19 we do not have data to ascertain how flow affects  
20 starry flounder abundance overall in the coastal waters  
21 offshore of San Francisco Bay.

22           In my opinion, I agree with interpretations of  
23 Kimmerer, et al., 2009 that Pacific herring abundance  
24 indices are not related to flow.

25           CO-HEARING OFFICER DODUC: Does that conclude

1 your testimony?

2 WITNESS GRIMALDO: Concludes, yes.

3 CO-HEARING OFFICER DODUC: And you?

4 All right. Let me do a couple things. First  
5 of all, I'd like to get estimates of cross-examination  
6 of the remaining witnesses. And then, based on that,  
7 I'd like to discuss the timing for presentation of  
8 rebuttal by the Sacramento Valley Water Users, which is  
9 up next, as well as Grassland and maybe even North  
10 Delta.

11 So first of all, time estimates for  
12 cross-examination?

13 MS. NIKKEL: Meredith Nikkel for Groups 7, 8,  
14 and 9. I have about five or ten minutes.

15 MS. DES JARDINS: Deirdre Des Jardins,  
16 Group 37. I have about an hour and 15 minutes.

17 MS. MESERVE: Osha Meserve for Group 47. I  
18 have about 45 minutes as well. I would note, I have to  
19 be at a meeting this afternoon, so I might seek to  
20 adjust the schedule to go earlier or later depending on  
21 how the cross-exam of this panel goes.

22 CO-HEARING OFFICER DODUC: What time do you --

23 MS. MESERVE: I have to leave at 2:15.

24 CO-HEARING OFFICER DODUC: Okay.

25 Mr. Jackson.



1           MR. JACKSON: I have about an hour and a half  
2 for the wildlife folks. And I will be available today  
3 if you want to move me into somebody else's slot.

4           CO-HEARING OFFICER DODUC: All right. If that  
5 is all, then that is an estimate of, I believe, what,  
6 one, two, three, almost four hours.

7           So Mr. Bezerra, let's plan on having your --  
8 unless there's redirect on this panel, let's plan on  
9 having you prepared to present your rebuttal testimony  
10 tomorrow morning.

11          MR. BEZERRA: Will do.

12          CO-HEARING OFFICER DODUC: Ms. Morris.

13          MS. MORRIS: I had a question about the time  
14 estimates because now three members of the panel are  
15 gone. So were those time estimates just for these two  
16 witnesses and one supporting witness and there's  
17 additional time -- since they're all one panel?

18          CO-HEARING OFFICER DODUC: Yes, yes.

19          Mr. Bezerra, before you sit down -- actually,  
20 you sat down already, but --

21          MR. BEZERRA: I need to get my steps today.

22          CO-HEARING OFFICER DODUC: Yes, yes. Are you  
23 estimating 30 minutes or so? How much time do you need  
24 for presentation?

25          MR. BEZERRA: I think that's about right, 30

1 minutes for the two witnesses.

2 CO-HEARING OFFICER DODUC: And estimated cross  
3 for the Sacramento Valley Water Users rebuttal?

4 MR. MIZELL: I wasn't anticipating being asked  
5 that question this morning so I will attempt to get you  
6 an answer this afternoon.

7 CO-HEARING OFFICER DODUC: All right. Then  
8 let me put Grassland on notice as well as North Delta  
9 Water Agency on notice that they may have to present as  
10 early as tomorrow.

11 MR. BEZERRA: Just in clarification, I suspect  
12 there may be others in the room who will want to  
13 cross-examine our panel, given the subject matter. So  
14 it might be helpful if others had an estimate.

15 CO-HEARING OFFICER DODUC: During our lunch  
16 break, for those who anticipate cross-examination of  
17 Group 7's rebuttal witnesses, who are Mr. Bourez and  
18 Dr. -- oh, no -- Dr. Shankar, yes, thank you. Please  
19 e-mail to the usual e-mail place your requests for  
20 cross-examination as well as a time estimate. And  
21 actually, while you're at it, also provide any estimate  
22 for cross-examination of Grassland and North Delta  
23 Water Agencies' witnesses.

24 MS. NIKKEL: Meredith Nikkel for the North  
25 Delta parties. Unfortunately, I need to report there

1 was a miscommunication while I was on vacation. So the  
2 request to switch North Delta was actually a request  
3 that was intended to be for cross-examination order,  
4 not for direct testimony order.

5 And one of the witnesses, Gary Kienlen, is  
6 actually not available to testify this week. Given the  
7 change in the schedule that just occurred, I'm going to  
8 work my best to find a way to resolve this. But I  
9 wanted to put the Hearing Team as well as the other  
10 parties on notice that I'll be working to find a way to  
11 get North Delta to come in next week. Thank you.

12 CO-HEARING OFFICER DODUC: All right.

13 All good for now? All right. Let's go ahead  
14 and take a little bit longer break for lunch, and we  
15 will return at 1:00 o'clock.

16 (Whereupon, the luncheon recess was  
17 taken at 11:50 a.m.)

18  
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25



1 Tuesday, August 14, 2018 1:00 p.m.

2 PROCEEDINGS

3 ---000---

4 CO-HEARING OFFICER DODUC: All right. It's  
5 1 o'clock. Welcome back.

6 We'll now turn to cross-examination of these  
7 three witnesses.

8 Miss Nikkel, you're up first with 10 minutes,  
9 and, then, Miss Meserve, we'll get to you. That should  
10 allow you to finish by 2:15.

11 And then we'll get to -- I don't remember the  
12 order. Does Mr. Jackson's group order come before  
13 Miss Des Jardins'? I believe so. Yes. Mr. Jackson  
14 and Miss Des Jardins.

15 MR. BERLINER: If I might, I would like to  
16 request that the Board reconsider the order that was  
17 discussed this morning moving our witnesses that have  
18 the alleged testimony that does not comport with the  
19 rebuttal rules, to allow them, as we have with other  
20 witnesses where there have been Motions to Strike, to  
21 allow them to testify. We had -- This week.

22 We can bring them back. Two of them are  
23 local, and Dr. Hanson's in Walnut Creek, so we could  
24 have them here tomorrow morning.

25 We have scheduling problems with witnesses for

1 next week -- starting next week and continuing into the  
2 week after.

3           If we could get them on this week, obviously,  
4 we understand their testimony's subject to -- to being  
5 eliminated if the Board should -- should decide in that  
6 way.

7           But we would like to have them go on so that,  
8 in the event that the Board decides to allow the  
9 testimony, that testimony can be in the record, and  
10 they will have undergone cross-examination, and we will  
11 have solved our scheduling difficulties.

12           And, again, it would be consistent with the  
13 way we've handled other witnesses who are subject to  
14 Motions to Strike.

15           CO-HEARING OFFICER DODUC: And let's make sure  
16 I understand.

17           The witnesses will not be available the next  
18 two weeks?

19           MR. BERLINER: Starting next week and  
20 continuing, I think, until -- through the 27th --

21           CO-HEARING OFFICER DODUC: The 27th.

22           MR. BERLINER: -- and they'll be available  
23 after the 27th.

24           CO-HEARING OFFICER DODUC: All right. Thank  
25 you, Mr. Berliner.

1 Miss Meserve, any response to that since you  
2 are part of the group that made --

3 Unless you have something to add.

4 MR. O'HANLON: Yes. One point to add.

5 This is Dan O'Hanlon on behalf of San Luis and  
6 Delta-Mendota Water Authority, Westlands Water  
7 District, Groups 4 and 5.

8 I would like to point out that the parties  
9 that are objecting and that made their Motion to Strike  
10 orally today, they have had since the Board's order of  
11 July 27 to have brought a written motion.

12 CO-HEARING OFFICER DODUC: Nope.

13 MR. O'HANLON: Yes, they could have brought a  
14 written motion before --

15 CO-HEARING OFFICER DODUC: Actually, some of  
16 the parties have already -- I believe it was  
17 Westlands -- violated our direction. Our direction was  
18 to not file -- For what it's worth, our direction was  
19 to not file any written objections but to make it  
20 orally at the hearing.

21 CO-HEARING OFFICER MARCUS: It's been our  
22 practice.

23 CO-HEARING OFFICER DODUC: It's been our  
24 practice.

25 MR. O'HANLON: Well, I -- There was a response

1 to the motion, which we also responded to -- to the  
2 Board's order, which we also responded to.

3 But it would be helpful, I think, if when  
4 witnesses are brought, that if there's going to be an  
5 objection, the parties be given Notice sooner than the  
6 time that the witnesses are testifying.

7 CO-HEARING OFFICER DODUC: Well, that is our  
8 fault. It was our direction. Miss Meserve and  
9 Mr. Keeling was complying with our direction, unlike  
10 another party.

11 Miss Meserve.

12 MS. MESERVE: The way I understood the  
13 briefing order that you gave earlier today, is that it  
14 would avoid a waste of time and resources on  
15 cross-examining those parties should their testimony or  
16 portions thereof be stricken. So, in that manner, it  
17 seems efficient.

18 I understand it's led to a cascading effect on  
19 schedules, so at this point, I don't have a strong  
20 opinion either way.

21 I think, as long as the -- that the merits of  
22 the motion would not be prejudiced by the presentation  
23 of the testimony -- I'm not sure that -- and everyone  
24 who made the motion is not necessarily here.

25 But, you know, I could understand. I'm not --



1 I wasn't aware of the scheduling issues that were just  
2 brought up.

3 I think, overall, the way that you ordered it  
4 to occur would be most efficient, but if there are  
5 legitimate scheduling issues, that that may be a  
6 concern that you would want to consider.

7 CO-HEARING OFFICER DODUC: Let me ask you  
8 this, Miss Meserve, speaking only on behalf of the  
9 parties that you represent, how much would you estimate  
10 for cross-examination should we -- should we allow for  
11 those witnesses to return, as Mr. Berliner suggested,  
12 tomorrow?

13 MS. MESERVE: So far, I had focused my  
14 cross-examination on Dr. Hutton, and I probably had  
15 about an hour of cross-examination for that witness.  
16 And Mr. Keeling had focused more on the other  
17 witnesses.

18 CO-HEARING OFFICER DODUC: Okay. I would  
19 expect Mr. Jackson and others to have cross-examination  
20 as well.

21 Miss Des Jardins.

22 MS. DES JARDINS: I just wanted to say that  
23 having a lot of oral testimony in the record on . . .  
24 written testimony that's . . . that could be stricken,  
25 you know, it's -- are we then supposed to -- also

1 supposed to make motions to strike that testimony, and  
2 when would the transcript be available?

3           It just -- It makes -- I think that the  
4 Hearing Officers' ruling postponing presentation of the  
5 panel until they consider whether to strike the written  
6 testimony -- because if the written testimony is  
7 stricken, they shouldn't be presenting oral testimony  
8 on it.

9           And my understanding is -- I don't know how  
10 the Hearing Officer would deal with the issue of the  
11 oral testimony on -- on any test -- on any testimony  
12 that was stricken, and it creates an issue.

13           CO-HEARING OFFICER DODUC: Thank you,  
14 Miss Des Jardins.

15           And before you comment, Mr. Berliner, I will  
16 note that, while in the past we have allowed for  
17 witnesses to proceed while considering motions to  
18 strike, those have been very discrete motions with  
19 specific sections or portions at nowhere near the level  
20 to which these motions are before us, to strike  
21 basically the entirety of three -- well, two witnesses,  
22 and I'm not sure about the third.

23           So that's an extensive length of testimony and  
24 cross-examination that we will be considering through  
25 these motions. So it is different than our previous

1 allowing of witnesses to proceed pending consideration  
2 of Motions to Strike.

3 But, Mr. Berliner, did you have anything else  
4 to add?

5 MR. BERLINER: Yes.

6 I understand that, but -- but it does raise  
7 the same issue, which is that testimony is tentatively  
8 allowed and is then going to be struck, so the  
9 transcript would have to reflect that.

10 And, in response to Ms. Des Jardins' concern,  
11 I would assume that a Motion to Strike the written  
12 testimony would then equally apply to whatever oral  
13 testimony is -- is --

14 CO-HEARING OFFICER DODUC: Yes.

15 MR. BERLINER: -- submitted upon  
16 cross-examination, so --

17 CO-HEARING OFFICER DODUC: Yes.

18 MR. BERLINER: -- it's an across-the-board  
19 motion.

20 CO-HEARING OFFICER DODUC: That is my  
21 understanding as well, of course, considering the  
22 efficiency of the amount of time that would be needed  
23 for direct as well as cross of those three witnesses.

24 But we will take your request under  
25 consideration. We can definitely say that do not

1 expect those witnesses to come tomorrow. We will give  
2 you any further indication tomorrow, but we will not  
3 plan to hear from them tomorrow.

4 MR. BERLINER: Okay. Thank you very much.

5 CO-HEARING OFFICER DODUC: All right.

6 Miss Nikkel's not here.

7 Oh, Miss Nikkel is here.

8 Miss Nikkel.

9 MS. NIKKEL: I am here.

10 Given the scheduling uncertainties, I think  
11 I'm just going to proceed here with my cross and see  
12 what happens. All sorts of moving schedules here.

13 CROSS-EXAMINATION BY

14 MS. NIKKEL: Okay. Good afternoon. I'm  
15 Meredith Nikkel. I'm here on behalf of the Sacramento  
16 Valley Group, the Tehama-Colusa Canal Authority, and  
17 the North Delta Water Agency.

18 I just have a few brief questions for  
19 Dr. Earle.

20 And, Dr. Earle, these questions arise out of  
21 your expertise on the Adaptive Management Plan which  
22 was referenced in DWR Exhibit 1143, the Second Revised.

23 And, specifically, I'm referring to  
24 Footnote 38. If Mr. Long could bring that up.

25 (Exhibit displayed on screen.)

1 MS. NIKKEL: Thank you. That's fine. It's  
2 pretty long.

3 So, Dr. Earle, are you familiar with this  
4 footnote?

5 WITNESS EARLE: (Examining document.)

6 Mr. Long, would you please scroll up a little  
7 more?

8 (Scrolling through document.)

9 WITNESS EARLE: (Examining document.)

10 And would you please scroll back down to the  
11 footnote?

12 (Scrolling through document.)

13 WITNESS EARLE: I'm sorry. I don't recall  
14 where this appears in the Adaptive Management Plan.

15 MS. NIKKEL: So, as you sit here today,  
16 Dr. Earle, is it -- do you have any opinion as to  
17 whether the Adaptive Management Program would require  
18 the Petitioners to return to the State Water Board to  
19 prove that a change to the Spring Outflow Criteria  
20 contained in the Incidental Take Permit would not  
21 result in injury to other water users?

22 WITNESS EARLE: I do not have an opinion  
23 regarding whether a proposed change conducted under the  
24 adaptive management criteria would have any particular  
25 regulatory or procedural consequences. That would be

1 determined on the basis of the potential effects of the  
2 proposed change.

3 MS. NIKKEL: But within the Adaptive  
4 Management Plan itself, there's no requirement under  
5 the Plan itself to return to the State Water Board; is  
6 that correct?

7 WITNESS EARLE: No. The Plan itself, as I  
8 noted in my testimony in March, addresses these issues  
9 under Step 4, which involves implementation of proposed  
10 adaptive management change, at which point, as always,  
11 the Department is required to comply with all  
12 applicable restricts -- restrictions and regulations.

13 MS. NIKKEL: So if, as suggested by this  
14 footnote, there were an alternative operation for  
15 spring outflow that would be developed somehow between  
16 DWR and CDFW, would the Adaptive Management Plan  
17 require DWR to come back to the State Water Board for a  
18 change to its water rights?

19 MR. BERLINER: Objection: The witness just  
20 responded that he's unaware as to what would cause  
21 return to the Water Board.

22 CO-HEARING OFFICER DODUC: Sustained.

23 He doesn't know, Miss Nikkel.

24 MS. NIKKEL: I have -- I understood his  
25 testimony to be that there was a step in the Adaptive

1 Management Plan that might apply, and so I'm asking  
2 about a specific way in which the Adaptive Management  
3 Plan might apply.

4           That was my understanding, was that Step 4 had  
5 a role or some interaction that could -- or requirement  
6 that could entail a change to a water right or impacts  
7 analysis. And I'm trying to understand how that would  
8 play with respect to this footnote.

9           CO-HEARING OFFICER DODUC: Are you able to  
10 answer, Dr. Earle?

11           WITNESS EARLE: As I stated, the  
12 implementation occurring under Step 4 of the Adaptive  
13 Management Plan would be required to comply with all  
14 applicable restraints and regulations.

15           Naturally, those would depend upon the  
16 specific proposal that is being put forth.

17           CO-HEARING OFFICER DODUC: But her --  
18 What was your question again, Miss Nikkel?

19           MS. NIKKEL: Well, my question was -- And I  
20 don't have a specific proposal, so the answer may be  
21 that it depends on a specific proposal.

22           But in the footnote, it implies or suggests  
23 that there could be a change to spring outflow or an  
24 alternative operation for spring outflow that could be  
25 developed between CDFW and the Department.

1           And my question is, How would Step 4 -- How  
2 would the adaptive management apply in that instance to  
3 whether or not there would be a change to the  
4 Department's water rights?

5           CO-HEARING OFFICER DODUC: I see.

6           WITNESS EARLE: The Adaptive Management Plan  
7 does not specifically prescribe the applications,  
8 permit processes, or otherwise that might be required  
9 for any change proposed under adaptive management.

10           So, the procedure, in the event that the  
11 circumstances described in -- in Footnote 38 were to  
12 come to pass, is not specified in the Adaptive  
13 Management Plan.

14           MS. NIKKEL: Okay. Thank you. That's all I  
15 have.

16           CO-HEARING OFFICER DODUC: Thank you,  
17 Miss Nikkel.

18           Miss Meserve.

19                         (Pause in proceedings.)

20           MS. MESERVE: Good afternoon.

21           I have questions for Dr. Earle based on his --  
22 the subjects that are in his testimony, such as noise,  
23 loss of habitat, the transmission lines, basically  
24 tracking the topics in his testimony.

25           CO-HEARING OFFICER DODUC: Speak more clearly



1 into the microphone and bring it closer to you,  
2 Miss Meserve.

3 MS. MESERVE: Sure.

4 CROSS-EXAMINATION BY

5 MS. MESERVE: Let's see.

6 So, Dr. Earle, your testimony -- And maybe we  
7 could just go ahead and put that up -- is DWR-1219.

8 And the first question I have relates to  
9 Page 6, Line 11.

10 (Exhibit displayed on screen.)

11 MS. MESERVE: And this is where you cite the  
12 Popper study.

13 And my question is: Is it your position that  
14 consideration of noise frequency would not have  
15 improved the analysis you relied on in the Final EIR of  
16 noise?

17 WITNESS EARLE: That is correct.

18 MS. MESERVE: And I have an exhibit which is  
19 just an excerpt from the Final EIR, which is labeled  
20 FSL-54 in the thumb drive I provided this morning. If  
21 you could please bring that up.

22 (Exhibit displayed on screen.)

23 MS. MESERVE: No. It says FSL-54.

24 (Exhibit displayed on screen.)

25 MS. MESERVE: Yeah, that one.

1           And are you familiar, Dr. Earle, with the  
2 Final EIR and what it states about the noise produced  
3 by pile drivers here on Page 12-148?

4           WITNESS EARLE: I see that Line 4 indicates  
5 that impact pile driving produces a sound level of  
6 approximately 101 dBA at 50 feet distance.

7           And, yes, I'm familiar with that.

8           MS. MESERVE: And in preparing this rebuttal  
9 testimony, you reviewed Dr. Shilling's testimony as  
10 well as the study cited by him in LAND-135?

11          WITNESS EARLE: I do not recall exactly what  
12 LAND-135 consists of.

13          MS. MESERVE: That's his --

14          WITNESS EARLE: It's true that --

15          MS. MESERVE: -- testimony.

16          WITNESS EARLE: -- I reviewed Dr. Shilling's  
17 testimony.

18          MS. MESERVE: Sorry.

19          Yeah, that's just his testimony.

20          WITNESS EARLE: Then, yes, I reviewed  
21 Dr. Shilling's testimony.

22          MS. MESERVE: Okay. And then one of the  
23 citations within that is the Popper study that I  
24 mentioned.

25          If we could please bring up LAND-148, which is

1 that study. I may be misnaming it. It's Dooling and  
2 Popper. LAND-148, and go to Page 35.

3 And I am going to point you toward language  
4 about intermittent sounds that are similar to pile  
5 driving.

6 (Exhibit displayed on screen.)

7 MS. MESERVE: And if we could go to Page 35 of  
8 that.

9 (Exhibit displayed on screen.)

10 MS. MESERVE: Scrolling down into the third  
11 full paragraph.

12 (Exhibit displayed on screen.)

13 MS. MESERVE: It discusses noise from  
14 aircraft, and pile driving may be similar.

15 And with respect to the comparison -- Well,  
16 I'll give you a chance to read. Sorry.

17 (Pause in proceedings.)

18 WITNESS EARLE: You may proceed.

19 MS. MESERVE: And if we could look at another  
20 exhibit I gave you this morning, which is FSL-55, which  
21 is a listing of different noise levels.

22 In the last excerpt we looked at, aircraft  
23 noise was --

24 (Exhibit displayed on screen.)

25 MS. MESERVE: -- mentioned.

1           Are you aware that aircraft noise is around  
2 97 decibels?

3           WITNESS EARLE: I am aware that the amount of  
4 noise produced by any source varies quite substantially  
5 with distance from the source.

6           So, 97 decibels, if that appears in this  
7 exhibit -- I don't see it at the moment -- is only a  
8 meaningful number if presented in the context of THE  
9 distance at which it is measured.

10          MS. MESERVE: Understood.

11          If it was at the correct distance, would you  
12 agree that aircraft sounds could be analogous to  
13 pile-driving sounds in the point that they would be  
14 intermittent?

15          WITNESS EARLE: I . . . Acoustically,  
16 aircraft sounds and pile-driving sounds are very  
17 different.

18          Aircraft sounds typically grow gradually as  
19 the plane approaches, have a peak level and then  
20 diminish as the plane goes away.

21          Pile-driving sounds are almost instantaneous  
22 in going from no noise to maximum noise, and also at a  
23 very rapid cessation.

24          These differences account for substantial  
25 behavioral differences in animals that are exposed to

1 those sounds.

2 MS. MESERVE: So would you also agree that  
3 highway noise would be a lot different from  
4 pile-driving noise?

5 WITNESS EARLE: Yes. Highway noise is  
6 generally continuous, and it also has a different  
7 attenuation with distance compared to pile-driving  
8 noise, because highway noise is essentially a linear  
9 noise source whereas pile-driving noise is point source  
10 in most cases.

