

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
WATER RIGHT APPLICATIONS 30358A AND 30358B
FILED BY THE WOODLAND-DAVIS WATER AGENCY

JOE SERNA, JR., CALEPA BUILDING
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CERTIFIED SHORTHAND REPORTER
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APPEARANCES

BOARD MEMBERS

Mr. Charlie Hoppin, Chair
Ms. Frances Spivy-Weber, Vice Chair
Ms. Tam M. Doduc
Mr. Dwight P. Russell

STAFF

Mr. Thomas Howard
Mr. Jonathan Bishop, Chief Deputy
Ms. Caren Trgovcich, Chief Deputy
Mr. Michael A.M. Lauffer, Chief Counsel
Ms. Jane Farwell, Environmental Scientist
Ms. Kathleen Groody, Environmental Scientist
Mr. Nathan Jacobsen, Staff Counsel

ALSO PRESENT

Mr. John Herrick, South Delta Water Agency
Mr. Michael Jackson, California Sportfishing Protection Alliance
Mr. Bill Jennings
Mr. Alan Lilly, Woodland-Davis Clean Water Agency
Mr. Chris Shutes

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1 PROCEEDINGS

2 VICE CHAIRPERSON SPIVY-WEBER: This is a
3 continuation of the Board meeting that we started
4 yesterday. Everyone took the oath who is testifying for
5 this hearing, but it will be helpful if you state that
6 when you make your statements on the record.

7 We are now moving to the second -- to the case in
8 chief being presented by California Sportsfishing
9 Alliance.

10 I want to make sure you know who our staff is,
11 which is the same as yesterday. Larry Lindsay, Nathan
12 Jacobsen, who is our attorney, Kathleen Groody, and Jane
13 Farwell. And I think that takes care of all the staff.

14 So, Michael, I will turn it over to you for
15 opening statement.

16 MR. JACKSON: Thank you very much.

17 CSPA filed a protest for this application in
18 1994. We did it based upon two grounds: The
19 over-appropriation of the Sacramento River and the delta
20 watershed and the condition in 1994 of the fisheries as
21 they have been revealed in a series of hearings that took
22 place before the State Water Board in the years 1991 and
23 1992. It resulted in a draft order 1630 which was later
24 not finalized.

25 But the information that was available in those

1 days was much like the information that you recently
2 reviewed when the Legislature gave you the duty of
3 responding to them about what kind of water flow would be
4 necessary in order to recover the delta. The results of
5 that flow decision were relatively consistent with what
6 people knew in 1991 and 1992 reflected in the draft
7 decision 1630.

8 The testimony didn't change between then and now.
9 What changed was that we went from millions of salmon to,
10 at the time of the review that you did, a situation in
11 which there were well under 100,000 salmon of all races.
12 And it was clear that folks couldn't have a commercial
13 fishery and that our sports fishermen were not going to be
14 allowed to fish, even though there is a constitutional
15 right in the California Constitution giving us the right
16 to fish. It was pretty clear that there were just too
17 many problems with the fishery to continue business as
18 usual.

19 The question of how that relates to new water
20 rights has been important in California, as you will find
21 from Mr. Jennings' testimony, since approximately 1934.
22 When they were beginning to build the projects, it was --
23 as an example, there were letters between the Department
24 of Interior and the Water Project Authority of California
25 that a judicial determination of existing water rights on

1 the Sacramento and San Joaquin Rivers is necessary in
2 order to operate the Central Valley Project efficiently
3 and successfully. And such determination should be
4 effected before the project is placed in operation. That
5 was never done.

6 In 1942, Henry Holsinger, who was a well-known
7 water rights attorney, and later became Chairperson of
8 this Board's predecessor, indicated that it is -- it has
9 in fact long been widely recognized that full adjustments
10 of water rights should proceed not only project operation
11 but also project construction. It was not done in the
12 40s.

13 In the 50s, it was relatively clear in the
14 discussions about Burns border and in the discussions
15 about the Central Valley Project Congressman Clair Ingle,
16 "We felt in state government" -- excuse me -- Governor
17 Earl Warren -- "We have felt in state government for many
18 years there should be a complete adjudication of the water
19 rights on the Sacramento River, and we believe that it
20 should be done before the Central Valley Project was
21 completed and in operation."

22 I'm pointing this out, because this is not a new
23 problem. This is a problem that, however, has a much
24 greater weight today than it did at any time that folks
25 were talking about it. We have a situation in which the

1 fisheries are in substantial decline. And our position is
2 that at some point -- and that point ought to be before
3 granting this right -- the State Board ought to analyze
4 whether or not there is water available for appropriation.
5 Continuing to give out water rights and have people build
6 expectations and build into their bonding and financial
7 systems the idea that they're going to have a certain
8 water supply in the face of what we think you know and
9 what we're going to try to tell you again today is
10 damaging to everyone.

11 Davis and Woodland are not going to build this
12 project until 2016. By 2016, you will -- on your present
13 schedule, you will have determined what the flow is going
14 to be, who is going to donate it to recover the fishery,
15 how the priority system is going to work in that regard.
16 And we will have some answers as to whether or not there
17 is water available in conditions that we know are
18 happening today and you are going to try to come to grips
19 within the near future.

20 Davis and Woodland have a water supply. They can
21 clean that water supply. That water supply -- present
22 water supply does not affect fisheries, nor does it change
23 priorities or the balance that you are to do in regard to
24 public trust in regard to the Sacramento River and the
25 delta.

1 It is simply a matter of cost. Everyone who is
2 on groundwater could shift to surface water. It would be
3 less possibly because you don't have to purchase the
4 surface water. There's a pumping cost. But basically,
5 the water is much cleaner and it makes it much easier to
6 meet the standards.

7 So what we're going to try to do today is to show
8 you in the testimony that there is likely not water
9 available for appropriation during these time periods and
10 that you would be much better off in terms of -- by
11 delaying the approval of this application until you know
12 what the system is going to be. Thank you.

13 VICE CHAIRPERSON SPIVY-WEBER: I assume you'll
14 move directly into your panel.

15 MR. JACKSON: Yes.

16 DIRECT EXAMINATION

17 MR. JACKSON: Mr. Jennings, have you been
18 previously sworn?

19 MR. JENNINGS: Yes, I have.

20 MR. JACKSON: Have you presented testimony in
21 writing for this hearing?

22 MR. JENNINGS: I did.

23 MR. JACKSON: Mr. Shutes, have you been
24 previously sworn?

25 MR. SHUTES: I have.

1 MR. JACKSON: Have you prepared testimony for
2 this hearing?

3 MR. SHUTES: I have.

4 BY MR. JACKSON:

5 Q Mr. Jennings, would you summarize your testimony,
6 please, for the Board?

7 A Yes. Briefly. The pelagic fisheries in the Central
8 Valley are in serious decline. The causes are multiple,
9 including significant reduction in delta outflow and
10 inflow that result in the loss and degradation of habitat,
11 massive changes in the historical hydrograph, effects of
12 export operations, contaminants, invasive species, and
13 others.

14 Sacramento River inflows to the delta between
15 April and June over the last 18 to 22 years have been
16 about 50 percent on average compared to unimpaired
17 conditions. And delta outflows near the 86-05 period have
18 been reduced by some 48 percent compared to unimpaired
19 conditions.

20 And the State Board's recent delta flow report
21 found delta flows are insufficient to support native delta
22 fisheries and recommended substantially greater inflows
23 and outflows.

24 Clearly, the various iterations of water quality
25 control plans, the water rights decisions implementing

1 those plans, the terms and conditions and permits like
2 Term 91, and a string of biological opinions have
3 cumulatively failed to protect the public trust resources
4 of the Central Valley fisheries.

5 Any additional upstream diversion will
6 inescapably exacerbate to some degree already degraded
7 habitat in fisheries. The Sacramento River delta estuary
8 identified as impaired, incapable of supporting beneficial
9 uses because of numerous contaminants.

10 The many water quality impairments identified in
11 the recently adopted 303(d) list represent only the tip of
12 the iceberg, because a number of unidentified impairments
13 are caused by constituents for which there are no water
14 quality criteria. Water quality criteria have not been
15 developed for the majority of chemicals used in national
16 commerce and discharged to our waterways. Promulgating
17 criteria do not consider multiple stressors, additive or
18 synergistic affects, degradents or sublethal impacts.

19 Alterations of flow alter assimilative capacity
20 change the fate and transport of contaminants. For
21 example, upstream diversions increase the residence time
22 and concentrations of downstream pollutants. Any new
23 upstream diversion will exacerbate in some degree the
24 impacts of downstream pollutants and already degraded
25 water

1 Water in the Sacramento basin is seriously
2 over-appropriated. As Michael said, staff within the
3 Department of Interior, the old State Water Rights Board
4 in the 30s and 40s, and the Chair of the State Water
5 Rights Board, the Governor of California in the early 50s
6 who I'm certain sufficient water was available for the
7 Central Valley Project and believed that adjudication
8 should proceed project operation.

9 When the formal findings of the 1951 Engle
10 Congressional Committee investigated water availability in
11 the Central Valley including the finding that -- and I
12 quote -- "for all practical purposes, the developed water
13 supplies of the Sacramento River are overcommitted and
14 oversubscribed." And this was before approval of the
15 State Water Project.

16 Similar concerns were voiced during the 1960
17 Porter hearings during the State Water Project. And I
18 know the Department of Water Resources Bulletin 76 delta
19 water facilities in 1958 observed that after 1981
20 operation of the State Water Project would necessitate
21 importation of about five million acre feet from north
22 coast streams.

23 MR. JENNINGS: The State Water Board staff's 2008
24 letter to the Delta Vision Blue Ribbon Task Force
25 identified the mean annual unimpaired flow in the delta

1 watershed as 29 million acre feet. Staff observed that
2 the total value/face value of the approximately 6300
3 active water rights permits within the delta was about 345
4 million acre feet. Face value did not include pre-14 and
5 riparian rights. The total face value of the unassigned
6 portion of the State filing for consumptive use -- I
7 mention consumptive use -- is approximately 60 million
8 acre feet.

9 Staff acknowledged a number of reasons why face
10 value is greater than actual diversion, insufficient
11 supply, bass bypass conditions, nonconsumptive uses, those
12 were mentioned and discussed yesterday.

13 Conceptually, actual use might be a better metric
14 than face value. However, staff admitted that the State
15 Board has, and I quote, "limited information on actual
16 use" and "comprehensive review of the State Water Board's
17 paper filled would provide only a crude estimate of actual
18 historic and current use because of gaps in reporting and
19 the unreliability of the data already collected."

20 Notwithstanding, it remains a fact that the State
21 Water Board does not know how much water is actually being
22 used. The State Water Board does not know the extent of
23 senior riparian or pre-1914 water rights in the basin.
24 For example, CSPA holds senior riparian rights that it's
25 not used.

1 The State Board does not know the full extent of
2 consumptive water rights and permits that are not
3 presently being used but may be legally exercised in the
4 future. One example is the pending petitions for time
5 extensions of the Bureau of DWR that amount to about 19
6 million acre feet of consumptive rights. If the unused
7 portion of the consumptive water rights in the 1927 State
8 filings -- the unused portion of the consumptive water
9 rights in the 1927 State filings is more than twice the
10 average unimpaired flow in the entire delta watershed.
11 All of these rights are senior to the applications of
12 Davis and Woodland. David and Woodland could have applied
13 to the State Board for assignment for a portion of the
14 State filings, but they didn't.

15 Further compounding the problem is the likelihood
16 that basin runoff will be reduced in the future because of
17 global warming. And I reference the work of PG&E's chief
18 hydrologist Gary Freeman. The additional cold water
19 storage that will likely be necessary to meet temperature
20 requirements for dams. And I reference the comments by
21 numerous experts in the delta flow process, including Fish
22 and Wildlife and NMFS.

23 The additional amounts of water that will be
24 required to protect fisheries and public trust resources,
25 whatever that amount ultimately is, it is likely to be

1 substantial.

2 Now, since the State filing for consumptive
3 rights, the unknown or uncounted riparian pre-14 rights
4 and the unused portion of the already approved appropriate
5 rights, many of which may be used north of delta, are
6 greater than the total unimpaired flow in the basin, there
7 cannot be water available for additional diversion, even
8 without considering the effects of the global warming,
9 increased cold water storage, and additional flows.

10 The applicants base their entire assumption of
11 water availability on several CalSim-II model runs. Now,
12 CalSim-II is like a Latin's lamb. It gives what you wish
13 for. The State contractors in the delta in the aftermath
14 of the delta proceedings painted a dyer picture that
15 implementation of the flow criteria would end life as we
16 know it in the Central Valley. David and Woodland using
17 CalSim-II saying, even if you implemented those flow
18 recommendations, there would be water available. It can't
19 be both.

20 In my testimony, I noted that the peer review of
21 CalSim-II was highly critical and detailed numerous
22 inadequacies. The latest version has not been peer
23 reviewed. The UCD technical survey that was peer reviewed
24 and funded by the Cal Fed science program identified a
25 litany of serious deficiencies in the model. The State

1 Board staff can't run the model, therefore can't
2 independently verify the accuracy of assumptions or
3 output. The model ignores global warming. It fails to
4 account for senior riparian, pre-14, and appropriative
5 rights that exist or have been approved but have yet to be
6 exercised.

7 So in closing, I believe there is no remaining
8 water available for appropriation in the Central Valley.
9 Approval of the application could result in significant
10 adverse impacts to water quality, the environment, public
11 trust resources. Project impacts are substantial and
12 cannot be avoided or mitigated. And consequently, the
13 proposed projects are not in the public interest and would
14 suggest that the Board exercise caution in finding that
15 water is available in issuing new permits, because it
16 would be foolhardy to discard 150 years of law and legal
17 precedent.

18 That concludes my testimony.

19 MR. JACKSON: Mr. Shutes.

20 MR. SHUTES: The overarching issue presented by
21 these applications is whether water is available for
22 appropriation. This is inseparable from considering how
23 much water is available for diversion overall from the
24 Sacramento-San Joaquin system if sufficient water is
25 devoted to protecting, maintaining, and restoring the

1 public trust resources of the Sacramento and San Joaquin
2 River system.

3 The applicants that presented water availability
4 analyses that are based on existing constraints on that
5 system, they've gone to voluminous length to show that if
6 you accept the existing constraints, there is plenty of
7 water for the permits. As modeled by the applicants,
8 future conditions maintain those constraints. They've
9 attempted to address -- they have not attempted to address
10 the larger question of the adequacy of those constraints.
11 Their underlying assumption is thus; that existing
12 requirements or something close to them devote adequate
13 flow from protection of public trust resources in the
14 Sacramento-San Joaquin River system.

15 The State Board's delta flow criteria report says
16 otherwise, according to modeling done by MBK, the same
17 folks that did the modeling for Davis and Woodland. The
18 requirements of the delta flow criteria report means that
19 on average about 5.5 million acre feet of additional delta
20 outflow are needed to protect, maintain, and restore delta
21 fisheries over and above the current required amounts of
22 flow.

23 When CSPA says Sacramento-San Joaquin River is
24 over-appropriated, we mean in the first instance. What
25 the delta flow criteria report says, we're 5.5 million

1 acre feet a year short. The first law of holes is to stop
2 digging. If we're five-and-a-half million acre feet a
3 year short, where are we going to find 45,000 acre feet to
4 service the permits of Davis and Woodland? Yes, Davis and
5 Woodland might be able to scratch out a few thousand acre
6 feet during winter floods. Floods are the last refuge of
7 prospective diverters from a grossly over-appropriated
8 system. Montgomery Watson Harza's earlier analysis was
9 that Davis and Woodland don't need much water in those
10 months. That's CSPA, CS 10 exhibit number. It's about 20
11 percent of their overall need.

