

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

In the Matter of:)
)
)
PUBLIC HEARING TO CONSIDER TAKING)
AN EMERGENCY DROUGHT-RELATED WATER)
RIGHTS ACTION ON A PETITION FOR)
TEMPORARY URGENCY CHANGE FILED BY)
THE DEPARTMENT OF WATER RESOURCES)
AND THE UNITED STATES BUREAU OF)
RECLAMATION REGARDING TEMPORARY)
RELAXATION OF THE FEBRUARY DELTA)
OUTFLOW AND THE SAN JOAQUIN RIVER)
FLOW OBJECTIVES IN RESPONSE TO)
CURRENT DRY CONDITIONS)
)
~~~~~ )

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SACRAMENTO, CALIFORNIA

VOLUME I

TUESDAY, FEBRUARY 17, 2009

1:34 P.M.

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LICENSE NUMBER 13196

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ALSO PRESENT:

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Mr. Steve Ottemoeller, Friant Water Authority, Friant  
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Ms. Maria Rey, NOAA Fisheries

Mr. Darrin Thome, US Fish and Wildlife Service

Ms. Karna Harrigfeld, Stockton East Water District

Mr. Bill Paris, San Joaquin River Group Authority

Dr. Perry Herrgesell, Department of Fish and Game

Ms. Ann Grottveit, California Avocado Commission

Ms. Barbara Barrigan-Parilla, Restore the Delta

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Mr. Cliff Schulz, Kern County Water Agency and State  
Water Contractors

Mr. Ron Milligan, Operations Manager, Central Valley  
Project

Dr. Mike Chotkowski, Acting Regional Environmental  
Officer, US Bureau of Reclamation

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## 1 P R O C E E D I N G S

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3 CO-HEARING OFFICER BAGGETT: Let's get  
4 started. We have probably an hour of policy statements  
5 alone.

6 This is the time and the place for the hearing  
7 to receive evidence relevant to the State Water  
8 Resources Control Board's consideration of a petition  
9 for a temporary urgency change filed on February 10,  
10 2009 by the Department of Water Resources and the  
11 United States Bureau of Reclamation for relaxation of  
12 the February Delta Outflow and San Joaquin River Flow  
13 Objectives contained in State Water Board Decision  
14 1641.

15 I'm Art Baggett, Member of the Board. With me  
16 today is State Board Member and Co-Hearing Officer,  
17 Charlie Hoppin; and we'll be assisted by our Senior  
18 Staff Counsel Erin Mahaney, Staff Scientist Diane  
19 Riddle, and Staff Engineer Jean McCue.

20 Before we get started, I want to say a few  
21 words. I think you all know the evacuation procedures,  
22 something -- two exits back there, and follow the signs  
23 out of the building, and take your valuables with you.

24 For the hearing today, the hearing is being  
25 held in accordance with the Notice of the Hearing dated

1 February 10, 2009, and the purpose of this hearing is  
2 to afford DWR, the US Bureau, and interested persons an  
3 opportunity to present relevant oral testimony and  
4 other evidence which addresses issues 1 through 9 as  
5 identified in the Hearing Notice.

6 Unless someone wants me to read the Hearing  
7 Notice, I think you've all -- I assume everybody is  
8 familiar with it. If there is anybody who would like  
9 me to read it, raise your hand. If not, it's a long  
10 notice; I will waive that portion and enter the Notice  
11 into the record.

12 We are broadcasting this hearing on the  
13 Internet and recording by both audio and video.

14 A court reporter is present to prepare a  
15 transcript of the proceeding. Anyone who would like a  
16 copy of the transcript must make separate arrangements  
17 with the court reporter.

18 And to assist the court reporter, as usual --  
19 I think you've all been to many of these hearings -- if  
20 you could present a business card to the reporter and  
21 also speak into the microphone with your name and  
22 affiliation when you come up, that would be helpful.

23 Before we begin the evidentiary portion of the  
24 hearing, we'll hear from any speaker who wishes to make  
25 non-evidentiary policy statements. If you wish to make

1 a policy statement, I think you all know if you could  
2 give us a blue card, that would be helpful.

3 We will also accept written policy statements  
4 for the record. If you have written copies, if you  
5 could give them to staff, that would be helpful.

6 It is subject to the limitations identified in  
7 the Notice. Persons making a policy statement must not  
8 attempt to use their statements to present factual  
9 evidence, oral, or by introducing written exhibits, and  
10 we've asked that you limit the policy statements to  
11 three minutes or less.

12 Again, remember you can submit a written  
13 statement and summarize it in three minutes.

14 After hearing any policy statements, we'll  
15 move to the evidentiary portion of the hearing for  
16 presentation of evidence and related cross-examination  
17 by the parties.

18 If you could indicate on the blue card if you  
19 are presenting a case-in-chief, and I think we have  
20 that or a couple cards of cross-examination purposes  
21 only, which is fine.

22 At the beginning of each case-in-chief, the  
23 party may make an opening statement, briefly summarize  
24 the party's position, and what the party's evidence  
25 tends to establish.

1           In the interests of time, the parties may  
2 submit written opening statements instead of making  
3 oral opening statements also.

4           After any opening statement, we'll hear the  
5 testimony from the parties' witnesses. Before  
6 testifying, the witnesses should identify the written  
7 testimony as their own and affirm that it is true and  
8 correct.

9           Witnesses should summarize the key points, and  
10 please do not read the entire testimony into the  
11 record.

12           Direct testimony will be followed by  
13 cross-examinations by other parties, Mr. Hoppin,  
14 myself, and staff.

15           Redirect testimony and recross-examination  
16 will be limited, as always, to the scope of the  
17 redirect testimony.

18           Parties are encouraged to be efficient in  
19 presenting their cases and their cross-examination.  
20 Except when I approve a variation, we'll follow the  
21 procedures as set forth.

22           Parties' presentations are subject to the  
23 following limits: Opening statements to be three  
24 minutes. For oral presentation of direct testimony, we  
25 would like to ask five minutes per witness or 30

1 minutes per panel. Cross-examination will be initially  
2 limited to 30 minutes per witness or panel of  
3 witnesses; and if you've got cause, we can make  
4 exceptions to that.

5 Oral closing statements will not be permitted.  
6 Toward the close of the hearing, Mr. Hoppin and I will  
7 decide whether to request submission of written closing  
8 briefs or a briefing schedule, if necessary.

9 Are there any procedural questions from any of  
10 the parties before we begin?

11 (No response)

12 CO-HEARING OFFICER BAGGETT: I will now ask  
13 the hearing participants to come up to the podium and  
14 identify themselves. I've collected blue cards, and  
15 will those making appearances please state your name  
16 and whom you represent so the court reporter can enter  
17 this information into the record.

18 Please also state whether it's a policy  
19 statement or presenting a case-in-chief. If you are  
20 presenting a case-in-chief, be sure to give us copies,  
21 preferably ten copies, of your exhibit to the staff and  
22 make copies available to other parties.

23 I think I'll deviate slightly. We've got ten  
24 cards for policy statements. There's really no -- you  
25 can introduce yourself when you come up for those.



1 I'm mainly interested right now in  
2 understanding who the parties of the proceeding are.  
3 So I've got at least ten parties right here, so I'll  
4 just start reading the ones I know and ask people to  
5 come up on your own and identify who you're  
6 representing.

7 So to begin with, the Bureau of Reclamation  
8 and then the Department of Water Resources. Who is  
9 making appearances for those parties?

10 MS. AUFDEMBERGE: This is Amy Aufdemberge.  
11 I'm with the Solicitor's office for Department of  
12 Interior, representing Reclamation.

13 MS. ALLEN: Kaylee Allen, also with the US  
14 Department of the Interior Solicitor's Office,  
15 representing Reclamation.

16 MS. CROTHERS: Cathy Crothers with the  
17 Department of Water Resources.

18 CO-HEARING OFFICER BAGGETT: Then we have  
19 South Delta Water Agency, Central Delta Water Agency.  
20 I'll just read the list of what I've got. CSPA, Bay  
21 Institute.

22 MR. NOME LLINI: Dante John Nomellini, John  
23 Herrick, and DeeAnne Watkins for San Joaquin County,  
24 Central Delta Water Agency, and South Delta Water  
25 Agency. We have a joint witness and one set of

1 exhibits.

2 CO-HEARING OFFICER BAGGETT: Very good. Thank  
3 you. Mr. Nomellini. CSPA, Bay Institute? Whichever?

4 MR. JACKSON: Michael Jackson representing  
5 CSPA. We have one witness, and we have the exhibits.

6 CO-HEARING OFFICER BAGGETT: Very good.

7 MR. BOBKER: Gary Bobker representing the Bay  
8 Institute. We have one witness, and we have exhibits  
9 that we've handed to staff.

10 CO-HEARING OFFICER BAGGETT: Butte  
11 Environmental Council?

12 MR. WAGNER: My name is Keith Wagner. I am  
13 with Lippe Gaffney Wagner, LLP here representing Butte  
14 Environmental Council today. I have submitted my  
15 written testimony and exhibits on CD.

16 CO-HEARING OFFICER BAGGETT: Thank you. We  
17 have Jon Rubin, and then Cliff Schulz.

18 MR. RUBIN: Good afternoon. Jon Rubin, with  
19 the law firm of Diepenbrock Harrison for San Luis &  
20 Delta-Mendota Water Authority as well as Westlands  
21 Water District.

22 MR. SCHULZ: Cliff Schulz, attorney for the  
23 Kern County Water Agency and the State Water  
24 Contractors. I expect to simply appear through  
25 cross-examination.

1 I do have one witness, if circumstances need  
2 be I can call, which would be Terry Erlewine; but I  
3 don't believe I'm going to need to do that.

4 CO-HEARING OFFICER BAGGETT: Thank you.  
5 Environmental Defense Fund?

6 MR. ROSEKRANS: Good afternoon. I'm Spreck  
7 Rosekrans for the Environmental Defense Fund and with  
8 one very short piece of testimony. Thanks.

9 CO-HEARING OFFICER BAGGETT: Thank you. And  
10 the last card I've got as a direct testimony is Russ  
11 Brown?

12 DR. BROWN: Good afternoon. I'm Russ Brown.  
13 I work for ICF Jones & Stokes, but I'd like an  
14 opportunity if I can to summarize my exhibit for myself  
15 as a citizen.

16 CO-HEARING OFFICER BAGGETT: Thank you.

17 With that, any other parties that intend to  
18 cross-examine or present a case-in-chief? Great. If  
19 not, then we'll do the policy statements, and then  
20 we'll administer the oath after that.

21 So policy statements, I'll just read the  
22 cards, and we'll go from there unless any questions.  
23 Okay. With that, we have Lee Orloff followed by Steve  
24 Ottemoeller. Leah, sorry.

25 MS. ORLOFF: Good afternoon, Board Members

1 Baggett and Hoppin and members of the staff.

2 I'm Leah Orloff, Water Resources Manager for  
3 the Contra Costa Water District. The Contra Costa  
4 Water District appreciates this opportunity to make a  
5 policy statement on the petition before you, and I  
6 would like to summarize the three key points of that  
7 policy statement.

8 The first is --

9 CO-HEARING OFFICER HOPPIN: Could you talk  
10 into the microphone just a bit more? Maybe let it  
11 down.

12 MS. ORLOFF: Is that better?

13 The first of our points is that if this  
14 petition is granted it will harm Contra Costa Water and  
15 other Delta diverters. The already dry and salty  
16 conditions that have obtained in the Delta this year  
17 are only going to get saltier.

18 Since our operation is based on water quality,  
19 particularly on Delta salinity, it will harm us. We  
20 will be required to make additional releases from our  
21 Los Vaqueros Reservoir in order to blend the saltier  
22 water down to the quality that's palatable for our  
23 customers.

24 And our reservoir is already, because of this  
25 year's condition, we're in danger of reaching emergency

1 storage, and the granting of this petition will only  
2 make that event more likely.

3 The second point we'd like to make is that  
4 although this will harm us we do not oppose the  
5 granting of this petition.

6 We recognize that these are extraordinary  
7 times, that extraordinary times demand extraordinary  
8 measures. And we further recognize that, as claimed in  
9 the petition, the Department of Water Resources and  
10 Reclamation are faced with a difficult task of  
11 balancing many obligations, and we are not opposed to  
12 this method of finding that balance.

13 The third and final point I'd like to make is  
14 that Contra Costa Water District is taking action in  
15 the face of this year's conditions and in the face of  
16 the potential granting of this petition.

17 We have reduced our customer demand through  
18 our ongoing conservation program, through this year's  
19 request of our customers to engage in voluntary  
20 rationing, and we're prepared to go to mandatory  
21 rationing if circumstances demand it.

22 Further, we have this year, in response to  
23 ongoing conditions, flexed our water quality delivery  
24 goal so that, to conserve water in our reservoir and  
25 make smaller releases than otherwise would be required,

1 we are serving our customers saltier water than they're  
2 used to receiving.

3           And finally, we will be working with the  
4 fisheries agencies to modify our operational  
5 requirements this spring in a way that will allow us to  
6 preserve water in -- our storage and our water supply  
7 and still provide a -- 30 more seconds -- the required  
8 level of protection to Delta fisheries.

9           That concludes my policy statement. I'd be  
10 happy to answer questions if there any.

11           CO-HEARING OFFICER BAGGETT: Thank you.  
12 Friant Water Users followed by NOAA Fisheries.

13           MR. OTTEMOELLER: Good afternoon, Members of  
14 the Board. My name is Steve Ottemoeller with the  
15 Friant Water Authority and the Friant Water Users  
16 Authority.

17           The purpose of our statement today is to  
18 support the petition for the relaxation. The key point  
19 that I want to make is that the potential impacts of  
20 the reduced exports as a result of the current  
21 conditions goes beyond what you might traditionally  
22 think of as the export service areas.

23           The Friant Water Authority members exist along  
24 with east side of the San Joaquin Valley from Madera  
25 County down to Kern County. We rely on the Friant

1 Division of the Central Valley Project.

2 That area encompasses almost a million acres  
3 of very productive farmland, 15,000 farmers, and all of  
4 the communities that support those agricultural  
5 economies in that area.

6 The key point here is that the Friant water  
7 supply is dependent on an exchange that was established  
8 in 1939 when the dam was built. The United States  
9 purchased and exchanged water rights on the San Joaquin  
10 River with certain landowners on the west side.

11 One of the provisions of that exchange is that  
12 if the conditions are such that the United States  
13 cannot provide the substitute water supply to those  
14 districts on the west side, the exchange contractors,  
15 then they may call on water from the San Joaquin River.

16 This is the first year in the 60 years of  
17 operation of that dam that we are in that circumstance.  
18 We have weathered droughts in the past, not faced this  
19 circumstance.

20 We are now looking at a fairly strong  
21 likelihood that if conditions don't change, including  
22 the ability to have the standards relaxed in the Delta,  
23 that the water supplies from Friant will be released to  
24 the exchange contractors.

25 We don't have a problem with the agreement,

1 but we just believe there are ways that we could limit  
2 the amount of water that would have to be released and  
3 inefficiently, notwithstanding some groundwater  
4 recharge, inefficiently use water and also that would  
5 impact the farmers on the east side.

6 So again, we support the petition and urge  
7 that it be granted. Thank you.

8 CO-HEARING OFFICER BAGGETT: Thank you. Maria  
9 Rey from NOAA Fisheries and then US Fish and Wildlife  
10 Services on deck.

11 MS. REY: Thank you. Good afternoon, Board  
12 Member Baggett, Board Member Hoppin. I am Maria Rey  
13 with NOAA Fisheries. I have a brief statement that  
14 I'll read into the record for you today:

15 NOAA Fisheries, National Marine  
16 Fisheries Service is appearing today to  
17 express support for the petition filed  
18 by US Bureau of Reclamation and  
19 California Department of Water Resources  
20 for temporary relaxation of X2 standards  
21 for the month of February.  
22 NMFS has reviewed the petition as part  
23 of Reclamation's continued  
24 implementation of our Biological Opinion  
25 for 2004 on the operations of the



1 Central Valley Project and State Water  
2 Project.  
3 NMFS is currently engaged in reviewing  
4 the draft February forecast prior to its  
5 initial announcement this Friday,  
6 February 20th, and NMFS will continue to  
7 utilize an adaptive process on a weekly  
8 basis to meet the biological needs of  
9 listed anadromous fish species within  
10 the constraints of the critically dry  
11 water year conditions.

12 Reclamation and NMFS are currently  
13 engaged in a reinitiation of the  
14 Endangered Species Act Section 7  
15 Consultation.

16 I'll summarize this part. This basically is  
17 just a summary of where we are in our consultation. If  
18 you have questions, I can respond to them:

19 As part of our Section 7 Consultation  
20 process, we've reviewed the existing  
21 hydrologic and biological conditions.  
22 We have determined that providing  
23 suitable water temperatures through the  
24 summer and early fall for spawning and  
25 rearing salmon and steelhead will be

1           very challenging.  
2           At best, the river miles of stream  
3           habitat with water temperature suitable  
4           for salmonid reproduction will be  
5           diminished.

6           At worst, cold water could run out  
7           before the end of the summer resulting  
8           in extensive temperature-related  
9           mortality.

10          Given the low storage levels in Shasta,  
11          Oroville, and Folsom reservoirs, the  
12          proposed relaxation of the X2 standard  
13          would likely retain more cold water  
14          storage instead of releasing it to meet  
15          Outflow Objectives in February and  
16          improve the extent and duration of  
17          salmonid and steelhead spawning and  
18          rearing habitat this summer and early  
19          fall.

20          If properly managed, this added  
21          increment of available cold water should  
22          help extend the period this summer  
23          wherein water temperatures in the rivers  
24          below these dams remain below harmful  
25          levels.

1 NMFS recognizes the difficulty that the  
2 current hydrology creates for operations  
3 of the CVP and SWP this water year.  
4 We're committed to assisting Reclamation  
5 and DWR within our regulatory and legal  
6 responsibilities.  
7 We support Reclamation and DWR's  
8 petition to relax the X2 standard as  
9 requested in the petition before you,  
10 and we also support an ongoing  
11 multi-species approach and believe it's  
12 important to look at the needs of both  
13 anadromous fish that spawn and rear  
14 below the cold water pools and the  
15 resident fish in the Delta and will  
16 continue to work with Fish and Wildlife  
17 Service and Fish and Game to ensure all  
18 species are adequately protected.

19 Thank you.

20 CO-HEARING OFFICER BAGGETT: Thank you, Maria.

21 US Fish and Wildlife Service followed by  
22 Stockton East Water District.

23 MR. THOME: Good afternoon. My name is Darrin  
24 Thome. I'm with the Fish and Wildlife Service in the  
25 regional office, and I will read you this brief

1 statement:

2 The Service is appearing today to  
3 express support for the petition filed  
4 by Reclamation and DWR for temporary  
5 relaxation of X2 standards for the month  
6 of February.

7 The Service has reviewed the petition  
8 and effects of the action on listed  
9 Delta smelt as part of a reinitiation of  
10 consultation required by the December  
11 2008 Biological Opinion evaluating the  
12 effects of the long-term operation of  
13 the Central Valley Project and State  
14 Water Project on Delta smelt.

15 The proposed relaxation of the X2  
16 standard for the month of February  
17 constitutes a change from the Project  
18 description that was analyzed in that  
19 opinion.

20 As a result of the reinitiation process,  
21 the Service has reviewed the existing  
22 hydrological and biological conditions  
23 and has determined that the temporary  
24 modification of the Project description  
25 articulated in the temporary urgency

1 petition is within the range of effects  
2 analyzed in the Biological Opinion.

3 The Service recognizes the difficulty  
4 that the continued critical hydrology  
5 creates for operations of The Projects  
6 in this water year.

7 The Service, as part of the Department  
8 of Interior is committed to assisting  
9 the State within the context of its  
10 regulatory responsibilities and  
11 statutory authority during this  
12 difficult time. Thus, the Service  
13 supports the petition for the month of  
14 February.

15 As described in the Biological Opinion,  
16 we will continue to utilize the adaptive  
17 process on a weekly basis to proactively  
18 meet the biological needs of the Delta  
19 smelt within the constraints of the  
20 critically dry water year conditions.

21 Thank you.

22 CO-HEARING OFFICER BAGGETT: Mr. Jackson?

23 MR. JACKSON: Mr. Baggett, I would move to  
24 strike the written testimony since it's my  
25 understanding that this is a policy statement, and it

1 cannot be cross-examined.

2 If Dr. Michael Chotkowski is not going to  
3 testify and Ronald Milligan is not going to testify, I  
4 would move to strike 2, 3, 4, 5, and 6.

5 MS. AUFDEMBERGE: This an Amy Aufdemberge for  
6 the Department of Interior.

7 We've identified the policy statement as DOI  
8 Exhibit 1. However, we are clear that this is not part  
9 of evidence. We will not move to put it into evidence.  
10 It was just a demarcation of --

11 CO-HEARING OFFICER BAGGETT: Okay.

12 MS. AUFDEMBERGE: -- part of the papers we  
13 submitted.

14 CO-HEARING OFFICER BAGGETT: Any other  
15 objection? If not, we'll strike as requested.

16 Stockton East followed by the San Joaquin  
17 River Group.

18 MS. HARRIGFELD: Good afternoon, Member  
19 Baggett, Member Hoppin. Karna Harrigfeld on behalf of  
20 Stockton East Water District. Stockton East has a few  
21 comments on the petition for temporary urgency change.

22 Stockton East supports DWR and Reclamation's  
23 request for relaxation of the February Delta Outflow  
24 and San Joaquin River Flow Objectives and urges the  
25 State Water Resources Control Board to grant this

1 temporary urgency petition.

2 As everyone is well aware, the state is  
3 experiencing a serious drought. On the San Joaquin  
4 River Basin, we are experiencing our third either dry  
5 or critical year.

6 New Melones water storage is at 1.1 million  
7 acre feet of water. The CVP contractors from the New  
8 Melones reservoir are projected to get zero allocation  
9 this year.

10 The CVP contractors on the New Melones system  
11 have 18,000 acres of permanent crops and/or vines for  
12 which we don't know where we will be provided  
13 irrigation water.

14 It is important to note that the San Joaquin  
15 River Flow Objective was part of a negotiated solution  
16 between parties that -- none of which were on the San  
17 Joaquin River side. Essentially, this negotiated  
18 solution came up with a percentage for the San Joaquin  
19 River Flow. It was ten percent.

20 Additionally, the San Joaquin River Flow  
21 Objective is tied in part to Sacramento River  
22 hydrology. This year, once again, is a wet year -- is  
23 a critically dry year; and instead of the 7-10 cfs flow  
24 objective at Vernalis, the higher level is being  
25 triggered. Therefore, we believe it shouldn't be tied

1 to Sacramento River hydrology.

2           Lastly, I think that the temporary urgency  
3 permit request demonstrated that there is, A, an urgent  
4 need, B, no legal injury to either water users or an  
5 adverse impact to fish and wild life.

6           Finally, revisiting San Joaquin River flow  
7 obviously is not a new issue. The State Water  
8 Resources Control Board has scheduled a hearing for  
9 later this year.

10           When we did the '05-06 review of the Bay Delta  
11 Water Quality Control Plan, Stockton East participated  
12 and doesn't believe that there is sufficient biological  
13 support for the existing objective.

14           One final comment. Reclamation has chosen to  
15 meet the San Joaquin River Flow Objective through New  
16 Melones releases solely. The State Board has directed  
17 them to look at other sources. So in the future and in  
18 the upcoming hearings to come, we urge the State Water  
19 Resources Control Board to ensure that Reclamation  
20 makes other available sources of water to meet the San  
21 Joaquin River Flow Objective when that time comes.

22           Thank you.

23           CO-HEARING OFFICER BAGGETT: Question? Thank  
24 you. San Joaquin River Group followed by Cal Fish and  
25 Game.



1           MR. PARIS: Good afternoon. My name is Bill  
2 Paris, P-a-r-i-s. I'm an attorney with O'Laughlin &  
3 Paris. I'm here on behalf of the San Joaquin River  
4 Group Authority.

5           Like Stockton East, we support the petition.  
6 We do so less for the merits of the petition than for  
7 our continuing concern about the validity of the  
8 objective and the San Joaquin River Flow aspect of  
9 that.

10           We have participated, much like Stockton East  
11 just mentioned, in several of the proceedings, D-1641,  
12 the '05-06 review, and again last year in the Board's  
13 request for Bay/Delta Basin Plan issues.

14           We've continued to raise this point and submit  
15 what we believe to be quite a bit of evidence that the  
16 San Joaquin River Flow aspect of this just simply isn't  
17 workable. We're not going to repeat that all here; but  
18 just as a reminder, we have three things that we think  
19 make this unworkable and therefore make the urgency  
20 petition something that should be granted.

21           The first, as mentioned by Ms. Harrigfeld, is  
22 the role that Sacramento River basin hydrology plays as  
23 the driver in all of this.

24           The San Joaquin River Group continues to  
25 contend that if this type of element of the objective

1 is going to continue that it has to be based -- the San  
2 Joaquin River flows are going to have to be based on  
3 San Joaquin River basin hydrology and not be simply  
4 some sort of percentage of Sacramento River basin  
5 hydrology, which often can be and is different.

6           Secondly, the Bureau is making these flows  
7 available by the release of stored water; however,  
8 there is no protective device currently to shepherd  
9 that water to make sure it meets its intended purpose.  
10 And as we know, unless and until it meets its intended  
11 purpose, it cannot be diverted for other uses.

12           So what we have is a situation unfortunately  
13 where -- and much of the evidence and studies that the  
14 San Joaquin River Group has provided in other forums --  
15 San Joaquin River flows, in our view, can be shown to  
16 be not contributing to Delta outflow. They contribute  
17 to Delta inflow, but not outflow because the water of  
18 the San Joaquin River is either exported or consumed by  
19 in-Delta diverters.

20           So the lack of some sort of a control or  
21 measurement to make sure that the water released from  
22 New Melones achieves its purpose and that purpose only,  
23 we believe is a significant failing.

24           So we look forward to participating later on  
25 this year pursuant to the Notice of Preparation you

1 guys just sent out on February 13th to address these  
2 issues in more detail.

3 Thank you.

4 CO-HEARING OFFICER BAGGETT: Thank you.

5 California Department of Fish and Game followed by  
6 California Avocado Commission.

7 DR. HERRGESELL: Good afternoon. My name is  
8 Perry Herrgesell. I'm the Bay/Delta Water Policy  
9 Coordinator for the Department of Fish and Game.

10 As you know, we're the trustee agency for the  
11 Department fish and wildlife resources in the state,  
12 and the Department really has a material interest in  
13 assuring that water flow in the Delta is maintained at  
14 levels that are adequate for the long-term protection  
15 and maintenance of the aquatic species that are there.

16 In that light, we'll be mentioning our  
17 comments today. And I've provided written comments as  
18 well, so I'm really quickly highlighting. We're most  
19 concerned about the Delta species, particularly the  
20 longfin smelt and Central Valley salmon.

21 The Department, as a start, is very acutely  
22 aware that California may be facing the third year of a  
23 drought, and the water management system is really  
24 facing unprecedented circumstances in trying to meet  
25 all the needs for all the water users.

1           But in a similar fashion, the Department  
2 really finds itself in an interesting situation too  
3 because we need to balance the conservation management  
4 of both the estuarine species downstream where X2 will  
5 be affected and also the salmon that are upstream.

6           In this case, I think our most legitimate  
7 concern today is for the longfin smelt, the estuarine  
8 species, but we recently looked at some of the very  
9 recent outflow projections that are proposed to happen  
10 as a result of the storms, and some of our concerns  
11 there have been mitigated somewhat by that observation.

12           With respect to this situation, this  
13 relaxation, we also realize it will have beneficial  
14 effects for upstream salmon as well.

15           A couple of general comments. The Department  
16 would first like to reiterate its support for X2 water  
17 quality objectives and the importance of compliance  
18 with this objective in maintaining essential elements  
19 in a healthy estuarine environment.

20           Some of the relationships between outflow and  
21 several fish that were the basis of X2 still exist.  
22 Some folks have said they've changed, but they still  
23 exist. They've only shifted somewhat, and there's a  
24 lot of work going on to try to define the reasons for  
25 those shifts.

1           The petition points out on page 14 that the  
2 impact of a modification on longfin smelt in February  
3 is unquantifiable.

4           I think we would probably suggest that it's  
5 more accurate to call this -- or say that we cannot  
6 really estimate the impacts now because the future  
7 hydrology is still unknown.

8           But I think it's important to point out that  
9 X2 and longfin smelt really has to be looked at in the  
10 several month kind of a context. It's not really what  
11 happens at one time that makes the abundance of the  
12 fish later in the season.

13           Well, it sounds like we have concerns about  
14 this process, but in reality we're supportive of the  
15 salmon part of this, providing cold flows for the  
16 salmon.

17           And we feel that the estuarine species could  
18 actually be impacted but protected through the WOMET  
19 process that we have established. That's a five-agency  
20 group that meets on a weekly basis to manage flows and  
21 operations and fish.

22           And we feel that if we follow that process as  
23 it's been established we can certainly provide  
24 protection for the species that we're concerned about  
25 in this particular case.

1 I won't talk any more about detail about the  
2 salmon issues. Marie has made a comment that basically  
3 we agree with, that it's pretty iffy this season, but  
4 we feel if we hold some of the water back now it will  
5 help us down the line later on in the summer for the  
6 salmon species needing cold water to spawn.

7 I think that's all I'll say at this point, and  
8 I could answer questions if necessary now or later.

9 CO-HEARING OFFICER BAGGETT: Thank you.  
10 California Avocado Commission followed by Restore the  
11 Delta.

12 MS. GROTTVEIT: Good afternoon, Member  
13 Baggett, Member Hoppin. My name is Ann Grottveit. I'm  
14 an attorney with the law firm of Kahn, Soares & Conway;  
15 our firm is general counsel for the California Avocado  
16 Commission, and I appear today on their behalf.

17 I have a very brief statement in support of  
18 the petition that I will read into the record.

19 The Commission supports the Petition for  
20 Temporary Urgency Change. The  
21 Commission also supports the California  
22 Department of Water Resources' and  
23 United States Bureau of Reclamation's  
24 request to waive specific starting gate  
25 provisions and flow requirements

1           described in the supplement to the  
2           petition.

3           This commission, formed in 1977 as an  
4           entity of state government, engages in  
5           advertising, promotion, production, and  
6           marketing research and dissemination of  
7           crop information for the estimated 6,000  
8           growers in the state.

9           Avocados are grown along the California  
10          central coast to San Diego County, and  
11          the estimated farmgate value of the crop  
12          is \$350 million.

13          The worsening water conditions across  
14          the state coupled with the restrictions  
15          on Delta water export pumping have  
16          caused California avocado growers to  
17          stump more than 4,000 acres this year.

18          Stumping, as evidenced by the  
19          photographs we have submitted, is the  
20          act of cutting avocado trees at three to  
21          four feet, then immediately whitewashing  
22          the stumps to protect them from sunburn.

23          This allows trees to regenerate,  
24          initially using minimal water which  
25          increases as trees regrow and return to

1 production which takes approximately  
2 three years.

3 Avocado growers have taken this action  
4 with the hope of accessing adequate  
5 water in the near future. Until then,  
6 the lost acreage will result in a loss  
7 of homegrown production.

8 Mexico, Chile, and Peru will be happy to  
9 fill this market void; and ultimately,  
10 this does mean more lost jobs for the  
11 state.

12 If this problem is not addressed  
13 immediately, additional acres will be  
14 stumped this year. Because it will be  
15 at least three years until these stumped  
16 trees can become productive, without  
17 additional water, this cycle continues,  
18 reducing local avocado production and  
19 extending the economic impact to the  
20 state.

21 We are hopeful that the relaxation of  
22 the Delta water export pumping  
23 restrictions will provide supplies of  
24 water vital to avocado growers in the  
25 southern coastal portion of this state.



1           Permitting the Delta outflow  
2           modification gives the hope of relief to  
3           California avocado growers already in  
4           the midst of a deep recession and severe  
5           drought.

6           The Commission thanks the Board for  
7           their interest in this vital issue.

8           Thank you.

9           CO-HEARING OFFICER BAGGETT: Thank you.

10          Restore the Delta followed by California Resources  
11          Strategy, Craig Johns.

12                 MS. BARRIGAN-PARILLA: My name is Barbara  
13          Barrigan-Parilla, and I'm the campaign director with  
14          Restore the Delta. Thank you to Board member Baggett  
15          and Hoppin for giving us time to speak today.

16                 Restore the Delta is a grassroots campaign,  
17          and we're committed to making the Sacramento-San  
18          Joaquin Delta swimmable, fishable, drinkable, and  
19          farmable to benefit all of California.

20                 We are a coalition of Delta residents,  
21          business leaders, civic organizations, Delta farmers,  
22          community groups, faith-based groups, fishermen and  
23          environmentalists; and we all work together to  
24          strengthen the health of the estuary and well-being of  
25          Delta communities.

1           We believe that the way to get to health for  
2 the Delta is to improve water quality so that farming  
3 and fisheries can thrive together again.

4           We seek the reduction of water exports  
5 permanently to restore and sustain the Delta to protect  
6 native and desirable species and to protect public  
7 health. Consequently, our 2400 members are absolutely  
8 opposed to the petition and suspension of Delta water  
9 quality protections.

10           We do not accept the notion that suspending  
11 Delta water quality protections is part of a plan, a  
12 plan to protect one species when other species are  
13 imperiled after years of massive over-pumping from the  
14 Delta, over-pumping to supply water for the Westlands  
15 Water District in the Kern County water bank.

16           It seems that this proposal, to us, is more of  
17 a cover. It's a cover of the State's unending  
18 willingness to support corporate agribusiness at the  
19 expense of Delta fisheries and Delta family farmers.

20           Suspending X2 and river flow requirements even  
21 for a month after DWR and the Bureau have failed to  
22 hold on to water for successive dry years is wrong.

23           Delta agriculture and fisheries are part of  
24 the state economy, and people forget that that  
25 contribution to the economy is nearly \$3 billion a

1 year. Again, it is our economy and our ecosystem in  
2 the Delta that are being sacrificed for corporate  
3 agribusiness in the southern part of the state.

4 Pitting one species of fish against another  
5 epitomizes the absolute failed water management  
6 policies of the State. And we just maintain that  
7 killing the Delta by a thousand small cuts is wrong,  
8 and it needs to end.

9 Thank you.

10 CO-HEARING OFFICER BAGGETT: Thank you. Craig  
11 Johns followed by San Luis & Delta Mendota, Jon Rubin.

12 MR. JOHNS: Good afternoon, Mr. Chair and  
13 Mr. Hoppin. My name is Craig Johns; I'm actually here  
14 today for Sacramento Regional County Sanitation  
15 District.

16 I want to point out the District does not and  
17 will not take a position on the specifics of the  
18 application in terms of whether the application should  
19 be approved or denied but simply want to point out  
20 that, if the request is granted, suggesting that there  
21 should be some monitoring and survey requirements  
22 relative to the potential expansion of the environment  
23 in which the Corbula or the Asian overbite clam exists.

24 It's fairly well documented -- I think most  
25 experts agree -- that the existence of the Corbula, or

1 since it was discovered in 1986, has contributed to a  
2 lot of the problems with the pod species. And if the  
3 X2 line requirements are relaxed, bringing the X2 line  
4 further eastward into the Delta, it is very likely that  
5 the salinity levels will become more habitable for the  
6 Corbula to exist and therefore thrive and possibly have  
7 further impacts on the pod species.

8 So we would just suggest that if the  
9 application is granted by the Board that there be  
10 specific requirements of the applicants to do Corbula  
11 surveys as well as other specific and appropriate  
12 reports and studies.

13 Thank you very much.

14 CO-HEARING OFFICER BAGGETT: Thank you. After  
15 San Luis is Kern County Water Agency and State Water  
16 Contractors.

17 MR. RUBIN: Jon Rubin for San Luis & Delta  
18 Mendota Water Authority. The Authority has no policy  
19 statement to make.

20 Thank you.

21 CO-HEARING OFFICER BAGGETT: Thank you. Do  
22 the Contractors have a policy statement?

23 MR. SCHULZ: Very briefly. We are here today  
24 to support the Department and the Bureau's request --

25 CO-HEARING OFFICER BAGGETT: Could you state

1 your name for the --

2 MR. SCHULZ: Oh. Cliff Schulz for Kern County  
3 Water Agency and the State Water Contractors. And our  
4 policy statement will be very short.

5 We are here in support of the request. We are  
6 in a situation where allocations of water to vast areas  
7 of California are at best -- the last time I talked to  
8 Jerry Johns at the Department of Water Resources about  
9 it, he said hanging on with our fingernails to 15  
10 percent and probably going down.

11 And on the federal side, possibly even less  
12 and possibly some zeros.

13 So we are in a situation where the balancing  
14 of hardships is what is involved in this. We can  
15 agree, I think, on exactly what has happened over the  
16 last weeks and months and what happened early in  
17 February.

18 The question is: What does the public  
19 interest balance say about that under the conditions of  
20 the native species in the Delta, the upstream  
21 anadromous fish, and the needs of Californians both  
22 agricultural and urban throughout the state for a  
23 liveable water supply.

24 And so we hope that you will grant the  
25 petition.

1 CO-HEARING OFFICER BAGGETT: Thank you. Any  
2 other policy statements? With that, let's move to the  
3 evidentiary portion. Policy statement?

4 MR. JACKSON: Do you want a policy statement  
5 for those of us who are --

6 CO-HEARING OFFICER BAGGETT: You're doing a  
7 case-in-chief?

8 MR. JACKSON: Yes.

9 CO-HEARING OFFICER BAGGETT: Opening  
10 statement, you'll get your chance.

11 MR. JACKSON: All right.

12 CO-HEARING OFFICER BAGGETT: We'll call it an  
13 opening at that point, so you can summarize your  
14 testimony and do a traditional opening statement.

15 With that, I'll administer the oath. Will  
16 those who plan to testify today please stand, raise  
17 your hand, and repeat after me.

18 (Potential witnesses complying)

19 CO-HEARING OFFICER BAGGETT: Do you promise to  
20 tell the truth in these proceedings?

21 THE WITNESSES (collectively): Yes.

22 CO-HEARING OFFICER BAGGETT: Thank you. With  
23 that, let's go off the record for just a minute.

24 (Recess)

25 CO-HEARING OFFICER BAGGETT: We'll go back on

1 the record. Five-minute recess; we'll come right back  
2 so you can set up and get your witnesses up.

3 (Recess)

4 CO-HEARING OFFICER BAGGETT: Let's go back on  
5 the record, and we'll begin with the opening statement  
6 from the Department of Water Resources. And this will  
7 be a summary, correct?

8 MS. CROTHERS: Yes.

9 Good afternoon, Mr. Baggett, Mr. Hoppin. And  
10 thank you for providing this expedited public hearing  
11 on DWR and the Bureau of Reclamation's Petition For a  
12 Temporary Urgency Change in our delta outflow  
13 requirements under D-1641.

14 My name is Cathy Crothers. I'm an Assistant  
15 Chief Counsel at the Department of Water Resources, and  
16 today DWR will present evidence in support of our  
17 petition.

18 It is a joint petition. We submitted it last  
19 week, last Tuesday. And we believe that today's  
20 evidence will provide you sufficient facts to support  
21 approval of our petition.