11 (Pause in proceedings.)

12 MS. MESERVE: So, looking at your testimony at  
13 Page 6, don't you appear to be equating, on Lines 13  
14 and 14, highway noise with pile-driving noise in a way  
15 that --

16 (Exhibit displayed on screen.)

17 MS. MESERVE: -- would not be appropriate?

18 WITNESS EARLE: I would say no. I appear to  
19 be quoting Dooling and Popper with regard to their  
20 analysis of frequency effects.

21 Ah. It may be that you misunderstood my use  
22 of the word "frequency."

23 I'm -- The term "frequency" here is not  
24 intended to mean how often something happens but to  
25 indicate how many cycles per second the sound is

1 produced at.

2 (Pause in proceedings.)

3 MS. MESERVE: So -- But do you still think  
4 that highway noise would be relevant to consideration  
5 of the pile-driving noise as was assumed in the EIR?

6 WITNESS EARLE: The two are relevant.

7 The -- The analysis in the EIR considered the  
8 distance at which a noise would be expected to  
9 attenuate to approximately background or, specifically,  
10 they used a threshold of 50 dBA, which is a common  
11 background level of noise in rural areas within the  
12 Delta, as demonstrated by measurements.

13 And in that case, at that distance, we're  
14 talking about a noise which does not actually exceed  
15 background, and at smaller distances -- somewhat  
16 smaller distances, it only exceeds background by a  
17 small amount.

18 At such distances, pile-driving noise, highway  
19 noise and, indeed, any source of noise are comparable  
20 in having a very low intensity and, consequently, a low  
21 potential to affect the behavior of animals.

22 MS. MESERVE: Doesn't the FEIR describe that  
23 pile driving could be 101 dBA, though?

24 WITNESS EARLE: That is correct.

25 101 dBA at 50 feet, I believe, that would drop

1 by approximately 60 BA for every time you doubled the  
2 distance from the noise source.

3 I believe it comes out to about half a mile at  
4 which pile-driving noise would be indistinguishable  
5 from background noise.

6 MS. MESERVE: And using that example, wouldn't  
7 there be birds closer than a half mile to the  
8 pile-driving noise --

9 WITNESS EARLE: Yes --

10 MS. MESERVE: -- in the Delta.

11 WITNESS EARLE: -- there certainly could and  
12 this is why the Final EIS expresses the opinion that  
13 such birds could be behaviorally affected by exposure  
14 to that noise.

15 MS. MESERVE: And then you agree that the  
16 pile-driving noise has a unique characteristic because  
17 it is intermittent, right, as discussed in the  
18 Final EIR?

19 WITNESS EARLE: Among other things, yes, it is  
20 intermittent.

21 MS. MESERVE: Which would be different than a  
22 freeway noise, for instance, not intermittent; is it?

23 WITNESS EARLE: Freeway noises are typically  
24 assumed to be fairly continuous in amplitude.

25 MS. MESERVE: Have you heard of the -- here's

1 another intermittent noise -- the use of cannons for  
2 bird control --

3 WITNESS EARLE: Yes.

4 MS. MESERVE: -- at landfills, for instance?

5 Could we look at another exhibit I had from  
6 this morning, which is FSL-56, please.

7 (Exhibit displayed on screen.)

8 MS. MESERVE: And if we scroll to the next  
9 page.

10 (Exhibit displayed on screen.)

11 MS. MESERVE: This is just an example of a  
12 Cannon used to disperse birds. It says they're fairly  
13 effective as dispersing birds.

14 Would you agree that this kind of noise would  
15 scare a bird?

16 MR. MIZELL: I'm going to object: This is  
17 beyond the scope of Dr. Earle's rebuttal testimony.

18 Again, as he qualified it earlier in response  
19 to Miss Meserve's question, the citation Miss Meserve  
20 is questioning him about talks about frequency as in --  
21 Well, I think Dr. Earle described it better than I  
22 could.

23 Not being a frequency in time but a frequency  
24 in oscillation or something.

25 CO-HEARING OFFICER DODUC: In occurrence.



1 MR. MIZELL: In -- Well, not in occurrence --  
2 not frequency in occurrence but frequency in --

3 CO-HEARING OFFICER DODUC: Yes. Not frequency  
4 in occurrence.

5 MR. MIZELL: Right.

6 CO-HEARING OFFICER DODUC: That's right.

7 MR. MIZELL: So, at this point, I fail to see  
8 the connection of this line of questioning to the  
9 statement referenced in Dr. Earle's testimony.

10 CO-HEARING OFFICER DODUC: Miss Meserve?

11 MS. MESERVE: Well, I think that the -- on  
12 Page 6 and thereafter, we're talking about the  
13 character of the noises that are analyzed and that  
14 Dr. Earle is attempting to rebut statements made by  
15 Dr. Shilling about the character of those -- of those  
16 noises.

17 So, I don't think it's -- I don't think  
18 everything is tied to frequency. I think it's also  
19 tied to the character of the noise, which I think is an  
20 instantaneous short duration point.

21 CO-HEARING OFFICER DODUC: Okay. Overruled.

22 MS. MESERVE: So I think I had a question  
23 pending.

24 Would you agree that these types of cannon  
25 shots could scare birds?

1 CO-HEARING OFFICER DODUC: And how does  
2 this -- I'm sorry.

3 Make the connection to me -- for me of this  
4 one example of a cannon. You're not asking him to  
5 opine about the specific, you know, maker or model,  
6 but -- So what is the -- what is the linkage here?  
7 What characteristic you are going for?

8 MS. MESERVE: What I'm trying to do is provide  
9 a more apt example of a noise that would be similar to  
10 a pile driving, more similar, for instance, than a  
11 freeway noise.

12 CO-HEARING OFFICER DODUC: Okay. Are you  
13 familiar with these type of cannons, Dr. Earle?

14 WITNESS EARLE: I am aware that cannons of  
15 this type have been used to -- to drive -- to haze  
16 birds that are in undesirable situations. They're used  
17 at airports and golf courses, for instances, to  
18 typically keep waterfowl away from areas where they  
19 could either be an inconvenience or a safety hazard.

20 And I'm aware that, if used consistently and  
21 at short distances, they can be effective in  
22 eliminating birds from a local area.

23 I would note --

24 CO-HEARING OFFICER DODUC: And how would their  
25 noise compare to that of the . . .

1           WITNESS EARLE: It is similar to the noise of  
2 a pile driver in the sense it has a very rapid rise  
3 time, a very rapid fall time. And it has been found to  
4 elicit a startle response from birds.

5           But it's important to note that it has to be  
6 loud to work; in other words, it has to be close to the  
7 bird.

8           Similarly, pile driving would have to be -- a  
9 bird would have to be quite close to the pile driving  
10 to be disturbed by this sort of phenomena.

11                   (Pause in proceedings.)

12           MS. MESERVE: So would you agree, then -- I  
13 think you already did -- that the intermittent noise  
14 characteristic of the pile driving is -- differs  
15 substantially from busy roads, residential areas and  
16 agricultural equipment referenced in your testimony?

17           WITNESS EARLE: If we could please pull up my  
18 testimony. I'm not quite certain what terminology  
19 you're referring to.

20                   (Exhibit displayed on screen.)

21           MS. MESERVE: I think it's on Page 6. Let me  
22 find it.

23                   (Pause in proceedings.)

24           MS. MESERVE: Line 16 of Page 7 -- sorry --

25                   (Exhibit displayed on screen.)

1 MS. MESERVE: -- states (reading):

2 "Most of the Delta's already subject  
3 to noise . . ."

4 (Pause in proceedings.)

5 WITNESS EARLE: I see this.

6 Would you please repeat your question?

7 MS. MESERVE: Given that pile drivers have a  
8 unique intermittent noise characteristic, as described  
9 in the EIR, don't sounds from pile driving differ  
10 substantially from busy roads, residential areas, and  
11 agricultural equipment mentioned on Page 7 of your  
12 testimony?

13 WITNESS EARLE: I have not reviewed the  
14 acoustic data that have been collected in this area. I  
15 would say that they probably do differ appreciably from  
16 busy roads.

17 Residential areas, it's harder to say, but  
18 typically residential areas have relatively low rates  
19 of noise production.

20 Agricultural equipment, the -- The noise  
21 produced by such equipment is highly variable depending  
22 upon the equipment in question.

23 As to the question whether, for instance, as  
24 it says here, Sandhill Cranes and other species are  
25 accustomed to the noise from pile driving or noise

1 that's comparable to that, it would be speculative  
2 to -- for me to conclude at this time.

3 MS. MESERVE: So you're not aware of noises  
4 similar to the pile-driving noise that you're opining  
5 about already being present in the Delta; are you?

6 WITNESS EARLE: I'm sure pile-driving noises  
7 are occasionally present in the Delta.

8 But we did not specifically evaluate differing  
9 bird responses to pile driving as opposed to other  
10 noises because, as I stated earlier, we concluded that  
11 there was a potential impact any time the noise was  
12 appreciably in excess of the acoustic background.

13 The determination in the EIR/EIS was that, in  
14 spite of that, there would still be a  
15 less-than-significant effect.

16 Most of the areas that would be exposed to  
17 relatively loud noises -- and, by that, I mean greater  
18 than maybe 70 or 80 decibels -- would actually be  
19 within the construction areas, areas that have already  
20 been cleared and where birds would be absent.

21 So very few birds could be exposed to noises  
22 as high as those generated by pile driving, except  
23 perhaps for birds that were located on the river next  
24 to where the pile driving was occurring. And that's a  
25 relatively low level of sonification.

1           The birds affected by that process do not  
2 belong to sensitive species and, therefore, it was  
3 concluded that it did not represent a significant  
4 adverse effect.

5           MS. MESERVE: So, in your analysis, did you  
6 equate the lack of a significant adverse effect with  
7 what I think you phrased as reasonable protection for  
8 wildlife?

9           WITNESS EARLE: Well, as I stated in my  
10 testimony in March, my opinion that the California  
11 WaterFix would be reasonably protective of wildlife is  
12 based not only upon my own analysis and the analysis  
13 presented in the various environmental documents, but  
14 also on the concurrence with that analysis that we've  
15 received from the various agencies whose jurisdiction  
16 is protection of fish and wildlife in California,  
17 essentially agreeing with our analysis.

18           MS. MESERVE: Was there any analysis of  
19 reasonable protection for Greater Sandhill Cranes in  
20 the ITP?

21           WITNESS EARLE: The ITP is an incidental take  
22 statement that authorizes take of species that are  
23 listed under the California Endangered Species Act.

24           The Greater Sandhill Crane is a fully  
25 protected species. There is no authorization of take

1 for this species unless, under the isolated  
2 circumstance of preparing a natural Community  
3 Conservation Plan which is not relevant in this case.  
4 Therefore, there is no mention anywhere in the  
5 Incidental Take Permit of the Greater Sandhill Crane.

6 MS. MESERVE: So there -- So the answer is,  
7 no, there's no one else; correct?

8 WITNESS EARLE: There's no reference to it in  
9 the Incidental Take Permit.

10 MS. MESERVE: So at least with respect to  
11 Sandhill Crane -- Greater Sandhill Crane, your prior  
12 statement would not apply; correct?

13 MR. BERLINER: Objection: Vague.

14 CO-HEARING OFFICER DODUC: I'm sorry. Which  
15 prior statement is that?

16 MS. MESERVE: The statement that the permits  
17 obtained by the Project would have analyzed effects on  
18 birds from a --

19 WITNESS EARLE: On the contrary. The Greater  
20 Sandhill Crane is evaluated at length in the  
21 Final EIR/EIS, which was reviewed and commented on by  
22 all of the fish and wildlife agencies, and which was  
23 nominally authored by the U.S. Fish and Wildlife  
24 Service.

25 MS. MESERVE: That's not a permit; is it?

1 WITNESS EARLE: An authorization.

2 But I -- I do not pretend to understand the  
3 legal niceties here.

4 MS. MESERVE: Okay. Well, I just want to be  
5 clear: There's no permit.

6 And there is no Federal Record of Decision  
7 with respect to the EIR/EIS, either; is there?

8 WITNESS EARLE: It's my understanding that  
9 that has not yet been issued.

10 MS. MESERVE: Now, on the issue of  
11 transmission line markers and their effectiveness --  
12 and that's discussed on Page 15 of your testimony.

13 (Exhibit displayed on screen.)

14 MS. MESERVE: And, let's see, you discuss that  
15 there's an addendum was issued that would -- with the  
16 effect of a substantial reduction in the proposed  
17 length of the transmission lines.

18 Do you see that part of your testimony?

19 WITNESS EARLE: Yes, I do.

20 MS. MESERVE: If we could go to an exhibit  
21 that is within FSL, and that's FSL-48, Page 2.

22 And this is an example of the new proposed  
23 transmission lines and --

24 CO-HEARING OFFICER DODUC: Do you mean FSL-58?

25 MS. MESERVE: I'm sorry. It's 48.



1 I'm sorry. FSL-48. It's something that's in  
2 our existing Exhibit List. Sorry about that.

3 (Pause in proceedings.)

4 MS. MESERVE: 48. FSL-48.

5 (Pause in proceedings.)

6 MS. MESERVE: I think we're going to have to  
7 go under the Friends of Stone Lakes. If you scroll  
8 down toward the bottom.

9 There you go.

10 (Exhibit displayed on screen.)

11 MS. MESERVE: And this is an exhibit -- If we  
12 could go to Page 2 of that.

13 (Exhibit displayed on screen.)

14 MS. MESERVE: We discussed earlier that this  
15 is similar to the proposed transmission lines that are  
16 discussed in your testimony on Page 15 as being subject  
17 to the addendum.

18 MR. MIZELL: I'm going to object:

19 We have a line of questioning here that goes  
20 to an exhibit that is not directly responsive to  
21 Dr. Earle's testimony.

22 His testimony on this point focuses on a  
23 critique of modeling and is not discussing the  
24 characterization of the transmission line polls and  
25 lines.

1           If Miss Meserve can provide us a closer  
2 citation, I'm happy to withdraw that objection.

3           CO-HEARING OFFICER DODUC:  Actually, I don't  
4 even know yet what her question is.

5           MS. MESERVE:  Yeah.  I mean, my questions go  
6 to this paragraph on Page 15 of Dr. Earle's testimony  
7 that talks about a substantial reduction in the  
8 proposed length.

9           And what my questions go to is, well, what  
10 about the character, not just the length?  And that's  
11 what my questions go to.  So I believe it's within the  
12 testimony in terms of availability for questioning.

13           CO-HEARING OFFICER DODUC:  And, Miss Meserve,  
14 are you focused solely on Dr. Earle's testimony on  
15 Page 15, that one paragraph?

16                           (Pause in proceedings.)

17           MS. MESERVE:  That was what I thought was most  
18 direct.

19           I can look for some other citations if you'd  
20 like.

21           CO-HEARING OFFICER DODUC:  And, Mr. Mizell --  
22 Let me ask Dr. Earle:

23           Dr. Earle, your testimony, as we see here, is  
24 it based solely on a modeling analysis?

25           WITNESS EARLE:  I beg your pardon?  Based

1 solely on which analysis?

2 CO-HEARING OFFICER DODUC: On a modeling  
3 analysis.

4 WITNESS EARLE: My testimony refers to  
5 modeling but it also refers to substantial changes in  
6 the Project as proposed, and also to various research  
7 that was performed.

8 MR. MIZELL: I was looking beyond the first  
9 paragraph. The first paragraph speaks solely in terms  
10 of laugh and that -- no other characteristics.

11 The remainder of this section speaks to a  
12 critique of the modeling presented by Protestants. I'm  
13 not aware of anyplace that discusses other  
14 characteristics of the transmission lines much as  
15 Miss Meserve just indicated.

16 Dr. Earle's testimony is limited to length.

17 CO-HEARING OFFICER DODUC: Miss Meserve.

18 MS. MESERVE: Well, I think I can make these  
19 into questions about the modeling if that would be  
20 helpful.

21 CO-HEARING OFFICER DODUC: Let's do that.

22 MS. MESERVE: Okay. So, if we could go back  
23 to the figure in FSL-48, please.

24 (Exhibit displayed on screen.)

25 MS. MESERVE: The modeling -- If we go --

1 scroll up to Page 1 of this --

2 (Exhibit displayed on screen.)

3 MS. MESERVE: -- would have assumed  
4 transmission lines -- or, rather, distribution lines  
5 that look like the one on the bottom of this page,  
6 wouldn't they, Dr. Earle?

7 MR. MIZELL: Objection: Assumes facts not in  
8 evidence.

9 CO-HEARING OFFICER DODUC: Dr. Earle, are you  
10 able to answer the question based on your knowledge?

11 WITNESS EARLE: I know that the -- the  
12 proposed power transmission lines that are described in  
13 the addendum do not resemble those shown in the  
14 photograph there.

15 MS. MESERVE: So, given your understanding of  
16 the model that you discuss on Page 15, isn't it true  
17 that the -- the model is assuming lines that are  
18 distribution lines with a single layer of lines as  
19 shown in the bottom here?

20 WITNESS EARLE: Mmm . . . If Mr. Long would  
21 bring us back to my testimony, Page 15, DWR-1219.

22 (Exhibit displayed on screen.)

23 WITNESS EARLE: Now, if you would please  
24 scroll up a little bit.

25 (Scrolling through document.)

1 WITNESS EARLE: Or, sorry, scroll down.

2 (Scrolling through document.)

3 WITNESS EARLE: Okay. This discusses a model  
4 that was developed by Dr. Ivey for the BDCP. This is  
5 actually the model that is referred to by Protestants.

6 This is -- This is not the model that -- that  
7 I advocate the use of in my testimony.

8 (Pause in proceedings.)

9 MS. MESERVE: Let's see. Well, I think we  
10 went over this some before.

11 I just -- When I reviewed your testimony, it  
12 appeared you weren't taking account on Page 15 of the  
13 different configuration which is suggested in the  
14 addendum, which is the power line -- the transmission  
15 line with the distribution underbuild as shown in  
16 FSL-48, Page 2.

17 MR. MIZELL: And I object to the question as  
18 being beyond the scope.

19 In the question as Miss Meserve has phrased  
20 it, she says it is not within his testimony. So I  
21 believe that this is beyond the scope of Dr. Earle's  
22 rebuttal testimony.

23 Unless we can find a reference to other  
24 characteristics of the transmission lines, it's beyond  
25 the scope.

1 MS. MESERVE: I'll just go to the . . .

2 When you discuss -- I'll move on.

3 CO-HEARING OFFICER DODUC: You're moving on.

4 Okay.

5 MS. MESERVE: Sorry.

6 When you on Page 15, Line 11, refer to the  
7 reduction in the proposed length of new transmission  
8 lines, you don't offer any analysis about a different  
9 configuration of transmission lines with underbuilds in  
10 that; do you?

11 (Pause in proceedings.)

12 WITNESS EARLE: That is correct.

13 MS. MESERVE: And on Line 12, you state that  
14 the addendum would only further reduce collision risks  
15 for birds.

16 But isn't it true that, if the power line is  
17 a -- is a dis -- is a transmission line with an  
18 underbuild with several layers of lines, that that  
19 might increase risks?

20 (Pause in proceedings.)

21 MR. MIZELL: I'm going to object as being  
22 beyond the scope of his rebuttal testimony.

23 His --

24 MS. MESERVE: He --

25 MR. MIZELL: -- conclusion here goes to the

1 reduction in length.

2 CO-HEARING OFFICER DODUC: So your conclusion  
3 is limited to just the analysis of length?

4 WITNESS BRADBURY: I think I can add some  
5 clarity here.

6 If we can go back to FSL-48, please.

7 (Exhibit displayed on screen.)

8 WITNESS BRADBURY: Existing power lines on  
9 Lambert Road between River Road and I-5, those are  
10 distribution lines.

11 The lines that we are modifying along Lambert  
12 Road are actually 69 kV lines. They're single-pole  
13 kV -- 69 kV lines and we're going to make them  
14 double-pole 69 kV lines.

15 So if you go down -- scroll down a bit.

16 (Exhibit displayed on screen.)

17 WITNESS BRADBURY: So this is a figure. This  
18 actually is not what the transmission lines will look  
19 like because it has one very specific problem.

20 But right now, the 69 kV lines that run along  
21 Lambert Road are basically that same configuration but  
22 with the six . . . the six wire holders. On the top  
23 part of the transmission poll, there's only three, so  
24 there's three on one side.

25 We will rebuild the existing lines so that

1 there's three on one side and three on the other side.

2           So, basically, the configuration is adding  
3 another set of three. It's approximately the same  
4 height and it does have a kV underbuild.

5           I think it's also important to note that this  
6 particular transmission line has a shield wire at the  
7 top of the pole. The poles that will be used by SMUD  
8 do not have that shield wire.

9           That's important because a number of studies  
10 have found that the shield wire is particularly  
11 problematic from a bird strike issue.

12           And one of the -- I believe it was Brown,  
13 et al., found that roughly 65 percent of bird strikes  
14 are on the shield wire.

15           So, again, our transmission lines will not  
16 have that shield wire. And it'll be basically that  
17 same configuration except that it'll have six wires  
18 attached to it instead of just three.

19           WITNESS EARLE: And I'd also note that on  
20 Page 18 of my testimony, DWR-1219 --

21           (Exhibit displayed on screen.)

22           WITNESS EARLE: -- Number 4 on Page 18.

23           (Exhibit displayed on screen.)

24           WITNESS EARLE: A little -- Scroll down a  
25 little farther.



1 (Scrolling through document.)

2 CO-HEARING OFFICER DODUC: Reiterates those  
3 points that were just made by Mr. Bradbury.

4 MS. MESERVE: So, Mr. Bradbury, is it your  
5 contention, then, there is already a 69 kV transmission  
6 line going all the way down Lambert Road?

7 WITNESS BRADBURY: The part that we will have  
8 reconstructed, yes, that's correct.

9 MS. MESERVE: Is there any . . . figures you  
10 could point to that show that?

11 WITNESS BRADBURY: Can you -- Let's see.

12 (Pause in proceedings.)

13 WITNESS BRADBURY: In the addendum . . .

14 MS. MESERVE: That's going to be a DWR  
15 exhibit; right?

16 WITNESS BRADBURY: DWR-1295.

17 (Exhibit displayed on screen.)

18 WITNESS BRADBURY: And as you scroll down.

19 (Scrolling through document.)

20 (Pause in proceedings.)

