

MEETING
STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD

LOWER YUBA RIVER HEARING

CAL/EPA BUILDING
1001 I STREET
COASTAL HEARING ROOM
SECOND FLOOR
SACRAMENTO, CALIFORNIA

WEDNESDAY, DECEMBER 5, 2007

9:08 A.M.

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APPEARANCES

HEARING PANEL

Mr. Arthur Baggett, Hearing Officer

Mr. Charlie Hoppin, Co-Hearing Officer

SWRCB STAFF

Ms. Marianna Aue, Staff Counsel

Ms. Jane Farwell, Staff Environmental Scientist

Mr. Ernie Mona, Staff Engineer

Mr. Greg Wilson, Staff Engineer

ALSO PRESENT

Mr. Chuck Bonham, Trout Unlimited

Mr. Bob Colella, U.S. Bureau of Reclamation

Ms. Cathy Crothers, Department of Water Resources

Mr. Jerry Johns, Department of Water Resources

Mr. Alan Lilly, Yuba County Water Agency

Mr. Paul Minasian, Cordua Irrigation District

Ms. Sandra Morey, California Department of Fish and Game

Mr. Jon Rubin, San Luis & Delta-Mendota Water Authority

Dr. H. Henry Smith, Anglers Committee

Mr. Michael Tucker, National Marine Fisheries Service

Mr. Jim Turner, U.S. Bureau of Reclamation

Mr. Hanspeter Walter, Kern County Water Agency & State
Water Contractors

Mr. Michael Warburton, Public Trust Alliance

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PROCEEDINGS

HEARING OFFICER BAGGETT: This is the time and place for the hearing to receive evidence relevant to determining whether to approve the Yuba County Water Agency's petition to modify water rights permits 15026, 15027, 15030, and applications 6232, 15204, and 15574, and petitions for long-term transfers of up to 200,000 acre-feet of water per year from Yuba County Water Agency to the Department of Water Resources and the United States Bureau of Reclamation under Permit 15026 and application 5632. The petitions were submitted to enact changes necessary to implement the proposed Lower Yuba County Accord.

The hearing will provide an opportunity for the petitioners, interested parties, and protestants to the petitions to introduce evidence relevant to the State Water Board's consideration of the petitions.

This hearing is being held in accordance with the notice of public hearing dated September 6th, 2007, and October 1st, 2007.

I'm Art Baggett, and I'm with the State Water Resources Control Board, the lead hearing officer in these proceedings.

With me is my colleague, Board Member Charlie Hoppin, the co-hearing officer; and staff counsel Marianna

1 Aue; staff engineers Greg Wilson and Ernie Mona; and staff
2 environmental scientist Jane Farwell.

3 This hearing provides parties, who have filed a
4 Notice of Intent to Appear, an opportunity to present
5 relevant testimony and other evidence that addresses the
6 following key issues:

7 First, should the State Water Board approve Yuba
8 County's Petition for Modification of Water Rights Permits
9 15026, 15027, and 15030? And if so, under what, if any,
10 terms and conditions, A, would the proposed changes injure
11 any legal user of water?; B, would the proposed changes,
12 in effect, initiate a new water right?; C, would the
13 proposed changes unreasonably affect fish, wildlife, and
14 other instream beneficial uses?; And D, would
15 implementing Yuba County Water Agency's petitioned
16 specific changes to RD 1644 and the proposed Yuba Accord
17 Fisheries Agreement provide a level of protection for
18 fishery resources in the Lower Yuba River during the term
19 of the Yuba Accord Fisheries Agreement, that is relevant
20 to or better than that which RD 1644 provides?

21 Second, should the State Water Board approve Yuba
22 County Water Agency's petition for long-term transfer
23 under Water Rights Permit 15026, and application 5623,
24 and, if so, under what, if any, conditions? A, would the
25 proposed transfer harm any legal user of water?; B, would

1 the proposed transfer unreasonably affect fish, wildlife,
2 or other instream beneficial uses?; And C, would the
3 proposed transfer unreasonably affect the overall economy
4 of the area from which the water is being transferred?

5 After the hearing record is closed, Board staff
6 will prepare a proposed order for consideration by the
7 Board. And after the Board adopts an order, any person
8 who believes that the order is in error will have 30 days
9 within which to submit a written petition for
10 reconsideration by the Board.

11 At this time, I will ask Marianna to cover any
12 procedural items and introduce the staff exhibits.

13 STAFF COUNSEL AUE: A few procedural items: A
14 court reporter is present to prepare a transcript of the
15 proceeding. Anyone who wants a copy of the transcript
16 should make separate arrangements with the court reporter.
17 The transcript will be posted on the Division of Water
18 Rights Web site 60 days after we receive the transcripts.

19 First item is a request for recusal. On
20 October 22nd and October 30th, 2007, Mr. Bob Baiocchi
21 representing the Anglers Committee of California suggested
22 that lead hearing officer Arthur Baggett should recuse
23 himself and not participate in this proceeding because of
24 alleged bias.

25 Hearing officer Charlie Hopping has been provided

1 with copies of the above-referenced communications. And I
2 now have co-hearing officer Charlie Hoppin to rule on this
3 request.

4 CO-HEARING OFFICER HOPPIN: Thank you, Marianna.

5 As co-hearing officer in this proceeding, I've
6 reviewed Mr. Baiocchi's request for recusal of Mr.
7 Baggett. I find that Mr. Baggett's membership in various
8 organizations and participation in prior board matters and
9 decisions does not create a bias. Experience, competence,
10 and specialized knowledge of the hearing officer does not
11 in itself subject an officer to disqualification. Neither
12 does prior expression of a view on an issue presented in
13 the proceedings. Members of the State Water Resources
14 Control board are selected for the experience and
15 expertise. Such experience and expertise does not provide
16 grounds for recusal.

17 Much of Mr. Baiocchi's request for recusal rests
18 on disagreement with procedures and procedural rulings.
19 These are subject to review by the full board and may be
20 raised as part of legal briefs or as part of a petition
21 for reconsideration. Even assuming one or more of these
22 rulings in error, erroneous rulings are generally not
23 enough on their own to infer bias.

24 Without committing myself to how I might rule on
25 these issues if they are raised as part of a legal brief

1 or petition for reconsideration, at this point I see
2 nothing in the record that indicates Hearing Officer
3 Baggett demonstrated bias by requesting additional
4 information from protestants or by denying a request to
5 present direct testimony, cross-examine witnesses, and
6 present rebuttal by telephone.

7 Therefore, I deny Mr. Baiocchi's request for
8 recusal.

9 Marianna?

10 STAFF COUNSEL AUE: The next item is participation
11 of Anglers Committee of California.

12 On November 21st, 2007, Mr. Baiocchi requested by
13 phone that he be able to participate in the hearing on
14 behalf of Anglers Committee of California by submitting a
15 written closing brief rather than by appearing in person
16 to testify. This request was based on the clarification
17 that such participation would not prejudice Mr. Baiocchi's
18 ability to request reconsideration of any final decision
19 the State Water Board reaches on the petitions presented.

20 Hearing Officer Art Baggett found that such
21 participation would not prejudice any party and would
22 eliminate the need for Mr. Baiocchi to appear in person.
23 On November 27th, 2007, Hearing Officer Art Baggett issued
24 an Order on Hearing Participation that approved
25 Mr. Baiocchi's request to participate in the manner just

1 described. No objections by any participants were
2 submitted by the specified deadline of November 29th,
3 2007.

4 Also, by e-mail dated November 30th, 2007,
5 Mr. Baiocchi notified staff that Dr. Henry H. Smith will
6 represent the Anglers Committee at this hearing and that
7 he will cross-examine witnesses on behalf of the Anglers
8 Committee.

9 I now ask Hearing Officer Arthur Baggett to
10 confirm for the record the approved manner of
11 participation by Anglers Committee representatives,
12 Mr. Baiocchi and Dr. Smith.

13 HEARING OFFICER BAGGETT: Just to make the record
14 clear, I will permit Mr. Baiocchi to participate at the
15 hearing through his written submission of a closing brief
16 and a policy statement, if he so chooses, rather than
17 appearing in person for direct testimony,
18 cross-examination, and rebuttal. And I also will permit
19 Dr. Smith to represent him for cross-examination purposes
20 only.

21 So with that, move exhibits?

22 STAFF COUNSEL AUE: Yeah. So the items listed as
23 staff exhibits in the Notice of Public Hearing dated
24 September 6, 2007, and listed in the November 20th, 2007,
25 letter regarding additional evidence, are hereby offered

1 into evidence by reference as staff exhibits.

2 Are there any objections to this evidence?

3 HEARING OFFICER BAGGETT: Any objections?

4 MR. LILLY: Alan Lilly. I'm the attorney for the
5 Yuba County Water Agency.

6 We do not object to staff exhibits being entered
7 into the order. However, we would like the clarification
8 that any use of them by the State Board in its
9 decision-making is subject to the rules, both the State
10 Board's Regulations sections 648.5.1 and Government Code
11 section 11513 which limit the use of hearsay evidence
12 basically according to the rules of court. So we do want
13 to make sure our objection was stated. Many, many of
14 these exhibits contain hearsay statements, and any use of
15 those hearsay statements should only be allowed subject to
16 those regulations and that statute.

17 HEARING OFFICER BAGGETT: We received that
18 objection in writing already.

19 MR. LILLY: Just to clarify, the objection before
20 was on the new delta -- there were some new declarations
21 from the NRDC versus Kempthorne litigation, and the
22 question was whether there were objections to that.

23 This objection now is to all of the staff exhibits
24 that had not previously been asked about. So I'm stating
25 that now for the record.

1 HEARING OFFICER BAGGETT: Obviously we'll follow
2 our own regulations. So if that satisfies you.

3 MR. LILLY: Thank you.

4 STAFF COUNSEL AUE: Additionally, staff also
5 recommends that the board take official notice of the
6 Interagency Ecological Programs 2006, 2007 Work Plan to
7 evaluate the decline of pelagic species in the upper San
8 Francisco Estuary, and the Board take official notice of
9 Interagency Ecological Programs 2005 Pelagic Organism
10 Decline Synthesis Report from 2005.

11 Are there any objection?

12 HEARING OFFICER BAGGETT: Mr. Lilly?

13 MR. LILLY: Alan Lilly.

14 Again -- and that objection, Mr. Baggett, you are
15 correct; we did state that in the letter. And we would
16 have no objection to them being admitted to the record.
17 But any use of the hearsay statements in them should be
18 subject to the State Board's regulation and Government
19 Code 11513.

20 And the reason I'm stating this objection is that
21 that statute says that the rule only applies if an
22 objection is stated. So I do have to state the objection
23 for the record in order for the statute to apply.

24 HEARING OFFICER BAGGETT: I understand. And I
25 think the Board will take official notice of the two

1 exhibits requested by staff, and you have preserved your
2 opportunity. And there will be opportunities for briefs
3 and a draft order and so on.