22 As you will hear in today's testimony,  
23 California is in the third straight year of  
24 below-average rainfall and snow melt runoff.

25 In October 2008, the reservoir levels

1 throughout the state were significantly below average.  
2 Dry conditions and low storage have resulted in  
3 significant reductions in water supplies throughout the  
4 state.

5           For example, as you heard just a bit ago from  
6 Cliff Schulz, the DWR allocations to our State Water  
7 Project contractors in December were only 15 percent of  
8 their requested allocations this year.

9           And we're not sure what will happen given the  
10 existing rainfall; but given the extremely dry January,  
11 it may be that these allocations aren't going to  
12 change.

13           We'll be updating the allocation later in the  
14 week.

15           Today, DWR engineer John Leahigh will provide  
16 expert testimony on the drought conditions and on  
17 details of our requested change. I'd like to provide a  
18 little bit of background for the petition and then a  
19 brief roadmap of what his testimony will be.

20           We submitted the urgency change petition after  
21 considerable study and deliberation on the options  
22 available to The Projects given the dry conditions.

23           These obligations for The Projects, which are  
24 one of the State's largest water supply projects, our  
25 obligations include water supplies for cities,



1 industries, agriculture, wildlife, and other water  
2 quality requirements for fish and wildlife.

3 Also, we do operate The Projects for flood  
4 control protection.

5 Many of the decisions we take -- make in terms  
6 of the reservoir operations are based on forecasts and  
7 predictions which, as you know, can be more and more  
8 unreliable as you try to project into the future.

9 DWR submitted our petitions based on the  
10 hydrologic conditions occurring at that time and on  
11 predictions of the future water hydrologic conditions.  
12 We can evaluate how well these -- oops, my three  
13 minutes. I'm going to summarize here quickly then,  
14 given this is just an opening statement.

15 It's -- DWR's witness, John Leahigh, he's  
16 going to present to you a summary of our petition  
17 through a PowerPoint. His evidence will be the  
18 PowerPoint presentation which you are going to see.

19 And we just wanted to note that we may be  
20 needing to come back to the Board. We're doing  
21 these -- we're analyzing these conditions as we go  
22 through a staged approach. We're only asking for  
23 changes in February.

24 With that then, I'm thinking we'll go forward  
25 with John Leahigh, if the Board's ready, unless you had

1 any questions of me?

2 CO-HEARING OFFICER BAGGETT: No, proceed.

3 MS. CROTHERS: Okay. We'll proceed now with  
4 our expert witness, who is John Leahigh, an engineer  
5 with the Department of Water Resources.

6 MR. JOHN LEAHIGH

7 Called by DEPARTMENT OF WATER RESOURCES

8 DIRECT EXAMINATION BY MS. CROTHERS

9 MS. CROTHERS: Mr. Leahigh, is DWR 1,  
10 Exhibit 1, a true and correct copy of your statement of  
11 qualifications?

12 MR. LEAHIGH: Yes, it is.

13 MS. CROTHERS: We have introduced that as --  
14 offered that as evidence and have given that as copies  
15 to the Board.

16 Mr. Leahigh, is DWR 2 the true and correct  
17 copy of the petition that DWR and the Bureau submitted  
18 as our petition for the temporary urgency change?

19 MR. LEAHIGH: Yes.

20 MS. CROTHERS: We've also offered that as our  
21 testimony which Mr. Leahigh will be summarizing in his  
22 written presentation.

23 DWR 3 is the written presentation that is  
24 going to be shown as a PowerPoint, and we have given  
25 copies of that to the Board and also provided copies to

1 the audience.

2 Mr. Leahigh, can you please then summarize or  
3 go through your presentation that summarizes the  
4 petition?

5 MR. LEAHIGH: Okay. Good afternoon. Thank  
6 you, Board Members Baggett and Hoppin, and Board staff  
7 for the opportunity to present our case for your  
8 consideration.

9 Next slide, please.

10 Just the summary of what the Department and  
11 Reclamation are petitioning for is modification to the  
12 existing outflow X2 compliance standards.

13 We are asking for a shift in compliance at  
14 Collinsville for 24 -- at Chipps Island to Collinsville  
15 for 24 days.

16 We are also asking for a waiver of the  
17 so-called starting gate requirement.

18 And we are no longer in need of the change for  
19 the Vernalis Flow Objective which is in our petition.

20 And I'll go into more detail on each of these  
21 items later.

22 Next slide, please.

23 We -- the Department and Reclamation did not  
24 take this decision lightly. It was a challenge for us  
25 to actually put forward this petition. We understand

1 the concerns, although considering the critically dry  
2 conditions that we are now faced with and potential  
3 crisis this summer, we felt this was the best balance  
4 for all of the competing needs for water supply.

5 And these include salmonid habitat, Delta  
6 smelt and other Delta fisheries, critical needs for the  
7 water users, and to maintain control of Delta salinity  
8 this year and next.

9 Next, please.

10 Setting the stage, we are experiencing a third  
11 dry year as we've noted. Just some of the hydrologic  
12 conditions as of early February for the Sacramento  
13 Valley: Precipitation is at 66 percent of average to  
14 date as of that point. Snow pack was 47 percent of  
15 average to date.

16 But most telling, runoff at 36 percent of  
17 average to date this year. And the other key item  
18 there is storage in the major upstream reservoir,  
19 Shasta, Folsom, and Oroville at 44 percent of average.

20 Next, please.

21 So in relation to the historical record, these  
22 storages for Oroville, for example -- end of December  
23 storage represented the lowest since construction of  
24 the dam, the Shasta, Folsom, Oroville combined storage  
25 is lower than the extremely dry year of 1977, one of

1 the driest in the century.

2           And this also is -- this year represents the  
3 first back-to-back critically dry year combination --  
4 last year and this year -- since The Projects have been  
5 operating to the X2 standard in 1995.

6           I can see it would be difficult to design a  
7 standard that would meet the real world challenges  
8 without modification. This is the first test of a  
9 back-to-back critically dry year combination since  
10 projects have been operating to the standard.

11           Next, please.

12           This graphic here is an illustration of the  
13 current 2008-2009 back-to-back critically dry years in  
14 red. This is Oroville's reservoir storage. Shows  
15 that -- also shown on here are -- in comparison -- are  
16 other drought periods in recent times. The '76-77  
17 drought period in dark blue.

18           MR. NOME LLINI: This is Dante John Nomellini.  
19 I request that the exhibit be identified so that the  
20 transcript could have some meaning at a later date.

21           CO-HEARING OFFICER BAGGETT: That's fine.  
22 Would you please identify the exhibit.

23           MR. LEAHIGH: Yes. We are on Slide 6 of the  
24 PowerPoint presentation titled Oroville Storage -- I'm  
25 sorry -- Oroville Reservoir.

1 CO-HEARING OFFICER BAGGETT: Thank you.

2 MR. LEAHIGH: And it's on -- for those with  
3 the handouts, it's page 3 but it is Slide 6 of the  
4 PowerPoint.

5 SENIOR STAFF COUNSEL MAHANEY: And that is  
6 Exhibit 3?

7 MR. LEAHIGH: DWR Exhibit 3, correct.

8 So continuing, the other dry periods denoted  
9 in the handout is the '90, '91, '92, three critically  
10 dry years.

11 As you can see from the graph, at the end of  
12 2008, as I noted below, a million acre feet was in  
13 storage at Lake Oroville, which was actually lower than  
14 the driest historically.

15 We are now slightly greater than the storage  
16 in 1991; however, as you can also tell, there is two  
17 rather telling things to take away from this graphic.

18 In '91, if some of you may recall, we had what  
19 we referred to as the Miracle March. You can see where  
20 storage recovered a bit in the March-April-May period  
21 of 1991 with the wetter spring.

22 But you can also take away the flip side of  
23 the coin in 1977 where that spring was bone dry, and we  
24 saw storage in Lake Oroville basically tank.

25 The one key differences between this year and

1 1977 is we were -- we had approximately 600,000 acre  
2 feet of more storage in Lake Oroville at this point in  
3 time.

4 But there's no forecasting the future at this  
5 point. We could see the trend go either way. If we  
6 were to see a '77-type scenario, you can imagine what a  
7 loss of additional storage as denoted in 1977 would  
8 result.

9 Next -- Slide 7, please.

10 Essentially, this is a similar-type graphic,  
11 but shows the combined Shasta, Oroville, Folsom  
12 storage. And just -- the only reason to put this in,  
13 it shows that it's a very similar pattern as looking at  
14 Oroville by itself.

15 Next, please.

16 In addition, water supplies are at a critical  
17 level.

18 CO-HEARING OFFICER BAGGETT: Excuse me. Could  
19 you identify --

20 MR. LEAHIGH: Slide 8.

21 Water supplies are at a critical level.

22 CO-HEARING OFFICER BAGGETT: Mr. Nomellini?

23 MR. NOMELLINI: Dante John Nomellini again. I  
24 request the reference be made to the exhibit number.

25 MS. CROTHERS: This is still DWR Exhibit 3,

1 and it's page 8 of Exhibit 3.

2 MR. NOME LLINI: And the previous slide?

3 MS. CROTHERS: The previous slide of the  
4 reservoir storage levels, that was page 7. I don't  
5 think you see the page number on the slide, apparently.

6 MR. NOME LLINI: Thank you.

7 CO-HEARING OFFICER BAGGETT: Okay, continue.

8 MR. LEAHIGH: Okay. I'm on Slide 8, talking  
9 about water supplies at a critical level currently.

10 Both Reclamation and DWR have notified their  
11 settlement contractors on the Sacramento and Feather  
12 Rivers that, based on the February 1st snow survey, the  
13 hydrologic criteria has triggered maximum shortage  
14 provisions in both of those contracts.

15 Also, as has been noted, State Water Project  
16 M&I allocation of 15 percent represents the greatest  
17 deficiency to these contractors ever.

18 Also noted -- noting there that the State  
19 Water Project has gradually been reducing our  
20 allocation each successive year as we've stepped  
21 through these three dry years. 60 percent allocation  
22 in 2007 meeting 35 percent of the requested demand in  
23 2008 and currently at the 15 percent in 2009.

24 Next, please.

25 Slide 9. Risk to south of Delta supply. We



1 haven't talked yet about San Luis Reservoir storage  
2 which is currently at 45 percent of average to date.

3           And based on the very dry conditions and the  
4 projected export capability, if it continues to stay  
5 dry, there's a significant risk that The Projects will  
6 not be able to meet all of the needs south of the  
7 Delta. And these include refuge supplies, supplies to  
8 senior water rights holders, and critical health and  
9 safety needs.

10           Next, please.

11           Slide 10. So just to define the X2 standard,  
12 the standard contained in D-1641 for the benefit of  
13 fish outlined in Tables 3 and 4 of that decision --  
14 although The Projects have been operating to the X2  
15 standard since 1995 as part of the Water Quality  
16 Control Plan.

17           X2 represents the location of the 2 parts per  
18 thousand isohaline line for salinity. It's measured  
19 for a number of days at particular locations near  
20 Suisun Marsh, for example Chipps Island.

21           We need to meet the standard to be at 2.64 EC  
22 for salinity or an equivalent outflow of 11,400 cfs.  
23 The number of days are based on the prior month's Eight  
24 River Index which is the full natural flow for the  
25 eight major rivers in the Sacramento and San Joaquin

1 basins.

2           If the Chipps objective is not triggered, with  
3 minor exceptions, there would be requirements to meet  
4 X2 at Collinsville as either EC or outflow.

5           Next, please.

6           So the next -- this graphic, page 11, just  
7 denotes geographically the locations of the various X2  
8 stations from Collinsville. And this is in kilometers  
9 measured from the Golden Gate. Collinsville is 81  
10 kilometers. Chipps Island's at 74. Port Chicago at 64  
11 kilometers.

12           Next, please.

13           This is just an excerpt from D-1641 Table 3.  
14 Highlighted in red is the standard in which we are  
15 asking for the modification.

16           Next, please.

17           The footnote to that Table 3 is -- talks about  
18 the starting gate condition which essentially talks  
19 about the need to meet Collinsville EC, both the X2  
20 line to the Collinsville station, 81 kilometers, for at  
21 least one day in the first 14 days of February.

22           And there are -- the footnote also describes  
23 very low 8RI conditions in January that would cause the  
24 standard to be waived. The upper limit of that range  
25 for waiver is 900,000 acre feet. We actually ended up

1 January slightly greater than that, 970-odd thousand  
2 acre feet.

3 Next, please.

4 This table is Table 4 which indicates the  
5 number of days required at Chipps Island station for  
6 X2. And I think it got cut off there on the left-hand  
7 side a bit.

8 But what it denotes the third row down is a  
9 million acre feet is the first row at which days are  
10 required at Chipps Island, and that is actually all 28  
11 days in February, and that is denoted in the red box.

12 The row just above that is 750,000 acre feet,  
13 and it shows the need to meet zero days at Chipps  
14 Island.

15 So the actual 8RI was slightly less than a  
16 million, was within that range between 750 and a  
17 million.

18 And the footnote on that page denotes that if  
19 the 8RI is between 800,000 and a million, the number of  
20 days required would be literally interpolated between 0  
21 and 28.

22 To get another way to describe this data, the  
23 next graphic is Slide 15. And this is the table for in  
24 graphical form shows that basically we're at that  
25 threshold level on the table extremely sensitive to the

1 8RI for January.

2 Next, please.

3 16 -- this is a blowup of that area that was  
4 circled in red on Slide 15. This is now Slide 16. And  
5 it shows that a variability in 8RI of just 4 percent  
6 will dictate 100 percent of the days required. So it  
7 could be anywhere from 0 to 28 within that small 4  
8 percent window of actual 8RI. So an extremely  
9 sensitive portion of the table.

10 Next, please.

11 So when The Projects were looking ahead into  
12 February, at that point in time, we were showing the  
13 potential hit to upstream storage of at least up to  
14 200,000 acre feet for February in order to meet the  
15 Chipps Island standard as opposed to Collinsville and  
16 also to move the -- for the purposes of the starting  
17 gate.

18 DWR and Reclamation coordinated with the  
19 fishery agencies, US Fish and Wildlife Service, NMFS,  
20 and Department of Fish and Game prior to submitting the  
21 petition. And what we looked at was based on our  
22 projected operations what would the Old and Middle  
23 River flows be, what would the EI ratio end up being  
24 during that proposed operations.

25 The -- and the -- Reclamation and the

1 Department continue to temper our modified operations  
2 with coordination with all the fishery agencies.

3 Next, please.

4 This graphic is page 18. I believe that's 18.  
5 Depicts the actual X2 location from the end of January  
6 through a couple days ago.

7 And it -- what it shows is right at the  
8 beginning of February we were at a little bit further  
9 east from 84 kilometers. The X2 line actually moved  
10 further east for a bit until it has come back west now,  
11 and on February 14th was actually at 81.22 kilometers.

12 So we are within a little over two-tenths of a  
13 kilometer from that starting gate condition being met.

14 What's also depicted on this graphic is really  
15 what was the big driver for that X2 location which is  
16 the tides. What's depicted on there is Antioch half  
17 tide, which is what was driving that X2 position east  
18 during the first few days of February during the spring  
19 tide on the neap tide now came back down towards  
20 west -- towards the west, towards Collinsville.

21 Next, please.

22 The other way to look at the X2 operation is  
23 the actual outflow. You can see denoted on this graph,  
24 Slide 19, Collinsville equivalent outflow of 7100 is  
25 the solid black line.

1           The dashed black line is the outflow  
2 equivalent for Chipps Island, 11,400 cfs.

3           The blue line is the actual NDOI.

4           So you can see that for the first four days,  
5 the requirement would be at Collinsville. That was  
6 met.

7           The Chipps Island was required for 24 days for  
8 the month, the remainder of the month, from the 5th on.

9           And you can see that outflow actually ended up  
10 closer to the Chipps Island level of flow than the  
11 Collinsville. And in fact, in the last few days, we  
12 have seen the outflow go beyond the Chipps Island  
13 requirement.

14           If you take an -- if you add one more day on  
15 there, to the 16th, what you would find is the average  
16 outflow for the first 16 days of February is actually  
17 equivalent to the amount of outflow that would be  
18 required on an unmodified operation to the standard,  
19 the first four days at Collinsville at 7100, and the  
20 next 12 days at the Chipps Island, 11-4.

21           Next, please.

22           So the modified operations resulted in  
23 relatively minor changes. We came within .22  
24 kilometers of meeting the starting gate objective on  
25 February 14th.

1 Actual average Delta outflow, as I said, will  
2 likely match the unmodified standard requirements  
3 through February 16th, and The Projects' exports  
4 continue to be tempered by Old and Middle River flow as  
5 discussed with the fishery agencies.

6 Next, please.

7 So updated information. As I said, we are no  
8 longer requesting a change in the Vernalis Flow  
9 Standard. And the reason there is that since we have  
10 submitted our petition, the classification for the San  
11 Joaquin Valley came in as critically dry, remains  
12 critically dry. Therefore, the flow objective will be  
13 met for the month.

14 The Chipps Island NDOI is being met as of  
15 February 15th. Exports continue to be tempered by the  
16 Old and Middle River objectives.

17 Sacramento River flow is forecasted to reach  
18 what we had identified as an off-ramp level of greater  
19 than 20,000 cfs as measured at Freeport for three days.  
20 Looks like that is very likely to happen later this  
21 week.

22 However, that does not -- if March hydrology  
23 is dry, and if things shut off after this last series  
24 of storms, our concerns will remain.

25 Next, please.

1           Slide 22. So again, in light of the current  
2 conditions, we feel that our -- what we are asking for  
3 in our petition is a balanced approach, and it is in  
4 the public interest, and it does balance all the  
5 competing interests: Salmonids, the Delta fish, public  
6 water supply and Delta water quality.

7           Next, please.

8           So we do recommend to the Board approval of  
9 the urgency change petition. The Projects will  
10 continue to comply with the listed species -- the  
11 Agency requirements for listed species. The Projects  
12 will provide updates to the Board on the water supply  
13 conditions.

14           And it is possible we may need to submit  
15 additional petitions this year if the conditions remain  
16 relatively dry.

17           Thank you. That ends my -- ends what I had to  
18 say.

19           MS. CROTHERS: Thank you, Mr. Leahigh.

20           That concludes our direct testimony. I did  
21 have one comment. I did want to make a correction on  
22 one of our exhibits.

23           Apparently the page number didn't show up on  
24 the DWR Exhibit No. 3, page 7. So the Board might just  
25 have to write in that page number. It didn't get



1 copied onto the slide itself or the exhibit, I don't  
2 think.

3 Other than that, then, I guess we're ready for  
4 cross-exam.

5 CO-HEARING OFFICER BAGGETT: I think we've got  
6 a couple of clarifications. I have one clarification  
7 question. So have you formally withdrawn the Vernalis  
8 request, Ms. Crothers?

9 MS. CROTHERS: Yes, I believe that would be an  
10 accurate statement. And I would just ask the Bureau of  
11 Reclamation to confirm that. They're the ones that are  
12 keeping track of that flow requirement.

13 But as I understand it, they -- Reclamation  
14 will be meeting that requirement, and there's no need  
15 to have anything waived on that objective.

16 CO-HEARING OFFICER BAGGETT: I'm just trying  
17 to narrow the cross a little bit here. Every little  
18 bit helps. If that's withdrawn, then we don't need  
19 cross on it.

20 Do you want to clarify?

21 SENIOR STAFF COUNSEL MAHANEY: I have a  
22 housekeeping question on the permits for which you  
23 petitioned to change, on page -- and I realize that  
24 D-1641 is not in the record at this point.

25 But it does identify the permits and license

1 that are subject to the objectives in Table 3, and I  
2 notice that the permit that -- the joint -- I'm sorry,  
3 the joint petition does not identify all of those  
4 permits.

5 Shall I run through the numbers with you, or  
6 is there a reason for that?

7 For example, DWR permit 16483 on the North Bay  
8 Aqueduct is not covered by the petition.

9 CO-HEARING OFFICER BAGGETT: Maybe we could  
10 just do this at the next break.

11 MS. CROTHERS: Yes, because actually I  
12 don't --

13 CO-HEARING OFFICER BAGGETT: If you could --

14 MS. CROTHERS: -- have a copy of the petition  
15 right here. And I would have to kind of compare what  
16 was in D-1641, I believe.

17 So maybe we could do that --

18 CO-HEARING OFFICER BAGGETT: Maybe we could do  
19 that at the break. I don't think that's going to be  
20 particularly relevant to cross-examination whether the  
21 numbers all align. Unless, Mr. Jackson, unless you  
22 want us to clarify this.

23 MR. JACKSON: It's a clarification question.

24 Could folks identify during the break exactly  
25 what's left of the petition so that -- I mean, there

1 were three or four pieces, and one is dropped.

2 But I'm --

3 CO-HEARING OFFICER BAGGETT: We want to  
4 confirm with the Bureau whether the Vernalis, only the  
5 Vernalis flows. That was all I've heard.

6 MS. AUFDEMBERGE: Amy Aufdemberge for  
7 Reclamation. We hereby withdraw the request for  
8 Vernalis objective.

9 CO-HEARING OFFICER BAGGETT: Okay. And I want  
10 to get through this panel, then we'll take a break, and  
11 then we'll come back with the Bureau; and maybe after  
12 the two cases-in-chief, you can come back and we could  
13 formally summarize what exactly has been dropped, what  
14 paragraph, and we can correlate that so we have a good  
15 record. Okay.

16 Let's begin with cross-examination then.  
17 Bureau, do you have any cross-examination of DWR.

18 MS. AUFDEMBERGER: No.

19 CO-HEARING OFFICER BAGGETT: South Delta, et  
20 al.? Any one of the three or four attorneys here want  
21 to take a crack?

22 MR. NOMELLINI: Dante John Nomellini. We're  
23 going to spare you three attorneys. We're going to do  
24 it with one.

25 CO-HEARING OFFICER BAGGETT: Thank you.

1           MR. NOME LLINI: Do you want the cross to be  
2 conducted from the podium here?

3           SENIOR STAFF COUNSEL MAHANEY: If I may offer  
4 a suggestion. If you would be more comfortable, you  
5 would be able to see the witness if you sat over there  
6 but it's your choice.

7           CO-HEARING OFFICER BAGGETT: I think that  
8 would be preferable.

9           CROSS-EXAMINATION BY MR. NOME LLINI  
10          FOR SAN JOAQUIN COUNTY, CENTRAL DELTA WATER AGENCY,  
11                           SOUTH DELTA WATER AGENCY

12          MR. NOME LLINI: I am Dante John Nomellini.  
13 I'm attorney for the Central Delta Water Agency.

14           In your testimony, you referred to "we" in  
15 making decisions as to operations. Could you list who  
16 constitutes the group or the person that makes the  
17 decision as to how the Project should be operated?

18          MR. LEAHIGH: I don't know about what specific  
19 instance you're referring to; but in general, "we"  
20 would be the Operations Office for the State Water  
21 Project and for -- and the Central Valley Operations  
22 for the federal project.

23          MR. NOME LLINI: Could you tell me who  
24 participates in that operation office in terms of  
25 making day-to-day decisions as to whether or not you

1 would export water?

2 MR. LEAHIGH: We have various staff members  
3 that have different areas of responsibility in making  
4 those decisions.

5 MR. NOMELLINI: In making the decision as to  
6 how you would balance the public interest against the  
7 need for exports, Delta water or Delta water quality,  
8 and public water supply, who would make that decision?

9 MS. CROTHERS: Mr. Baggett, I object to that  
10 question because I believe that question really is a  
11 legal conclusion which -- our petition has been offered  
12 to the Board to make that decision, and it's the  
13 Board's role to decide if our petition meets the public  
14 interest requirement.

15 We are offering facts to support that, but I  
16 don't think Mr. Leahigh as the engineer here should be  
17 asked to make that decision.

18 CO-HEARING OFFICER BAGGETT: A response?

19 MR. NOMELLINI: I thought they said -- I  
20 thought the testimony was that the Department was  
21 balancing the public interest with regard to these  
22 determinations as they made decisions as to Project  
23 operations.

24 MS. CROTHERS: In terms of what you're meaning  
25 as public interest, I wasn't quite sure if you meant

1 that in the formal terms as, you know, with the Board's  
2 decision-making or if you meant in general.

3 DWR has, we believe, what -- in terms of  
4 public interest, we felt we have met that requirement.

5 But if it's in the general sense, I guess  
6 Mr. Leahigh could explain that.

7 CO-HEARING OFFICER BAGGETT: I think why don't  
8 you proceed and answer in a general sense. I don't  
9 think he's asking for the legal conclusion on what  
10 you --

11 MR. NOMELLINI: Oh, I'm not asking for a legal  
12 conclusion. I'm asking for the process.

13 CO-HEARING OFFICER BAGGETT: If you could  
14 answer the question.

15 MR. LEAHIGH: Well, yes.

16 As part of the normal process for the  
17 operations of both Projects, we are having to balance  
18 many needs, whether they be for the water supply for  
19 our contractors, for senior water rights holders.  
20 There are the needs for our -- of course, our water  
21 rights, the Biological Opinions.

22 At some -- at this point, we came to a  
23 situation where -- where our judgment is that there was  
24 not enough supply to meet all of the required needs of  
25 the Project.

1           And so we -- as I said, we did not come  
2 forward -- we did not take this decision lightly, but  
3 we felt this was the best balanced approach to meeting  
4 all of those needs of the Project.

5           CO-HEARING OFFICER BAGGETT: You're referring  
6 to slide -- let me -- I'm going to interject some today  
7 so we can keep this thing moving. It's not -- it's  
8 sort of a hybrid hearing is the way I'm looking at  
9 this.

10           On Slide 22, page 22, I assume is what you're  
11 referring where it says: Changes in the public  
12 interest. And they're petitioning us to make that  
13 change.

14           MR. NOMESELLINI: Well, I was going to the  
15 direct testimony rather than the slide.

16           Do you agree that you've operated The Projects  
17 in violation of the conditions of the permits issued by  
18 the State Water Resource Control Board for February of  
19 2009?

20           MS. CROTHERS: Mr. Baggett, I object to that  
21 question as a legal conclusion.

22           CO-HEARING OFFICER BAGGETT: Do you have a  
23 response? Otherwise, I would sustain.

24           MR. NOMESELLINI: Well, it's a factual question.

25           MS. CROTHERS: Mr. Baggett, we're offering a

1 petition here related to that question.

2 CO-HEARING OFFICER BAGGETT: I would -- well?

3 MR. NOMESELLINI: This petition has not yet been  
4 granted, as far as I understand. If I'm wrong,  
5 somebody ought to tell me.

6 MS. CROTHERS: Well, I would say that's the  
7 point of the petition, however. I mean, that's what  
8 we're here for.

9 If that petition is granted, then you'll have  
10 your answer. So I don't think we're in a position now  
11 to provide an answer on that, and Mr. Leahigh wouldn't  
12 be making that call.

13 CO-HEARING OFFICER BAGGETT: I would sustain.

14 Mr. Jackson?

15 MR. JACKSON: Well, I was just going to say, I  
16 mean, it is a factual question: Were they operating  
17 to -- from February 1 until today in conformance with  
18 the existing order?

19 And it's a simple question. It's -- he's the  
20 only witness they're putting up. If he can't answer  
21 the question, then I would move to strike the  
22 testimony.

23 CO-HEARING OFFICER BAGGETT: Ms. Crothers?

24 MS. CROTHERS: Could you repeat your question,  
25 Mr. Nomellini?



1           MR. NOMELLINI: Do you agree that you have not  
2 operated the Project in February of 2009 to conform to  
3 the requirements of the State Water Resources Control  
4 Board permit?

5           MR. RUBIN: I'm going to object this time on  
6 relevance grounds. I think the question goes far  
7 beyond the scope of this proceeding.

8           CO-HEARING OFFICER BAGGETT: I'd sustain that.  
9           Could you rephrase the question, make it more  
10 specific, make it --

11           MR. NOMELLINI: What X2 outflow did the  
12 Project provide during the month of February 2009 to  
13 the current date?

14           MR. LEAHIGH: I'd have to -- you'd have to  
15 clarify what particular date you're talking about or  
16 range of dates.

17           MR. NOMELLINI: Let's start with February 1st,  
18 and let's go through -- I think your exhibit showed the  
19 14th?

20           MR. LEAHIGH: I can report on, yes, what that  
21 Slide 19 shows as the Delta outflow. Would you like me  
22 just to go through each day or?

23           MR. NOMELLINI: Were any of those below the  
24 numeric requirements set forth in the State Water  
25 Resources Control Board Decision 1641?

1           MR. LEAHIGH: Yes. There are approximately  
2 eight days.

3           MR. NOMELLINI: And what days were those?

4           MR. LEAHIGH: Although I will note that --  
5 well. February -- the eight days that I'm referring to  
6 as far as outflow below the equivalent Chipps Island,  
7 11,400, would be February 5th through February 13th, it  
8 looks like, according to the graph here.

9           MR. NOMELLINI: All right.

10           During that period of time, February 5th  
11 through February 13th, 2009, were any exports of water  
12 from the Delta made by the State Water Project or the  
13 Central Valley Project?

14           MR. LEAHIGH: Yes.

15           MR. NOMELLINI: And what amounts were those?

16           MR. LEAHIGH: I don't have the exact figures,  
17 but approximately -- it was a combined -- it varied.  
18 But the combined export rate, if I recall correctly,  
19 was varied between a combination of 2,000 cfs to 4,000  
20 cfs during that period.

21           MR. NOMELLINI: Is there an exhibit or a slide  
22 that has that information that you presented?

23           MR. LEAHIGH: I don't believe so.

24           MR. NOMELLINI: All right. With regard to the  
25 period February 5th through February 13th, was the

1 Delta in balance?

2 MR. LEAHIGH: I don't know that The Projects  
3 have made a formal call on that at this point.

4 MR. NOMELLINI: Do you know whether or not the  
5 exports during the period of February 5th to  
6 February 13th diminished the amount of cold water in  
7 storage that would be needed to meet salmonid  
8 objectives?

9 MR. LEAHIGH: I would say that the water  
10 that -- I'm sorry. Could you repeat the question?

11 MR. NOMELLINI: Do you know whether or not the  
12 export of water during the period of February 5th  
13 through February 13th reduced the amount of cold water  
14 in storage necessary to meet salmonid objectives?

15 MR. LEAHIGH: No, it did not deplete the  
16 storage in upstream reservoirs.

17 MR. NOMELLINI: Do you agree that if those  
18 exports were not made during that period of time, that  
19 the water that was exported would have otherwise helped  
20 meet the X2 numerical requirements during that period?

21 MR. LEAHIGH: Yes.

22 MR. NOMELLINI: Do you recall what factors  
23 were considered during the period of time of  
24 February 5th versus February 13th that led in favor of  
25 exporting that water rather than using that water to

1 meet X2 requirements?

2 MR. LEAHIGH: Yes, as I --

3 MR. RUBIN: I'm going to object to the  
4 question. I believe it misstates the testimony.

5 I don't think that Mr. Leahigh testified that  
6 a change in export would cause the X2 objective to be  
7 met. I believe that's what Mr. Nomellini was  
8 suggesting in his question.

9 MR. NOMELLINI: I believe he testified exactly  
10 to that: That, but for the exports, that water would  
11 have been used to meet X2 requirements.

12 MR. RUBIN: Maybe I misunderstood the question  
13 and the answer, but I don't believe the question to  
14 Mr. Leahigh was that it would cause the objective to be  
15 met.

16 I believe Mr. Nomellini asked would it help  
17 meet the objective. It was a bit ambiguous. But there  
18 is a difference in terms of what the question was and  
19 what the answer was.

20 CO-HEARING OFFICER BAGGETT: Why don't we --  
21 let's rephrase the question and the answer to get it  
22 clear.

23 MR. NOMELLINI: All right. Let's clarify that  
24 if we can.

25 Do you agree that were the exports not made

1 during the period of February 15th versus February 13th  
2 that the water that was exported would have helped meet  
3 the X2 requirements during that period?

4 MR. LEAHIGH: Yes, it --

5 MR. RUBIN: I'm going to object to the  
6 question on the basis of ambiguity. Help meet? That  
7 doesn't -- that's not clear to me.

8 Does that mean it will cause the objective to  
9 be met? Or where it would contribute to outflow?

10 Again, the question in my mind is unclear.

11 (Interruption)

12 MR. RUBIN: I apologize. My name is Jon  
13 Rubin, attorney for San Luis & Delta Mendota Water  
14 Authority, Westlands Water District.

15 CO-HEARING OFFICER BAGGETT: That's sustained.  
16 Why don't you rephrase with even more specificity. I  
17 think it's an important question.

18 MR. NOMELLINI: Would the -- focusing again on  
19 the period February 5th through February 13th, you  
20 testified that exports from the Delta ranged between  
21 2,000 to 4,000 cubic feet per second. If that water  
22 was not exported, where would it have gone?

23 MR. LEAHIGH: If that water were not exported,  
24 it would have helped contribute to the net Delta  
25 outflow index.

1 MR. NOMESELLINI: Thank you.

2 Focusing again on the water that was exported  
3 during the February 5th through February 13th period,  
4 would on any of those days that water cause The  
5 Projects not only to help meet the X2 objective but to  
6 meet it, cause it to meet the requirement?

7 MR. LEAHIGH: On some of the days, it's  
8 possible it would have helped meet the requirement.

9 MR. NOMESELLINI: But not achieve it; just help  
10 meet it? Is that your testimony?

11 MR. LEAHIGH: Well, on some days, it would  
12 have resulted in an outflow greater than 11,400.

13 MR. NOMESELLINI: And you would agree, would you  
14 not, that that would cause the requirement to be met?

15 MS. CROTHERS: Excuse me. I think there's  
16 some confusion. I think maybe a little clarity in the  
17 questioning might help because I'm not sure what the  
18 requirement is that Mr. Nomellini is referring to.

19 Is he referring to the 24 days of meeting an  
20 X2 if the petition weren't granted rather than the --  
21 you know, it's -- throughout the month of February, we  
22 have that interpolated value for X2 based on the Table  
23 4 which we determined would have been 24 days.

24 Is that what you're saying, is it would have  
25 contributed? I want you to rephrase the question

1 because I think it may help clarify what it is you're  
2 asking.

3 CO-HEARING OFFICER BAGGETT: I would sustain  
4 that. Can you reclarify?

5 MR. NOMELLINI: All right. I'll give it a  
6 shot.

7 During the period February 5th through  
8 February 13th, was there ever a requirement for 11,400  
9 cubic feet per second in that Delta outflow?

10 MR. LEAHIGH: Well, there was a -- according  
11 to Table 4 in D-1641, and based on the 8RI for January,  
12 24 -- it indicated -- Table 4 indicated that 24 days  
13 would be required at Chipps Island in the month of  
14 February.

15 MR. NOMELLINI: At 11,400 cubic feet per  
16 second, correct?

17 MR. LEAHIGH: Or met through salinity. But in  
18 this case, 11,400 outflow.

19 MR. NOMELLINI: All right. And how many days  
20 are there between February 5th and February 13th?

21 MR. LEAHIGH: Eight days.

22 MR. NOMELLINI: So some of those days between  
23 February 5th and February 13th had to have an 11,400  
24 cubic feet per second net Delta outflow; is that  
25 correct?

1           MR. LEAHIGH: Well, again, there -- there's --  
2 there's other ways to meet the standard besides  
3 outflow. But one interpretation is that that would be  
4 a requirement.

5           MR. NOMELLINI: All right. In the  
6 decision-making with regard to exporting water during  
7 the period of February 5th to February 13th, who  
8 participated in the decision to make exports during  
9 that period?

10          MR. LEAHIGH: The Department of Water  
11 Resources, the Bureau of Reclamation, the National  
12 Marine Fisheries Service, US Fish and Wildlife Service,  
13 Department of Fish and Game.

14          MR. NOMELLINI: Were there specific people  
15 whose names you recall?

16          MR. LEAHIGH: Specific names? As I noted in  
17 my testimony, The Projects presented the operation --  
18 modified operations plan to the fishery agencies as  
19 part of the normal WOMT, so-called WOMT process, in  
20 which we received feedback on appropriate levels of  
21 export for the protection of listed species based on  
22 such parameters as Old and Middle River flow, EI ratio.

23          MR. NOMELLINI: All right. So you don't  
24 recall the names of the people that were involved; is  
25 that what your testimony is?



1           Let me back up.

2           Are there so many that it would be burdensome  
3 to this hearing --

4           MR. LEAHIGH: Well --

5           MR. NOMELLINI: -- for you to name some  
6 people?

7           MR. LEAHIGH: There are, you know, various  
8 managers from each of those agencies that participate  
9 in WOMET meetings. You know, I don't know specifically  
10 who was from which agency at any particular meeting.

11           MR. NOMELLINI: Were any deputy directors of  
12 the Department of Water Resources involved in that  
13 decision?

14           MR. LEAHIGH: Well, certainly our letter that  
15 we sent to the Board -- forget the date exactly. But  
16 that was -- that letter was signed at the executive  
17 level from Department of Water Resources which  
18 indicated a petition of this sort would be forthcoming  
19 to the Board.

20           MR. NOMELLINI: So the decision-making -- was  
21 the decision-making elevated to the Director level in  
22 the Department of Water Resources, to your knowledge?

23           MS. CROTHERS: Mr. Baggett?

24           MR. NOMELLINI: Talking about February 5th  
25 through February 13th.

1 MS. CROTHERS: Mr. Baggett, I object to the  
2 relevancy of all this line of questioning.

3 I think the Department speaks for itself as  
4 the Department through our employees and our Deputy  
5 Directors and our Director.

6 And I thought Mr. Leahigh's answer was quite  
7 adequate to explain the letter --

8 CO-HEARING OFFICER BAGGETT: I would sustain.

9 Can you answer why -- the relevance?

10 MR. NOMESELLINI: Well, I would like to get to  
11 how the balancing was actually done. If it wasn't done  
12 at the level that this witness was acting at, well then  
13 he can't really testify to the factors that were taken  
14 into consideration to do that balancing to make the  
15 decision to export water that would have otherwise  
16 allowed them to comply with the conditions of the  
17 permits.

18 MS. CROTHERS: Mr. Baggett, I beg to differ.

19 I think Mr. Leahigh did respond in answer to  
20 that question. It was asked in the general sense of  
21 how the Department operates to meet all the  
22 requirements we have for our Project. And he listed  
23 those Project parameters, everything from environmental  
24 needs to water supply needs.

25 MR. NOMESELLINI: There was no explanation as to

1 what factors were considered in doing that balancing  
2 within the Department.

3 It's clear that the petition is seeking the  
4 Board itself to also do that. But they did it on a  
5 daily basis during the period of February 5th through  
6 February 13th, and I think I should be allowed to  
7 cross-examine to find out what factors, and how they  
8 weighed those factors, in making that decision  
9 themselves.

10 CO-HEARING OFFICER BAGGETT: Then I would  
11 suggest you rephrase the question and ask it that  
12 directly: What factors were considered? You can ask  
13 the witness to his knowledge.

14 We don't have the Director here; you can  
15 only -- we have a witness.