21 WITNESS BRADBURY: Oh, hold on a second.

22 MS. MESERVE: There's a figure on Page 3.

23 WITNESS BRADBURY: There's -- I think in the  
24 description, it talks about how the existing line --  
25 what the existing line is and how it will be modified.

1 (Pause in proceedings.)

2 WITNESS BRADBURY: I'm not seeing that.

3 (Pause in proceedings.)

4 WITNESS BRADBURY: I'm sorry. I'm not seeing  
5 that right now.

6 MS. MESERVE: I'm not aware -- We can move on.  
7 I just -- From my experience, I did go Lambert Road and  
8 I did take that picture, and that's the trans -- that's  
9 the distribution lines I found, and so I was a little  
10 confused by your statement.

11 WITNESS BRADBURY: That distribution line that  
12 you took a picture of is actually on the other side of  
13 the bridge.

14 CO-HEARING OFFICER DODUC: Can you tie this  
15 back to Dr. Earle's testimony somehow?

16 I thought it was interesting, but --

17 MS. MESERVE: I know. Sorry.

18 There's a factual issue about what the  
19 existing line is now and what's being replaced, because  
20 Dr. Earle is claiming that the change is a reduction in  
21 length that will serve to only further reduce  
22 collision. And that's why I'm trying to discover that.

23 CO-HEARING OFFICER DODUC: And I believe  
24 Mr. Bradbury's explanation was intended to support that  
25 finding in Dr. Earle's testimony.

1 WITNESS BRADBURY: That's correct.

2 MS. MESERVE: And I guess for the detail of  
3 what's there now versus what's proposed, the best  
4 reference we have would be this DWR exhibit. And so I  
5 can study that again later.

6 Let's go to the issue of diverters, then.

7 On Page 18, Line 23 of your testimony,  
8 Dr. Earle, you discuss that the collision risk would be  
9 lowered by 60 percent.

10 (Exhibit displayed on screen.)

11 MS. MESERVE: Do you see that?

12 WITNESS EARLE: Yes.

13 MS. MESERVE: And is it your opinion that  
14 installing flight diverters on power lines is highly  
15 effective at averting collisions?

16 WITNESS EARLE: As stated there, they have  
17 been found to reduce the incidence of collisions by  
18 approximately 60 percent.

19 MS. MESERVE: And in making that assertion and  
20 citing the Yee study, which is at SOS-59, that you're  
21 relying on the Yee study from 2008; is that correct?

22 WITNESS EARLE: I do cite the Yee study in  
23 support of that conclusion. That is not the -- the  
24 only study that has evaluated this. Comparable numbers  
25 have been found by other studies, such as the -- the

1 Brown and Drewien cited in the testimony presented by  
2 Save Our Sandhill Cranes.

3 MS. MESERVE: And just sticking with the Yee  
4 study for now, that studied the effectiveness of flight  
5 diverters on power lines that had only one layer of  
6 horizontal lines; isn't that correct?

7 WITNESS EARLE: I don't know. We would have  
8 to -- to look at the Yee study to determine that.

9 MS. MESERVE: That's SOSC-59, Page 14.

10 (Pause in proceedings.)

11 MS. MESERVE: And my question is: Isn't it  
12 true that those transmission lines in the study would  
13 look more like the photo I took?

14 If we look at Page 14 and see there's --  
15 Whoops. SOSC-59. That's going to be at the bottom of  
16 your Exhibit List there.

17 And then 59.

18 (Exhibit displayed on screen.)

19 MS. MESERVE: And then if you scroll to .pdf  
20 Page 28.

21 (Exhibit displayed on screen.)

22 MS. MESERVE: So that was the lines studied in  
23 Yee; right?

24 WITNESS EARLE: Yes.

25 MS. MESERVE: So --

1           WITNESS EARLE: I'm not sure if I'd call  
2 that -- That's a very vague picture. But it appears to  
3 have a groundwater or a shield wire located above the  
4 conductors.

5           MS. MESERVE: Would you say it's more similar  
6 to the photo I took on Lambert Road than what I had on  
7 Page 2 of FSL-48?

8           WITNESS EARLE: Yes.

9           MS. MESERVE: And looking at that  
10 configuration, in the example that I provide in FLS-48,  
11 Page 2, which is the transmission line with the  
12 underbuild, wouldn't you agree that this is different  
13 in shape than the single layer used in the Yee study?

14          WITNESS EARLE: Yes.

15          MS. MESERVE: And since the Yee study was  
16 based on a single layer of power lines, not the  
17 multilayered lines that would be proposed, do you still  
18 think that a 60 percent reduction with power line  
19 collisions reported in Yee would still apply?

20          WITNESS EARLE: Yes.

21           As we noted earlier, the -- the majority of  
22 the collisions in any case are on the shield wire,  
23 which is both the highest and the thinnest wire in the  
24 array.

25           The birds typically are thought to hit the

1 shield wire because they think they're flying above the  
2 transmission wires, and then there's this very narrow  
3 wire that they can't see that they hit.

4 I -- I think it is implausible from the point  
5 of view of bird behavior that the bird would try to fly  
6 between such an accumulation of wires such are shown in  
7 this photograph.

8 MS. MESERVE: If it was at night or with fog,  
9 wouldn't that lead to a -- more likelihood of the bird  
10 hitting it without seeing it?

11 WITNESS EARLE: I agree it is possible to  
12 conceive circumstances where there is a substantially  
13 higher risk of birds hitting wires than -- than under  
14 good visibility and clear skies.

15 MS. MESERVE: And then -- And are you aware  
16 that there is more incidence of fog in the Delta than  
17 in Colorado, for instance, where the Brown and Drewien  
18 study was based?

19 WITNESS EARLE: May I remind you that it was  
20 Gary Ivey who cited the Brown and Drewien study. The  
21 Yee study was performed in the Delta.

22 MS. MESERVE: And the Yee study affirmed that  
23 fog can reduce visibility and reduce flight diverter  
24 effectiveness; doesn't it?

25 WITNESS EARLE: I -- I believe he -- he

1 reached that in his conclusions, yes.

2 MS. MESERVE: And sticking with the Yee  
3 study --

4 Could we look at SOSC-59 again, please.

5 And -- Sorry. This is going a little slower  
6 than I had anticipated. I'll try to keep things  
7 moving, but I guess I would request an additional 15  
8 minutes.

9 CO-HEARING OFFICER DODUC: Okay. But move  
10 faster, Miss Meserve.

11 MS. MESERVE: Sorry.

12 Okay. FS -- SOSC-59, on Page -- .pdf Page 41.

13 (Exhibit displayed on screen.)

14 MS. MESERVE: And the part I want to look at  
15 is the -- the fatalities not accounting for biases due  
16 to searcher efficiency.

17 In the first paragraph there, if you could  
18 take a look at that, Dr. Earle.

19 (Pause in proceedings.)

20 MS. MESERVE: So the report itself talks about  
21 some of the limitations and that there was likely  
22 underreporting; doesn't it?

23 (Pause in proceedings.)

24 WITNESS EARLE: Yes, it does.

25 MS. MESERVE: And if there was a 60 percent

1 reduced mortality rate, as you allege, some birds --  
2 some birds would still die; wouldn't they?

3 WITNESS EARLE: Yes. Yes. It is certainly  
4 true that there is a -- there is a calculable  
5 probability that birds would die under any  
6 circumstances involving transmission lines and bird  
7 flight.

8 MS. MESERVE: And that would include the  
9 Greater Sandhill Crane, which is a fully protected  
10 species as well; wouldn't it?

11 WITNESS EARLE: In principal, yes.

12 However, as I note in my testimony, the Yee  
13 study found one Sandhill Crane, not a Greater Sandhill  
14 Crane, just one Sandhill Crane which represent  
15 approximately 15 years. Greater Sandhill Crane are  
16 about 15 percent in the Delta. Found one bird killed  
17 per year.

18 And even allowing for biases due to searcher  
19 efficiency, scavenger removal, habitat and crippling,  
20 that's a very small number of birds potentially  
21 affected, especially when you consider the extremely  
22 really small mileage of lines that are currently  
23 proposed, since the issue of the addendum.

24 We've calculated that, in all probability,  
25 there would be no mortalities of Greater Sandhill



1 Cranes. But there is an extremely small possibility to  
2 that a mortality could occur at some point.

3 MS. MESERVE: And you've stated in your  
4 testimony that the effectiveness of the bird diverters  
5 is 60 percent -- right? -- not 99 percent.

6 WITNESS EARLE: That's correct.

7 MS. MESERVE: Moving on to the issue of the  
8 Swainson's Hawk habitat.

9 In your testimony, you talk about -- Starting  
10 on Page 19 --

11 (Exhibit displayed on screen.)

12 MS. MESERVE: -- you respond to Dr. Fries' and  
13 Mr. Pachl's testimony.

14 Are you aware that the Proposed Project  
15 changes in the Supplemental EIR would increase the  
16 amount of agricultural land that would be permanently  
17 lost?

18 WITNESS EARLE: I think it would be helpful at  
19 this point to bring up Chapter 12 of the Supplemental  
20 EIR and -- and look at what those acreages are for  
21 Sandhill Cranes.

22 MS. MESERVE: I'm talking about Swainson's  
23 Hawk.

24 WITNESS EARLE: Oh, sorry, Swainson's Hawk.

25 MS. MESERVE: So that would be SWRCB-113,

1 Chapter 12, Page 37.

2 (Pause in proceedings.)

3 MS. MESERVE: Chapter 12 and then Page 37,  
4 which has a table showing the habitat loss gained as a  
5 result of the Project changes.

6 (Exhibit displayed on screen.)

7 MS. MESERVE: Page 37.

8 (Exhibit displayed on screen.)

9 WITNESS EARLE: Mr. Long, if you'd please  
10 scroll the page up a little.

11 (Scrolling through document.)

12 WITNESS EARLE: Or down, apparently.

13 (Scrolling through document.)

14 WITNESS EARLE: A bit more, please.

15 (Scrolling through document.)

16 WITNESS EARLE: That's very good. Thank you.

17 So, as shown here, the -- the proposed changes  
18 described in the Administrative Draft Supplemental EIS  
19 would show an increase of approximately 136 acres of  
20 impact to Swainson's Hawk foraging habitat.

21 On the other hand, a substantially decrease of  
22 approximately 11 acres out of the former 29 in nesting  
23 habitat.

24 Now, if you direct your attention to the lower  
25 table there, where we are seeing an increased acreage

1 of impacts on foraging habitat, you will see that there  
2 is a very substantial reduction in impacts to moderate  
3 quality forage habitat but a very large increase in  
4 impacts to low and very low-quality foraging habitat.  
5 That is, there has been a net shift in impacts from  
6 moderate to very high-quality habitat.

7           Instead, we're impacting primarily low and  
8 very low-quality habitat. This is why we interpret  
9 this change as being beneficial for the Swainson's  
10 Hawk.

11           MS. MESERVE: So you're -- But you're adding a  
12 lot of low-value habitat?

13           I found this table confusing.

14           Are you saying you're -- Wouldn't low-value  
15 habitat be lower value for the bird and you're --

16           WITNESS EARLE: That's correct.

17           MS. MESERVE: -- adding a lot of that?

18           WITNESS EARLE: That's correct.

19           Impacts on low-value habitat, which have  
20 little significance for the birds, have been greatly  
21 increased.

22           In compensation for that, the impacts to  
23 moderate-value habitat have been greatly decreased.  
24 This means greater forage availability for the Sandhill  
25 Cranes (sic) compared to what was proposed in the Final

1 EIR/EIS.

2 MS. MESERVE: Swainson's Hawk, you meant to  
3 say.

4 WITNESS EARLE: I'm sorry. Swainson's Hawk.

5 (Pause in proceedings.)

6 CO-HEARING OFFICER DODUC: And how do you  
7 consider the plus 41 for the very high habitat?

8 WITNESS EARLE: That is an adverse impact.

9 MS. MESERVE: So you're losing --

10 WITNESS EARLE: But it is proportionally a  
11 very small percent impact, approximately 5 percent.

12 MS. MESERVE: There's very little habitat in  
13 the valley for Swainson's Hawk under current  
14 development conditions, though; isn't that true? Of  
15 high value.

16 WITNESS BRADBURY: I -- I can answer that.

17 That's not true. Actually, there's quite a  
18 lot of very high-value habitat in the Delta.

19 Swainson's Hawks primarily like to forage  
20 alfalfa. Alfalfa is the most heavily used. And there  
21 is quite a lot of alfalfa in the Delta and around the  
22 areas where the Project will occur.

23 MS. MESERVE: Okay. I think I'm going to  
24 leave the questions off with that.

25 Thank you for your indulgence.

1 And I'll allow the next questioner up.

2 CO-HEARING OFFICER DODUC: All right.

3 Mr. Jackson, you're up.

4 And, Candace, are you okay with going to about  
5 2:30 and then we'll take a break then?

6 THE REPORTER: Um-hmm.

7 CO-HEARING OFFICER DODUC: Okay. So,  
8 Mr. Jackson, I don't know if you heard, but I would  
9 like to give the court reporter a break at 2:30 or  
10 around there so --

11 MR. JACKSON: I did.

12 CO-HEARING OFFICER DODUC: So --

13 MR. JACKSON: I did hear that and --

14 CO-HEARING OFFICER DODUC: -- if there's a  
15 good time in your cross to . . .

16 (Pause in proceedings.)

17 MR. JACKSON: My questions are mostly for  
18 Dr. Earle, and I assume Mr. Bradbury will get involved  
19 when he -- when he thinks he's got something.

20 And then there will be some questions for  
21 Mr. Grimaldo.

22 The questions for Dr. Earle are in regard to  
23 the California Black Rail, noise effects on the Rail  
24 and other terrestrial species, ag ditches and  
25 conveyance channels as habitat, a number of specific

1 misstatements of my witnesses' testimony, at least they  
2 look like it to me, so maybe they'll fix them.

3           And the -- the final topic would be the  
4 commitment for surveys in mitigation that he recounts  
5 through his testimony.

6                           CROSS-EXAMINATION BY

7           MR. JACKSON: Good morning (sic), Dr. Earle.  
8 My name is Mike Jackson. I'm representing the  
9 California Sportfishing Protection Alliance, the  
10 California Water Impact Network, and AquAlliance.

11           I would like to go to DWR-1219 at Page 8, and  
12 the first questions will be about Lines 6 to 21.

13                   (Exhibit displayed on screen.)

14                   (Pause in proceedings.)

15           MR. JACKSON: Dr. Earle, in this passage,  
16 you . . . assert that Dr. Fries estimated that, with --  
17 I think you pointed out -- with no survey data, that no  
18 California Black Rails will be affected -- or that you  
19 have asserted that no California Black Rails will be  
20 affected by the tunnel construction; is that correct?

21           WITNESS EARLE: I agree with what it states on  
22 Lines 8 and 9 here.

23           MR. JACKSON: All right.

24           And I think you indicate that, at Page --  
25 at --

1           Could we go to Exhibit SWRCB-102.

2           (Exhibit displayed on screen.)

3           MR. JACKSON:  Actually, I think it'll be more  
4 direct and quicker if we go to SWRCB-111 at Pages 4-52  
5 to 4-54.

6           (Exhibit displayed on screen.)

7           MR. JACKSON:  Now, these are the Avoidance and  
8 Mitigation (sic) Measures . . .

9           We need to go on to Page 4-52.

10          (Exhibit displayed on screen.)

11          MR. JACKSON:  These are the Avoidance and  
12 Minimization Measures for the California Black Rail; is  
13 that correct?

14          WITNESS EARLE:  That is correct.

15          MR. JACKSON:  Did you rely on Exhibit -- on  
16 this exhibit to form your opinion that -- that the  
17 Project will result in no injury to Black Rails or  
18 mortality of Black Rails because AMM 38 requires  
19 avoidance of the California Black Rail individuals?

20          WITNESS EARLE:  I did assume in my analysis  
21 that the Avoidance and Minimization Measures prescribed  
22 in AMM 38 would be followed and that that would  
23 contribute to avoiding impacts to the California Black  
24 Rail.

25          MR. JACKSON:  All right.  And in following

1 those, did you review the survey data for Black Rails  
2 in order to determine whether or not it would be  
3 possible for this AMM 38 to accomplish lack of  
4 mortality or injury?

5 WITNESS EARLE: That is a question about  
6 survey data.

7 The word "survey," as you can see, appears  
8 quite a bit in AMM 38. This entirely describes surveys  
9 that have not yet been performed and, therefore, have  
10 not produced any data.

11 So, no, I did not rely on any data from these  
12 surveys.

13 I did rely on data that we have regarding the  
14 known distribution of Black Rail, which is shown in the  
15 Supplemental EIR/EIS in Chapter 12.

16 MR. JACKSON: You were critiquing at this  
17 point Dr. Fries for not having survey data to support  
18 his opinion; correct?

19 WITNESS EARLE: I -- I'm -- You'll have to  
20 define what you mean by "survey data."

21 You've been referring to surveys in the  
22 context of AMM 38. Dr. Fries did not specify what he  
23 meant when he talked about surveys.

24 MR. JACKSON: Well -- So, let's go through a  
25 couple of questions, then, to see if we can highlight



1 that.

2 Has DWR, or anyone at the California WaterFix,  
3 done surveys for the California Black Rail in the  
4 construction activity zones?

5 MR. MIZELL: I'm going to object to the line  
6 of questioning as being beyond Dr. Earle's testimony.

7 Dr. Earle does quote Dr. Fries in the first  
8 paragraph of this section of his testimony.

9 Dr. Fries asserted -- and this is simply  
10 basing my objection on this, so I'm not testifying --  
11 that the Final EIR/EIS simply estimates with no survey  
12 data, et cetera. It's quoted in Dr. Earle's testimony.

13 Dr. Earle goes on to explain how AMM 38  
14 refutes that assertion. At no point does Dr. Earle  
15 state in his testimony, so far as Mr. Jackson has cited  
16 to, survey data.

17 So, again, I'd say it's beyond the scope of  
18 Dr. Earle's testimony at this point.

19 CO-HEARING OFFICER DODUC: Mr. Jackson, I'm  
20 reading the testimony and I would tend to concur unless  
21 you can convince me otherwise.

22 MR. JACKSON: Well, I'll make a run at it.

23 The . . . California WaterFix has --  
24 has . . . has not completed its surveys of California  
25 Black Rail habitat at this time; has it -- have they?

1 MR. MIZELL: I'm going to --

2 CO-HEARING OFFICER DODUC: That is correct.

3 Mr. Jackson, my -- my understanding, as I'm  
4 reading the testimony now, is that what Dr. Earle is  
5 rebutting is, he is not arguing that surveys have been  
6 conducted, but he is saying that surveys will be  
7 conducted prior to construction, and that, along with  
8 other measures, such as AMM 38, would provide the --  
9 the protection as described in the Final EIR/EIS.  
10 That's my understanding.

11 So he -- He did not contend that surveys had  
12 been conducted. So that's not a point for argument  
13 right now.

14 So I'm trying to understand what you are  
15 trying to emphasize.

16 MR. JACKSON: What I'm trying to emphasize  
17 is -- and I was going to get to it toward the end,  
18 but --

19 CO-HEARING OFFICER DODUC: Get to it now,  
20 Mr. Jackson.

21 MR. JACKSON: I will get to it right now.

22 How, without surveys, can -- can anyone  
23 determine how much habitat there is that is presently  
24 occupied, how many California Black Rails there are,  
25 and whether or not avoidance is possible?

1           WITNESS EARLE: I'll probably have to ask you  
2 to repeat that.

3           But the first of those questions was, how do  
4 you determine how much occupied California Black Rail  
5 habitat there is out there.

6           In response to that, it's irrelevant. We  
7 don't really care whether it's occupied right now  
8 because nobody's out there doing anything right now in  
9 connection with the California WaterFix.

10           We care whether it's occupied when the impacts  
11 are going to occur, which is why the surveys are  
12 performed shortly -- during the year prior to when  
13 construction occurs. That way, we will have an  
14 estimate of whether the habitat is occupied.

15           As to whether the habitat exists, a model of  
16 habitat which relies upon known survey data that's been  
17 collected by various entities associated with the State  
18 of California was used to develop a -- an estimate of  
19 where California Black Rail habitat likely occurs  
20 within the Delta.

21           This model was vetted, commented on and  
22 revised in accordance with recommendations from the  
23 California Department of Fish and Wildlife during the  
24 process used in developing the BDCP. It was  
25 subsequently revised again with the input from the CDFW

1 during the process of developing the Final EIR/EIS.

2 That tells us where the habitat is out there  
3 and is the basis of acreage estimates of habitat that  
4 would be affected.

5 Again, as to whether the habitat is occupied,  
6 that will be determined shortly before California  
7 WaterFix impacts occur with avoidance measures required  
8 and as described here in AMM 38.

9 MR. JACKSON: Well, let's -- Could you Project  
10 DWR-1309.

11 (Exhibit displayed on screen.)

12 MR. JACKSON: Okay. Are you familiar with  
13 this document?

14 WITNESS EARLE: I have not read it in its  
15 entirety. I've seen it before.

16 MR. JACKSON: All right. Go to Page 2,  
17 please.

18 (Exhibit displayed on screen.)

19 MR. JACKSON: Does this describe a Project  
20 location on Bouldin Island in San Joaquin County,  
21 California?

22 WITNESS EARLE: Yes, it does.

23 MR. JACKSON: And what kind of project is  
24 that?

25 WITNESS EARLE: (Examining document.)

1           Bouldin Island is, I believe, where the -- the  
2 primary launch point for the shaft construction and the  
3 tunneling will be located.

4           There will also be RTM disposal sites located  
5 there.

6           MR. JACKSON: And building of roads as well?

7           WITNESS EARLE: Yes.

8           MR. JACKSON: So it's building roads, a barge  
9 landing, a launch pad, and disposal site; correct?

10          WITNESS EARLE: Those are among the activities  
11 that would occur there. They're not necessarily a full  
12 list.

13          MR. JACKSON: Go to Page 3, please, and look  
14 at Bullets B and C.

15          (Exhibit displayed on screen.)

16          CO-HEARING OFFICER DODUC: And you're going to  
17 somehow link this back to Dr. Earle's rebuttal  
18 testimony?

19          MR. JACKSON: Yes, I am.

20          CO-HEARING OFFICER DODUC: Please link it for  
21 me now.

22          MR. JACKSON: Do you see that the Project is  
23 scheduled to begin December 12th, 2018, and end by  
24 October 2019?