4 Thank you.

5 With that --

6 STAFF COUNSEL AUE: Did we officially move them
7 into evidence and take official notice?

8 HEARING OFFICER BAGGETT: They are moved into
9 evidence. Okay. We've got the objection. It's noted.
10 We can accept them as evidence.

11 STAFF COUNSEL AUE: Okay.

12 HEARING OFFICER BAGGETT: Before we begin the
13 evidentiary presentations, we'll hear from any speakers
14 who wish to make a non-evidentiary policy statement, who
15 wish to make a policy statement, and have not submitted a
16 Notice of Intent to Appear. Fill out a blue card. If you
17 already have, there's no need. If you have already handed
18 it in, then you do not need to fill out the blue card. We
19 will also accept written policy statements from those who
20 don't want to present orally.

21 A policy statement is not an evidentiary
22 statement. It is subject to the limitations listed in the
23 hearing notice. Persons making policy statements must not
24 attempt to use their statement to present factual evidence
25 or orally or by introduction of written exhibits. They

1 will be limited to ten minutes or less, and we will begin
2 with those.

3 The U.S. Bureau of Reclamation. Do you have a
4 policy statement?

5 MR. COLELLA: Good morning. My name is Bob
6 Colella, and I'm a water rights specialist for the Bureau
7 of Reclamation. The Reclamation has previously submitted
8 its policy statement in support of the water rights
9 changes sought by Yuba County Water Agency to its permits.

10 This is a new day, a remarkable day. This hearing
11 itself demonstrates that major breakthroughs and the
12 resolution of very difficult issues by parties holding a
13 variety of interests are realistic and achievable.

14 The proposed Yuba Accord is a result of
15 collaboration among Yuba, irrigation, environmental, and
16 fisheries interests, and state and federal agencies.
17 Reclamation urges this Board to expedite implementation of
18 the Yuba Accord by approving Yuba's petitions for change.

19 This hearing represents a wonderful opportunity
20 for this Board to encourage parties to continue to work
21 hard together and for this Board to help keep the momentum
22 going to incur similar breakthroughs in the future.

23 Thank you.

24 HEARING OFFICER BAGGETT: Thank you.

25 Westlands Water District followed by San Luis and

1 Delta-Mendota Water Authority.

2 MR. RUBIN: Good morning. John Rubin for San Luis
3 and Delta-Mendota Water Authority and Westlands Water
4 District, speak on behalf of both entities.

5 And just very briefly --

6 CO-HEARING OFFICER HOPPIN: John, do you see, when
7 we have an important hearing, we give you a real
8 microphone?

9 MR. RUBIN: The Authority and Westlands have been
10 engaged in the development of the Accord and specifically
11 the Water Purchase Agreement, one of the key components of
12 the Accord.

13 The Authority has negotiated with the Department
14 of Water Resources an agreement that provides the terms
15 and conditions under which the Authority would be
16 purchasing water made available under the Water Purchase
17 Agreement. The authority has taken the necessary steps to
18 comply with the California Environmental Quality Act and
19 is in the process right now of memorializing the terms of
20 the agreement. The Authority believes it will be in a
21 position to sign the agreement between DWR and the
22 Authority within the next week or two.

23 Because of the circumstances, I think Bureau of
24 Recommendation eloquently stated, the Authority is
25 requesting that the State Water Resources Control Board

1 approve the petitions as requested by the Yuba County
2 Water Agency.

3 Thank you.

4 HEARING OFFICER BAGGETT: Thank you.

5 California Department of Fish and Game.

6 MS. MOREY: Hello. I'm Sandra Morey, the regional
7 manager of the north central region of the California
8 Department of Fish and Game. Yuba County is located in
9 the Department's north central region.

10 We've previously submitted our policy statements,
11 so I will just summarize them briefly here.

12 I am here today to voice the Department's support
13 of the YCWA petition that's now before you.

14 The Department was involved throughout the process
15 that led to the Lower Yuba River Fisheries Agreement, an
16 element of the Yuba Accord. And we plan to actively
17 participate on the river management team for the Fisheries
18 Agreement.

19 The Department supports implementation of the
20 Water Purchase Agreement that is part of the Yuba Accord
21 as the financial element helping to make the Yuba Accord a
22 success.

23 And we urge the State Water Resources Control
24 Board to approve the petitions before today and create a
25 path forward for the implementation of the Yuba Accord.

1 Thank you very much.

2 HEARING OFFICER BAGGETT: Good morning.

3 MR. BONHAM: My name is Chuck Bonham. I'm the
4 California director for Trout Unlimited. I would like to
5 say good morning to Hearing Officer Baggett and Co-Hearing
6 Officer Hoppin.

7 I'm making this policy statement this morning also
8 on behalf of the Bay Substitute as well as Friends of the
9 River.

10 By the end of the day, we will provide a written
11 copy of this policy statement, which I expect will also
12 include the South Yuba River Citizens League.
13 Logistically, we haven't been able to confirm that because
14 of Mr. Rainey's travel schedule over the last two days.

15 The central question for the Board in this hearing
16 is whether the Board should approve the petition for
17 modification of water right permits. We answer in the
18 affirmative, yes, the Board should approve. There's a
19 critical ancillary question for our organizations, and
20 that is whether implementing the petition changes to
21 revised decision 1644 and implementing the Yuba Fisheries
22 Agreement would provide a level of protection for
23 fisheries equal to 1644 or greater.

24 Again, we answer in the affirmative, yes, it would
25 provide an equal or greater level of protection for

1 critical public trust resources in the Lower Yuba River.

2 As you know, our organization's filed suit against
3 1644. We subsequently entered into negotiations with Yuba
4 County and the Department of Fish and Game. I can say
5 they were difficult. They were lengthy.

6 You may also know that in May of 2007, we signed a
7 proposed or -- excuse me, a statement of support for the
8 Fisheries Agreement and reserved our right to execute the
9 final agreement based on review under California
10 Environmental Quality Act. This review's been done.
11 We've since signed the Fisheries Agreement. My
12 understanding is, you have a fully executed Fisheries
13 Agreement in front of you.

14 In most years under most conditions, more flow
15 would be provided under the agreement than 1644. We
16 expect that Yuba County will present detailed information
17 about the equivalency or better protection for public
18 trust resources. The agreement also provides dedicated
19 funding for restoration projects and establishes an
20 adaptive management collaborative effort to manage the
21 Lower River, going forward.

22 Concurrent to the negotiation for the Fisheries
23 Agreement, there was also a negotiation for a proposed
24 transfer agreement, I think now called the Purchase
25 Agreement. We did not participate in those negotiations;

1 we are not parties to that agreement.

2 So we have a comment about transfer. The majority
3 of water transferred under the Purchase Agreement would
4 use priority EWA dedicated capacity during the summer and
5 fall period. Therefore, it represents the first rather
6 than the last increment of export pumping. Consequently,
7 we believe the Purchase Agreement should not result in new
8 incremental increases in exports or export-related
9 impacts.

10 However, water transferred as the last increment
11 of export pumping should be treated differently. We're
12 deeply concerned about the prospect of additional
13 incremental stresses on the ecosystem of the Bay Delta.
14 And we would refer you to our written policy statement on
15 that point.

16 By way of conclusion, let me turn back to
17 something which I think is of great value to me,
18 personally, and the more important story here. I did a
19 count this morning. The Lower Yuba River is a
20 15-year-and-running water right dispute. I counted 27
21 days of hearing, at least three draft decisions, several
22 full rounds of briefing before state courts, I think one
23 preliminary injunction, extensive public comment, and now
24 full CEQA review on a proposed alternative.

25 We're turning a corner here. In 2007, there are

1 very few reasons to celebrate in water, in California.
2 This is one of them. From our view, there's no downside
3 to this chapter. Hope about California's water future is
4 sorely needed. For us, the Fisheries Agreement is an
5 important step for a new water future on the lower Yuba
6 River.

7 Thank you.

8 HEARING OFFICER BAGGETT: Thank you. Kern County
9 Water Agency.

10 MR. WALTER: Hi, Board Members. I'm just trying
11 to clarify --

12 THE REPORTER: State your name, please.

13 MR. WALTER: Hanspeter Walter representing the
14 Kern County Water Agency and State Water Contractors.

15 I'm just trying to clarify, we did file a notice
16 to appear for cross-examination, and I have an opening
17 statement. I realize this is a time for policy
18 statements. I wasn't sure if this was the appropriate
19 time to give that opening statement or if I will have
20 another opportunity.

21 HEARING OFFICER BAGGETT: I'm trying to -- just a
22 minute. The opening statements, it's under State Water
23 Contractors. We've got it. So you will get an
24 opportunity.

25 MR. WALTER: So in answer to that, later or now?

1 HEARING OFFICER BAGGETT: Yeah, later. We'll do
2 the opening statements. We'll get there in a few minutes.

3 Public Trust Alliance.

4 Good morning.

5 MR. WARBURTON: I'm Michael Warburton and director
6 of the nonprofit Public Trust Alliance.

7 As the name of our organization implies, we're
8 concerned with the defense of public trust rights and the
9 application of public trust law for the management of
10 California's natural heritage.

11 I submitted a written statement supporting changes
12 in behavior by the Yuba County Water Agency and operators
13 of the New Bullards Bar Dam which would help fish in a
14 stretch of the Lower Yuba River. But I also described my
15 concerns about the adjustments of water rights and the
16 allocation of payments that might make it appear that the
17 public has to buy back its own water from private
18 claimants to support public fisheries.

19 I was also concerned about just who was
20 representing public trusts in this public interest in this
21 transaction, which appears mostly to benefit contractors
22 of the water projects as the water gets through the delta.

23 And of course, there's the uncertainty about the
24 quantification of historical use and questions about
25 whether this deal may just enable larger delta exports and

1 take the place of other water needed to meet South Delta
2 standards.

3 This is a deal reflecting large commitments of
4 public resources -- both water and money and extensive
5 environmental and legal documentation that is hard to
6 understand and which puts general members of the public,
7 who might want to meaningfully participate in public
8 decision making at a tremendous disadvantage.

9 I said in my written statements that a better way
10 of introducing myself would be as the father of a young
11 girl growing up in the California that we're talking
12 about. Is it going to be a viable community supported by
13 responsible resource stewardship?

14 Attending the board meeting yesterday, I learned
15 that a random sample of 12 permits revealed 12 incidents
16 where they weren't in compliance with federal standards.

17 As a member of the public, I don't know what
18 federal standards are anymore. In natural resources
19 management in California, we're seeing how the
20 standards -- how low the standards are with relation to
21 who is out making key decisions and presenting arguments
22 and delisting endangered species. There's also a
23 revolving door between people who have been representing
24 the public and the Bureau of Reclamation and private
25 parties interested in private irrigation use and marketing

1 of public water. And people living in the -- by the
2 Klamath have seen the results of huge fish kills when the
3 GOP election apparatus swung into action up there.

4 What I'm hoping to see in this hearing is an
5 honest presentation of evidence and testing of that
6 evidence by parties with clear interests and actual
7 defense of state trust interests.