16 MR. NOMELLINI: I understand that. I was  
17 trying to find out whether -- I don't even know if the  
18 Director was involved.

19 MR. HERRICK: Mr. Chairman, may I comment?  
20 John Herrick for South Delta Water Agency.

21 DWR is putting on one witness, and his  
22 testimony deals with water operations. In order for  
23 them to prevail on this petition, they have to show a  
24 number of things, including diligence. And that  
25 includes what they've done prior to this, what

1 decisions were made.

2 This is our only opportunity to figure out how  
3 they make decisions, either in the short-term or  
4 long-term, to either release water, not release water.

5 So this is certainly relevant, and this is our  
6 only chance.

7 CO-HEARING OFFICER BAGGETT: That question  
8 would be relevant, but that wasn't the question that  
9 was asked.

10 MR. RUBIN: And I would raise the relevance  
11 objection as well. These questions may or may not be  
12 relevant, but Mr. Nomellini has not established a  
13 foundation for them.

14 How The Projects were operated during the  
15 month of February prior to the petition being filed  
16 could be relevant if they had the ability to change  
17 operations in order to ensure the objective was  
18 complied by the end of the month. And that foundation  
19 has not been established.

20 CO-HEARING OFFICER BAGGETT: I sustain the  
21 objection, but let me go back and maybe help clarify.

22 I think, as I understood the question you were  
23 asking, and maybe you would just rephrase it this  
24 simply: What factors were considered by this witness  
25 in making that decision? Or recommendation. I guess

1 the decision was probably --

2 MR. NOMELLINI: I was trying to determine  
3 whether this witness actually made the decision by  
4 asking who participated in it, and I was going to get  
5 to who made the decision.

6 But I'll ask the questions --

7 CO-HEARING OFFICER BAGGETT: Lay some  
8 foundation.

9 MR. NOMELLINI: -- you'll allow me to ask.

10 CO-HEARING OFFICER BAGGETT: Lay some  
11 foundation, please.

12 MR. NOMELLINI: All right.

13 Do you know what factors were considered in  
14 making the decision to export water during the period  
15 of February 5th through February 13th of 2009?

16 MR. LEAHIGH: Yes.

17 MR. NOMELLINI: All right. Could you state  
18 those please?

19 MR. LEAHIGH: Well, a number of factors, as  
20 noted in my presentation.

21 The needs to meet all of the south of Delta  
22 requirements later in the year.

23 The current unstored flow that is occurring in  
24 the Delta. There is a limited window for export of  
25 this particular supply. The Projects have water supply

1 forecasts looking forward into the year.

2           Based on estimations of pumping capabilities  
3 and storages in San Luis, as I had noted, and the lack  
4 of storage upstream, there -- it was qualitatively in  
5 the judgment of the operators a significant risk that  
6 The Projects would not be able to meet those very  
7 minimal needs south of the Delta without additional  
8 exports.

9           Now, the upper end capping of those exports,  
10 as I noted, were taking into account the needs for  
11 protection of listed species. And that's why, when you  
12 look back at the data, you do not see The Projects  
13 basically run amok and export every drop of water down  
14 to 7100. You see a tempered response.

15           Where, in fact, looking at the historical  
16 data, you'll see that we finished much closer to the  
17 11,400 cfs target than the Collinsville 7100. But  
18 these were the factors that went into play in making  
19 that recommendation from the operations groups that  
20 established those export levels in early February.

21           MR. NOMELLINI: Did you take into  
22 consideration whether or not the pumping rate would  
23 cause the take of Delta smelt? And this is during that  
24 same period. I'm focusing on the February 5th through  
25 February 13th period.

1 MR. LEAHIGH: Indirectly, yes.

2 When we were looking at the -- those  
3 hydrologic parameters which are generally an indicator  
4 of likelihood of entrainment at the facilities, the Old  
5 and Middle River flow is certainly one of those  
6 parameters.

7 MR. NOMELLINI: Did the Project exports cause  
8 the take of smelt during that period of February 5th  
9 through February 13th?

10 MR. LEAHIGH: My understanding is that there  
11 was one Delta smelt salvaged, I believe, at the federal  
12 facility during that period.

13 MR. NOMELLINI: Did you reduce the exports to  
14 try and avoid further take of Delta smelt at that time?

15 MR. LEAHIGH: The driver for that upper level  
16 of export remained the same in terms of Old and Middle  
17 River levels of concern.

18 MR. NOMELLINI: So regardless of the actual  
19 take of the smelt, the Old and Middle River flow was  
20 the criteria that would guide the decision -- or that  
21 guided the decision at that time; is that correct?

22 MR. LEAHIGH: I would say yes, it was.

23 MR. NOMELLINI: All right. Now with regard to  
24 the minimal needs south of the Delta served by the  
25 exports during February 5th through February 13th,

1 could you tell me what those were?

2 MR. LEAHIGH: What I testified to was that the  
3 exports were needed for minimal needs for the remainder  
4 of the year. And what we are presented with here in  
5 early February is a limited opportunity to capture  
6 unstored flow because there is no real stored water  
7 upstream in the reservoirs at this point in order to  
8 meet even those minimum requirements for refuge  
9 supplies, senior water rights holders, and to have  
10 water in San Luis Reservoir through the summer.

11 There -- based on hydrologic runoff forecasts,  
12 there is a significant risk that if additional exports  
13 do not occur at this point in time, we would not be  
14 able to meet all of those needs.

15 MR. NOMELLINI: Is it your testimony that the  
16 water stored in San Luis at the present time will only  
17 be used for refuge water supply and senior water right  
18 requirements?

19 MR. LEAHIGH: The water in San Luis  
20 reservoir -- well, you have to take a look at storage  
21 that exists today plus any forecast of additional  
22 export.

23 And that is correct. There is a good -- there  
24 is a significant chance that all of the storage that is  
25 in storage in San Luis storage currently would go to



1 only those minimal needs at this point that I've  
2 identified.

3 MR. RUBIN: All right. You testified that the  
4 projected allocation for the State Water Project was  
5 15 percent; is that correct?

6 MR. LEAHIGH: That's correct.

7 MR. NOMELLINI: Does that 15 percent include  
8 any uses other than refuge water supply or water supply  
9 for health and safety?

10 MR. LEAHIGH: That's -- that 15 percent -- I  
11 can't define to you how much of that 15 percent would  
12 be for health and safety.

13 MR. NOMELLINI: Does that 15 percent  
14 allocation apply across the board to all the  
15 contractors of the State Water Project?

16 MR. LEAHIGH: Yes, it does.

17 MR. NOMELLINI: And some of those contractors  
18 are agricultural water users, are they not?

19 MR. LEAHIGH: Yes, they are.

20 MR. NOMELLINI: And some of those agricultural  
21 water users could grow cotton with that water; could  
22 they not?

23 MR. LEAHIGH: I don't know.

24 MR. NOMELLINI: Is there a limitation on the  
25 crops they can grow with water allocated to an

1 agricultural contractor?

2 MR. LEAHIGH: If they only had 15 percent of  
3 their supply, I don't know what they would be using  
4 their water for that may cause them to change their  
5 water use.

6 MR. LEAHIGH: So it is true, is it not, that  
7 there is no assurance that the water that was exported  
8 during February 5th through February 13th would be used  
9 only for refuge or health and safety purposes?

10 MS. CROTHERS: Mr. Baggett, I object to that.

11 I think that question was asked and answered.  
12 Mr. Leahigh did respond to that question before.

13 He responded -- Mr. Leahigh responded to a  
14 question about whether that water would be used for  
15 health and safety and refuges, and Mr. Leahigh said he  
16 thought so.

17 I think he's speculating -- he's trying to get  
18 Mr. Leahigh to speculate, and that wouldn't be  
19 appropriate.

20 CO-HEARING OFFICER BAGGETT: No, I would  
21 sustain.

22 Could you rephrase?

23 MR. NOMELLINI: Well, my last question  
24 certainly wasn't speculation, but -- I was asking  
25 whether he agreed that there was no assurance that the

1 water that was exported during the period of  
2 February 5th through February 13th would be limited in  
3 use to refuge water supply and health and safety  
4 purposes. That question should be answered.

5 CO-HEARING OFFICER BAGGETT: Just a yes or no.

6 MR. LEAHIGH: No. And I explained -- I think  
7 I explained why. It --

8 MR. NOMESELLINI: No, you can't assure that it  
9 would be used only for those purposes, correct?

10 MR. LEAHIGH: No, I can't assure it. But  
11 there's a reasonable risk that it wouldn't even be  
12 enough to meet all those needs south of the Delta.

13 MR. NOMESELLINI: Okay. Let's test that for  
14 clarification.

15 Assuming there's no additional rainfall, your  
16 testimony is that the amount of water in San Luis would  
17 not be sufficient to meet all the needs of refuges and  
18 water rights -- health and safety needs; is that  
19 correct?

20 MR. LEAHIGH: Health and safety, water rights,  
21 and refuges, that's correct. There is a possibility it  
22 may not be enough.

23 MR. NOMESELLINI: Okay. And you also testified  
24 there was a 15 percent allocation across the board; is  
25 that correct?

1 MR. LEAHIGH: Currently, there is.

2 MR. NOMELLINI: As a part of your petition,  
3 are you agreeing that this water that is in San Luis at  
4 the present time will only be used for refuge, water  
5 rights, and health and safety purposes?

6 MR. LEAHIGH: No. As I said, there is a -- it  
7 all depends on what happens from this point on as far  
8 as how much it rains.

9 But under the dry scenario, what exists in San  
10 Luis currently would not be enough to meet all of those  
11 needs.

12 MR. NOMELLINI: Is there a process in place as  
13 to where or how that water will be allocated? At the  
14 present time, do you know how that water is going to be  
15 allocated?

16 MR. LEAHIGH: No, I don't.

17 MR. NOMELLINI: Is there any planning underway  
18 for holding sufficient water in reservoir stores to  
19 meet water quality standards in the future?

20 MR. LEAHIGH: That is part of the equation as  
21 far as determining what exports would be available to  
22 The Projects later in the year.

23 MR. NOMELLINI: Isn't it correct that given  
24 the present situation there is no water available in  
25 storage for export purposes?

1 MR. LEAHIGH: No water in upstream storage?

2 MR. NOMELLINI: Yes.

3 MR. LEAHIGH: That -- currently, that's  
4 correct on the State Water Project side.

5 MR. NOMELLINI: How about on the federal side?

6 MR. LEAHIGH: I don't know. I'd defer that to  
7 the CVP.

8 MR. NOMELLINI: Is there -- in the planning  
9 process, does the Department of Water Resources project  
10 the possibility of the recurrence of historical  
11 hydrology such as during the period of '87 through '92  
12 and what their ability would be to meet the water  
13 quality standards under those circumstances?

14 MR. LEAHIGH: Well, yes.

15 Actually, we are currently in our process of  
16 evaluating our delivery capabilities and operational  
17 needs based on the latest February 1st snow survey and  
18 the resulting runoff forecasts that came about as a  
19 result of that snow survey.

20 MR. NOMELLINI: My question goes beyond that.  
21 Beyond those forecasts, do you game the Project  
22 operation such that you would anticipate the  
23 possibility of further -- a further sequence of  
24 critical and dry years such as historically occur?

25 MR. LEAHIGH: Yes. In the drier exceedances

1 of the forecast that we receive, that's -- that's  
2 indeed what it -- it would be reflecting those types of  
3 years, the very driest years.

4 MR. NOMELLINI: So that's your --

5 MR. LEAHIGH: In -- we're currently, as I  
6 said, we are going through that analysis right now  
7 through our operations models.

8 MR. NOMELLINI: And right now it shows you  
9 don't have any water in storage available for export?

10 MR. LEAHIGH: Under those dry conditions,  
11 that's correct, yes. In fact -- yes. We draw below  
12 power pool storages in Lake Oroville for example.

13 CO-HEARING OFFICER BAGGETT: Could we do a  
14 time check here Mr. Nomellini? How much longer do you  
15 have?

16 MR. NOMELLINI: I'm going to move on now.

17 CO-HEARING OFFICER BAGGETT: Okay. I'm just  
18 trying to get an idea of timing here. We still have  
19 eight more parties.

20 MR. NOMELLINI: I just have one other area I  
21 really want to cover here. It should take about five,  
22 ten minutes.

23 CO-HEARING OFFICER BAGGETT: I realize you're  
24 representing three parties, so I am cutting you --

25 MR. NOMELLINI: We tried to spare you a little

1 bit, even though this might be painful.

2 CO-HEARING OFFICER BAGGETT: Hopefully, Mr.  
3 Jackson's taking notes too.

4 MR. NOMESELLINI: He's not part of our group.  
5 (Laughter)

6 CO-HEARING OFFICER BAGGETT: I understand.  
7 But he is next. Continue.

8 MR. JACKSON: I am taking notes.

9 MR. NOMESELLINI: May I proceed?

10 CO-HEARING OFFICER BAGGETT: Yes.

11 MR. NOMESELLINI: With regard to the water  
12 stored in San Luis at the present time, is it not true  
13 that that water could be released to the San Joaquin  
14 River to help meet X2 requirements -- or let's change  
15 that -- net Delta outflow requirements?

16 MR. LEAHIGH: I don't know that that would be  
17 possible.

18 Even if it was possible, I can't see us doing  
19 that in light of what I just responded to in the  
20 previous question regarding lack of supply necessary  
21 for even the minimum requirements south of Delta.

22 MR. NOMESELLINI: All right. Let's for the sake  
23 of this line of questioning assume that you don't want  
24 to do it. But is it physically possible to recirculate  
25 or reintroduce San Luis water into the San Joaquin

1 River?

2 MR. LEAHIGH: That type -- well, there has  
3 been a recirculation-type operation that has occurred  
4 in the past on an experimental basis so that has --  
5 physically has occurred.

6 MR. NOMELLINI: So you agree it's physically  
7 possible --

8 MR. LEAHIGH: Well, it --

9 MR. NOMELLINI: -- to reintroduce San Luis  
10 unit water or San Luis Reservoir water back into the  
11 San Joaquin River?

12 MS. CROTHERS: I object on the relevancy of  
13 that question.

14 MR. NOMELLINI: Well, let me explain the  
15 relevance.

16 CO-HEARING OFFICER BAGGETT: I'll overrule.  
17 Just answer the question. It's a simple yes  
18 or no: Is it possible or not possible?

19 MR. LEAHIGH: Well, I don't know.

20 If you're talking about water from San Luis  
21 Reservoir, I don't know if that's physically possible.

22 We have done recirculation where water had  
23 been pumped from the Delta, released down the San  
24 Joaquin back into the Delta. Whether it is physically  
25 possible to come from San Luis, I'm not certain at this



1 point in time sitting here.

2 MR. NOMELLINI: You're not familiar with the  
3 Mendota Pool, I gather?

4 MR. LEAHIGH: Not as much as a Reclamation  
5 operator would be.

6 MR. NOMELLINI: Okay. Do you know how much is  
7 in San Luis today?

8 MR. LEAHIGH: I forget the exact number, but I  
9 have a general idea.

10 MR. NOMELLINI: It's over 700,000 acre feet,  
11 isn't it?

12 MR. LEAHIGH: That sounds about right.

13 MR. NOMELLINI: And if the water was  
14 introduced into the San Joaquin River, could it -- is  
15 it your understanding that it could result in net Delta  
16 outflow?

17 MR. LEAHIGH: I don't know. Depending on the  
18 timing, there are -- I don't know.

19 MR. NOMELLINI: Okay.

20 MR. LEAHIGH: I'll say it's possible.

21 MR. NOMELLINI: It is physically --

22 MR. LEAHIGH: I suppose it would be possible.

23 MR. NOMELLINI: Okay. You agree that it's  
24 physically possible for water to flow downhill through  
25 the San Joaquin River and on out of the Delta?

1 MR. LEAHIGH: Yes.

2 MR. NOMELLINI: Okay.

3 MR. LEAHIGH: Well, yes. Without being  
4 diverted.

5 MR. NOMELLINI: I mean, I assume that the  
6 physical possibility assumes that there is no  
7 intervening act.

8 MR. LEAHIGH: Right.

9 MR. NOMELLINI: Okay.

10 MR. LEAHIGH: Water flows downhill. I agree.

11 MR. NOMELLINI: All right. Well, with that  
12 concession, I'm going to end my cross-examination.  
13 Thank you.

14 CO-HEARING OFFICER BAGGETT: Thank you.

15 (Laughter)

16 CO-HEARING OFFICER BAGGETT: With that,  
17 Mr. Jackson, you're up. Or should we take a break? I  
18 guess I should ask you before you start.

19 MR. JACKSON: I don't really care. I'm down  
20 here for the rest of the night.

21 CO-HEARING OFFICER BAGGETT: Well, is it  
22 lengthy, your cross?

23 MR. JACKSON: It is lengthy. I mean, I get 30  
24 minutes, and I'm sure I will be cut off at 30 minutes.

25 CO-HEARING OFFICER BAGGETT: Okay, let's take

1 five minutes then, and we'll come back. Five minutes,  
2 not ten, not 15. Five minutes recess.

3 (Recess)

4 CO-HEARING OFFICER BAGGETT: With that, we are  
5 back on the record with Mr. Jackson. CSPA  
6 cross-examining the Department of Water Resources.

7 MR. SCHULZ: Chairman Baggett?

8 CO-HEARING OFFICER BAGGETT: Mr. Schulz.

9 MR. SCHULZ: Just a little indulgence. I  
10 wanted to become involved in the relevancy discussions  
11 with the last cross-examiner but wasn't able to.

12 I would just ask that the Chair in considering  
13 the relevancy objections distinguish between what is in  
14 the public interest and what the Department thought was  
15 in the public interest.

16 I think we all -- it's very clear from the  
17 evidentiary record that is in that the Department  
18 operated in a certain fashion from February 1 through  
19 now; that at some time in early February, late January  
20 and early February, realized it was going to have a  
21 heck of a lot of problems doing everything that it  
22 needed to do; and that it made a decision to file a  
23 petition with this Board and to move forward with a  
24 certain kind of operation which did not include at all  
25 times 11,400 cfs Delta outflow during the month of

1 February.

2           The ultimate question before this Board was:  
3 Was that operation in the public interest, and will it  
4 into the future be in the public interest?

5           If so, you would grant the petition, and they  
6 will be on their way.

7           If not, and you decide it wasn't in the public  
8 interest, they will be in violation of their permits.  
9 Whether they thought -- whatever they thought, they  
10 will still be in violation of their permits.

11           So to me, the issue in this proceeding is not  
12 what the Department thought in early February but  
13 whether or not the operations that were undertaken and  
14 are planning on being undertaken the rest of this month  
15 are in the public interest.

16           And that will ultimately be your decision, and  
17 that's what the testimony and cross-examination ought  
18 to be directed to.

19           I find this discussion of -- taking way too  
20 long and, you know, trying to -- and not really  
21 relevant to the question of --

22           CO-HEARING OFFICER BAGGETT: So I guess that's  
23 a pre-relevancy objection?

24           MR. SCHULZ: It's a pre-relevancy objection.

25           CO-HEARING OFFICER BAGGETT: It's noted,

1 but -- Mr. Nomellini?

2 MR. NOME LLINI: Dante John Nomellini.

3 If Mr. Schulz wants to testify, I request I be  
4 allowed to cross-examine. You don't get after-the-fact  
5 forgiveness.

6 If you violate your standards, you violate  
7 your standards.

8 If you want to get a temporary urgency change  
9 to change your conduct, you get it in advance.

10 So his position I disagree with, and I would  
11 like to cross-examine him because he testified as to  
12 what the process was, which I couldn't even get out of  
13 the witness.

14 CO-HEARING OFFICER BAGGETT: Thank you.  
15 Noted. Let's continue, Mr. Jackson.

16 MR. JACKSON: And I'd just like to say a  
17 little about that.

18 Would you note for the record, or not, Mr.  
19 Hearing Officer, that the statements made by Mr. Schulz  
20 in regard to the facts was not testimony?

21 CO-HEARING OFFICER BAGGETT: So noted.

22 It was a general relevancy objection filed  
23 late. It was noted, but I did not rule or strike any  
24 testimony based on the objection.

25 MR. JACKSON: Okay.

1                   CROSS-EXAMINATION BY MR. JACKSON  
2                   FOR CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

3                   MR. JACKSON: For the purposes of the  
4 cross-examination, Mr. Leahigh, my name is Mike  
5 Jackson, and I'm the lawyer for the California  
6 Sportfishing Protection Alliance in this action.

7                   And I'm going to just go straight through your  
8 slides. So could we have Slide No. 2 up, since you've  
9 identified yourself in Slide No. 1?

10                  CO-HEARING OFFICER BAGGETT: Mr. Jackson, do  
11 you have a copy of the written handout? Maybe we  
12 can --

13                  MR. JACKSON: I was given a disc, and I --

14                  CO-HEARING OFFICER BAGGETT: Okay.

15                  MR. JACKSON: -- don't really have one to  
16 play. I mean the nature of the urgency is that we  
17 didn't have people's testimony --

18                  CO-HEARING OFFICER BAGGETT: Right.

19                  MR. JACKSON: -- so we're trying to prepare on  
20 the fly here as we go.

21                  CO-HEARING OFFICER BAGGETT: I appreciate  
22 that. We all are.

23                  MR. JACKSON: Right.

24                  Now, Mr. Leahigh, bullet point number one says  
25 that the DWR is requesting modification of compliance

1 from Chipps Island for 24 days in February. Could you  
2 meet the standard now? Could you actually comply with  
3 the law as it was laid out today?

4 MR. LEAHIGH: Well, I don't know if it's a  
5 matter of the project's complying. The outflow is well  
6 above the 11,400 cfs as we sit here today because of  
7 runoff from the recent storms.

8 MR. JACKSON: Okay. And you have projections  
9 at DWR that you operate on. How long do you project  
10 this sudden obeying of the law to be capable of being  
11 continued here in February?

12 MR. LEAHIGH: Well, I'll respond to the fact  
13 of the natural flows from the recent storms, as I  
14 indicated.

15 Projections are that we will continue to see  
16 Delta inflow increase over the next -- for the  
17 remainder of this week, basically. And as I testified,  
18 it's likely that inflow on the Sacramento River at  
19 Freeport will exceed 20,000 cfs.

20 MR. JACKSON: All right. So then actually  
21 your projections indicate that you can comply with the  
22 Chipps Island standard for the rest of the month,  
23 correct?

24 MR. LEAHIGH: Delta outflow is likely to be  
25 above 11,400 cfs for the remainder of the month.

1           MR. JACKSON: So why do you need the urgency?  
2 What's the urgency now that the Lord gave us the rain?

3           MR. LEAHIGH: The urgency was there end of  
4 January, beginning of February before we knew that  
5 these storms were going to occur.

6           MR. JACKSON: So the first bullet point will  
7 be met no matter what happens in regard to this order;  
8 is that correct? Whether they grant it or deny it, it  
9 will be the same result, will meet the underlying  
10 standard for the rest of February?

11          MR. LEAHIGH: You're referring to bullet 1 on  
12 Slide 2?

13          MR. JACKSON: I am.

14          MR. LEAHIGH: Bullet 1 on Slide 2 was the --  
15 was our petition for modification of the X2 standard to  
16 move the compliance at Chipps Island for 24 days --  
17 move that to Collinsville.

18                 So the new requirement would be for 28 days at  
19 Collinsville for the month of February. That was  
20 our -- that was our petition.

21          MR. JACKSON: All right. And because of  
22 intervening rain events, you now project that without  
23 modifying the compliance from Chipps to Collinsville  
24 you can meet for the rest of the month the Chipps  
25 Island standard in D-1641?



1 CO-HEARING OFFICER HOPPIN: Mr. Jackson, would  
2 you clarify for me: Are you concerned about whether  
3 they will meet the standard from this point until the  
4 end of the month, or whether they in fact would be able  
5 to meet the 24 days in February? I think there is a  
6 significant difference there.

7 MR. JACKSON: I am asking whether or not there  
8 will be any difference, no matter what the State Board  
9 does, in the fact that there will be 11,400 cfs at  
10 Chipps for the rest of the month.

11 MR. LEAHIGH: Yeah. From this point forward,  
12 the outflow, we can say with -- we're fairly certain  
13 that it will be met for the remainder of this month,  
14 that the outflow will be well above 11,400 cfs for the  
15 remainder of the month from this day forward.

16 MR. JACKSON: And as I understand the  
17 petition, and please correct me if I'm wrong, the  
18 petition that you have asked for, the urgency petition,  
19 expires at the end of February, correct?

20 MR. LEAHIGH: Correct.

21 MR. JACKSON: So in terms of bullet one, you  
22 actually don't need the petition.

23 MR. LEAHIGH: Well, 24 days will not be met at  
24 Chipps Island for the month of February.

25 MR. JACKSON: Okay. Now, we'll get to that

1 part. I guess that that's in bullet two, right, that  
2 you've already violated for a number of days and you  
3 don't have time to make it up?

4 MR. LEAHIGH: No, that's not correct.

5 At the time that we sent our letter and our  
6 petition -- well, from the time we sent our letter,  
7 that this is what we were asking for was modification  
8 in the Chipps Island standard -- which, by the way, we  
9 didn't have the -- we didn't know how many days we  
10 would need to meet at Chipps Island until we got a day  
11 or so into February.

12 MR. JACKSON: We'll get back to that one on a  
13 different slide. But -- okay. I'll move on to the  
14 second one.

15 What the second bullet point says is that the  
16 Board should retroactively waive the requirement for  
17 the days that have already passed. Is that what you  
18 are asking?

19 MR. LEAHIGH: No, this was -- this was a  
20 different component of the X2 standard that is very  
21 specific to the first 14 days of February where rather  
22 than the two different ways to meet compliance, whether  
23 it be through salinity or outflow, this particular  
24 component of the standard says you have to meet it  
25 through salinity, actually move the X2 position to

1 Collinsville for at least one day for the first -- in  
2 the first 14 days of February. It's --

3 MR. JACKSON: In order to get more salt in the  
4 river?

5 MR. LEAHIGH: In order to move that X2  
6 position physically to Collinsville.

7 MR. JACKSON: For variability purposes?

8 MR. LEAHIGH: Excuse me?

9 MR. JACKSON: For variability purposes?

10 MR. LEAHIGH: For whatever the --

11 MR. JACKSON: Whatever --

12 MR. LEAHIGH: -- X2 standard is designed for,  
13 yes.

14 MR. JACKSON: Okay.

15 Now, you came pretty close right? I mean you  
16 dropped it -- well, let's take a look -- well, I'll go  
17 in order because it'll be easier and probably go  
18 quicker. We'll come back to that one.

19 Now, on Slide No. 3, you have identified that  
20 the reasons for this petition are to -- you have an  
21 urgent need to build reservoir storage for later use?

22 MR. LEAHIGH: Yes, it reads conserve slash  
23 build reservoir storage for later use.

24 MR. JACKSON: And the first bullet is cold  
25 water for salmonid habit.

1 MR. LEAHIGH: That's correct.

2 MR. JACKSON: So is this water, if you get  
3 this petition, going to be dedicated to cold water  
4 habitat for salmon later in the year?

5 MR. LEAHIGH: Well, again, at the time we  
6 submitted the petition, there was a very real  
7 possibility, rather than Mother Nature providing the  
8 flows, we, The Projects, would be releasing large sums  
9 of storage from upstream.

10 MR. JACKSON: But Mother Nature took that duty  
11 on itself, right?

12 MR. LEAHIGH: You could put it that way.

13 MR. JACKSON: Or herself?

14 MR. LEAHIGH: Yes.

15 MR. JACKSON: Yeah.

16 So for this period of time -- I live above  
17 Lake Oroville. I pass the lake, the river is roaring.  
18 You're now over a million, right? Acre feet?

19 MR. LEAHIGH: Yes, slightly over a million  
20 acre feet.

21 MR. JACKSON: So you never did get into that  
22 800 -- one million -- you went over a million by the  
23 date that matters, right?

24 MR. LEAHIGH: No, I think you're confusing the  
25 full natural flow calculation. I'm not sure where --

1 what number you're referring to.

2 MR. JACKSON: You talked about a number of  
3 800,000 to a million put you in one category?

4 MR. LEAHIGH: Yes. That was based on the  
5 Eight River Index, not storage in Oroville.

6 MR. JACKSON: All right. But the storage on  
7 the Eight River Index is substantially up now from the  
8 time that you wrote this petition, correct?

9 MR. LEAHIGH: The Eight River Index is the  
10 January Eight River Index which will now not change,  
11 which as I testified was slightly over 970,000 acre  
12 feet for January.

13 MR. JACKSON: And do you know what it is  
14 today?

15 MR. LEAHIGH: It's still 970,000 acre feet for  
16 the month of January. It does not change at this  
17 point.

18 MR. JACKSON: Right.

19 And of course, the -- you have the bullet  
20 point for the critical needs of water users. Could you  
21 explain the word critical to me? What do you -- is  
22 that the health and safety, the stuff you went through  
23 with Mr. Nomellini? Those are what you call critical?  
24 Refuges, health and safety?

25 MR. LEAHIGH: Yes.

1           MR. JACKSON: Okay. And that doesn't include  
2 your regular agricultural contracts?

3           MR. LEAHIGH: It -- critical in this sense is  
4 in a qualitative sense.

5           Critical would also include the ability to  
6 even provide water to any of the users south of the  
7 Delta, if, for example, San Luis storage would get too  
8 low to even provide water to any users at some point in  
9 time.

10          MR. JACKSON: Now you've -- I think you said  
11 you had somewhere around 750,000 acre feet in San Luis  
12 now?

13          MR. LEAHIGH: That's correct.

14          MR. JACKSON: And so if you don't release any  
15 for a while you'll have that -- you can keep that  
16 storage, right?

17          MR. LEAHIGH: Well, that -- that storage is --  
18 that's correct. We keep that storage.

19          MR. JACKSON: Okay.

20          Now, on Slide 4, the Sac Valley hydrological  
21 conditions, there's probably been a precipitation  
22 change somewhat, maybe not large, because of the storms  
23 in February? Is that correct?

24          MR. LEAHIGH: That's correct. I believe as of  
25 yesterday or today it's -- I think it's over 70 percent

1 of average to date.

2 MR. JACKSON: Okay. And in terms of snow  
3 pack, just judging from Quincy, you've got a lot more  
4 snow pack now than you had in January?

5 MR. LEAHIGH: There have been some increases  
6 in snow pack, yes.

7 MR. JACKSON: I've been shovelling them, so  
8 I'm pretty sure.

9 And the runoff seems to be down below the  
10 precipitation, and that's basically just the forest  
11 kind of sopping up the water?

12 MR. LEAHIGH: Well, to a large extent that's a  
13 result of the fact that we're in a third dry year. The  
14 same amount of precipitation is not resulting in an  
15 equivalent -- a proportional result in runoff.

16 MR. JACKSON: Probably because the ground was  
17 parched.

18 MR. LEAHIGH: Yes.

19 MR. JACKSON: Okay. And at some point, the  
20 ground saturates and then the precipitation comes. The  
21 number's completely different because there's less  
22 going into the ground, right?

23 MR. LEAHIGH: Correct.

24 MR. JACKSON: Okay. Now, the last bullet is  
25 the storage at Shasta, Folsom, and Oroville is 44

1 percent of average. And I'm going to do this question  
2 in coordination with your Exhibit 5 which talks about  
3 the lowest December 2008 Oroville Reservoir storage in  
4 history. And you compare it just with Oroville alone  
5 to 1977.

6 Now there is some substantial differences in  
7 where the storage is between 1977 and today, correct?  
8 I mean, in 1977 there was no Diamond Valley Reservoir.  
9 There was no Tulare Lake Water Bank. There was no  
10 semi-tropic water bank. And that water would have had  
11 to be, if you wanted to keep it, stored in Oroville,  
12 correct?

13 MR. LEAHIGH: I'm not sure I understand the  
14 premise to that question.

15 MR. JACKSON: Well, the premise is: You've  
16 got more storage than you had in 1977. You just have  
17 already moved it south of the Delta, correct?

18 MR. LEAHIGH: No. There's a lot of -- you  
19 can't single out one particular issue as explaining the  
20 difference in storage between today and 1977. There  
21 are a number of reasons why storages might be  
22 different.

23 MR. JACKSON: Have you calculated the south of  
24 Delta storage into your storage numbers and seen  
25 whether or not your actual total storage is below 1977



1 or not?

2 MR. LEAHIGH: Well, I did report on the fact  
3 that San Luis storage is 45 percent of average. I  
4 don't have the figures for 1977, but I don't imagine  
5 they would be -- if you factored those in, it would  
6 make that big of a difference.

7 MR. JACKSON: Well, isn't there still 400,000  
8 acre feet in Diamond Valley? It sure wasn't there in  
9 1977.

10 MR. LEAHIGH: I don't know the exact storage  
11 in Diamond Valley; it's not one of our facilities. But  
12 yeah. I don't know the relevance of the question.

13 MR. JACKSON: Well, I'm trying to determine  
14 whether or not your Slide No. 5 that the Shasta,  
15 Folsom -- the Oroville portion of that storage is lower  
16 than 1977, and it's the lowest in Oroville's history.  
17 The difference is -- one of the differences is that you  
18 moved the water in 2007, 2006 to storage south of the  
19 Delta. Isn't that true?

20 MR. LEAHIGH: Well, one of the differences  
21 between this year and 1977 is this is the third  
22 consecutive dry year. 1977 was the second dry year in  
23 its sequence.

24 CO-HEARING OFFICER BAGGETT: Just to give you  
25 a time check, Mr. Jackson, you have about 14 minutes.

1 MR. JACKSON: Okay. Thank you.

2 So now, calling your attention to Slide No. 6,  
3 and Slide No. 7. These slides indicate that there are  
4 years in which the winter precipitation is  
5 substantially different than a model would show.

6 Miracle March, what's looking like a pretty  
7 good February here this year. There's no way to tell  
8 where you're going to be at the time the irrigation  
9 season begins, is there?

10 MR. LEAHIGH: There's no way to know exactly,  
11 that's correct. There is a range of values that we're  
12 fairly confident we would fall within, but it's a  
13 pretty broad range still at this point.

14 MR. JACKSON: Calling your attention to No. 8,  
15 Slide 8, water supplies at a critical level.

16 The Feather River settlement contractors have  
17 been notified of a maximum shortage -- let me step  
18 back.

19 You don't have any settlement contractors on  
20 the Sacramento system, do you?

21 MR. LEAHIGH: No, just the Feather River.

22 MR. JACKSON: Okay. So calling your attention  
23 to the Feather River system, what is the maximum  
24 shortage provision that you've notified them that  
25 you're going to exercise?

1           MR. JACKSON: Yes, our settlement contract  
2 allows the Department to short those senior water  
3 rights holders by 50 percent of the contracted amount  
4 if certain hydrologic parameters are met.

5           MR. JACKSON: Are all those parameters met as  
6 of today?

7           MR. LEAHIGH: They are met as of the  
8 February 1st snow survey.

9           MR. JACKSON: And is that the key date?

10          MR. LEAHIGH: That is one of the dates. That  
11 is one of the key dates.

12          MR. JACKSON: So is there a March date and  
13 April date as well?

14          MR. LEAHIGH: There are subsequent updates to  
15 that, yes.

16          MR. JACKSON: Okay. Now, calling your  
17 attention to Slide 10, the X2 standard defined. D-1641  
18 Tables 3 and 4: It's clear to the Department that  
19 those are the fish protections in D-1641?

20          MR. LEAHIGH: D-1641 identifies the X2  
21 standard as for fishery benefit.

22          MR. JACKSON: All right.

23                 So why would it be amenable to all to grant  
24 this petition given the fact that the outflow  
25 requirement is going to be pretty much the same and

1 that nature's providing more cold water for the pool?

2 Why would you want to suspend fish the protection?

3 MR. LEAHIGH: Well, I mean there's two parts  
4 to that.

5 One is, again, we didn't -- we were asking for  
6 the modification earlier this month, not knowing that  
7 this last week of storms was going to occur. Okay. So  
8 the reason that we submitted the petition was that at  
9 the time it looked as if large amounts of upstream  
10 storage would need to be released in order to meet the  
11 objective as it's written in 1641.

12 The part of the reason we felt it was a  
13 reasonable petition to put forward is partially the  
14 fact that, as you look at the tables, these -- this  
15 Chipps Island standard, for example, was just barely  
16 triggered.

17 If it were just slightly dryer in January, the  
18 standard would have said meet Collinsville for the  
19 entire month, and that's no problem. That's  
20 sufficient.

21 So as I noted in my testimony, we're in a very  
22 sensitive part of that curve. I understand that  
23 designing a standard of this complexity would be a  
24 challenge. But it would not be surprising -- it's not  
25 surprising to me that as the standard is tested in

1 actual conditions that there may be some modification  
2 needed.

3           This is the first -- as I noted, this is the  
4 first back-to-back critically dry condition that has  
5 occurred in the basin since the standard has been  
6 adopted or since The Projects have been operating to  
7 this standard.

8           MR. JACKSON: All right. And that came up in  
9 the conversations you were having with the other  
10 agencies, with the Bureau and NOAA -- or NMFS, I guess  
11 now, and US Fish and Wildlife Service, and Department  
12 of Fish and Game, and all of those other agencies that  
13 are supposed to be taking care of our fish?

14           MR. LEAHIGH: That was part of the discussion  
15 that -- yes. That --

16           MR. JACKSON: Okay.

17           MR. LEAHIGH: -- the Projects were making.

18           MR. JACKSON: Now, since you got this -- since  
19 it's going to -- since the flow is projected to be for  
20 the rest of February, over 11,400 cfs at Chipps, don't  
21 you think it would be a good idea to rethink that with  
22 what -- you know, in terms of you can keep your storage  
23 and nature will provide the outflow, so I guess I keep  
24 coming back to: What's the problem here?

25           We got lucky. You guys were preparing. And

1 we got lucky.

2 MR. LEAHIGH: Well, if there is no problem,  
3 that would be great.

4 But we did -- we did put an off ramp provision  
5 in our petition that if it did turn wet, and there were  
6 sufficient flows into the Delta at a certain rate, and  
7 we identified that as at least three days of 20,000  
8 cfs, then, you know, we could basically guarantee that  
9 the Chipps Island standard would be met for the  
10 remainder of the month. And that's pretty much where  
11 we sit today.

12 MR. JACKSON: Okay. So we can basically  
13 guarantee and you -- so again, going back to that: But  
14 for the problem that might exist with violations from  
15 February 1 to 14 that Mr. Nomellini was talking about,  
16 you're just not going to violate for the rest of the  
17 month?

18 MS. CROTHERS: I need to object to that  
19 question. I don't think it's stating an accurate  
20 portrayal of what we're petitioning or what's actually  
21 in front of the Board.

22 MR. JACKSON: I'm sorry, counsel, but I'm  
23 actually relying on your testimony in No. 2 which asks  
24 for these two modifications, and then you've dropped  
25 the change in Vernalis flow, and I'm wondering whether

1 or not, you know, it would be practical just to drop  
2 the other two as well and we can all go home?