25          CO-HEARING OFFICER DODUC: And before you

1 answer that, Dr. Earle, again, Mr. Jackson, how --  
2 explain to me, how is this linking back to this  
3 rebuttal --

4 MR. JACKSON: I'm --

5 CO-HEARING OFFICER DODUC: -- testimony?

6 MR. JACKSON: I'm trying to link it back by  
7 pointing out that there is a Project schedule to go on  
8 Bouldin Island right about October of this year, and  
9 that the surveys have not been done, and that it would  
10 be -- therefore, the avoidance and mitigation is not  
11 going to work.

12 MR. MIZELL: I would like to --

13 CO-HEARING OFFICER DODUC: All right.

14 MR. MIZELL: -- put this document in the  
15 proper light: That it is a draft document as marked on  
16 its face. And as I believe we have discussed quite  
17 frequently here, the Permit from the State Water Board  
18 must be granted prior to construction beginning.

19 So clearly a -- any estimation of construction  
20 on this Project is contingent on some very large  
21 caveats, one of them being the issuance of a Water  
22 Rights Permit.

23 MR. JACKSON: Dr. Earle, have the surveys for  
24 birds and other wildlife on Bouldin Island been done at  
25 the present time, to your knowledge?

1 MR. MIZELL: Objection: Asked and answered.

2 CO-HEARING OFFICER DODUC: Sustained.

3 No -- And let me understand, Dr. Earle.

4 My understanding of your testimony -- your  
5 rebuttal testimony is that no studies have been done --  
6 no surveys have been conducted but will be conducted.  
7 And so that would apply to any potential construction  
8 activities that Mr. Jackson might ask of you with  
9 relation to the WaterFix.

10 WITNESS EARLE: I agree with all of that.

11 MR. JACKSON: Is Bouldin Island possible  
12 roosting and foraging habitat for . . . for the . . .  
13 Black Rail and -- and other species of concern?

14 CO-HEARING OFFICER DODUC: So, Mr. --

15 WITNESS EARLE: Mr. --

16 CO-HEARING OFFICER DODUC: Hold on. Hold on.  
17 Hold on. Let's see.

18 Mr. Jackson -- And this is -- This is not --  
19 This is an ongoing thing. So I'm hoping that by  
20 perhaps taking some time to discuss it, we get project  
21 some clarity moving forward for all of us.

22 I realize that your and some of the other  
23 parties' contentions is that all the surveys should be  
24 done, all the studies should be done, all the analysis  
25 should be done before making assertions about impacts

1 or non-impacts or protectiveness going forward.

2           And I understand from Petitioners' witnesses  
3 that they are relying on these future studies, future  
4 analysis, and future commitments to ensure that  
5 activities are protected going forward.

6           There is that disconnect that we've have  
7 throughout this entire hearing. And your continuing  
8 questioning of these witnesses along that line, while I  
9 appreciate that it goes into the record so that -- upon  
10 which you may make your closing arguments, is there a  
11 way for us to shortcut to that given that this is a  
12 long-standing . . . gap between where you would like to  
13 see and where Petitioners have made their proposal?

14           MR. JACKSON: I think that I'm using this as  
15 an example because it is a commitment that is made in  
16 the -- in the EIR.

17           CO-HEARING OFFICER DODUC: Um-hmm. There are  
18 many commitments.

19           MR. JACKSON: And there are many commitments.

20           And this is the -- the first one of these  
21 survey bird location --

22           CO-HEARING OFFICER DODUC: And when you say  
23 "this," you are referring specifically to this  
24 Bouldin --

25           MR. JACKSON: This Bouldin Tract --



1 CO-HEARING OFFICER DODUC: Okay.

2 MR. JACKSON: -- approach.

3 The . . . If I could put up SRB -- S --

4 CO-HEARING OFFICER DODUC: I'm sorry. Before  
5 you pull up another document, help me understand.

6 Yes, I appreciate that this draft timeline,  
7 this draft document, has a date here of December 12,  
8 2018, but I need, I guess, a demonstration of proof for  
9 you -- from you if you're going to continue to make the  
10 argument using this particular example, that this  
11 particular date is still valid.

12 MR. JACKSON: Well, we -- We started by the  
13 critique of my witness' testimony in regard to Black  
14 Rail, and that his -- his allegations were without  
15 survey.

16 And I guess what I'm trying to point out is,  
17 if surveys have not been done for potentially hundreds  
18 of Black Rail, the -- and construction dates at least  
19 in our -- in our record are beginning shortly, within  
20 six weeks --

21 CO-HEARING OFFICER DODUC: That's not true,  
22 Mr. Jackson.

23 MR. JACKSON: Well, it --

24 CO-HEARING OFFICER DODUC: It's a draft  
25 document.

1 MR. JACKSON: I understand. Is there a final  
2 document?

3 CO-HEARING OFFICER DODUC: Miss Morris, and  
4 then -- I'm sorry, Miss Morris, hold on.  
5 Miss Des Jardins had been standing there before you.

6 MS. MORRIS: Oh, I'm sorry.

7 MS. DES JARDINS: I just wanted to point out  
8 that DWR-1309 is DWR's exhibit. It is a draft  
9 document, but it was submitted for the record.

10 To the extent that it is and it states that  
11 construction is expected to begin in December 2018,  
12 there's a question of whether the surveys could even be  
13 completed, and certainly there are seasonal issues  
14 about birds use and --

15 CO-HEARING OFFICER DODUC: Dr. Earle, to your  
16 knowledge, is there a survey being planned for this  
17 activity on Bouldin Island? And, if so, will it be  
18 finished by December 12th?

19 WITNESS EARLE: Short answer: No.

20 Slightly longer answer: The Black Rail is a  
21 migratory species. Work that commences during the  
22 wintertime would not affect the Black Rail because  
23 they're not present there.

24 Under those circumstances -- Actually, I  
25 suspect that -- that surveys would not be required.

1           Also, surveys are required in potential  
2 habitat for the California Black Rail. I'm not aware  
3 offhand of where there is potential habitat for the  
4 California Black Rail in close proximity to the  
5 proposed construction. Surveys would only be required  
6 if it were.

7           So, these specific questions about what is  
8 going to happen on Bouldin Island and when, and what  
9 will it do to Black Rails, require considerable more  
10 analysis than we can produce off the cuff at this  
11 moment.

12           CO-HEARING OFFICER DODUC: And, Mr. Jackson, I  
13 go back to Dr. Earle's testimony, which is actually  
14 quite short. He puts up one statement about Dr. Fries'  
15 assertion that the Final EIR/EIS did not contain survey  
16 data and to which his response was that survey will be  
17 conducted and other Mitigation Measures will be taken.

18           MR. JACKSON: Before construction.

19           CO-HEARING OFFICER DODUC: Survey before  
20 construction, yes.

21           And so that's the extent of it. And so I am  
22 wondering how you are expanding that short piece of  
23 testimony into this broader document that is not even  
24 mentioned in his testimony.

25           MR. JACKSON: I do not want to sound

1 argumentative or flippant, but before lunch, we were  
2 watching one or two references by witnesses that  
3 expanded into bibliographies of 15 to 20 different  
4 documents, and -- and I'm trying to get the rules  
5 straight here.

6 CO-HEARING OFFICER DODUC: What are you -- I'm  
7 not -- You totally confused me.

8 MR. JACKSON: Your -- Your statement that I'm  
9 expanding the fact that there are no surveys, which  
10 were commented on by this witness as a critique of my  
11 witness' testimony --

12 CO-HEARING OFFICER DODUC: Okay.

13 MR. JACKSON: -- I'm trying to determine  
14 whether or not, using the Black Rail as an example --  
15 because there are a very large number of other species  
16 to follow and I don't want to go into the same depth on  
17 those -- if we can -- if we can get resolved about  
18 whether or not there is going to be any construction  
19 before we determine where these critters are.

20 CO-HEARING OFFICER DODUC: Please answer that  
21 question.

22 WITNESS EARLE: No, there would not.

23 CO-HEARING OFFICER DODUC: Thank you.

24 MR. JACKSON: Then taking out the question of  
25 presence, what are the other . . . other protections,

1 other than this AMM, that allow you to conclude that  
2 the impact on the Black Rail is going to be less than  
3 significant?

4           WITNESS EARLE: The Black Rail would also  
5 receive what you might call collateral benefits from  
6 other aspects of the Project.

7           For instance, AMM 20 for Greater Sandhill  
8 Crane goes into considerable detail about measures that  
9 would minimize the risk of a bird striking a power  
10 line.

11           Now, Black Rails are already at extremely low  
12 risk of that because they -- they generally fly only  
13 short distances and stay near the ground, but they can  
14 reach the elevations of power lines during periodic  
15 migrations or long-distance movements by the birds. In  
16 those situations, they would be beneficiaries of the  
17 same protections that are provided primarily for the  
18 benefit of Greater Sandhill Crane.

19           Black Rails also use tidal habitat which is in  
20 many ways similar to the tidal habitat that's being  
21 proposed as mitigation for the Smelts.

22           Now, not all Smelt habitat is suitable as  
23 Black Rail habitat, but certainly a significant  
24 fraction of it is.

25           And when we're talking about 1500 acres or so

1 of habitat mitigation for the fish, it is very likely  
2 that significant acreage within that area will be  
3 suitable for the Black Rail.

4 And, similarly, the Black Rail is also  
5 beneficiary indirectly of a variety of other avoidance  
6 and minimization measures and mitigation commitments  
7 that are primarily intended to benefit other species.

8 MR. JACKSON: In regard to Smelt habitat --

9 CO-HEARING OFFICER DODUC: If you are moving  
10 to a different --

11 MR. JACKSON: No. I'm staying -- He used the  
12 Smelt as an example of in -- incidental benefit that  
13 might protect the Black Rail.

14 CO-HEARING OFFICER DODUC: Okay. I'm trying  
15 to give the court reporter her break.

16 MR. JACKSON: Okay.

17 CO-HEARING OFFICER DODUC: So if you -- Is  
18 this a short question?

19 MR. JACKSON: It'll be relatively short.

20 CO-HEARING OFFICER DODUC: Okay. Let's finish  
21 this up, then.

22 (Pause in proceedings.)

23 MR. JACKSON: What sort of foraging and  
24 nesting habitat does the Black Rail use in the Delta?

25 WITNESS EARLE: Black Rail habitat is

1 primarily seasonally or perennially shallowly inundated  
2 marshes.

3 MR. JACKSON: Calling your . . .

4 Do -- Do you -- Before I call it up.

5 Do you remember that the . . . that, at this  
6 point, the environmental documents reflect that CFW  
7 project impacts on the acreage of Black Rail habitat  
8 would decrease from 13 acres in the Approved Project to  
9 six areas in the new Proposed Project?

10 WITNESS EARLE: I believe that's the reduction  
11 that's described in the Supplemental EIR/EIS.

12 MR. JACKSON: Would you put up DDJ-246,  
13 Page 12.

14 (Exhibit displayed on screen.)

15 MR. JACKSON: Do you recognize this map?

16 WITNESS EARLE: I do not.

17 MR. JACKSON: Mr. Bradbury, do you recognize  
18 this map?

19 WITNESS BRADBURY: Yes. It's part of my  
20 paper.

21 CO-HEARING OFFICER DODUC: Microphone, please.

22 WITNESS BRADBURY: Yes, it's a figure in my  
23 paper.

24 MR. JACKSON: And the areas that appear as  
25 black spots, what do they designate?

1           WITNESS BRADBURY: That is the predicted  
2 probability of presence of Black Rails in the -- and  
3 the area that was analyzed.

4           MR. JACKSON: Do which of the Black Rails --  
5 Or do any of the areas that appear as black spots  
6 coincide with California WaterFix construction  
7 activities?

8           MR. MIZELL: Object to the line of  
9 questioning. We've moved beyond the scope of the  
10 rebuttal testimony provided by Dr. Earle and  
11 Mr. Bradbury.

12           We're now exploring a tangent of a response --  
13 a verbal response that Dr. Earle provided when asked to  
14 elaborate on other portions of his testimony.

15           I don't believe there's any tie-back to the  
16 written testimony at this point on the extent of Black  
17 Rail habitat and its overlap with the footprint.

18           CO-HEARING OFFICER DODUC: Mr. Jackson.

19           MR. JACKSON: Yes. The -- If -- If we could  
20 go to . . . SWRCB-108 at Page 108.

21           CO-HEARING OFFICER DODUC: And while that is  
22 being pulled up, what is the document and . . .

23           MR. JACKSON: This is a document that is  
24 the --

25           CO-HEARING OFFICER DODUC: And, more



1 importantly, how does it respond to Mr. Mizell's  
2 objection?

3 MR. JACKSON: It responds to Mr. Mizell's  
4 objection --

5 (Exhibit displayed on screen.)

6 MR. JACKSON: -- in that it points out that  
7 there is a potential increase in Delta Smelt habitat --  
8 which is what we were talking about -- that could be  
9 used of -- be used for foraging or nesting habitat.

10 And I want to . . . I -- I want to establish  
11 that, so that I can then go back to the rebuttal of  
12 Dr. Earle and ask him how he can say with certainty at  
13 the present time that this commits the Project to  
14 reducing impacts below a level of significance,  
15 which -- through habitat restoration, which he says  
16 will be performed prior to the habitat loss.

17 CO-HEARING OFFICER DODUC: Are you able to  
18 answer that question, Dr. Earle?

19 Or do we need to walk through those various  
20 documents?

21 WITNESS EARLE: Would you please restate the  
22 question.

23 MR. JACKSON: Yes.

24 I'd like to see the last paragraph on this  
25 particular page.

1 (Exhibit displayed on screen.)

2 MR. JACKSON: This is from the California  
3 WaterFix Final Environmental Impact Report, and it's  
4 the last paragraph.

5 Are you familiar with that?

6 WITNESS EARLE: I've seen it before.

7 MR. JACKSON: It says here (reading):

8 "With regard to California Black  
9 Rail" that "the proportions (sic) of the  
10 increase in dealt Smelt habitat . . . of  
11 (sic) (up to 1,022 acres) . . ."

12 Are those acres included in the six that  
13 Mr. Bradbury estimates in table -- in his tables?

14 CO-HEARING OFFICER DODUC: I'm sorry. Are we  
15 getting sidetracked again? I thought you were  
16 repeating the -- the direct question that you wanted  
17 Dr. Earle to answer.

18 MR. JACKSON: I --

19 CO-HEARING OFFICER DODUC: The culmination of  
20 all this is . . .

21 MR. JACKSON: Right.

22 Dr. Earle indicates that he -- that, without  
23 the surveys --

24 CO-HEARING OFFICER DODUC: Um-hmm.

25 MR. JACKSON: -- and avoidance, that

1 potentially Delta Smelt habitat in this statement could  
2 serve as additional nesting and foraging habitat for  
3 the Rail.

4 CO-HEARING OFFICER DODUC: Okay.

5 MR. JACKSON: And I'm trying to find out  
6 whether or not this 1,022 acres is included in the six  
7 that was identified in the previous paper.

8 Or if --

9 CO-HEARING OFFICER DODUC: And for what  
10 purpose?

11 MR. JACKSON: To indicate that -- that they  
12 have completely underestimated the amount of Black Rail  
13 acreage that will be impacted by the CWF.

14 WITNESS EARLE: Very well.

15 CO-HEARING OFFICER DODUC: Thank you.

16 WITNESS EARLE: I think that this paragraph  
17 beautifully summarizes the situation.

18 As we have discussed many times before, sites  
19 for habitat restoration under the California WaterFix  
20 have not yet been designated and would be identified  
21 subject to Project approval. The . . .

22 This is a strategy that has been agreed to by  
23 the participating agencies and -- and, as stated here,  
24 if there would be impacts to this fully protected  
25 species as a result of selection of given mitigation

1 site, DWR would comply with the law.

2           In other words, either a site would be  
3 modified or work would be performed at such a time that  
4 take of the fully protected species could be fully  
5 avoided, or possibly a site might be disqualified if it  
6 was not possible to avoid take of this particular  
7 species.

8           If impacts that did not amount to take on the  
9 Black Rail would nonetheless occur, then they would be  
10 evaluated through Supplemental CEQA evaluation.

11           Regardless, approval of the California  
12 WaterFix does not constitute approval of mitigation  
13 sites. It's been clearly stated throughout this  
14 process that those approvals have to be secured  
15 separately.

16           MR. JACKSON: So the -- the -- the questions  
17 are directed toward the -- the difference in these  
18 6 acres and what the likely distribution of Black Rails  
19 is from Mr. Bradbury's paper and from surveys that  
20 haven't -- that they admit need to happen but haven't  
21 happened yet.

22           And we're getting, again, close to the end of  
23 this hearing, and I still don't know how they're going  
24 to protect Black Rails, and that's what the questions  
25 are about.

1 CO-HEARING OFFICER DODUC: Yes. And you've  
2 established that on multiple fronts, that they are  
3 still seeking to base future protective measures on  
4 future studies and future plans.

5 MR. JACKSON: Okay. I have a few questions  
6 for Mr. Bradbury.

7 CO-HEARING OFFICER DODUC: And we are going to  
8 ask you to wait so that the court reporter can get a  
9 break, so that we can all get a break, and we will  
10 return at 3 o'clock.

11 (Recess taken at 2:46 p.m.)

12 (Proceedings resumed at 3:00 p.m.):

13 CO-HEARING OFFICER DODUC: All right. It is  
14 3 o'clock. We're back.

15 Miss Nikkel.

16 MS. NIKKEL: Good afternoon. Meredith Nikkel  
17 on behalf of North Delta Water Agency.

18 If the Hearing Officers will allow me, I just  
19 have an update on scheduling. And I was mistaken  
20 through a variety of miscommunications.

21 There's no need for a switch for North Delta  
22 Water Agency. North Delta Water Agency will be  
23 available to testify immediately after Grasslands Water  
24 District this week.

25 And also on behalf of Group 7, the Sacramento

1 Valley Water Users, I can confirm that Mr. Bourez and  
2 Dr. Shankar Parvathinathan are available to testify  
3 tomorrow at 9:30.

4 CO-HEARING OFFICER DODUC: Okay. How do we  
5 say that last name again?

6 MS. NIKKEL: Parvathinathan.

7 CO-HEARING OFFICER DODUC: Parvathinathan.

8 MS. NIKKEL: But it's not well rehearsed with  
9 the witness himself. It will be perfect tomorrow  
10 morning.

11 CO-HEARING OFFICER DODUC: All right. Thank  
12 you, Miss Nikkel.

13 MS. NIKKEL: Thank you.

14 MR. MIZELL: Hearing Officer Doduc, if I might  
15 get additional clarity from Miss Nikkel.

16 Does that include the appearance of Mr. Gary  
17 Kienlen?

18 MS. NIKKEL: It does. That's where the  
19 miscommunication started, but there's no -- no  
20 unavailability of Mr. Kienlen. He's available to  
21 testify together with the North Delta witnesses.

22 Thank you.

23 CO-HEARING OFFICER DODUC: All right.

24 MR. O'HANLON: Daniel O'Hanlon on behalf of  
25 Westlands Water District. I'm here to give an apology.

1           At the last break, Hearing Officer Doduc noted  
2 that Westlands had violated an order of the Board. I  
3 was surprised by that.

4           I confirmed that, in fact, your June 18 order  
5 does say to obtain permission prior to filing written  
6 objections to testimony, which we did not do, and that  
7 was my oversight, and I apologize for that.

8           My intention will be to move to strike that  
9 testimony orally at the appropriate time unless the  
10 Board orders otherwise.

11           CO-HEARING OFFICER DODUC: All right. We'll  
12 get to that when we get to it.

13           MR. O'HANLON: Thank you.

14           CO-HEARING OFFICER DODUC: All right. At this  
15 time, we will turn back to Mr. Jackson.

16           MR. JACKSON: Thank you.

17           Actually, I have a couple more questions for  
18 Dr. Earle.

19           Dr. Earle, you answered questions in regard to  
20 the testimony of Dr. Shilling in response to  
21 Ms. Meserve.

22           Do you remember that earlier . . . testimony?

23           WITNESS EARLE: Would you refresh me as to the  
24 issue that was being discussed?

25           MR. JACKSON: Sure.

1           Could you put up DWR-1219, Page 4 at Lines 4  
2 and 5, and then 22 and 24 is pretty much the same  
3 thing.

4                         (Pause in proceedings.)

5           CO-HEARING OFFICER DODUC: So that would be  
6 noise.

7                         (Exhibit displayed on screen.)

8           MR. JACKSON: Page 4.

9                         (Exhibit displayed on screen.)

10          MR. JACKSON: Actually, it starts at Line 6  
11 (reading):

12                         "Dr. Shilling cited no independent  
13 analysis of the . . . CWF in his direct  
14 testimony . . . and (sic) that he had  
15 (sic) performed no quantitative  
16 analysis . . ."

17          Have you done any quantitative analysis in  
18 regard to your work that you were te -- that you  
19 testified to in this particular document?

20          WITNESS EARLE: Yes. Yes. This document  
21 refers to the analysis that determined the distance at  
22 which noise affects the Project would diminish to a  
23 background threshold of 50 dBA.

24          MR. JACKSON: Calling up Exhibit SR --  
25 SWRCB-11.



1 (Exhibit displayed on screen.)

2 MR. JACKSON: And we've been here before in  
3 regard to the Crane; correctly (sic)? This is where  
4 the Minimization Measure 38 is.

5 And there are other species that have  
6 mitigation plans as well in -- in this document; are  
7 there not?

8 WITNESS EARLE: Avoidance and minimization  
9 measures are specified for a number of species.

10 MR. JACKSON: Okay. Did you do any  
11 quantitative analysis of the impacts regarding noise  
12 and traffic on Swainson's Hawk?

13 MR. BERLINER: Objection: I believe this goes  
14 beyond the scope of his rebuttal testimony.

15 CO-HEARING OFFICER DODUC: Mr. Jackson.

16 MR. JACKSON: He's criticizing others for not  
17 doing quantitative analysis. I just want to see  
18 whether or not, on the -- I was going to go through  
19 them quickly -- on the -- a number of the species that  
20 are on the fully protected list.

21 CO-HEARING OFFICER DODUC: And Mr. Berliner?

22 MR. BERLINER: The witness was not testifying  
23 about quantitative studies that he did. He was  
24 rebutting work done by others on behalf of Protestants  
25 in his testimony.