8 Anyway, I've been surprised by a lot of the
9 changes that have been happening. You know, I guess it
10 happens in water hearings all the time, even with this
11 27-year history. There's a lot of surprises about who's
12 appearing and what they are representing. And as a member
13 of the public, it's just a concern with that, that I'm
14 here. And I'm hoping that a clear decision and a really
15 good precedent comes out of this.

16 HEARING OFFICER BAGGETT: Thank you.

17 We have Michael Tucker, NOAA Fisheries, if
18 necessary.

19 MR. TUCKER: Good morning. I'm Michael Tucker
20 with National Marine Fisheries Service. We do have a
21 written policy statement that we're submitting, so I will
22 just do a quick summary of it.

23 National Marine Fisheries Service has been
24 involved with this process or at least the Yuba court
25 process from the very beginning, and we have helped to

1 develop the Fisheries Agreement and also sat in on lots of
2 meetings on the purchase agreement and basically the
3 entire Accord, and we do support it whole heartedly.

4 We do feel that the Fisheries Agreement and the
5 fisheries flows in the Lower Yuba River will basically,
6 you know -- you know, it will provide a level of
7 protection equal to or greater than that of 1964,
8 specifically for listed species, spring-run chinook salmon
9 and green sturgeon and central valley steelhead in the
10 Lower Yuba River, which is our primary charge as a federal
11 agency to enforce the Endangered Species Act.

12 We do also intend to continue to participate in
13 the -- in the NEPA, CEQA process as well as the ESA
14 process, and also will maintain our active role on the
15 River Management Team to help continue to manage the river
16 throughout the term of the Accord.

17 And that is all I have.

18 Thanks.

19 HEARING OFFICER BAGGETT: Thank you.

20 The last blue card of policy statement, Paul
21 Minasian.

22 MR. MINASIAN: I will make an opening statement at
23 the appropriate time.

24 HEARING OFFICER BAGGETT: We will now move to the
25 evidentiary --

1 MR. JOHNS: Mr. Baggett, if I may, the Department
2 of Water Resources also --

3 THE REPORTER: State your name, please.

4 HEARING OFFICER BAGGETT: A policy statement as
5 opposed to opening statement?

6 MR. JOHNS: We have a policy statement and we also
7 have an opening statement later on in the hearing. If we
8 could make that now, that would be helpful.

9 HEARING OFFICER BAGGETT: Why don't you make your
10 policy statement now, and then we're going to go to the
11 opening statements right afterwards. I want to give Yuba
12 County the opportunity of first opening statement.

13 MR. JOHNS: This is not an opening statement; this
14 is a policy statement from the Department of Water
15 Resources.

16 My name is Jerry Johns with the Department of
17 Water Resources. I'm a deputy director of the Department.

18 We have a written policy statement that we'll hand
19 out to the Board members, that Cathy Crothers will hand
20 out in a second.

21 But basically, the Department of Water Resources
22 supports to Yuba petitions to modify their water rights to
23 allow implementation of the Accord. The Department of
24 Water Resources and Yuba County Water Agency just recently
25 signed a Water Purchase Agreement to acquire this water

1 for long-term purposes and will be used for both the
2 environmental water count and for our dry year programs
3 that the Department has run in several years in the past.

4 The Water Purchase Agreement cannot be made
5 available or cannot be effective unless the implementation
6 of the Yuba Accord provisions as requested by Yuba County
7 Water Agency are approved by the Water Board. And the
8 water from this accord will be moved at a time that's
9 protective of fish as we've done for the environmental
10 water count for the last several years, since the EWA was
11 in place in 2000, and in our water transfers that we have
12 done at the Department for our dry year programs.

13 This year is -- last year, in 2007, was a dry year
14 in California. So far, precipitation this year is not
15 much better than last, and the reservoir levels are
16 extremely dry. This Accord would allow us, or this
17 purchase agreement would allow us, to be positioned well
18 in case next years are dry or future years are dry for our
19 dry year program.

20 The Purchase Agreement becomes basically the
21 financial engine that runs the Accord. Yuba County Water
22 Agency will talk about that in their direct testimony but
23 provides for not only direct costs of making the water
24 available but provides conversion of wells that currently
25 use diesel to electricity. It provides for groundwater

1 monitoring and rapid response plans that you might have
2 for the groundwater basins. It provides resources for the
3 fisheries studies that are talked about and in the fishery
4 agreement. And it allows Yuba County Water Agency to
5 invest in much needed levee improvements at a time in
6 California when levee improvements have never been more in
7 the public fore than they are today.

8 The Yuba Accord also provides for fishery flows in
9 the Lower Yuba River to resolve outstanding legal issues
10 that you have heard about already. The Board has a
11 long-standing tradition of allowing parties to resolve
12 their differences and stepping in and using their
13 authority in cases where such local solutions are not
14 possible.

15 Yuba County Water Agency has worked diligently
16 over the last several years with all the parties involved
17 in this controversy. And I think -- and has developed a
18 program that resolved those conflicts, and the Board
19 should seize upon the solution and allow its
20 implementation to its changes in the water rights that
21 Yuba County Water Agency proposes.

22 Yuba -- the Accord also provides Yuba County the
23 ability to reoperate the groundwater program in the Yuba
24 County area in a conjunctive use fashion. And conjunctive
25 use in California is something that is encouraged by the

1 California Water Plan. It provides for effective water
2 management in both servicing groundwaters and in a time
3 where we are attempting as a state to find additional
4 water resources between -- in terms of storage, this is an
5 opportunity for us to utilize our existing reservoirs, New
6 Bullards Bar, and groundwater resources in a conjunctive
7 manner to expand capabilities for water supplies in the
8 state.

9 In closing, the Department of Water Resources
10 believes that the Yuba Accord and the Water Purchase
11 Agreement and all the active moving parts of the Accord
12 resolve long, outstanding, legal issues and provides for
13 conjunctive use of water in a much more effective fashion
14 than it could be with annual agreements. It provides for
15 protection of environmental purposes in the delta and
16 provides water for our dry year programs.

17 It's a good deal for all the parties that are
18 involved in this effort, and we encourage the Water Board
19 to approve Yuba's petitions.

20 Thank you very much.

21 HEARING OFFICER BAGGETT: There's no other blue
22 cards.

23 Are there any other persons who want to make a
24 policy statement? We at least have a big enough room this
25 time.

1 With that, let's move on to the evidentiary
2 portion of the hearing for presentation of evidence and
3 related cross-examination by parties who have submitted
4 Notices of Intent to Appear. Because the only protestant
5 to the petitions has elected to participate by submission
6 of a written brief only, I will ask the remaining parties
7 to be as brief as possible.

8 First, let's get a -- I would like to get a list
9 of who's appearing for the parties. Yuba County Water
10 Agency?

11 MR. LILLY: Mr. Baggett, as I said earlier -- it's
12 Alan Lilly of Bartkiesicz, Kronick & Shanahan representing
13 Yuba County Water Agency -- we do have several witnesses
14 here, but I will introduce them when we get to them.

15 HEARING OFFICER BAGGETT: Department of Water
16 Resources?

17 MS. CROTHERS: My name is Cathy Crothers. I am
18 staff counsel at the Department of Water Resources and DWR
19 will put on some testimony after the Yuba County Water
20 Agencies.

21 HEARING OFFICER BAGGETT: We'll do opening
22 statements prior to that.

23 U.S. Bureau of Reclamation? Is anybody here
24 making an appearance for the Bureau?

25 MR. TURNER: We will not --

1 THE REPORTER: Come to the microphone, please.

2 MR. TURNER: I'm assistant regional solicitor Jim
3 Turner for the Department of the Interior. The Bureau of
4 Reclamation is simply going to be making a policy
5 statement. We will not be making any presentation of
6 evidence. We have, in fact, been permitted to
7 cross-examine if the need arises, but that would be our
8 only function.

9 HEARING OFFICER BAGGETT: That's exactly what I'm
10 trying to get on the record, who's representing for the
11 purposes of cross as well as opening statements.

12 Cordua, Mr. Minasian.

13 THE REPORTER: Excuse me. What did you say?

14 HEARING OFFICER BAGGETT: The irrigation district
15 is C-O-R-D-U-A.

16 MR. MINASIAN: My name is Paul Minasian. The
17 court reporter has a card. And I'm representing Cordua
18 for the purposes of cross-examination and possible
19 rebuttal.

20 HEARING OFFICER BAGGETT: And Westlands Water
21 District and San Luis and Delta-Mendota Water Authority.

22 MR. RUBIN: Good morning. John Rubin.
23 Diepenbrock Harrison. I'll be appearing for Westlands
24 Water District as well as the San Luis and Delta-Mendota
25 Water Authority.

1 And as we expressed in our Notice of Intent to
2 Appear, we are appearing solely for the purposes of
3 potentially cross-examining witnesses and possibly
4 rebuttal.

5 Thank you.

6 HEARING OFFICER BAGGETT: State Water Contractors
7 and Kern County Water Association.

8 MR. WALTER: Kern County Water Agency. Hanspeter
9 Walter, Kronick Moskowitz Teideman & Girard representing
10 State Water Contractors, Kern County Water Agency,
11 appearing for cross-examination and an opening statement.

12 HEARING OFFICER BAGGETT: Anglers Committee.

13 DR. SMITH: Good morning. I'm Hank Smith
14 representing the Anglers Committee, and I'm here to
15 cross-examine the witnesses.

16 HEARING OFFICER BAGGETT: Thank you.

17 With that we will now hear the parties'
18 case-in-chief in the following order. First, I think
19 we'll just do those who wish to make opening statements,
20 which I have noticed is four parties.

21 We'll start out with Yuba County Water Agency's
22 opening statement, followed by Department of Water
23 Resources.

24 MR. LILLY: Good morning, Mr. Baggett, Mr. Hoppin,
25 Board staff, members of the public.

1 As I've said earlier, my name is Alan Lilly, and I
2 represent the Yuba County Water Agency. And I will note,
3 I've represented the Yuba County Water Agency in Yuba
4 River proceedings since 1990, which was a long time ago.

5 I have submitted a written opening statement which
6 goes into quite a bit of detail, as authorized by the
7 hearing notice, and I've served that on all parties on the
8 service list. So to save time, I'm certainly not going to
9 repeat all the points in that statement, and instead, I
10 will just briefly summarize five key points:

11 First of all, Yuba County Water Agency has worked
12 hard over the last six years to reach consensus and has
13 reached consensus with all the major participants in the
14 RD 1644 process. This, of course, is demonstrated both by
15 the signatories to the various Yuba Accord agreements and
16 to the policy statements you have just heard this morning.

17 This certainly is one of the most significant
18 multiparty consensus packages in the history of California
19 water law. It was not easy. It took a lot of time. It
20 took a lot of details. It took a lot of the give and
21 take, but we've made it, and we're proud of it. And we
22 hope that the Board will be able to approve our petition
23 so it can go forward.