3 MS. CROTHERS: Well, the reason I'm objecting  
4 is I don't really think that's characterizing what the  
5 petition and what the point of the hearing --

6 CO-HEARING OFFICER BAGGETT: That's sustained.

7 Can you -- what you just stated was different  
8 than the question you asked. Maybe we should just  
9 strike and rephrase the series of questions.

10 Mr. Jackson, what you just said was not what  
11 you asked the witness and not --

12 MR. JACKSON: No, I was actually arguing with  
13 the lawyer at that point.

14 CO-HEARING OFFICER BAGGETT: Okay.

15 MR. JACKSON: Which I think I'm entitled to  
16 do. All us lawyers get to argue with each other.

17 CO-HEARING OFFICER BAGGETT: Outside the room.  
18 Continue.

19 MR. JACKSON: Okay.

20 X2, which is your second bullet point on No.  
21 10, is -- you say is the location of the two part per  
22 thousand isohaline. Is it fair to say that in these  
23 conversations you were having it also is the area of  
24 habitat for the Delta smelt?

25 MR. JACKSON: Yeah, I believe that is what is

1 behind the X2 standard, although the biological aspects  
2 of the standard is not my area of expertise.

3 MR. JACKSON: Yes, sir. I know that, but  
4 you're the only person I've got. So if you don't  
5 feel -- just don't answer.

6 The -- did in this conversation -- or do you  
7 know what the biological benefits of Chipps Island are  
8 in comparison to Collinsville?

9 MR. RUBIN: I'm going to object to the  
10 question. The question asked the witness about  
11 biological benefits of the objective. The witness has  
12 explained he's not qualified to talk about biological  
13 benefits.

14 I understand that the Department of Water  
15 Resources has not called a biologist. If Mr. Jackson  
16 or his client wants to call a biologist to get this  
17 testimony into the record, he's had that opportunity.

18 CO-HEARING OFFICER BAGGETT: Okay. Sustained.  
19 You've got a couple -- about three minutes or so.

20 MR. JACKSON: Yes, sir.

21 On your Slide No. 17, you call this a Petition  
22 for Modified Compliance, and you say in the first  
23 bullet that early February projections showed a  
24 potential hit to upstream storage of up to 200,000 acre  
25 feet.



1           What is the hit to Oroville as we sit here  
2 today for the month of February?

3           MR. LEAHIGH: As we sit here today, we did not  
4 make any additional releases from Lake Oroville in  
5 order to meet any of the X2 requirements, so there was  
6 no hit as we sit here today.

7           But the projections were, as stated in that  
8 bullet --

9           MR. JACKSON: Sure.

10          MR. LEAHIGH: -- that there would have been a  
11 need to release water from upstream in order to meet --

12          MR. JACKSON: Okay. But the testimony is  
13 being given today and will be admitted today: Is it  
14 fair to say that the first bullet is just flat wrong at  
15 this point?

16          MS. CROTHERS: I object to that question as  
17 not relevant to the requested petition. The petition  
18 is on an urgent request to make modifications at the  
19 time we knew of these concerns which is what this  
20 petition -- what this Slide 17 is showing.

21          And we submitted to the Board early in  
22 February -- I believe it was February 5th -- and then  
23 followed up on February 12th, as soon as we could, a  
24 petition making this request based on this information.

25          It's not based on the information as of today.

1 So I object to that question as not relevant to this  
2 hearing.

3 CO-HEARING OFFICER BAGGETT: Mr. Jackson, you  
4 can answer.

5 MR. JACKSON: Mr. Baggett, it seems to me that  
6 the statement that projections are what is relevant to  
7 evidence rather than actual evidence is not correct.  
8 There is no hit. This would be misleading, and I'm  
9 sure it would be seen as an abuse of discretion. And I  
10 just want to clarify that this is wrong.

11 MS. CROTHERS: The facts that we are  
12 submitting are accurate.

13 CO-HEARING OFFICER BAGGETT: Let me --

14 MS. CROTHERS: I don't think this is wrong.

15 CO-HEARING OFFICER BAGGETT: I would sustain  
16 the objection. The statement on the slide, the  
17 evidence before this Board was: Early February  
18 projections showed this. That is what the evidence  
19 they submitted was.

20 The evidence of what is actually happening on  
21 time today was not submitted. What is submitted is the  
22 early projections.

23 MR. JACKSON: It's my understanding that he  
24 just testified that there has been no hit to upstream  
25 storage, and that's under oath in this hearing, so I

1 mean --

2 CO-HEARING OFFICER BAGGETT: So what is your  
3 question?

4 MR. JACKSON: My question is: I guess they  
5 don't want to withdraw the projection. I was thinking  
6 they might. But if they don't, that's fine. The  
7 evidence is: There has been no hit.

8 CO-HEARING OFFICER BAGGETT: Okay.

9 MS. CROTHERS: We do not want to withdraw our  
10 projections and our petition.

11 CO-HEARING OFFICER BAGGETT: That is a legal  
12 discussion that the Department can have and their  
13 attorney can file with this Board. That is not this  
14 witness's -- so it's not relevant to this witness.  
15 You've got the information. Proceed.

16 MR. JACKSON: To your knowledge in bullet  
17 No. 2, has DWR notified the United States Fish and  
18 Wildlife Service and NMFS and DFG prior to the hearing  
19 that there would be no hit to upstream storage for  
20 salmonids in February?

21 MR. RUBIN: I'm going to object to the  
22 question. I believe it misstates the testimony of the  
23 witness.

24 CO-HEARING OFFICER BAGGETT: I'd overrule.

25 MR. RUBIN: I think if I could explain?

1 CO-HEARING OFFICER BAGGETT: I don't think he  
2 asked that. He just asked a simple question. Have you  
3 notified the Department of this information?

4 MR. RUBIN: But his question said that there  
5 would be, I think, no hit on upstream storage during  
6 the month of February. And I don't believe that's what  
7 Mr. Leahigh testified to.

8 MR. JACKSON: I believe it was. So I guess we  
9 could have it read back.

10 MR. RUBIN: If I recall the testimony that  
11 Mr. Leahigh provided to this Board, he said that there  
12 has yet to be a hit to upstream storage.

13 He has not said that there will or will not be  
14 in the future. I imagine that depends on what this  
15 Board does and how the Department of Reclamation reacts  
16 to what this Board does.

17 CO-HEARING OFFICER BAGGETT: As I understood  
18 the question -- maybe I should have you rephrase the  
19 question. It was: Up to this point, has there been a  
20 hit? Not into the future. And I think that was a  
21 relevant question.

22 Why don't you rephrase the question,  
23 Mr. Jackson?

24 MR. JACKSON: I'll break it into two.

25 Up until today, as we sit here today, has

1 there been a hit to upstream storage in February?

2 MR. LEAHIGH: As we sit here today, looking  
3 back, there has not been a hit to upstream storage.

4 MR. JACKSON: As we sit here today, looking  
5 forward in the projections, sort of the same  
6 projections, I guess as there are in the first bullet,  
7 is there any hit projected for the rest of February?

8 MR. LEAHIGH: No. In relation to this  
9 standard, no.

10 MR. JACKSON: Now, back to my original  
11 question: Has DWR notified the fish agencies that to  
12 the best of their knowledge there will now not be a hit  
13 to storage in February?

14 MR. LEAHIGH: I believe the fishery agencies  
15 are aware of that fact, yes.

16 MR. JACKSON: And that was because DWR made  
17 them aware?

18 MR. LEAHIGH: Yes. As I note -- as I noted  
19 earlier, we meet on a regular basis, and we go over  
20 current conditions.

21 At some point -- and they also receive  
22 operations data via e-mail from the Department. Yes,  
23 they're aware. They're aware of that as we sit now.

24 But that was not the case early February.

25 MR. JACKSON: I agree. Now the last slide and

1 the last set of questions is Slide No. 22 where you lay  
2 out your balanced approach. And I'd like to ask you a  
3 couple questions about that, and then I will be  
4 through, Mr. Baggett.

5 CO-HEARING OFFICER BAGGETT: Thank you.

6 MR. JACKSON: You indicate that the Department  
7 believes the change is in the public interest by  
8 balancing competing interests through this year and  
9 into next on salmonids.

10 Now, it doesn't make any difference in terms  
11 of storage for salmonids in February one way or the  
12 other now because of the rain, correct?

13 MR. LEAHIGH: Now it doesn't.

14 MR. JACKSON: And the same might be true.  
15 Maybe there is no hit to Delta fish because of the  
16 rain. Correct?

17 MR. LEAHIGH: That's for others to decide.

18 MR. JACKSON: Okay. That's not an area that  
19 you would balance. What difference does it make, given  
20 the situation of the rain, to public water supply in  
21 February?

22 MR. LEAHIGH: The point of this slide is not  
23 where we sit today. It's the reasons behind submitting  
24 our petition back in early February where all of these  
25 competing interests were at stake.

1           MR. JACKSON: Is another way to say that that  
2 it is no longer as urgent as it was?

3           MR. LEAHIGH: Well, we would like to get a  
4 ruling from the Board on our petition based on the  
5 actual operations that occurred early February. But  
6 this point forward, as we discussed, it's not likely to  
7 be an issue.

8           MR. JACKSON: All right. Now, the last bullet  
9 point is that DWR and USBR may need to submit  
10 additional petitions during the year.

11           Have you had conversations among yourselves  
12 about a group of serial petitions for March, April,  
13 May, June, July, August, September?

14           MR. LEAHIGH: Yes. There have been  
15 discussions about whether or not the -- all of the  
16 standards in D-1641 will be met for the remainder --  
17 certainly the remainder of the year, yes.

18           MR. JACKSON: Were you part of the group that  
19 did CEQA on this?

20           MR. LEAHIGH: I don't think CEQA is -- well,  
21 we have not submitted petitions at this -- these  
22 additional petitions.

23           MR. JACKSON: But you already have knowledge  
24 that you may have to do additional petitions?

25           MR. LEAHIGH: It's possible, yes.

1           MR. JACKSON: And you've talked about that  
2 among yourselves?

3           MR. LEAHIGH: As part of the planning process  
4 for operations, yes.

5           MR. JACKSON: Thank you, sir.

6           No further questions.

7           CO-HEARING OFFICER BAGGETT: Thank you. Bay  
8 Institute. Does Gary, have any --

9           MR. HERRICK: Mr. Chairman, John Herrick,  
10 South Delta Water Agency. I don't mean to delay this.  
11 I apologize.

12           But without overstating, I just want to be as  
13 accurate as I can. I think we can go home.

14           The conditions have changed. DWR anticipates  
15 that the flow henceforth, or actually starting a few  
16 days ago, is above the minimum 11-4 and that it will be  
17 such a level that it will probably average out for the  
18 24 days.

19           They don't want the San Joaquin River standard  
20 changed because they are in compliance.

21           So all that leaves is that -- what do they  
22 call it, starting gate? And I don't -- I think by  
23 definition you can't have an urgency change to excuse a  
24 potential -- I won't even say -- but a potential prior  
25 violation. That would be an enforcement action.



1           And I'm not being -- I'm not trying to delay  
2 this. There isn't a basis to proceed now that I see.

3           CO-HEARING OFFICER BAGGETT: Then it should be  
4 a fairly short cross-examination from now on. I think  
5 we need to -- we haven't even heard from the Bureau.  
6 So I think we at least owe them that opportunity.

7           MR. HERRICK: I agree. But if they dispute  
8 any of these inflow/outflow things, they should say so  
9 right now.

10           Because -- again, I'm not being facetious. We  
11 should go home now. This should be withdrawn. Because  
12 we shouldn't be here to make rulings on what might be  
13 petitioned next month.

14           CO-HEARING OFFICER BAGGETT: I appreciate the  
15 point you make.

16           MR. HERRICK: Thank you.

17           CO-HEARING OFFICER BAGGETT: Tom, did you have  
18 a question?

19           DR. ROSENFELD: Hi. I'm Jon Rosenfield for  
20 the Bay Institute. And Gary has left the room, and the  
21 Bay Institute waives its need to cross-examine this  
22 witness. Thanks.

23           CO-HEARING OFFICER BAGGETT: Thank you. Tom,  
24 did you have a comment?

25           CO-HEARING OFFICER HOPPIN: Mr. Howard, I have

1 a question for you. Would you agree with the  
2 statements that have been made that, given the  
3 hydrologic conditions from this point and what's  
4 anticipated for the end of the month, they will in fact  
5 be in compliance with their requirements?

6 CHIEF DEPUTY DIRECTOR HOWARD: I could be  
7 mistaken, but my understanding is that they were  
8 required to achieve 24 days at Chipps Island which has  
9 an equivalent -- or an equivalent outflow of 11,400 cfs  
10 for 24 days.

11 It's not an averaged number over -- so that it  
12 equals, you know, some sort of weighted average over 24  
13 days. It's a daily compliance requirement.

14 Since they haven't -- there's no way they can  
15 physically meet 24 days at this juncture. So at this  
16 point, the question is does the Water Board want to  
17 provide a -- want to adopt an order that would say that  
18 the Project acted in a prudent way at the time that  
19 they filed this petition or instead just leave it as a  
20 discretionary enforcement issue.

21 CO-HEARING OFFICER BAGGETT: Your point is  
22 they didn't file the petition today; they filed it over  
23 a week ago.

24 And we have decided to hold a hearing rather  
25 than do another emergency ruling without a hearing. So

1 this Board, to allow people an opportunity to comment,  
2 didn't have one Board Member issue an emergency order.  
3 I mean that's why we're here.

4 CO-HEARING OFFICER HOPPIN: And as has been  
5 stated, they are not in fact allowed -- they don't have  
6 the ability to average. They have to achieve it on 24  
7 individual days.

8 CHIEF DEPUTY DIRECTOR HOWARD: That's my  
9 understanding, yes.

10 CO-HEARING OFFICER BAGGETT: Let's continue  
11 down this list and allow the Bureau to come up, and  
12 then the Project and Bureau can caucus, and we'll take  
13 a break and decide what -- if they want to withdraw or  
14 not.

15 Butte Environmental Council, do you have any  
16 cross? Environmental Defense Fund?

17 MR. ROSEKRANS: Thank you. Spreck Rosekrans  
18 for Environmental Defense Fund. I think this will be  
19 brief; but this is my first attempt at this side of the  
20 microphone, so we'll see.

21 CROSS-EXAMINATION BY MR. ROSEKRANS

22 FOR ENVIRONMENTAL DEFENSE FUND

23 MR. ROSEKRANS: Mr. Leahigh, your Slide 5  
24 mentions that this is the first time since the adoption  
25 of the X2 standard that we have had two critically dry

1 years in a row; is that correct?

2 MR. LEAHIGH: That's correct.

3 MR. ROSEKRANS: And so this is the first time  
4 the Project has had to operate to meet the D-1641  
5 requirements that are of this nature; Is that correct?

6 MR. LEAHIGH: That's correct. Under these  
7 current conditions.

8 MR. ROSEKRANS: In your operation of the  
9 Project, do you rely on planning models that might have  
10 foreseen these conditions?

11 MR. LEAHIGH: To a certain extent, yes.

12 This standard -- we can model this standard,  
13 although -- this standard is a very difficult one to  
14 model based mostly on some of the triggering mechanisms  
15 and the way in which compliance occurs, as the  
16 discussion that took place just earlier between Board  
17 Member Baggett and Board staff.

18 The requirement for the outflow is based on a  
19 three-day average for various days through the month,  
20 whereas many of the other standards are based on  
21 monthly averages.

22 The forecast models that we have are based on  
23 a monthly time step, so it is very difficult to -- in  
24 order for those models to pick up on a standard that is  
25 based on a day-to-day compliance operation.

1           So to a large extent, we are -- we are not  
2   able to model this particular standard very well.

3           MR. ROSEKRANS:   And your Slide 5, again,  
4   suppose that this may well be the second critically dry  
5   year in a row.   We of course don't know what this year  
6   will be, but it's in fact the third dry year in a row.

7           MR. LEAHIGH:   That's correct.   It's the third  
8   either dry or critically dry year in a row.

9           MR. ROSEKRANS:   And have there been periods in  
10  the hydrologic record that have been this dry over a  
11  period of -- I guess it's been somewhere between two  
12  and three years at this point?

13          MR. LEAHIGH:   There have been, you know, back  
14  in the late '80s, early '90s period.   In fact, one of  
15  the slides showed three years in the early '90s that  
16  were all critically dry.

17          However, all of these years were prior to any  
18  operation of the current X2 standard.

19          MR. ROSEKRANS:   And when you use past  
20  hydrology to predict how The Projects might respond,  
21  don't you also go back to pre-project hydrologic  
22  conditions?

23          MR. LEAHIGH:   Yes, we do.   We essentially take  
24  in a record of approximately 80 years of historical  
25  hydrology that can be run through the models.   Again,

1 they're based on a monthly -- monthly time steps.

2 MR. ROSEKRANS: And in that approximately 80  
3 years of hydrologic record, can you say how many  
4 periods there have been approximately as dry or dryer  
5 than what we're experiencing today?

6 MR. LEAHIGH: I'm sorry? A particular year or  
7 sequence of years?

8 MR. ROSEKRANS: I think the question applies  
9 to 2007, 2008, and 2009 to date, since that's the  
10 drought to which we're responding.

11 MR. LEAHIGH: Right. I think that 80-year  
12 period, there's probably -- well, I indicated the  
13 '76-77 was very dry, although it was only a two-year  
14 sequence.

15 The early '90s, the dry stretch.

16 There's maybe one or two other dryer sequences  
17 of similar, maybe similar range as what we're  
18 experiencing.

19 MR. ROSEKRANS: So The Projects in planning  
20 for dry periods, have had other hydrologic records to  
21 look at to predict how they would respond to dry  
22 conditions and meet the various project objectives of  
23 salmonids, Delta fish, water quality and public water  
24 supply?

25 MR. LEAHIGH: Our historic record, again, is

1 good on a monthly basis. But I think what we're seeing  
2 is this particular standard, because it is based on  
3 daily compliance, we don't have a real good model for  
4 this particular standard.

5 MR. ROSEKRANS: Has the Department considered  
6 how it might improve forecasting so that this  
7 situation, which I think we all agree is unfortunate,  
8 would not arise again?

9 MR. LEAHIGH: I think there -- I think the  
10 modeling community is always looking for ways of  
11 improving those models that are out there.

12 And this -- in modeling this particular  
13 standard, as I said, presents kind of a unique  
14 challenge; but it certainly is something that I think  
15 they would probably like to focus their attention.

16 I think they probably have done about as well  
17 as they can based on the way the standard is structured  
18 and what kind of historical data is available.

19 MR. ROSEKRANS: And would you agree that under  
20 these dry conditions that fisheries, both salmonids and  
21 Delta fish, as well as water quality and public water  
22 supply, are all suffering?

23 MR. LEAHIGH: Yes. I think -- well, I'd say  
24 that it's becoming evident that we -- that we are not  
25 able -- there is not enough water to meet all of the

1 desired needs for all of those purposes.

2 MR. ROSEKRANS: And yet the petition in  
3 question is one that would relax the standard that  
4 benefits estuarine fish, and I guess Contra Costa also  
5 testified that it will impact water quality in the  
6 Delta but would otherwise benefit public water supply  
7 and salmonids?

8 MR. LEAHIGH: That's what this particular  
9 petition is addressing, yes.

10 The reductions in the public water supplies  
11 are already taking place without -- there's no need for  
12 a petition for that particular action, but -- so this  
13 particular petition addresses what you mentioned, the  
14 standard that is for the benefit of Delta fishery.

15 MR. ROSEKRANS: Will the Department be able to  
16 learn from this experience to prevent the situation  
17 where you sit here before the State Board asking for a  
18 relaxation of the X2 standard in the future?

19 MR. LEAHIGH: I think we always look to  
20 improve on the operations. I don't know -- sitting  
21 here, I don't know what could have been done  
22 differently in this particular case.

23 But again, this is the first time that this  
24 particular standard and the way it's structured has  
25 been tested in a real-time, day-to-day-type operation.



1 And I think we are learning quite a bit about that  
2 standard this year.

3 MR. ROSEKRANS: Thank you. That's all the  
4 questions.

5 CO-HEARING OFFICER BAGGETT: Thank you.

6 Mr. Brown said he had no cross. So we are up  
7 to Mr. Rubin, do you have any? And Mr. Schulz.

8 CO-HEARING OFFICER HOPPIN: Mr. Rosekrans,  
9 before you get too far away, not to slight your expert  
10 questioning there: I'm certainly sorry that you're not  
11 in your office and Tom Graff wasn't here asking those  
12 questions. And that's no slight to you, believe me.

13 CROSS-EXAMINATION BY MR. RUBIN

14 FOR SAN LUIS & DELTA MENDOTA WATER AUTHORITY and  
15 WESTLANDS WATER DISTRICT

16 MR. RUBIN: Good afternoon, Mr. Leahigh. Jon  
17 Rubin for San Luis & Delta Mendota Water Authority and  
18 Westlands Water District. I just have hopefully two or  
19 three short questions for you.

20 As part of the testimony today, you explained  
21 that the Department of Water Resources meets regularly  
22 with the Department of Fish and Game; is that correct?

23 MR. LEAHIGH: That's correct.

24 MR. RUBIN: And does the Department of Water  
25 Resources also meet regularly with the United States

1 Fish and Wildlife Service?

2 MR. LEAHIGH: Yes.

3 MR. RUBIN: Does the Department of Water  
4 Resources meet regularly with the National Marine  
5 Fisheries Service?

6 MR. LEAHIGH: Yes.

7 MR. RUBIN: And by regularly, what do you  
8 mean; how often?

9 MR. LEAHIGH: Well, there is a -- actually a  
10 number of different operations teams that meet on  
11 various days throughout the week. So at some level,  
12 there is probably some type of interaction almost on a  
13 daily basis with the fishery agencies.

14 MR. RUBIN: Mr. Leahigh, the Department of  
15 Water Resources and Bureau of Reclamation has been  
16 exporting water from the Delta since February 1, 2009;  
17 is that correct?

18 MR. LEAHIGH: Yes.

19 MR. RUBIN: Do you know if the United States  
20 Fish and Wildlife Service was aware that the United  
21 States Bureau of Reclamation and the Department of  
22 Water Resources was exporting water since February 1,  
23 2009?

24 MR. LEAHIGH: Yes, they were aware of that.

25 MR. RUBIN: Do you know if the United States

1 Fish and Wildlife Service was aware?

2 MR. LEAHIGH: Yes, they were aware.

3 MR. RUBIN: And what about the Department of  
4 Fish and Game?

5 MR. LEAHIGH: Yes, they were aware of that.

6 MR. RUBIN: I apologize; I might have asked  
7 this question but: Was National Marine Fisheries  
8 Service aware?

9 MR. LEAHIGH: Yes, they were.

10 MR. RUBIN: Would the -- do you know if the  
11 United States Fish and Wildlife Service would have  
12 raised concerns with operations that have been  
13 occurring since February 1, 2009?

14 MR. LEAHIGH: They did not express any  
15 concern.

16 MR. RUBIN: Did the Department of Fish and  
17 Game raise any concerns about operations since  
18 February 1, 2009?

19 MR. LEAHIGH: I think they -- they were not  
20 concerned with the exports that occurred.

21 MR. RUBIN: And what about NOAA fisheries?

22 MR. LEAHIGH: There was no concern expressed.

23 MR. RUBIN: Okay. Just -- I'm sorry. There's  
24 just a few more questions than I anticipated.

25 But there was some questions about reservoir

1 storage in 1977 versus 2009. Do you recall those  
2 questions?

3 MR. LEAHIGH: Yes.

4 MR. RUBIN: Are the operation criteria at the  
5 Department of Water Resources and the Bureau of  
6 Reclamation the same today as existed in 1977?

7 MR. LEAHIGH: No. They are very different.

8 MR. RUBIN: Does the Department of Water  
9 Resources and the Bureau of Reclamation release water  
10 from reservoirs like Oroville, Shasta, and Folsom for  
11 the benefit of fish and wildlife today that did not  
12 exist in 1977?

13 MR. LEAHIGH: Yes.

14 MR. RUBIN: Thank you.

15 I have no further questions.

16 CO-HEARING OFFICER BAGGETT: Mr. Schulz?

17 CROSS-EXAMINATION BY MR. SCHULZ

18 FOR KERN COUNTY WATER AGENCY and STATE WATER

19 CONTRACTORS

20 MR. SCHULZ: I'm Cliff Schulz for the Kern  
21 County Water Agency and State Water Contractors.

22 Mr. Leahigh, a couple of areas. You've been  
23 asked questions by a number of parties about critical  
24 needs, and I'd like to ask you a little bit about that.

25 When you described critical needs, were you

1 considering keeping trees and other permanent crops  
2 alive as a critical need? I don't think you ever  
3 specifically mentioned that.

4 MR. LEAHIGH: No, not necessarily.

5 MR. SCHULZ: So you don't consider that a  
6 critical need?

7 MR. LEAHIGH: Well, critical needs is, in the  
8 way that I used it, was more in a qualitative sense. I  
9 didn't really define critical needs.

10 Although to the extent that if no water was  
11 accessible from San Luis Reservoir, that would be --  
12 obviously would present a level below critical need for  
13 any of the urban contractors that withdraw water from  
14 San Luis, for example.

15 MR. SCHULZ: Mm-hmm. So you do not consider  
16 keeping trees and other permanent crops alive as being  
17 something that should be considered in the balancing?

18 MR. LEAHIGH: I think it should be considered.

19 I -- again, when I use the term critical  
20 needs, I didn't drill down to that level of defining  
21 exactly what the critical needs were. But in a general  
22 sense, that certainly is important.

23 MR. SCHULZ: Okay. From a policy standpoint,  
24 I'll make my own statement to the Board that we  
25 consider that to be a very important factor that needs

1 to be considered when you're looking at San Luis.

2 Mr. Herrick raised a point which I tend to  
3 believe has some merit in his statement about being  
4 able to go home. So I'm going to ask these questions;  
5 and Cathy, you can object if you want.

6 But would the Department be satisfied with an  
7 order from the Board that simply said that your  
8 obligation to meet the requirement at Chipps Island was  
9 modified from 24 days to 14 days?

10 In other words, why worry about the trigger  
11 anymore and the 20,000 for three days at Freeport? I  
12 mean, as I understand, the testimony is that you can  
13 meet it from now until the end of the month.

14 So would that simple type of modification  
15 satisfy the Department as to that aspect? I'll go to  
16 the second bullet in a moment.

17 MR. LEAHIGH: I believe that would. I  
18 think -- I believe that would satisfy us.

19 I'd have to -- I'd want to double-check on  
20 that 14 days, but I believe that would cover us.

21 MR. SCHULZ: Okay. Second, there has been a  
22 lot of, I think, misunderstanding by folks as to what  
23 that second bullet was about.

24 And it is my understanding -- and you can tell  
25 me if this is correct, please -- that what the

1 requirement is, it's at some time within the first 14  
2 days of February that you have to provide a 2.64 EC at  
3 Collinsville -- not at Chipps, but at Collinsville. Is  
4 that correct?

5 MR. LEAHIGH: That's correct.

6 MR. SCHULZ: What day of the month did you  
7 meet that?

8 MR. LEAHIGH: I don't believe that that  
9 salinity level has been met as of yet this month.

10 MR. SCHULZ: At Collinsville?

11 MR. LEAHIGH: At Collinsville.

12 MR. SCHULZ: Okay.

13 MR. LEAHIGH: Unless it was yesterday or  
14 today.

15 MR. SCHULZ: Okay.

16 MR. LEAHIGH: It's likely to be met here  
17 within the next -- if it hasn't been met as of  
18 yesterday, it's likely to be met within the next couple  
19 days with the increased outflow.

20 MR. SCHULZ: Okay. I thought you'd indicated  
21 to me that it had been -- in earlier testimony that you  
22 thought it possibly had now been met.

23 MR. LEAHIGH: We had actually -- it had  
24 actually gotten within .22 kilometers. But as the  
25 tides shifted back, it was starting to drift back

1 eastward again.

2           So right now, it's the struggle between the  
3 tides moving it in and the additional runoff pushing it  
4 back out. But at some point, that -- with the runoff  
5 projections, the flows will win out over the tides, and  
6 it will push the X2 line west of Collinsville.

7           MR. SCHULZ: Isn't it a fact that you're  
8 expecting probably 40,000 cfs of Delta outflow within  
9 the next few days?

10          MR. LEAHIGH: I'm not sure that the Delta  
11 outflow will get up to that level.

12          There are forecasts that river flows farther  
13 up on the Sacramento will reach that stage. Those  
14 flows are generally attenuated a bit as you move  
15 downstream.

16          But it's clear that we will see fairly high  
17 outflows in a few days.

18          MR. SCHULZ: So you would need to have -- in  
19 addition to the change from 24 to 14, you would need to  
20 have a suspension of the trigger obligation this year;  
21 is that correct?

22          MR. LEAHIGH: For the starting gate condition?

23          MR. SCHULZ: For the starting gate.

24          MR. LEAHIGH: Yes, that's correct.

25          MR. SCHULZ: Okay. Thank you.



1           There were some questions asked about your  
2 ability to model and project that this would occur in a  
3 series of dry years. And quite frankly, I'm not sure  
4 I'm going to be able to ask these questions in a way --  
5 and if I'm unable to, maybe I will have to call my  
6 witness.

7           But in the prior three years, three dry years,  
8 three dry critical patterns, which I guess would be  
9 something in '28 through '34 and another one in '86  
10 through '92, have you seen a pattern in a December --  
11 or, excuse me -- in a January, like occurred in January  
12 '09, where the San Joaquin River was a much larger  
13 percentage of that Eight River Index than the  
14 Sacramento?

15           MR. JACKSON: I'm going to object to the  
16 question on the grounds that the San Joaquin was taken  
17 out of the hearing. This question is irrelevant for  
18 what's left.

19           MR. SCHULZ: It's not for the Eight River  
20 Index. The Eight River Index establishes the  
21 requirement for X2, and that includes three flows  
22 incoming to three San Joaquin River reservoirs.

23           I'm asking questions about the Eight River  
24 Index that triggered the obligation to meet the X2 at  
25 Chipps, not about San Joaquin River flows.

1 CO-HEARING OFFICER BAGGETT: Overruled.

2 MR. LEAHIGH: Well, in a general sense, every  
3 year is unique hydrologically as far as the percentage  
4 of contributions from various basins.

5 So to that extent, even though we have a  
6 historical record back 80 years, it doesn't come close  
7 to covering the possible permutations of the relative  
8 contributions from various watersheds.

9 MR. SCHULZ: What happens when you get a  
10 higher contribution from the San Joaquin River off of  
11 the Eight River Index? Does that water show up in the  
12 Delta, or does it show up in the San Joaquin  
13 reservoirs?

14 MR. LEAHIGH: Well, actually, much of the  
15 water on both watersheds ends up in the reservoirs.

16 But as far as San -- yeah. The full natural  
17 flows described in the Eight River Index to a large  
18 extent would be impaired by the reservoirs on the San  
19 Joaquin system.

20 MR. SCHULZ: To a greater amount than would be  
21 true on the Sacramento.

22 MR. LEAHIGH: I'm not sure I can answer  
23 that --

24 MR. SCHULZ: Okay.

25 MR. LEAHIGH: -- definitively.

1           MR. SCHULZ: Okay. Do you know what the  
2 generally accepted -- or generally used. Not accepted;  
3 that would be the wrong word -- but the generally used  
4 percentage of Sacramento contribution to the Delta  
5 versus San Joaquin is?

6           MR. LEAHIGH: Gosh. Just typically, I mean,  
7 it's on the order of say 10 to 1.

8           MR. SCHULZ: Okay. Was it in January of '09?

9           MR. LEAHIGH: No.

10          MR. SCHULZ: It was much higher than that in  
11 terms of San Joaquin?

12          MR. LEAHIGH: San Joaquin proportion was a lot  
13 higher than that typical value, correct.

14          MR. SCHULZ: Okay. Thank you.

15                 And that wouldn't necessarily be reflected in  
16 models, that type of shift?

17          MR. LEAHIGH: No. No. Only to the extent  
18 that there was one of the years in the 80-year record  
19 resembled what we're seeing today, and I can't say  
20 definitively whether it did or not.

21          MR. SCHULZ: Okay. That's fine. Thank you.

22                 I think that's all I've got.

23          CO-HEARING OFFICER BAGGETT: Thank you. Any  
24 questions Diane, Jane? Questions from staff. Erin?

25          SENIOR STAFF COUNSEL MAHANEY: I'd just like

1 to ask one clarifying question.

2 QUESTIONS BY SENIOR STAFF COUNSEL MAHANEY

3 FOR STATE WATER RESOURCES CONTROL BOARD STAFF

4 SENIOR STAFF COUNSEL MAHANEY: With respect to  
5 the Chipps Island requirement, did I hear correctly  
6 that you had said you thought you would meet it from  
7 here on out, from today on out, through the end of the  
8 month?

9 MR. LEAHIGH: Yes, I think it -- we could say  
10 with great confidence that it would be met from today  
11 through the end of the month.

12 SENIOR STAFF COUNSEL MAHANEY: Okay. Thank  
13 you.

14 CO-HEARING OFFICER BAGGETT: Any questions? I  
15 only have one, and it's probably semi-relevant.

16 On 8, where you have the water supplies at  
17 critical levels and you're talking about 2007,  
18 60 percent; 2008, 35; 2009, 15. Were those all based  
19 on the same total acre feet per year?

20 What was the total flow for 2007 that's in the  
21 Project that you --

22 MR. LEAHIGH: Yeah, that's based on the total  
23 requests which would be approximately the same for each  
24 of those years.

25 CO-HEARING OFFICER BAGGETT: Okay.

1 Any other questions? Any redirect?

2 MS. CROTHERS: Yes, I have two or three  
3 questions. Would that be all right?

4 CO-HEARING OFFICER BAGGETT: Yeah.

5 REDIRECT EXAMINATION BY MS. CROTHERS

6 FOR DEPARTMENT OF WATER RESOURCES

7 MS. CROTHERS: Mr. Leahigh, when you were  
8 discussing the determination of when we would have this  
9 Chipps Island requirement identified, can you recall  
10 when it was that the Department and the Bureau first  
11 identified approximately when the Chipps Island number  
12 of days requirement was going to be triggered?

13 MR. LEAHIGH: I don't remember exactly, but it  
14 was probably right towards -- it was right towards the  
15 end of January when it looked as if the 8RI was going  
16 to be in the range in which Chipps Island's days would  
17 be required.

18 MS. CROTHERS: And do you recall  
19 approximately, for the record, when the letter was that  
20 the Department and Reclamation wrote to the Board to  
21 notify them of our concern and that we would be  
22 submitting this urgent request?

23 MR. LEAHIGH: Yes. Well, I believe it was  
24 either February 4th or 5th, I believe, is when the  
25 letter went out.

1 MS. CROTHERS: And do you believe there was an  
2 expectation that perhaps the Board would act upon our  
3 request as soon as possible?

4 MR. LEAHIGH: Yeah. It was my understanding  
5 that the Board could act on our request immediately.

6 MS. CROTHERS: Thank you.

7 That's all the questions I have.

8 CO-HEARING OFFICER BAGGETT: Any parties have  
9 any recross based on those three questions?

10 MR. NOMESELLINI: I'll go to a mike.

11 CO-HEARING OFFICER BAGGETT: Please. Any  
12 other parties? Just trying to -- okay.

13 RE-CROSS-EXAMINATION BY MR. NOMESELLINI  
14 FOR SAN JOAQUIN COUNTY, CENTRAL DELTA WATER AGENCY,  
15 SOUTH DELTA WATER AGENCY

16 MR. NOMESELLINI: Dante John Nomellini. Just  
17 for the record, do you know the date the petition was  
18 filed, this particular petition?

19 MR. LEAHIGH: I believe the date on the  
20 petition is the 10th. February 10th.

21 MR. NOMESELLINI: Thank you.

22 CO-HEARING OFFICER BAGGETT: Any other?

23 Mr. Jackson?

24

25

1           REXCROSS-EXAMINATION BY MR. JACKSON  
2           FOR CALIFORNIA SPORTFISHING PROTECTION ALLIANCE  
3           MR. JACKSON: Mr. Leahigh, had there been any  
4 discussion of this particular aspect of D-1641 prior to  
5 this year, to your knowledge, in DWR?

6           MR. LEAHIGH: Any discussion of -- I guess I  
7 need more clarification.

8           MR. JACKSON: Any discussion of the fact that  
9 you were going -- you said that this was a kind of a  
10 problematic part of D-1641.

11          MR. RUBIN: I'm going to object to the  
12 question. I don't believe this is within the scope of  
13 the redirect that the attorney for the Department of  
14 Water Resources --

15          MR. JACKSON: She talked about when they begin  
16 to consider this issue, when they began to realize this  
17 was going to be a problem, identified a date in January  
18 of 2009.

19          What I want to know, based upon that, is: Is  
20 this the first year they ever thought this would be a  
21 problem?

22          CO-HEARING OFFICER BAGGETT: Just answer the  
23 question, if you can.

24          MR. LEAHIGH: Well, I think what I testified  
25 to is that in general the X2 standard, not just in this

1 aspect but in every aspect, is difficult to forecast  
2 the needs for that particular standard because of the  
3 complex triggering mechanism and the day-to-day  
4 compliance.

5 MR. JACKSON: So this particular part of  
6 D-1641, Table 3 and 4, is really no harder to comply  
7 with than the rest of it; and so you think it all  
8 should be thrown out? Or suspended?

9 MS. CROTHERS: I object. I don't think that's  
10 what Mr. Leahigh testified.

11 CO-HEARING OFFICER BAGGETT: That's beyond --  
12 that's well beyond the redirect. Overruled. Nice try.

13 (Laughter)

14 CO-HEARING OFFICER BAGGETT: Anybody else?  
15 Any other parties? Recross? Staff?

16 If not, exhibits?

17 MS. CROTHERS: Yes. Would this be the time we  
18 should be offering our exhibits into evidence? All  
19 right.

20 DWR would like to offer into evidence our  
21 exhibit DWR-1, which is a statement of qualifications  
22 for Mr. Leahigh.

23 DWR Exhibit 2, which is the petition that was  
24 submitted.

25 And then DWR Exhibit 3, which is the testimony



1 that Mr. Leahigh made.

2 CO-HEARING OFFICER BAGGETT: Any objection?

3 MR. RUBIN: I don't have any objection. I do  
4 have a question for clarification.

5 I believe the Department of Water Resources  
6 has marked for exhibit the petition that was filed.  
7 And I just want to make sure that -- or question  
8 whether they're moving that into -- seeking to have it  
9 entered into evidence along with the exhibits to the  
10 petition.

11 MS. CROTHERS: Yes, we are. We submitted to  
12 the Board electronic and hard copies of our petition,  
13 and they have attached to them the exhibits to the  
14 petition.

15 CO-HEARING OFFICER BAGGETT: Okay. Lining up  
16 for objections?

17 MR. HERRICK: I believe the petition has  
18 attached to it -- I'm sorry. John Herrick, South Delta  
19 Water Agency.

20 I believe the petition has attached to it a  
21 study, a report by Mr. -- is it Kimmerer? I don't want  
22 to mispronounce his name.