12 We've put together a rebuttal exhibit that shows
13 that according to the modeling done by Mr. Bourez, the
14 average annual diversion under delta flow criteria
15 standards that would be available to Davis and Woodland
16 would be about 2,356 acre feet a year to service these
17 permits.

18 Permit terms and area of origin statutes don't
19 make up for water quality there's not there. Term 91 is
20 part of the base line condition. It hasn't protected the
21 delta. The idea that the magnitude of delta flow
22 shortfall can be addressed on a permit by permit basis
23 according to Terms 80 and 90 is simply not credible. Even
24 if the storage were two million or three million acre
25 feet, to have hearings on each permit to go through

1 whether or not they ought to shorten them seasonally or in
2 any given season is just not a reasonable way to address
3 the magnitude of the problem. And area of origin
4 protections up until now have protected diversions. They
5 have not protected aquatic ecosystems. There is no
6 mechanism to reduce exports on a basis that is equivalent
7 to new in-basin diversions, let alone a mechanism to scale
8 back exports to grant in-basin priority for existing
9 diversions on a widespread scale.

10 The suggestion by the Assistant Deputy Director
11 of Water Rights in standard permit terms, an area of
12 origin protections will address our concerns with these
13 proposed permits simply kicks the can down the road.
14 We've already kicked the can down the road with Term 91 in
15 the early 80s and its subsequent broader application in
16 the late 80s and with permit Terms 80 and 90.

17 The delta flow criteria report said we need to
18 increase delta flow. You can't do that if you increase
19 diversions. MBK itself says and I quote, "Under existing
20 laws and regulations and given the recent hydrology of
21 1986 to 2005, a rough estimate of the combined annual
22 average consumptive use and exports is eight million acre
23 feet. The proposed delta flow criteria will cut this by
24 five-and-a-half million acre feet on an average annual
25 basis, a 69 percent reduction. This is very significant."

1 That's in our CSPA Exhibit CS 9. In other words,
2 the system is over-appropriated according to MBK if flows
3 needed to restore the delta according to the State Board
4 are implemented. The State Water Project and the Central
5 Valley Project have petitioned to extend time on their
6 permits. DWR alone has not used 1.3 million acre feet a
7 year in consumptive storage rights than it has in Oregon.
8 The CVP petitions are jumbled together, but we estimate
9 that there is about six million acre feet of storage
10 rights available to CVP in the Sacramento River basin,
11 including the American River. The maximum amount of
12 annual use of these rights has fallen short of the
13 permitted amounts. We don't know by how much because in
14 the petitions the CVP doesn't tell us.

15 The amounts of potential increased direct
16 diversion under these permits are much greater. And some
17 of these rights may well be used in basin, including for
18 delta flow requirements, which are considered to be
19 in-basin requirements, especially if more spring flow is
20 required. If more spring flow is required, then the time
21 periods in which Term 91 is in effect will be much
22 greater.

23 When we look at the water availability analysis
24 that was displayed yesterday -- and it's also in CSPA CS
25 Number 9, we see a very small number of months in which

1 Term 91 is in effect. But if you start increasing delta
2 flow and taking water out of the system and needing to
3 find that water, you're running out of water. And all of
4 a sudden, in order to meet any water demands at all, the
5 projects are going to have to start releasing stored
6 water. And low and behold, Term 91 will be in effect.

7 Effectively, what you saw yesterday from Mr.
8 Bourez in Exhibit 104 was that Term 91 is in effect almost
9 all year if the delta flow criteria report standards were
10 to be implemented as regulatory standards. There are
11 State filings whose value amounts to 60 million acre feet
12 a year. Many of these are county of origin filings.
13 There's over a million acre feet of these in the American
14 River watershed alone. El Dorado Water and Power
15 Authority recently filed application for partial
16 assignment of these filings that may directly compete for
17 water with junior diverters.

18 I presented in my testimony letters from a group
19 of upstream diverters in the watershed. They express
20 concern about BDCP and in general about concern their
21 water rights were going to be effected. And we're seeing
22 this happening all over the state. People are
23 significantly concerned that they're going to lose water.

24 Now, whatever Mr. Bourez's model might say, the
25 practical response on the part of dozens of water

1 purveyors has been to make sure that if someone loses
2 water, it's not going to be them. And, of course, there's
3 climate change, which has already reduced the amount of
4 water available in the Feather River by an average of
5 hundreds of thousands of acre feet a year.

6 All the water users in the state are in a scrum
7 to make the losers of water be someone else. If these
8 permits were to be granted, it would mean that there don't
9 need to be any losers among diverters who are senior to
10 Davis and Woodland. And the ultimate losers will be the
11 public trust resources and the Board itself, which will
12 have issued a delta flow criteria report that ends up
13 meaning nothing, nothing at all.

14 Before it considers granting any new permits, the
15 Board needs to show that there is water available for
16 appropriation if flows needed to restore the delta are
17 required, that senior existing diversions are sustainable,
18 and that new diversions will not injure senior diverters,
19 that senior diversions that have not been exercised yet
20 are also sustainable, that the Board can account for water
21 use throughout the San Joaquin and Sacramento River
22 systems, especially in the face of tightened operations of
23 that system that will come about with increased storage of
24 water, that the Board can grant these permits and still
25 defend the priority system, or else it has a legal and

1 workable modification of that system, and that the Board
2 has accounted for and has a plan to deal with county of
3 origin state filings.

4 That concludes my testimony. Thank you.

5 MR. JACKSON: That concludes our case in chief.
6 And at this point, I would offer our exhibits into
7 evidence.

8 VICE CHAIRPERSON SPIVY-WEBER: I'll take your
9 exhibits into evidence after we've completed all the
10 cross.

11 Tam has some questions now, so I'll have her go
12 and then Charlie does.

13 BOARD MEMBER DODUC: I'll direct the question at
14 Chris, but obviously I would welcome Mr. Jennings' input
15 as well.

16 Help me understand your concern. And this is
17 hypothetically should the Board at some future date after
18 the appropriate proceedings require the additional flows
19 that are required to protect beneficial uses and the
20 projects and all others that the Board indicate have
21 responsibility to release water to meet those objectives
22 do so, then Term 91 and other terms come in that would
23 prohibit the cities of Davis and Woodland and this project
24 from taking the service water because of their junior
25 rights and because of their agreement to Term 91

1 conditions, under that scenario, help me understand what
2 your concerns are.

3 So we have a situation where the Board requires
4 additional flows. Flows are being released to meet these
5 prior outflows and inflow objectives. Term 91 kicks in.
6 Davis and Woodland do not take the surface water, use
7 their alternatives supplies. So what is your concern
8 under that scenario?

9 MR. SHUTES: The concern is that once you
10 actually start looking at significant amounts of increased
11 delta outflow, the time periods in which Term 91 are going
12 to be in effect will effectively be always, except when
13 there is a huge amount of water in the system.

14 BOARD MEMBER DODUC: And, therefore, they will
15 not be diverting surface water when Term 91 kicks in. If
16 it kicks in all the time, they will not be diverting at
17 all.

18 MR. SHUTES: Okay. So then you need to ask
19 yourselves, is it in the public interest if there is only
20 a couple thousand acre feet a year actually available to
21 these folks for their permits. And these folks are going
22 to build all this infrastructure in order to make use of
23 those permits and in order -- they're going to make
24 decisions about their infrastructure, their wastewater
25 infrastructure based on the presumed availability of those

1 permits -- of water under those permits. And they end up
2 spending, according to what I heard yesterday, something
3 on the order of half a billion dollars.

4 And in effect, there's no water available to
5 service those permits most of the time. I would maintain
6 that there is not enough water to service the permits in
7 the first instance and the permit should not be granted.

8 In the letter from Delta Vision that was
9 referenced, it says if water is available in half the
10 years for agricultural purposes, then the Board may
11 consider granting a permit. Now, this is not for
12 agricultural purposes. This is for domestic use. And you
13 are asking these folks to spend a whole lot of money, a
14 whole lot of money and effort in order to build permits
15 they won't have.

16 What happens in reality when all of a sudden it's
17 found out that Term 91 is in effect all the time? Well,
18 what we've seen is that once people have the right, they
19 consider that basically almost a property right. I mean,
20 it's their water, especially if they've gone to huge
21 expense in order to make use of that water. And then it
22 comes back to you all to enforce stuff. And you haven't
23 always had a great record on that.

24 And moreover, it gets to the press and to public
25 debate. And you have debates over, well, this is our

1 water. And people -- you may understand and I might
2 understand that these rights are conditional. But what
3 happens in the real world, a lot of people don't
4 understand that. And then it becomes a political battle
5 over something that shouldn't have been done in the first
6 place.

7 MR. JENNINGS: If I could address that. We're
8 talking about municipal and industrial supply. They've
9 already indicated that they're going to be shutting some
10 wells down. I mean, they're not going to depend upon this
11 source of water in the integral. If they don't get it,
12 what are you going to do? They're going to make plans for
13 new subdivisions and possible future growth based upon
14 water that may not, in fact, be in existence. This is --
15 you're not going to take water away from babies once it's
16 approved.

17 And you have an obligation to make sure that
18 water is available before you grant a water right that
19 someone is going to issue bonds on, collect revenue on,
20 and go down a path. You know, you can't just have that as
21 a water that may or may not be available in the future.
22 You have to be pretty certain that it is available.

23 BOARD MEMBER DODUC: Well, Mr. Lilly, I hope
24 you're taking notes. I hope that in rebuttal we'll hear
25 from your witnesses with respect to the city's

1 understanding of the risk that they're taking.

2 Obviously, Chris, you said that the Board is
3 asking or requesting that the cities make these
4 investments and, in fact, we're not making that request.
5 They are. And I would assume that when they are making
6 that request they understand the risk that they are taking
7 and therefore that's why they are pursuing alternative
8 sources. But I will wait to hear from Mr. Lilly's
9 rebuttal on that matter.

10 I think that wraps up my question.

11 VICE CHAIRPERSON SPIVY-WEBER: Charlie has a
12 question and then Dwight has a question.

13 CHAIRPERSON HOPPIN: Actually, I have six
14 questions.

15 Bill, rather than to read them all off and say
16 what do you think, I know you have a computer for a mind,
17 but I think it's probably in the interest of what we're
18 doing here it's better if I go over them one at a time and
19 let you respond to them. If you want to pass it off to
20 Chris, that's fine.

21 You have articulated today your concerns about
22 the fishery, the health of the fishery, and I don't think
23 anybody's sitting here shaking their head saying, Bill,
24 you're putting something funny in your pipe. I think we
25 all realize those issues are very true.

1 But when I look at what's before us, which as Tam
2 said, had been brought to us, it's not that we're
3 requiring them to do something. I see some advantages to
4 you and the things that you rightfully support. And I
5 would like you to comment on those. If you disagree with
6 me, I know you're not going to be bashful, and I'm not
7 going to take offense. I'm going to give you my opinion.

8 First of all, what is being proposed here will
9 reduce TDS and other components in two POTWs, which are
10 currently not in compliance. If the information we're
11 getting is correct and it seems reasonable so there is a
12 good expectation that both the discharge facilities of
13 Woodland and Davis when the plan is implemented would be
14 in compliance with their NPDES permit. So I would see
15 that certainly as an advantage to you and to water that
16 ultimately is going to be discharged; is that correct?

17 MR. JENNINGS: Well, you know that I've been
18 particularly concerned about the parts of waste discharge
19 permits issued throughout the Central Valley. And I think
20 I have 50 appeals pending before this Board right now.

21 CHAIRPERSON HOPPIN: It's 52.

22 MR. JENNINGS: And I agree. But at the end,
23 you're essentially blending water and removing water from
24 the ecosystem to blend it and to return. And you get a
25 benefit there. You know, but every --

1 CHAIRPERSON HOPPIN: You have a whole bunch of
2 these. I'm not saying it with fire in my eyes. I'm just
3 asking --

4 MR. JENNINGS: I understand. Is using scarce
5 water to dilute waste a beneficial use of water? That's
6 one question.

7 Second: Are there alternatives? I mean, you
8 know, POTWs all over the state are electing to go to
9 ground rather than discharge surface waters. And you have
10 a huge area, Conaway Ranch, right next door that they
11 could have blended a little bit and discharged surface
12 waters, and they wouldn't have to discharge to the
13 Sacramento River. They could have worked out an exchange
14 agreement with Conaway where they could apply their
15 wastewaters to irrigate crops, perhaps dilute it a bit so
16 you don't get into a salt problem, although the salt
17 coming out of the effluent is not all that much higher
18 than what south delta farmers have to irrigate with.

19 But the question is -- and that's what I'm
20 saying. Why -- I can't conceive of why they didn't
21 embrace a conjunctive use program with the neighboring
22 ranches to utilize their Sacramento water to augment or to
23 dilute the problems in their drinking water. Although I
24 must note, in all fairness, Charlie, the wells they closed
25 with the high nitrate levels are all in the urban service

1 area and are all getting worse. We have the issue of
2 failing to protect groundwater in these urban areas, which
3 is the cause of them having to look for additional sources
4 because they don't want to treat it.

5 But I do see that. Clearly, reducing 20 tons a
6 day of salt out of the Sacramento River is desirable. To
7 use -- to remove water from the Sacramento in order to do
8 that when there are other options available is not as
9 good.

10 CHAIRPERSON HOPPIN: Let's talk about number two,
11 the second option, assuming these communities are not
12 going to go away. And I don't see you as one of those
13 people that your agenda is just to get cities and towns to
14 go away. I think you're sincere about what you're
15 concerned about with the environment. And I would
16 acknowledge that.

17 But assuming these communities are not going to
18 go away, it's been stated in the common sense falls into
19 the fact that if we deny this permit, they will go to RO.
20 That I think in response to Mr. Jackson's question was the
21 next alternative. It was certainly more expensive. So if
22 they go to RO, where would you like them to put the brine
23 line? If they do that, when you come in for that hearing,
24 where is going to be the brine line discharge of choice
25 for CSPA?

1 MR. JENNINGS: I don't know if it's either/or.

2 First addressing the brine line. Maybe we're
3 looking at another Class 1 landfill and the proper
4 disposal of waste that don't necessarily have to dump it
5 back into the waters.

6 But that's assuming that they have no alternative
7 but to go to RO. And I'm saying -- and yesterday, they
8 were very open about their ability to purchase water. I
9 mean, this water right application is only to get free
10 water. I mean, they have demonstrated the ability to
11 purchase water. Or if they believe they can that will be
12 necessary for the operation of this project. I don't know
13 why they only arrange to purchase 10,000 acre feet of
14 water for Conaway. As the newspapers say, they're going
15 to ship 80,000 to Los Angeles. I mean, so I don't know.
16 I mean, I think there are other options that have not been
17 explored and not been discussed. And we couldn't because
18 the whole deal with Conaway came up after the close of
19 this hearing. But I'm saying I think there are other
20 options.

21 Now, frankly, Charlie, I think we're about --
22 with respect to RO where we were with secondary to
23 tertiary treatment a few years ago, frankly, I suspect
24 that the next iteration or the iteration after this we're
25 going to be requiring a number of treatment plants to go

1 to RO simply because as the mass load of contaminants
2 increases, as we're beginning to address the
3 pharmaceuticals and the whole range, the chemical
4 universe, endocrine disrupters, it's not going to surprise
5 me to see RO become the standard or advanced treatment
6 become the standard for POTWs. But I admit that it's
7 costly. But I don't think this project adequately looked
8 and examined the potential alternatives of working in
9 conjunctive use with Conaway and other areas.

10 CHAIRPERSON HOPPIN: You mentioned the fact that
11 one of their alternatives could have been to have
12 purchased more water outright. I think it was pretty well
13 acknowledged that because of Term 91 and their senior
14 water right, there would be times they would need to do
15 that.