24 As the result of this consensus with the Yuba
25 Accord, the flows and other related matters are now going

1 to be better for the fisheries in the Lower Yuba River,
2 the Feather River, the Sacramento River, and the Delta,
3 and for the other beneficial uses of water in these water
4 bodies that could be resulted through any decision arising
5 out of an adversarial process. Quite frankly, with a give
6 and a take and multiple negotiations, a lot more can be
7 achieved than can ever be achieved in an adversarial
8 process.

9 As we've said, the parties that worked to develop
10 the Yuba Accord Fisheries Agreement included both the
11 state and federal resource agencies with statutory
12 responsibility for protecting fish and the Lower Yuba
13 River and the Delta as well as several nongovernmental
14 organizations.

15 The resource agency staff members that worked with
16 Yuba County Water Agency and the NGOs to develop the Yuba
17 Accord are the people in these agencies -- Mike Tucker and
18 others -- with the most experience and knowledge about the
19 Yuba River. And they use the most recent data and
20 information to develop the instream flow schedules;

21 Point number two, the three Yuba Accord agreements
22 and the flow schedules in the Fisheries Agreement are a
23 package. The Fisheries Agreements specifies the flow
24 schedules. The Water Purchase Agreement and the
25 conjunctive use agreements then take the necessary steps

1 so that the whole package can be implemented. No part of
2 the package can be changed without seriously disrupting
3 the other parts of the package and frankly risking
4 derailing or killing the whole Yuba Accord;

5 Point number three, the Yuba Accord will not
6 unreasonably affect and, in fact, as we've heard from both
7 Fish and Game and National Marine Fisheries, will provide
8 an equivalent or better level of protection for fish in
9 the Lower Yuba River than would be provided under Revised
10 Decision 1644. These conclusions are discussed in detail,
11 separately, for each fish species and each run of the
12 major fish species of management concern in the Lower Yuba
13 River in the Yuba Accord EIR/EIS, which is based on
14 several extensive technical analyses of several different
15 scenarios.

16 And I will just note, parenthetically, no similar
17 analysis was conducted, and no EIR or EIS was prepared
18 before either D 1644 or RD 1644 was adopted;

19 Fourth point, the Yuba Accord will not
20 unreasonably affect fish in the Delta. And probably most
21 important, in light of yesterday's extensive -- yesterday
22 afternoon's extensive workshop, which I know the board
23 members were present for, exports of Yuba Accord water
24 from the Delta will be subject to the terms, conditions,
25 and requirements of all of the State Water Resources

1 Control Board decisions and orders, the 1641 and all of
2 the related orders, all biological opinions that apply to
3 the Delta, and all court orders that apply to DWR or
4 reclamation pumping from the Delta. We're not asking for
5 any exceptions. We fully recognize that the Accord will
6 be subject to all present and future requirements that
7 apply to the state and federal water projects for Delta
8 exports.

9 The Yuba Accord will help DWR reclamation mitigate
10 some of the water supply impacts from the recent court
11 orders that limit winter and spring pumping, basically by
12 providing some -- some, certainly not all, but some
13 make-up water during the summer. So stated simply, the
14 Yuba Accord is not part of the Delta problem; it will be
15 part of the Delta solution;

16 And finally, the fifth point, to avoid having to
17 go back of the court where the pending litigation or --
18 excuse me, where the litigation on RD 1644 is pending, the
19 Yuba County Water Agency needs to have the State Water
20 Board approve these pending petitions before the end of
21 March of next year, because that is when the long-term
22 requirements in RD 1644 are scheduled to go into effect.

23 We have submitted proposed ordering provisions in
24 our written opening statement -- that's exhibit C, D, and
25 E -- and that's what we request that the Board adopt after

1 this hearing is completed.

2 We will be prepared, when we get to the step, to
3 present a detailed and honest presentation of evidence on
4 public trust and related resources. And as I said
5 earlier, I will introduce our witnesses at that time.

6 Thank you.

7 HEARING OFFICER BAGGETT: Thank you.

8 Does the Department of Water Resources have an
9 opening statement?

10 MS. CROTHERS: Good morning, Chairman Baggett and
11 members of the board and staff.

12 THE REPORTER: State your name.

13 MS. CROTHERS: I just have a -- my name is Cathy
14 Crothers from the Department of Water Resources. I just
15 have a brief statement that I would just like to introduce
16 our testimony that we will be presenting. I don't really
17 have a formal opening statement that I submitted in
18 advance.

19 But in brief, DWR's testimony that we will be
20 presenting will explain the rule that DWR has in the Yuba
21 Accord, and it is that we will be purchasing the water
22 that's made available by the Yuba County Water Agency
23 through the Accord. And as our deputy director Jerry
24 Johns previously said, that will help with providing funds
25 for the programs that are identified in the Accord's EIR,

1 such as flood control and participation on the fishery
2 management teams.

3 The transfer of water that will occur through the
4 Delta will be subject to all the permits and obligations
5 that DWR has when such transfers are done through our
6 facilities. And I would like to note that through this
7 long-term water purchase agreement, DWR believes that this
8 is a preferred method of providing these dry year water
9 supplies in the EWA water that we have been purchasing
10 from the Yuba County Water agency over the last many
11 years, and that this will be a long-term agreement that
12 will improve the abilities to use the funds for things
13 such as a water -- a fish management team program or flood
14 control purposes, that you really can't obtain through a
15 year-to-year program that we have been implementing in the
16 last, yet, several years.

17 So anyway, I just wanted to summarize that we will
18 be providing a summary of the Water Purchase Agreement and
19 the water operations through the Delta that permit that
20 transfer.

21 Thank you.

22 HEARING OFFICER BAGGETT: Thank you.

23 Kern County Water Agency.

24 MR. WALTER: Good morning, Board Members. My name
25 is.

1 THE REPORTER: Use the microphone, please.

2 MR. WALTER: My name is Hanspeter Walter.

3 THE REPORTER: Use the microphone. It's not close
4 enough. Use the tall one.

5 MR. WALTER: Can you hear me?

6 THE REPORTER: Barely.

7 MR. WALTER: I've never been accused of being
8 quiet. I'm trying to speak up.

9 Hanspeter Walter, Kronick Moskovitz Tiedemann &
10 Girard representing the State Water Contractors and Kern
11 County Water Agency.

12 Members of the board, the petitions before you
13 today ask you to take several specific actions, namely,
14 first, to approve certain changes to the water rights of
15 the Yuba County Water Agency through amendments to revise
16 Water Right Decision 1644; and secondly, to approve the
17 long-term transfer of water from the Yuba County Water
18 Agency to the state water project, the Environmental Water
19 Account, and the Central Valley project.

20 The State Water contractors, including Kern, focus
21 primarily on the water purchase agreements, but this was
22 in recognition of the fact that as Jerry Johns said, these
23 are the driving force that provides a funding and other
24 mechanisms to make the benefits of the Accord as a whole
25 realized.

1 We think that the Accord represents a win-win-win
2 for the State of California.

3 First, it's a win for the public's fisheries and
4 biological and recreational resources, because, as has
5 been mentioned, part of the Accord, the Lower Yuba River
6 Fisheries Agreement provides sustaining flows in that
7 river and downstream.

8 Additionally, the Accord supports the River
9 Management Fund, which the State Water Contractors and
10 Kern County Water Agency wholly support, and, in fact, the
11 funding -- the revenue from the water transfers will
12 support the River Management Fund.

13 The transfers of the water allow multiple uses of
14 the water -- first, to provide fisheries benefits and then
15 later to provide Environmental Water Account water and
16 water for the state water project and Central Valley
17 project users. This is the kind of forward thinking, the
18 type of actions, that California needs that both provide
19 significant benefits to natural resources and water users
20 throughout the state.

21 Secondly, the Accord is win for the local water
22 users in Yuba County because part of the Accord is a
23 conjunctive use agreement between that agency and its
24 member units. The funding and mechanisms through that
25 will provide for better management of surface and

1 groundwater supplies, allowing those entities to cope
2 better with annual variation in the Yuba River's
3 hydrology.

4 And lastly and most importantly, from our
5 perspective, the Accord is a win for the millions of
6 Californians and the hundreds of thousands of acres of key
7 farmland that depends on the state water project and the
8 Central Valley project water supplies.

9 This is the kind of innovative thinking and
10 cooperation necessary for California to avoid drastic
11 water reductions in the next drought.

12 There is full agreement now between the state
13 water project contractors, the Yuba County Water Agency
14 and the Department of Water Resources on the terms of the
15 various water transfer contracts. The state water project
16 contractors, including Kern and the CVP export
17 contractors, will provide the necessary funding.

18 Numerous agencies, as you've heard, support this
19 agreement and have worked tirelessly for many years in
20 support, to make this day a reality. DWR, the Bureau,
21 Fish and Game, NMFS, Yuba County Water Agency, all the
22 state water project and Central Valley project contractors
23 are but a few examples.

24 Additionally, you've heard that there are public
25 and private interests that have made significant

1 contributions and support the Accord, including Trout
2 Unlimited, The Bay Institute, and Pacific Gas & Electric.

3 So today, Board Members, you have the unique
4 opportunity before you to, one, take actions that benefit
5 all these multiple interests; to two, set an example of
6 good water management and policy for this state; and
7 third, to provide potential divisive litigation and water
8 rights disputes on the Yuba River.

9 So in sum, the State Water Project contractors and
10 Kern County Water Agency urge approval of the petitions
11 before you today. In this way, the Yuba Accord can serve
12 as a positive example of the cooperative water management
13 and negotiations necessary as California forges ahead into
14 a changing hydrologic future.

15 I have a written statement if I could move that
16 into the record. I have numerous copies. I did not have
17 it available until late last night.

18 HEARING OFFICER BAGGETT: I don't know that it --
19 we'll accept it as part of the record but it won't be an
20 evidentiary statement. We will accept it as part of the
21 record. Please provide staff.

22 Any other parties. Mr. Minasian, do you have an
23 opening statement?

24

25 MR. MINASIAN: Thank you. My name is Paul

1 Minasian appearing for Cordua Irrigation District, a small
2 district located north of the Yuba River.

3 Hopefully, our questioning will be aimed at two
4 very precise points:

5 First, the chairman has sent an excellent letter
6 explaining the ramifications to the meaning of the
7 intention of pages 110 and 111, which provides information
8 in regard to waterfowl and crop use after the harvest of
9 rice.

10 Our questioning will be designed to encourage the
11 Board to include the contents of that letter within its
12 decision, approving the modifications of 1644, so that it
13 is permanently of record, and not simply a letter from the
14 chairman;

15 The second point of our questioning will be in
16 regard to this problem, which Cordua is faced with, and we
17 want to find a mechanism which provides the least burden
18 to the Yuba County Water Agency and to the Department of
19 the Water Resources, but provides a reasonable level of
20 protection for groundwater users within Yuba County and
21 which provides protection for the Board in terms of its
22 reputation in the future.