23 Nobody has offered any testimony to support  
24 that or verification or any mention of it, so it  
25 certainly can't be accepted into evidence at this

1 point; therefore, I would object to it being accepted.

2 MS. CROTHERS: It's attached to our petition  
3 as a reference document. In our petition, we reference  
4 it. So I would assume it's incorporated into our  
5 petition as a reference.

6 CO-HEARING OFFICER BAGGETT: And is the  
7 petition evidence?

8 MR. JACKSON: I had the same argument in  
9 regard to Mr. Kimmerer which I will leave. I just want  
10 to join Mr. Herrick in that regard.

11 But the petition itself is flawed under your  
12 rules, and I was planning on doing that with the  
13 Bureau, so I don't want it to go into evidence. It's a  
14 joint petition. But there's 30 minutes of what's wrong  
15 with the petition under your rules that we haven't done  
16 yet.

17 So I would object to it going in until both  
18 petitioners have testified.

19 CO-HEARING OFFICER BAGGETT: Okay, that's  
20 fair.

21 So the petition will be held. We'll accept  
22 DWR 1, 2 and 3 into evidence at this point. We'll  
23 allow the Bureau to enter the petition then.

24 MS. CROTHERS: Wait a minute. The petition is  
25 DWR 2 that we have -- we wanted to submit that as an

1 exhibit, and it's what the basis of Mr. Leahigh's  
2 testimony is made from.

3 CO-HEARING OFFICER BAGGETT: Okay. So the  
4 objection is to an attachment, but it sounds like you  
5 have other procedural objections. We'll deal with  
6 those -- those are legal issues. We can still accept  
7 the petition into evidence.

8 And the exhibit attached to it, since we do  
9 not have a witness, will be subject to the hearsay  
10 rules of the Board, I would assume. I mean they will  
11 be. Since it's not -- since there is no witness to  
12 verify the study referred to. Okay.

13 That's the ruling.

14 (Whereupon Exhibits DWR 1, 2, and 3 were  
15 accepted in evidence.)

16 CO-HEARING OFFICER BAGGETT: With that, thank  
17 you, DWR. Let's go off the record for a minute and try  
18 to get a time check here.

19 (Recess)

20 CO-HEARING OFFICER BAGGETT: Let's go back on  
21 the record. Let's do the Bureau, and then we'll take a  
22 break before we begin the cross. But let's get your  
23 case-in-chief in anyway.

24 MS. AUFDEMBERGE: Can we go off the record  
25 again for a second?

1 (Recess)

2 MS. HARRIGFELD: I have one point of  
3 clarification.

4 CO-HEARING OFFICER BAGGETT: Do you want to  
5 identify yourself for the record.

6 MS. HARRIGFELD: Sorry. Karna Harrigfeld,  
7 Stockton East Water District.

8 The Bureau of Reclamation originally  
9 petitioned to have the San Joaquin River flow  
10 relaxation. I was not made aware of their request to  
11 withdraw that until we appeared at the hearing today.  
12 Obviously, my policy statement would be different.

13 It is my understanding that his written  
14 testimony includes an explanation of why they are  
15 requesting the withdrawal; and I would respectfully  
16 request you had allow me to -- I have just a few  
17 cross-examination questions to clarify Mr. Milligan's  
18 testimony.

19 CO-HEARING OFFICER BAGGETT: For DWR?

20 MS. HARRIGFELD: No. For Ron Milligan.

21 CO-HEARING OFFICER BAGGETT: Oh. Okay.

22 MS. HARRIGFELD: The Bureau. Who he --

23 CO-HEARING OFFICER BAGGETT: We will allow  
24 that.

25 MS. HARRIGFELD: -- will be testifying. I was

1 a policy statement only, and so --

2 CO-HEARING OFFICER BAGGETT: Very good.

3 MS. HARRIGFELD: Okay. Thank you.

4 CO-HEARING OFFICER BAGGETT: Any other  
5 procedural motions? Objections?

6 MR. NOMELLINI: Dante John Nomellini. I  
7 thought we left with the issue on the table of whether  
8 or not the Vernalis relaxation was withdrawn or not.

9 CO-HEARING OFFICER BAGGETT: We --

10 MR. NOMELLINI: Because if it's not withdrawn,  
11 then our cross-examination of DWR witnesses was  
12 incomplete and didn't deal with the Vernalis.

13 CO-HEARING OFFICER BAGGETT: Well DWR has  
14 stated on the record they withdrew.

15 MR. NOMELLINI: At the same time, the Bureau  
16 was asked, if I recall -- I wasn't paying perfect  
17 attention -- but as I understood it, there was a pause  
18 and they --

19 CO-HEARING OFFICER BAGGETT: So did I.

20 MR. NOMELLINI: Checked with the Bureau, and  
21 the Bureau said they did. Anyway, whatever it is.

22 CO-HEARING OFFICER BAGGETT: I guess we have  
23 the lemon rule here too, right? Like when you buy a  
24 car you have 15 days to -- no? Anyway.

25 MR. NOMELLINI: Well, anyway, if you want to

1 get into that, we would like to go back and cross.

2 CO-HEARING OFFICER BAGGETT: I agree. Bureau,  
3 you're up.

4 MS. AUFDEMBERGE: Okay, I think for the record  
5 we are withdrawing the San Joaquin Vernalis Objective  
6 Relaxation Request.

7 CO-HEARING OFFICER BAGGETT: Okay. It is  
8 hereby withdrawn unless a court overrules us.

9 MS. AUFDEMBERGE: Board Member Baggett and  
10 Board staff, we are pleased to be here for this  
11 opportunity to present you with testimony in support of  
12 the Emergency Temporary Urgency Change Petition for X2  
13 during February 2009 filed by DWR and Reclamation.

14 My name is Amy Aufdemberge. I'm with the  
15 Department of the Interior Solicitor's Office. And  
16 with me today is Kaylee Allen, also of the Solicitor's  
17 Office.

18 We will present two witnesses today, Mr. Ron  
19 Milligan, Operations Manager for the Central Valley  
20 Project, and Mr. Mike Chotkowski, Acting Regional  
21 Environmental Officer for Reclamation.

22 And I think the way we would like to set it up  
23 is to present these two witnesses in a panel.

24 Regarding the petition, Reclamation concurs  
25 with the testimony provided by DWR and believes that

1 the petition shows cause for the Board to issue an  
2 order as requested.

3 An important point for Reclamation regards the  
4 Eight River Index. In normal years, the Eight River  
5 Index incorporates a certain expected level of local  
6 runoff or accretions into the Delta. The local runoff  
7 was very low during January '09 and through  
8 mid-February '09.

9 Therefore, while D-1641 determines that if the  
10 Eight River Index is above 9,000 -- excuse me, 900,000  
11 acre feet, as it was during January '09 at 973,000 acre  
12 feet, the X2 location should be set at Chipps Island.

13 Due to the lack in local runoff in January and  
14 February '09, the 973,000 acre feet is not sufficient  
15 to meet the Chipps Island location without the release  
16 of large amounts of stored water in upstream  
17 reservoirs, threatening cold water reserves and further  
18 limiting exports and storage for public health and  
19 safety deliveries.

20 Under these extraordinary and urgent  
21 circumstances, which were not represented by the Eight  
22 River Index in D-1641, the appropriate location for X2  
23 is at Collinsville.

24 In addition to Mr. Milligan, Interior will  
25 present Mr. Mike Chotkowski who will testify regarding

1 the anticipated effects that our relaxation of X2 in  
2 February would have on federally listed threatened and  
3 endangered aquatic species.

4 Specifically, Mike will testify that based on  
5 the current status and location of Delta smelt far  
6 upstream of Collinsville, he does not anticipate any  
7 meaningful effects to Delta smelt populations.

8 Further, he will testify that while there are  
9 tradeoffs for anadromous species and green sturgeon,  
10 that the benefit of preserving cold water resources to  
11 provide necessary temperatures for winter run Chinook  
12 salmon spawning later in the summer may help protect  
13 this year class of winter run.

14 That concludes my opening statement.

15 MR. RON MILLIGAN DR. MICHAEL CHOTKOWSKI

16 Called by US BUREAU OF RECLAMATION

17 DIRECT EXAMINATION MR. MILLIGAN BY MS. AUFDEMBERGE

18 MS. AUFDEMBERGE: We call Ron Milligan.

19 MR. MILLIGAN: For the purposes of saving  
20 time, I will not go blow-by-blow and --

21 MS. AUFDEMBERGE: Okay. Wait a minute Ron. I  
22 just have a few questions.

23 MR. MILLIGAN: Oh, sorry.

24 MS. AUFDEMBERGE: Do you have before you what  
25 is marked DOI Exhibit 2?



1 MR. MILLIGAN: Yes, I do.

2 MS. AUFDEMBERGE: Is this a true and correct  
3 copy of your testimony?

4 MR. MILLIGAN: Yes, it is.

5 MS. AUFDEMBERGE: Can you briefly describe  
6 your qualifications to testify at this hearing and then  
7 summarize your testimony, please.

8 MR. MILLIGAN: I am currently the CVP  
9 Operations Manager for the Bureau of Reclamation  
10 Mid-Pacific region.

11 I have a bachelor's degree with honors in  
12 civil engineering from Sacramento State University. I  
13 have worked with Reclamation since November of '99 with  
14 a number of positions there including regional --  
15 Deputy Regional Planning Officer and several other  
16 supervisory positions.

17 Before that, I worked with the US Army Corps  
18 of Engineers in the Sacramento district since 1984 on  
19 numerous hydrologic modeling, planning investigations,  
20 and reservoir operations in the Central Valley.

21 MS. AUFDEMBERGE: Can you please summarize the  
22 rest of your written testimony?

23 MR. MILLIGAN: I will say that I agree with  
24 the technical aspects of Mr. Leahigh's testimony by  
25 DWR.

1           My written testimony includes information  
2 about current reservoir storages, and also those values  
3 in relationship to the 15-year running average. That  
4 includes both San Luis Reservoir and the federal share.

5           It includes some information about current  
6 allocations to CVP contractors as well as our  
7 understanding of State Water Contractors' allocations  
8 to date.

9           Last Friday on the 13th, Reclamation provided  
10 notice to Sacramento River Settlement Contractors and  
11 the San Joaquin River Exchange Contractors that the  
12 shortage provisions of their contracts as they relate  
13 to Shasta year critical flows have been triggered which  
14 triggers a 25 percent reduction in their contracts.

15           My written testimony has some information  
16 about Eight River Index. This particular year, Eight  
17 River Index has been fairly unusual for two reasons --  
18 or at least the value of the index as it relates to the  
19 end of January -- which is the mechanism which calls  
20 for both the starting gate and the number of days of  
21 Chipps Island requirement.

22           The two unusual pieces of this is that the  
23 contribution from Bend Bridge which would be  
24 representative of the unregulated stream flows within  
25 the Sac Valley were extremely low.

1           I would credit this to the fact that since  
2 March of last year we've had extremely dry conditions  
3 in the Central Valley and particularly depletions have  
4 been unusually high.

5           For a number of stations in the Sac Valley in  
6 January, we were running at historic lows, and  
7 depletions were running at levels that would equate to  
8 a 99 percent exceedance level.

9           The other unusual aspect of it is that the --  
10 which is typically not the case -- is that San Joaquin  
11 River basin reservoir or let's say river basins above  
12 the reservoirs was also driving the index more than you  
13 would usually see.

14           Typically, Sac River -- rivers will tend to  
15 take the index in whatever direction it's going to go.  
16 In this particular January, that was not quite the  
17 case.

18           For several reasons, the precipitation that we  
19 saw in the Valley at the end of January took us from a  
20 position where we felt that we probably would be  
21 clearly operating at the Collinsville objective for the  
22 month of February or we'd be in the area where the  
23 Table 3 would indicate discretion by the Executive  
24 Director.

25           It wasn't until very early February that

1 tabulation of values showed that we would be in the  
2 requirement for Collinsville -- or, excuse me -- at  
3 Chipps Island for 24 days.

4           John did indicate that on the 14th -- in terms  
5 of starting gates, one thing I wanted to make notice of  
6 is that The Projects did make an attempt in early  
7 January, where there were still some -- excuse me --  
8 early February where there was still some inflows from  
9 the preceding week's storms to coordinate reduced  
10 exports in an attempt to meet the starting gate  
11 requirement of 2.64 at Collinsville.

12           That was not a successful enterprise as  
13 that -- the outflow had dropped off considerably, and  
14 we were unable to meet the salinity objective at  
15 Collinsville there at the beginning of February.

16           On February 14th was probably our best day  
17 this month. That was at 2.74.

18           The other item I wanted to add -- highlight in  
19 my testimony is that we've had very close coordination  
20 with both Department of Water Resources and the fishery  
21 agencies, meaning Fish and Wildlife Service, NOAA  
22 Fisheries, and Department of Fish and Game, throughout  
23 this month about what were protective actions as they  
24 relate to both Delta smelt, longfin smelt and concerns  
25 about cold water pool for the upcoming summer.

1           We've met at several levels with those  
2 agencies' representatives, you know, upwards to three  
3 to four times a week in different forums to discuss how  
4 we might be putting together a package of protective  
5 action should weather conditions and lack of rainfall  
6 drive us to some very unusual operations. And we  
7 continue to have those discussions.

8           Several items that I also make reference to in  
9 my written testimony relate to a great deal of concern  
10 about if we did not get some rainfall runoff this  
11 month, as we discussed putting together a petition,  
12 that it -- a very difficult position of increasing  
13 reservoir releases.

14           John Leahigh outlined a number of potentially,  
15 up to 200,000 acre feet. If that were -- if we had a  
16 very dry February along the lines of we'd seen in  
17 January, that is not an unrealistic number in terms of  
18 a need to augment reservoir releases to be able to meet  
19 the particular Chipps Island days.

20           We are thankful that we did get a great deal  
21 of rainfall here later in the month, and we believe  
22 that that will carry us through for the rest -- the  
23 remainder of the month.

24           But I did want to make clear that that was not  
25 an exaggeration at the time that we put the document

1 together.

2 I also wanted to note that as we were putting  
3 the petition together we were very concerned about the  
4 potential for the San Joaquin River basin year class  
5 designation at the 75 percent exceedance level.

6 Along the same lines that we had seen the San  
7 Joaquin River basin raise the Eight River Index, there  
8 was a potential that that designation for the San  
9 Joaquin River could come in at a dry condition as  
10 opposed to critically dry.

11 The requirements for Chipps Island days and a  
12 dry condition would have likely required Reclamation to  
13 make additional releases from New Melones Reservoir to  
14 meet a Vernalis flow objective. That is something that  
15 we would be greatly concerned with, given the amount of  
16 storage, water that's been taken out of storage, over  
17 the last two and a half years from Melones.

18 We believe at the critically dry level there  
19 should not be a concern with having to make reservoir  
20 releases as they relate to the Vernalis flow objective  
21 or its contribution to X2 days.

22 We do anticipate if we were to see a radical  
23 change in base flows on the San Joaquin River to  
24 reexamine that issue and, if need be, maybe approach  
25 the Board on it as a separate issue.

1           But that's the basis for our withdrawing that  
2 aspect of this particular petition.

3           And with that, I will just let my written  
4 testimony stand as it is.

5           MS. AUFDEMBERGE: Do you have before you DOI  
6 Exhibit 5?

7           MR. MILLIGAN: Yes, I do.

8           MS. AUFDEMBERGE: What is this exhibit?

9           MR. MILLIGAN: This exhibit is a memorandum  
10 from myself to the Fish and Wildlife Service last week.  
11 It is requesting -- identifying that Reclamation/DWR  
12 have made this petition, and that these particular  
13 conditions lay outside of the Project description as  
14 outlined in the recently completed Biological Opinion  
15 for Delta smelt.

16           MS. AUFDEMBERGE: Is DOI Exhibit 5 a true and  
17 correct copy of that memorandum?

18           MR. MILLIGAN: Yes, it is.

19           MS. AUFDEMBERGE: Do you have before you DOI  
20 Exhibit 6?

21           MR. MILLIGAN: Yes, I do.

22           MS. AUFDEMBERGE: Can you explain what this  
23 exhibit is?

24           MR. MILLIGAN: This is a memorandum from the  
25 US Fish and Wildlife Service. It is in response to my

1 memorandum to them of last week.

2 MS. AUFDEMBERGE: Is this a true and correct  
3 copy of the memorandum you received?

4 MR. MILLIGAN: Yes, it is.

5 MS. AUFDEMBERGE: Can you explain anything in  
6 the -- is there anything you to want summarize from  
7 this exhibit?

8 MR. MILLIGAN: I think there are two things,  
9 one of which was some clarification as it relates to  
10 components of the reasonable and prudent alternative  
11 that were included in the Biological Opinion that we  
12 received from Fish and Wildlife Service last month, one  
13 of those of which clarified a triggering mechanism as  
14 it related to detection of Delta smelt larval in the  
15 system and a clarification that those turned out to be  
16 actually longfin larval that they had found.

17 Secondly, that they felt that -- they  
18 concurred that this modification, or departure from  
19 D-1641, was not part of the Project description; but  
20 they also felt that it was included or considered  
21 within the range of effects that they analyzed when  
22 conducting the Opinion and proposed that we continue to  
23 work through the adaptive management process that was  
24 outlined in the opinion.

25 MS. AUFDEMBERGE: This concludes your direct



1 testimony?

2 MR. MILLIGAN: Yes, it does.

3 DIRECT EXAMINATION OF DR. CHOTKOWSKI BY MS. ALLEN

4 FOR US BUREAU OF RECLAMATION

5 MS. ALLEN: Good evening, almost. My name is

6 Kaylee Allen. I'm with the US Department of the

7 Interior. We would now like to call Dr. Michael

8 Chotkowski.

9 What is your position with the Bureau of  
10 Reclamation?

11 DR. CHOTKOWSKI: I am the Acting Regional  
12 Environmental Officer.

13 MS. ALLEN: And prior to your temporary duty  
14 as Acting Regional Environmental Officer, what was your  
15 position?

16 DR. CHOTKOWSKI: I was the Chief of the  
17 Applied Science Branch.

18 MS. ALLEN: Could you please take a look at  
19 the exhibit marked DOI 4. Is this a true and correct  
20 copy of your c.v.?

21 DR. CHOTKOWSKI: Yes.

22 MS. ALLEN: Could you also please take a look  
23 at the exhibit marked DOI 3. Is this a true and  
24 correct copy of your written testimony?

25 DR. CHOTKOWSKI: Yes.

1 MS. ALLEN: Could you please summarize your  
2 written testimony?

3 DR. CHOTKOWSKI: I -- just to provide some  
4 background, since I'm the only biologist from either  
5 DWR or Reclamation who is testifying.

6 I have a PhD in biology from UCLA and nine  
7 years' experience with Reclamation managing  
8 Reclamation's participation in the interagency  
9 ecological program, the Pelagic Organism Decline  
10 investigation, and other scientific support and  
11 environmental compliance activities involving fishes.

12 My staff and I participated in the drafting of  
13 the last two biological assessments for the Section 7  
14 Consultations regarding the long-term operations of the  
15 Central Valley Project and the State Water Project.  
16 That would be in 2004 and 2008.

17 I have personally been a member of the Fish  
18 and Wildlife Service's smelt workgroup, which provides  
19 weekly advice to the Service on the ongoing effects of  
20 Water Project operations on Delta smelt for several  
21 years.

22 And I'm a member of the -- actually, the chair  
23 of the Fish and Wildlife Service's Delta Native Fishes  
24 Recovery Team.

25 In my present testimony, I'm speaking from

1 some personal expertise with Delta smelt, and I'm  
2 relying on the advice of my staff in weighing the  
3 potential effects of the proposed action on the  
4 anadromous species.

5 MR. JACKSON: Mr. Baggett, I don't know  
6 whether his microphone is on, but there's just kind of  
7 a -- I'm sitting pretty close, and we can't hear him.

8 DR. CHOTKOWSKI: Is this better?

9 MR. JACKSON: Yes.

10 CO-HEARING OFFICER BAGGETT: Yeah. If you  
11 could speak up, that would help.

12 DR. CHOTKOWSKI: My testimony addresses only  
13 one issue that -- in the State Board's notice, and that  
14 is No. 5: Will the proposed modifications unreasonably  
15 affect fish, wildlife, or other in-stream beneficial  
16 uses.

17 And I really deal primarily with the potential  
18 for the proposed modification to affect federally  
19 listed Delta smelt and secondarily, based on my  
20 expertise, with federally listed salmonids and green  
21 sturgeon.

22 Of the three changes that were requested in  
23 the petition, I dealt with only one because the  
24 third -- the second, that's the starting gate  
25 provision, occurred in the past, and there's nothing to

1 analyze.

2           And the San Joaquin River Flow requirement at  
3 Vernalis was withdrawn, so.

4           The remaining element, No. 1, calls for  
5 maintenance of 7100 cfs of outflow at Collinsville as a  
6 three-day prior moving average for the remainder of the  
7 month of February.

8           This outflow, as I understand it, is  
9 equivalent to a steady-state X2 at Collinsville.

10           I have interpreted the petition to convey that  
11 there aren't any alternative ways to achieve compliance  
12 during the remainder of February if the petition is  
13 granted.

14           Regarding effects on Delta smelt, Delta smelt  
15 are usually an annual species. Most of them rear to  
16 adulthood in the general area of X2 during the summer  
17 and fall which is somewhat saltier than the areas that  
18 they spend during the remainder of the year.

19           Adults migrate into the interior Delta during  
20 the winter where they spawn, and the early larval  
21 development occurs in fresh water with the juveniles  
22 migrating outward and back down toward X2 in the early  
23 summer.

24           In February, therefore -- and in fact, based  
25 on evidence that we have available to us now, the Delta

1 smelts are present in the Delta only as pre-spawning  
2 adults, most of which have apparently migrated away  
3 from the current location of X2 and into freshwater  
4 areas of the north and central Delta, probably mostly  
5 the north Delta.

6 We do have some very recent monitoring data  
7 that was just released by Fish and Game and isn't  
8 mentioned in my testimony here today that suggests that  
9 there are a substantial number in Suisun Marsh this  
10 year.

11 Because most of the fish are upstream and some  
12 of them are quite far upstream, away from X2, it seems  
13 to me to be fairly unlikely that shifting X2 or the  
14 equivalent Delta outflow standard from Chipps to  
15 Collinsville will alter the salinity or other qualities  
16 of Delta smelt habitat in the areas where the large  
17 majority of the fish will be spawning or are currently  
18 residing.

19 Consequently, it seems to me that this change  
20 is unlikely to meaningfully affect the Delta smelt  
21 population by itself.

22 I did include a rather extensive caveat to  
23 this conclusion which states that I am assuming that  
24 the reasonable and prudent alternative to the Fish and  
25 Wildlife Biological Opinion that was issued in December

1 remains in force.

2 Delta smelt are at very low numbers. We're  
3 somewhat lucky this year because Delta smelt have been  
4 very favorably distributed during the winter and  
5 turbidity and water temperatures have remained  
6 relatively low.

7 In particular, the lower turbidity and the  
8 distribution of the fish favor a reduction in the risk  
9 of entrainment at present. However, the risk of  
10 entrainment might change over time; and if that  
11 happens, then the Service may consider imposing a  
12 limitation on negative Old and Middle River flow.

13 I might mention, by the way, that at present  
14 none of the actions in the RPA are in force. It looked  
15 as of last week as though there might be some Delta  
16 smelt larvae out there; however, reconsideration of the  
17 IDs on those has concluded that they were longfin smelt  
18 larvae.

19 Because the February 1st 50 percent exceedance  
20 forecast indicates that 2009 will be a critically dry  
21 year, Reclamation has requested reinitiation of  
22 consultation with the Service under the consecutive  
23 critically dry year trigger that's described on page  
24 296 of the Biological Opinion.

25 Reinitiation of consultation will give Fish

1 and Wildlife and Reclamation an opportunity to evaluate  
2 in detail the consequences of the current prolonged  
3 drought conditions and what they might have on Delta  
4 smelt, including the effects of a potential spring  
5 outflow relaxation if one's requested.

6           The Service has provisionally concluded on the  
7 basis of the petition that maintenance of 7100 cfs  
8 outflow for the remainder of February is unlikely to  
9 substantially affect Delta smelt provided the adaptive  
10 review process described on page 280 of the Biological  
11 Opinion continues in force.

12           With respect to anadromous fishes, there is  
13 some concern that reduced Delta outflow may affect the  
14 anadromous species by reducing the amplitude of the  
15 cues that trigger their migration.

16           At present in late February, that would  
17 include upstream-migrating adult winter run Chinook,  
18 spring run Chinook, and green sturgeon that may be  
19 passing through the Delta.

20           It may also affect out-migrating juvenile  
21 winter run and steelhead that are also now entering the  
22 Delta but from the opposite side. It's possible that  
23 the reduction of -- it's reasonably plausible that the  
24 reduction in outflow from 11,400 cfs to 7,100 cfs might  
25 delay their migrations.

1           However, it isn't clear what the amount of the  
2 delay will be, and there is some debate over whether  
3 the delay will meaningfully change the proportion of  
4 fish that reach their destination.

5           Against this concern, there is the potential  
6 benefit of the proposed action to all Sacramento River  
7 anadromous species and ESUs that must be weighed  
8 against the concern I just described.

9           According to Ron Milligan's testimony, the  
10 relaxed February outflow standard could allow a large  
11 quantity of water, as much as nearly 200,000 acre feet,  
12 to be retained in storage for later release.

13           In the present very dry conditions, having a  
14 larger cold water pool in the reservoirs, especially  
15 Shasta, improves the probability that the CVP will be  
16 able to maintain some degree of cold water control  
17 during July and August.

18           This is of great concern because if there is  
19 not enough cold water to maintain a region of cold  
20 water below the dams, then this entire year's  
21 production of winter-run Chinook could be lost.

22           So my overall conclusion is that, by itself,  
23 the relaxation of Delta outflow to 7100 cfs in February  
24 won't meaningfully affect Delta smelt. It seems likely  
25 also that any slowing of the upstream migration of



1 adult green sturgeon, spring run and winter run Chinook  
2 salmon will be offset by the increase in the likelihood  
3 that there will be enough extra water -- extra cold  
4 water in Shasta to maintain some degree of temperature  
5 control through July and August.

6 For those reasons, I think overall the  
7 proposed outflow relaxation doesn't appear to represent  
8 a threat to the federally listed species.

9 MS. ALLEN: At this time, we'll open the panel  
10 up for questions from the Board or for  
11 cross-examination.

12 CO-HEARING OFFICER BAGGETT: Does DWR have any  
13 cross?

14 MS. CROTHERS: No, we have none.

15 CO-HEARING OFFICER BAGGETT: None? No cross  
16 from Department of Water Resources. South Delta, et  
17 al.? Central Delta? San Joaquin?

18 CROSS-EXAMINATION BY MR. NOME LLINI

19 FOR CENTRAL DELTA WATER AGENCY, SOUTH DELTA WATER  
20 AGENCY, and SAN JOAQUIN COUNTY

21 MR. NOME LLINI: I am Dante John Nomellini.  
22 I'm counsel for the Central Delta Water Agency, and I'm  
23 appearing for the purposes of this cross-examination on  
24 behalf of Central Delta Water Agency, South Delta Water  
25 Agency, and San Joaquin County.

1 My first question is to -- is it Chotkowski?

2 I'll call you Michael, how about that?

3 In your testimony, you stated that you have  
4 interpreted the petition to convey that there are no  
5 alternative ways to achieve compliance during the  
6 remainder of February if the petition is granted. Is  
7 that a correct statement?

8 DR. CHOTKOWSKI: Yes.

9 MR. NOMELLINI: All right. Did somebody tell  
10 you there were no other ways than to relax the  
11 standards?

12 DR. CHOTKOWSKI: No. That's just what I  
13 gathered from reading the documents.

14 MR. NOMELLINI: If you knew that a reduction  
15 in exports of water from the Delta could help achieve  
16 the standards, would you still feel that the standards  
17 should be violated?

18 MS. AUFDEMBERGE: I'm going to object based on  
19 Mike Chotkowski's never said he felt there is a  
20 violation. We're not clear that there has been a  
21 violation. That calls for a conclusion by Mr.  
22 Chotkowski.

23 CO-HEARING OFFICER BAGGETT: I understand your  
24 question. Could you rephrase it?

25 MR. NOMELLINI: I'll leave the word violation

1 out.

2 CO-HEARING OFFICER BAGGETT: It's a legitimate  
3 question.

4 MR. NOMELLINI: If you knew that a reduction  
5 in exports would allow greater water to be used for net  
6 Delta outflow, would that surprise you in view of your  
7 interpretation of the petition?

8 DR. CHOTKOWSKI: I'm sorry. I might be just a  
9 little slow, but I'm not sure I understand what you're  
10 asking.

11 MR. NOMELLINI: Okay. If you knew that  
12 reducing the exports during the period of February 1st  
13 through February 15th would have allowed greater flow  
14 of water to go out of the Delta, would you have changed  
15 your view towards the necessity of granting this  
16 petition?

17 DR. CHOTKOWSKI: Well, if I understand what  
18 you're asking, when you were first raising the  
19 question, you asked me whether I'd be surprised if a  
20 reduction in export pumping would allow more water to  
21 be released as Delta outflow, and that would not  
22 surprise me. That's just arithmetic.

23 MR. NOMELLINI: Okay. Did you realize that  
24 the exports that were being made in February were of  
25 water that would have gone to net Delta outflow to help

1 meet the Outflow Objectives?

2 DR. CHOTKOWSKI: I understand that, yes.

3 MR. NOMELLINI: Did you understand it at the  
4 time of your testimony?

5 DR. CHOTKOWSKI: Yes.

6 MR. NOMELLINI: And is it your testimony that  
7 you view the requirements to meet those standards for  
8 protection of fish should be subservient to the  
9 exports?

10 DR. CHOTKOWSKI: Well, I can only answer from  
11 the biological point of view. I can't give you a  
12 policy answer or a moral answer.

13 From a biological point of view, I think it's  
14 generally -- the restrictions on X2 location are  
15 generally considered to be a good thing.

16 So the only question I was considering is  
17 whether an export -- I'm sorry, an outflow restriction  
18 would -- I'm sorry, my entire answer applies to  
19 outflow.

20 But for -- but what I was saying is that for  
21 purposes of my analysis I only considered the likely  
22 biological effects of an outflow restriction for the  
23 limited period of the second half of February.

24 MR. NOMELLINI: And you concluded what with  
25 regard to that outflow?

1 DR. CHOTKOWSKI: Well, as I said in my  
2 testimony, I think the movement of X2 by itself in the  
3 second half of February is not likely to be a problem  
4 for Delta smelt.

5 And if there are problems for anadromous  
6 fishes, they're likely to be compensated for -- more  
7 than compensated for by improved storage.

8 MR. NOME LLINI: With regard to Delta smelt,  
9 how would a reduction in net Delta outflow during the  
10 period of February 1st through February 14th adversely  
11 effect smelt?

12 MS. AUFDEMBERGE: Could you clarify that  
13 question?

14 MR. NOME LLINI: I think it was a simple  
15 question.

16 DR. CHOTKOWSKI: You're asking how --

17 MR. NOME LLINI: Does outflow in the period of  
18 February through February 15th affect Delta smelt?  
19 Start with that one.

20 DR. CHOTKOWSKI: Well, if you're talking about  
21 a relaxation from Chipps to Collinsville, I think it's  
22 probably the same story throughout February: It's not  
23 that big an issue for Delta smelt.

24 MR. NOME LLINI: Not that big of an issue.

25 What is the degree of the impact -- is there

1 any impact, adverse impact, to smelt by that reduction?

2 DR. CHOTKOWSKI: That's unclear. The -- well,  
3 I'd like to finish my answer.

4 If X2 were to move very far upstream, then I  
5 think it's -- I think most people would agree and the  
6 modeling would show that there would be an increased  
7 risk of entrainment of Delta smelt as a result of that.

8 But I think this amount of movement from  
9 Chipps to Collinsville is small enough that it's -- it  
10 seems to me to be pretty close to inconsequential for  
11 the limited period of February.

12 MR. NOMELLINI: Does that in any way depend on  
13 exports of water?

14 DR. CHOTKOWSKI: Sure. It depends a lot on  
15 exports of water because the actual mechanism that  
16 operates to transport the fish to the facilities is  
17 driven by the currents in the Old and Middle River  
18 system.

19 MR. NOMELLINI: And in your testimony, do you  
20 make any references to how exports of water should be  
21 limited in the remainder of February to assure that  
22 Delta smelt would not be adversely impacted?

23 DR. CHOTKOWSKI: Yes, I did.

24 I have a big caveat at the end that says that  
25 the Biological Opinion particulars, especially the RPA,

1 once one element of it gets activated, needs to be  
2 observed.

3 MR. NOMESELLINI: And that was --

4 DR. CHOTKOWSKI: It provides for control of  
5 the Old and Middle River flow.

6 (Interruption by the reporter)

7 DR. CHOTKOWSKI: I was just saying that the  
8 Biological Opinion's reasonable and prudent alternative  
9 has controls on OMR that occur in February if the  
10 provisions of the RPA are activated and that those need  
11 to remain in force because I think that that is  
12 probably a more serious issue, a more important issue  
13 to Delta smelt in February.

14 MR. NOMESELLINI: Are you aware that the export  
15 pumping during the period of February 1 through  
16 February 12 resulted in the take of some Delta smelt?

17 DR. CHOTKOWSKI: Yes.

18 MR. NOMESELLINI: And what was the take that you  
19 recall during that period of Delta smelt?

20 DR. CHOTKOWSKI: Well, I'm -- my memory is  
21 probably not reliable on the date, but I believe during  
22 that range there was one Delta smelt or an expanded  
23 number of four taken at the Jones facility on one day.

24 MR. NOMESELLINI: If I said there were four on  
25 February 11, 2009, would you believe that to be

1 correct --

2 DR. CHOTKOWSKI: Yes.

3 MR. NOMELLINI: -- or incorrect?

4 DR. CHOTKOWSKI: I would be unsurprised.

5 MR. NOMELLINI: What is Delta smelt density?

6 DR. CHOTKOWSKI: I'm sorry?

7 MR. NOMELLINI: Do you know what Delta smelt  
8 density is?

9 DR. CHOTKOWSKI: Are you referring to the  
10 population density?

11 MR. NOMELLINI: I'm just referring to a report  
12 of the take of smelt at the pumps, and there is a  
13 reference to Delta smelt density.

14 Do you have any awareness of what that is?

15 DR. CHOTKOWSKI: No, I'm sorry. That doesn't  
16 ring a bell.

17 MR. NOMELLINI: All right.

18 With regard to the impact of reduction in  
19 outflow from 11,400 to 7100, you indicated that there  
20 could be impacts on other fish species; is that  
21 correct?

22 DR. CHOTKOWSKI: Yes.

23 MR. NOMELLINI: And what are those impacts?

24 DR. CHOTKOWSKI: They -- there could be a  
25 reduction in the migratory cues that the current



1 creates for anadromous fishes.

2 MR. NOMELLINI: And would that adversely  
3 affect salmon, for example, in their up-migration?

4 DR. CHOTKOWSKI: Potentially, yes.

5 MR. NOMELLINI: Is that effect related to the  
6 fertility of the upstream migrant salmon females or --  
7 well, let's start with that one.

8 Is it a temperature problem? A timing  
9 problem?

10 DR. CHOTKOWSKI: It's more of a -- as I  
11 understand it, more of a timing problem than it is  
12 either a fertility problem or a temperature problem.

13 MR. NOMELLINI: And what is the timing  
14 problem?

15 DR. CHOTKOWSKI: The fish that are -- remain  
16 in the Delta might be subjected to higher levels of  
17 predation, higher levels of disease or whatever. I'm  
18 talking about out-migrating fish.

19 Fish that are migrating inward, if they don't  
20 get up to the spawning areas, might actually be trapped  
21 on the wrong side of the Red Bluff diversion dam.

22 MR. NOMELLINI: And with regard to  
23 out-migrants, now, you say it's disease and  
24 temperature?

25 DR. CHOTKOWSKI: Once again, I'm not an expert

1 on this. I'm trying to recall the explanations that I  
2 received from my staff.

3 MR. NOMELLINI: All right.

4 With regard to longfin smelt, what would the  
5 impact be of reduction of the outflow from 11,004 to  
6 7,100 cubic feet per second?

7 DR. CHOTKOWSKI: The longfin smelts are  
8 probably a similar case to Delta smelt.

9 One difference is that longfin smelt have a  
10 stronger outflow-to-population-numbers relationship  
11 than Delta smelt do.

12 Once again, if X2 were to move sufficiently  
13 far upstream, then it would certainly increase the risk  
14 of entrainment of all life stages that are present of  
15 longfin smelt. However, this seems like a relatively  
16 small movement even for longfin.

17 MR. NOMELLINI: Are you aware of any consent  
18 by the US Fish and Wildlife Service to the Bureau of  
19 Reclamation operating to violate the standards in  
20 anticipation or in advance of an urgency petition filed  
21 with the State Board?

22 MS. ALLEN: I'd like to object to the question  
23 as, again, Dr. Chotkowski isn't -- hasn't stated that  
24 Reclamation is operating in violation of a standard.

25 CO-HEARING OFFICER BAGGETT: That's sustained.

1           MR. NOMELLINI: Did you consent -- are you  
2 aware of the US Fish and Wildlife Service granting its  
3 consent to the Bureau's change in operation that would  
4 not provide the water to achieve an 11,400 cubic feet  
5 per second net Delta outflow during February, any time  
6 in February, of 2009?

7           DR. CHOTKOWSKI: I'm not aware of any such  
8 consent, no.

9           MR. NOMELLINI: All right.

10           Ron Milligan. Does the Bureau of Reclamation  
11 have a share of the water that's presently in San Luis  
12 Reservoir?

13           MR. MILLIGAN: Yes.

14           MR. NOMELLINI: And what is that share?

15           MR. MILLIGAN: I believe in my written  
16 testimony I had a number, which I do think is accurate  
17 as of yesterday, of approximately 314,000 acre feet.

18           MR. NOMELLINI: And do you know how that water  
19 is going to be used by the Bureau of Reclamation?

20           MR. MILLIGAN: Some quantities of the water  
21 currently ends -- the federal share at San Luis  
22 Reservoir is there under Warren Act contract.

23           MR. NOMELLINI: Excuse me; I just didn't hear  
24 that quite well enough.

25           MR. MILLIGAN: Some portion of that federal

1 share of water in San Luis Reservoir is stored there  
2 currently under Warren Act contracts.

3 MR. NOMELLINI: Oh. Warren Act contract.

4 MR. MILLIGAN: Warren Act contract.

5 MR. NOMELLINI: So it belongs to somebody.

6 MR. MILLIGAN: That is correct.

7 There is also a quantity of water that will  
8 likely be needed for dead pool storage as we go through  
9 the summer.

10 And there's a quantity of water that is the  
11 product of actions taken by CVP contractors in the 2008  
12 water year for the purposes of rescheduling into the  
13 current water year.