1           So the work that he has done is not at issue  
2 in his rebuttal testimony.

3           CO-HEARING OFFICER DODUC: Mr. Jackson, if  
4 you're going to --

5           MR. JACKSON: Just "yes" --

6           CO-HEARING OFFICER DODUC: -- quickly lay --

7           MR. JACKSON: They're just "yes" or "no"  
8 answers.

9           CO-HEARING OFFICER DODUC: I'm -- I'm --  
10 I'm -- I need -- I'm assuming here that you are going  
11 to quickly lay the foundation for arguments that you'll  
12 be making in your closing briefs?

13          MR. JACKSON: Yes.

14          CO-HEARING OFFICER DODUC: All right.  
15 Quickly, then, Mr. Jackson.

16          MR. JACKSON: Yes.

17          Did you do any quantitative analysis in regard  
18 to Swainson's Hawks?

19          WITNESS EARLE: To avoid going through this  
20 with regard to every species of bird named in the  
21 EIR/EIS, I would like to simply state that we did an  
22 analysis of the distance at which the noise sources  
23 would diminish to a background level of approximately  
24 50 dBA. That distance is the same regardless of the  
25 species of bird affected.

1 MR. JACKSON: In regard to the -- to

2 Page 4-54 --

3 (Exhibit displayed on screen.)

4 MR. JACKSON: -- Lines 4 to 9, it talks about  
5 a -- a construction footprint within 500 feet of a  
6 known calling center.

7 Are you familiar with that?

8 WITNESS EARLE: That is what it says.

9 MR. JACKSON: What evidence did you cite that  
10 Rails can acclima -- acclimatize to the noise within  
11 that distance?

12 MR. BERLINER: Again, the same objection:

13 This is now examining beyond the scope of the  
14 witness' rebuttal testimony.

15 And I understand it might be brief, but it's  
16 off topic, outside the scope.

17 CO-HEARING OFFICER DODUC: So point me,  
18 Mr. Jackson, to where in Dr. Earle's testimony this  
19 line of questioning is addressing.

20 MR. JACKSON: Yes. He relies on the  
21 FEIR/FE -- FEIS in regard to his testimony at Lines 22  
22 and 24 --

23 CO-HEARING OFFICER DODUC: Of page?

24 MR. JACKSON: -- talking about the . . .  
25 Exhibit SWRCB-111 for a number of other species going

1 down through 22 to 28.

2 I'm just trying to determine, since his  
3 criticism of Dr. Shilling was that he performed no  
4 quantitative analysis, whether or not Dr. Earle did any  
5 quantitative analysis for the list of species that he  
6 has in his testimony at Page 4.

7 CO-HEARING OFFICER DODUC: So, Dr. Earle  
8 listed his testimony all the analysis evaluated in the  
9 FEIR/FEIS to rebut what he believed is Dr. Shilling's  
10 lack of studies.

11 Is that correct, Dr. Earle?

12 WITNESS EARLE: Yes, I believe so.

13 CO-HEARING OFFICER DODUC: So I guess my --  
14 What I'm interpreting Mr~Berliner's objection to be is,  
15 Dr. Earle lists the studies in the FEIR/IS that were  
16 conducted by Petitioners to contrast against  
17 Dr. Shilling's what he characterized is lack of  
18 independent analysis.

19 And you are now using that to delve into the  
20 specific of each of these studies in the FEIR/FEIS.

21 MR. JACKSON: No, I'm --

22 CO-HEARING OFFICER DODUC: Is that your  
23 objection, Mr. Berliner?

24 MR. BERLINER: In -- In essence, yes.

25 CO-HEARING OFFICER DODUC: And, Mr. Jackson,

1 if that's not what you're doing, then please explain.

2 MR. JACKSON: What I'm doing is trying to  
3 determine whether or not, with this list that's in his  
4 testimony, he did -- personally did any quantitative  
5 analysis.

6 CO-HEARING OFFICER DODUC: May we just ask  
7 that.

8 Dr. Earle, as reflected in your testimony on  
9 Page 4, et al., in response to Dr. Shilling, did you  
10 yourself conduct any of those analysis or evaluations?

11 WITNESS EARLE: I . . . am not exactly clear  
12 which analysis I'm being asked on.

13 CO-HEARING OFFICER DODUC: All the ones  
14 starting on Line 12, I guess.

15 WITNESS EARLE: 12. So (reading):  
16 ". . . Effects of increased traffic on  
17 local roads . . . that could increase  
18 wildlife mortality and impede wildlife  
19 movement."

20 CO-HEARING OFFICER DODUC: You know what? It  
21 just occurred to me, Mr. Jackson, that at least I read  
22 Dr. Earle's testimony as saying these are the studies  
23 that have been conducted. He's not claiming that he  
24 conducted them himself.

25 MR. JACKSON: No. And there was testimony

1 from Dr. Shilling that dealt with the FEIR. But the  
2 testimony, as I read it, from this witness is that  
3 Dr. Shilling did no quantitative analysis, and he  
4 admitted that on cross-examination.

5 I'm just trying to do the same thing with him  
6 because -- I mean, if he did quantitative analysis, I  
7 need to know about it. But if he didn't, it goes to  
8 the weight of his critique of Dr. Shilling if he did  
9 the same thing that Dr. Shilling did and just debated  
10 what was in the FEIR.

11 CO-HEARING OFFICER DODUC: All right.  
12 Dr. Earle.

13 WITNESS EARLE: Well, with regard to that  
14 point, I would just note that the basis for the opinion  
15 that I -- that I expressed is based in large part upon  
16 review and approval of the FEIR/S by fish and wildlife  
17 agencies, not just by one Consultant Biologist.

18 Dr. Shilling, on the other hand, essentially  
19 presents his statements as being statements of opinion  
20 and supported by evidence.

21 Now . . .

22 Well, I think -- I think that addresses the --  
23 the concern.

24 MR. JACKSON: When you were considering the  
25 adequacy of these . . . avoidance methodologies in

1 regard to noise, did you evaluate the noise created  
2 by -- by the barges and tugboats going by for Black  
3 Rail?

4 WITNESS EARLE: Barge and tugboat noise was  
5 considered in the analysis of effects on wildlife,  
6 which I repeat was based on consideration the magnitude  
7 of the noise produced, and was regarded to be roughly  
8 equivalent for all birds that might be potentially  
9 exposed to it, among them Black Rail.

10 MR. JACKSON: Are you -- Are you aware that  
11 tugboats create an average noise level of 85 decibels?

12 MR. BERLINER: Objection: Assumes facts not  
13 in evidence.

14 CO-HEARING OFFICER DODUC: Mr. Jackson.

15 MR. JACKSON: What is the -- What is your  
16 knowledge of the noise level of a tugboat moving . . .  
17 moving adjacent to Rail habitat?

18 WITNESS EARLE: I have not specifically  
19 researched that question.

20 I'm reasonably certain that I could find  
21 information on the noise produced by a tugboat. Of  
22 course, tugboats vary in size from 20 feet to 250 feet  
23 long, so I would need a few more specifics on that, but  
24 I'm sure the data are out there.

25 MR. JACKSON: And -- But you're not familiar

1 with what they are.

2 WITNESS EARLE: No, I do not offhand recall  
3 the noise produced by the majority of pieces of  
4 construction equipment that might be used in the course  
5 of constructing the California WaterFix.

6 MR. JACKSON: Has the California WaterFix  
7 determined that there are no California Black Rails  
8 within 500 feet of the barge landings?

9 MR. BERLINER: Objection: This has been asked  
10 and answered, and it's beyond the scope of his  
11 testimony.

12 CO-HEARING OFFICER DODUC: Sustained.

13 MR. JACKSON: Relative to the avoidance and  
14 mitigation strategy, there is indication that the  
15 California WaterFix would construct a sound barrier  
16 between nest sites and a tugboat, or any noise source.

17 MR. BERLINER: Objection: This is beyond the  
18 scope of his testimony. We're now into specific  
19 Mitigation Measures.

20 MR. JACKSON: Which . . . Which he quotes in  
21 his testimony.

22 CO-HEARING OFFICER DODUC: And, again, I'll go  
23 back to:

24 Dr. Earle, I believe, listed all these various  
25 impacts, analysis, studies, options simply to



1 demonstrate that there are some analysis.

2 I don't think -- And I'm not intending for you  
3 to go into the detail of all these various studies that  
4 he cites.

5 MR. JACKSON: The question that was asked was:

6 How would someone construct a sound barrier  
7 between a nest and a tugboat passing within 500 feet?  
8 You're on the waterside of the levee.

9 CO-HEARING OFFICER DODUC: And point me to  
10 where in his testimony makes mention of that.

11 (Pause in proceedings.)

12 MR. JACKSON: It's AMM 38, Page 54, Line 4 to  
13 9 in SWRCB-111.

14 (Scrolling through document.)

15 MR. BERLINER: As we're scrolling, my  
16 objection is going to be the same, which is: This is  
17 all premised as a response to the point that  
18 Dr. Shilling cited no independent analysis in his  
19 testimony, which is on Line 6 of Page 4.

20 And -- And Mr. Earle goes through, and this is  
21 just a continuation of his response to that contention.

22 So he's not opening up to say, "Let's discuss  
23 all these Mitigation Measures." I think he explained  
24 before why he was doing this, so I won't repeat it.

25 CO-HEARING OFFICER DODUC: Sustained.

1 MR. JACKSON: Go to SR -- SWRCB-113,  
2 Chapter 12. And I'm looking for Table 12-54.

3 (Exhibit displayed on screen.)

4 MR. JACKSON: These questions are about  
5 agricultural ditches and conveyance channels.

6 As -- As -- Do you see on this table that the  
7 Proposed Project estimates fill of 80.14 acres of  
8 agricultural ditches and 19.42 acres of conveyance  
9 channel?

10 And this is actually an increase from the --  
11 from the Approved Project.

12 Now go to Page 12-83, Lines 11 to 13.

13 (Exhibit displayed on screen.)

14 MR. JACKSON: And, yes, that was the  
15 highlighted part of this.

16 (Exhibit displayed on screen.)

17 MR. JACKSON: And to the end of the sentence.

18 (Exhibit displayed on screen.)

19 MR. JACKSON: Dr. Earle, is it your opinion  
20 that ag ditches and conveyance channels are not  
21 important for the existence of birds and other  
22 wildlife?

23 WITNESS EARLE: It is not.

24 MR. JACKSON: It is not?

25 WITNESS EARLE: No.

1           A variety of wildlife species make regular use  
2 of those habitats, and particularly the Giant Garter  
3 Snake makes extensive use of them, as is noted in our  
4 analysis of effects on that species.

5           MR. JACKSON: And that would be true for  
6 Modesto Song Sparrows?

7           WITNESS EARLE: With regard to Modesto Song  
8 Sparrows, I have not reviewed the habitat model for  
9 that species for years now. And I would have to go  
10 back and look at the cover types that we included in  
11 that habitat model.

12          MR. JACKSON: Would your answer be the same  
13 for Common Yellow Throat?

14          WITNESS EARLE: Yes.

15          MR. JACKSON: For Marsh Wrens?

16          WITNESS EARLE: Yes.

17          MR. JACKSON: For Red-Winged Blackbirds?

18          WITNESS EARLE: For any species you convey in  
19 those analyzed in the EIR/EIS, we developed, in  
20 collaboration with U.S. Fish and Wildlife Service and  
21 CDFW, a habitat model describing its potential  
22 occurrence within the vicinity of the Project.

23                 Those habitat models specify the cover types  
24 and the habitat types where those species are expected  
25 to potentially occur.

1 MR. JACKSON: So, in -- in your professional  
2 opinion, the statement in this document is incorrect.

3 MR. MIZELL: Objection as to vague and  
4 ambiguous.

5 What statement are we talking about? What  
6 document are we talking about.

7 MR. JACKSON: (Reading):

8 "Generally, agricultural ditches and  
9 conveyance channels, which are regularly  
10 ill-maintained and often devoid of  
11 vegetation, support only minimal  
12 hydrologic (sic) function (water  
13 conveyance), with virtually no water  
14 quality or habitat function."

15 WITNESS EARLE: I would say --

16 MR. BERLINER: Objection. I'm sorry.  
17 Objection.

18 I believe inadvertently Mr. Jackson may have  
19 misread the sentence, which, if I understood correctly,  
20 he stated "which are regularly ill-maintained" and  
21 that's what the court reporter has in the transcript,  
22 and I believe the sentence reads, "Which are regularly  
23 maintained."

24 MR. JACKSON: Yeah, I did misspeak.

25 CO-HEARING OFFICER DODUC: All right. So

1 correct it.

2 MR. JACKSON: So the correct statement is  
3 (reading):

4 "Generally agricultural ditches and  
5 conveyance channels, which are regularly  
6 maintained and often devoid of  
7 vegetation, support only minimal  
8 hydrologic -- hydraulic function (water  
9 conveyance), with virtually no water  
10 quality or habitat function."

11 Is that statement, in your professional  
12 opinion, incorrect?

13 WITNESS WE: Well, I would begin by noting a  
14 grammatical error.

15 If we read this as saying "agricultural  
16 ditches and conveyance channels, 'that' are regularly  
17 maintained and often devoid of vegetation, support only  
18 minimal hydraulic function," then, to a large degree,  
19 that is probably true in the Delta.

20 However, many ditches do not receive that  
21 level of maintenance and have become colonized by a  
22 variety of vegetation types and -- and in those cases  
23 it's possible that they support greater function.

24 Also, qualitative statements like "virtually  
25 no" are somewhat questionable. Certainly, there is a

1 spectrum of variability with regard to those ecological  
2 functions listed in that sentence.

3 MR. JACKSON: Insofar as these -- as the --  
4 oops, excuse me -- as the agriculture ditches and  
5 conveyance channels in the Delta are . . . left in some  
6 condition other than sort of scraped, they do play a  
7 role in habitat for the species that we talked about.

8 WITNESS EARLE: As -- As I noted earlier,  
9 there are species treated in the analysis for which  
10 these are regarded as potentially suitable habitat and  
11 are included as such in calculations of impact to  
12 acreage.

13 MR. JACKSON: Thank you.

14 (Pause in proceedings.)

15 MR. JACKSON: I'd like to go to DG -- DDJ-246.  
16 This is the last line of discussion.

17 (Exhibit displayed on screen.)

18 MR. JACKSON: And these are questions for  
19 Mr. Bradbury.

20 And I'd like to go to Page 2.

21 (Exhibit displayed on screen.)

22 MR. JACKSON: There are two columns in this  
23 particular paper.

24 Mr. Bradbury, are you the Michael Bradbury  
25 that wrote this?

1 WITNESS BRADBURY: I am one of three authors  
2 on this paper, yes.

3 MR. JACKSON: The . . . In the . . .

4 (Pause in proceedings.)

5 MR. JACKSON: Do you agree with the statement  
6 in the left column --

7 Can we go up just a bit.

8 (Scrolling through document.)

9 MR. JACKSON: The other -- The other -- I'm  
10 sorry. Down.

11 (Scrolling through document.)

12 MR. JACKSON: Do you agree with the statement  
13 that (reading):

14 "Black Rails are secretive and  
15 difficult to detect . . ."

16 MR. MIZELL: Objection.

17 So, we've received no tying back to the  
18 rebuttal testimony for this line of questioning.

19 We don't see any reference to this study  
20 within the testimony, and Mr. Jackson hasn't  
21 established what component of the rebuttal testimony  
22 he's pursuing this line of questioning for.

23 CO-HEARING OFFICER DODUC: Mr. Jackson.

24 MR. JACKSON: Yes. This is -- This is a  
25 continuation of the -- the questions about whether or

1 not you need to do the surveys before you determine  
2 what kind of impacts there are going to be.

3 CO-HEARING OFFICER DODUC: I'm confused,  
4 because Dr. Earle's testimony was that surveys would be  
5 conducted before any constructions or otherwise  
6 activities.

7 MR. JACKSON: And so I'm questioning  
8 Mr. Bradbury on his own paper to see whether or not he  
9 agrees with that.

10 CO-HEARING OFFICER DODUC: I'm -- I'm sorry.  
11 I'm trying to -- So how does this paper tie  
12 into Dr. Earle's testimony that surveys will be  
13 conducted?

14 MR. JACKSON: His testimony that surveys will  
15 be conducted depend upon what kind of surveys and the  
16 ability for the surveys to be meaningful.

17 CO-HEARING OFFICER DODUC: Uh-huh.

18 MR. JACKSON: And I'm trying to determine  
19 whether or not someone who is -- has written a paper,  
20 what form of survey he would recommend doing.

21 CO-HEARING OFFICER DODUC: That is beyond the  
22 scope of his rebuttal testimony, that level of  
23 specificity is.

24 (Pause in proceedings.)

25 MR. JACKSON: Let's try the same document,



1 DDJ-246, Page 2, right column.

2 (Exhibit displayed on screen.)

3 MR. JACKSON: Is the large scale planning  
4 effort . . . that you refer to in your paper complete?

5 MR. MIZELL: Objection: Same objection as  
6 before.

7 CO-HEARING OFFICER DODUC: Same question to  
8 you, Mr. Jackson, as before.

9 MR. JACKSON: I'm trying to determine whether  
10 or not the little information that this paper says is  
11 available to restoration practitioners and Land  
12 Managers is an impediment to the AMM that is listed and  
13 been quoted by Mr. Bradbury as his . . . in his  
14 critique and his rebuttal of Mr. Shilling.

15 CO-HEARING OFFICER DODUC: It was  
16 Dr. Earle's --

17 MR. JACKSON: Dr. Shilling, excuse me.

18 CO-HEARING OFFICER DODUC: -- testimony, I  
19 believe. And Dr. Earle's testimony -- Did you  
20 reference this paper?

21 WITNESS EARLE: I did not.

22 (Pause in proceedings.)

23 MR. JACKSON: Dr. Bradbury, did you represent  
24 this paper in anything you filed for this hearing?

25 (Pause in proceedings.)

1 CO-HEARING OFFICER DODUC: Regardless of  
2 whether he did or not, Mr. Jackson, you certainly have  
3 the right to introduce whatever documents you wish to  
4 use in your cross-examination.

5 But you have to be able to link it to, at  
6 least for this phase, either the rebuttal testimony,  
7 DWR-1143 Second Revision, or the Supplemental EIR --  
8 I'm sorry -- EIR supplement, whatever it's called.

9 Administrative Draft, yes, that long title.

10 So that is what I'm struggling with.

11 MR. JACKSON: And so the question is to  
12 Mr. Bradbury to determine -- to let me know whether or  
13 not he referenced this document in anything that he's  
14 filed, his testimony, in this particular hearing.

15 CO-HEARING OFFICER DODUC: Mr. Mizell.

16 MR. MIZELL: Yes.

17 Mr. Bradbury's testimony is very short,  
18 consists --

19 CO-HEARING OFFICER DODUC: It is.

20 MR. MIZELL: -- of about two paragraphs and  
21 does not contain a reference to this study.

22 CO-HEARING OFFICER DODUC: Mr. Jackson,  
23 please -- Sustained.

24 I'm now sustaining the objection. Please move  
25 on.

1 MR. JACKSON: I think that's it.

2 CO-HEARING OFFICER DODUC: Thank you.

3 MR. JACKSON: Oh, excuse me.

4 CO-HEARING OFFICER DODUC: In fact, didn't you  
5 have questions for Dr. Grimaldo?

6 MR. JACKSON: I do. But I also have a few  
7 questions -- and it's a very few -- that were left with  
8 me by Mr. Keeling before he left to start doing the  
9 written motion.

10 CO-HEARING OFFICER DODUC: And so you're  
11 asking questions --

12 MR. JACKSON: On behalf -- On behalf of  
13 Mr. Keeling.

14 CO-HEARING OFFICER DODUC: Go ahead.

15 And how much additional time will you need for  
16 that?

17 MR. JACKSON: Looking at this, in his usual  
18 succinct fashion, probably no more than 10 minutes.

19 CO-HEARING OFFICER DODUC: And then you have  
20 questions for Dr. Grimaldo?

21 MR. JACKSON: Yes, but they are . . .  
22 They're about his summary of opinions.

23 CO-HEARING OFFICER DODUC: And so would 15  
24 minutes do?

25 MR. JACKSON: 15 will do.

1 CO-HEARING OFFICER DODUC: All right.

2 MR. JACKSON: Dr. -- Could we put up DWR-1219  
3 at Page 4, Line 12 to Page 8, Line 3.

4 (Exhibit displayed on screen.)

5 MR. JACKSON: And, Dr. Earle, in this section  
6 of your testimony, you rebut Dr. Shilling's opinion  
7 that construction and operation of the CWF will  
8 interfere with wildlife movements caused by roads and  
9 other linear features and, in particular, by the  
10 mechanisms of habitat, fragmentation, direct mortality,  
11 and aversion effects, as well as light- and  
12 noise-induced effects; correct?

13 WITNESS EARLE: That's correct.

14 MR. JACKSON: In this part of your written  
15 Part 2 rebuttal testimony, DWR-1219, from Page 4,  
16 Line 12 through Page 8, Line 3, I notice that, besides  
17 citing to Dr. Shilling's testimony itself, you cite the  
18 following exhibits to support your opinions:  
19 SWRCB-102, SWRCB-111, SWRCB Appendix 5J, and LAND-148,  
20 the 2007 Dooling and Popper study.

21 Did he miss any?

22 CO-HEARING OFFICER DODUC: And the point of  
23 this question is?

24 MR. JACKSON: I have four questions following  
25 this, and one of them has to do with quantitative

1 analysis, which I think we probably beat up pretty  
2 well.

3 (Pause in proceedings.)

4 CO-HEARING OFFICER DODUC: As I take it, the  
5 last question you asked was simply iteration of the  
6 references that --

7 MR. JACKSON: Right. It's a foundational  
8 question to -- to determine whether or not there's --  
9 there's something other than what he -- what he quoted  
10 as these exhibits --

11 CO-HEARING OFFICER DODUC: Dr. Earle.

12 MR. JACKSON: -- in his testimony.

13 MR. MIZELL: I'd like to object.

14 Is the question misstating the record? And it  
15 is likely a -- simply an oversight because of the line  
16 break.

17 But the reference to Appendix 5J was reflected  
18 as just SWRCB Appendix J. It should be SWRCB-5.

19 MR. JACKSON: Appendix 5J, correct.

20 CO-HEARING OFFICER DODUC: Dr. Earle, did you  
21 rely on anything else?

22 WITNESS EARLE: Based on a brief review of the  
23 text, I believe that is an accurate inventory.

24 MR. JACKSON: In preparing this rebuttal of  
25 Dr. Shilling's Part 2 testimony on these issues, did

1 you yourself perform any quantitative analysis of the  
2 effects of the CWF regarding noise and traffic?