23 The Board has asked to approve on a lock stop
24 whole basis transfers of up to 200,000 acre-feet per year,
25 during the term of this agreement. Our questioning will

1 be aimed at asking the board to put a caveat or condition
2 upon that approval.

3 We believe the Yuba County Water Agency will
4 endeavor to protect the groundwater basin from stress and
5 overdraft. There will be nothing worse than to approve
6 this deal with the optimism that has been expressed today
7 and find, all of a sudden, wells drying up, chaos, and the
8 Board basically blamed for that. We're confident the
9 parties in the local area will try to avoid that.

10 Our questioning will be designed to encourage the
11 Board to include a condition that if the water levels in
12 the area north of the Yuba River fall to the same level
13 that they were at in the fall of 1991 -- you will
14 remember, 1991 was a massive ground water pumping year in
15 order to aid the whole of the state. If they fall to that
16 level, that the Board's approval of transfers is suspended
17 until a further order of the Board -- now, that has two
18 palliative and beneficial effects, we believe. One is it
19 makes it much less likely that groundwater will be pumped
20 in. We sort of needed it. It's a good idea here, and
21 instead, saved for the sort of problems that we have as a
22 result of not building new dams and reservoirs for 30
23 years.

24 The second is, it will encourage the parties that
25 are working where the agency in regard to groundwater

1 pumping -- and Cordua will not be one of those probably,
2 except to the extent of the phase A pumping. It will
3 encourage them to use good management practices and not
4 wait for the alarm bells to go off.

5 Thank you.

6 HEARING OFFICER BAGGETT: Thank you. Any other
7 opening statements from any other parties?

8 If not, before testifying, witnesses should
9 identify their written testimony as their own and affirm
10 that it is true and correct. Witnesses should summarize
11 the key points in their written testimony, and please do
12 not read the written testimony into the record.

13 Direct testimony will be followed by
14 cross-examination by other parties. Board staff, myself,
15 and Mr. Hoppin.

16 Redirect testimony is permitted, followed by
17 recross, and recross-examination always is limited to
18 scope of the redirect.

19 After all case-in-chiefs are complete, the parties
20 may present rebuttal evidence. Parties are encouraged to
21 be efficient in presenting their case and their
22 cross-examination. Except where approved with a
23 variation, will follow the procedures set forth in the
24 Board's regulations and hearing notice.

25 We will discuss the need in closing briefs at the

1 end, at length, and whether we needed closing oral
2 argument -- I don't anticipate any, but we will see how
3 the day goes.

4 With that in mind -- first, we only have two
5 cases-in-chief, the Yuba County Water Agency and the
6 Department of Water Resources. So at this time, I will
7 administer the oath.

8 Will those persons who testify today please stand
9 and raise your right hand.

10 (All testifying parties were administered
11 the oath by Hearing Officer Baggett.)

12 HEARING OFFICER BAGGETT: With that, we will start
13 with the Yuba County. We have an opening statement. It's
14 10:00 o'clock.

15 You can go off the record for a minute.

16 (A discussion was held off the record.)

17 (Thereupon a break was taken in
18 proceedings.)

19 HEARING OFFICER BAGGETT: With that, we are back
20 on the record.

21 And Mr. Lilly, you may proceed.

22 MR. LILLY: Thank you, Mr. Baggett. And I won't
23 introduce everyone at once here. I'll introduce people as
24 they speak.

25 One important person I do want to introduce to

1 begin with is Amanda O'Connell who's running our projector
2 here. So when you hear people say, "Amanda, could you get
3 that page," that's her. She is responsible for pulling up
4 all exhibits on the screen as necessary.

5 And with that, I will introduce Curt Aikens, the
6 Yuba County Water Agency's general manager and our first
7 witness.

8 And Mr. Aikens, please state your name and spell
9 your last name for the record.

10 MR. AIKENS: My name is Curt Aikens, last name is
11 spelled A-I-K-E-N-S.

12 MR. LILLY: Have you taken the oath this morning?

13 MR. AIKENS: Yes, I have.

14 MR. LILLY: Are there any corrections to your
15 written testimony that you want to make?

16 MR. AIKENS: Yes, there is one question. That's
17 on page 2, line 2, the second SWP should be changed to
18 "CVP."

19 MR. LILLY: Thank you.

20 And I noticed in your paragraph 7 of your direct
21 testimony, you state that the notice of determination for
22 the final EIR/EIS was filed with the Yuba County clerk on
23 October 24th.

24 Since that date, has any -- first of all, have you
25 or people under your direction checked with the Yuba

1 County Superior Court to see whether any legal challenges
2 have been filed to the EIR/EIS?

3 MR. AIKENS: Yes, we have.

4 MR. LILLY: And have any challenges been filed as
5 of the most recent checking?

6 MR. AIKENS: No, they have not.

7 MR. LILLY: And was that most recent check after
8 the 30-day statute of limitations?

9 MR. AIKENS: Yes, it was.

10 MR. LILLY: And next, just to update, please tell
11 us the current status of the Yuba Accord Water Purchase
12 Agreement and the associated Tier 3 agreements.

13 MR. AIKENS: As you heard from Jerry Johns, the
14 Water Purchase Agreement has been signed by both parties.
15 I have a copy of it.

16 Also, on the Tier 3 agreements, there is a board
17 approval by Kern County Water Agency, Met's Board to
18 sign -- also by San Luis and Delta-Mendota Water Authority
19 to sign the agreement. My understanding, they have
20 agreement on all the terms. They are just finalizing the
21 contract itself, and it should be completed within the
22 next two weeks.

23 MR. LILLY: Please just clarify who Met is for the
24 record.

25 MR. AIKENS: Metropolitan Water District.

1 MR. LILLY: And please also tell us the current
2 status of the conjunctive use agreements for the Yuba
3 Accord.

4 MR. AIKENS: We have five signed conjunctive use
5 agreements, and that's sufficient to implement the Accord.

6 MR. LILLY: And what is the status of the proposed
7 amendment of the 1966 Power Purchase Contract between Yuba
8 County Water Agency and PG&E for the implementation of the
9 Accord?

10 MR. AIKENS: We have a letter from PG&E basically
11 saying that they see this as the ability to move forward
12 on that. We're in discussions right now, finalizing a
13 contract, and we expect that to be finalized within the
14 early part of 2008.

15 MR. LILLY: So in summary, please state what are
16 the remaining outstanding conditions for the Yuba Accord
17 Fisheries Agreement to be able to go into effect.

18 MR. AIKENS: There's the Tier 3 agreements, which
19 we expect within the next two weeks. There's approval of
20 the State Water Resources Control Board of the two pending
21 petitions. And there's the PG&E agreement, YCWA, and the
22 Power Purchase Contract.

23 MR. LILLY: And those are the only remaining
24 conditions before the Fisheries Agreement will go into
25 effect?

1 MR. AIKENS: Yes.

2 MR. LILLY: All right. And now, please, going --
3 using your slides that were submitted as part of your
4 system, please briefly summarize your direct testimony.

5 MR. AIKENS: Well, Mr. Baggett, we remember past
6 hearings. In 2003, you encouraged the parties to continue
7 their settlement efforts to come to a resolution on a
8 long-term solution for the Yuba. We've achieved that
9 settlement, as you've heard today. The Fisheries
10 Agreement is the foundation of the Accord. It was created
11 by the most knowledgeable fishery biologists on the Yuba
12 River from the three fishery agencies, from NGOs, and on
13 that YCWA term. That occurred over a two-year period. We
14 used the most current data, the best science, to build the
15 accord flow schedules and the accord agreements.

16 And once we had a solid foundation there, we went
17 onto complete the other two agreements to move forward on
18 the Accord.

19 2006 was 175 percent runoff year resulting in
20 Accord Schedule 1 classification. Because the Delta was
21 in excess conditions, there were no water transfers and no
22 earned revenues to YCWA. There were significant expenses
23 paid by YCWA and other parties to move the Accord forward.

24 2007 was a 52 percent water year resulting in
25 Accord Schedule 2 classification and a D 1644 dry year

1 classification. Delta balance conditions allowed all the
2 pilot water be transferred to the EWA program.

3 The pilot resulted in 60,000 acre-feet of higher
4 minimum instream flows under the Accord than what would
5 have occurred under D 1644 long-term. This is because the
6 Accord better matches available better water to the flow
7 requirements for the fish.

8 Two pilot years showed the durability of the
9 Accord by testing it under both wet and dry conditions by
10 providing two years or about \$1.2 million of funding for
11 the river management team, of which 1.1 million came from
12 YCWA and water transfer revenues.

13 The River Management Team has been working
14 together on planning and conducting studies. And the two
15 years have allowed us to test other provisions in the
16 accord agreements. The bottom line is the two years of
17 pilot Accord program showed that there were no major flaws
18 in the Accord, and the experience gained allowed us to
19 refine the agreements. I would like to acknowledge that
20 if it were not for the State Board approval of these two
21 pilot programs, we would not be here today.

22 On November 22nd, a significant EIR milestone was
23 achieved. No legal challenges were filed within the
24 30-day window of the notice of determination. This is
25 another strong indicator of the durability of the Accord

1 and as a result of many hard years of work.

2 On a local basis, the Accord benefits include
3 resolution of nearly two decades of controversy that will
4 resolve the pending legal actions; higher instream flows
5 that provide water for the fish when it is most
6 beneficial; a collaborative working partnership focusing
7 on the Yuba Fishery; a YCWA funding source to pay for the
8 ongoing Accord expenses, which are substantial; a funding
9 source to help pay for the hundred-some millions of
10 dollars desperately needed in flood protection and water
11 supply projects, and that's a primary mission of the Water
12 Agency. The devastating 1986 and 1997 floods in Yuba
13 County resulted in three deaths and over \$500 million in
14 damages.

15 The Yuba is a poor county and the water transfer
16 revenues that YCWA have received, in the past, were the
17 only sources of money for these public safety projects.

18 The Accord also provides benefits to the farmers
19 in terms of less water supply deficiency pumping and also
20 a source of revenues that helps the local economy.

21 On a statewide basis, the accord benefits
22 additional water flow to the Delta during balanced
23 conditions; an economic and long-term water supply for the
24 EWA program; additional water supply for the CVP and State
25 Water Contractors during scarce supplies.

1 The Kempthorne decision did not impact the
2 overall accord. It did support its structure. The Accord
3 water transfers were not significantly impacted because
4 they occur from July through October and not the December
5 through June, when Kempthorne limits pumping.
6 Restructuring occurred because Kempthorne caused
7 reclamation to postpone participation in the Accord. DWR
8 will buy all the water until reclamation joins in the
9 second phase.

10 Since the Kempthorne decision occurred after
11 distribution of the EIR/EIS public draft in June, an
12 additional analysis was formed to determine whether or not
13 this new court decision would affect the analysis of the
14 Accord impacts and EIR/EIS. The new analysis shows that
15 there are no additional significant impacts either with
16 the DWR-only or the DWR and reclamation phase.