14 MR. NOMELLINI: So you would agree, would you  
15 not, that the Bureau cannot assure that the water that  
16 constitutes its share in San Luis would be used only  
17 for public health and safety and senior water rights?

18 MR. MILLIGAN: The current share of water that  
19 is there, although Reclamation may use that storage  
20 over the year or the summer to -- in conjunction with  
21 its Delta operations to meet water rights to the  
22 exchange contractors, to potentially use water to  
23 refuges, and to meet the M&I supplies to -- which will  
24 probably likely be at health and safety levels for a  
25 number of south of Delta contractors.

1           MR. NOMELLINI: Could it also be used to grow  
2 cotton?

3           MR. MILLIGAN: I believe that some quantity of  
4 the rescheduled water will probably be used for various  
5 uses within the water districts that we serve.

6           My assumption would be that it would probably  
7 go to a pretty high use given the number of permit  
8 crops currently on the ground.

9           MR. NOMELLINI: But there's no assurance that  
10 it has to be used in that manner, is there?

11          MR. MILLIGAN: There would be no assurance  
12 other than the laws of economics.

13          MR. NOMELLINI: The -- do you agree that water  
14 stored in San Luis could physically be injected into  
15 the San Joaquin River?

16          MR. MILLIGAN: We have taken --

17          MR. RUBIN: Can I -- sorry Mr. Milligan. I  
18 raise an objection to the line of questioning.

19           I understand that the Board has latitude in  
20 terms of questions that are asked on cross-examination,  
21 and the threshold is relevance.

22           But at this time, and given the facts that  
23 have been -- or the testimony that's been given, I  
24 question the relevance of the question that's been  
25 presented.

1           The testimony of Mr. Leahigh has been that  
2 from this point forward he's confident, or as confident  
3 as you can be, that the number of days or -- each day  
4 moving forward will meet the flow requirement for X2.

5           And so I question the relevance of the  
6 question that's been presented. Release of water into  
7 the San Joaquin River, given the testimony, doesn't  
8 seem to be relevant to me.

9           CO-HEARING OFFICER BAGGETT: Mr. Nomellini, do  
10 you have a response?

11           MR. NOMELLINI: It's very relevant -- sure.

12           The testimony of this witness says he was  
13 joining in in supporting the testimony of the previous  
14 witness by Department of Water Resources in this  
15 regard.

16           The previous witness also said that this was a  
17 Bureau type of a facility that would have to be  
18 utilized to get water from San Luis into the river.

19           So he's the right person to answer, and it's  
20 with regard to their petition. Their petition says the  
21 purpose.

22           CO-HEARING OFFICER BAGGETT: I understand.  
23 I'll overrule. Can you, I guess, get on with the  
24 questioning and --

25           MR. NOMELLINI: It doesn't have to take a long

1 time. It seems like a simple answer.

2 CO-HEARING OFFICER BAGGETT: Okay. If you  
3 could make it a simple yes or no, and let's move on.

4 MR. NOMELLINI: Do you agree that physically  
5 water from San Luis Reservoir can be -- I said  
6 injected, caused to flow into the San Joaquin River?

7 MR. MILLIGAN: Under certain operational  
8 scenarios, water can find its way from San Luis  
9 Reservoir back into the San Joaquin River via a couple  
10 paths.

11 MR. NOMELLINI: All right. And you would  
12 agree that if -- once in the San Joaquin River, absent  
13 other diversions, it could result in net Delta outflow?

14 MR. MILLIGAN: Depending on the size of the  
15 release, it could -- and the lack of being picked up or  
16 absorbed into the ground -- could find its way to the  
17 Delta outflow.

18 MR. NOMELLINI: Thank you.

19 What is the present urgency for this  
20 particular petition?

21 MR. MILLIGAN: As it sits today?

22 MR. NOMELLINI: As it sits today.

23 MS. AUFDEMBERGE: I want to object to that  
24 question. We're here to lay out the facts of what is  
25 happening in February of '09. Whether or not there

1 exists an urgency for the petition I think is a call  
2 for the Board to make.

3 CO-HEARING OFFICER BAGGETT: Certainly agree  
4 it's a legal question. Can you rephrase the question?

5 MR. NOMELLINI: In your opinion as an  
6 engineer, what is the urgency of the petition as it  
7 stands today? Not a legal conclusion. An engineering  
8 understanding of what the urgency is for the petition.

9 MR. MILLIGAN: As an engineer, and one who  
10 studies hydrology, it is my estimation that there would  
11 be adequate inflows into the Delta that would not  
12 require additional upstream releases to meet an Outflow  
13 Objective for the 11,400 cfs surrogate for Chipps  
14 Island.

15 In terms of the urgency components, I do think  
16 that's a legal -- that has a legal connotation, which  
17 I --

18 MR. NOMELLINI: I don't want you to get into  
19 the legal because the Chairman doesn't want us to go  
20 there. But engineers like to give legal opinions, and  
21 lawyers like to give engineering.

22 MR. MILLIGAN: I noticed that. Yeah.

23 (Laughter)

24 MR. NOMELLINI: I believe you testified that  
25 in early February there was an effort to coordinate



1 reduction in exports and, as I understood it -- you can  
2 correct me if I'm wrong -- to help meet Delta outflow;  
3 is that correct?

4 MR. MILLIGAN: That is correct.

5 MR. NOMELLINI: Do you recall when in  
6 February --

7 MR. MILLIGAN: This would --

8 MR. NOMELLINI: -- that might have occurred?

9 MR. MILLIGAN: This was on one of the first  
10 day or two of February. There was actually some --  
11 what I would say some -- there were some flows that  
12 were on the receiving end of the hydrograph from the  
13 previous week's storm that, given the early part of the  
14 month, may have allowed -- because it was -- the Chipps  
15 Island requirements would not have been for the entire  
16 month.

17 There were probably some inflows that could  
18 have been exported by The Projects and be in compliance  
19 with Collinsville. The Projects consciously did not  
20 increase exports to pick up that flow in attempt to  
21 meet the starting gate.

22 MR. NOMELLINI: Okay. So then it was not a  
23 reduction in exports but not an increase that occurred;  
24 is that what your testimony --

25 MR. MILLIGAN: That is correct.

1           MR. NOMESELLINI: All right. Did the Bureau  
2 increase exports around February the 10th of 2009?

3           MR. MILLIGAN: Somewhere around the 10th or  
4 the 11th.

5           MR. NOMESELLINI: And is it correct that the  
6 Tracy exports went up from 1,002 cubic feet per second  
7 to 1,719 on the 11th and 2,018 on the 12th?

8           MR. MILLIGAN: I believe the 11th value was  
9 probably -- because I believe those numbers sound like  
10 they are averages for the day, and probably -- the  
11 first number for the 11th sounds like a partial day  
12 with the second unit running at the Jones pumping  
13 plant.

14           The second number sounds like two units  
15 running for the entire day.

16           MR. NOMESELLINI: Was that increase in pumping  
17 made with recognition that that water was being taken  
18 away from net Delta outflow? If you know.

19           MR. MILLIGAN: I probably would not have used  
20 the word recognized. I think we recognize that there  
21 would be a reduction in Delta outflow by that increment  
22 of pumping.

23           But in consultation -- and I mean that in  
24 lower case C, not as a Section 7 ESA Consultation --  
25 but in consultation with the various fishery agencies

1 about protection of the in-Delta species and  
2 consultation with the Fish and Wildlife Service  
3 specifically about the effects on Old and Middle River  
4 flows, it appeared that that would be an appropriate  
5 and a protective action for the fishery.

6 MR. NOMELLINI: In that regard, is it your  
7 contention that the US Fish and Wildlife Service  
8 consented to the reduction in net Delta outflow for the  
9 purpose of making those exports in February between the  
10 1st and the 12th?

11 MR. MILLIGAN: Those were -- I will say that  
12 the staff that I discussed this particular matter with,  
13 with Fish and Wildlife Service, were aware of the  
14 exports and were providing their professional expertise  
15 in terms of whether that would be protective action or  
16 not or what the pros and cons, but the decision was  
17 with Reclamation.

18 MR. NOMELLINI: Okay. With regard to the  
19 National Marine Fisheries Service, is your testimony  
20 the same?

21 MR. MILLIGAN: Yes.

22 MR. NOMELLINI: As to whether they consented  
23 to your doing --

24 MR. MILLIGAN: My testimony is that they were  
25 consulted. Again, not in a Section 7 ESA context, but

1 we discussed what the effects were, what they might be,  
2 and they did not have a concern about that incremental  
3 change in exports versus outflow.

4 MR. NOMELLINI: But they didn't say it was  
5 okay, did they?

6 MR. MILLIGAN: They did not think that it  
7 would have an adverse effect.

8 MR. NOMELLINI: That's kind of nonresponsive.  
9 But they didn't say it was okay?

10 MR. MILLIGAN: Well, I didn't ask them if it  
11 was okay.

12 MR. NOMELLINI: All right. Okay. Don't  
13 ask/don't tell, that kind of --

14 MR. MILLIGAN: It was discussed. And I was  
15 certainly interested in their perspective on this, that  
16 increment of pumping versus the increment of outflow.

17 MR. NOMELLINI: Got it. That's fair enough.

18 Now how about with regard to Department of  
19 Fish and Game. Did they consent?

20 MR. MILLIGAN: We had discussions -- I've had  
21 these discussions individually with the agencies and  
22 then also within group discussions.

23 Their concern was more along the lines of  
24 longfin. And clearly, as the Dr. Chotkowski indicated,  
25 clearly all the agencies were concerned with what would

1 the effects -- probably more so on the effects of Old  
2 and Middle River flows as more so than the outflow  
3 component.

4 MR. NOMELLINI: Did they say it was okay?

5 MR. MILLIGAN: Again, I didn't ask them if it  
6 was okay. And I don't remember them saying that, gee,  
7 that's okay.

8 MR. NOMELLINI: All right. With regard to the  
9 US Fish and Wildlife Service letter attached to I guess  
10 both your testimony. It's exhibit DOI-6.

11 MR. MILLIGAN: Yes, I have it here.

12 MR. NOMELLINI: Do you agree that that letter  
13 was -- do you know when it was received?

14 MR. MILLIGAN: I received it -- actually, it  
15 was this morning.

16 MR. NOMELLINI: Okay. And you agree that this  
17 morning is long after February 1 through February 12,  
18 right?

19 MR. MILLIGAN: I would concede that, yes.

20 MR. NOMELLINI: All right. I appreciate that.

21 CO-HEARING OFFICER BAGGETT: You've got a few,  
22 couple minutes here, Mr. Nomellini.

23 MR. NOMELLINI: I'm almost through.

24 CO-HEARING OFFICER BAGGETT: Okay. Thank you.  
25 Just giving you a heads-up.

1 MR. NOMELLINI: Strange as it may seem.

2 That's all I have. Thank you very much.

3 CO-HEARING OFFICER BAGGETT: Thank you.

4 Mr. Jackson, you're up.

5 CROSS-EXAMINATION BY MR. JACKSON

6 FOR CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

7 MR. JACKSON: Mr. Milligan, I have some  
8 questions for you. Starting with your conclusion on  
9 page 4, the first sentence:

10 Reclamation does not believe the total  
11 exports could have been reduced enough  
12 to help meet the necessary number of  
13 days for the Chipps Island X2  
14 requirement for the month of February.

15 Your testimony is that if you shut off pumping  
16 during that period of time that wouldn't have met the  
17 X2 standard?

18 MR. MILLIGAN: Specifically, if exports would  
19 have been taken to zero, we would not have met the 24  
20 days.

21 MR. JACKSON: You would not have met the 24  
22 days?

23 MR. MILLIGAN: Correct.

24 MR. JACKSON: Why?

25 MR. MILLIGAN: My estimation and review of the

1 data is that exports, particularly for some of the days  
2 around the 4th to the 7th specifically, maybe to the  
3 8th, would not have been enough to take us into -- into  
4 the 11,400 and given us a total number of days for --  
5 as related to the requirements within the footnote.

6 MR. JACKSON: All right.

7 MR. MILLIGAN: Table 3.

8 MR. JACKSON: Now it's clear that in Table 3  
9 they understood that February was a month with 28 days.  
10 And so requiring by 24, is it fair to say that they  
11 probably meant you could only violate four?

12 MR. MILLIGAN: The word violate is --

13 MR. JACKSON: I'll change the word. That you  
14 could only fail to meet the standard four times?

15 MR. RUBIN: I'm going to object to the  
16 question. I don't think there is any foundation that  
17 there is a fail to meet the objective. If --

18 CO-HEARING OFFICER BAGGETT: Okay. I would  
19 sustain. You want to rephrase?

20 MR. JACKSON: Looking at the first sentence in  
21 your conclusion, how many days could you have met the  
22 X2 standard by ceasing exports, you and SWP, or the  
23 State Water Project, together?

24 MR. MILLIGAN: I have not done that analysis.  
25 But I do know that it would not have met 24 days at the

1 Chipps Island.

2 MR. JACKSON: Now, you indicate in your  
3 conclusion that -- you say that the marginal increase  
4 in Delta pumping was not an attempt to manage to the  
5 Collinsville object, but was an attempt to balance  
6 critical needs in light of very dire hydrologic  
7 conditions.

8 So you do in that sentence acknowledge that  
9 you increased pumping, knowing that you were not  
10 meeting the standard?

11 MR. MILLIGAN: What they say in that  
12 particular sentence is that exports were not increased  
13 to a level that would have equated to an outflow of  
14 7,100.

15 In fact, in most of this time period that's  
16 been in question, Delta outflows have been -- were in  
17 the neighborhood of about 10,000.

18 What I am saying there is that some increment  
19 of additional pumping beyond where we had been earlier  
20 in the month was undertaken after consultation with the  
21 fishery agencies about what was protective for the  
22 various resident fish.

23 MR. JACKSON: So you sort of just nibbled away  
24 at it, the standard?

25 MR. MILLIGAN: Again, I do not believe in a



1 number of those months that we were going to make, A,  
2 the starting gate and, B, the 24 months -- excuse me,  
3 the 24 days within the month.

4 MR. JACKSON: And did that have anything to do  
5 with the fact that you'd been pumping in January and  
6 February?

7 I mean you -- in other words, if you had  
8 started earlier, could you have avoided putting  
9 yourself in a position where you couldn't meet the  
10 standard?

11 MR. MILLIGAN: I fail to see the connection to  
12 exports in January at the minimal rates that we were at  
13 as affecting February.

14 MR. JACKSON: Calling your attention to your  
15 page 3, the -- where you say without the modifications  
16 requested the following impacts could occur.

17 Now this is your testimony at this hearing,  
18 correct?

19 MR. MILLIGAN: Yes.

20 MR. JACKSON: Okay. And you list some impacts  
21 that could occur. So now what I'm going to do is ask  
22 you to read No. 1 and tell me if it did occur.

23 MR. MILLIGAN: No. 1, if all the X2  
24 requirements remained in effect --

25 MS. AUFDEMBERGE: I'm going to -- yeah.

1 MR. RUBIN: Can I object to the question?

2 MS. AUFDEMBERGE: I'm going to object as well.

3 MR. RUBIN: Go ahead, Ms. Aufdemberge.

4 MR. MILLIGAN: What --

5 MR. RUBIN: I think the document speaks for  
6 itself. If Mr. Jackson wants to ask Mr. Milligan  
7 whether the events that are contemplated in paragraph  
8 one occurred, that's fine.

9 But for Mr. Milligan to have to go through and  
10 read three paragraphs of testimony at this point seems  
11 to be an undue burden, at least on the witness.

12 MR. JACKSON: Mr. Baggett, I understand that  
13 the rules here are different than in a courtroom  
14 somewhat, but they are based upon the laws of  
15 California.

16 And putting in evidence that you know is wrong  
17 has a name in the law under oath.

18 CO-HEARING OFFICER BAGGETT: What -- I'll  
19 sustain the objection. Just start all over. Repeat  
20 your question. He doesn't have to read the testimony  
21 into the record.

22 MR. JACKSON: Right.

23 CO-HEARING OFFICER BAGGETT: It's late. It's  
24 not necessary.

25 MR. JACKSON: As you sit here today, Mr.

1 Milligan, did these outflow targets jeopardize the  
2 Project's ability to maintain cold water reserves in  
3 upstream reservoirs for the protection of these fish?

4 MS. AUFDEMBERGE: I'm going to object on  
5 relevance. I don't -- I --

6 CO-HEARING OFFICER BAGGETT: I overrule on  
7 relevance. But can you just answer the question, if  
8 you can.

9 MR. MILLIGAN: The purpose of these three  
10 bullets was to indicate that if The Projects were to  
11 have -- given the hydrologic conditions we had, were to  
12 meet the full 24 days of outflow, we would have had to  
13 make additional releases from upstream reservoirs that  
14 could -- would have had a depletion of cold water pool  
15 which then could translate into an effect on these  
16 species.

17 MR. JACKSON: Mr. Hearing Officer, would you  
18 ask him to answer the question that was asked: Did it?

19 I don't understand why there's so much trouble  
20 from the Bureau of Reclamation saying that they thought  
21 this was going to happen, and it didn't.

22 But I mean, we're getting close to they're  
23 basically stonewalling the truth.

24 CO-HEARING OFFICER BAGGETT: He answered your  
25 question. But you can answer it again to the best of

1 your ability. Rephrase the question.

2 MR. JACKSON: Did what you were speculating in  
3 No. 1 happen?

4 MR. MILLIGAN: Given a combination of the  
5 actions that the two projects took and the hydrology in  
6 the latter half of the month, the answer is no, it did  
7 not occur.

8 MR. JACKSON: Thank you.

9 Did the items in No. 2 that you list in your  
10 testimony in the section that begins:

11 Without the modifications requested the  
12 following impacts could occur.

13 Did those impacts occur?

14 MR. MILLIGAN: Those did not occur given the  
15 hydrology that -- and the rainfall events we had this  
16 month.

17 MR. JACKSON: Thank you.

18 And No. 3, since there has been no change in  
19 upstream storage in February caused by the standards,  
20 did February increase the potential to result in a loss  
21 of control over salinity?

22 MR. MILLIGAN: Same answer as the -- for  
23 bullet number 1.

24 MR. JACKSON: And that answer is no.

25 MR. MILLIGAN: That answer was the combination

1 of the actions that the Project took and the later  
2 hydrology, no, it did not.

3 MR. JACKSON: All right.

4 And so the last sentence in No. 3: There was  
5 no change in February that will change your ability to  
6 maintain the requirements of Order 95, and D-18 -- and  
7 D-893 either; is that correct?

8 MR. MILLIGAN: Given that the reservoir levels  
9 are at the same level that they would have otherwise  
10 been, the answer is there would be no change.

11 MR. JACKSON: Thank you, sir.

12 Calling your attention to your page 2 of your  
13 testimony, the second paragraph from the bottom, the --  
14 you indicated that you did at some point in February  
15 coordinate reduced exports in an attempt to achieve the  
16 starting date condition; is that correct?

17 MR. MILLIGAN: Yes.

18 MR. JACKSON: How much did you reduce exports  
19 in an attempt to reach the starting gate condition?

20 MR. MILLIGAN: As I stated for Mr. Nomellini,  
21 that was a conscious decision not to raise exports.

22 While it would have been allowable and still  
23 be in compliance with the Outflow Objective, I do  
24 believe that on one day around the 1st or the 2nd that  
25 DWR had taken slightly less of an intake into Clifton

1 Court.

2 MR. JACKSON: So do you know --

3 MR. MILLIGAN: What --

4 MR. JACKSON: -- what percentage of what the  
5 two of you were taking that day was your attempt to  
6 reach this starting gate?

7 MR. MILLIGAN: The major component of the  
8 attempt was not to take advantage of several thousand  
9 acre feet of outflow on that particular day or  
10 combinations of several days at the beginning of the  
11 month.

12 MR. JACKSON: And so it was an opportunity  
13 cost, not actual water?

14 MR. MILLIGAN: I'd say primarily an  
15 opportunity. I do think that it resulted in actual  
16 water.

17 MR. JACKSON: So you said a couple of times in  
18 your testimony that, you know, you talked to US Fish  
19 and Wildlife Service and DFG and NOAA and NMFS about  
20 not meeting the requirements in D-1641.

21 Is it your position that if the federal and  
22 state fisheries agencies agree to not meeting D-1641  
23 that you're not required to obey Table 3 and Table 4?

24 MR. MILLIGAN: No.

25 MR. JACKSON: Thank you, sir.

1 Mr. Chot -- Cho --

2 DR. CHOTKOWSKI: Chotkowski.

3 MR. JACKSON: Chotkowski. I have it now.

4 Thank you, sir, and I am sorry. Michael Jackson is not  
5 any dream, either.

6 (Laughter)

7 MR. JACKSON: I want to talk -- I want to  
8 start with your caveat on page 3.

9 The -- you were relying on Mr. Milligan's  
10 testimony for the operational parameters under which  
11 you came to your biological conclusions? Is that true?

12 DR. CHOTKOWSKI: Yes, although when I  
13 discussed that I was really talking about the second  
14 part of this when we were discussing anadromous fishes,  
15 not the Delta smelt part.

16 MR. JACKSON: All right. Let's start with the  
17 anadromous fishes. I think you indicated that you  
18 believe that there was some potential to affect  
19 up-migrating winter run salmon by this temporary  
20 urgency permit request?

21 DR. CHOTKOWSKI: Yes.

22 MR. JACKSON: And you -- I think you also said  
23 there was some potential to affect down-migrating  
24 winter run salmon smolts and steelhead juveniles?

25 DR. CHOTKOWSKI: Yes.

1           MR. JACKSON: And you balanced that, as I  
2 understand it, with the idea that there could be a loss  
3 of as much as 200,000 acre feet of cold water from  
4 storage facilities that might be useful for those  
5 species at a later life stage during 2009?

6           DR. CHOTKOWSKI: I think you might want to  
7 rephrase that. It was a savings of 200,000 acre feet,  
8 not a loss of 200,000 acre feet.

9           MR. JACKSON: It depends on who you're looking  
10 at. I mean, the fish might see it as a loss.

11           So now that you know that there is no cold  
12 water loss in February, is there still a potential that  
13 there will be damage to in-migrating adults or  
14 out-migrating juveniles in the conditions we have  
15 actually today?

16           DR. CHOTKOWSKI: Given the actual weather  
17 conditions, no. I think it's less of a concern.

18           MR. JACKSON: Right.

19           So it's just kind of a wipeout, both ways.  
20 The potential for damage of this project kind of goes  
21 away, and a potential for gaining for later in the year  
22 kind of goes away. Right?

23           DR. CHOTKOWSKI: I'm not sure I would  
24 completely agree with that, but that's only because I'm  
25 not completely sure what's required in Shasta in order



1 to maintain an appropriate level of cold water  
2 compliance below the dams.

3 MR. JACKSON: And that's the next and probably  
4 last question that I have for you in regard to salmon.

5 What is the present plan to protect cold water  
6 for winter run salmon for the year 2009 on the  
7 Sacramento River in terms of cold water storage?

8 MR. RUBIN: I'm going to object to the  
9 question on grounds of relevance.

10 CO-HEARING OFFICER BAGGETT: Can you --

11 MR. JACKSON: Sure. I mean it's relevant  
12 because all of the testimony was assuming some damage  
13 to them by the loss of cold water for the smelt.

14 And now we're not going to lose it. And I'd  
15 like to know whether or not there is a plan so I know  
16 whether or not we're going to have another urgency  
17 permit and another urgency permit.

18 CO-HEARING OFFICER BAGGETT: Mr. Rubin?

19 MR. RUBIN: I don't know if his explanation  
20 addressed my objection on relevance grounds. You have  
21 a petition before you to modify an Outflow Objective.  
22 You've heard testimony today that it's the --

23 CO-HEARING OFFICER BAGGETT: Okay.

24 MR. RUBIN: -- professional opinions of the  
25 Bureau of Reclamation/Department of Water Resources

1 that they're not going to have to release water from  
2 storage.

3 To the extent that this petition's before you,  
4 I don't think the question has relevance.

5 CO-HEARING OFFICER BAGGETT: I would sustain  
6 the objection, and that would be another proceeding.

7 If you can lay a foundation why it's relevant?

8 MR. JACKSON: Sure. Can I -- I guess I could  
9 say at this point that this proceeding seems to have  
10 come down to a violation, which logically would be  
11 another proceeding.

12 CO-HEARING OFFICER BAGGETT: Just ask the  
13 question. We don't need legal argument at this point.

14 MR. JACKSON: All right.

15 I guess I'm through. Thank you, sir.

16 CO-HEARING OFFICER BAGGETT: Thank you.

17 Bay Institute, do you have any cross?

18 MR. BOBKER: Yeah. I'll try to make it brief.

19 CO-HEARING OFFICER BAGGETT: Butte

20 Environmental Council, do you have cross?

21 MR. WAGNER: A couple of questions.

22 CO-HEARING OFFICER BAGGETT: You can be ready  
23 then.

24

25

1 CROSS-EXAMINATION BY MR. BOBKER

2 FOR BAY INSTITUTE

3 MR. BOBKER: Gary Bobker, Bay Institute. Just  
4 a couple of quick questions.

5 Mike, would you agree that longfin smelt and  
6 Delta smelt are at record low levels of abundance?

7 DR. CHOTKOWSKI: Yes.

8 MR. BOBKER: Do you think that represents a  
9 high risk of extinction for these species?

10 DR. CHOTKOWSKI: Yes.

11 MR. BOBKER: Would relaxing the Outflow  
12 Objectives improve or degrade conditions for those  
13 species?

14 DR. CHOTKOWSKI: You're talking about X2 now  
15 or the equivalent outflow?

16 MR. BOBKER: Yeah.

17 DR. CHOTKOWSKI: I think it's a matter of  
18 degree. As I said before, I think if you relax them by  
19 a lot, it would certainly represent a risk. The  
20 question is how much relaxation gets you into risk  
21 territory.

22 MR. BOBKER: Right.

23 DR. CHOTKOWSKI: And as best I can tell, based  
24 on my review of a lot of data and having worked with  
25 these for a long time, this relaxation for this length

1 of time in February is not a big risk.

2 MR. BOBKER: Not a big risk. But you would  
3 agree that it does represent a risk. So it's a  
4 question of the degree of risk, but there is a risk.

5 DR. CHOTKOWSKI: It's certainly a question  
6 that you would want to answer every time this issue  
7 comes up.

8 MR. BOBKER: Okay. Did you or anyone involved  
9 in preparing the petition actually do a quantitative  
10 analysis of that risk or the effects on abundance based  
11 on what we know about flow-abundance relationships, et  
12 cetera?

13 DR. CHOTKOWSKI: You mean specifically for  
14 this hearing? No.

15 MR. BOBKER: Okay. Also you, and others of  
16 course, in talking about the justification for the  
17 relaxation have talked about the desire to maintain the  
18 cold water pool to preserve some measure of temperature  
19 control.

20 Did you or anyone else actually do a  
21 quantitative analysis of the degree of temperature  
22 control that would be achievable given the savings that  
23 might accrue as a result of the relaxation?

24 In other words, the length of time, the amount  
25 of river miles that, you know, the -- whether it's

1 duration or the actual temperatures, et cetera. Was  
2 there any kind of quantitative analysis?

3 DR. CHOTKOWSKI: Not for this hearing, no.

4 MR. BOBKER: Okay, great. Thanks.

5 Ron, I had a quick question for you, and that  
6 is: In looking at the options that the Project  
7 operators had to try and maintain the cold water pool,  
8 did you guys look at -- I'm sure you looked at  
9 reduction of exports as an option?

10 MR. MILLIGAN: We did. Consistent with some  
11 of my declarations to federal court, you know, through  
12 January and February we have been at minimal releases  
13 at Keswick and Nimbus.

14 We've been at 3250 for both months at Keswick  
15 which is the rock bottom as it applies to 90-5. And we  
16 have reduced the releases at Nimbus to 800 cfs, all in  
17 an attempt to conserve as much storage as we could.

18 That's -- that represents a threshold of  
19 concern just for the resident species there, and we  
20 didn't feel we could lower those any more.

21 So there really was limited ability to reduce  
22 exports. The exports were not driving those releases.  
23 I think a similar case is occurring at Oroville down  
24 the Feather River.

25 MR. BOBKER: Okay. And I did understand that

1 part of your testimony.

2 I guess the question that I was trying to get  
3 at in my inartful way was: Given that I'm sure you  
4 make assumptions about the level of deliveries you're  
5 going to try to provide through the rest of the season,  
6 did you look at changes in exports throughout the  
7 delivery season -- in other words, beyond February --  
8 and the effect that would have on the assumptions you  
9 would make about how much storage would be upstream to  
10 help maintain the cold water pool?

11 MR. MILLIGAN: Given the very low storages  
12 that we're going to see at Shasta and -- or likely will  
13 see at Shasta or at Folsom, barring some very, very wet  
14 conditions, we are looking at all options to try to  
15 minimize the releases from both reservoirs, both from  
16 in terms of looking at, let's say, deliveries to  
17 contractors, looking for ways to shift releases so that  
18 they can coincide with temperature releases in the  
19 summer.

20 MR. BOBKER: Okay.

21 MR. MILLIGAN: So we are currently working  
22 with NOAA Fisheries on a number of options that we hope  
23 will maximize the amount of cold water pool that we'll  
24 have.

25 MR. BOBKER: Okay.

1           MR. MILLIGAN: This is -- was just part of an  
2 overall strategy to conserve as much as we possibly  
3 could.

4           MR. BOBKER: Okay. Thanks.

5           CO-HEARING OFFICER BAGGETT: Thank you.

6           Butte Environmental Council, then  
7 Environmental Defense, if you have any questions after  
8 that.

9           CROSS-EXAMINATION BY MR. WAGNER

10          FOR BUTTE ENVIRONMENTAL COUNCIL

11          MR. WAGNER: Hello. I'm Keith Wagner with  
12 Lippe Gaffney Wagner on behalf of Butte Environmental  
13 Council. Mr. I think Chaikowsky? Is that correct?

14          DR. CHOTKOWSKI: That's close enough.

15          MR. WAGNER: Okay. I apologize.

16          You mentioned I believe during your testimony,  
17 although I'll posit the question to either of you  
18 gentlemen, that the relaxation of the requirements of  
19 1641 would result in a larger amount of cold water  
20 storage; is that correct?

21          MR. MILLIGAN: Probably to put a finer point  
22 on that, to meet the full number, 24 days, it would  
23 have required some augmentation of reservoir releases  
24 to meet the outflow.

25          And with the days that that would occur, that

1 would have drawn down the potential pool that we think  
2 would be available for cold water management.

3 Mike, did you have anything you want?

4 DR. CHOTKOWSKI: No.

5 MR. WAGNER: I'm not sure that answered -- I  
6 think the number 200,000 acre feet was mentioned?

7 MR. MILLIGAN: That was mentioned if we had  
8 very dry conditions through the month of February with,  
9 let's say, Delta inflows, particularly from the  
10 Sacramento River Basin that were at a level that we had  
11 seen in the first part of February.

12 MR. WAGNER: So when you put this application  
13 in, you were looking the potential of being able to  
14 save up to an additional 200,000 acre feet of water?

15 MR. MILLIGAN: And that was based on if we had  
16 to augment flows in the Delta by 4,000 cfs which is the  
17 difference between the Collinsville versus the Chipps  
18 Island, that would have equated to about 200,000 acre  
19 feet of water.

20 So that certainly was the upper limit. And if  
21 we did get wetter conditions, hopefully that would  
22 augment.

23 Our primary concern was that we had not seen a  
24 response by the watershed nor in Sac Valley to some  
25 smaller systems that had come through, so that was why



1 we had an abundance of caution in terms of what we  
2 thought might be achievable here.

3 MR. WAGNER: So if what you were concerned  
4 about had happened in the month of February, and it had  
5 been a dry year after all, it would have been -- well,  
6 would one say that it would have been significant in  
7 terms of the water that could have been saved for later  
8 in the year for the purposes of other salmon  
9 protection?

10 MR. MILLIGAN: I would say yes. That would  
11 have been -- you know, dry conditions through February  
12 would have been a significant difference between  
13 meeting the 24 days at Chipps versus at Collinsville.

14 MR. WAGNER: Thank you.

15 CO-HEARING OFFICER HOPPIN: Environmental  
16 Defense? Russ Brown?

17 We're going to take, before we start our next  
18 phase, about a five-minute break, and we'll be back.

19 (Recess)

20 CO-HEARING OFFICER BAGGETT: Let's go back.  
21 We had three more parties that want to do a brief  
22 cross, I understand: San Luis Mendota, Mr. Rubin; Mr.  
23 Schulz, and -- you have no questions? Only two, then.

24 Mr. Rubin, you're up. And then Stockton East  
25 will be up.

1 CROSS-EXAMINATION BY MR. RUBIN  
2 FOR SAN LUIS & DELTA MENDOTA WATER AUTHORITY and  
3 WESTLANDS WATER DISTRICT

4 MR. RUBIN: Good evening now. Jon Rubin for  
5 San Luis & Delta Mendota Water Authority, Westlands  
6 Water District. Just a few questions.

7 The first deals with some discussion about Old  
8 and Middle River flows and regulation of flows in Old  
9 and Middle River.

10 Mr. Milligan, Mr. Chotkowski, do you recall  
11 discussions today about Old and Middle River flows?

12 DR. CHOTKOWSKI: I do.

13 MR. MILLIGAN: Yes.

14 MR. RUBIN: And either of you can answer this  
15 question. Are there regulations on flows in Old and  
16 Middle River that exist today?

17 MR. MILLIGAN: I'm not aware of quote  
18 regulations. It is a tool, a management tool, that's  
19 articulated in the current Biological Opinion with Fish  
20 and Wildlife Service to protect Delta smelt.

21 And it is a tool that we're currently -- have  
22 used the last couple of years and probably would use  
23 this year to help protect, both with adults and larval  
24 smelt, from the risk of entrainment.

25 Does that sound about right, Mike.

1 DR. CHOTKOWSKI: Yeah.

2 MR. RUBIN: And again, if I -- just to make  
3 sure I understood your answer correctly, Mr. Milligan:  
4 The tool in terms of Old and Middle River flows is a  
5 regulation that's been in place for several years?

6 MR. NOMELLINI: I object. He's misstating the  
7 testimony. Dante John Nomellini. The testimony did  
8 not reference a regulation.

9 MR. RUBIN: I'll rephrase the question.

10 CO-HEARING OFFICER BAGGETT: Rephrase the  
11 question, please. I'll sustain the objection.

12 MR. RUBIN: Mr. Milligan, I believe you  
13 characterized it as a tool. There's a tool involving  
14 flows in Old and Middle River; is that correct?

15 MR. MILLIGAN: A management tool, I think is  
16 how I described it.

17 MR. RUBIN: And how long has that management  
18 tool been in place?

19 MR. MILLIGAN: Well, as something that's  
20 articulated in the Biological Opinion, only since last  
21 December.

22 But it is something, a parameter that we have  
23 been -- used and worked with the Fish and Wildlife  
24 Service and the smelt working group for the last couple  
25 of years.

1           MR. RUBIN: And does that management tool  
2 affect water supply available south of the Delta?

3           MR. MILLIGAN: It can act as a -- as something  
4 that does constrain exports at particular times.

5           MR. RUBIN: And Mr. Milligan, was that tool  
6 available in 1995? Or let me rephrase my question.

7           Did Reclamation use the management tool that  
8 we're speaking of in 1995?

9           MR. MILLIGAN: I am not aware of this  
10 particular parameter being something that was discussed  
11 readily and used to manage exports and operations in  
12 the Delta.

13          MR. RUBIN: The same question regarding the  
14 year 2000. Was it a management tool used in the period  
15 between 1995 and 2000?

16          MR. MILLIGAN: Not that I'm aware of.

17          MR. RUBIN: Thank you.

18          DR. CHOTKOWSKI: If you want me to expand on  
19 that, or rather clarify that: It's a fairly new tool.  
20 The science that gave rise to it didn't exist until  
21 around -- until the pod investigation. So it's  
22 post-2005.

23          MR. RUBIN: Great. Thank you.

24          Now, Mr. Milligan, I have a question about a  
25 statement in your testimony, and it's on page 2.

1 MR. MILLIGAN: Yes.

2 MR. RUBIN: You have a statement -- it's the  
3 first complete paragraph, second sentence, second part  
4 of the second sentence. It says:

5 It is likely that allocations to many  
6 CVP contractors will be extremely low in  
7 2009.

8 Do you see that statement?

9 MR. MILLIGAN: Yes, I do.

10 MR. RUBIN: Is that true for a district like  
11 Westlands Water District?

12 MR. MILLIGAN: Yes, it would be.

13 MR. RUBIN: Is it your expectation that a  
14 district like Westlands Water District will receive a  
15 historically low allocation in 2009?

16 MR. MILLIGAN: Given current conditions, yes.

17 MR. RUBIN: And that's your conclusion, even  
18 given the level of pumping during the period February 1  
19 through today?

20 MR. MILLIGAN: Yes.

21 MR. RUBIN: Thank you.

22 Mr. Milligan, I have another question; it's an  
23 operational question. Do you know what the outflow has  
24 been during the month of February?

25 MR. MILLIGAN: Net Delta outflow?

1 MR. RUBIN: Yes.

2 MR. MILLIGAN: Generally, yes.

3 MR. RUBIN: And take a period maybe from  
4 around maybe the 5th, 6th, or 7th of February through  
5 the 13th of February. Can you characterize generally  
6 what the outflow might have been?

7 MR. MILLIGAN: Yeah. Outflow at that time,  
8 and I'm basing this in part on my recollection and also  
9 Mr. Leahigh's presentation, that it ranged from 9- to  
10 10,000 cfs.

11 MR. RUBIN: Thank you.

12 Mr. Milligan, just a couple more questions.  
13 First, on page 3 of your testimony, I believe  
14 Mr. Jackson asked you a number of questions regarding  
15 paragraphs that are labelled 1, 2, and 3?

16 MR. MILLIGAN: Yes.

17 MR. RUBIN: As I understand it, you've  
18 characterized circumstances; is that correct?

19 MR. MILLIGAN: Yes.

20 MR. RUBIN: And in your characterizations, you  
21 use the word often -- I think you often use the word  
22 "could"; is that correct?

23 MR. MILLIGAN: That is true.

24 MR. RUBIN: And did you use that term because  
25 it's a possibility of occurring?

1           MR. MILLIGAN: I used that term given the  
2 variability of weather conditions, uncertainties  
3 related to runoff, and depletions in the Sac River  
4 Basin.

5           MR. RUBIN: Thank you.

6           Mr. Milligan, I have one last question, and I  
7 ask you to take a hypothetical -- or excuse me; it's  
8 not a hypothetical. But I ask you to take yourself  
9 back to the day that Reclamation and DWR filed the  
10 petition before the Board today.

11           Are you there?

12           MR. MILLIGAN: Yes.

13           MR. RUBIN: Thank you.

14           MR. MILLIGAN: I remember it well.

15           MR. RUBIN: Mr. Milligan, when you filed --  
16 excuse me. When Reclamation filed the petition, was it  
17 your expectation if the Board were to grant the  
18 petition that the allocation to Westlands Water  
19 District in the 2009 water year would increase?

20           MR. MILLIGAN: No. That was not my  
21 expectation.