16 I guess the way I -- if I try to put myself in
17 your shoes, which I do more often than I think you
18 believe, but --

19 MR. JENNINGS: Have I ever criticized you?

20 CHAIRPERSON HOPPIN: No. You've been pretty
21 fair.

22 But I would look at it like this, Bill. Whether
23 you, in principle, like water transfers or not, assuming
24 like these communities are going to be here, the water
25 transfers are a viable tool in managing our water

1 resources in the state of California. I guess the way I
2 would look at that is additional surface water that would
3 be purchased would be purchased within the basin of
4 origin. And it would be used within the basin of origin.
5 And quite frankly, it would preclude that quantity of
6 water quite potentially from being transferred south of
7 the delta through the pumps which we've talked about at
8 length; is that not correct?

9 MR. JENNINGS: I think so. You certainly
10 understand my concern about transfers is that they may be
11 short-term solutions, but what we're seeing is serial
12 transfers without the benefit of environmental analysis,
13 CEQA analysis. And that I think transfers are a Band-Aid
14 because we haven't yet dealt with the over-appropriation of
15 water. I remember Secretary Salazar when he first came to
16 California discussing the adjudication in Colorado of the
17 very painful ten-year process. I remember him saying his
18 ranch, they lost some of their 1870 water rights. And
19 thank God they had some 1850 water rights that got them
20 through.

21 But after they went through that process, they
22 had adjusted what they had promised and with the amounts
23 of real water. And at some point, California is going to
24 have to do that. And I think transfers are Band-Aids
25 piled on top of Band-Aids trying to avoid addressing the

1 adjudication of water of assigning responsibility.
2 Obviously, they're going to have changing conditions and
3 things that are changing needs. But the Water Codes'
4 flexible in that. It's just that we haven't complied with
5 the requirements in the Water Code. So we've gotten this
6 huge imbalance. We've promised a universe of water that
7 doesn't exist. You can't base a rational water policy on
8 paper water.

9 CHAIRPERSON HOPPIN: The other thing -- I think
10 this is going to be the easiest one. We are talking about
11 eliminating a diversion point that was there before you
12 and I were preliminary in anyone's eye. I think you would
13 accurately categorize that point of diversion as a fish
14 grinder, would you not?

15 MR. JENNINGS: I would. And that's interesting.
16 And I was fascinated to hear the discussion yesterday,
17 because I noted in Dr. Hanson's testimony he talked about
18 the consolidation of the diversion as a possibility if
19 funds were available. And they seem to be more definite
20 on that. And I would appreciate if you all could clarify
21 what a consolidated diversion would be.

22 I would point out that that diversion, which will
23 increase the amount of water coming through, it will be
24 state-of-the-art screens for fish. And that's good. But
25 the mesh is not sufficient to screen eggs and larvae

1 stages of green sturgeon, which is a listed species,
2 splittail, which is California listed, and striped bass of
3 which the state is under -- there is a doubling mandate in
4 federal law.

5 So, you know, there's going to be a loss there.
6 And you've got to consider the cumulative --

7 CHAIRPERSON HOPPIN: Is it a loss? I don't mean
8 to interrupt you, but I don't see it. There is a loss
9 there, but it's an improvement over current conditions.
10 Because what's being talked about is not only a screen for
11 Woodland and Davis, but for the whole Conaway Ranch. And
12 so while in a perfect world the screen still is going to
13 take larvae and fry to one degree or another, it's going
14 to be a gross improvement over what is there today.

15 MR. JENNINGS: It's going to reduce the
16 entrainment to some degree of juvenile fish over 15
17 millimeters. It's going to have no effect on the larva
18 and eggs.

19 CHAIRPERSON HOPPIN: But the only way you do that
20 is to cease all diversions.

21 MR. JENNINGS: No. You could unrealistically
22 require a greater screening criteria. We're not going to
23 do that.

24 But what my concern is that as we're looking at
25 the likely addition -- you know, just down river will

1 be -- the peripheral canal there will be enormous
2 screens constructed. What's the cumulative impact?

3 But I agree with you that it would be an
4 improvement to have current technological screens at the
5 Conaway diversion.

6 VICE CHAIRPERSON SPIVY-WEBER: Okay.

7 CHAIRPERSON HOPPIN: Chris I think touched on
8 this more than you, but as Tam stated, we didn't go to
9 Woodland and Davis. They came to us. And I see the
10 people they've hired and the people they've been around
11 certainly have their eyes open as to the consequences of
12 having a junior water right. And I would assume that
13 their eyes are open wide enough to realize that in their
14 request there is a certain jeopardy that goes along with
15 this water right. To me, if they are still asking for it
16 under the terms and conditions that could potentially be
17 applied to this, then, you know, the points that Chris
18 brings out are a business decision they have to make
19 coming forward with that kind of a capital investment. I
20 mean, it's not like we are mandating something to them.
21 We could potentially mandate something to them if we don't
22 get these two POTWs in compliance and have a plan to do
23 so, as you well know, and would be right in the middle of
24 that. And rightly so.

25 MR. JENNINGS: But you are mandated to make a

1 determination, a factual finding, that water is available
2 before you can issue a new water right. In other words,
3 the application is on you to protect them from their own
4 devices, if anything else. I mean, because you know,
5 don't let them travel a path that will have horrible
6 consequences down the road.

7 And all we're saying is that at this point in
8 time, you know, with the backload of rights that have
9 already been granted by this Board, senior rights, we
10 don't believe water is available. They could have applied
11 for and asked you to release some of those 1927 rights.
12 But they didn't do that. And there's a reason for that.
13 But they could have gone down that path, but they chose
14 not to. They choose to come in as a very junior diverter.

15 CHAIRPERSON HOPPIN: And the last one, Bill. And
16 I probably could have combined it in my first question.

17 But to the selenium and boron and arsenic, the
18 system isn't like what you would be concerned about in the
19 San Joaquin Valley where it's the result of agricultural
20 land being irrigated and consequently drained. This is
21 the result of pulling naturally occurring products out of
22 the soil via the groundwater and then discharging that
23 into what has clearly been identified as a very sensitive
24 environmental area in the Yolo Bypass.

25 So, you know, by switching to groundwater absent

1 RO, if they go through some conjunctive use with Conaway
2 or something else, those naturally occurring constituents
3 in the soil are going to be pumped out and they're going
4 to be put into the drain water in the Yolo Bypass or
5 they're going to be incorporated into the soil of the Yolo
6 Bypass to be -- I'm not a chemist as you well know. But
7 instead of being at a thousand feet in the ground, they're
8 either going to be in the water or on the surface. And
9 that seems like that has positive environmental
10 consequences.

11 MR. JENNINGS: Well, I don't know what the
12 residual levels of selenium and boron are in the soils. I
13 don't know whether that was a geological artifact or
14 whatnot.

15 I mean, the nitrate is I think induced by human
16 activity. And to what degree those exist, I mean, that's
17 why recycling minerals through human activity and the
18 question is are there alternatives that could have been
19 employed that would have better minimized that and would
20 have necessitated to discharge to the river. I think that
21 there is -- and regardless of how, that's going to be a
22 problem regardless.

23 The question here is can you keep -- given an
24 estuary that's so severely impaired that is in need of
25 additional flow, can you keep promising or granting more

1 water when it doesn't exist. I mean, at some point, you
2 have to take stock and say the inn is full. I mean, God
3 told Mary that she couldn't come in the inn. She had to
4 go to the stable. At some point, you have to say the inn
5 is full. We don't have any room, unless you can bargain
6 and negotiate with somebody who has a reservation.

7 CHAIRPERSON HOPPIN: This is just a comment.

8 Chris, you talked about the delta flow report and
9 the implementation in gross numbers. You realize with the
10 public trust if we were to go down that road, it wouldn't
11 be the gross amount you're talking about, but it would be
12 factored by other water rights and existing needs. So I
13 just wanted to comment on that. You know, we throw out a
14 number as something that would be factored -- ultimately
15 be factored down a degree. I just want to mention that.

16 MR. SHUTES: I certainly understand that. But
17 what we have in terms -- if you're looking at water
18 availability, I think you need to look at a reasonable set
19 of scenarios of what that number might end up being. I
20 don't think we've done that. All we've looked at is
21 existing constraints and we've looked at what would happen
22 if the entire amount were required.

23 Part of the problem with the Board not having its
24 own independent modeling capability as far as CalSim goes
25 is that you folks aren't able to go in and say where's the

1 tipping point? Where is it that all of a sudden we don't
2 have water available in most months of the year? And you
3 just don't know that yet. All you've got is some boundary
4 conditions. And before you find water being available for
5 these permits, I think you need to do that kind of serious
6 technical analysis and find out. And if it's three
7 million, okay. If it's two million, whatever it is, once
8 you hit a certain point -- and I think we've heard this
9 from the different experts in these different proceedings,
10 you start having to not just reduce here and reduce there.
11 You start changing operations or you start making big
12 policy decisions. Like in the exhibit that we put
13 forward, the settlement contractors were shorted by a
14 million and a half acre feet. That's a big policy
15 decision you might end of having to make in order to meet
16 all these other things.

17 CHAIRPERSON HOPPIN: I understand. I want to
18 thank both of you and my colleagues for your indulgence in
19 my long line of questions.

20 MR. JENNINGS: It's always a pleasure to indulge
21 you, Charlie.

22 BOARD MEMBER RUSSELL: This question is for
23 either one of you.

24 Will you please share with the Board how much of
25 the water that's diverted would be returned as an effluent

1 discharge back to the system?

2 MR. JENNINGS: That's interesting. Off the top
3 of my head, I'm drawing a blank.

4 MR. SHUTES: I think what we heard yesterday was
5 that it may take a long time. Some of it -- a lot of it
6 may percolate into groundwater. Really depends on what
7 the ultimate resolution of the wastewater issue is and how
8 they decide to configure that. Some of it may get -- end
9 up getting returned into agricultural use or into the
10 lands in the bypass or along the edge of the toe drain or
11 the Tule Canal.

12 BOARD MEMBER RUSSELL: Do you know where they
13 discharge now? Where the point of discharge is for the
14 city of Davis and city of Woodland?

15 MR. SHUTES: The city of Woodland is north and
16 it's near the Tule Canal southeast of Woodland. The city
17 of Davis has a funny series of wetland kind of things that
18 it discharges water to that's just north of the Highway
19 80. And they've got a kind of unworkable settling kind of
20 setup there that's sort of at the south end of Conaway
21 Ranch. Davis, as I understand it from what was said
22 yesterday, is somewhere south in Putah Creek down there
23 by --

24 MR. JENNINGS: U.C. Davis.

25 MR. SHUTES: U.C. Davis, yes. Down by the Fish

1 and Game wildlife refuge.

2 BOARD MEMBER RUSSELL: One of the reasons I ask
3 the question is I hear from you the concern about water
4 diverted somehow taken out of the system never to be
5 returned again. But if most of this is going to M&I and
6 it's going to be treated at the wastewater treatment
7 plants and they're going to discharge that water, a good
8 portion of it may return back to the system. So the total
9 amount taken out wouldn't be necessarily the -- just the
10 amount that's diverted. In other words, some of it will
11 come back. In addition, if they do discharge better
12 quality water than what's being taken from the ground,
13 they're improving the water quality of the discharge and
14 put it back into the system, would you consider that a
15 benefit?

16 MR. JENNINGS: And you're certainly correct on
17 that. However, remember that when you use that water, a
18 few constituents will improve. But it will also pick up a
19 huge number of drugs and pharmaceuticals and industrial
20 chemicals that are also discharged and not have an effect
21 on that.

22 CHAIRPERSON HOPPIN: We can have potentially carp
23 on steroids, is that what you're saying, Bill.

24 MR. JENNINGS: The studies show the number of
25 feminatis (phonetic) fish in wastewater outfalls is up

1 around 70 percent.

2 MR. SHUTES: I'd also point out in terms of the
3 diversions, regardless of whether it eventually gets back
4 in the system, you are significantly changing the timing
5 of flow so that when most of the time when a flow is
6 actually going to get back into the delta is going to be
7 during winter. And most of the time when the flow is
8 going to be diverted is going to be diverted in the late
9 spring or summer.

10 BOARD MEMBER RUSSELL: I'd like to follow up on
11 that, please. How much residence time do you believe is
12 in the system before the diverted water is used in the
13 treatment plant and returned back? You say it's a long
14 time? Is it more than --

15 MR. SHUTES: What I heard yesterday was up to a
16 couple of years.

17 MR. JENNINGS: For the diversion to come to the
18 water treatment plant and then it goes to the surface area
19 and then the wastewater treatment plant. It's not a
20 long --

21 MR. SHUTES: Maybe I misunderstood the question.
22 I thought you were asking how much water -- after the
23 water is discharged, how long does it take to get back to
24 the Sacramento River.

25 BOARD MEMBER RUSSELL: The question was let's say

1 they discharge at 12:00 or they divert at 12:00. How much
2 time goes by before that water goes through the water
3 treatment plant and served to the users, collected in the
4 wastewater treatment plant and returned back to the
5 system? Not how long does it take after it reaches the
6 receiving water area does it get back into the Sacramento
7 River. I want to know how much resident time you think
8 that diverted water is in there, distribution and
9 collection system.

10 MR. JENNINGS: They testified yesterday that they
11 might hold it for a day or two and then it would cycle
12 through. It wouldn't be a lot.

13 MR. SHUTES: To me, the water quality question I
14 think would be how long would it take before it gets back
15 to the river.

16 BOARD MEMBER RUSSELL: Which adds to the next
17 question, if there was an improvement in their design
18 where they discharge their treated effluent directly into
19 the Sacramento River system, then there would be no minor
20 net loss due to consumptive use and the water would come
21 back into the system and be available for whatever the
22 needs downstream; is that right?

23 MR. JENNINGS: You're absolutely right. If they,
24 in fact, change the outfall system and go straight for the
25 wastewater treatment plant in the Sacramento River. But

1 again, if you go that route, you are increasing the
2 concentration of this other universe of chemicals that
3 we're not addressing directly into the river. And it's
4 not being ameliorated by going through a wetland treatment
5 or something like that that it would today.

6 BOARD MEMBER RUSSELL: I understand. Thank you.
7 You answered my question.

8 VICE CHAIRPERSON SPIVY-WEBER: Thank you, Board
9 members. We will have even more opportunity to ask
10 questions later.

11 And, Mr. Lilly, thank you for indulging us.

12 Now we will have Mr. Lilly's cross-examination of
13 the panel. And after that, it will be the staff will have
14 an opportunity to cross as well as Board members if you
15 have additional questions.

16 MR. LILLY: Ms. Spivy-Weber, before I start, I
17 have seven exhibits that I'm going to use on
18 cross-examination. And I will give them to Ms. Farwell to
19 distribute to you and of course give copies to Mr. Jackson
20 and Mr. Jennings.

21 CROSS-EXAMINATION

22 BY MR. LILLY:

23 Q Morning, Mr. Jennings.

24 As you know, I'm Alan Lilly, attorney for the
25 Woodland-Davis Clean Water Agency. And I do have some

1 cross-examination questions this morning.

2 First of all, I think you alluded to this in
3 response to one of your answers to Mr. Hoppin's questions.
4 But the California Sportfishing Protection Alliance has,
5 in fact, filed many petitions with the State Water
6 Resources Control Board for review of NPDES permits issued
7 by the Central Valley Regional Water Quality Control
8 Board; is that correct?

9 A Yes. We review and comment on most of the major
10 proposed NPDES permits in the Central Valley. And where
11 we find that the regulations aren't followed or complied
12 with in developing limits and requirements in those
13 permits, we field them to the State Water Board.