3 MR. MIZELL: Objection: Asked and answered.

4 CO-HEARING OFFICER DODUC: Sustained.

5 MR. JACKSON: I agree.

6 CO-HEARING OFFICER DODUC: You actually asked  
7 that.

8 MR. JACKSON: What?

9 CO-HEARING OFFICER DODUC: We actually went  
10 through that already.

11 MR. JACKSON: We did.

12 In preparing this rebuttal of Dr. Shilling's  
13 Part 2 testimony on these issues, did you yourself  
14 perform any independent analysis of the impacts of the  
15 CWF?

16 MR. MIZELL: Objection: Asked and answered.

17 CO-HEARING OFFICER DODUC: Actually, that's  
18 slightly different. Independent analysis.

19 MR. JACKSON: Right.

20 WITNESS EARLE: My rebuttal testimony presents  
21 what I hope is a rational connected argument rebutting  
22 Dr. Shilling's testimony.

23 Such an argument can be described as an  
24 analysis. And in places, it cites numbers and can,  
25 therefore, be characterized as quantitative.

1 MR. JACKSON: But that's the -- That's the  
2 limit of what you're relying on for the -- for your  
3 testimony.

4 MR. MIZELL: I'd like to object to that -- to  
5 the question, both this one and the previous, as to  
6 their probative value in this case.

7 Dr. Earle is a well-qualified expert. He is  
8 capable and permitted to rely upon the expertise of  
9 others. In this case, he has copiously cited to those  
10 other instances --

11 CO-HEARING OFFICER DODUC: Say that word  
12 again. "Copiously."

13 MR. MIZELL: Yes.

14 CO-HEARING OFFICER DODUC: Sustained,  
15 Mr. Mizell.

16 MR. JACKSON: At Page 12, Lines 22-24 of your  
17 testimony, DWR-1219, you state your opinion (reading):

18 ". . . That the minimization and  
19 mitigation commitments for Sandhill Crane  
20 would still be reasonably protective of  
21 this species."

22 Is that right? I mean, is that correct?

23 WITNESS EARLE: I -- That is an accurate  
24 reading of Lines 22 to 24.

25 MR. JACKSON: In this context, what do you

1 mean by "reasonably protective"?

2           WITNESS EARLE: As I've stated earlier, my  
3 inference of reasonable protection for fully protected  
4 species is based both upon my professional opinion as a  
5 Biologist based on the analyses that have been  
6 performed by these species, and also upon the approval  
7 and findings issued by CDFW for the EIR and associated  
8 documents.

9           This particular section that you're citing is  
10 preceded immediately by a discussion of the findings in  
11 the Administrative Draft Supplemental EIR/EIS, which  
12 has not been acknowledged in findings published by  
13 CDFW.

14           And with regard to that, I explained my  
15 rationale for interpreting the supplemental analysis as  
16 indicating a reduction in impacts to Sandhill Crane  
17 and, therefore, consistent with the opinion I developed  
18 based on the earlier analyses.

19           MR. JACKSON: Thank you, sir.

20           Could we have DWR-1222 up on the screen.

21           (Exhibit displayed on screen.)

22           MR. JACKSON: The questions are . . .

23           Oh, let's start on Page 2, Line 15 --

24           (Exhibit displayed on screen.)

25           MR. JACKSON: -- "Overview of Testimony."



1           The first question is: Mr. Grimaldo, on  
2 Line 20, you indicate that (reading):

3           "These studies" -- that you're  
4           talking about up above that -- "provide  
5           new information and augment the  
6           information submitted in the . . . 2010  
7           Flow Policy Report and the . . . 2012  
8           Water Quality Control Plan Workshop  
9           (sic), relied on by several parties."

10           Were those available to -- to you at the time  
11 DWR put on its case in chief in Part 2?

12           CO-HEARING OFFICER DODUC: Ms. Morris.

13           MS. MORRIS: Sorry. I'm moving slow today.

14           Objection as to relevance.

15           CO-HEARING OFFICER DODUC: Actually, I do see  
16 the relevance, but, Mr. Jackson, would you like to  
17 respond?

18           MR. JACKSON: Well, I -- I do believe it's  
19 relevant. I mean, I don't know how else to respond.

20           CO-HEARING OFFICER DODUC: Am I to understand  
21 that you are trying to ascertain whether this is  
22 appropriate rebuttal testimony or whether it should  
23 have been in the case in chief?

24           MR. JACKSON: Correct.

25           CO-HEARING OFFICER DODUC: On that ground, I

1 will overrule and ask Mr. -- Dr. Grimaldo to answer.

2 WITNESS GRIMALDO: So, I'm not sure I  
3 understand --

4 CO-HEARING OFFICER DODUC: Microphone on,  
5 please.

6 WITNESS GRIMALDO: I'm not sure I understand  
7 the question because I don't know the -- the date of  
8 the case in chief.

9 MR. JACKSON: Well, for the purposes of  
10 speeding it up, let's assume that the case in chiefs  
11 (sic) were due in . . . May.

12 Was this new information available in May?

13 CO-HEARING OFFICER DODUC: May I rephrase your  
14 question, Mr. Jackson.

15 MR. JACKSON: Sure.

16 CO-HEARING OFFICER DODUC: In this testimony,  
17 Dr. Grimaldo, is there a specific timeframe during  
18 which you believe this progress and new information was  
19 developed?

20 WITNESS GRIMALDO: Yes. I would say most of  
21 this information has started coming out since -- since  
22 the publication in 2017. I'm looking at the dates.  
23 "Accepted, April 2017."

24 And there was also information provided in  
25 Exhibit 1346 in a presentation that I gave to the Smelt

1 Workshop in 2016, and other -- another presentation  
2 that I provided as Exhibit -- bear with me -- 1321 that  
3 was presented this past March in 2018.

4 So, most of the new research that's been  
5 emerging has been coming out in the last year or two.

6 CO-HEARING OFFICER DODUC: All right. Thank  
7 you.

8 MR. JACKSON: You indicate on Line 25 that you  
9 are highlighting (reading):

10 ". . . New field studies . . . modeling  
11 work, and analyses that show Longfin  
12 Smelt abundance and distribution is more  
13 seaward . . . than previously  
14 recognized . . ."  
15 Haven't . . .  
16 Wasn't that information available earlier  
17 in -- in 2018?

18 CO-HEARING OFFICER DODUC: Who wants to  
19 address this Mr. Berliner or Miss Morris?

20 MS. MORRIS: You go first.

21 MR. BERLINER: Okay.

22 There may be a misunderstanding here.

23 Dr. Grimaldo's testimony concerns rebuttal,  
24 and he's citing these studies as rebuttal to  
25 Mr. Baxter.

1           For instance, on Page 4, Line -- I guess it's  
2 6 or 7, it says(reading):

3           "In my testimony, I am rebutting  
4           Mr. Baxter's testimony that Longfin Smelt  
5           savage -- salvage increases under drier  
6           conditions," et cetera.

7           This is rebuttal testimony, and that's the  
8 purpose for citing these more recent studies that  
9 Mr. Baxter did not cite.

10           So the whole point is to show there's recent  
11 work that ought to be considered before making these  
12 contentions that Mr. Baxter made.

13           CO-HEARING OFFICER DODUC: And so your  
14 objection is?

15           MR. BERLINER: Mr. Jackson appears to be  
16 trying to establish that this information should have  
17 been presented in the Part 2 case in chief.

18           But in the Part 2 case in chief, we were not  
19 rebutting Mr. Baxter's testimony in this respect. We  
20 were presenting, obviously, the case in chief part.

21           So, the -- the questions don't seem to bear on  
22 the relevance of why these studies were cited, and  
23 that's my point.

24           CO-HEARING OFFICER DODUC: Ah, thank you.

25           Miss Morris.

1 MS. MORRIS: I'd join as irrelevant because  
2 it -- Again, these -- several of these cites are to  
3 witnesses saying that the Flow Criteria Report and the  
4 Water Quality Control Plan are the best-available  
5 science.

6 And this witness is rebutting that by showing  
7 that there are additional studies that haven't been  
8 considered in those documents, so it's appropriate  
9 rebuttal.

10 CO-HEARING OFFICER DODUC: All right.  
11 Mr. Jackson, your response to that, if you have one?

12 MR. JACKSON: Yes. That these studies . . .

13 The way they come in on rebuttal, they require  
14 surrebuttal because they've never been mentioned in  
15 this hearing before.

16 I'm trying to determine whether or not they  
17 were available so that we can make the argument that,  
18 if they weren't available prior to the case in chief,  
19 then we need surrebuttal.

20 CO-HEARING OFFICER DODUC: Mr. Jackson, I --

21 MR. JACKSON: Mr. Baxter was not my witness.

22 CO-HEARING OFFICER DODUC: Mr. Jackson, I'm  
23 going out on a limb here. I'm guessing you're going to  
24 argue that the surrebuttal is necessary regarding of  
25 when these studies were developed.

1 MR. JACKSON: Well, I'm certainly going to be  
2 arguing that, if they're allowed -- if these opinions  
3 and these -- and the supporting documents are allowed  
4 into the record, then -- then we are going to need an  
5 opportunity to rebut them.

6 CO-HEARING OFFICER DODUC: Okay. So --

7 MR. JACKSON: If they --

8 CO-HEARING OFFICER DODUC: So, you can make  
9 that --

10 MR. JACKSON: If they aren't entered into the  
11 record, then we may not. I'm trying to determine --

12 CO-HEARING OFFICER DODUC: And -- I'm sorry --  
13 at this point, are you making a motion? What are you  
14 doing?

15 Because I -- Let me -- Let me say this:

16 I sustained Mr. Berliner and Miss Morris'  
17 objection, or clarification, that this is responding to  
18 Part 2 case in chief testimony and, therefore, is  
19 rebuttal testimony.

20 MR. JACKSON: Are we going to have a chance  
21 to . . . surrebuttal?

22 I mean, I don't care which way it goes. I  
23 just want to make sure that I get an opportunity to --  
24 to find other information rebutting these statements.

25 CO-HEARING OFFICER DODUC: And that is

1 something we will discuss later. It's not appropriate  
2 as a subject matter for cross-examination of  
3 Dr. Grimaldo.

4 MR. JACKSON: I'm simply trying to make a  
5 record.

6 Now I have no further questions.

7 CO-HEARING OFFICER DODUC: Thank you.

8 All right. Do you need a break, Candace?

9 THE REPORTER: (Shaking head.)

10 CO-HEARING OFFICER DODUC: All right. Then  
11 Miss Des Jardins is our final cross-examiner for these  
12 witnesses.

13 And we do have a hard stop at 5:00 today.

14 MS. DES JARDINS: Deirdre Des Jardins with  
15 California Water Research.

16 I'd first like to bring up Dr. Grimaldo's  
17 testimony, DWR-1222, Page 4.

18 (Exhibit displayed on screen.)

19 CROSS-EXAMINATION BY

20 MS. DES JARDINS: And Dr. Grimaldo, you state  
21 here you're (reading):

22 ". . . Rebutting Mr. Baxter's testimony  
23 that Longfin Smelt salvage increases  
24 under drier conditions, especially during  
25 recent years when the 2009 Biological

1 Opinions have been in effect."

2 Is that -- That's -- That's correct?

3 WITNESS GRIMALDO: That is correct.

4 MS. DES JARDINS: And that section is  
5 rebutting --

6 I just -- I'm trying to clarify.

7 Can we go to the April 11th transcript that  
8 you cite on Page 77? Just trying to clarify what  
9 particular statements you're rebutting.

10 MR. LONG: I'm sorry. Did you say 11 --

11 MS. DES JARDINS: 11th, 2018 transcript, yes.

12 (Exhibit displayed on screen.)

13 MS. DES JARDINS: Thank you.

14 And please go to Page 77, which I believe  
15 is -- it's a little bit later. It might be  
16 Page 80 . . .

17 (Exhibit displayed on screen.)

18 MS. DES JARDINS: There it is.

19 And then you cite Lines 13 to 15.

20 And I'm just confused because this appears to  
21 be a discussion about why the Cache Slough complex is  
22 an important spawning area for Longfin Smelt.

23 WITNESS GRIMALDO: So maybe we have the pages  
24 mixed up, but if you do a search on "entrainment" in  
25 this document, Dr. Bax -- Randy Baxter makes a comment.



1 MS. DES JARDINS: Yeah. Maybe we can find  
2 where he says that.

3 WITNESS GRIMALDO: And maybe the .pdf I was  
4 looking at had a different page.

5 MS. DES JARDINS: Yeah. Can we look for it?  
6 It was Miss Ansley, I think.

7 WITNESS GRIMALDO: Yes. Yes, definitely under  
8 the questions.

9 MS. DES JARDINS: I'm not seeing -- I guess --  
10 Is it anywhere else?

11 WITNESS GRIMALDO: If you could keep going  
12 down, please.

13 MS. DES JARDINS: Yeah. Maybe from this.

14 (Scrolling through document.)

15 WITNESS GRIMALDO: Keep going.

16 (Scrolling through document.)

17 WITNESS GRIMALDO: Keep going.

18 (Scrolling through document.)

19 WITNESS GRIMALDO: I just reviewed this  
20 statement before I came up here, so I'm trying to find  
21 it.

22 (Pause in proceedings.)

23 MS. DES JARDINS: This appears to be a  
24 cross-examination on --

25 WITNESS GRIMALDO: Right.

1 MS. DES JARDINS: -- Mr. Baxter on your work.

2 It seems a little circular.

3 WITNESS GRIMALDO: No. This -- This isn't the  
4 piece that I was referencing.

5 Maybe -- Maybe a search for "drier."

6 MR. BERLINER: Or perhaps it's .pdf Page 77?

7 MS. DES JARDINS: I checked that one as well.

8 We can try it. I mean, I just really wasn't  
9 finding that statement by Mr. Baxter.

10 (Scrolling through document.)

11 WITNESS GRIMALDO: So, if you scroll up.

12 Maybe these are the lines actually that I was referring  
13 to. This might be close to it.

14 (Scrolling through document.)

15 WITNESS GRIMALDO: As outflow gets lower,  
16 according to that . . . Because -- Yes. I'd have to  
17 speculate.

18 But as outflow gets lower, because Longfin  
19 larvae have already transferred, the adults tend to  
20 move further into the Delta to spawn.

21 MS. DES JARDINS: But that doesn't seem to --  
22 That's not the same as him testifying (reading):

23 ". . . That Longfin Smelt salvage  
24 increases under drier conditions,  
25 especially during recent years when the

1           2009 Biological Opinions have been in  
2           effect."

3           He doesn't discuss salvage. His reference is  
4           stating that the Cache Slough complex is an important  
5           spawning area.

6           WITNESS GRIMALDO: In this case, he's  
7           referencing that adults tend to move further into the  
8           Delta to spawn, which is a source of entrainment risk.

9           But he does make a statement about entrainment  
10          being a risk increasing during lower outflow periods.  
11          Unfortunately, I have it marked in my computer but not  
12          here.

13          And it was during questions -- questions from  
14          Miss Ansley.

15          MS. DES JARDINS: Could -- I'm just wondering  
16          if Mr. Baxter actually limited it to the Biological  
17          Opinion years.

18          Because I'm -- I'm not seeing that he -- that  
19          most of his testimony was about the pelagic organism  
20          decline --

21          WITNESS GRIMALDO: I --

22          MS. DES JARDINS: -- and started significantly  
23          earlier.

24          MR. MIZELL: Objection: Misstates the  
25          witness' testimony.

1 Dr. Grimaldo's citation of Mr. Baxter does not  
2 limit it to the '09 Biological Opinions --

3 MS. DES JARDINS: Well --

4 MR. MIZELL: -- especially during --

5 MS. DES JARDINS: -- it says (reading):

6 ". . . Especially during recent years  
7 when the 2009 Biological Opinions have  
8 been in effect."

9 And I would like to be able to know if  
10 Mr. Baxter stated that, because, otherwise, he is  
11 misstating Mr. Baxter's testimony, and the full  
12 response, it only considers post-BiOps years.

13 MR. MIZELL: To the extent that  
14 Miss Des Jardins continues to want to find this  
15 particular quotation, I would request that Dr. Grimaldo  
16 be given the opportunity to find the quotation.

17 We were working both off rough transcripts as  
18 well as final transcripts. I recognize we did not  
19 specify which of those two in this particular citation.

20 But, if we could have a moment, Dr. Grimaldo  
21 very well might be able to find the citation.

22 CO-HEARING OFFICER DODUC: Dr. Grimaldo, are  
23 you able to locate that right now, or do you --

24 WITNESS GRIMALDO: It will take me a few  
25 minutes to -- to get to my laptop and open it.

1 CO-HEARING OFFICER DODUC: All right.

2 WITNESS GRIMALDO: Maybe three minutes.

3 CO-HEARING OFFICER DODUC: Let's take a  
4 five-minute break.

5 WITNESS GRIMALDO: Okay.

6 CO-HEARING OFFICER DODUC: Return at 4:05.

7 (Recess taken at 4:00 p.m.)

8 (Proceedings resumed at 4:06 p.m.):

9 MR. JACKSON: Before you start again --

10 CO-HEARING OFFICER DODUC: Hold on,  
11 Mr. Jackson.

12 MR. JACKSON: Okay.

13 (Pause in proceedings.)

14 CO-HEARING OFFICER DODUC: Go ahead.

15 MR. JACKSON: There was discussion evidently  
16 right after lunch and my e-mail's litten (sic) up --  
17 has lit up about: Are -- Is there any possibility that  
18 the other members of this panel are coming back  
19 tomorrow?

20 CO-HEARING OFFICER DODUC: No.

21 MR. JACKSON: Okay. Do we -- Are we going to  
22 have time to get the brief in before we have to come  
23 back here?

24 CO-HEARING OFFICER DODUC: I'm confused. What  
25 was the last question?

1 MR. JACKSON: The people are writing portions  
2 of the brief that we were --

3 CO-HEARING OFFICER DODUC: Yes. The motions  
4 that you -- that Mr. Keeling, Miss Meserve --

5 MR. JACKSON: Right.

6 CO-HEARING OFFICER DODUC: -- and  
7 Miss Des Jardins have.

8 MR. JACKSON: Right.

9 CO-HEARING OFFICER DODUC: Yes?

10 MR. JACKSON: And, so my question is, in terms  
11 of organizing witnesses and lawyers, do we have an idea  
12 whether or not those witnesses will be testifying this  
13 week?

14 CO-HEARING OFFICER DODUC: That's what we  
15 are -- That was the request Mr. Berliner made, which we  
16 are taking under consideration.

17 MR. JACKSON: Then, as I understand, the  
18 response to the briefs won't be -- were due on Friday.

19 CO-HEARING OFFICER DODUC: Friday.

20 MR. JACKSON: So, the question becomes, it  
21 seems more logical to have it be next week.

22 CO-HEARING OFFICER DODUC: The problem was,  
23 according to Mr. Berliner, those witnesses are not  
24 available next week until -- I believe it was  
25 August 27th?

1 MR. MIZELL: That's correct. After  
2 August 27th, they'll return.

3 MR. JACKSON: That . . .

4 CO-HEARING OFFICER DODUC: So you are  
5 requesting that --

6 MR. JACKSON: That it be August 27th.

7 CO-HEARING OFFICER DODUC: Thank you,  
8 Mr. Jackson.

9 MR. JACKSON: Okay.

10 CO-HEARING OFFICER DODUC: We'll take that  
11 under consideration.

12 Miss Taber.

13 MS. TABER: Thank you.

14 Kelly Taber on behalf of City of Stockton and  
15 Sacramento Regional County Sanitation District.

16 I apologize for raising a schedule issue.

17 CO-HEARING OFFICER DODUC: Have you or have  
18 you not swapped with North Delta Water Agency?

19 MS. TABER: We have, but there -- It's -- As  
20 you've noticed, it's very difficult to predict where  
21 things are happening.

22 And Dr. Paulsen, who is testifying for three  
23 witnesses (sic), has unavoidable conflicts in Southern  
24 California this Thursday and next Thursday.

25 In reviewing the schedule, it looks like there

1 could be a good chance that she could have to appear on  
2 one of those two days and, therefore, I'm -- given the  
3 need for her to arrange her travel and her  
4 unavailability, I wonder if it's possible that she  
5 would be able to present her testimony this Friday,  
6 because I am somewhat concerned there might be a next  
7 Friday, the 24th. I have been working to coordinate  
8 with other parties. It appears there is flexibility in  
9 the order, but . . .

10 CO-HEARING OFFICER DODUC: Is there any  
11 objection to Dr. Paulsen, representing Group 13, 22 and  
12 27, testifying on Friday?

13 MR. MIZELL: Unfortunately, yes. The  
14 Department would object to that shift.

15 It would bring Dr. Paulsen substantially back  
16 forward in the schedule. We've been preparing for  
17 cross-examination for a couple weeks.

18 CO-HEARING OFFICER DODUC: Understand.

19 MR. MIZELL: Yeah.

20 CO-HEARING OFFICER DODUC: And I appreciate  
21 that on behalf of Mr. Mizell.

22 MS. TABER: And I understand.

23 So, looking ahead, just -- I will note right  
24 as of now, we've been informed she does have an  
25 obligation in Southern California on Thursday, the



1 23rd.

2           And so I don't know if we'll be having a  
3 Friday, the 24th, but . . .

4           CO-HEARING OFFICER DODUC: But, in any case, I  
5 would encourage you to, I guess, work with the other  
6 parties in order to swap places, as necessary.

7           MS. TABER: Sure. Okay. Thank you.

8           MR. BERLINER: To the extent it's helpful, if  
9 they want to schedule Dr. Paulsen, as we did once  
10 before, I believe, for a date certain, that would be  
11 fine.

12           CO-HEARING OFFICER DODUC: But just not this  
13 Friday.

14           MR. BERLINER: Exactly.

15           CO-HEARING OFFICER DODUC: Okay.

16           MS. TABER: Thank you. And so --

17           CO-HEARING OFFICER DODUC: Why don't you guys  
18 get together.

19           MS. TABER: Assuming the hearing will still be  
20 on the rebuttal phase through next Friday, then that  
21 would work.

22           CO-HEARING OFFICER DODUC: I . . . would not  
23 dare to estimate a timing with respect to all of this.  
24 As you can tell, things are going as they go.

25           MS. TABER: I appreciate that. Thank you.

1 CO-HEARING OFFICER DODUC: All right.

2 Miss Des Jardins -- Oh, I'm sorry.

3 Dr. Grimaldo, we're back to you.

4 If you could please clarify the exact  
5 placement in the transcript you are referring to,  
6 Lines 6 through -- Well, actually, the line numbers  
7 aren't straight -- 6 through 9ish on Page 4 of your  
8 testimony.