22           MR. RUBIN: Thank you.

23           I have no further questions.

24           CO-HEARING OFFICER BAGGETT: Okay. Stockton  
25 East.

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CROSS-EXAMINATION BY MS. HARRIGFELD  
FOR STOCKTON EAST WATER DISTRICT

MS. HARRIGFELD: Good evening. Karna  
Harrigfeld on behalf of Stockton East Water District.

Ron, I just have a couple of questions for  
you. In looking at your testimony on the bottom of  
page 2 and the top of page 3, from a review of this and  
from your oral testimony, it is my understanding that  
the Bureau withdrew your request for modification of  
the San Joaquin River flow objective at Vernalis  
because the water year type was classified as  
critically dry instead of dry; is that correct?

MR. MILLIGAN: Yes.

MS. HARRIGFELD: So what is the San Joaquin  
flow objective that is required to be met based on that  
critical dry designation?

MR. MILLIGAN: My reading of the footnote that  
accompanies Table 3 of the decision is that for periods  
where a Chipps Island outflow would be governing that  
the component of San Joaquin River flow at Vernalis  
would be approximately 1,140 cfs.

MS. HARRIGFELD: And you withdrew the request  
for relaxation because of your modeling that suggested  
that the 1,140 objective would be met?



1           MR. MILLIGAN: A combination of modeling and  
2 forecasted flows on the San Joaquin River.

3           Our primary motivation for including this  
4 component in the petition was that if the San Joaquin  
5 River index had come in at the dry condition and for  
6 days that Chipps Island may have been required, that  
7 particular flow may have been in the neighborhood of  
8 1,500 cfs or above that.

9           And that gave us some concern in that that was  
10 well in excess of flows we've currently seen at  
11 Vernalis and would have required augmentation with  
12 releases from New Melones.

13          MS. HARRIGFELD: So when you filed the  
14 petition, it was your anticipation that relaxation was  
15 required to prevent reductions in storage at New  
16 Melones?

17          MR. MILLIGAN: It was, if you will, a hedge  
18 against the possibility of a dry year classification  
19 and to protect the storage within New Melones.

20          MS. HARRIGFELD: If releases from New Melones  
21 storage are triggered to meet the 1,140 objective, will  
22 Reclamation request relief from this objective?

23          MR. MILLIGAN: I would be very concerned about  
24 making particularly -- even with the weather we have  
25 had the last week, very concerned about making releases

1 from even New Melones for an Outflow Objective of this  
2 sort. And we would give strong consideration to asking  
3 for some sort of relaxation.

4 MS. HARRIGFELD: Thank you.

5 CO-HEARING OFFICER BAGGETT: This completes  
6 the cross. Is there any redirect?

7 MS. AUFDEMBERGE: No.

8 CO-HEARING OFFICER BAGGETT: Not? Any  
9 questions from staff? Charles? None. Tom?

10 QUESTIONS BY CHIEF DEPUTY DIRECTOR HOWARD

11 FOR STATE WATER RESOURCES CONTROL BOARD STAFF

12 CHIEF DEPUTY DIRECTOR HOWARD: Dr. Chotkowski,  
13 are you aware of any statistically significant  
14 relationship between Delta smelt populations and Delta  
15 outflow?

16 DR. CHOTKOWSKI: During February, no.

17 CHIEF DEPUTY DIRECTOR HOWARD: And during  
18 other months?

19 DR. CHOTKOWSKI: No. Not that I know of. Not  
20 outflow.

21 CHIEF DEPUTY DIRECTOR HOWARD: Thank you.

22 QUESTIONS BY SENIOR STAFF COUNSEL MAHANEY

23 FOR STATE WATER RESOURCES CONTROL BOARD STAFF

24 SENIOR STAFF COUNSEL MAHANEY: Maybe we can  
25 ask the same question -- I think you answered it

1 previously -- related to longfin smelt? During  
2 February, if it's more significant --

3 DR. CHOTKOWSKI: Outflow is more of an issue  
4 for longfin. I don't think it's outflow per se but --  
5 I'm sorry.

6 SENIOR STAFF COUNSEL MAHANEY: During February  
7 specifically?

8 DR. CHOTKOWSKI: Well, they're fairly similar  
9 to Delta smelt as far as their life history goes, so  
10 it's -- what I was about to say is it's more of an  
11 issue for them I think largely because the outflow is a  
12 surrogate for the amount of the sort of shallow  
13 seasonally flooded habitat that they use to spawn.

14 So they actually have a somewhat different  
15 spawning life history than Delta smelt do.

16 QUESTIONS BY CO-HEARING OFFICER HOPPIN  
17 FOR STATE WATER RESOURCES CONTROL BOARD

18 CO-HEARING OFFICER HOPPIN: Michael, so I  
19 don't butcher your last name, I'm just going to call  
20 you Michael as well.

21 When you were being asked by I believe  
22 Mr. Jackson about the possible effects of reducing  
23 Delta outflow, you talked about the in-migration of  
24 salmon. You also talked about possible delays in the  
25 out-migration of steelhead and salmon smolts.

1           Would the damage to these out-migrating fish  
2 be from disease, exposure to water, or potentially from  
3 predation?

4           DR. CHOTKOWSKI: As far as I know it's -- the  
5 largest evidence is for predation or entrainment if  
6 they're delayed.

7           I'm not sure I can fully answer that question  
8 because of the lack of expertise in this area. There  
9 might be other issues. But it would be those mainly, I  
10 think.

11           CO-HEARING OFFICER HOPPIN: So you were  
12 basically giving someone else's opinion on that  
13 particular --

14           DR. CHOTKOWSKI: My staff's.

15           CO-HEARING OFFICER HOPPIN: I see.

16           CO-HEARING OFFICER BAGGETT: Any other  
17 questions? No redirect. Exhibits?

18           MS. AUFDEMBERGE: We move DOI Exhibits 2  
19 through 6 be moved into evidence.

20           CO-HEARING OFFICER BAGGETT: Any objections?  
21 If not, they're admitted.

22                   (Whereupon Exhibits DOI 2-6 were  
23                   accepted in evidence.)

24           CO-HEARING OFFICER BAGGETT: You're finished.  
25 Thank you. Mr. Nomellini.

1           MR. NOMELLINI: I'd like to move at this time  
2 for dismissal of the Petition For Temporary Urgency  
3 Change in its entirety.

4           I base that on the fact that no evidence has  
5 been produced by DWR or US Bureau of Reclamation to  
6 show an urgent need to make the proposed modifications.

7           I think the issue is after-the-fact  
8 consideration of what took place prior to this hearing,  
9 and I think that's really a matter of whether or not  
10 there is a violation and how it should be punished, not  
11 a question of a temporary urgency change.

12           I don't see any basis for an urgent decision  
13 by this Board or change with regard to what happened in  
14 the past, and I question whether or not it is even an  
15 appropriate process to address the past violation or  
16 past action.

17           CO-HEARING OFFICER BAGGETT: I think there is  
18 a line behind you who would like to comment on the  
19 motion.

20           MR. JACKSON: I'll be very short. I'd like to  
21 join in the motion on behalf of CSPA. There has been  
22 no evidence of urgency presented at this hearing.

23           CO-HEARING OFFICER BAGGETT: Okay. Bureau of  
24 Reclamation?

25           MS. AUFDEMBERGE: This is Amy Aufdemberge from

1 Bureau of Reclamations.

2 We know of no other procedure in which  
3 Reclamation or DWR can seek modification of an  
4 objective from -- of D-1641 other than a temporary  
5 urgency change for 30 days.

6 We are still in need of the requested  
7 modification for the month of February, and we are  
8 still within the month of February '09. We are still  
9 within the window of the requested order.

10 The relief requested in the petition actually  
11 contemplates that there would be an off-ramp condition  
12 if conditions change for February, so we are still  
13 within the confines of the relief we requested in our  
14 order irrespective of the fact that we believe today  
15 that we can potentially meet Chipps Island for the rest  
16 of the month.

17 We are hard-pressed to see the way that we are  
18 not entitled to the relief we have requested a week ago  
19 for the month of February.

20 Thank you.

21 MS. CROTHERS: This is Cathy Crothers for the  
22 Department of Water Resources, and I would like to  
23 object to the motion to dismiss on the grounds that we  
24 are following a process that's put out through the  
25 Board procedures.

1           This was a temporary urgency change request  
2 that we made as soon as we were aware of the  
3 difficulties in the outflow requirements, the number of  
4 days at Chipps Island.

5           That -- like John Leahigh explained, that  
6 requirement is triggered by data that's collected at  
7 the end of January. There was no basis for us to know  
8 that we were going to be stuck in this concern of  
9 outflow today versus cold water habitat later in the  
10 year.

11           So we had a choice to make between the two  
12 species, so we submitted that in our petition as the  
13 basis for an urgent need. It was submitted as soon as  
14 we became aware of the conflict we had to choose  
15 between, and we also submitted a letter to the Board --  
16 I believe it was February 5th; it might have been the  
17 4th, but say it was the 5th.

18           We had the state furlough day the next day.

19           We met with fish agencies Monday to try to get  
20 it established in the petition on how we were  
21 proceeding.

22           We sent the letter in advance of the petition  
23 because there is some procedural things you have to  
24 submit in your petition, and we hadn't time to get all  
25 those procedural -- that information needed to make any

1 action on the petition any more timely than we could  
2 have met. And that was -- by the time we got the  
3 actual petition, it was February 10th.

4 But we did submit the petition -- we did  
5 notify the Board as soon as we could have, which was  
6 February 4th or 5th which I think you guys have the  
7 letter in your records.

8 Based on the timeliness of our urgent petition  
9 and the information we put in there, it was the  
10 information we had the soonest we could have gotten it  
11 together based on the way that the mechanism works for  
12 this particular D-1641 requirement, we feel there is  
13 enough information for the Board to make a decision on  
14 our petition, that it's a relevant petition, the  
15 process is being followed.

16 And the concerns people have here about, oh,  
17 well, it's rained: We could not have known that at the  
18 time we prepared this.

19 I think all that information shouldn't be part  
20 of the consideration of whether this urgent need met  
21 the public interest requirement, it met the requirement  
22 that there's no harm to other water users, and there's  
23 no significant impact to the fishery.

24 We've met those three requirements, and that  
25 should be the focus of the Board's decision, not what



1 all of a sudden happened that was not what we knew of  
2 at the time we submitted the petition.

3 So I would request that the motion to dismiss  
4 be denied. Thank you.

5 CO-HEARING OFFICER BAGGETT: I want to hear  
6 from everybody before we --

7 MR. RUBIN: I too oppose the motion that's  
8 been made, assuming that you could grant it, but.

9 CO-HEARING OFFICER BAGGETT: There's a  
10 question.

11 MR. RUBIN: I think what the Board needs to  
12 be -- or excuse me, what the Hearing Officers need to  
13 be doing is looking to the circumstances at the time  
14 the petition was filed.

15 Clearly at that time, there was an urgency.  
16 And I think if you don't, there's a significant penalty  
17 that's imposed on the Bureau of Reclamation and  
18 Department of Water Resources.

19 And the irony of the penalty would be the  
20 process that the Board or the Hearing Officers has gone  
21 through is to accommodate complaints that were raised  
22 by at least some of the interests and possibly the  
23 interests that have moved for dismissal.

24 It's been a long day, and maybe my  
25 recollection is foggy today, but I recall earlier today

1 at the Board meeting John Herrick raising complaints  
2 about a petition that was granted last year and his  
3 complaint in part was not having an opportunity for a  
4 hearing.

5 And so now you have before you an interest  
6 from -- and I'm not sure who Mr. Nomellini was  
7 representing when he made the motion saying it's moot.

8 MR. NOMELLINI: I represented all three  
9 parties.

10 MR. RUBIN: So he represents one of the  
11 parties that was complaining this morning. He's  
12 claiming that it's moot now because you have  
13 accommodated his client's concerns.

14 And that just seems incredibly inequitable to  
15 put that burden back on the Central Valley Project and  
16 the State Water Project.

17 MR. WAGNER: Keith Wagner on behalf of Butte  
18 Environmental Council.

19 The burden is on the petitioners to prove all  
20 elements of their petition. One of those elements is  
21 that they must provide competent evidence that there is  
22 urgency.

23 While the attorneys here seem to be quite  
24 convinced there is urgency, the witnesses that they  
25 have produced have testified that there is none.

1           At this point, what we are left with is a  
2 purely past violation, something that this Board really  
3 should not engage in; and I question whether you have  
4 the jurisdiction to engage in permitting, directly  
5 objecting to a permit that would only apply to wholly  
6 past activity.

7           Another reason that this motion should be  
8 granted is because it will inform the Department -- or  
9 the Bureau of Reclamation and Department of Water  
10 Resources that the time to apply for permits to deviate  
11 from their existing permit conditions is before they  
12 engage in those violations, not after.

13           I don't want to be here next month for the  
14 application urgency application for March.

15           I don't want to be here in the middle of April  
16 for the urgency application for April.

17           I don't want to be here in the middle of May  
18 for the urgency application in May.

19           If they think that there are problems in the  
20 future, now is the time for them to figure out and get  
21 their house of cards in order.

22           But this application is limited to the month  
23 of February and the month of February only, and they  
24 have testified under oath there is no urgency. They do  
25 not meet the requirements of Section 1435.

1           MR. HERRICK: John Herrick, South Delta Water  
2 Agency.

3           I agree with the previous speaker. If there  
4 were an urgency when this was filed, the fact that it  
5 no longer exists ends the matter. You can't come  
6 before the Board and say would you please give me a  
7 blessing for a past violation. That's not a procedure.

8           There is no basis to proceed. There is no  
9 urgency because, as the last speaker just said, the  
10 witnesses all said the urgency is gone. There is no  
11 reason to proceed.

12           And just in brief, the idea that my complaint  
13 that I didn't get a hearing on something else forces us  
14 to rule on something that's moot now is nonsensical.

15           There is no basis to move forward on this, and  
16 I hope that you grant this motion so that we don't have  
17 to come back tomorrow.

18           MR. SCHULZ: Cliff Schulz for the Kern County  
19 Water Agency and the State Water Contractors.

20           I think we're creating the perfect conundrum.  
21 On February 2nd or 3rd, whenever the end of January  
22 numbers were known, we saw the 970 number of which was  
23 a great surprise based on what we normally think would  
24 have been a number somewhere in the 750s.

25           So immediately, the Department and the Bureau

1 get together and put together a notice to the Board  
2 somewhere around the 4th or 5th of February when it was  
3 dry as a bone still.

4 An action which is my understanding could have  
5 been looked at by a Board Member -- a single Board  
6 Member -- and signed on that day. But you decided to  
7 give a great deal of due process to everybody involved,  
8 and so you set this hearing. And it rained.

9 But what you're left with, if you say -- what  
10 the perfect conundrum is is if you say now it's no  
11 longer an emergency and so you can't issue a  
12 modification of the permit, DWR and the Bureau, in  
13 spite of the fact they acted as quickly as humanly  
14 possible to get the notice before you and let you know  
15 what was going on, are left with the potential of an  
16 enforcement hearing as the follow-up to this if you  
17 dismiss.

18 Doesn't work. It doesn't work.

19 And I think it's just -- you really do need to  
20 look at this proceeding as of the circumstances when  
21 the petition was filed and you decided to grant this  
22 hearing today. So we would ask that the motion be  
23 dismissed -- I mean the motion to dismiss be dismissed.  
24 Be denied.

25 CO-HEARING OFFICER BAGGETT: One final word.

1 MR. NOMELLINI: Does the maker get a rebuttal?

2 This is simply a moot issue, not because you  
3 granted a hearing but because the intervention of  
4 hydrology and weather.

5 It makes the urgency a nullity. It cannot be  
6 demonstrated. There's no dispute on that. The  
7 question is whether or not the past conduct is  
8 excusable in some respect.

9 I would submit that the past conduct includes  
10 some exaggeration or misrepresentation with regard to  
11 the need to relax the standard rather than curtail  
12 exports or even apply San Luis Reservoir water to the  
13 cause.

14 But that isn't the issue.

15 The issue before you is whether or not to  
16 grant a temporary urgency change. And part of that  
17 burden is to show the urgency, and there is no longer  
18 an urgency. There may be a decent plea for leniency  
19 with regard to past conduct, but that's not the subject  
20 of the temporary urgency change.

21 Thank you.

22 CO-HEARING OFFICER BAGGETT: Okay. We'll take  
23 it under submission for five minutes.

24 (Recess)

25 CO-HEARING OFFICER BAGGETT: Okay. We're

1 ready.

2           While I appreciate the efficiencies parties  
3 are trying to provide us with, I think we'll take that  
4 motion under submission and complete the hearing and  
5 we'll deal with it at the end I think because there  
6 remains a number of questions.

7           One, whether Hearing Officers can legally  
8 grant such a motion under the rules of the Board. To  
9 my knowledge, or to anybody up here's knowledge, it's  
10 never been done before. We are on new ground.

11           As you recall, we have -- as I think some know  
12 full well out there, I've got something like 40 or 50  
13 motions under submission in another water right hearing  
14 right now. And until the full order's adopted, we  
15 can't -- one Board Member cannot deal with those.

16           Two, there was a timely filing, and we did  
17 grant this opportunity for parties to weigh in. This  
18 is slightly different than other emergency orders, at  
19 least I've dealt with in my almost ten years on this  
20 Board.

21           Those other ones are not just on the San  
22 Joaquin; there have been others. Have all -- with long  
23 histories and with objectives and flow objectives that  
24 were real clear, and we had a much longer history and  
25 understanding.

1           This is -- at least for this Board, this is a  
2 new issue. X2 has never been dealt with. It is more  
3 complex. It's not as clean and as clear as some other  
4 issues to deal with on an emergency basis.

5           That's why I think Mr. Hoppin and I decided to  
6 have a proceeding so we could actually make an informed  
7 decision and allow parties to present cases and  
8 provided that extra measure.

9           So we'll take the motion and give it serious  
10 consideration. We'll deal with it in the final order  
11 which we come up with hopefully in a timely fashion.  
12 And we do appreciate the concerns parties have raised  
13 and have heard them.

14           So with that, we will continue. I think we'll  
15 continue definitely tomorrow from 8:00 until noon and  
16 be done by noon. Tonight, I think we have an  
17 opportunity --

18           MR. RUBIN: In terms of the schedule tomorrow,  
19 I believe that the Board staff scheduled a workshop.

20           CO-HEARING OFFICER BAGGETT: There's another  
21 workshop. We'll talk about that in a minute.

22           For tonight's purposes, we still have another  
23 half hour, an hour. Are there any parties that have  
24 cases-in-chief that would be a hardship to come back  
25 tomorrow?



1           I mean we've got two, four, six more parties  
2 that want to do a case-in-chief. Anybody have a  
3 hardship to bring their witness back tomorrow or come  
4 back tomorrow?

5           MR. HERRICK: John Herrick, South Delta Water  
6 Agency. Our witness does have a conflict tomorrow. We  
7 talked about --

8           CO-HEARING OFFICER BAGGETT: We could -- I  
9 assume that some of these cases will be much shorter,  
10 given they're going to make an argument that's moot  
11 anyway which we've heard.

12          MR. HERRICK: Without offering to stay too,  
13 too late, South Delta Water Agency, Central Delta, and  
14 the County would like to get their witness out of the  
15 way. Or, in the alternative, tomorrow we were thinking  
16 about withdrawing the testimony but asking for judicial  
17 notice of the websites at cdec and other places, just  
18 information, given the cross-examination today. Just  
19 to have some information put in through judicial  
20 notice, not through a witness.

21          CO-HEARING OFFICER BAGGETT: Are all parties  
22 aware of that?

23          MR. HERRICK: I only talked about it with one  
24 other party.

25          CO-HEARING OFFICER BAGGETT: If parties

1 stipulate to that, that's fine with us. But I think  
2 we'd want stipulation.

3 MR. RUBIN: Mr. Herrick raised that to me  
4 during the break. I won't have an objection except  
5 potentially on relevance grounds. I haven't had time,  
6 frankly, to go through the information in detail.

7 CO-HEARING OFFICER BAGGETT: Okay.

8 MR. RUBIN: But official notice is I think an  
9 appropriate vehicle for information that is easily  
10 verified. And information on the DWR's website I think  
11 falls within that category, at least in my mind.

12 But the real question is whether all of the  
13 information that's attached to the testimony is  
14 relevant.

15 CO-HEARING OFFICER BAGGETT: Well, that makes  
16 it a problem then.

17 MR. SCHULZ: Well, I actually -- all of my  
18 questions on cross-examination dealt with the text  
19 around the numbers. The cdec data is what it is. I  
20 think quite frankly you can take official notice of  
21 what's in cdec, and I didn't have any issue with that  
22 aspect of it.

23 So to the extent there, just want to put in  
24 the cdec data and make a policy statement or something  
25 of that nature, I would be willing to waive cross.

1 CO-HEARING OFFICER BAGGETT: Is that what you  
2 are proposing Mr. Herrick?

3 MR. HERRICK: Maybe I've just confused this.  
4 John Herrick again.

5 If you don't want to put a witness on tonight,  
6 which we would do right now, then tomorrow we would  
7 submit a request for judicial notice of certain sites  
8 instead.

9 CO-HEARING OFFICER BAGGETT: Okay. Got it. I  
10 think we'll probably put them on, but let me hear from  
11 Environmental Defense first.

12 MR. ROSEKRANS: Spreck Rosekrans for  
13 Environmental Defense Fund. We have a very short case;  
14 it would be really great if it could happen tonight.  
15 But if not, we'll come back tomorrow.

16 CO-HEARING OFFICER BAGGETT: Okay. I think  
17 we've got Environmental --

18 MS. CROTHERS: This is Cathy Crothers for  
19 Department of Water Resources.

20 I don't have my expert here to give me as much  
21 advice on the cdec data. I know it's posted. Just  
22 have some concerns that sometimes cdec does have a  
23 little aberrations in them.

24 CO-HEARING OFFICER BAGGETT: Let's proceed.  
25 Let's just see how quickly -- see if we can -- I've

1 been assured it's a very short case-in-chief, and then  
2 it's up to the cross-examination parties whether they  
3 want to drag this thing on for hours.

4 MS. AUFDEMBERGE: I just have a question for  
5 clarification. You said tomorrow we would go from 8 to  
6 noon.

7 CO-HEARING OFFICER BAGGETT: And we'll be  
8 done.

9 MS. AUFDEMBERGE: No longer than noon?

10 CO-HEARING OFFICER BAGGETT: No. We don't  
11 have a place. And we don't have a court reporter.  
12 Okay. Let's just continue and see if we can get  
13 through these three parties that say they want to get  
14 their witnesses done today.

15 So Mr. Herrick, do you want to go first? I  
16 mean, if it's putting in a witness to basically verify  
17 some data, put it on and enter it into the record, then  
18 this could be quick.

19 MS. GILLICK: And for the record, DeeAnne  
20 Gillick representing the County of San Joaquin.

21 I did submit a written opening statement which  
22 I'll submit. We'll waive talking on behalf of the  
23 County, and then John's going to present the witness.

24 CO-HEARING OFFICER BAGGETT: Okay. So we'll  
25 accept San Joaquin County's opening statement as

1 written as noted and as part of the official record.

2 MR. RUBIN: I do want to make just a point of  
3 clarification in terms of the openings statement that  
4 the Board will not consider the opening statement for  
5 evidentiary purposes.

6 CO-HEARING OFFICER BAGGETT: Of course.

7 MR. RUBIN: I raise this because I believe the  
8 opening statement, at least in written form, did not --  
9 was not limited to a summary of the testimony that was  
10 going to be provided.

11 CO-HEARING OFFICER BAGGETT: That's  
12 understood. Opening statements are not evidence and  
13 are not accepted as evidence.

14 With that, Mr. Herrick?

15 MR. HERRICK: Mr. Chairman, Board Member.  
16 John Herrick for the South Delta Water Agency.

17 The witness today is Mr. Mel Lytle -- Dr. Mel  
18 Lytle, excuse me. I will not waste our time with an  
19 opening statement.

20 Our closing statement will certainly cover  
21 everything, and the motion certainly brings up other  
22 issues that we think are relevant.

23 CO-HEARING OFFICER BAGGETT: All right.

24

25

1 DR. MEL LYTLE

2 Called by SOUTH DELTA WATER AGENCY

3 DIRECT EXAMINATION BY MR. HERRICK

4 MR. HERRICK: One quick correction or  
5 addition: Mr. Lytle's testimony itself is not labeled,  
6 but it was supposed to have been labeled 1, and it has  
7 attached to it 1-A through G, I believe.

8 DR. LYTLE: That's correct.

9 MR. HERRICK: And Exhibit 2 is Mr. Lytle's  
10 statement of qualifications. And so with that, I'll  
11 just first ask Dr. Lytle, would you confirm that South  
12 Delta, Central Delta, San Joaquin County 1 with  
13 attachments is your testimony for here today?

14 DR. LYTLE: That's correct.

15 MR. HERRICK: And Exhibit 2 is a correct copy  
16 of your statement of qualifications?

17 DR. LYTLE: That's correct.

18 MR. HERRICK: Mr. Lytle, would you please  
19 summarize your testimony as contained in Exhibit No. 1?

20 DR. LYTLE: Thank you. I'll try to make this  
21 brief as I can.

22 I was asked to by South Delta Water Agency,  
23 Central Delta Water Agency, as well as San Joaquin  
24 County as the water resource coordinator for San  
25 Joaquin County to provide them with some information

1 preparatory for this hearing.

2           Essentially, I investigated and what's present  
3 here in this testimony of mine, Exhibits A through G,  
4 information from the State of California's Data  
5 Exchange Center regarding various issues that have been  
6 addressed pretty much already from Mr. Nomellini as  
7 well as Mr. Herrick.

8           I'll just go through, just highlight a couple  
9 of things, and then just give a quick summary of some  
10 of my thoughts regarding that.

11           For the cdec, Exhibit 1-A, there has been a  
12 lot of discussion about the current reservoir  
13 operations and capacities in San Luis Reservoir.  
14 Exhibit 1-A is giving the most up to date of that.

15           Exhibit 1-B, there's been discussion about  
16 entrainment of the Delta smelt on the pumps. That one  
17 and as well as various State Water Project and Central  
18 Valley Water Project operations. That's the summary of  
19 that -- of that.

20           Then as you go on, there's other ones  
21 regarding Exhibit 1-C, regarding various hydrologies in  
22 the river, in the San Joaquin River, as well and so on.

23           And I won't go into all of -- listing all of  
24 them, but they're included as part of my testimony.

25           I do want to address one issue regarding the

1 recirculation in the San Joaquin River. There's been a  
2 little bit described about that and discussed regarding  
3 that, and from what I understand in San Joaquin County  
4 that process or that pilot study or project or however  
5 you want to define it is something that's gone on I  
6 think in 2004, again in 2007, and then again in 2008.

7 I think 2008 was quite a bit longer than the  
8 other two previous years.

9 From a personal point of view and from San  
10 Joaquin County, I have been at the meetings where  
11 farmers and folks that are very sensitive to water  
12 quality in the south Delta as well as flow in the San  
13 Joaquin have greatly appreciated the fact that that  
14 recirculation project has gone forward.

15 I think it was no small task to move it  
16 forward. I know there was a lot of communication from  
17 South Delta Water Agency to the State Water Board  
18 folks, and I truly appreciate that before the Board as  
19 well as through staff at the -- at Interior -- at  
20 Reclamation, sorry.

21 So with that, I continue to support the idea  
22 that recirculation makes sense. Hopefully it's  
23 something that can be moved forward into the future.

24 In fact, if you look at my testimony, we  
25 believe that water stored in San Luis this year may be



1 used or potentially has a responsibility of being used  
2 for that, meeting various salinity objectives.

3           If I can go on a little bit more on that  
4 issue, I think that there is also federal direction as  
5 far as that goes. I think if we had completed the  
6 requirements of HR 2828, that actually outlined a  
7 number of issues regarding ways that you can meet some  
8 of the standards that we're all discussing today.

9           If we had actually completed the plan back in  
10 2004, we may not have been at this circumstance where  
11 we're debating about meeting a standard after the fact,  
12 so to speak.

13           I think that's a requirement that was given  
14 under that HR 2828 to find the plan and the solutions  
15 to meet those standards.

16           Unfortunately, we haven't done that yet. And  
17 I think we're paying the price now. Even if it's the  
18 price of having to sit through a hearing today to  
19 listen to this type of thing.

20           But let me just summarize real quick and then  
21 I'd be happy to answer any questions.

22           I think with HR 2828, I think that gave a  
23 direction to the Reclamation to find the plan. But  
24 again, like we talked about, we're faced with this  
25 dilemma as we get into a dry year or a series of dry

1 years, and it seems like -- in one of my exhibits, I  
2 have some of the chronologicalized reconstructed  
3 Sacramento-San Joaquin Valley water year hydrologic  
4 classification indices for -- to spell that out, it's  
5 essentially looking at the dry years over the last  
6 number of years, 80 years or so of hydrology, as I  
7 think somebody said here earlier.

8           The issue there is it seems like we continue  
9 to lack in the planning side. I think there is a lot  
10 of investigation early on whether or not the watersheds  
11 in northern California would be able to supply the  
12 water necessary to meet obligations, not only to the  
13 Delta but folks south of the Delta.

14           Unfortunately, it seems like we're lacking in  
15 that planning even today and even after only a two-year  
16 or so drought.

17           I've done a little bit of investigation  
18 regarding previous historic droughts from California,  
19 and many of those actually last more than six years.  
20 Some last 20 or 50 years. And we're all excited about  
21 a drought that may only last two or three.

22           I think that's a very, very narrow focus and a  
23 short sight on our part throughout the water community.

24           Let me summarize by saying this: DWR and the  
25 US Bureau of Reclamation appear to have been operating

1 the Central Valley Project and the State Water Project  
2 this water year in a manner which would not result in  
3 compliance with their permit obligations for X2 or  
4 other standards.

5           Instead, they appear to be operating as if  
6 they have some sort of minimum right for the amount of  
7 exports and are taking such exports at the detriment of  
8 X2. I think that's fairly evident by the hearing and  
9 the evidence that's been put forth today.

10           As of February 12 of 2009, the water being  
11 exported, and especially the increased exports as of  
12 February the 11th of 2009, could have been allowed to  
13 contribute to the outflow in X2.

14           The failure to plan ahead has resulted in a  
15 violation of the X2 standard, but at least a portion of  
16 these exports are still available to meet X2 through --  
17 potentially through San Luis Reservoir, the San Joaquin  
18 River Flow standards as well as the southern Delta  
19 standards as we face potentially another dry summer.

20           That concludes my testimony. I'd be happy to  
21 answer any questions.

22           CO-HEARING OFFICER BAGGETT: Thank you. DWR,  
23 questions?

24           MS. CROTHERS: I have just a couple.

25           CO-HEARING OFFICER BAGGETT: Proceed.

1 CROSS-EXAMINATION BY MS. CROTHERS

2 FOR DEPARTMENT OF WATER RESOURCES

3 MS. CROTHERS: My name is Cathy Crothers,  
4 Department of Water Resources.

5 Mr. John?

6 DR. LYTTLE: John's over here. I'm Mel.

7 MS. CROTHERS: No.

8 DR. LYTTLE: Sorry.

9 MS. CROTHERS: I'm sorry. Mr. Lytle.

10 DR. LYTTLE: That's correct.

11 MS. CROTHERS: Sorry.

12 You were talking about the recirculation tests  
13 that were done in the last couple years. DWR  
14 cooperated in that. It's actually more of a Bureau of  
15 Reclamation test.

16 I would like to know: Do you know what time  
17 of year that recirculation test is done?

18 DR. LYTTLE: For what year? Were you  
19 describing 2004, '07, or '08?

20 MS. CROTHERS: Yes. In any of those years,  
21 when was the recirculation actually done?

22 DR. LYTTLE: Well, that's a good question. I  
23 don't have the exact months. I think it may be  
24 included in my testimony for some of the tests. I  
25 think that you can find it there.

1           It says in '07, recirculated from August --  
2 for the period of time of August and September.

3           And then from July until September in 2008.

4           But I think it wasn't just those were selected  
5 as idealic (sic) months for recirculation. I think it  
6 was a matter of the process by which they were trying  
7 to get the study or pilot study in place, took many  
8 months to actually get it going. And those were  
9 essentially the last months that they had actually  
10 putting it into place.

11           MS. CROTHERS: So as far as you know, those  
12 recirculation studies were done in the late summer  
13 early fall months; is that correct?

14           DR. LYTTLE: For my testimony, that is correct.

15           MS. CROTHERS: Do you know how that type of  
16 use of water could benefit the month of February?

17           MR. HERRICK: Objection. We have to deal with  
18 rational discussions here.

19           Nobody has suggested that water that was  
20 recirculated in August somehow is available in  
21 February. That's irrelevant.

22           MS. CROTHERS: Thank you. I just wanted to  
23 try to figure out the relevancy myself.

24           That's all the questions I have. Thank you.

25           DR. LYTTLE: Great. Thanks.

1 CO-HEARING OFFICER BAGGETT: Thank you. Okay.  
2 Does the Bureau have any questions? Bureau?  
3 Reclamation. No. CSPA, Michael? And the Bay  
4 Institute. None? While he's coming up, Butte Council,  
5 do you have any questions? None. EDF? No questions.  
6 Mr. Brown? No questions. Yes, okay. And Mr. Schulz.  
7 Yes, okay.

8 CROSS-EXAMINATION BY MR. JACKSON  
9 FOR CALIFORNIA SPORTFISHING PROTECTION ALLIANCE  
10 MR. JACKSON: Mr. Lytle, you talked a little  
11 about the recirculation program. How exactly -- how  
12 physically does it get from San Luis back into the San  
13 Joaquin River? Does water get from San Luis to the San  
14 Joaquin?

15 DR. LYTLE: I think it depended on the actual  
16 year that they did the study. But from what I  
17 understand, it was taken down the Newman Wasteway, from  
18 San Luis through the Newman Wasteway into the San  
19 Joaquin River.

20 MR. JACKSON: So in the event of a violation  
21 of 1641, the water stored in San Luis in your opinion,  
22 based upon that experience, is still available to deal  
23 with the standards of 1641 in the Delta?

24 DR. LYTLE: I'm not -- you know, I'm not a  
25 professed expert in D-1641 or can make a legal ruling

1 regarding that. But I still think that the actual  
2 ability to move water from San Luis through the Newman  
3 Wasteway into the San Joaquin is available.

4 MR. JACKSON: And are there times in which --  
5 in the past in which the standards, the agricultural  
6 standards in San Joaquin County, have not been met by  
7 The Projects?

8 DR. LYTLE: That is correct.

9 MR. JACKSON: Thank you.

10 CO-HEARING OFFICER BAGGETT: Thank you. Okay.  
11 Mr. Rubin, then Mr. Schulz.

12 CROSS-EXAMINATION BY MR. RUBIN  
13 FOR SAN LUIS & DELTA-MENDOTA WATER AUTHORITY and  
14 WESTLANDS WATER DISTRICT

15 MR. RUBIN: Good evening Mr. Lytle, is it?

16 DR. LYTLE: Mr. Rubin.

17 MR. RUBIN: How are you.

18 DR. LYTLE: We shouldn't meet like this.

19 MR. RUBIN: A few questions for you. Question  
20 first on page 4 of your written testimony it's --

21 DR. LYTLE: Page 4?

22 MR. RUBIN: Yes. The last complete paragraph.  
23 It begins: It is my understanding. Do you see that  
24 paragraph?

25 DR. LYTLE: That's correct.

1           MR. RUBIN: It looks about five lines down  
2 from the beginning of the paragraph, you conclude that:

3           USBR and DWR can use their San Luis  
4           storage to meet or help attempt to meet  
5           the San Joaquin River flow standards.

6           Do you see that?

7           DR. LYTTLE: Yes. It's San Joaquin River; it's  
8 not rivee.

9           MR. RUBIN: Yes, I assumed that was a typo.

10          DR. LYTTLE: Yes, that's correct.

11          MR. RUBIN: What is the basis for your  
12 conclusion as stated on page 4 of your written  
13 testimony?

14          DR. LYTTLE: I believe that it had to deal with  
15 the -- let's see -- with -- my introductory sentence in  
16 that paragraph says:

17                 It is my understanding that the DWR and  
18                 USBR permits for San Luis Reservoir also  
19                 include obligation of meeting X2 San  
20                 Joaquin flow standards in the south --  
21                 southern Delta standards.

22          MR. SCHULZ: Okay. Did you review the permits  
23 that the Bureau of Reclamation holds for operation of  
24 the Central Valley Project or the permit?

25          DR. LYTTLE: Not for this hearing.



1           MR. RUBIN: And did you review the permits  
2 that the Department of Water Resources holds for  
3 operation of the State Water Project for your purposes  
4 of your testimony?

5           DR. LYTTLE: Not for this hearing.

6           MR. RUBIN: Are you generally familiar with  
7 water right permits?

8           DR. LYTTLE: It would have to depend on which  
9 ones.

10          MR. RUBIN: Generally are you aware that water  
11 right permits sometimes contain terms and conditions?

12          DR. LYTTLE: Sure.

13          MR. RUBIN: Are you aware that permit -- water  
14 rights permits contain terms and conditions related to  
15 the place of use?

16          DR. LYTTLE: Absolutely. Sure.

17          MR. RUBIN: Do you know if the Bureau's  
18 permits for San Luis Reservoir allow for use of water  
19 stored in San Luis in the San Joaquin River?

20          DR. LYTTLE: I don't know the detail, no.

21          MR. RUBIN: And do you know if the permits  
22 that the Department of Water Resource holds for  
23 operation of -- or storage of water in San Luis allow  
24 for use of stored water in the San Joaquin River?

25          DR. LYTTLE: Well, I would --

1           MR. RUBIN: My question was: Do you know if  
2 they do?

3           DR. LYTTLE: Not specifically, no.

4           MR. RUBIN: Has recirculation ever occurred  
5 with releases from San Luis Reservoir?

6           DR. LYTTLE: I think so. I think in '04, '07,  
7 and '08.

8           MR. RUBIN: Are you sure of that?

9           DR. LYTTLE: Not specifically, no.

10          MR. RUBIN: Would you surprised to hear if  
11 recirculation has never been done with stored water  
12 from San Luis Reservoir?

13          DR. LYTTLE: Well, it was either stored water  
14 or water specifically out of the canal.

15          MR. RUBIN: And when you speak of water  
16 directly out of the canal, is that water pumped from  
17 either the Jones pumping plant or the Banks pumping  
18 plant into the Delta Mendota Canal or the San -- excuse  
19 me -- the California Aqueduct?

20          DR. LYTTLE: That's what I understand.

21          MR. RUBIN: So does it -- does your answer to  
22 my question change now in terms of whether  
23 recirculation has ever been done using stored water  
24 from San Luis Reservoir?

25          DR. LYTTLE: Well, I can't -- you know, I can't

1 specifically say that it has or hasn't come from the  
2 reservoir itself.