17 Over the past six years, we have taken a concept
18 and turned it into a tested agreement. We have a signed
19 Fisheries Agreement by four key NGOs, DFG, and YCWA. And
20 this agreement is supported by NMFS and Fish and Wildlife
21 Service. We have a signed Water Purchase Agreement. We
22 have five conjunction use agreements that are signed. We
23 have a comprehensive EIR with no legal challenges and only
24 one significant impact of additional energy consumption
25 for groundwater pumping. And we have successfully tested

1 the Accord over wet and dry year times and we did not find
2 any structural flaws.

3 The Accord continues to be viable under the
4 Kempthorne limitations. And there's only a few conditions
5 precedent that need to move the Accord forward. There's
6 the Tier 3 agreements, the PG&E contract, and the State
7 Board approval.

8 In summary, we took your encouragement to settle
9 the issue. We worked hard. We achieved consensus. We've
10 delivered a solid product. And now we're asking the Board
11 to move forward with the Accord and prove the package as
12 presented.

13 Thank you for your time.

14 MR. LILLY: Thank you, Mr. Aikens.

15 With that, we'll go to Andy Draper.

16 Dr. Draper, please state your name and spell your
17 last name for the record.

18 MR. DRAPER: My name is Andrew Draper, spelled
19 D-R-A-P-E-R.

20 MR. LILLY: And you might want to move the
21 microphone. You almost have to treat it like an ice cream
22 cone. Thank you.

23 MR. DRAPER: Is that better?

24 MR. LILLY: Yes.

25 MR. DRAPER: I'm a professional civil engineer in

1 the State of California. My qualifications have been
2 submitted as Exhibit YCWA 15.

3 MR. LILLY: Before you get into your detailed
4 summary, I just have to do a little bit of housekeeping.

5 Have you taken the oath today?

6 MR. DRAPER: I have taken the oath.

7 MR. LILLY: Okay. And then your direct testimony
8 is Exhibit YCWA 14. So please go ahead with your summary.

9 MR. DRAPER: I'm going to very briefly summarize
10 my written testimony which relates to three resource
11 areas: surface water supply, groundwater resources in Yuba
12 County, and surface water quality.

13 Surface water supply and management is described
14 in Chapter 5 of the draft EIR/EIS and in Appendix c. The
15 Yuba Accord could affect both water bodies and water
16 users. To look at these effects or potential effects, we
17 used a suite of modeling tools. These tools included a
18 reservoir operations model for the Yuba project. This
19 model was used to support testimony presented to the State
20 Board in the 2006 hearings. We used CalSim II which is
21 the generally accepted model of the Central Valley Project
22 and the State Water Project operations.

23 And lastly, we used DSM-2 which is the accepted
24 model for hydrodynamic and water quality model of the
25 Delta. I think those models are well known to the Board

1 members.

2 From our analysis using these tools, we make the
3 following conclusions. We did a comparative analysis of
4 Yuba operations under the Yuba Accord alternative,
5 compared to a no-project alternative. No-project
6 alternative is operation of the Yuba Project under RD
7 1644, long term.

8 Firstly, member unit allocations by YCWA would be
9 slightly higher under the Yuba Accord. Any reductions in
10 contract deliveries to CVP/SWP contractors south of the
11 Delta would be more than offset by water -- by Yuba Accord
12 water.

13 And lastly, with regard to Delta conditions,
14 changes would not significantly affect either Contra Costa
15 Water District's ability to fill Los Vaqueros Reservoir
16 for agricultural water users in the South Delta.

17 Turning now to groundwater resources within Yuba
18 County, the analysis is discussed in Chapter 6 of the
19 draft EIR/EIS.

20 Groundwater pumping under the Yuba Accord would be
21 triggered by three factors: Firstly, the commitment under
22 the Fisheries Agreement to provide 30,000 acre-feet of
23 groundwater institution pumping in Schedule 6 years;
24 secondly, there would be groundwater pumping to mitigate
25 any surface water deliveries by YCWA to its member unit;

1 and lastly, there would be member unit participation in
2 the conjunctive use agreement to provide grant water
3 substitution transfers.

4 We used a wealth of empirical field data to
5 characterize both the existing and historical conditions
6 in the groundwater basin below Yuba County. The analysis
7 considered both long-term regional impacts and short-term
8 local impacts to groundwater levels.

9 The next two slides show some of the details of
10 the groundwater modeling. And in the interest of time,
11 I'm just going to make two summary remarks: Looking at
12 the well hydrograph in the bottom right, you will see a
13 low point that occurred around 1982. Since the
14 introduction of the surface water deliveries to the South
15 Yuba Basin, groundwater levels have steadily risen.

16 MR. LILLY: Just to clarify for the record, you
17 were talking about Slide 10, and now you are going to
18 slide 11 of your testimony?

19 MR. DRAPER: That's correct.

20 Secondly, and in our groundwater simulation,
21 looking at monthly operations of the groundwater basin
22 over a 73-year period, the maximum drawdown on groundwater
23 storage that we anticipated was 180,000 acre feet. That
24 could potentially occur in a repeat of a six-year drought,
25 such as 1987 to 1992.

1 This reduction in groundwater storage would still
2 leave groundwater levels above the historical 1991 level
3 and significantly above the historical low that occurred
4 in 1982.

5 MR. LILLY: And just to clarify, Dr. Draper, that
6 slide is showing for the South Yuba Basin; is that
7 correct?

8 MR. DRAPER: This slide shows water levels in the
9 South Yuba Basin, and it is based on the assumption -- the
10 assumption that all groundwater pumping would occur in the
11 South Basin. Since ground water substitution pumping
12 would occur both in the North Yuba Basin and the South
13 Yuba Basin, the drawdown shown in this chart is an
14 overestimate.

15 This is simply to demonstrate the relative
16 magnitude of the groundwater storage decline that we are
17 projecting.

18 The conclusions from our groundwater analysis:
19 Firstly, we concluded that there will be no significant
20 impacts to water levels, either regionally or locally. We
21 concluded there will be no significant impacts to stream
22 losses to the underlying aquifer. There was no evidence
23 of any water quality impacts. And there was no evidence
24 that there will be any land subsidence impacts.

25 Moving on to surface water quality, which is

1 discussed in Chapter 9 of the draft EIR/EIS, the Yuba
2 Accord will affect water temperatures in the Lower Yuba
3 River. To a lesser extent, it will affect water
4 temperatures in the Feather River and the Lower Sacramento
5 River, downstream of the confluence of the Feather River.

6 The Accord also has the potential to affect water
7 quality in the Delta.

8 To look at the water temperature impacts, we used
9 a statistical temperature model for the Lower Yuba River,
10 and we used Reclamation's reservoir and river temperature
11 models to look at temperature effects on the Sacramento
12 and Feather River. And we used DSM-2, that I referred to
13 earlier, to look at salinity impacts in the Delta.

14 That statistical temperature model accounts for
15 changes in storage in New Bullards Bar and changes in flow
16 from the Colgate Powerhouse all the way down through the
17 system to the flow at Marysville Gage.

18 From the output of the temperature model, we're
19 able to produce exceedance blocks, exceedance blocks of
20 the average monthly temperature. Examples are shown in
21 the upper right.

22 MR. LILLY: This is slide 16.

23 MR. DRAPER: From the temperature analysis, we
24 concluded that temperatures under the Accord compared to
25 the no-project alternative would be slightly warmer in May

1 and they will be colder July, August, September, and
2 October.

3 Our last analysis concerned the recent court
4 order. We looked at both the environmental effects of the
5 phasing of the Yuba Accord and the operation of the Accord
6 according to the interim remedies order.

7 The additional analysis, starting, first of all,
8 with a discussion of CVP and SWP impacts, obviously there
9 was a significant contaminant or reduction in CVP/SWP
10 exports from late December through to the end of June as a
11 result of the interim remedies order.

12 Secondly, there would be some increases in exports
13 for the period July through November to partly offset or
14 mitigate for those earlier pumping contaminants. This
15 indirectly affects the operations in the Yuba River and
16 the Yuba Accord because it reduces the available pumping
17 capacity for what it transfers.

18 The main impact is to reduce the amount of
19 groundwater substitution pumping that would be
20 implemented, which would lead to a slight reduction in
21 flows, July, August, September at Marysville, and a slight
22 reduction in Delta inflows and Delta exports during this
23 period.

24 But in conclusion, we reached that the
25 environmental -- the environmental effects and

1 determinations that we reached in the draft EIR/EIS would
2 not change with implementations of the recent court order.
3 And secondly, we believe that the Yuba River Accord will
4 help the CVP/SWP mitigate for -- partly mitigate for the
5 surface water impacts of the court decision.

6 MR. LILLY: Thank you, Dr. Draper.

7 We'll now move on to Paul Bratovich.

8 Mr. Bratovich, please state your name and spell
9 your last name for the record.

10 MR. BRATOVICH: Paul Bratovich, B-R-A-T-O-V-I-C-H.

11 MR. LILLY: And have you taken the oath today?

12 MR. BRATOVICH: Yes, I have.

13 MR. LILLY: And is Exhibit YCWA 16 your direct
14 testimony for this proceeding?

15 MR. BRATOVICH: Yes, it is.

16 MR. LILLY: Please summarize your direct
17 testimony.

18 MR. BRATOVICH: For the EIR/EIS hydrologic output
19 described by Andy Draper was used to establish flow and
20 water temperature conditions in the Yuba River, the
21 Feather River, the Sacramento River, and habitat
22 parameters and conditions in the delta.

23 Slide 1 shows the fish species and life stages
24 present in the lower Yuba River during each month of the
25 year that were the focus of our studies for the EIR/EIS.

1 Over the 72-year period of analysis included in
2 the EIR/EIS, potential impacts to these fish species and
3 these life stages were evaluated by examining changes in
4 flows, water temperatures, and indicators of habitat
5 availability.

6 Slides 2 through 6 of my testimony describe in
7 more detail how these analyses were conducted for several
8 comparisons for the different comparative scenarios, using
9 spring-run chinook salmon in the Lower Yuba River, as an
10 example, comparing the Yuba Accord to the no-project
11 alternative.

12 In the interest of time, I'm not going to go into
13 detail that is described in Slides 2 through 6 unless the
14 board members have any questions about them.

15 Therefore, if not, I will go straight to the
16 conclusions for spring-run chinook salmon using the
17 examples which are presented in Slide 7.

18 Slide 7 presents a summary of the analysis of
19 potential effects of the Yuba Accord relative to the
20 no-project alternative on spring-run chinook salmon in the
21 Yuba River.