9 WITNESS GRIMALDO: Right. We just found it.  
10 And it's Page 77?

11 MR. MIZELL: That's correct.

12 So the citation to the page was correct in his  
13 testimony. Citation on the line numbers did seem to be  
14 offset. And, again, it may be because we were -- we  
15 were working with the rough transcript at this time, so  
16 we apologize.

17 But you can find the statements Dr. Grimaldo's  
18 referencing at the bottom of this page.

19 (Exhibit displayed on screen.)

20 MS. DES JARDINS: Which exact sentence are you  
21 referring to? Can you read it?

22 WITNESS GRIMALDO: So one of the -- one of the  
23 patterns that we see in this for the fish to move  
24 farther and farther upstream in there, and their  
25 spawning as flow reduces in their winter/early spring

1 spawning period.

2 CO-HEARING OFFICER DODUC: And -- I'm sorry.

3 I'm jumping in, Miss Des Jardins.

4 But how does that relate to your restatement  
5 of Mr. Baxter's testimony?

6 WITNESS GRIMALDO: So, just to be clear on  
7 that statement that I was making, I was just rebutting  
8 that long -- Yeah. Mr. Baxter's testimony is that  
9 Longfin salvage increases under drier conditions,  
10 perhaps a better description would be that Longfin  
11 Smelt movement increases upstream under drier  
12 conditions.

13 The statement about "especially during recent  
14 years under the 2009 Biological Opinions have been in  
15 effect," that's -- that's my opinion, that -- that I'm  
16 rebutting that statement -- I'm sorry -- that  
17 characterization of Longfin Smelt distribution during  
18 drier years.

19 MS. DES JARDINS: Can we go back to Exhibit  
20 DWR-1222, please.

21 (Exhibit displayed on screen.)

22 MS. DES JARDINS: I mean, then you go out and  
23 you have a table of SWP and CVP Adult Longfin Smelt  
24 salvage by water year.

25 I mean, how does this relate to testimony

1 about moving of Delta Smelt into Cache Slough?

2 WITNESS GRIMALDO: This is not specifically  
3 about movement into Cache Slough.

4 What this table demonstrates is that salvage  
5 under dry, below normal, wet years and the last --  
6 since the Biological Opinions have been in place, have  
7 been really low, zero in most of those years, and  
8 there's no pattern of water year or characterization  
9 of -- of . . . of increased salvage or movement during  
10 drier years.

11 So one of the hypotheses that we have is that  
12 if Longfin Smelt do move upstream in drier years,  
13 they'd be more vulnerable to salvage.

14 What this table shows is that, amazingly,  
15 we've only salvaged --

16 MS. DES JARDINS: I would like to --

17 WITNESS GRIMALDO: -- three Longfin Smelt.

18 MS. DES JARDINS: I would like to ask you to  
19 stop.

20 I would like to move to strike this section  
21 because I think it is quite a leap from the Smelt  
22 moving into Cache Slough to "this is what happens with  
23 salvage post-2009."

24 And I'd like to strike Page 4 at 3 through  
25 Page 6 at 16 in this section that is rebutting this

1 particular section. And I'd like to strike the  
2 testimony he just provided on post-BiOp salvage,  
3 because while you might like to make that point, it is  
4 a big leap and it's beyond -- I argue it's beyond the  
5 scope of rebuttal.

6 CO-HEARING OFFICER DODUC: Before you respond,  
7 Mr. Mizell, Mr. Jackson.

8 MR. JACKSON: Yes. I -- I would like to join  
9 in the Motion to Strike.

10 Table 1 seems to be a table in search of  
11 something to rebut.

12 CO-HEARING OFFICER DODUC: Mr. Mizell. Or  
13 anyone wishing to respond to this motion by  
14 Miss Des Jardins.

15 MR. MIZELL: Certainly.

16 I believe that Dr. Grimaldo's answer to her  
17 question as to how his testimony is tied to  
18 Mr. Baxter's statement in the record was just answered,  
19 and he provided a clear connection to the migration of  
20 Smelt into the Cache Slough complex and how that would  
21 be reflected or not in the -- in the Longfin salvage  
22 numbers under the -- under the various trawls.

23 So I believe that he's -- he's clearly laid  
24 out the connection just now in his answers, and we  
25 would oppose the Motion to Strike.

1 CO-HEARING OFFICER DODUC: Actually,  
2 Mr. Mizell -- perhaps I'll turn to others up here --  
3 but that connection wasn't clear to me, which is why I  
4 actually asked even before Miss Des Jardins voiced her  
5 motion.

6 Dr. Grimaldo, perhaps if you would explain  
7 again to this Engineer how the testimony by Mr. Baxter  
8 at the bottom of Page 77 in the transcript translate  
9 into your assertion of his testimony as reflected on  
10 Lines 6 through 8 on Page 4.

11 WITNESS GRIMALDO: So, clearly, that's not  
12 a -- If you go back to that, that's not a reference to  
13 Cache Slough right there, so that was not  
14 characterized --

15 CO-HEARING OFFICER DODUC: Okay.

16 WITNESS GRIMALDO: -- appropriately by  
17 Miss Des Jardins.

18 If -- Can we go back to that statement,  
19 please.

20 CO-HEARING OFFICER DODUC: Go back to the  
21 transcript.

22 WITNESS GRIMALDO: The transcript.

23 CO-HEARING OFFICER DODUC: Okay.

24 WITNESS GRIMALDO: So one of the patterns that  
25 we see is for fish to move furtherer and furtherer

1 upstream. And they're spawning as flow reduces into  
2 the early winter/spring period.

3 CO-HEARING OFFICER DODUC: Okay.

4 WITNESS GRIMALDO: So that's not a --

5 CO-HEARING OFFICER DODUC: I'm sorry.

6 If we scroll down, there is the linkage to  
7 Cache Slough.

8 WITNESS GRIMALDO: And there's a relationship  
9 that exists for the San Joaquin River as well. That's  
10 clearly stated, where the Project facilities are  
11 located.

12 CO-HEARING OFFICER DODUC: Okay.

13 WITNESS GRIMALDO: So, given that the Project  
14 facilities are located on the San Joaquin River,  
15 there's a pretty plausible likelihood, high likelihood,  
16 if that increase does occur on the San Joaquin River,  
17 as stated by Mr. Baxter, that those would show up at  
18 the -- at the salvage facility, and that that pattern  
19 would be reflected in -- in dry -- in showing increased  
20 salvage under drier years.

21 So if you go back to my table --

22 (Exhibit displayed on screen.)

23 WITNESS GRIMALDO: -- what I show is, in fact,  
24 during the last 10, 11 years there, that there is no  
25 pattern of increased movement as reflected by the

1 largest sampling device that we have in the system for  
2 fish. In fact, what I see are only zeros.

3           If the assertion is that Longfin Smelt are  
4 moving into the San Joaquin during drier years, we  
5 should see higher numbers of them in the salvage  
6 facility during critical and dry years.

7           CO-HEARING OFFICER DODUC: So you're refuting  
8 Mr. Baxter's testimony of the movement, not the salvage  
9 increase.

10           WITNESS GRIMALDO: That's -- That's correct.

11           CO-HEARING OFFICER DODUC: And I think,  
12 earlier, you had testified -- or at least you had made  
13 a correction to your testimony.

14           Would you please repeat that?

15           WITNESS GRIMALDO: Yeah. That correction is  
16 that I'm rebutting Mr. Baxter's testimony . . .

17           Well, let's see.

18           That . . . I guess the correction would be  
19 here that he didn't necessarily say that salvage  
20 increases but -- but that movement into the San Joaquin  
21 increases during drier years.

22           CO-HEARING OFFICER DODUC: And you are  
23 rebutting that on your theory that, if that movement --  
24 that movement would be reflected in salvage increase.

25           WITNESS GRIMALDO: That's not just based on my



1 theory. That's also based on a paper that I cite in --  
2 in my testimony. It's Exhibit -- It's the Grimaldo  
3 2009 -- Exhibit 1314 where I clearly show that salvage  
4 increases as a function of -- of exports, and a  
5 distribution of fish into the -- into the San Joaquin  
6 River.

7 CO-HEARING OFFICER DODUC: And with that  
8 change -- that correction in your testimony in Lines 6,  
9 I guess, 6 through 8, how does that affect the  
10 remainder of your testimony in this section?

11 WITNESS GRIMALDO: I'd have to review it for a  
12 second, but I don't think it -- it changes my  
13 testimony.

14 So then I go into the mechanisms where I think  
15 that, if there was increased movement into the South  
16 Delta, for example, we'd see increased salvage of -- of  
17 juvenile fish.

18 And if you refer to Table . . .

19 MS. DES JARDINS: Excuse --

20 WITNESS GRIMALDO: I'm sorry.

21 MS. DES JARDINS: -- me. This -- This  
22 section -- This specific Section A, Adult Longfin  
23 Salvage/Entrainment, is only about adult entrainment  
24 and only references Mr. Baxter's testimony.

25 So I'm talking about Section A on Page

1 (sic) --

2 CO-HEARING OFFICER DODUC: Yes.

3 MS. DES JARDINS: -- III A.

4 CO-HEARING OFFICER DODUC: That's what I'm  
5 looking at.

6 MS. DES JARDINS: Yeah.

7 CO-HEARING OFFICER DODUC: That's what I'm  
8 looking at.

9 And based on Dr. Grimaldo's correction of his  
10 testimony, or at least the correction of his citation,  
11 his attribution -- or attribute to Mr. Baxter's  
12 testimony.

13 WITNESS GRIMALDO: So in looking at -- There's  
14 two figures that I provide in Figure 1 and Figure 2 --

15 CO-HEARING OFFICER DODUC: Um-hmm.

16 WITNESS GRIMALDO: -- on Pages 6 and Page 7 --  
17 (Exhibit displayed on screen.)

18 WITNESS GRIMALDO: -- where you can pull up  
19 the mean percentage --

20 MS. DES JARDINS: Excuse me. Those are  
21 juveniles. That's a different section.

22 WITNESS GRIMALDO: Okay. Well, then, we'll  
23 pull up Page 6.

24 (Exhibit displayed on screen.)

25 WITNESS GRIMALDO: Yeah, those are adult.

1 That's correct.

2           So when you look at the mean number of Adult  
3 Longfin salvage as a proportion of the population, as I  
4 pointed out in my testimony, those numbers are  
5 extremely low. It's less than 1 percent of the  
6 population.

7           And, in my interpretation, I don't see a  
8 pattern of increased salvage with these different water  
9 year-types. This is quite variable.

10           CO-HEARING OFFICER DODUC: All right. Based  
11 on that correction of his testimony, motion is denied.

12           MS. DES JARDINS: All right. I'd like to pull  
13 up Exhibit DDJ-319, please.

14           (Exhibit displayed on screen.)

15           MS. DES JARDINS: Oh, and, Dr. Grimaldo, you  
16 did recognize that Mr. Baxter's response did not limit  
17 it to any particular years?

18           This is a copy of the 2007 Pelagic Organism  
19 Decline Synthesis Report.

20           Are you aware of this document?

21           WITNESS GRIMALDO: Yes, I'm aware of this  
22 document.

23           MS. DES JARDINS: Okay. And I'd like to go to  
24 Page 18.

25           (Exhibit displayed on screen.)

1 MS. DES JARDINS: And . . .

2 Do you see in the last paragraph where it  
3 states (reading):

4 "One piece of evidence that export  
5 diversions played a role in the POD . . .  
6 substantial increases in winter CVP and  
7 SWP salvage that occurred  
8 contemporaneously . . ."

9 It says (reading):

10 "Increased winter entrainment of  
11 Delta Smelt, Longfin Smelt and Thredfin  
12 Shad represents a loss of pre-spawning  
13 adults and all their potential progeny."

14 Are you aware of -- Do you -- Do you see those  
15 statements in the document?

16 WITNESS GRIMALDO: Yes, I see those  
17 statements.

18 And I believe the report was published in  
19 2008. And, since then, I published a paper in 2009.  
20 And then the evidence provided once again in my figures  
21 Table 2 and -- I mean, in Figures 2 and -- Figures 1  
22 and 2 where you would actually adjust for the size of  
23 the population.

24 It is my opinion, as I provided in my  
25 testimony, that those source of the entrainment as a

1 source of mortality for Longfin Smelt is very low.  
2 From those tables, it's less than 1 percent of the  
3 population.

4 I also provided a paper by Dr. Kimmerer -- I  
5 don't remember the exhibit number here -- his 2008  
6 paper where entrainment losses that he estimated were  
7 on the 20 to 30 percent range in some of the high  
8 years.

9 So, in comparative -- In my opinion, and  
10 looking at the comparison, and as I provide in my  
11 testimony, entrainment has been a very low source of  
12 mortality for Longfin Smelt.

13 And this -- This document was done prior to  
14 when all these -- As I mentioned earlier, these new  
15 studies started coming out and we started learning more  
16 about the distribution of Longfin Smelt.

17 MS. DES JARDINS: Let's -- Let's go back to  
18 DWR-1222, please.

19 (Exhibit displayed on screen.)

20 MS. DES JARDINS: So -- So you are looking at  
21 entrainment.

22 How did you calculate the population  
23 abundance?

24 WITNESS GRIMALDO: So, this work was actually  
25 completed by Dr. Greenwood as part of the ITP

1 Application for California WaterFix.

2 And I don't recall the exact survey that he  
3 used, but the entrainment losses, as you see at the  
4 bottom, were developed by DFG.

5 So, in a -- in a rough sense, we took the --  
6 the estimated number of fish, probably expanded by  
7 volume is what Dr. Greenwood likely did, and divided  
8 the entrainment loss by the size of the population from  
9 those trawl surveys.

10 MS. DES JARDINS: So how -- The real question  
11 is: How did you go -- Let's pull up Exhibit DDJ-282,  
12 please, which is in the -- That would be in my  
13 submitted exhibits, so in the case in chief.

14 It's DD -- Exhibit DDJ-282 as found on the  
15 website.

16 (Exhibit displayed on screen.)

17 MS. DES JARDINS: So can you scroll down just  
18 to the bottom.

19 (Scrolling through document.)

20 MS. DES JARDINS: There we go.

21 This is the Fall Midwater Trawl Longfin Smelt  
22 Annual Abundance Indices from the DFG website.

23 Do you recognize these graphs?

24 WITNESS GRIMALDO: I recognize that graph.

25 MS. DES JARDINS: And . . . they show that the

1 Abundance Indices have fallen to record lows in recent  
2 years; is that not correct?

3 WITNESS GRIMALDO: I would interpret that that  
4 graph shows that the Fall Midwinter Trawl Longfin  
5 Indices have declined.

6 MS. DES JARDINS: Given -- Given the crash in  
7 population, wouldn't you expect the salvage numbers at  
8 the pumps to decrease as well?

9 WITNESS GRIMALDO: So, once again, I -- That's  
10 why I cited Dr. Greenwood's work on the ITP  
11 Application, because he corrected for the size of the  
12 population in his estimate.

13 And it was less than 1 percent for all years,  
14 except for one year for the adults and one year for the  
15 juveniles.

16 MS. DES JARDINS: Let's go to Exhibit  
17 DWR-1222.

18 And I'd like to find the cite to --

19 (Exhibit displayed on screen.)

20 MS. DES JARDINS: Where do you cite to  
21 Dr. Greenwood's work on the ITP Application?

22 WITNESS GRIMALDO: It's cited in the testimony  
23 up -- up above.

24 MS. DES JARDINS: Okay.

25 WITNESS GRIMALDO: That's where that figure

1 came from.

2 (Exhibit displayed on screen.)

3 MS. DES JARDINS: Calculated by dividing  
4 salvage per the population size for water years.

5 But it just represents that the -- that --  
6 Don't you have to extrapolate from the trawl data to an  
7 estimated population size? And isn't . . . to -- to  
8 get -- get those population estimates?

9 WITNESS GRIMALDO: So, I don't recall all the  
10 details of what Dr. Greenwood did in his testimony,  
11 but -- And it's my understanding that he did provide  
12 the -- the correct application of volumes for each  
13 region for the number of fish that were captured in the  
14 trawl surveys.

15 MS. DES JARDINS: Wouldn't -- Wouldn't your  
16 estimate of the percentage of fish entrained be very  
17 sensitive to -- to populate -- to your population  
18 estimates?

19 And if -- if the population estimates reduced  
20 much larger estimates of population, wouldn't that  
21 introduce errors?

22 WITNESS GRIMALDO: I'm sorry. I think you  
23 asked two questions there.

24 MS. DES JARDINS: Yes, I did. Apologies.

25 So, isn't -- isn't there some uncertainty in



1 estimating population data from trawl data?

2 WITNESS GRIMALDO: Yes.

3 MS. DES JARDINS: And isn't that an area of  
4 controversy?

5 WITNESS GRIMALDO: I'm not aware of where that  
6 controversy's been provided.

7 Can you elaborate or --

8 MS. DES JARDINS: Didn't you --

9 WITNESS GRIMALDO: -- refer to something?

10 MS. DES JARDINS: Didn't you testify in  
11 litigation over the Federal BiOp?

12 WITNESS GRIMALDO: Are you asking if I  
13 testified --

14 MS. DES JARDINS: Yes.

15 THE WITNESS: -- in the Federal case for The  
16 NFMS Fish and Wildlife Service?

17 Yes, on behalf of the -- the Federal  
18 government as an expert witness.

19 MS. DES JARDINS: And did you testify about  
20 population -- similar testimony about population  
21 estimates?

22 MR. MIZELL: I'm going to file an objection as  
23 beyond the scope of his rebuttal testimony at this  
24 point.

25 I don't believe we've seen any tie-back to

1 previous testimony Dr. Grimaldo may have given in years  
2 past during lawsuits.

3 MS. DES JARDINS: Well, he said he's not aware  
4 that it's an area of controversy, and I wanted to ask  
5 because I -- I believe that salvage densities were a  
6 huge area of litigation in the Federal BiOps and was an  
7 area of controversy.

8 MR. MIZELL: I believe the extrapolating  
9 answer that was related to his testimony into a global  
10 statement as to any work he's ever done is beyond the  
11 scope of this rebuttal testimony.

12 CO-HEARING OFFICER DODUC: Sustained.

13 MS. DES JARDINS: Okay. Let's see. So I did  
14 that, that.

15 And then I'd like to go to Page 8 at --  
16 Page 12 at 8.

17 (Pause in proceedings.)

18 CO-HEARING OFFICER DODUC: Miss Des Jardins,  
19 before you continue.

20 Are all your questions directed to  
21 Dr. Grimaldo or --

22 MS. DES JARDINS: Yes, they are.

23 CO-HEARING OFFICER DODUC: Okay. In that  
24 case, do you have redirect for Mr. Bradbury or  
25 Dr. Earle?

1 MR. MIZELL: I have no redirect for those  
2 witnesses.

3 CO-HEARING OFFICER DODUC: Thank you,  
4 Dr. Earle and Mr. Bradbury.

5 (Witnesses excused.)

6 MS. DES JARDINS: Let's scroll up to Line 8,  
7 please.

8 (Scrolling through document.)

9 MS. DES JARDINS: So --

10 WITNESS GRIMALDO: Line 8. Yes.

11 MS. DES JARDINS: Line 8, yeah.

12 In Line 7, you say (reading):

13 "It is noteworthy to point out that  
14 Juvenile Longfin Smelt are able to  
15 tolerate salinities up to 30 psu in the  
16 late spring and early summer . . ."

17 And you cite a paper by MacWilliams.

18 WITNESS GRIMALDO: That's correct.

19 MS. DES JARDINS: So, let's go to Exhibit  
20 DWR-1322.

21 (Pause in proceedings.)

22 MS. DES JARDINS: Actually, I can backtrack  
23 later.

24 I'd like to -- Are you aware that exhibit  
25 DWR-1322 -- actually, it's Exhibit DWR-1322-Errata --

1 is -- it's an EPA-funded study of . . .

2 Let -- Let's go ahead and bring it up.

3 Can you please bring in Exhibit  
4 DWR-1322-Errata.

5 (Exhibit displayed on screen.)

6 CO-HEARING OFFICER DODUC: So, Dr. Grimaldo,  
7 in your testimony, are you referring to 1322 or  
8 1322-Errata, or does it matter?

9 WITNESS GRIMALDO: It does matter. It would  
10 be 1322-Errata, because there's a link to a table that  
11 demonstrates my point there very well.

12 I didn't realize that the link -- If you got  
13 it without the hyperlink, you wouldn't be able to open  
14 it, but there's a link in Table 2 that you need to open  
15 to see -- to -- to clearly demonstrate the point I was  
16 making there.

17 (Exhibit displayed on screen.)

18 MS. DES JARDINS: So, this is a discussion of  
19 (reading):

20 "3-D simulations of the  
21 San Francisco Estuary with Subgrid  
22 Bathymetry to Explore Long-Term Trends in  
23 Salinity Distribution and Fish  
24 Abundance."  
25 Correct?

1 WITNESS GRIMALDO: That's correct.

2 MS. DES JARDINS: Let's scroll down.

3 (Scrolling through document.)

4 MS. DES JARDINS: This -- This is a study by  
5 the EPA; isn't that correct?

6 WITNESS GRIMALDO: Not all of the authors work  
7 for the EPA.

8 MS. DES JARDINS: Erin Foresman works for the  
9 EPA, and then there were two other authors.

10 WITNESS GRIMALDO: I'm not sure where Erin  
11 works anymore, but Michael and Aaron do work for  
12 Anchor, so . . .

13 MS. DES JARDINS: Yes. But at the time  
14 Foresman worked at the EPA --

15 WITNESS GRIMALDO: That's my understanding,  
16 yes.

17 MS. DES JARDINS: -- correct?

18 Okay. So, there were the actual studies of  
19 Longfin Smelt that went with this paper; correct?

20 WITNESS GRIMALDO: What studies are you  
21 referring to?

22 MS. DES JARDINS: Let's pull up -- I believe  
23 it's Exhibit DDJ -- DDJ-322.

24 (Exhibit displayed on screen.)

25 MS. DES JARDINS: So this is the EPA web page.

1 It says (reading):

2 "EPA created maps for six fish  
3 species that show changes in abundance  
4 and distribution . . ."

5 Please continue scrolling down.

6 (Scrolling through document.)

7 MS. DES JARDINS: Scroll down.

8 (Scrolling through document.)