3 MR. RUBIN: Thank you.

4 Now, in terms of the recirculation programs,  
5 it was your testimony that there was a pilot program in  
6 2004?

7 DR. LYTTLE: I believe so.

8 MR. RUBIN: And was there a pilot  
9 recirculation program in 2007?

10 DR. LYTTLE: That's correct.

11 MR. RUBIN: And was there a pilot program in  
12 2008?

13 DR. LYTTLE: That's correct.

14 MR. RUBIN: Do you recall for those pilot  
15 programs was the recirculation pilot program done in  
16 the same time of the year?

17 DR. LYTTLE: For '04, I'm not specifically  
18 certain. But in 2007 it was done for two months,  
19 whereas in 2008, it was done I think for a month  
20 longer.

21 MR. RUBIN: In 2007, do you recall which two  
22 months the recirculation pilot program was implemented?

23 DR. LYTTLE: As I stated earlier, I think it  
24 was August. I'd have to go back and actually see my  
25 testimony again.

1 MR. RUBIN: Do you recall in 2007 --

2 DR. LYTTLE: '07, it was August and September.

3 And '08, it was July, August and September.

4 MR. RUBIN: And do you recall the purpose of  
5 the pilot programs in 2007 and 2008?

6 DR. LYTTLE: Purpose. I think primarily it was  
7 to increase flow in the river itself. I think also to  
8 improve water quality.

9 MR. RUBIN: Are you aware of any water quality  
10 objectives related to flow that apply in July, August  
11 or September?

12 DR. LYTTLE: Generally, but I couldn't probably  
13 pull them out of my -- pull it out of a hat right now.

14 MR. RUBIN: Is it your understanding that  
15 recirculation in 2007 and 2008 was -- occurred in order  
16 to help achieve a flow objective?

17 MR. HERRICK: Let me just object for lack of  
18 foundation. There all sorts of things going on in the  
19 south Delta.

20 CO-HEARING OFFICER BAGGETT: Okay.

21 MR. HERRICK: If the question seeks to know  
22 whether or not flow might assist in making the southern  
23 Delta --

24 CO-HEARING OFFICER BAGGETT: Okay. Sustained.

25 MR. HERRICK: -- meet standards.

1           MR. RUBIN: Let me ask a general question and  
2 see if you could expand, just for sake of time. What  
3 was the purpose of the 2007 and 2008 recirculation  
4 programs, in your mind?

5           DR. LYTTLE: In my opinion, it was to improve  
6 water quality and flow on the San Joaquin.

7           MR. RUBIN: Was the improvement of flow and  
8 water quality to assist in protecting agricultural  
9 beneficial uses?

10          DR. LYTTLE: Probably amongst others.

11          MR. RUBIN: And what other things do you think  
12 recirculation might have been implemented for?

13          DR. LYTTLE: Could have been agriculture as  
14 well as maybe habitat improvements along the river.

15          MR. RUBIN: Is your recollection that  
16 recirculation programs in 2007, 2008 were intended to  
17 improve conditions for fish?

18          DR. LYTTLE: You know, I couldn't say  
19 specifically.

20          MR. RUBIN: Is it your recollection that the  
21 2007-2008 pilot programs were intended to improve  
22 conditions for agriculture?

23          DR. LYTTLE: Yeah, I think there was some  
24 intention that that was the case.

25          MR. RUBIN: Do you know if the United

1 States -- excuse me; strike that.

2 Do you know if the National Marine Fisheries  
3 Service supports a recirculation program in order to  
4 help achieve flow requirements at Vernalis?

5 DR. LYTTLE: That I don't know.

6 MR. RUBIN: Do you know if the California  
7 Department of Fish and Game supports the use of  
8 recirculation in order to meet flow objectives at  
9 Vernalis?

10 DR. LYTTLE: I don't specifically know.

11 MR. RUBIN: Turning to the paragraph just  
12 above the one we were speaking of on page 4 of your  
13 written testimony.

14 DR. LYTTLE: Okay.

15 MR. RUBIN: You have a statement here that  
16 says:

17 It is my understanding that a permittee  
18 must comply with his/hers/its permit  
19 terms and conditions in order to take  
20 the benefits of the permit.

21 Do you see that statement?

22 DR. LYTTLE: Yes.

23 MR. RUBIN: What do you mean by benefits?

24 DR. LYTTLE: It could be water supply benefits.

25 MR. RUBIN: Is it correct to characterize

1 benefits to mean the ability to appropriate water under  
2 a water right?

3 DR. LYTTLE: Yeah. Sure.

4 MR. RUBIN: And so is it your testimony today  
5 that if a permittee is not complying with a water right  
6 the permittee should not be able to exercise the  
7 rights?

8 DR. LYTTLE: The water right terms and  
9 conditions of the permits?

10 MR. RUBIN: Let me rephrase my question if you  
11 didn't understand.

12 DR. LYTTLE: Okay.

13 MR. RUBIN: My question to you today is: Is  
14 it your position that if a permittee is not complying  
15 with the terms and conditions of his, her, or its  
16 permit that the holder of the permit should not be able  
17 to exercise rights that are afforded by the permit?

18 DR. LYTTLE: Generally speaking.

19 MR. RUBIN: And are you testifying today on  
20 behalf of the County of San Joaquin?

21 DR. LYTTLE: That's correct.

22 MR. RUBIN: Is it -- and is your position  
23 today the County's position?

24 DR. LYTTLE: That's correct.

25 MR. RUBIN: And so the County has a position

1 that if a person or an entity holds a permit and is  
2 violating the permit, it should not exercise any rights  
3 accorded to it under the permit?

4 MR. HERRICK: Mr. Chairman, let me just say  
5 that this is a fascinating line of inquiry, but I don't  
6 see its relevance to whether or not San Joaquin County  
7 thinks that a permittee should or should not receive  
8 some part, a few benefits of a permit.

9 CO-HEARING OFFICER BAGGETT: Mr. Rubin?

10 MR. RUBIN: I think the statement's been made,  
11 and I want to understand the extent of the County's  
12 position.

13 MR. HERRICK: To what end?

14 MR. RUBIN: I presented my question. I  
15 believe it is relevant. I'm trying to explore the  
16 statement that's been made here, and it's been made in  
17 the context. If my question is not relevant, I don't  
18 see how the statement is relevant.

19 CO-HEARING OFFICER BAGGETT: Proceed. Could  
20 you --

21 MR. RUBIN: I would ask the court reporter to  
22 read back the question.

23 (Record read as follows:

24 Is it your position that if a permittee  
25 is not complying with the terms and



1 conditions of his, her, or its permit  
2 that the holder of the permit should not  
3 be able the exercise rights that are  
4 afforded by the permit?)

5 DR. LYTTLE: Generally speaking, that's correct  
6 if you're taking it out that far.

7 MR. RUBIN: Thank you.

8 Now I have a couple of questions, and this is  
9 the last line of my questions regarding the first two  
10 paragraphs on page 4.

11 DR. LYTTLE: Okay.

12 MR. RUBIN: Is it -- are you familiar with HR  
13 2828, Public Law 108-261.

14 DR. LYTTLE: I'm familiar with it.

15 MR. RUBIN: And it's your understanding that  
16 in HR 2828 Congress mandated Reclamation to implement  
17 recirculation?

18 DR. LYTTLE: Does it actually say mandated?  
19 I'm not sure specifically it says mandated. I'd have  
20 to look at the actual language of the bill.

21 MR. RUBIN: In the first paragraph on page 4,  
22 I believe you say:

23 Implementing recirculation should not be  
24 met with reluctance by USBR as  
25 recirculation was mandated by Congress

1 in 2004.

2 Do you see that statement?

3 DR. LYTTLE: That's what it said.

4 MR. RUBIN: Do you still support the statement  
5 that you made on page 4?

6 DR. LYTTLE: I would have to clarify the actual  
7 word mandate. I'd have to review the language of the  
8 bill.

9 MR. RUBIN: I do have a copy of HR 2828, if  
10 you don't mind.

11 DR. LYTTLE: Does it say mandate?

12 MR. RUBIN: I'm not sure. I was going to ask  
13 you to take a look at one of the provisions to see if  
14 it was the provision that you were referring to to  
15 support your statement.

16 DR. LYTTLE: Okay.

17 MR. RUBIN: Mind if I approach.

18 CO-HEARING OFFICER BAGGETT: No, please.

19 MR. RUBIN: Let the record reflect that I've  
20 provided the witness with a copy of Public Law 108- I  
21 believe it's 361 which is HR 2828.

22 Is that correct?

23 DR. LYTTLE: 361 or 261.

24 MR. RUBIN: According to the document that I  
25 have, which I believe comes from the official record,

1 it's 361?

2 DR. LYTTLE: Okay. Sorry.

3 MR. RUBIN: I ask that you turn to page 118  
4 Stat. 1687. And that number is reflected on the top  
5 right-hand corner of the document.

6 DR. LYTTLE: Okay.

7 MR. RUBIN: About a quarter of the way down  
8 the page, there is a subsection D, Program to Meet  
9 Standards. Is that the section that you were relying  
10 upon to support your statement on page 4 of your  
11 written testimony?

12 DR. LYTTLE: It's probably one of them. I'd  
13 have to look at it closer.

14 MR. RUBIN: Well, take your time. I think  
15 this is an important issue.

16 DR. LYTTLE: Okay.

17 MR. RUBIN: My question I think that I  
18 presented to you is: Is the paragraph that's a third  
19 of the way down the page on 118 Stat. 1687 under the  
20 subsection (d), Program to Meet Standards, is that the  
21 section that you relied upon to support your statement  
22 on page 4 of your written testimony?

23 DR. LYTTLE: Yeah.

24 MR. RUBIN: And after reading that section, do  
25 you have any clarification for the statement on page 4,

1 the first sentence on page 4, of your written  
2 testimony?

3 DR. LYTLE: It -- from what I see, it does not  
4 say mandates. But it does say shall to the extent --  
5 the maximum extent feasible, the measures described in  
6 the clauses, and then it goes on to say recirculation  
7 program.

8 MR. RUBIN: And -- I apologize. The maximum  
9 extent feasible relates to programs that are defined in  
10 the statute, one of which is recirculation?

11 DR. LYTLE: I believe so.

12 MR. RUBIN: And let's take that one step  
13 further. If you look under subsection (d)(i), it's  
14 entitled in general; is that correct? (D) little i; do  
15 you see that?

16 DR. LYTLE: Okay.

17 MR. RUBIN: It's one paragraph above. I  
18 believe it reads:

19 Prior to increasing export limits from  
20 the Delta for purposes of conveying  
21 water to south of Delta, Central Valley  
22 Project contractors or increasing  
23 deliveries through the intertie.

24 Do you see that?

25 DR. LYTLE: Mm-hmm.

1           MR. RUBIN: After reading that, as well as the  
2 remainder of that subsection (d)(i), does that provide  
3 any additional clarification for your statement on page  
4 4 of your written testimony, the first sentence on  
5 page 4?

6           DR. LYTTLE: Goes on to say:  
7           develop, initiate, and implementation of  
8           a program to meet all existing water  
9           quality standards and objectives for  
10          which the Central Valley Project has  
11          responsibility.

12          MR. RUBIN: And so the clause that I read that  
13 begins "prior to increasing" provides conditions on the  
14 secretary?

15          DR. LYTTLE: Mm-hmm.

16          MR. RUBIN: Is that correct?

17          DR. LYTTLE: That's correct.

18          MR. RUBIN: And the sentence that you -- the  
19 clause that you read -- excuse me.

20          The clause that you read dealing with a  
21 program to meet all existing water quality objectives:  
22 Is that the program that's referred in subsection  
23 (d)(ii) that says in developing and implementing the  
24 program?

25          DR. LYTTLE: I think so.

1 MR. RUBIN: Okay. Thank you.

2 Now the provision that we've just been  
3 speaking of touches on the program to -- touches on a  
4 program to meet all existing water quality standards;  
5 is that correct?

6 DR. LYTTLE: As defined in that -- sorry. I  
7 thought we'd moved on.

8 MR. RUBIN: I'm not trying to -- just a segue  
9 to the next question.

10 DR. LYTTLE: As directed in this bill. I can't  
11 say every water quality issue.

12 MR. RUBIN: That's fine.

13 On page 4 of your written testimony, you also  
14 talk about an obligation or direction that the  
15 Secretary of Interior has to develop and initiate  
16 implementation of a program to meet all existing water  
17 quality standards and objectives.

18 Do you see that statement in the second  
19 paragraph of your written testimony on page 4?

20 DR. LYTTLE: Yes.

21 MR. RUBIN: Is it correct to state that the  
22 statement that you've made on page 4 in the second  
23 paragraph is also supported by the section of HR 2828  
24 that occurs on page 118 stat 1687?

25 DR. LYTTLE: I believe so.

1 MR. RUBIN: Mr. Lytle, just one or two last  
2 questions.

3 In terms of preparing your testimony, did you  
4 consider the water cost of recirculation if it were to  
5 occur to meet either the salinity standards, the X2  
6 standards, or the San Joaquin River flow standards?

7 DR. LYTLE: No, it's not included as part of  
8 my testimony.

9 MR. RUBIN: And did you consider the power  
10 cost to use recirculation to meet either the south  
11 Delta salinity standards, the X2 standard, or San  
12 Joaquin River flow standard?

13 DR. LYTLE: No, it's not part of my testimony.

14 MR. RUBIN: Thank you.

15 I have no further questions. I would ask that  
16 the Hearing Officers take official notice of HR 2828.

17 CO-HEARING OFFICER BAGGETT: Any objection?  
18 If not, noted. And it would be under Exhibit from --  
19 do you want to give it a number?

20 MR. RUBIN: We could mark it as SLDMWA Exhibit  
21 01.

22 CO-HEARING OFFICER BAGGETT: Thank you. Okay.

23 (Whereupon Exhibit SLDMWA 1 was marked  
24 for identification.)

25 CO-HEARING OFFICER BAGGETT: Mr. Schulz, do

1 you have any questions?

2 MR. RUBIN: Thank you.

3 CO-HEARING OFFICER BAGGETT: A few questions?

4 A question?

5 MR. SCHULZ: As few as possible. I don't know  
6 why I brought my umbrella. Just in case it rains.

7 CROSS-EXAMINATION BY MR. SCHULZ

8 FOR KERN COUNTY WATER AGENCY, STATE WATER CONTRACTORS

9 MR. SCHULZ: Dr. Lytle, I notice from your  
10 testimony -- from your Exhibit 2 that apparently your  
11 main expertise is in botany and agronomy. Is that  
12 correct? Is that what your degrees are in?

13 DR. LYTLE: That's correct. I have a  
14 bachelor's and master's degree in agronomy and a PhD in  
15 botany.

16 MR. SCHULZ: Okay.

17 DR. LYTLE: And I'm a post-doctoral fellow  
18 from University of California, Berkeley.

19 MR. SCHULZ: Do you consider yourself to be an  
20 expert in hydrology and modeling?

21 DR. LYTLE: No.

22 MR. SCHULZ: Okay. Thank you. On to the  
23 next. Everybody's been asking you about recirculation,  
24 and I'm not going to be any different.

25 DR. LYTLE: Oh, great.



1           MR. SCHULZ: We in this proceeding are  
2 concerned with three specific items that the Department  
3 and the Bureau have asked for with respect to D-1641:  
4 X2 in February, the triggering event between  
5 February 1st and 14th of meeting X2 for one day at  
6 Collinsville, and now one that has been withdrawn, that  
7 is San Joaquin River flow relaxations.

8           So I want to limit us to those areas. And in  
9 making your recirculation argument in your testimony,  
10 were you assuming that recirculation would be useful  
11 for X2? For meeting X2?

12          DR. LYTLE: In February?

13          MR. SCHULZ: In February?

14          DR. LYTLE: No.

15          MR. SCHULZ: Okay. So you must have been --  
16 did you intend that section then only to be read with  
17 respect to the withdrawn issue of San Joaquin River  
18 Flows?

19          DR. LYTLE: Maybe you can answer the question  
20 again.

21          MR. HERRICK: Mr. Chair, let me talk to my  
22 witness because I think he just misstated his  
23 testimony. Let me just clarify what.

24          (Discussion off the record)

25          MR. SCHULZ: May the record show that counsel

1 is telling his client what to say.

2 (Laughter)

3 MR. HERRICK: Yeah, I'm confirming with my  
4 client what the testimony says. This is all done --

5 CO-HEARING OFFICER BAGGETT: That's fine.  
6 Just answer the question.

7 DR. LYTLE: Well, I think the matter of  
8 confusion here is: Is a recirculation program that  
9 is -- that is functioning in the summer months going to  
10 help with X2 in February? And that's where I think the  
11 confusion was.

12 MR. SCHULZ: So you were not suggesting that  
13 we should do recirculation in February?

14 DR. LYTLE: All I'm saying is that during the  
15 summer months recirculation could potentially have a  
16 positive benefit.

17 MR. SCHULZ: On Delta outflow.

18 DR. LYTLE: That's correct.

19 MR. SCHULZ: And --

20 DR. LYTLE: And -- and --

21 MR. SCHULZ: If you recirculate, how do you  
22 tell --

23 DR. LYTLE: Let me keep going a little bit --

24 MR. SCHULZ: Okay.

25 DR. LYTLE: -- further in the sense that I

1 believe that if recirculation was in place in February,  
2 just because it is a flow of water potentially from San  
3 Luis Reservoir through the Newman Wasteway out to the  
4 San Joaquin, it could potentially also have that  
5 benefit.

6 MR. SCHULZ: So you have a different concept  
7 of recirculation, as I understand it, than has ever  
8 been tested. So you are suggesting that recirculation  
9 ought to occur by diverting water during one season  
10 into San Luis Reservoir; and in another season -- you  
11 leave it there, you leave it in storage, and then in  
12 another season you put it back in.

13 You're not talking about a recirculation of  
14 the type that was tested in any of those tests?

15 MR. HERRICK: Mr. Chairman, I believe that  
16 misrepresents the testimony.

17 The testimony is very clear that it said  
18 diversions that have occurred this water year are still  
19 available and could be potentially put back into the  
20 river to meet both river and output.

21 CO-HEARING OFFICER BAGGETT: Can you restate  
22 the question? Sustained.

23 MR. SCHULZ: I'd prefer Mr. Herrick not  
24 testify. And in fact because what he just said was  
25 something I did not ask.

1 I thought I tried very hard in the beginning  
2 of this questioning to say we aren't talking about in  
3 this hearing San Joaquin River flows because they've  
4 been withdrawn.

5 We're talking about recirculation for X2.

6 And I'm trying to find out from this witness  
7 how he thinks you would do a recirculation program that  
8 would benefit X2. So all I'm looking for is an  
9 explanation how this would work.

10 DR. LYTTLE: You're asking me?

11 MR. SCHULZ: I'm asking you. How would you do  
12 a recirculation program for X2 purposes?

13 DR. LYTTLE: Well, I would -- frankly, I think  
14 it's probably something that should be developed as  
15 part of the overall plan.

16 MR. SCHULZ: How would you do it?

17 DR. LYTTLE: How would I do it?

18 MR. SCHULZ: What's your recommendation?  
19 You've suggested it's something that should be done.  
20 What's -- how do you think it should be done?

21 DR. LYTTLE: I think there is capability in the  
22 facilities as currently developed to allow for water to  
23 recirculate down the San Joaquin River to provide  
24 additional flow.

25 MR. SCHULZ: Why wouldn't you just leave that

1 in the Delta to go as outflow? Why would you run it  
2 down the canal and back down the San Joaquin to benefit  
3 X2?

4 DR. LYTTLE: I didn't say I'd just run down the  
5 canal.

6 MR. SCHULZ: How do you recirculate?

7 DR. LYTTLE: Water could be taken out of  
8 storage.

9 MR. SCHULZ: So you are talking about taking  
10 water out of the Delta during some period, putting it  
11 into San Luis, holding it until another time, and then  
12 returning it at a later time. Is that what you are  
13 talking about?

14 DR. LYTTLE: There is a potential there.

15 MR. SCHULZ: So you are not suggesting that as  
16 part of this hearing that there should be any  
17 recirculation in February or March?

18 DR. LYTTLE: Am I not saying that? Could it be  
19 a contributing factor to benefitting X2 by allowing  
20 water to go down the San Joaquin? I mean, I am not  
21 going to give my opinion on that based on lack of, you  
22 know, sufficient planning.

23 MR. SCHULZ: Would you --

24 DR. LYTTLE: I'd love to see the alternatives  
25 that show the modeling and the information that would

1 be available to allow that to happen.

2 MR. SCHULZ: And would that recirculation  
3 increase the negative flows in Old and Middle River  
4 that occurred in February and March?

5 DR. LYTLE: It would be interesting to see the  
6 modeling.

7 MR. SCHULZ: So the extra pumping out of the  
8 Delta for your recirculation program in the times when  
9 the Fish and Wildlife Service wants to protect Delta  
10 smelt wouldn't impact Delta smelt?

11 DR. LYTLE: Well, we could -- that would be  
12 part of the planning process.

13 MR. SCHULZ: Okay. So you really haven't  
14 worked out a way to have this done yet; you just want  
15 to see somebody look at it?

16 DR. LYTLE: That's correct.

17 MR. SCHULZ: Okay. Okay.

18 On your -- you quoted almost verbatim from the  
19 last paragraph of your testimony during your summary.  
20 And you say -- and the one that you -- that I had  
21 already underlined that you read -- it said:

22 Instead, they appear to be operating as  
23 if they have a right to a minimum amount  
24 of exports and are taking such exports  
25 to the detriment of X2.

1           Did you hear the testimony of the earlier  
2 witnesses and the policy statements of the fishery  
3 agencies that they did not believe that there was a  
4 measurable impact on fishery as a result of this  
5 modification in X2?

6           DR. LYTTLE: I did hear that.

7           MR. SCHULZ: Do you have --

8           MR. HERRICK: Mr. Chairman, the question is  
9 confusing the issue.

10           The testimony was about whether it was to the  
11 detriment of X2, and Mr. Schulz confused that with  
12 whether or not the fishery agencies said it was a  
13 detriment to fish.

14           MR. SCHULZ: I didn't confuse it at all. I  
15 will now -- I was going to ask that next question.

16           CO-HEARING OFFICER BAGGETT: He was laying a  
17 foundation.

18           MR. SCHULZ: I was laying the foundation for  
19 the question of: Do you -- what is the difference  
20 between a detriment to X2 and a detriment to the  
21 fishery benefits of X2 in your opinion?

22           What did you mean by detriments to X2?

23           DR. LYTTLE: The lack of outfall -- or outflow,  
24 sorry.

25           MR. SCHULZ: Okay. And so you weren't

1 attaching it to any impact on any beneficial use of  
2 water? Just -- it was a change in the amount of  
3 outflow?

4 DR. LYTTLE: That would be it.

5 MR. SCHULZ: Okay. But you were not making  
6 any judgment or you don't claim any expertise with  
7 respect to the effects of that reduction?

8 DR. LYTTLE: I'm not a fisheries biologist.

9 MR. SCHULZ: Okay. Thank you.

10 And when you say have a right to a minimum  
11 amount of exports, you've heard earlier testimony today  
12 about health and safety needs and things of that  
13 nature.

14 Were you making a judgment that in your mind  
15 that those diversions were not necessary for health and  
16 safety purposes or did -- let me stop there.

17 DR. LYTTLE: Now what's the question again?

18 MR. SCHULZ: In your mind, when you state they  
19 appear to be operating as they have a right to a  
20 minimum amount of exports, were you making any judgment  
21 as to whether or not the exports that were made were  
22 necessary for health and safety purposes?

23 DR. LYTTLE: No.

24 MR. SCHULZ: Okay. That's all I have.

25 CO-HEARING OFFICER BAGGETT: Thank you.



1 Stockton East? Gone. With that, is there any  
2 redirect?

3 MR. HERRICK: Sorry, Mr. Chairman. No, I  
4 don't think so.

5 CO-HEARING OFFICER BAGGETT: Would you like to  
6 introduce exhibits?

7 MR. HERRICK: Yes, I'd like to offer for  
8 acceptance into evidence South Delta, Central Delta,  
9 San Joaquin County Exhibits No. 1 which includes 1-A  
10 through I believe F -- I don't think there is -- I mean  
11 there's a G sorry G, and No. 2.

12 (Whereupon Exhibits SDCDSJC1 and  
13 SDCDSJC2 were accepted in evidence.)

14 CO-HEARING OFFICER BAGGETT: There's no  
15 objection? They're so accepted.

16 Try EDF? Do you want to try to.

17 DR. LYTTLE: Thank you for your time.

18 CO-HEARING OFFICER BAGGETT: Thank you.

19 Is it going to be short?

20 MR. ROSEKRANS: I can't promise what other  
21 attorneys might --

22 CO-HEARING OFFICER BAGGETT: Do you just have  
23 an opening statement, or do you have a witness?

24 MR. ROSEKRANS: I am proposing to be both,  
25 offer the opening statement and the testimony. Has it

1 been done before?

2 CO-HEARING OFFICER BAGGETT: It's rare, but  
3 let's see how it goes. You can summarize your own  
4 testimony with -- opening statement, and then you'll  
5 summarize your testimony. Okay. Let's go.

6 MR. ROSEKRANS: And it will go quickly and  
7 smoothly and noncontroversially.

8 CO-HEARING OFFICER BAGGETT: Very good. Go  
9 for it.

10 MR. ROSEKRANS: I'm Spreck Rosekrans from the  
11 Environmental Defense Fund, and I am both presenting a  
12 statement and offering very short testimony.

13 I will note that in dry years all beneficial  
14 uses of water in California suffer. We have a Water  
15 Quality Control Plan, and the Water Rights Order to  
16 enforce that that was signed by the Department of Water  
17 Resources and the Bureau of Reclamation.

18 That was based on a series of planning studies  
19 using historic hydrology; and as the testimony will  
20 show, that the historic hydrology had many dry periods  
21 similar to this, and the models all suggested that the  
22 X2 standards could be met as well as other beneficial  
23 uses of water.

24 At this time, we're in a difficult situation.  
25 And we are not opposing the petition, but we are asking

1 the Board to take action to ask the Bureau and the  
2 Department to submit plans to submit criteria to assure  
3 that this sort of circumstance does not recur.

4 I'd like to move very quickly to testimony.

5 SPRECK ROSEKRANS

6 Called by ENVIRONMENTAL DEFENSE FUND

7 DIRECT EXAMINATION BY MR. ROSEKRANS

8 MR. ROSEKRANS: What I've labelled as EDF-1 is  
9 a very short version of my qualifications. I did not  
10 get into things like water color that Dr. Lytle had on  
11 his lengthy resume.

12 And as far as my testimony goes, it's very  
13 simple. I did a little bit of research from the cdec  
14 database, and Exhibit EDF-3 shows the end of year, and  
15 this is end of water year, end of September storages at  
16 the principal upstream reservoirs.

17 I added Clair Engle and the Trinity River  
18 since that's a major storage reservoir for the Central  
19 Valley Project in addition to Shasta, Oroville, and  
20 Folsom.

21 And as you can see, at the end of 2006,  
22 storage was over eight million acre feet, in the upper  
23 range of what we see in any of the years in the  
24 hydrologic record. So storage was in good shape then.

25 Moving on to Exhibit EDF-4, I looked at the

1 droughts we've had in the hydrologic record over the  
2 past 80 years and defined these as being 28 months  
3 droughts, beginning of a water year, starting in  
4 October, going around two full years, and then the next  
5 four months, and found there were six periods dryer  
6 than what we've seen so far this year. And they're on  
7 the left-hand side of Exhibit EDF-4 starting with '76,  
8 '78 and so on.

9           And then another five 28-month periods that  
10 were only slightly wetter. And these have all been  
11 through the analysis of the water projects, and so they  
12 had been able to say, gee, this could happen again.

13           So I am sympathetic to the Project operators.  
14 They have a lot of objectives. They have a lot of  
15 constraints. They have a lot of pressures trying to  
16 operate the system.

17           But I think we would all be better served if  
18 we weren't back in this room saying why did we agree to  
19 a set of rules that we now find we can't abide by?

20           So I'm suggesting a role for the State Board  
21 to ask, or require, recommend -- I'm sure you have your  
22 ways -- asking these water projects, the Department of  
23 Water Resources and the Bureau of Reclamation, to  
24 submit plans that say this is how we're going to  
25 address storage to meet cold water requirements as well

1 as the X2 that's required as well as the export of  
2 water and water quality issues.

3 So that's my statement, and my testimony, and  
4 I'll take any questions.

5 CO-HEARING OFFICER BAGGETT: Any questions  
6 from DWR? The Bureau?

7 MS. CROTHERS: Actually I do have a question.  
8 Well, a couple questions.

9 (Laughter)

10 CO-HEARING OFFICER BAGGETT: The lights go out  
11 in 25 minutes, so.

12 CROSS-EXAMINATION BY MS. CROTHERS

13 FOR DEPARTMENT OF WATER RESOURCES

14 MS. CROTHERS: This is Cathy Crothers,  
15 Department of Water Resources.

16 Mr. Rosekrans, have you done some modeling,  
17 water project modeling, in the past?

18 MR. ROSEKRANS: Yes.

19 MS. CROTHERS: So you're fairly familiar with  
20 how modeling of water projects is done?

21 MR. ROSEKRANS: Yes.

22 MS. CROTHERS: Would you say that there is at  
23 times some error in modeling results in relationship  
24 to -- if you compare it to actual hydrology?

25 MR. ROSEKRANS: Yes. I'll quote Professor Jay

1 Lund who says that all models are wrong but some are  
2 useful.

3 MS. CROTHERS: So when you were saying that in  
4 the past there was modeling done by the Bureau and DWR  
5 to determine whether X2 could be met under dry  
6 hydrology, do you know whether those modeling efforts  
7 encompassed the types of year that we're seeing now  
8 including the Eight River Index that's resulted in this  
9 year's hydrology?

10 MR. ROSEKRANS: The particular issue with the  
11 Eight River Index right on the cusp of the February,  
12 sort of steep stair-step, I believe is without  
13 precedent.

14 There were -- there have been other occasions,  
15 if you look at the history of the first DWR sim  
16 modeling runs, now CALSIM, where they show significant  
17 releases from storage to meet X2 requirements.

18 In many years, there are no such releases; and  
19 in many years, there are significant releases.

20 I would say that it's possible that The  
21 Projects could, perhaps should, have left more water in  
22 storage after water years 2007, 2008 and found that  
23 they could have then made those releases while  
24 retaining cold water in storage.

25 MS. CROTHERS: Mr. Rosekrans, would you say

1 that is more of an approach of hindsight versus --  
2 well, an approach of hindsight at this point?

3 MR. ROSEKRANS: I'd say it's both hindsight  
4 and foresight.

5 Nobody asked me a year ago or last summer  
6 perhaps what The Projects should have been doing. But  
7 if you look at -- and in EDF Exhibit 3, you see that  
8 storage dropped as precipitously as almost any year  
9 except for 1976-1977.

10 There were the driest years on record, much  
11 drier than these last two years, and much of that water  
12 was moved south, some of which for consumptive use,  
13 some of which perhaps to the groundwater banks and  
14 storage and south of Delta.

15 But I don't think it's entirely hindsight.

16 MS. CROTHERS: Do you also agree that at this  
17 time that The Projects are operating under quite  
18 different operation constraints for ESA species than  
19 they were ten years ago?

20 MR. ROSEKRANS: Yes.

21 MS. CROTHERS: Thank you.

22 CO-HEARING OFFICER BAGGETT: Okay. The Delta?

23 MR. NOMELLINI: I think we're covered.

24 CO-HEARING OFFICER BAGGETT: Okay.

25 CSPA. Mr. Jackson?

1 MR. JACKSON: No.

2 CO-HEARING OFFICER BAGGETT: Okay. The  
3 Institute? Does any other party have any  
4 cross-examination? Going once. Butte? No. Last  
5 shot. Mr. Schulz, you're the last one. Stockton East?  
6 Nope? Okay.

7 CROSS-EXAMINATION BY MR. SCHULZ  
8 FOR KERN COUNTY WATER AGENCY, STATE WATER CONTRACTORS

9 MR. SCHULZ: I'd like to just very quickly,  
10 2008: Are you aware of what the allocations to the  
11 federal and state contractors were last year?

12 MR. ROSEKRANS: Oh, I think they were on  
13 overhead earlier. I don't recall.

14 MR. SCHULZ: Okay. Would it surprise you to  
15 know that the federal was 40 percent and the state 35  
16 percent?

17 MR. ROSEKRANS: That sounds roughly correct.  
18 And I always like to remind people when they say the  
19 federal allocation is 40 percent, that would be to the  
20 ag service contractors. I believe full deliveries were  
21 made to the exchange contractors.

22 MR. SCHULZ: Right. And that was required  
23 under the contracts because of the Shasta inflow rate,  
24 correct?

25 MR. ROSEKRANS: Yeah. Sure.



1           MR. SCHULZ: Okay. Do you know whether any  
2 stored water releases were made to deliver water to  
3 contractors in 2008?

4           And I -- contrasting that to making releases  
5 for navigation for cold water maintenance, do you know  
6 whether or not any specific releases were made for  
7 deliveries to these federal and state contractor --  
8 federal contractors?

9           MR. ROSEKRANS: I would be surprised if that  
10 were not the case.

11          MR. SCHULZ: Okay. So I just was trying to  
12 find out how they would have held more carryover  
13 storage than they did?

14          You suggested that they maybe should have left  
15 some more water in storage last year, and I was trying  
16 to figure out under the circumstances that they faced  
17 last year, how that would occur.

18          MR. ROSEKRANS: I believe -- I mean you're  
19 assuming facts not in evidence. I have not seen  
20 evidence that says there were no releases from storage  
21 for water deliveries last year.

22          MR. SCHULZ: Okay. That's all.

23          CO-HEARING OFFICER BAGGETT: Thank you. You'd  
24 like to -- assume there's any redirect?

25          (Laughter)

1 CO-HEARING OFFICER BAGGETT: If not, would you  
2 like to submit your exhibit into the record?

3 MR. ROSEKRANS: I would like to submit these  
4 exhibits into evidence.

5 CO-HEARING OFFICER BAGGETT: Okay. We've got  
6 the numbers? EDF-1, 2, 3, and 4. Any objection? If  
7 not so admitted.

8 (Whereupon Exhibits EDF 1-4 were  
9 accepted in evidence.)

10 CO-HEARING OFFICER BAGGETT: I think let's  
11 just call it here, call it a night. And the plan is we  
12 have the Sierra Hearing Room at 8:00. We'll be out of  
13 there by noon. What I will propose --

14 (Interruption)

15 CO-HEARING OFFICER BAGGETT: Okay. Do you  
16 want to try? I'm willing to stay if the other parties  
17 are.

18 Okay, let's do that one.

19 And while you're coming up, the rules for  
20 tomorrow: We'll start at 8:00. Any party that wishes  
21 has until noon to either make -- I will allow  
22 five-minute closings, or you could submit it, and you  
23 can submit or in lieu you can submit a written closing  
24 statement or brief if you want by noon tomorrow if you  
25 don't want to come back.

1           Send a written statement, or you can come back  
2 and read a written statement. You can give us a  
3 written statement.

4           But I will allow you to make it a brief if you  
5 want to -- I know it's short timing, but this is like a  
6 TRO, so. If you want to make a brief, make some legal  
7 arguments, go for it. You've got until noon tomorrow  
8 though; that's the only problem.

9           With that, let's go. Butte Environmental  
10 Council, you're on.

11           MR. WAGNER: My name is Keith Wagner. I am an  
12 attorney that represents Butte Environmental Council; I  
13 am also a member. I am here to actually present  
14 testimony more on the issues not of the substance of  
15 the water transfer but on the issue of CEQA compliance  
16 and on the adequacy of the application.

17           So there was some concern that simply  
18 submitting a policy statement would not be sufficient  
19 in order to participate in the proceeding sufficient to  
20 exhaust remedies.

21           And so what I would like to do is just run  
22 through a handful of issues here. This would  
23 effectively serve as testimony or as an opening  
24 statement, depending on the Board's pleasure.

25           CO-HEARING OFFICER BAGGETT: Basically a legal

1 argument though.

2 MR. RUBIN: That's what I was going to raise.  
3 I don't believe the Board's precedent is to allow for  
4 testimony on legal issues.

5 CO-HEARING OFFICER BAGGETT: No.

6 MR. RUBIN: Maybe given the time, it's  
7 appropriate for some sort of written submittal.

8 CO-HEARING OFFICER BAGGETT: I would -- I  
9 think that would be -- if it's -- if you could do a  
10 written -- I mentioned: We'll allow five-minute  
11 closing oral arguments tomorrow.

12 If you want to submit a written brief -- it's  
13 a short time period, I understand. But it sounds like  
14 you've already got your arguments laid out.

15 MR. WAGNER: We've already laid out our  
16 argument.

17 CO-HEARING OFFICER BAGGETT: If you want to  
18 submit them in writing as a closing brief, they're  
19 legal arguments. I think that's appropriate. And then  
20 we can address them.

21 MR. WAGNER: Okay. But in that case, I would  
22 just want to clarify that we are here to participate as  
23 parties and as fully involved members of the public,  
24 that we have attempted to -- all due effort to exhaust  
25 our remedies that are laid out within our statement.

1 The use of the negative dec -- or a CEQA exemption is  
2 not appropriate for this, and the application is  
3 inadequate.

4 CO-HEARING OFFICER BAGGETT: And that --  
5 those, as you know, are legal arguments. And if you --  
6 I would -- I think it would be appropriate, and it  
7 would be appreciated if you would next -- in your sleep  
8 or it sounds like you've got the outline written.

9 The outline's good enough. Send it as a  
10 closing brief, and it's a written legal argument, and  
11 that's an appropriate place for that argument, and we  
12 will address it. Very good.

13 So there is no evidence submitted, it's a  
14 legal argument and a closing brief.

15 So 8 o'clock tomorrow, we'll begin with CSPA,  
16 Bay Institute, and Russ Brown.

17 And then we'll allow five-minute closing oral  
18 arguments. And if you want to submit written closings  
19 you've got until noon tomorrow to do it.

20 \* \* \*

21 (Thereupon the WATER RESOURCES CONTROL  
22 BOARD hearing recessed at 8:42 p.m.)

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25

1 CERTIFICATE OF REPORTER

2 I, LINDA KAY RIGEL, a Certified Shorthand  
3 Reporter of the State of California, do hereby certify:

4 That I am a disinterested person herein; that  
5 the foregoing WATER RESOURCES CONTROL BOARD hearing was  
6 reported in shorthand by me, Linda Kay Rigel, a  
7 Certified Shorthand Reporter of the State of  
8 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 meeting nor in  
12 any way interested in the outcome of said meeting.

13 IN WITNESS WHEREOF, I have hereunto set my  
14 hand this March 2, 2009.

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LINDA KAY RIGEL, CSR  
Certified Shorthand Reporter  
License No. 13196