14 Q Just on Monday, I downloaded a list of the water
15 quality petitions that have been filed with the State
16 Board in recent years. And I labeled that as exhibit
17 WDCWA 400. I'm not going to ask you to review every
18 single entry in here. But I do notice numerous entries by
19 CSPA. I wonder if you can confirm those are a listing of
20 the petitions CSPA has filed.

21 A Yes. And actually I don't think they're all listed on
22 the electronic database.

23 Q Okay. I'll just go forward now to Exhibit WDCWA 401.
24 We may get it up on the screen here in a minute. But if
25 you could just briefly look at the first page and the last

1 page -- second to last page of this and just confirm that
2 this is, in fact, a petition that you signed on behalf of
3 CSPA asking the State Board to review waste discharge
4 requirements that the Regional Board had issued for the
5 city of Fresno and other entities?

6 A All the way back in 2006.

7 Q Okay. So this is, in fact, an accurate copy of a
8 petition you filed for CSPA?

9 A Yes.

10 Q And I highlighted a paragraph on page 12 of that, and
11 I'd just like you to take a look at that and just confirm
12 that this is, in fact, what you wrote.

13 On page 12, it says, "In order to reduce TDS
14 loadings to the WWTP, the discharger can also install well
15 head treatment for municipal water system or seek an
16 alternate water supply with lower TDS concentrations.
17 Since other treatment technology may still be employed to
18 reduce TDS, the discharger has not demonstrated that the
19 WWTP has implement BPTC." Did you, in fact, write that?

20 A Yes.

21 Q I know this area has a lot of jargon. Can you tell us
22 what WWTP means?

23 A Wastewater treatment plant.

24 Q And what does BPTC mean?

25 A Best professional treatment and control.

1 Q So, basically, you were asserting here that the
2 Regional Board should at least consider requiring the city
3 of Fresno and others to look into alternate water supplies
4 with lower TDS concentrations so as to reduce the TDS
5 concentrations of their discharges?

6 A Yes.

7 Q Let's go on to Exhibit WDCWA 402. And I have just
8 copied the cover page, pages 12 and 13 and then the
9 signature page. I realize this is not a copy of the
10 entire petition. But could you just briefly review that
11 and confirm this is, in fact, an excerpt of the petition
12 that you filed with the State Board for CSPA challenging
13 the Regional Water Quality Control Board's waste discharge
14 requirements and NPDES permit for Clear Creek Community
15 Services District?

16 A Another 2006 appeal.

17 Q Okay. And on page 12, which is the second page in the
18 exhibit I have here, I just want to confirm a couple of
19 things that I have highlighted here. And I understand
20 these were not highlighted when you filed the petition.
21 But the Section I on page 12 starts out the heading says,
22 "The order contains a flawed reasonable potential analysis
23 for electrical conductivity"; is that correct?

24 A Yes.

25 Q And, in fact, in the first paragraph you recite the

1 MCLs for EC are 900 micromhos per centimeter recommended
2 level; 1,600 upper level and 2,200 short-term maximum.
3 Just so we can clarify for the uninitiated here, what are
4 MCLs?

5 A MCLs are maximum contaminant levels. They're drinking
6 water standards.

7 Q And then down in a couple paragraphs down, you refer
8 to the Ayers and Westcot report that was done for the
9 organization of United Nations, and that's irrigation and
10 drainage paper number 29. And it recites that levels
11 of -- this is electrical conductivity above 700 micromhos
12 per centimeter will reduce crop yield for sensitive
13 plants; is that correct?

14 A Yes.

15 Q And then you also cite the next sentence that U.C.
16 Davis extension service paper that states there will not
17 be problems with crops as long as EC remains below 750; is
18 that correct?

19 A Yes.

20 Q Going on to the permit that's at issue here, the next
21 paragraph says that the waste charge EC level was
22 projected to be 1253 and you were asserting that that
23 clearly -- as the next sentence says, clearly the
24 discharge exceeds the MCLs for EC presenting a reasonable
25 potential to exceed the water quality objective; is that

1 correct?

2 A Yes.

3 Q Okay. And then just to wrap up this petition on the
4 next page, page 13, you wrote -- and again I've
5 highlighted it here, "failure to establish effluent limits
6 for EC that are protective of the chemical constituents
7 water quality objective blatantly violates the law." You
8 wrote that?

9 A I wrote that.

10 Q Let's go on to Exhibit WDCWA 403. And again, this is
11 just an excerpt. I was trying to save a little bit of
12 paper here. But please just look this over and confirm
13 this is, in fact, an excerpt of a petition that you filed
14 for CSPA with the State Board challenging the NPDES
15 permits and waste discharge requirements that the Regional
16 Water Board had issued for the Linda County Water
17 District.

18 A It's another 2006 appeal. And frankly, Alan, you
19 could have used the appeals we filed last year as well,
20 because we have consistently taken this position.

21 Q And if you could clarify, what is "this position"
22 regarding EC? You basically challenged many of the EC
23 limits in the NPDES permits issued by the Regional Board
24 for discharges in the Central Valley?

25 A Yes. Linda County was a fascinating story.

1 Q We probably don't have time to go into it. And we
2 have to try to keep this hearing focused, and my clock is
3 running here.

4 But on page 4 of this petition, you, in fact,
5 were -- one of your arguments the heading was, "The order
6 grants 100 percent of the Feather River's assimilative
7 capacity for EC contrary to the anti-degradation policy
8 and federal regulations"; is that correct?

9 A Yes. And the Board turned around and granted the same
10 assimilative capacity at Yuba City.

11 Q So the problem you had here in the highlighted
12 sentence of that paragraph, you said the proposed order
13 contains an EC effluent limitation of 780 micromhos per
14 centimeter for the Linda County Water District. And you
15 had a problem with that, because that basically was
16 granting Linda County Water District the entire remaining
17 assimilative capacity for EC on the Feather River?

18 A Right.

19 Q Okay. And I think you said later in the page the
20 problem you saw was that Marysville and Oroville were
21 going to be adding EC as well and therefore exceeding the
22 assimilative capacity for EC capacity in the Feather
23 River?

24 A Right.

25 Q Let's go onto the next exhibit. This is WDCWA 404.

1 Again, please just quickly review this and confirm that
2 this is an excerpt of a petition you signed and filed for
3 CSPA challenging the Regional Board's issue for the city
4 of Portola's waste discharge requirements NPDES permit; is
5 that correct?

6 A Right.

7 Q Okay. And, in fact, I notice the date on this one is,
8 in fact, 2009. So we're moving forward to the present.

9 And then on the second page of the exhibit, which
10 was page 216 of the petition, again there is a heading
11 where you basically were challenging the NPDES's permit
12 effluent limitation for electrical conductivity; is that
13 correct?

14 A Correct.

15 Q And the first sentence says that the permit has an
16 effluent limitation of 684 micromhos per centimeter; is
17 that correct?

18 A Yes, as a monthly average.

19 Q And then on the next page you said in the petition
20 that the volume of salt discharged by Portola will be seen
21 in downstream waters unless they are physically removed
22 and that a discharge of higher salt loads upstream will
23 contribute to the impairment of downstream water.

24 A Salt is a conservative constituent and remains in the
25 environment.

1 Q So basically if it's discharged, unless there is some
2 active process to remove it, it will remain there?

3 A Yes.

4 Q That's why the ocean is salty; is that correct?

5 A That's true.

6 Q The following paragraph you, in fact, confirm that the
7 beneficial uses of the receiving streams could be degraded
8 by the salt concentrations?

9 A Yes.

10 Q And then just to wrap that up at the end of that
11 paragraph, you said, "Therefore, the permits do not
12 protect the beneficial uses of the receiving stream and
13 then on down to the Sacramento River and therefore does
14 not comply with federal requirements or the California
15 Water Code"?

16 A That's correct.

17 Q Okay. Next exhibit I wanted to go through is WDCWA
18 405. Again, please just briefly review this and confirm
19 that this is a petition you filed with the State Water
20 Resources Control Board challenging that Regional Board's
21 NPDES permit for the University of California Davis, the
22 Center of Aquatic Biology and Aquaculture.

23 A Yes.

24 Q And on the second page of this exhibit, which is page
25 11 from the petition, you were asserting that the order

1 issued by the Regional Board did not contain an effluent
2 limitation for EC to protect an irrigated agricultural
3 beneficial use in the receiving stream?

4 A Correct.

5 Q That was in violation of the State waste laws and the
6 federal regulations?

7 A Correct.

8 Q And in the middle of that page, it's highlighted a
9 sentence that says, "The order has been changed from the
10 original 700 micromhos per centimeter to 800 micromhos per
11 centimeter." And you state there is no information in the
12 order which indicates that 800 microhmos is protective of
13 irrigated agriculture.

14 A That's true.

15 Q So you were basically asserting that they should not
16 have raised it from 700 to 800?

17 A Yeah. And I'm not recalling the exact permit. I
18 probably raised anti-deg issues and backsliding issues in
19 that as well.

20 Q You probably did.

21 And then down at the bottom of that page, the
22 other thing you raised, the other important argument here
23 is you argue that the combined source waters -- and this
24 is for the aquaculture facility at U.C. Davis, which get
25 water from the Solano project. The EC in those source

1 waters is well below the 700, in fact; right?

2 A I'm assuming -- and I don't recall exactly. I'm
3 assuming it was information contained in the draft permit.

4 Q So then on the next page you said, "Since the source
5 water is well below 700 and the solid waste is easily
6 controllable, the discharger has not excessively exceeded
7 700 and, therefore, the proposed 800 was not protective of
8 the beneficial uses and the 700 should be reestablished";
9 is that correct?

10 A That is correct. Oddly phrased, but correct.

11 Q We won't challenge your grammar. We realize you have
12 a lot of writing to do on your job.

13 The last exhibit I'd like to go through is
14 Exhibit WDCWA 406. Please just briefly review this and
15 confirm that this is an excerpt from the petition that you
16 signed and filed for CSPA challenging the Regional Water
17 Board's waste discharge requirements and NPDES permit for
18 the city of Davis.

19 A City of Davis in the October of last year.

20 Q Okay. And again, I'm trying to go through this fairly
21 quickly, because our time is limited. But Section H,
22 which is the second page of the exhibit, page 27 of the
23 petition, you had a section heading which basically
24 challenged the Regional Board's permit because it did not
25 contain an effluent limit for EC in violation of the

1 federal regulations.

2 And then just flipping forward on page 30, which
3 is a couple of pages later in that exhibit, you made some
4 statements to support your argument. I just highlighted a
5 couple here. One of them was that the beneficial uses of
6 the receiving streams -- this is the receiving streams
7 that receive water discharge by the city of Davis
8 wastewater treatment plant may be degraded by salt
9 concentrations in the wastewater discharges?

10 A Yes.

11 Q And down a little further on that page, you said that,
12 "The discharge of salt, whether measured as EC or TDS, may
13 be a designated waste as defined by the CWC" -- I assume
14 that means the Clean Water -- California Water Code.
15 Excuse me. As a non-hazardous waste that contains
16 pollutants that could be released in concentrations
17 exceeding applicable water quality objectives; is that
18 correct?

19 A Yes.

20 Q Okay. And then on the next page?

21 A Were we talking about -- go ahead.

22 Q And I realize that this is a fairly quick summary of
23 some complex documents, but I'm just trying to hit certain
24 points here. On the next page of that exhibit, you say
25 that because the discharge exceeds the MCLs for EC, there

1 is a reasonable potential for exceeding the water quality
2 objective?

3 A Correct.

4 Q And then you go on to say that, "The city's wastewater
5 discharges increases concentrations of EC, unacceptable
6 concentrations, adversely effecting the agricultural
7 beneficial use. And the wastewater discharge not only
8 presents a reasonable potential, but actually causes
9 violation of the chemical constituent water agency
10 objective in the basin plan"; is that correct?

11 A Correct.

12 Q And finally at the end of that paragraph you state,
13 "The failure to establish effluent limits for EC that are
14 protective of the chemical constituent water quality
15 objective blatantly violates the law"; is that correct?

16 A That's correct.

17 Q And then just to confirm on the last page of this, you
18 signed and filed this petition in October of 2010?

19 A 2010.

20 MR. LILLY: Ms. Spivy-Weber, I don't want to
21 forget, and I realize you may want to do this later, but I
22 do want to remember at some point to offer Exhibits 400
23 through 406 into evidence as part of the record.

24 VICE CHAIRPERSON SPIVY-WEBER: We'll keep track.

25 MR. LILLY: Okay. Thank you.

1 BY MR. LILLY:

2 Q And the last thing for Mr. Shutes, I think you alluded
3 to this in response to a question I think it was from Mr.
4 Hoppin or one of the Board members. And there are times
5 when the Sacramento River system is in flood flows. And
6 under those circumstances, I think you agreed -- even you
7 would agree there is unappropriated water available for
8 the Davis-Woodland project under those conditions; is that
9 correct?

10 A Yes.

11 MR. LILLY: Thank you. I have no further
12 questions. I appreciate both of your attention this
13 morning.

14 MR. JENNINGS: Thank you, Alan.

15 VICE CHAIRPERSON SPIVY-WEBER: Staff, do you have
16 cross questions?

17 Identify yourself.

18 MS. GROODY: Mr. Jennings or Mr. Shutes, my name
19 is Katherine Groody. I'm on the hearing team.

20 I seem to recall that prior -- well, maybe
21 ten years ago, the Davis wastewater treatment facility
22 discharged to the Conaway Ranch.

23 MR. SHUTES: Is that a question?

24 MS. GROODY: Yeah. My question is: Why is that
25 not possible currently?

1 MR. JENNINGS: Davis went -- at the time they
2 established what they hope to be a wetland treatment, it
3 was a very attractive idea. Either through misoperation
4 or engineering or that they didn't properly size it or
5 something, it never quite worked out. And frankly,
6 wetland treatment has proved more difficult than
7 originally anticipated when it was started.

8 But yes, I think some of that was discharged to
9 Conaway Ranch. And we believe -- I believe that would be
10 a viable way of disposing. If you went through perhaps
11 wetland treatment and diluting with some water, I mean, I
12 think you could get the EC concentrations and boron
13 concentrations down to a level that you could irrigate
14 crops at Conaway without a problem.

15 MS. GROODY: Do you have any recollection as to
16 why that operation was -- why they don't do that
17 currently?

18 MR. JENNINGS: Well, I do know they were having
19 some problems with the wetland treatment. I'm going back
20 and I can't remember exactly right now, but it didn't
21 proceed as they had hoped, I think.

22 MS. GROODY: Thank you.

23 VICE CHAIRPERSON SPIVY-WEBER: Does the Board
24 members have any additional questions?

25 Then back to you, Michael. Do you have

1 additional statements that you'd like -- additional
2 testimony that you'd like to present?

3 MR. JACKSON: Somewhere last night in the time we
4 had, both of these gentlemen presented rebuttal testimony.
5 Are you calling --

6 VICE CHAIRPERSON SPIVY-WEBER: We'll get to that
7 later.

8 MR. JACKSON: We have no additional testimony at
9 this point. We would ask to move our exhibits into the
10 record.

11 VICE CHAIRPERSON SPIVY-WEBER: Without -- we will
12 accept those exhibits.

13 MR. LILLY: Wait. Excuse me. Do I get a chance
14 to object to some of his exhibits?

15 VICE CHAIRPERSON SPIVY-WEBER: You certainly may.

16 MR. LILLY: Excuse me. I'm sorry, but we do have
17 some objections to some of the CSPA exhibits. May I state
18 those now?