9 MS. DES JARDINS: (Reading):

10 "This work was published in  
11 the . . . San Francisco Estuary and  
12 Watershed Science."

13 And it cites the paper you cite; correct?

14 WITNESS GRIMALDO: Yes, it appears to cite the  
15 same paper.

16 MS. DES JARDINS: And it also provides the  
17 maps?

18 WITNESS GRIMALDO: That seems to be correct.

19 MS. DES JARDINS: Can you pull up Exhibit  
20 DDJ-320, which is the map for Longfin Smelt.

21 (Pause in proceedings.)

22 MS. DES JARDINS: That is on the memory stick  
23 I gave you.

24 (Exhibit displayed on screen.)

25 MS. DES JARDINS: And, Dr. Grimaldo, this

1 shows --

2 Let's scroll out a little.

3 (Scrolling out.)

4 MS. DES JARDINS: So, does this show catch per  
5 unit effort and salinity gradient in the San Francisco  
6 Estuary?

7 WITNESS GRIMALDO: Yes. That shows Juvenile  
8 Longfin Smelt catch per unit effort.

9 MS. DES JARDINS: And doesn't it show that  
10 most of the Longfin Smelt are in salinities that are  
11 below 30 psu?

12 MR. MIZELL: So I'm going to object to the  
13 characterization of the evidence globally. The chart  
14 does read 1980, so if we can characterize it as a  
15 single year's chart.

16 CO-HEARING OFFICER DODUC: So noted.

17 MS. DES JARDINS: This goes from 1980 through  
18 2012. I'm going to ask for a couple selected ones,  
19 years.

20 WITNESS GRIMALDO: So, I think it would be  
21 highly informative to scroll through the different maps  
22 and reference my testimony that I say that Longfin  
23 Smelt have, at this -- at this life stage, have low  
24 dependence on low-salinity habitat, because I -- The  
25 way that I interpret those maps, if you see them in the

1 orange and the yellow, that's in psu's, you know, from  
2 12 to 20 for this year.

3 But you have to scroll through all the years  
4 to get --

5 MS. DES JARDINS: Let's --

6 WITNESS GRIMALDO: -- a great understanding of  
7 the point I was making in my testimony.

8 MS. DES JARDINS: Let's go ahead and scroll  
9 through the next few, please.

10 (Scrolling through document.)

11 MS. DES JARDINS: There's another one, 1981.  
12 Let's go to --

13 WITNESS GRIMALDO: If we could pause for a  
14 second.

15 So, I just want to highlight here once again.

16 We're going from green, that greenish blue, so  
17 we're already going over 6 psu, which has been defined  
18 as low-salinity habitat for Delta Smelt.

19 We don't have a definition of low-salinity  
20 habitat for Juvenile Longfin. I'm not aware of one.

21 But, in my opinion, just -- just my  
22 interpretation of the map, I see a higher proportion of  
23 Longfin in -- in salinities greater than 5 or 6 there  
24 than I do in the freshwater for -- for this year.

25 MS. DES JARDINS: Well --



1 WITNESS GRIMALDO: Please scroll down.

2 MS. DES JARDINS: Excuse me.

3 But isn't there a definition -- There's  
4 brackish water habitat, which would be, for example, in  
5 Suisun Bay, in -- in this graph, and it's, you know,  
6 like, 5 to 8 psu. And they are in there.

7 But isn't 30 psu right there at the very edge  
8 of their distribution.

9 WITNESS GRIMALDO: If I can back to my  
10 testimony for a second.

11 I believe I said they were found up to 30 psu.

12 (Exhibit displayed on screen.)

13 CO-HEARING OFFICER DODUC: Yes. In late  
14 spring and early summer.

15 WITNESS GRIMALDO: I don't even see the line  
16 anymore.

17 Page 12.

18 CO-HEARING OFFICER DODUC: Page 12, Line 8.

19 WITNESS GRIMALDO: So, it's noteworthy to  
20 point out that Juvenile Longfin Smelt are able to  
21 tolerate salinities up to 30 psu, and you would -- you  
22 could interpret that from some of these maps.

23 So this is pretty amazing. This is some of  
24 the new information that I was discussing before,  
25 because I don't think there was a recognition that

1 Juvenile Longfin Smelt were able to be in salinities  
2 greater than 6 psu, yet alone all the way up to 30 psu  
3 as these maps indicate.

4 CO-HEARING OFFICER DODUC: And while you're  
5 there -- I'm sorry -- your reference to Exhibit  
6 DWR-1322, should that be Exhibit DWR-1322-Errata?

7 WITNESS GRIMALDO: That's correct.

8 CO-HEARING OFFICER DODUC: Correct, that it  
9 should be --

10 WITNESS GRIMALDO: 1322-Errata, right, which  
11 provides the link to the -- to the Longfin Smelt maps  
12 on Table 32 of that paper.

13 MS. DES JARDINS: So, it says -- When you  
14 say, "This study suggests that Juvenile Longfin Smelt  
15 are not obligated to rear in low-salinity habitat," how  
16 do you define "low-salinity habitat"?

17 WITNESS GRIMALDO: As I mentioned before, we  
18 don't have an official definition for Delta -- for  
19 Longfin Smelt. It's been mostly applied to Delta  
20 Smelt.

21 I didn't define it here but, for the sake of  
22 being consistent with Delta Smelt, I would say 5 or  
23 6 psu would be consistent. And that might be  
24 consistent with other papers that published work on  
25 Longfin Smelt, but there has not been a true definition

1 about what that is exactly.

2 MS. DES JARDINS: Isn't it understood that  
3 Longfin Smelt rear in brackish water habitat?

4 WITNESS GRIMALDO: What life stage are you  
5 talking about? Because it's not understood. That's  
6 part of my testimony.

7 (Pause in proceedings.)

8 MS. DES JARDINS: These were -- Let -- Let's  
9 go back to Exhibit DDJ-320, please.

10 (Exhibit displayed on screen.)

11 MS. DES JARDINS: Yeah, that's it.

12 So, does brackish water habitat -- Let's --  
13 Let's go down to -- through a few more of these.

14 But brackish water habitat is . . . down to  
15 about the -- the blue-green, it looks like there, up to  
16 about 14 that they primarily rear in. I mean, it shows  
17 them using both fresh and brackish.

18 We could scroll through a few more years if  
19 you'd like, where the . . .

20 (Scrolling through document.)

21 MS. DES JARDINS: Yeah.

22 So, in . . . Isn't -- Isn't this -- And isn't  
23 it a case that the -- the -- that brackish salinity  
24 zone expands in -- into San Pablo Bay in -- in very wet  
25 years, as is shown on this graph?

1 WITNESS GRIMALDO: Your question is: Does the  
2 brackish zone extend into San Pablo Bay --

3 MS. DES JARDINS: San Pablo Bay during wet.

4 WITNESS GRIMALDO: -- during wet years?

5 MS. DES JARDINS: Yeah.

6 WITNESS GRIMALDO: Yes. That's consistent  
7 with my understanding of how outflow, not only from the  
8 Delta but from other -- other -- other tributaries  
9 along the Bay, influences the salinity zone in  
10 San Pablo Bay.

11 MS. DES JARDINS: So let's -- I'd like to go  
12 back to your testimony, Page 8 at 19.

13 (Exhibit displayed on screen.)

14 MS. DES JARDINS: 19, you say (reading):

15 ". . . Analysis of CDFW Smelt Larval  
16 Survey Data shows that over 50 percent  
17 of . . . larvae are found in Suisun Bay."

18 But isn't -- I mean, isn't the San Pablo Bay  
19 also important and -- and the brackish water habitat in  
20 both estuaries?

21 WITNESS GRIMALDO: So, I think there's some  
22 confusion on the life stages.

23 So the maps, just to be clear, that we were  
24 showing were for the juvenile life stages --

25 MS. DES JARDINS: And this is for larval.

1 WITNESS GRIMALDO: -- and for larval.

2 And I think the important point here is, yes,  
3 as I provide in the figure, if you go to it, and I show  
4 this, Figure 4 on Page 10 of my testimony --

5 (Exhibit displayed on screen.)

6 WITNESS GRIMALDO: -- provides some of the  
7 exciting new work that we're -- we're working on.

8 So, it's hard to see there, but the green --  
9 the green dots show Larval Longfin in 2017, and the red  
10 dots show Larval Longfin in 2016.

11 And I should note that Larval Longfin haven't  
12 been sampled in this rigorous way in the monitoring  
13 programs in shallow water.

14 So what we're showing is that Longfin are  
15 rearing in San Pablo Bay in much higher abundances than  
16 previous recognized.

17 There's two exhibits that say that Larval  
18 Longfin Smelt are spawning and rearing in fresh water.  
19 So this is exciting in the work, is that we're showing,  
20 no, they're not just spawning and living in fresh water  
21 at this life stage.

22 MS. DES JARDINS: Going back to Exhibit  
23 DDJ-320. It's now 1982.

24 (Exhibit displayed on screen.)

25 MS. DES JARDINS: Let's -- Let's -- Scroll

1 forward to, for example, 2006.

2 WITNESS GRIMALDO: So to be clear, this is for  
3 the juvenile life stage.

4 MS. DES JARDINS: Yeah. But, like, isn't  
5 it -- I mean, 2006 was another record wet year. And  
6 isn't it the case that it's not necessarily that new  
7 that Longfin Smelt use San Pablo Bay in record wet  
8 years like 2006 and 2017?

9 WITNESS GRIMALDO: So, Longfin Smelt are not  
10 just using -- if you look at the map there, and it's  
11 not just wet years. They're using South Bay, Central  
12 Bay. They use the whole estuary. In fact, I don't  
13 think you can see the bottom there, but they're even in  
14 Coyote Creek in some years.

15 To be clear, on these maps, the Department of  
16 Fish and Wildlife stopped measuring Juvenile Longfin  
17 less than 40 millimeters, I believe, in the 1990s. So,  
18 it's not showing the full number of the Juvenile  
19 Longfin as -- as they did in the earlier '90s maps.

20 MS. DES JARDINS: But, again, let's -- Let's  
21 go -- Scroll up to, for example, 2014.

22 Oh, I don't know if we have 2014.

23 How about 2009? That was a drought year.

24 (Exhibit displayed on screen.)

25 MS. DES JARDINS: So, isn't it true, for

1 example, in this drought year, there's significantly  
2 fewer Longfin Smelt caught? It shows there -- You  
3 know, there's fewer and -- and the -- the Bay is much  
4 more -- much more saline.

5 WITNESS GRIMALDO: So, once again, this  
6 illuminates something very interesting that I was  
7 saying in my testimony, that there's Longfin occurring  
8 up to 30 psu.

9 They don't appear to -- My interpretation is,  
10 they're not dependent on low-salinity habitat at this  
11 life stage; that a question about less fish during  
12 drier years, that's provided in several testimonies and  
13 papers, that there is a relationship with the recruits  
14 and their abundance during the fall . . . from --  
15 from -- Well, I'll just leave it at that.

16 MS. DES JARDINS: Okay. Can we go to Page 10  
17 at 25, of your testimony. DWR-1222.

18 (Exhibit displayed on screen.)

19 CO-HEARING OFFICER DODUC: And just a time  
20 check, Miss Des Jardins.

21 We need to adjourn in less than 10 minutes.

22 MS. DES JARDINS: I'm almost done.

23 So, the --

24 I can finish up within the 10 minutes.

25 So you state (reading):

1           ". . . New findings suggest that Longfin  
2           Smelt rely on flow from local  
3           tributaries . . ."

4           Are you aware that the flow from those  
5           tributaries as a percentage of contribution to  
6           San Pablo Bay is much smaller than the flow from the  
7           Sacramento River?

8           WITNESS GRIMALDO: I'm not aware of the exact  
9           magnitude relative to Delta outflow, so I don't know  
10          that number.

11          But I would presume, because their smaller  
12          channel capacity in volume, that they would contribute  
13          less, which is interesting because I'm not showing data  
14          from the Napa River. For permit reasons, I couldn't  
15          sample the Napa River.

16          In 2017, high densities of Larval Longfin in  
17          the Napa -- As you can see there on the top left of the  
18          graph, high densities of Larval Longfin in Petaluma  
19          River.

20          So, although these rivers may be small in  
21          volume, they may be very important for rearing --  
22          spawning and rearing habitat as the data shows.

23          MS. DES JARDINS: But, Dr. Grimaldo, isn't it  
24          still an open question of whether the -- the larva that  
25          are found in those tributaries live to survive?



1 (Pause in proceedings.)

2 WITNESS GRIMALDO: I would say it's an open  
3 question on the -- the percentage of larvae that  
4 survive from anywhere in the estuary, their origin.

5 We have an idea of the salinity that they  
6 survive at, but that doesn't give us a geographic  
7 region just yet.

8 And I am involved peripherally with some  
9 research where I know that that investigation is going  
10 on.

11 MS. DES JARDINS: Isn't . . . If -- You  
12 know . . . aren't -- isn't there, you know, a question  
13 of Otolith research and that question -- and the  
14 question of whether the larvae that are living in those  
15 rivers are surviving and spawn as a subject of active  
16 research?

17 WITNESS GRIMALDO: So -- So, yes, there is  
18 Otolith research going on and providing samples for  
19 folks to the researches at U.S. Davis to do those  
20 analyses to determine that -- the natal origin of the  
21 survivors.

22 But there's an outstanding question on the  
23 survivors from all regions of the estuary, just to be  
24 clear.

25 MS. DES JARDINS: Okay. And then, finally,

1 I'd like to go to Page 14, at Line 3.

2 (Exhibit displayed on screen.)

3 MS. DES JARDINS: And you state (reading):

4 "Mr. Baxter also testified that  
5 Starry Flounder cue in on freshwater to  
6 move into upstream habitats."

7 But you say in your (reading):

8 ". . . Review of the peer-review  
9 literature" you "cannot find any evidence  
10 that Starry Flounder are using cues to  
11 move into freshwater habitats."

12 WITNESS GRIMALDO: That's correct.

13 MS. DES JARDINS: Can we bring up Exhibit  
14 DDJ-321, please.

15 (Exhibit displayed on screen.)

16 MS. DES JARDINS: And this is from that same  
17 study. It shows distribution and salinity.

18 And doesn't this show Starry Flounder in  
19 low-salinity habitats?

20 WITNESS GRIMALDO: This shows Starry Flounder  
21 in very high salinity, brackish salinity, and  
22 low-salinity habitats. And it -- You can draw no  
23 inference about how those fish got there in terms of  
24 use, based on my opinion.

25 MS. DES JARDINS: Okay. And -- And so -- So,

1 you know that -- But you do know that they're using the  
2 low -- Starry Flounder are using the low-salinity  
3 habitat. You just don't know how they got there?

4 WITNESS GRIMALDO: It is my testimony that  
5 Starry Flounder are using two-layer gravitational  
6 circulation to enter the estuary. That's the primary  
7 mechanism. And that's consistent with what Mr. Baxter  
8 testified to as well.

9 MS. DES JARDINS: Isn't gravitational  
10 circulation also tied to abundance of phytoplankton in  
11 the North Bay?

12 WITNESS GRIMALDO: I'm not aware of that  
13 dynamic.

14 (Pause in proceedings.)

15 MS. DES JARDINS: Can we bring up Exhibit  
16 DDJ-323, please.

17 (Exhibit displayed on screen.)

18 MS. DES JARDINS: Are you aware of studies  
19 done by Jim Cloern of phytoplankton production and  
20 gravitational circulation?

21 WITNESS GRIMALDO: If your question is general  
22 studies that he's published on phytoplankton  
23 production, I'm aware of some basic studies that  
24 he's -- a few studies that he's published.

25 MS. DES JARDINS: This isn't one study.

1           But if we can scroll down to where it says  
2 "Abstract."

3           (Exhibit displayed on screen.)

4           MS. DES JARDINS: It says there (reading):

5                   "Phytoplankton populations in the  
6           northern reach of San Francisco Bay  
7           apparently are most strongly regulated by  
8           the physical accumulation of suspended  
9           particulates by gravitational  
10          circulation . . ."

11          Do you see that?

12          WITNESS GRIMALDO: I -- I see that on the  
13 screen.

14          MS. DES JARDINS: So -- So wouldn't  
15 phytoplankton then be associated with gravitational  
16 circulation?

17          WITNESS GRIMALDO: I agree that that is what  
18 this paper concluded. I'm not familiar with this  
19 paper.

20          MS. DES JARDINS: So, you're not familiar  
21 with -- with James Cloern's work tying gravitational  
22 circulation to phytoplankton production?

23          WITNESS GRIMALDO: I am not familiar with this  
24 paper.

25          MS. DES JARDINS: Okay. Okay. Thank you.

1           That concludes my test -- my questions --  
2 cross-examination.

3           CO-HEARING OFFICER DODUC: Thank you,  
4 Miss Des Jardins.

5           Dr. Grimaldo, assuming that there's no  
6 redirect.

7           MR. MIZELL: That is correct, no redirect.

8           CO-HEARING OFFICER DODUC: Thank you for your  
9 testimony.

10          I do have a request of you.

11          We spent quite a bit of time discussing  
12 Page 4, Line 6 through 8, and you did read into the  
13 record your correction of your description of  
14 Mr. Baxter's testimony, and then reframed the  
15 discussion about salvage and how it linked to  
16 Mr. Bakter -- Baxter's testimony.

17          I believe your counsel has access to the rough  
18 transcript. I'm requesting that you submit an errata  
19 that reflects the correction that we discussed today in  
20 the record just so everyone has the corrected version.

21          WITNESS GRIMALDO: Yes, I will. Thank you.

22          CO-HEARING OFFICER DODUC: And you might as  
23 well correct the DWR-1322-Errata reference as well.

24          WITNESS GRIMALDO: Great. I'll do that, too.

25          CO-HEARING OFFICER DODUC: Thank you.

1 Appreciate that.

2 Mr. Mizell, do you have an estimate of  
3 cross-examination for Group 7's two witnesses?

4 MR. MIZELL: I do.

5 My estimate for DWR will be approximately 10  
6 minutes.

7 CO-HEARING OFFICER DODUC: Any other?

8 The only e-mail we've received is from  
9 Grassland with an estimate of 15 minutes.

10 MS. MORRIS: I estimate -- Stefanie Morris,  
11 State Water Contractors -- no more than 10 minutes.

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

13 MS. MORRIS: No more than 10 minutes.

14 CO-HEARING OFFICER DODUC: 10 minutes.

15 Anyone else?

16 MS. DES JARDINS: Dierdre Des Jardins, and I  
17 apologize. I was working on my cross-examination  
18 questions over lunch.

19 I would like to reserve 45 minutes.

20 CO-HEARING OFFICER DODUC: 45 minutes.

21 All right. So, assuming there's no redirect,  
22 we will get to Grasslands Water District Mr. Ortega's  
23 witness. Hopefully, Grassland is watching.

24 What is your estimate for cross-examination of  
25 Mr. Ortega?

1 MR. MIZELL: DWR requests 20 minutes, please.

2 CO-HEARING OFFICER DODUC: Any other?

3 MS. MORRIS: I estimate about 10 minutes.

4 CO-HEARING OFFICER DODUC: That means we will  
5 also get to North Delta Water Agency.

6 Cross-examination estimates?

7 MR. MIZELL: DWR would request 45 minutes,  
8 please.

9 MS. MORRIS: At this time, about 20 minutes  
10 for State Water Contractors.

11 CO-HEARING OFFICER DODUC: That means it is  
12 possible we will also get to San Joaquin Tributary  
13 Authority, Mr. Demko.

14 Cross?

15 MR. MIZELL: I'm -- DWR might reserve five  
16 minutes, but I don't believe we'll have much in the way  
17 of cross.

18 CO-HEARING OFFICER DODUC: All right.

19 MS. MORRIS: I think no more than 10 minutes.

20 I -- Can I ask a clarifying question? Maybe I  
21 missed it, quite possible.

22 Was there ever a ruling based on -- There was  
23 a ruling and then Mr. O'Laughlin sent a letter, and  
24 then I thought the Board was going to be making an  
25 additional ruling on Demko's testimony.

1 CO-HEARING OFFICER DODUC: I thought we had  
2 addressed everything dealing with the San Joaquin  
3 Tributary Authority.

4 MR. DEERINGER: I would suggest that we  
5 address that tomorrow morning.

6 I -- My understanding was that you had  
7 addressed it all, but there may be additional things  
8 that need to be buttoned up.

9 MS. MORRIS: Okay.

10 CO-HEARING OFFICER DODUC: Miss Des Jardins.

11 MS. DES JARDINS: I would like -- Excuse me.

12 I'd like to reserve 20 minutes both for  
13 Grasslands and for -- and I apologize for not getting  
14 up, a little tired at the end of the day -- and for  
15 San Joaquin Tributaries -- Mr. Demko, San Joaquin  
16 Tributaries Authority.

17 CO-HEARING OFFICER DODUC: Okay. I don't  
18 think I'll push my luck to LAND tomorrow.

19 That should be the plan for tomorrow.

20 All right. With that, thank you, everyone.

21 Oh, Mr. Mizell.

22 MR. MIZELL: Yes.

23 With the correction -- With the errata version  
24 of the testimony for Dr. Grimaldo, would you wish us to  
25 also red line the limited corrections he made at the



1 beginning of his summary, or would you like us to leave  
2 those as originally submitted?

3 CO-HEARING OFFICER DODUC: Let's go ahead and  
4 make all the corrections.

5 MR. MIZELL: Thank you.

6 CO-HEARING OFFICER DODUC: Great.

7 All right. Thank you all. See you back here  
8 tomorrow at 9:30.

9 (Proceedings adjourned at 5:01 p.m.)

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1 State of California )  
2 County of Sacramento )

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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  
16 had and testimony taken;

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

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

21

22 Dated: August 25, 2018

23

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Candace L. Yount, CSR No. 2737

1 STATE OF CALIFORNIA )  
 ) ss.  
 2 COUNTY OF MARIN )

3 I, DEBORAH FUQUA, a Certified Shorthand  
 4 Reporter of the State of California, do hereby  
 5 certify that the foregoing proceedings (Pages 1  
 6 through 87) were reported by me, a disinterested  
 7 person, and thereafter transcribed under my  
 8 direction into typewriting and which typewriting is  
 9 a true and correct transcription of said  
 10 proceedings.

11 I further certify that I am not of counsel  
 12 or attorney for either or any of the parties in the  
 13 foregoing proceeding and caption named, nor in any  
 14 way interested in the outcome of the cause named in  
 15 said caption.

16 Dated the 27th day of August, 2018.

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DEBORAH FUQUA  
 CSR NO. 12948