22 The Yuba Accord is expected to provide relative to
23 the no-project alternative generally equivalent or
24 approved adult immigration and holding conditions because
25 of equivalent passage conditions, similar holding habitat

1 conditions, and more suitable water temperatures during
2 September;

3 It also is expected to provide improved spawning
4 conditions due to similar amounts of spawning habitat
5 availability and more suitable water temperatures,
6 particularly during the warmest water temperature
7 conditions that occur during September and October;

8 Improved embryo incubation conditions due to more
9 suitable water temperatures, particularly, again, during
10 the warmest water temperature conditions during September
11 and October;

12 Improved over summer juvenile rearing conditions,
13 particularly due to more suitable water temperatures, both
14 upstream at and above Daguerre Point Dam and downstream at
15 Marysville;

16 And generally equivalent juvenile immigration
17 conditions from the Lower Yuba River, downstream, by
18 providing flows in the Lower Yuba River, when the data
19 indicate juveniles are actually immigrating, and by
20 mimicking the unimpaired flow patterns in the Lower River
21 Yuba itself.

22 Similar analyses were conducted for the other five
23 key fish species in the Lower Yuba River that were the
24 focus of the analysis in the EIR/EIS. Detailed analyses
25 and conclusions for the each of these species are included

1 in the EIR/EIS, and in my direct testimony. And the
2 following slides simply show these conclusions for these
3 other species for the Yuba Accord compared to the
4 no-project alternative.

5 Slide A8 represents the conclusion of generally
6 equivalent or improved conditions for all life stages for
7 fall-run chinook salmon.

8 Slide 9 represents the conclusion of generally
9 equivalent or improved conditions for all life stages of
10 steelhead.

11 Slide 10 represents the generally equivalent or
12 improved conditions for all life stages of green sturgeon.

13 Slide 11 represents the conclusion of generally
14 equivalent conditions for the attraction of American shad
15 and striped bass into the Lower Yuba River during the
16 spring months.

17 And Slide 12, we state that similar analyses were
18 conducted for each of the -- for each of the species and
19 the life stage combinations in the Feather and Sacramento
20 Rivers as well as in the Lower Yuba River.

21 In addition to the focused evaluation for the key
22 species in the Lower Yuba River, split -- Sacramento
23 splittail also were evaluated for the Feather River. And
24 winter-run chinook salmon, late fall-run chinook salmon,
25 and Sacramento splittail also were evaluated for the

1 Sacramento River.

2 In these rivers, the analyses and the EIR/EIS for
3 all species, life stages, and impact indicators
4 demonstrate that the Yuba Accord would not unreasonably
5 affect fish resources in the Feather and Sacramento
6 Rivers.

7 In the EIR/EIS, potential impacts to Delta fishes
8 also were evaluated and focused on delta smelt, striped
9 bass, winter-run chinook salmon, spring-run chinook
10 salmon, steelhead, and other fishes using a habitat-based
11 approach and salvage estimation at the Delta CVP and SWP
12 export facilities. For the other Delta fish species,
13 salvage estimates were not available so the evaluation was
14 based on a habitat evaluation.

15 Results of the analyses of delta fishery resources
16 found that the Yuba Accord relative to the no-project
17 alternative would not unreasonably affect Delta fishery
18 resources.

19 Since the draft EIR/EIS was issued in June of
20 2007, the draft interim remedy order was issued in August
21 by the court in the NRDC versus Kempthorne case. As Curt
22 Aikens and Andy Draper both mentioned, that has caused two
23 significant changes to the Yuba Accord. And these changes
24 led us to evaluate the following three scenarios relative
25 to the no-project alternative: The first phase of the

1 Yuba Accord alone; the Yuba Accord with the interim
2 remedies order in place; and then the combination of the
3 first phase of the Yuba Accord with an interim remedies
4 order.

5 As was done for the draft EIR/EIS, assessment
6 methodology, hydrologic modeling, was conducted and served
7 as the basis for potential effects evaluation for these
8 changed conditions.

9 Based on these evaluations for the upstream of the
10 Delta region, it was concluded and we have found that
11 changes in flows and water temperatures that Andy
12 described in his testimony would be within the range of
13 effects that were presented in the draft EIR/EIS, that
14 unreasonable effects would not occur, and equivalent or
15 higher level of protection for fish species in the Lower
16 Yuba River would still be provided relative to the CEQA
17 no-project alternative; and that unreasonable effects
18 would not occur to fishes in the Feather or the Sacramento
19 River relative to the CEQA no-project alternative.

20 We also evaluated these three scenarios for
21 potential effects in the Delta including salvage estimates
22 at the CVP and SWP export facilities. This analysis
23 focused on delta smelt, winter-run and spring-run chinook
24 salmon, steelhead and striped bass for salvage estimation
25 and evaluation.

1 Relative to our prior analysis in the EIR/EIS, for
2 all three scenarios, there would be equivalent or lesser
3 changes in Delta habitat parameters.

4 However, there would be changes in salvage. For
5 the first phase of the Yuba Accord alternative, there
6 would be relatively minor differences in long-term -- in
7 long-term average and water-year-type specific fish
8 salvage estimates with fewer fish being salvaged under the
9 first phase relative to the no-project alternative.

10 By contrast, with implementation of the draft
11 interim remedies order, there would be large reductions in
12 long-term average and in water-year-type specific salvage
13 for all of the evaluated fish species including the salmon
14 fish species.

15 With a combination of the first phase of the
16 Accord with the interim remedy orders in place, very
17 similar to what we found for the Yuba Accord with the
18 interim remedy order -- large reductions in long-term
19 average and water-year-type specific salvage for all of
20 the evaluated fish species.

21 In conclusion, we conducted extensive analyses to
22 evaluate the potential effects of the Yuba Accord. Impact
23 evaluations were conducted for various species for the
24 various runs by life stage, by geographic location, by
25 month, and for the various impact indicators using methods

1 collaboratively developed with the Department of Fish and
2 Game, National Marine Fisheries Service, U.S. Fish and
3 Wildlife Service, Reclamation, DWR, and others. This
4 analysis was extremely detailed.

5 For example, for this single comparison that I've
6 shown you today, this one comparison for the Yuba Accord
7 relative to the no-project alternative, over 1400
8 individual evaluations were conducted.

9 In conclusion, the Yuba Accord relative to the
10 no-project alternative would result in equivalent or
11 higher level of protection for fish in the Lower Yuba
12 River and would not unreasonably affect fishes in the
13 Lower Yuba River, the Feather River, the Sacramento River,
14 or the Delta. And also, these conclusions would not be
15 changed by phasing of the Yuba Accord or by implementation
16 of the interim remedies order.

17 Thank you.

18 MR. LILLY: That concludes our summary of our
19 direct testimony.

20 At this time, I would like to introduce the other
21 members of the panel, and then we'll be ready for
22 cross-examination, if that's acceptable.

23 HEARING OFFICER BAGGETT: Please.

24 MR. LILLY: Just sitting immediately to the left
25 of Curt Aikens, who you've already heard from, is Tom

1 Johnson. To his left, is Jeff Weaver. Then you have
2 already heard from Andy Draper. To his left is Steve
3 Grinnell. And you have heard from Mr. Paul Bratovich.
4 And to his left is Dianne Simodynes.

5 Resumes of all of these witnesses have been
6 submitted as exhibits for the hearing and all of these
7 witnesses have taken the oath. So depending on what
8 questions come up, any of them may be the appropriate
9 witness to answer.

10 HEARING OFFICER BAGGETT: Very good. Thank you.
11 With that, let's begin cross-examination.

12 Ms. Crothers, does DWR have anything?

13 MS. CROTHERS: No, we have none.

14 HEARING OFFICER BAGGETT: Cross from the Bureau?

15 MR. COLELLA: No cross.

16 HEARING OFFICER BAGGETT: Mr. Minasian?

17 MR. MINASIAN: Two brief questions for Mr. Draper.

18 Mr. Draper, focusing on the north sub-basin, the
19 annual average recharge that can be expected in that area
20 is approximately what amount according to the EIR?

21 MR. DRAPER: For the EIR, we looked at the
22 historical groundwater levels and historical groundwater
23 storage. You see a pattern where the ground water basin
24 seems to be in long-term equilibrium, so we looked at
25 periods following a groundwater substitution transfer.

1 If you look at 1991, which it was a groundwater
2 substitution year, and then you looked at the recovery in
3 the following years, we did use that. It would be an
4 annual recharge rate 10,000 acre-feet a year.

5 MR. MINASIAN: As groundwater is used in the north
6 area, the recharge rate will actually increase because
7 there's more space and more gradient. Will it not?

8 MR. DRAPER: That's correct. It's a dynamic
9 system.

10 MR. MINASIAN: Do you have your overhead projector
11 operating?

12 MR. DRAPER: Yeah, we do.

13 HEARING OFFICER BAGGETT: Slide 10, I assume, is
14 what you -- the map?

15 An overhead projector?

16 MR. MINASIAN: Yeah. I'm technologically
17 backward.

18 Let me ask it in a different way.

19 Mr. Draper, you worked on some of the responses to
20 the questions in the EIR?

21 MR. DRAPER: I did.

22 MR. MINASIAN: And were you aware that a chart was
23 included which showed the maximum amounts of water that
24 might be pumped, assuming that all of the components --
25 two, three, and the voluntary component of additional two,

1 three, and four water, was pumped and basis for a
2 transfer?

3 MR. LILLY: I think, if you are referring to Table
4 LA 2-2 from the final EIR, we can put that up because that
5 is one of our exhibits.

6 I think Amanda can get that probably in about five
7 seconds.

8 MR. MINASIAN: Thank you very much, Mr. -- while
9 we're doing that, let me just ask you a question. The
10 amounts of water which are shown on that schedule, that
11 were pumped in the period of 1987 to 1992, obviously
12 exceed the levels of recharge both north and south. Do
13 they not?

14 MR. DRAPER: That's correct. We used surface
15 water and groundwater. You use groundwater, then let the
16 groundwater basin recover, and switch back to surface
17 water. It's a conjunctive use operation.

18 MR. MINASIAN: Now, the trick with the conjunctive
19 use operation is having judgment of how much water to pump
20 and when to pump it; isn't it?

21 MR. DRAPER: That's correct.

22 MR. MINASIAN: And in the south area, we have a
23 history of severe overdraft, bringing a surface water
24 supply in, and remedying that; do we not?

25 MR. DRAPER: But prior to the introduction of the

1 surface water, to the area, that's correct.

2 MR. MINASIAN: Okay. Now, in this particular
3 case, the purchase of water by DWR has certain terms and
4 conditions; does it not?

5 MR. DRAPER: The Fisheries Agreement has
6 conditions, yes.

7 MR. MINASIAN: But I'm referring to the Water
8 Purchase Agreement with DWR.

9 And let me focus you on one of those conditions.
10 One of the conditions is that if we have what's called a
11 conference year, which is like 1977, that there's no
12 mandatory transfer by the Yuba County Water Agency of
13 component one, two, three, or four water.

14 MR. DRAPER: Okay.

15 MR. MINASIAN: Is that correct?

16 MR. DRAPER: Yes, that's correct.

17 MR. MINASIAN: Okay. Now, what I'm asking you is,
18 you have looked at the hydrographs for the conditions in
19 1991, north of the Yuba River. Would you agree that
20 exceeding those conditions would put the groundwater basin
21 in that area into a potential dangerous condition?