19 VICE CHAIRPERSON SPIVY-WEBER: You certainly may.

20 MR. LILLY: Okay. First of all, we object to
21 exhibits -- let me just make sure I have this right.
22 Exhibits BJ 10, BJ 12, and ES 3 and ES 5 on the grounds
23 that these appear to be draft documents that were prepared
24 by the State Board staff, but they were never adopted by
25 the State Board itself. And there is no supporting

1 evidence regarding who prepared them or why the State
2 Board did not adopt them. So we object on the basis that
3 there is not an adequate foundation and they're not
4 relevant to the proceeding. And they certainly do not
5 fall within the scope of an official notice exception
6 because they are not official acts of the State Board.

7 VICE CHAIRPERSON SPIVY-WEBER: And the ones that
8 you mentioned are 12 -- BJ 12 --

9 MR. LILLY: Yeah. BJ 10 was a pie chart prepared
10 for a draft strategic -- California Water Board strategic
11 plan update. And BJ 12 is the report allegedly from the
12 State Board staff to Delta Vision. But there is no
13 statement as to who wrote it at the State Board staff or
14 any clear indication it was from the State Board.

15 And then ES 3 is the State Board's draft water
16 right decision 1630, which as Mr. Jackson has said was
17 never adopted by the Board.

18 And then ES 5 is a draft State Water Resources
19 Control Board Water Quality Control Plan for salinity from
20 1988, which also was never adopted by the State Board.

21 So it would really open up a can of worms if we
22 had to start examining all the reasons why those exhibits
23 were prepared and then ultimately not adopted by the State
24 Board. And I don't think it's appropriate for them to be
25 submitted when they were never adopted.

1 VICE CHAIRPERSON SPIVY-WEBER: Nathan.

2 MR. JACKSON: Would you like me to be heard?

3 VICE CHAIRPERSON SPIVY-WEBER: Sure. Let's hear
4 a response, but then I'd like to come back to you, Nathan.

5 MR. JACKSON: First of all, the pie chart BJ 10
6 is actually in the final strategic plan update. It's the
7 same pie chart. And we believe that therefore it is not
8 any longer a draft document. It's a final document.

9 BJ 12 is -- we took off the Delta Vision website,
10 and they indicated that it came from the State Water
11 Resources Control Board as part of the original program,
12 their request during Delta Vision. And, therefore, we
13 believe it's an official record of the State of California
14 and therefore usable.

15 VICE CHAIRPERSON SPIVY-WEBER: Can you hold on
16 just a second? We're going to get that on the screen.
17 Okay.

18 Comments on ES 3 or 5?

19 MR. JACKSON: I'm still trying to figure out what
20 exactly those are. The B 1630 report was offered to
21 indicate there's been a long history of the State Board
22 trying to address the problems of the fisheries in the
23 delta. And their identification has been consistent
24 through the years of the need for additional freshwater
25 flow in order to restore the fisheries. That's the

1 purpose it was offered for. And we believe that it's
2 admissible for those purposes, not necessarily for the
3 truth of the matter asserted.

4 If Mr. Baggett was here, I'm sure he would be
5 pointing out that it's not the truth of it. It's the fact
6 that it was done because of the problems that were
7 identified in the early 90s.

8 VICE CHAIRPERSON SPIVY-WEBER: And ES 5?

9 MR. JACKSON: The 1988 Water Quality Control
10 Plan, which has been not finalized, and then probably more
11 into the 1994 Water Quality Control Plan, '95 Water
12 Quality Control Plan is again offered simply to indicate
13 that these problems have been known for years and that the
14 State Board has been grappling with this problem for
15 years, not necessarily for the truth of the matter
16 asserted within.

17 VICE CHAIRPERSON SPIVY-WEBER: So Nathan, I would
18 like your advise as to what we should do in response to
19 Mr. Lilly's objection to these.

20 MR. JACOBSEN: To go through them in order
21 starting with Exhibit BJ 10, I'm wondering if based on the
22 foundation that Mr. Jackson just laid for that document if
23 Mr. Lilly would agree to stipulate the inclusion of that
24 pie chart.

25 MR. LILLY: I'm sorry, but I'm not willing to do

1 that because Mr. Jackson has said that it was incorporated
2 into a final report, but he can't testify. He's not under
3 oath. And we don't have the final report. All we have
4 before us is a draft.

5 MR. JACOBSEN: Well, let me move on to -- come
6 back to that.

7 Move on to BJ 12, which was pulled, according to
8 Mr. Jackson, from the Delta Vision website. I believe
9 that the Board could admit that evidence. And this
10 goes -- this rationale applies to BJ 10 well. The
11 documents offered do not have to be officially adopted by
12 the Board for the Board to take notice of them and admit
13 them into evidence.

14 For ES 3, again, Mr. Jackson indicated that that
15 is not being offered in support of the truth of the matter
16 asserted in the document. It's just offered as evidence
17 that this document exists and the Board did evaluate it
18 and look at it. So I believe that that is also admissible
19 and subject to notice by the Board. And likewise for ES
20 5.

21 VICE CHAIRPERSON SPIVY-WEBER: What I would like
22 to do, because --

23 MR. JACOBSEN: I would like to add that, in
24 addition, those documents, if they were admitted by the
25 Board, would be admitted for a limited purpose. Again,

1 not for the truth of the propositions asserted in those
2 documents.

3 VICE CHAIRPERSON SPIVY-WEBER: Okay. Before I
4 make a decision on this, I'd like to take a few minutes
5 and think about it and talk with counsel. And we need to
6 take a break anyway. So if we could take a break for ten
7 minutes -- I'm sorry.

8 MR. LILLY: If I facilitate your process, if I
9 can say my other objections to exhibits and then you can
10 deliberate on all of them. Excuse me for interrupting.

11 VICE CHAIRPERSON SPIVY-WEBER: I didn't realize
12 that.

13 MR. LILLY: You thought you were done with me?

14 VICE CHAIRPERSON SPIVY-WEBER: I did.

15 MR. LILLY: CSPA has offered Exhibit ES Number 1,
16 which is the delta flow criteria report that was adopted
17 by this Board or accepted by this Board in August of 2010.
18 And certainly since the State Board has accepted that,
19 there is an official act by the State Board and I don't
20 object to it coming into the record.

21 However, the report itself states some numerous
22 limitations on its use, particularly on pages 1 through 4
23 and notes that the criteria that are in there are not
24 regulatory or water right requirements. So I would ask
25 that if the State Board accepts that into the record it be

1 subject to the limitations that the State Board itself
2 stated in the report.

3 VICE CHAIRPERSON SPIVY-WEBER: On that one I
4 can -- Michael, do you want --

5 MR. JACKSON: I think the report speaks for
6 itself, and we would expect you would read it in that
7 light.

8 VICE CHAIRPERSON SPIVY-WEBER: The report does
9 speak for itself, and I would accept Mr. Lilly's request
10 that we acknowledge the introductions as well as the body
11 of the report.

12 MR. LILLY: And then, finally, there are several
13 documents that are hearsay. And Mr. Jacobsen has already
14 correctly stated that the Board may accept hearsay
15 documents into the record but is subject to the
16 limitations on use. They're stated in Government Code
17 Section 11513, which is also referred to in the State
18 Board's regulations in Title 23 California Code of
19 Regulations Section 648.5.1.

20 And I don't object to the following exhibits
21 coming into the record, but I do object their being used
22 for the truth of the matter asserted therein and ask they
23 be admitted subject to the limitations in Government Code
24 Section 11513. And those exhibits are -- and there's
25 several of them here.

1 In the CS series, it's CS 8, CS 9, CS 11, CS 12,
2 and CS 13.

3 In the BJ series, we've already talked about BJ 3
4 and 5. And I accept Mr. Jacobsen's ruling on that, which
5 I think is consistent with what I just stated.

6 We object on the hearsay grounds to BJ 6, 7, 8,
7 10 -- excuse me -- 10, 12, and 13. BJ 3 and 5 were not
8 subject to his prior ruling. BJ 10 and 13 -- so I object
9 additionally to BJ 3, 5, 6, 7, 8, and 13.

10 And then finally, on the same grounds as hearsay,
11 I object to ES 3, 5, and 9.

12 VICE CHAIRPERSON SPIVY-WEBER: We've already
13 spoke about 3 and 5. So do you want to comment?

14 MR. JACKSON: Yes. The comment is your rules are
15 as your rules are. And it seems that to have an
16 individual argument about each and every one of these may
17 take a particular amount of time.

18 We are offering these in general because they are
19 the kind of documents that are used by the Board regularly
20 in making its decisions. Clearly, there is evidence
21 within them which would qualify in court so you don't have
22 to bring everybody in. But your rules on hearsay are a
23 lot broader than the court rules. And in order to have
24 hearings like this in the time frame that you set, we try
25 to supply data that is the normal data that you consider

1 in the course of these things. I would suggest that you
2 give it the weight to which you believe it's worthy.
3 Otherwise, your hearings are going to go on for days and
4 days and days.

5 VICE CHAIRPERSON SPIVY-WEBER: And we don't want
6 that.

7 Let's take a break before we make a decision on
8 this and come back at 11:00. And the next -- once we
9 resolve the acceptance of the various documents, we'll
10 move to rebuttal and cross-examination and closing. We
11 should finish up by noon.

12 (Thereupon a recess was taken.)

13 VICE CHAIRPERSON SPIVY-WEBER: We are going to
14 reconvene the hearing.

15 As I've been advised by counsel, as was pointed
16 out by several that the State Board does have very, very
17 broad, very flexible procedures in terms of how much
18 weight we give to evidence.

19 So I'm going to let the evidence in, subject to
20 the limitations of Government Code 513, which was
21 discussed between you and Mr. Jackson. So I will be
22 letting the evidence in. But we will be using it
23 appropriately, not for the truth of the matter.

24 (Whereupon the above-referenced exhibits
25 were admitted into evidence.)

1 MR. LILLY: Excuse me, Ms. Spivy-Weber. Before
2 we go on, I did offer WDCWA Exhibits 400 through 406. Is
3 now the time?

4 VICE CHAIRPERSON SPIVY-WEBER: Yes. I want to
5 accept into the record the evidence that has been
6 presented in your case in chief, Michael.

7 MR. JACKSON: Okay. And I have no objection to
8 the entering of the evidence that included excerpts of Mr.
9 Jennings' complaints.

10 VICE CHAIRPERSON SPIVY-WEBER: Thank you very
11 much. So you are submitting those documents into the
12 record. There's no objection. So those two are in the
13 record.

14 (Whereupon the above-referenced exhibits
15 were admitted into evidence.)

16 VICE CHAIRPERSON SPIVY-WEBER: Any more
17 documents?

18 And I thank you both. And I thank counsel, too,
19 for helping me. As you know, I'm new to this. And I'm
20 learning every step of the way. Thank you for being
21 patient.

22 So now we're moving to rebuttal and
23 cross-examination in the same order that we've been
24 hearing presentations of the evidence in the past. First,
25 we'll do Woodland-Davis Clean Water Agency. And Alan, do

1 you have a rebuttal?

2 MR. LILLY: Yes. I would ask Mr. Bourez and Mr.
3 Yost to come forward. I do have a few questions for them.
4 And I'll circulate. We have one exhibit for Mr. Bourez's
5 questioning, WDCWA 115, and I'll give that to staff to
6 circulate to all of you.

7 REBUTTAL

8 BY MR. LILLY:

9 Q Mr. Bourez, do you have a copy of Exhibit WDCWA 125 in
10 front of you?

11 A Yes, I do.

12 Q Please tell -- first of all, did you prepare this
13 exhibit?

14 A Yes, I did.

15 Q And just to begin with, could you please explain what
16 the columns are where it says average wet, above normal,
17 below normal, and so forth?

18 A Average column is the '82 year.

19 VICE CHAIRPERSON SPIVY-WEBER: Can you speak more
20 directly into your microphone?

21 MR. BOUREZ: The average column is the annual
22 average for the entire '82 year CalSim period in the
23 record. Wet and above normal, below normal, dry and
24 critical are averages for year types based on the 40, 30,
25 30 Sacramento River index.

1 BY MR. LILLY:

2 Q And then please explain what the different entries for
3 location mean.

4 A Those are different output locations in the model
5 around the delta.

6 Q And then please explain what the existing conditions
7 scenario is.

8 A The existing conditions is the existing condition
9 model simulation without project, and it does include the
10 depiction of the current operating criteria that we used
11 in our updated analysis.

12 Q And then what's the future condition without project
13 scenario?

14 A That's the cumulative condition modeling simulation.

15 Q And then what is change with project?

16 A That is the difference between the cumulative
17 condition and the cumulative condition without project.

18 Q Okay. And then, finally, what does cumulative change
19 compared to existing conditions mean?

20 A That is the cumulative condition, and that does
21 include the project compared to existing conditions.

22 Q So is it correct to say that cumulative change
23 compared to existing conditions is how much each of these
24 parameters would change if you went from existing
25 conditions to the future conditions with all the other

1 projects that are in the CalSim future conditions plus the
2 Davis-Woodland project?

3 A That's correct.

4 Q All right. And then for each of these locations, it
5 shows what the total change in the parameter would be with
6 all of those, the changes occurring between existing
7 condition and future condition with the project?

8 A That's correct.

9 Q Mr. Bourez, -- let me go on to Mr. Yost now.

10 Mr. Yost, some questions came up regarding the --
11 first of all, regarding the Davis wastewater treatment
12 plant. Could you please explain why Davis is being forced
13 to go from its current wetland disposal to a tertiary
14 treatment process?

15 BY MR. YOST:

16 A Actually, it's not that they're being forced to go
17 from the wetland to the tertiary treatment process. It's
18 that they're having to discharge their effluent at a
19 different location than to the wetland project area. And
20 the primary concern is the build-up of contaminants in
21 that wetland area, notably selenium.

22 Q Why is the selenium build-up -- there a problem?

23 A It's contributing to build-up of selenium in the eggs
24 from the birds that are using the area.

25 Q Now, there has been -- there was some discussion in

1 CSPA's case about could Davis or Woodland deliver its
2 effluent for irrigation to Conaway. What are the problems
3 with that?

4 A Well, interestingly enough, the city of Davis spent I
5 don't know how many years -- a number of years trying to
6 work out a reuse solution with Conaway Ranch. And the
7 bottom line is the ranch does not want to accept its
8 wastewater for reuse because it would not allow them to
9 grow rice. They just would not be able to market the rice
10 if it was grown with reused effluent.

11 Q There was also some discussion about could Davis and
12 Woodland discharge their treated wastewater into the
13 groundwater base in Yolo County basically through
14 injection wells? Is that possible?

15 A Actually, we looked at disposal of the brine from well
16 head treatment systems, and it is prohibited by ordinance
17 in Yolo County.

18 Q I assume that's because of the concerns about
19 groundwater quality?

20 A That's correct.

21 Q There was also some discussion about why did
22 Woodland-Davis limit the amount of water purchased from
23 Conaway to 10,000 acre feet per year? Why didn't they go
24 higher than 10,000?

25 A Well, in actuality, the time when the water that we

1 could purchase from Conaway would be useful to the project
2 is limited to pretty much the summer months, and that's
3 really the only practical level of sale they could make of
4 the water that they have available.

5 Q Are there also limitations in the EIR related to --

6 A There are limitations in the EIR. The EIR talks about
7 a sale of 10,000 acre feet, and the primary concern is the
8 additional pumping that Conaway would have to do to create
9 a groundwater substitution transfer.

10 Q And then Mr. Russell asked a couple of questions
11 basically -- and if I'm stating this incorrectly, I'm sure
12 he will correct me, because I don't have the engineering
13 expertise.

14 But I think the question was basically what is
15 the residence time from when water is diverted from the
16 Sacramento River to when it returns to the bay delta
17 system after going through the water treatment plant that
18 the pipe lines, the people's houses, the wastewater
19 treatment plant, and then the discharge back to the
20 system. If you could just give us some indication of what
21 that is.

22 A I can't tell you precisely, but it would be a matter
23 of days.

24 MR. LILLY: I don't have any further questions
25 for rebuttal evidence.

1 BOARD MEMBER DODUC: I have a question for Mr.
2 Bourez. Looking at Exhibit 115, these are modeling
3 results that you performed?

4 MR. BOUREZ: That's correct.

5 BOARD MEMBER DODUC: I'm curious, what is your
6 level of confidence that this paper water actually
7 represents -- truly represent actual wet water that would
8 be available under these conditions?

9 MR. BOUREZ: Well, this table is not showing
10 water available. It's showing a change from existing
11 conditions, today conditions, to 2030 conditions.

12 BOARD MEMBER DODUC: So what is your level of
13 confidence in the model and in these results?

14 MR. BOUREZ: I have a high level of confidence in
15 the models, primarily because the level of land use that
16 is represented upstream does show an increase in water
17 use. It does show conversions from ag to urban. It does
18 show changes in facilities that are reasonably
19 foreseeable, such as at the MC inter-tie. San Joaquin
20 River restoration is included in the future level. Model
21 run compared to the existing level. And that's one of the
22 reasons that you see greater flows coming in on the south
23 delta side is because we're trying to represent what the
24 future is.

25 And these studies are directly from the State

1 Water Project delivery reliability report and their
2 assumptions of the future and their best depiction of what
3 land use will be in the future and what facilities will be
4 in the future. So it is the best estimate from DWR and
5 the Bureau of Reclamation.

6 BOARD MEMBER DODUC: But what is your personal
7 level of confidence? Just look existing conditions. What
8 is your personal level of confidence that the existing
9 conditions outlined here truly reflect actual conditions?

10 MR. BOUREZ: That's a good question. And I've
11 done a lot of comparisons on the existing level CalSim
12 modeling with actual historical gauges. And the San
13 Joaquin River flow and salinity workshop a couple of weeks
14 ago, State Board staff put a comparison of Vernalis flow
15 and CalSim flow. And I developed most of the hydrology
16 for the San Joaquin River system. And it showed a very
17 good comparison between the model and the gauge flow for
18 current level.

19 I've done comparisons like that for most of the
20 tributaries that are in CalSim, the major tributaries.
21 And I've found that the model does a good job mimicking
22 recent operations. There are things that happen in
23 realtime operations that the model doesn't include,
24 certain closures, facility outages. And in keeping in
25 mind that actual operations are daily, and there is a lot

1 of decisions that go into that where the model use rules
2 that don't capture all the nuances and daily operations,
3 given that, I believe the model does a pretty darn good
4 job of depicting the way the system works.

5 BOARD MEMBER DODUC: Thank you.

6 VICE CHAIRPERSON SPIVY-WEBER: I have a -- oh,
7 Dwight, go ahead.

8 BOARD MEMBER RUSSELL: Actually, this is for
9 Walter.

10 The CalSim model is a monthly time step, if I
11 remember correctly.

12 MR. BOUREZ: That's correct.

13 BOARD MEMBER RUSSELL: And my earlier question
14 regarding the residence time is one of the CalSim's -- I
15 want to say one of the reporting locations in CalSim or
16 even in input to the system is the discharge location for
17 the city of Davis and the city of Woodland.

18 MR. BOUREZ: Yeah. It enters into the toe drain
19 which enters Cache Slough and into the Yolo Bypass. And
20 it's depicted by an input to the delta near Rio Vista.

21 BOARD MEMBER RUSSELL: The amount of water is
22 pre-operated. Would you know that before you start
23 running the CalSim model how much is going to come in?

24 MR. BOUREZ: Well, the Yolo County Bypass is
25 dynamic in the model.

1 BOARD MEMBER RUSSELL: How much is your input
2 value? You already pre-operated the treatment plant
3 effluent. Do you know how much you're going to add to
4 that location?

5 MR. BOUREZ: Yes. The hydrology -- and let me
6 step back.

7 The way CalSim works, it has the demand
8 represented for Davis and Woodland. So in an existing
9 condition, that demand is met from groundwater, and that
10 return flow is shown in the model output. When you run
11 with alternative, you still have a same amount of effluent
12 discharge from the plants. But the diversion is now from
13 the Sacramento River rather than from groundwater. That's
14 why when you look at the changes in Sacramento River flow
15 that we're showing as impact of the project, you'll see a
16 change in Sacramento River flow below the diversion point.
17 But when you look at an increase in return flow from
18 Davis-Woodland, it would be the same as without project.

19 BOARD MEMBER RUSSELL: Thank you. That was my
20 question.

21 VICE CHAIRPERSON SPIVY-WEBER: My question is it
22 goes back to Tam's earlier question about confidence in
23 these numbers. Which, if any, of these calculations are
24 most affected by CalSim's mathematical insertion I guess
25 is what I'll call it of groundwater levels that aren't

1 based on actual groundwater? So that basically CalSim has
2 to have a balance so they just substitute the number that
3 would create the balance for groundwater? Does the lack
4 of actual information on groundwater effect any of these
5 numbers -- your confidence in any of these numbers?

6 MR. BOUREZ: CalSim doesn't dynamically operate
7 groundwater. The way it's represented in the model is
8 through surface water budgets. When we prepare a surface
9 water budget for the model, you will see that the effect
10 of groundwater in the surface water in that base line
11 model run.

12 When you look at an alternative that involves
13 groundwater, you would -- CalSim is not going to do a good
14 job of picking up that change in groundwater. We do look
15 at other analyses with groundwater, and there are
16 groundwater modeling tools to use for that.

17 For this project, we did not -- I did not
18 evaluate changes in groundwater levels. Jim probably
19 would be a better person to answer that question.

20 MR. YOST: What's the question for me?

21 VICE CHAIRPERSON SPIVY-WEBER: The question is:
22 Using the CalSim model, there are challenges with
23 incorporating groundwater -- CalSim incorporates
24 groundwater in a more mathematical way than an actual
25 measurement way. And so does that factor influence your

1 confidence in the numbers that are here in this exhibit?

2 MR. BOUREZ: It doesn't affect my confidence in
3 those numbers. What I read into your comment was how do
4 we deal with groundwater in our analysis and the changes
5 in groundwater pumping that would occur as a result of the
6 project and how that would influence these numbers.

7 We didn't increase, say, groundwater levels which
8 if you increase groundwater levels, you may have a greater
9 contribution of groundwater to stream flow or less stream
10 contribution to groundwater as a result of a higher
11 groundwater table. We did not consider that in the
12 analysis. If we did, we'd likely see a slight decrease in
13 project impacts or influence on the system.

14 BOARD MEMBER RUSSELL: I have a follow-up
15 question.

16 Looking at your exhibit here, I think it's 115,
17 the numbers that we see and the difference, does that
18 represent groundwater storage since you had previously
19 taken out of groundwater and introduced it as a discharge
20 into the CalSim model? Now that you're not taking the
21 water out of the river system, do the numbers I see here
22 represent a change in storage in the groundwater, all else
23 being the same?

24 MR. BOUREZ: All else being the same, if you're
25 pumping less groundwater and taking surface water, you

1 would expect that groundwater levels would increase.

2 BOARD MEMBER RUSSELL: I'm not talking about the
3 levels. I'm talking about we have acre feet. So the
4 numbers I see here would represent greater groundwater
5 storage than would have been there under existing
6 conditions, because you're not taking water out of the
7 Sacramento system.

8 MR. BOUREZ: That's correct.

9 MR. YOST: I might just add to that. The two
10 cities now, as you well know, rely completely on
11 groundwater. They pump groundwater as their single source
12 of supply. In the future, they'll pump very little
13 groundwater. As it turns out, this groundwater basin
14 underlying the East Yolo County area has significant
15 releases to the Sacramento River. And what will happen
16 when the two cities quit pumping all that groundwater, the
17 groundwater basin is going to build up and these releases
18 will increase. So the net impact on the Sacramento River
19 will be there will be additional groundwater released into
20 the groundwater basin in the area of Woodland and Davis.

21 And then the second part of that discussion is
22 that the 60 or 70 percent of the surface water diverted
23 for use by the two cities will be returned as return flow.
24 And it may even be higher than that, because both cities
25 are embarking on a program to install the capability to

1 pump groundwater for landscape irrigation in their parks
2 and other places in the city, and they wouldn't use the
3 surface water.

4 BOARD MEMBER RUSSELL: If I understand you
5 correctly, you're saying about 40 percent of the diverted
6 water would be consumptively used?

7 MR. YOST: That's correct.

8 MR. BOUREZ: If I can add something as well. The
9 reason I didn't want to include groundwater in our
10 analysis, it would have been a little speculative and very
11 costly to do. And by not including that increased
12 groundwater contribution of stream flow, I would be
13 overpredicting potential influences or effects of this
14 project on the system. And I wanted to err on the side of
15 showing a greater impact to the system than not enough.

16 VICE CHAIRPERSON SPIVY-WEBER: So that is the end
17 of your rebuttal. And you have cross?

18 RECROSS-EXAMINATION

19 BY MR. JACKSON:

20 Q Mr. Bourez, calling your attention to the exhibit that
21 I believe is 115 that's on the screen, when you have a
22 minus number, what does that mean?

23 A It's a decrease. If it's a flow number, it would be a
24 decrease in flow.

25 Q All right. So your study indicates there will be a

1 decrease in net delta outflow as a result of this project?

2 A That's correct.

3 Q And it indicates that there will be a decrease in
4 total delta inflow as a result of this project?

5 A As a result of the project. But I'm comparing the
6 cumulative condition and cumulative without project,
7 that's correct.

8 MR. JACKSON: I think that's all my questions.

9 VICE CHAIRPERSON SPIVY-WEBER: Does staff have
10 additional questions?

11 MS. GROODY: Yes.

12 I'd like to ask a question again of Mr. Bourez.
13 Going back to the table in Exhibit 102, page 2, I think
14 we've kind of figured out that these values are based
15 on -- they're a projection using the model that's not
16 based on historical data.

17 MR. BOUREZ: That's correct.

18 MS. GROODY: And so that's how you project the
19 use of Term 91 all the way back to 1922 when Term 91
20 didn't, in fact, exist?

21 MR. BOUREZ: That's correct. It didn't come into
22 existence until 1984.

23 MS. GROODY: Okay. So this is actually -- Nathan
24 and I share this concern. If you look at the values for,
25 say, for example, March, the value is the same in the

1 critical years as -- they're exactly the same -- the
2 critical years and the wet years have the exact same value
3 for the month of March.

4 MR. BOUREZ: That's correct.

5 MS. GROODY: Can you please explain how the
6 model -- how the model projects that this is the water
7 that the city would be taking out; correct?

8 MR. BOUREZ: That's correct. And it's based on a
9 forecasted demand. And Jim knows more about the demand.
10 I'll explain how the demand is developed to a certain
11 degree. But if you want more details on how the demand is
12 calculated, Jim helped develop that.

13 I took the demand -- the forecasted demands and
14 those demands are on a typical curve. And this is very
15 common for most of the urban demands that are depicted in
16 CalSim and a lot of other models. As you pick a standard
17 kind of demand in the wintertime, the demands go very low.
18 And that's typically indoor urban demand. In the
19 summertime, the demand tends to increase because folks
20 water more plants on their porches and water their lawns.
21 So the demand pattern is very typical of an urban demand.

22 What we do is put that typical urban demand
23 pattern into CalSim, and we simulate the model to meet
24 that demand. So if it -- and it does meet the demand
25 unless Term 91 is in effect. And then the diversions

1 under this permit would be reduced to zero. That doesn't
2 mean the demand goes away. That just means the diversion
3 of this permit would be zero and an alternative source
4 would have to be used.

5 MS. GROODY: Then can you explain 1958 where
6 there's zero demand in March?

7 MR. BOUREZ: In 1958, in that year, CalSim
8 determined that there was supplemental water in the
9 system. And I know that the model -- the way supplemental
10 water is calculated is the same method that the State
11 Board uses. In fact, we took a spreadsheet we got from
12 the State Board and implemented that exact logic for Term
13 91 into our calculations.

14 But actual Term 91 is calculated on a daily basis
15 where the model is a monthly basis and it doesn't have the
16 dynamics that actual operations have. So in that
17 particular case, in 1958, in March, we calculated that
18 Term 91 would be in effect and the project would not be
19 able to divert under the permit.

20 MR. JACOBSEN: Just the clarify that point. So
21 is this chart -- does this chart contain the correlation
22 between the CalSim modeling and Term 91? In other words,
23 is the correlation exact?

24 MR. BOUREZ: Okay. This is a model simulation.
25 When I compare when Term 91 is in effect from the

1 modeling, it doesn't compare identically to what happened
2 historically because we have different regulatory
3 environments. We have the biological opinions. We have a
4 monthly model with rules. So the timing of Term 91 is
5 similar to what has happened in recent historical period,
6 but it's not identical.

7 We took the logic that's applied by the State
8 Board to determine when Term 91 is in effect and applied
9 that logic to the CalSim result. So we're using the same
10 methodology in our analysis as the State Board uses in
11 actual operations. And that's how we determine when Term
12 91 would be in effect in our model.

13 And keeping in mind that in the future I'll
14 guarantee that the historical precipitation and hydrology
15 will not replicate itself in the future. So Term 91 is
16 meant to be a dynamic way of curtailing post-1965 water
17 rights that were junior to the project. So it will be
18 different in the future. I guarantee.

19 VICE CHAIRPERSON SPIVY-WEBER: Any additional
20 questions from staff?

21 Then you have something to submit into the
22 record?

23 MR. JACKSON: No objection.

24 MR. LILLY: Just for the record, we're offering
25 Exhibit WDWCA 115.

1 VICE CHAIRPERSON SPIVY-WEBER: Thank you. We
2 will accept that into the record.

3 (Whereupon the above-referenced exhibit
4 was admitted into evidence.)

5 VICE CHAIRPERSON SPIVY-WEBER: Michael, do you
6 have rebuttal?

7 MR. JACKSON: Very short.

8 BY MR. JENNINGS:

9 Q Mr. Jennings, did you stay up late last night working
10 on the rebuttal?

11 A Actually, no.

12 Q All right. This one is for Mr. Shutes.

13 Mr. Jennings, what rebuttal testimony do you have
14 to offer today?

15 MR. JENNINGS: Well, I would notice that Dr.
16 Hanson testified that the project fish screen will be 95
17 percent effective in effect of entrainment impingement of
18 larger fish. That was WDCWA 200, page 4 of number 17.
19 But that's eggs and larva of striped bass, American shad,
20 and other species will be vulnerable to be entrained into
21 the fish screen mesh. That was the same exhibit, Page
22 518.

23 I note that the EIR that was WDCWA-2093.622
24 admits that green sturgeon -- listed species eggs or larva
25 are present in the water column throughout the year. The

1 EIR at 3.616 through 27 acknowledges that sensitive life
2 stages of numerous other native and nonnative species are
3 present, including stripe bass, American shad, and
4 splittail.

5 I notice that the recent DFG 2010 fall midwater
6 trawl data indicates striped bass and splittail are at
7 lowest levels in history. There is a federal mandate to
8 double the population of striped bass.

9 And I can find no mitigation for the expected
10 five percent entrainment or the impingement of fish or
11 entrainment of eggs and larva other than the agreement
12 with the Department of Fish and Game, which is WDCWA 210,
13 page 8, number 15 and Appendix D for a proposed study of
14 general fishery conditions in the vicinity of the project,
15 but with no mandate to implement any mitigation. Here's a
16 project impact with no mitigation.

17 And Dr. Hanson testified about the potential
18 opportunity if funds are available to consolidate the
19 current fish screens. Now, I hope that they would clarify
20 that. I'm concerned that if funding might -- development
21 of funding might be a problem is, in fact, iron clad that
22 the consolidation of the fish screens will be an integral
23 part of the project and that the project won't go forward
24 without a consolidation of the fish screens. I think that
25 needs to be clarified.

1 With respect to Mr. Yost's testimony, he
2 testified that some 16 wells in Davis and Woodland have
3 been shut down because of age, production, loss or high
4 contaminant levels and that was WDCWA 1-3, page 2, number
5 9, exhibits WDCWA 4 and WDCWA 5 reveal the various Davis
6 and Woodland wells have been abandoned because of high TDS
7 EC conductivity, nitrates, chromium, selenium, and
8 magnesium.

9 I note that the abandoned and historic wells
10 within the Davis and Woodland service area that's Yost
11 slide number twelve, nitrate levels and groundwater have
12 sharply increased over the last 20 years until they now
13 violate drinking water standards at Yost slide number
14 eleven. And it appears that Davis and Woodland have
15 failed to protect groundwater. And only after having
16 polluted their source of drinking water are now seeking a
17 new source in the Sacramento River.

18 Mr. Yost testified that a reason for the project
19 is the ability of Davis and Woodland to comply with
20 salinity, boron, and selenium requirements in the NPDES
21 permit and that reduction in the concentration of these
22 minerals will require very expensive reverse osmosis
23 process. I think that was WDCWA 1-3, page 3, number 11.

24 I note that the high concentration of pollutants
25 in the groundwater is at least partly a result of not

1 protecting groundwater. Reverse osmosis would address
2 numerous contaminants that pose a threat to public health
3 that aren't adequately treated by traditional treatment
4 processes. And that since Conaway Ranch apparently has
5 sufficient water rights to sell long-term transfers to Los
6 Angeles, they are at least potential sources of many
7 others and to potentially a conjunctive use project.

8 Just recently on rebuttal, Mr. Yost noted that
9 groundwater into the river would increase if there were
10 not pumping required -- groundwater pumping to provide
11 drinking water. So I'm presuming that that would also
12 increase the discharge of selenium and boron and whatever
13 other contaminants there are to the system as well, if
14 production increased.

15 And actually I think that's probably all I've got
16 to say.

17 BY MR. JACKSON:

18 Q Mr. Shutes, did you prepare a rebuttal Exhibit CS
19 number 19?

20 BY MR. SHUTES:

21 A Yes, I did.

22 Q Would you describe to the Board what you did.

23 A Yes. I started with a monthly average water demand
24 that was given in CSPA-CS 10, Montgomery Watson Harza memo
25 that was sent by the applicants to the State to the

1 Department of Fish and Game. And actually was
2 excerpted -- the relevant part was excerpted from the EIR,
3 the modeling section of it. And it gives in that the
4 average monthly demand in acre feet for the project.

5 Now, that was when they were asking or
6 anticipating the demand for the project was 56,717 acre
7 feet. Now that they reduced that to 46,136 acre feet by
8 their -- then took a coefficient and reduced the amount of
9 demand on a monthly basis uniformly to get what the
10 average monthly demand would be according to the new
11 permit request.

12 Then I looked at Mr. Bourez's Exhibit Number 104
13 which gave the amount of time that water would be
14 available under -- to service the permits, the percent of
15 time in any given month that water would be available to
16 service the permits. And to simply get an average of how
17 much water is available, I multiplied the first -- the
18 second row by the third row, that is, the percent of time
19 by the monthly demand and came up with the average monthly
20 diversion that would be available under permits if the
21 State Board would adopt the delta flow criteria.

22 Now, Mr. Bourez says in his written testimony
23 that water is available. What I'm showing here is, yes,
24 water is available, as Mr. Lilly asked me, during floods.
25 But what's available on average to service these permits,

1 if you were to institute the delta flow criteria's
2 regulatory requirements, would be 2,356 acre feet.

3 I'd also point out that the far number in the
4 right column of Mr. Bourez's Exhibit 104 had a 61 percent
5 number, which says -- which meant something different.
6 What that meant was that in 61 percent of years there
7 would be something available. But what I just looked at
8 is how much of the year overall water would be available.
9 It's about five percent.

10 Now, we've been through the discussion that,
11 well, maybe we're not going to reduce diversions or
12 increase delta outflow by 5.5 million acre feet. Right
13 now, all we have in terms of the water availability
14 analysis is the current conditions which were just the
15 current constraints, not conditions. So when Mr. Bourez
16 says, well, I looked at the future conditions, he's
17 looking at the future conditions, but he's still looking
18 at them with the existing constraints. And when we look
19 at that, we don't have anything in between the two. We
20 have no idea if we actually start to address the issues
21 that we're going to address over the next few years how
22 much water is going to be available. So far as I know, we
23 don't have any modeling analysis that gives us the answers
24 to that.

25 What I think this shows is that if you provide

1 sufficient water to protect public trust resources
2 according to what the flow report says, then the system is
3 over-appropriated and you have 2,356 acre feet to service
4 this permit. It's not in the public interest to grant a
5 permit to supply that much water.

6 I'd like to speak for a minute also to the
7 importance of the September 26th, 2008, letter, because a
8 lot was made about that. One of the most important things
9 that I think has been lost is that it expresses the fact
10 we don't have good accounting for water use in the system.
11 And so what we have instead is the model that sort of gets
12 at it, but you put a lot of assumptions in it. And the
13 Board hasn't taken upon itself as of this time to do a
14 good accounting. Part of what we think needs to happen
15 before you start granting more permits is you start
16 getting a handle on what kind of accounting needs to
17 happen. We think that's in the public interest.

18 Mr. Hanson, in point 25 of his testimony, said
19 that the permits will result only in small incremental
20 reductions in Sacramento River flows. And the biological
21 impacts on fisheries' resources in the Sacramento River
22 and delta from these changes were found to be less than
23 significant. Also, changes in river flows and delta
24 outflow and associated fishery habitat and quality
25 availability will be less than significant.

1 Mr. Hanson is addressing the wrong question.
2 It's not simply the increment between the existing and
3 future, but the question needs to be do the sum of
4 diversions senior to Davis and Woodland, which must be met
5 before Davis and Woodland can divert, have significant and
6 unsustainable impacts on Sacramento and delta fisheries
7 resources? And do the diversions senior to Davis and
8 Woodland, which must be met before Davis and Woodland can
9 divert, have significant and unsustainable impacts on
10 delta outflow and associated fishery habitat and delta
11 quality?

12 The applicants want to substitute an incremental
13 effects analysis for a cumulative effects analysis. And
14 we've seen pages, hundreds in the EIR and in the testimony
15 that gets to this point.

16 Mr. Yost said in his testimony that the project
17 anticipates future water quality requirements. I believe
18 some of the other folks from Davis and Woodland also
19 testified to this. Well, we think it's also in the public
20 interest to look not only at future water quality
21 requirements, but also to look at future water quantity
22 requirements such as requirements that are going to be
23 needed for delta flow.

24 Thank you.

25 MR. JACKSON: And that ends our rebuttal

1 testimony. And we offer CSPA 19.

2 VICE CHAIRPERSON SPIVY-WEBER: Let me take that
3 in after we've had cross of the rebuttal. I see that
4 Dwight has a question.

5 BOARD MEMBER RUSSELL: This is regarding the new
6 exhibit you just shared with us. And after listening to
7 what I heard a few minutes ago about how much water would
8 be consumptively used by the city of Davis and the city of
9 Woodland, how much would that knowledge now change these
10 numbers if you know that at least 60 percent of the water
11 is returning to the system?

12 MR. SHUTES: It wouldn't change the numbers,
13 because it's a question of how much water is available to
14 divert. And Term 91 -- what the bottom line there means
15 is that Term 91 is in effect for six months of the year,
16 and except for two percent of the time in another month
17 and except for four percent of the time in another month.
18 And what that would mean would be that the cities of Davis
19 and Woodland would not be diverting. And so I don't know
20 that it would have -- whatever the return flow was
21 wouldn't be returning because it wouldn't be diverted in
22 the first place.

23 MR. JENNINGS: Return flows do, in fact, return
24 below the diversion point.

25 BOARD MEMBER RUSSELL: I understand that. I'll

1 pass on that one. I'm not sure I understood your answer.

2 VICE CHAIRPERSON SPIVY-WEBER: Mr. Lilly?

3 MR. LILLY: We could go back and forth forever,
4 but I'm not going to. So I will not ask any further
5 questions of these witnesses.

6 VICE CHAIRPERSON SPIVY-WEBER: Does staff have
7 additional questions on rebuttal? Then now, Michael,
8 would you like to submit your exhibit and is there any
9 objection from Mr. Lilly?

10 MR. LILLY: I do not object to this exhibit.

11 VICE CHAIRPERSON SPIVY-WEBER: Okay. We will
12 accept Exhibit CSPA CS 19 into the record.

13 (Whereupon the above-referenced document
14 was admitted into evidence.)

15 VICE CHAIRPERSON SPIVY-WEBER: And I believe that
16 is the end of the rebuttal, and so we have closing and
17 we'll start with Mr. Lilly.

18 MR. LILLY: I have a couple of slides for my
19 closing statement. They are copies of exhibits that have
20 already been introduced into the record. And I'll ask
21 either Mr. Anderson or Mr. Lindsay to put that up on the
22 screen.

23 First of all, I do want to thank all of the
24 members of the State Board for scheduling this hearing and
25 for the attention during the hearing. Obviously, these

1 are very good questions from State Board members, and they
2 really show your dedication. And we greatly appreciate
3 that.

4 I do want to emphasize that this project is very
5 important to the Woodland-Davis Clean Water Agency that
6 the State Board promptly grant the pending applications
7 and issue these permits. As Mr. Yost testified, we need
8 the permits now to support financing, water rate
9 increases, the design build operate bid operations, and
10 processing of the numerous other permits that are required
11 for the project. The lead times for these actions require
12 that the permits be issued now so we can keep going and
13 get this project online by 2016 to meet the anticipated
14 new waste discharge requirements and NPDES permits.

15 Why should the State Board grant these
16 applications? Water Code Section 1253, we've talked about
17 it a lot, says the Board shall allow the appropriation for
18 beneficial uses of unappropriated water under terms and
19 conditions as this judgment will best develop, discern,
20 and utilize in the public interest the water sought to be
21 appropriated.

22 Mr. Bourez's analysis from the CalSim-II modeling
23 shows that there will be unappropriated water in the
24 system. Basically, there will be times when Term 91 is
25 not in effect in many months of all water year types.

1 Obviously, more months in the wet years and fewer months
2 in the dry years.

3 CSPA's arguments regarding unappropriated water
4 are incorrect for two reasons. First of all, to the
5 extent they're relying on the face values of water right
6 permits and licenses, we've demonstrated that's just not
7 an appropriate way to look at this, because the face
8 values of the permits far exceed the existing or future
9 use and certainly the consumptive use of water under those
10 permits.

11 Also, by looking just at the matter on an annual
12 basis and talking about how many million acre feet per
13 year of additional outflow may be ordered by the Board in
14 the future, ignores completely and incorrectly the large
15 month-to-month variations in supplies and demands. An
16 analysis of this issue must be done on an effort that
17 recognizes there's more water generally in the river
18 systems than there is in the summer, and their analysis
19 does not do that.

20 And when that analysis is done correctly, the
21 Board can understand why it's possible that higher delta
22 flow criteria will have significant impacts on the State
23 and federal projects, and yet still will allow there to be
24 times when unappropriated water is available for
25 appropriation by Davis and Woodland.

1 Water Code Section 1257, I'll just paraphrase,
2 says the Board, in considering applications, is supposed
3 to look at the relative benefit to be derived from all
4 beneficial uses of the water involved.

5 Here, this project will have some very
6 significant benefits to Woodland and Davis and U.C. Davis.
7 We've talked about increased water supply reliability
8 rather than continuing to rely on aquifers of uncertain
9 long-term yields. We've talked about improved drinking
10 water quality, particularly regarding nitrates, chromium,
11 and arsenic. And I'll just add Mr. Jennings' arguments
12 about the nitrates incorrectly assume that the pollution
13 has come from the cities, when undoubtedly it has come
14 primarily from the neighboring agriculture.

15 The improved quality of the discharges -- I'll
16 just put up the slides here. Slide 15 shows the present
17 problems with the EC limits, the boron limits, and the
18 selenium limits in the city of Woodland's discharges and
19 the fact that those significantly exceed the future waste
20 discharge limits.

21 There's been discussion about other potential
22 alternatives. The reverse osmosis alternative is
23 discussed in Mr. Yost's written testimony. He really
24 didn't get a chance to summarize that in detail. It would
25 double the cost of the project. And another \$300 million

1 is real money for these cities. They're already looking
2 at doubling their water rates with the existing project.

3 Other possibilities, ponds -- evaporation ponds
4 are discussed and rejected because of the selenium
5 concerns about waterfowl. And for those of us who have
6 been in this business a while, we all remember Kesterton,
7 and we don't want a repeat of that.

8 Also, with the reverse osmosis, the discharge
9 brine would have to go somewhere. And I suspect CSPA
10 would be at the first of the line in the protest on
11 discharges of selenium into the Carquinez drains. And
12 there would be others, I'm sure.

13 This is the reason many cities, most cities in
14 the Central Valley that have been on groundwater supplies
15 have shifted to surface water and Davis and Woodland want
16 to do it for the same reason.

17 Now, the adverse impacts on aquatic life, those
18 are analyzed. There have been some questions raised. But
19 I think the evidence is clear that the new fish screen
20 will improve the situation at the diversion and that there
21 also will be benefits -- that the primary issue is the
22 impacts in the delta.

23 Now, on that, we agree with the State Board that
24 the declines in delta fish populations, which are
25 discussed in the State Board's 2010 report, are very

1 significant and that the Board will need to address those.
2 But those declines are not a reason for a moratorium on
3 all new pending water right applications in the Sacramento
4 Valley as CSPA has requested.

5 We have considered -- and I think Ms. Doduc hit
6 the nail on the head with her questions earlier today --
7 that the State Board may adopt substantially new delta
8 outflow requirements, but that the evidence shows that
9 even if it does so, there still will be sometimes when
10 there is unappropriated water. Even Mr. Shutes'
11 exhibit -- and we could quibble about maybe he didn't get
12 the winter numbers right and they would be higher. Even
13 his exhibit and even he's admitted there would be
14 unappropriated water. The cities would have to buy
15 substantially more water than is projected now. But even
16 that shows there would be unappropriated water. And
17 obviously if the State Board adopts any lower delta
18 outflow requirements than those in the report, then the
19 amounts of unappropriated water would go up. So the
20 situation is set up where there is unappropriated water
21 available in the system now and anticipated to be in the
22 future.

23 If we can flip forward a couple of slides, I'm
24 trying to blast through this. I just want to say -- I
25 don't have time to go through all the details, but your

1 staff in a letter that Mr. Kassel signed and submitted on
2 July 10th, 2010, that I put up here, really discusses how
3 these terms work. And he got it right. The highlighted
4 sentence here on page 1 says, "The inclusion of these
5 standard water right permit terms will address CSPA's
6 concerns regarding water availability for other water
7 right holders and the environment."

8 And then on page 2 of the letter the next slide,
9 "Therefore, the approval of these applications would not
10 effect the availability of water for senior water users or
11 meet delta water requirements."

12 CSPA has disputed these statements, but the
13 statements are correct. The problem with CSPA's arguments
14 is they improperly confuse Sacramento River and delta flow
15 requirements with these water right permit terms. The
16 flow requirements and the permit terms address different
17 things, which this Board certainly knows well. The flow
18 requirements that are discussed in the report, they may
19 need to be met in the future to address delta issues. We
20 know that.

21 In contrast, Terms 80, 90, and 91 were developed
22 to address implementation of whatever flow requirements
23 are in effect at any time and the allocation of
24 responsibilities for that implementation among the various
25 water right holders.

1 And they are not the cause of the problem. There
2 are many factors that have caused the problems in the
3 delta. Delta outflow requirements may or may not be one
4 of them. But these permit terms are not part of the
5 problem. And they will, in fact, automatically require
6 the project to adjust its diversions as necessary if new
7 requirements are met.

8 And getting to your question, Ms. Doduc, which I
9 think certainly hit right to the core of the entire issue,
10 Woodland-Davis Clean Water Agency recognizes that it, like
11 just about every other municipal supplier in California,
12 has risks. If the delta flow requirements go up, the
13 project can still go forward. There still will be
14 sometimes when water is available for diversion under
15 these permits. And then projects will have to buy more
16 supplemental water supplies. The EIR does analyze those
17 supplies. They are available. Just to put it in terms,
18 there probably are two to three million acre feet of water
19 in the Sacramento River under settlement contracts base
20 supplies that are potentially available through
21 groundwater substitution programs upstream of this project
22 in the Sacramento River. So for a price, the water is
23 there and can be obtained. Obviously, it would make the
24 cost of the project go up, but the project can go forward.

25 Finally, just on the cumulative impact issue and

1 the next slide, again, Mr. Kassel's letter summarizes the
2 concerns regarding cumulative impacts will be addressed by
3 these permit terms. And I won't repeat that because I
4 don't have the time.

5 We did finish -- if we go to the next slide. Mr.
6 Bourez's analysis -- I asked Walter to prepare this
7 exhibit, which is an updated exhibit in the EIR. This is
8 the best available analysis of the future hydrology. And
9 it shows that this massive -- this concern about some
10 massive increase in State and federal project diversions
11 is not founded. These numbers show that cumulative
12 effects of this project and all other anticipated
13 activities going from today until 2030. As this exhibit
14 shows, this is Exhibit 115, the percentage impacts and the
15 actual changes in flows are very, very small. So we don't
16 have this concern about some major change in the system.

17 Finally, just regarding the permit terms and
18 conditions, we appreciate the staff's including draft
19 permit terms as exhibits to the notice. And we agree with
20 those terms. Frankly, the priority date and the other
21 terms will ensure that we will not infringe on senior
22 water right priorities and the terms from Fish and Game's
23 35-page protest dismissal agreement will ensure that we
24 will not have significant impacts.

25 Just a minor point. The California coordinates

1 and the draft permit term I think they pulled them from an
2 old map. They seem to refer to the existing Conaway
3 diversion, and we ask they be changed in the final permit
4 to those on the engineers map that we filed in November
5 which lists the coordinates of the new project. I think
6 they're about 150 feet apart, but we'd like to have the
7 new coordinates on that.

8 For project operations, there were a few
9 questions yesterday. Good questions about how that will
10 work. It's important to separate out physical operations
11 from water rights, because the two -- they require
12 different analyses. The physical operations we do have
13 technology so that from a remote control at the water
14 treatment plant the pumps can be turned on and off and the
15 variable speed pumps and they can be operated to provide
16 just the amount of water that the water treatment plant
17 needs to treat and then provide the water that the cities
18 and U.C. Davis will need. Mr. Yost explained this in
19 detail. We do not anticipate any massive spills or waste
20 of water. Obviously, we want to avoid that.

21 The water right accounting is a separate
22 question. And it's really not that complicated. What
23 will happen -- and, frankly, some of this can even be done
24 after the fact, although we can do it pretty close to
25 realtime. Diversions will be accounted for as under the

1 Davis-Woodland project while Term 91 is not in effect.
2 The day Term 91 goes into effect, the diversions will be
3 accounted for under the alternate water supplies that the
4 project will have. We've talked about the Conaway
5 agreement. There will be others as necessary to meet the
6 full supply.

7 We don't have a full plan for this. We can only
8 do so much at one stage. And believe me, we are working
9 very hard on this project. We have five years to work
10 that out. And the bottom line is Term 6 in the draft
11 permits completely addresses this point. Staff got it
12 right. And we will comply with that. It requires us to
13 file a plan to show we have alternate supplies. And
14 certainly for municipal supplies, we're not going to
15 follow the cities and the houses. So we need to be able
16 to do that. And we accept that. And we do not believe
17 that any other permit terms are necessary.

18 So I know I went a little over my time and I
19 appreciate the Hearing Officer's patience. She's shown a
20 lot of that in the last two days.

21 But just in conclusion, for these reasons, the
22 Woodland-Davis Clean Water Agency requests that the State
23 Board dismiss the CSPA protest and issue these water right
24 permits promptly so that the project can go forward.

25 And I'll certainly be glad to answer any

1 questions.

2 VICE CHAIRPERSON SPIVY-WEBER: Charlie has one.

3 CHAIRPERSON HOPPIN: Alan, from a housekeeping
4 standpoint, please don't take my comment to indicate how I
5 may feel about this project. But I think it would be a
6 good idea for you to get together with staff after the
7 conclusion and talk about updating this map that's in the
8 draft permit. It's one of those things that could get
9 swept under the rug and forgotten. If you don't pick it
10 up, it does become an issue in the future, I think it's
11 better to have that clear right now, even though it's in
12 draft form and may never be used.

13 MR. LILLY: I will be glad to do that. I see
14 Ms. Farwell has the engineer's maps at the table. We will
15 be glad to just clarify that. It will only take a moment.
16 I'm not attributing any wrong to staff, because the draft
17 permit went out before they got the final map from us. I
18 don't think moving the POD by 150 feet is an issue, but we
19 want to get it right.

20 CHAIRPERSON HOPPIN: I think there's someone in
21 the back of the room from Mendocino County that might tell
22 you moving the map 150 feet could have enormous
23 consequences in the future.

24 MR. LILLY: We'll try to get it right.

25 CHAIRPERSON HOPPIN: I respectfully disagree with

1 you.

2 MR. LILLY: I appreciate your instruction.

3 VICE CHAIRPERSON SPIVY-WEBER: Thank you very
4 much.

5 Michael.

6 MR. JACKSON: On behalf of CSPA, we'd like to
7 thank you for the attention to this particular hearing.
8 We'd also like to make a couple of points.

9 The first is there's been an argument that face
10 value of water rights doesn't mean anything, which is a
11 little bit surprising to us since we are going to be
12 very -- if this project goes forward, we're going to be
13 very, very interested in whether or not it gets bonded at
14 46,000 acre feet or whether it gets bonded at some number
15 as low as 2,300-some-odd acre feet.

16 The point is that people who get water rights
17 assume that they have the face value. They base their
18 financial decisions on that. They base their rates on
19 that. And in this particular circumstance, it's just
20 clearly not going to be the case. I don't know how you
21 intend to deal with that, but if you establish the water
22 right at the amount that they've asked for, you are
23 basically taking a risk that we're not going to have paper
24 water. That can be solved maybe by them obeying Term 91
25 and Term 90 and Term 80 and the rest of the terms you have

1 in this thing. But it also could end up with sort of
2 paper loans in the sense that the loan structure is based
3 on an entitlement and it's figured out that way.

4 The real questions, which we decided to bring
5 this to you for, is knowing what you know now, when are
6 you going to decide that some incremental increase in the
7 amount of paper water rights should stop? If not now,
8 when? Three years down the road? Five years down the
9 road? Our evidence sort of showed that this was a nagging
10 problem from 1934 on.

11 And that every senior politician -- I don't live
12 in Red Bluff, but I grew up in Redding. And when I was a
13 kid, Clair Ingle was the Senator from the neighboring
14 town. And you can see from Mr. Jennings' testimony that
15 has now been admitted into the record that he was talking
16 about an adjudication. He was talking about not one drop
17 of surplus water will leave the drainage. People have
18 been talking about limits since the beginning of the
19 project. And yet, here we are in 2011, 70 to 80 years
20 later and we are still making arguments that there will be
21 some water available to margin.

22 It used to be that the arguments for additional
23 water rights were maybe not stated this way, but they were
24 basically, well, we'll take it from the environment. But
25 you've heard -- we know the results of that all over the

1 state. We are now trying to unravel projects to make them
2 fit with the real water, not the paper water.

3 And you've all set through, with the possible
4 exception of Dwight who's newer, the latest evidence in
5 regard to what the scientists and the experts all believed
6 would be necessary in terms of flow to protect the public
7 trust in the estuary, which was the question that came to
8 you from this in this flow here. And obviously it has not
9 been balanced yet. And I'm looking forward to that
10 particular hearing, because I believe that there are a lot
11 of water supplies outside of the delta that can satisfy a
12 number of the problems within this watershed. And I'm
13 looking forward to the opportunity. CSPA is looking
14 forward to the opportunity to show you how to do that
15 balance. We're spending a lot of time. We will spend a
16 lot of money, not that we have much. But for us, we will.

17 But the question in the mean time is we have a
18 face value of 46,000 acre feet in which a project is going
19 to be built that's going to cost \$500 million. And we
20 have evidence that very shortly we're going to be having
21 hearings on what's left of -- I don't know what order
22 you're going to do them in. But we put in the evidence on
23 the extension of time. These are rights that have been
24 reserved to the State and federal projects for use in the
25 Central Valley and State Water Project. They must be --

1 these extensions of time in the additional actual water
2 use must be what we're going to put into the peripheral
3 canal if, in fact, we build that. And at the same time,
4 we know that we have taken more water than the environment
5 can sustain.

6 So if not now, when are we going to begin to
7 match the real water with the paper that we've sent out in
8 terms of water rights? And when are we going to stop
9 sending a right that says on its face 46,000 acre feet,
10 knowing that we're probably at various times, important
11 times, times when the demand is up, not going to be able
12 to divert? When are we going to stop saying as a state
13 and is it in the public interest to say that we'll deal
14 with that later when the time comes in a circumstance in
15 which we have a history of never dealing with it?

16 Mr. Holsinger didn't get his adjudication. Mr.
17 Gleeson didn't get his adjudication. Earl Warren didn't
18 get his adjudication. The first Governor Brown didn't get
19 his adjudication. And on its face, it's clear that this
20 right, if there was an adjudication, would never exist in
21 reality.

22 And so we are here to make a public interest
23 argument that basically says it is inconvenient. These
24 are -- my daughter went to U.C. Davis. We love Davis. We
25 have friends in Davis. The president of our organization

1 lives in Woodland. So when we thought about finally
2 trying to get this issue in front of you so that you could
3 address it about this incremental stepping away from
4 reality that we see happening and the history tells us has
5 been happening for a long time, rather than pick on Los
6 Angeles or rather than pick on the face value of the CVP
7 right at Westlands, we decided that it was fairer to make
8 our public interest argument to you when you were asked
9 for a new right by people who are -- and I don't mean to
10 distinguish them out -- but we are not telling you that
11 these people aren't trying. We are telling you there is
12 not real water available.

13 And it's time. I mean, the signal needs to go
14 out that we need to get -- I don't know whether the State
15 and the federal government and their huge paper water
16 rights with the 1927 priority date, I don't know that
17 you're going to extend time for them to build projects
18 that aren't described. But the point is, they have a 1927
19 date. And until that's done, I think you've got to
20 calculate all that into whether or not you've got water
21 for these folks.

22 Thank you very much for the opportunity.

23 CHAIRPERSON HOPPIN: I'll remind you what we did
24 with water rights for the Auburn Dam that was just about
25 that old.

1 MR. JACKSON: Yes, sir. And my Congressman, Mr.
2 McClintock, is making it very clear that he considers that
3 a major problem. And it was a good thing. Follow the law
4 to the letter and may have resolved an ongoing problem in
5 a way that you could and the State could point to with
6 pride.

7 CHAIRPERSON HOPPIN: I thought I saw you and Tom
8 having lunch together. I wondered what you were talking
9 about.

10 MR. JACKSON: We were talking about trees.

11 I vote a straight democratic ticket all my life,
12 but I like Republican people and I talk to them regularly.

13 CHAIRPERSON HOPPIN: I had to give him one of
14 those.

15 MR. JACKSON: And I understand that. And I will
16 not repeat who I saw you talking to the other day. Thank
17 you very much.

18 VICE CHAIRPERSON SPIVY-WEBER: Thank you,
19 Michael. Thank you, both parties. And thank you, staff.
20 Thank the Board for this.

21 The Board will now take this matter under
22 submission. The participants in this hearing will be sent
23 notice of the Board's proposed --

24 SUPERVISOR LINDSAY: Before we close, a couple of
25 housekeeping things I just want to make sure we're

1 straight on.

2 So the record is clear on the movement of the
3 point of diversion, I just want to be clear, my
4 understanding is the point of diversion the intended
5 location has never changed. We just have a map that has a
6 better more accurate description of it; is that correct?

7 MR. LILLY: That is correct. What we're showing
8 on the map is the same as what's in the EIR.

9 SUPERVISOR LINDSAY: Very good.

10 And I also heard the applicant's request for one
11 permit. I'm acknowledging we've heard that. Is that
12 still true? Assume the applications are approved.

13 MR. LILLY: That is correct. As long as it
14 doesn't delay the process, we would be more than happy to
15 have one permit issued solely to the Woodland-Davis Clean
16 Water Agency for the total amount that is in both draft
17 permits.

18 SUPERVISOR LINDSAY: And one last thing. For
19 both parties, the exhibits that have come in at the
20 hearing, if you would, please -- I know they passed
21 through the computer here and all. But just if you would
22 submit them to us electronically as a package to us and of
23 course to each other by 5:00 p.m. today. Would that be
24 okay? And please just PDFs. I know some of these are
25 Excel files. We would just like to have PDF.

1 MR. LILLY: I assume we should use just the same
2 website?

3 SUPERVISOR LINDSAY: Yes. Just like in the
4 hearing notice.

5 MR. LILLY: We would be glad to do that.

6 MR. SHUTES: Are we able to do this tomorrow so
7 I don't have to go home to do that? Is that acceptable?

8 SUPERVISOR LINDSAY: I have no problem with that.

9 MR. SHUTES: Or tonight?

10 SUPERVISOR LINDSAY: Or tonight. Just by
11 tomorrow morning. Thank you.

12 VICE CHAIRPERSON SPIVY-WEBER: Larry, you snuck
13 that one in on me. I didn't look that far. Okay.

14 Once again, the participants in this hearing will
15 be sent notice of the Board's proposed decision in this
16 matter and the day of the Board meeting at which the
17 decision will be considered. We anticipate issuing a
18 draft fairly soon, and we right now have been advised by
19 Larry Lindsay that a target date of February 15th is
20 likely. If it's any earlier, we will certainly let you
21 know. But right now, that looks like it will be the
22 target date.

23 After the Board adopts an order, any person who
24 believes that the order is in error will have 30 days to
25 submit a written petition for reconsideration of the order

1 to the Board.

2 Thank you all for your interest, cooperation, and
3 participation in this hearing. The hearing is now
4 adjourned. And I will be turning the meeting over to
5 Charlie, who will now pick up the regular Board meeting.

6 (Thereupon the California Water Board
7 adjourned at 12:18 a.m.)

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1 CERTIFICATE OF REPORTER

2 I, TIFFANY C. KRAFT, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing hearing was reported in shorthand by me,
7 Tiffany C. Kraft, a Certified Shorthand Reporter of the
8 State of California, and thereafter transcribed into
9 typewriting.

10 I further certify that I am not of counsel or
11 attorney for any of the parties to said hearing nor in any
12 way interested in the outcome of said hearing.

13 IN WITNESS WHEREOF, I have hereunto set my hand
14 this 2nd day of February, 2006.

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TIFFANY C. KRAFT, CSR

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