22 MR. DRAPER: I think there are two parts to the
23 analysis of -- or the consideration of groundwater
24 resources. We've estimated -- for the groundwater
25 modeling simulation, we put together what we considered

1 reasonable assumptions on upper bounds to groundwater
2 pumping so that we could evaluate environmental impacts to
3 the Delta.

4 There's a whole second side, which is the
5 groundwater management and monitoring plan, which would go
6 into effect. Mr. Grinnell helped write that monitoring
7 management plan. You would have to defer your question to
8 Mr. Grinnell.

9 MR. MINASIAN: Mr. Grinnell, let's take a look at
10 the next period, 1987 through '92.

11 Thank you very much for putting that up, Mr.
12 Lilly.

13 Actually, I'm looking for pages 495 and 96.
14 Looking for the next pages. You are on it there. Let's
15 go to 1987.

16 You see 1987 to 1992, Mr. Grinnell? Did you work
17 on putting these together?

18 MR. GRINNELL: I assisted in preparing the
19 criteria for developing this chart.

20 MR. MINASIAN: If I told you that the total of
21 1986 through -- 1987 through 1992 was two -- three --
22 360,000 acre-foot.

23 Would that seem about right?

24 MR. GRINNELL: I'm sorry. Could you repeat that?

25 MR. MINASIAN: The total of the far column.

1 Assuming all of the water that is provided for in
2 the various components was elected to be transferred, that
3 the groundwater pumping would total those amounts between
4 '87 and '92, and that total would be about 360,000
5 acre-feet?

6 MR. GRINNELL: I can't -- again, I'm not doing
7 math in my head, but I assume that's correct.

8 MR. MINASIAN: It's in that range.

9 And the recharge would be approximately 11,000
10 acre-feet, 10 to 11 thousand acre-feet per year in the
11 north area, and about 20,000 acre-feet in the south area?

12 MR. GRINNELL: That's what was used for the
13 environmental analysis.

14 MR. MINASIAN: And that's per year.

15 So the key to balancing this aquifer is not
16 exercising judgment to voluntarily transfer water in
17 certain year types and certain drought sequences; isn't
18 it?

19 MR. GRINNELL: I don't quite understand your
20 question.

21 MR. MINASIAN: My question is, if we had pumped
22 the amounts, 1987 to 1992, that are in the far column,
23 would we not end up in dangerous territory from the point
24 of view of managing the groundwater to avoid interruption
25 of rural residential wells and agricultural wells?

1 MR. GRINNELL: I would not agree with that
2 statement. The analysis of these amounts showed that the
3 levels that would be reached were within levels that have
4 been seen historically and did not result in significant
5 impacts to third parties -- significant unmitigated
6 impacts to third parties.

7 MR. MINASIAN: So your view is that if those
8 amounts, that are put on that chart, allocated to the
9 north area were pumped, we would not go below the 1991
10 pumping levels that were registered in the fall of '91?

11 MR. GRINNELL: The analysis shown in the EIR/EIS,
12 was to allocate all of this pumping to the South Basin,
13 and for the South Basin allocating all of this pumping to
14 that basin would not result in levels below the '91 fall
15 level.

16 MR. MINASIAN: So if the Board were to include a
17 condition that you said that if we approached the fall '91
18 levels in the area, north, that should not be a problem
19 for the organization of this program of transfers, in your
20 view?

21 MR. GRINNELL: Yes, it would be a problem for a
22 couple of different reasons.

23 First, it would be -- you would have to make a
24 distinction between the North and South Basin. The
25 analysis applied all of the pumping to the South Basin.

1 The North Basin, as was indicated by Mr. Draper, has not
2 been significantly exercised. There has been groundwater
3 substitution pumping in the North Basin in '91, '94, 2001
4 and 2002. And in fact, the levels that were seen in 2001
5 and 2002 in some areas were below the '91 levels. And in
6 those recent years of groundwater substitution, we did not
7 see significant unmitigated third-party impacts.

8 So to establish that level as an absolute
9 prohibition for the north or, for that matter, for the
10 south would not be consistent with recent operations that
11 have been successful.

12 Secondly, the mitigation measures that are in
13 place, that are part of the finalized EIR/EIS, provide
14 substantial control, local control, on the amounts of
15 pumping that will be done under the Accord. Those include
16 exhaustive determination each year of the amount of
17 expected pumping and groundwater levels that would result,
18 and an examination of what the expected, if any, impacts
19 would be, and to limit pumping if there is an examination
20 of third-party impacts that could not be mitigated, or
21 that it would -- that pumping would contribute to
22 overdraft.

23 MR. MINASIAN: Now, if I remember right, the total
24 of those columns was about 360,000, and if you looked up
25 to 1975 through 1979, the total there appears to be about

1 260,000 acre-feet.

2 How is it, with recharge in the range of 30,000
3 acre-feet a year that these quantities can be pumped?

4 MR. GRINNELL: You said it yourself, Mr. Minasian.
5 This is a dynamic system, and the more you pump it, the
6 more it recharged for this analysis. For this
7 environmental analysis, there were some simplified
8 assumptions made. However, we have a long history of
9 observing this basin and how it responds to pumping.

10 There had been one instance in 2001 and 2002 where
11 there was back-to-back pumping. You know, we saw
12 substantial, greater, recharge in the North Basin
13 specifically in 2002 than we did see in 2001. So you have
14 to separate it out, a very conservative assumption set for
15 the EIR/EIS, which still showed that these levels would
16 not create significant impacts or overdraft, but also
17 examined the fact that we do have a long history with this
18 basin of observing it. It is highly monitored, and there
19 were significant controls put in place for the accord.

20 MR. MINASIAN: "Controls."

21 Do you agree that there's nothing that says that
22 transfers stop at certain groundwater level marks?

23 MR. GRINNELL: The mitigation measures do say that
24 there will be a determination by Yuba County entities
25 which would include the overlying member units. There

1 will be involvement by the Groundwater Advisory Group,
2 which includes all of the groundwater users in Yuba
3 County, and Yuba County Water Agency to examine the
4 specifics of hydrology and to make a determination on
5 whether or not a level of pumping can be done in a
6 specific year. So that is a fairly significant local
7 control and determination for pumping.

8 MR. MINASIAN: Would you agree Mr. Grinnell, that
9 from a policy point of view, it's important that this
10 process of managing groundwater be orderly both for the
11 credibility of DWR, that's being given indirect access to
12 the water, and for the purposes of Yuba County Water
13 Agency and the Board?

14 MR. LILLY: I'm just going to object to that
15 question. "Orderly" is so vague. The question doesn't
16 make any sense.

17 HEARING OFFICER BAGGETT: Would you please
18 rephrase?

19 MR. MINASIAN: I have nothing further.

20 HEARING OFFICER BAGGETT: Thank you.

21 Mr. Rubin?

22 MR. RUBIN: John Rubin for San Luis and
23 Delta-Mendota Water Authority and Westlands Water
24 District.

25 If you wouldn't mind, can you put the table up

1 from the Environmental Impact Report/Impact Statement that
2 Mr. Minasian was just asking questions?

3 I will ask my questions generally, and whomever
4 from the panel for Yuba County Water Agency is capable,
5 best capable of answering, I would ask to answer the
6 question.

7 Mr. Minasian asked a number of questions regarding
8 the data on that table; is that correct?

9 MR. DRAPER: Yes, that's correct.

10 MR. RUBIN: Does this data require specific
11 quantities of water to be pumped under the Yuba Accord?

12 MR. DRAPER: No, it doesn't. This table stems
13 from modeling assumptions that were made so that we could
14 look at flows in the Lower Yuba River and exports in the
15 Delta. We assumed a certain maximum amount of groundwater
16 pumping. We assumed 90,000 acre-feet maximum of
17 groundwater substitution pumping followed by 60,000
18 acre-feet followed by 30,000 acre-feet. Over a three-year
19 period, you could have 180,000 acre-feet, but that
20 implies -- that does not imply any commitment by the
21 member units or YCWA.

22 MR. RUBIN: And if I understand correctly, the
23 assumes that were made for purposes of the Environmental
24 Impact Report/Environmental Impact Statement, as reflected
25 in the data that was produced in the table that was

1 discussed by Mr. Minasian, were made to help with the
2 environmental analysis?

3 MR. DRAPER: That's correct.

4 And just one number that I would like to point out
5 on that table. At the bottom of the table, it says
6 "averages for all years," and if you look at the last
7 column, you will see the figure of 28,000 acre-feet.
8 That's the long-term average amount of groundwater pumping
9 that we considered in the EIR/EIS. And that is less than
10 the long-term average rate of recharge that we estimated,
11 which was 30,000 acre-feet.

12 MR. RUBIN: Just have a few more questions, and
13 they are regarding, I believe, what has been marked as
14 Yuba County Water Agency Exhibit 11. This is the
15 agreement for the long-term -- excuse me, Long-Term
16 Purchase of Water from Yuba County Water Agency by the
17 Department of Water Resources.

18 I don't know if this is a question that would be
19 best answered by Mr. Grinnell. If it is, I would ask that
20 he turn to Section 11, which I believe appears on page 17
21 and continues on to page 18.

22 MR. GRINNELL: I'm sorry. Could you state the
23 pages again?

24 MR. RUBIN: I ask that you please turn to section
25 11 of Yuba County Water Agency Exhibit 11, which is the

1 Agreement for Long-Term Purchase of Water from Yuba County
2 Water Agency by the Department of Water Resources.
3 Section 11 starts on page 17 and continues to page 18.

4 MR. GRINNELL: I have it.

5 MR. RUBIN: Can you explain what Section 11A is
6 intended to do.

7 MR. GRINNELL: 11A refers to the accounting of
8 water under the agreement and then refers to Exhibit 1,
9 which is the accounting provisions, which is the process
10 by which water for a transfer is enumerated.

11 MR. RUBIN: I now ask that you turn to Exhibit 1,
12 which is entitled Scheduling and Accounting Principles,
13 and specifically Section 7, which appears on page 14 of
14 Exhibit 1.

15 MR. GRINNELL: Yes.

16 MR. RUBIN: If I understand the purpose of Section
17 6 to Exhibit 1 of Yuba County Water Agency Exhibit 11, the
18 intent of the exhibit -- excuse me, of the Section 7 is to
19 provide the terms upon which water that is made available
20 to DWR would be accounted for.

21 MR. GRINNELL: Yes.

22 MR. RUBIN: I ask that you turn to page 15,
23 Section 7.5.

24 MR. GRINNELL: Yes.

25 MR. RUBIN: Section 7.5 of Exhibit 1 to Yuba

1 County Water Agency Exhibit 11 deals with potential
2 deficits and what's classified as component one water; is
3 that correct?

4 MR. GRINNELL: That's correct.

5 MR. RUBIN: Is it possible that under Section 7.5,
6 deficiencies in the amount of component one water
7 available would occur?

8 MR. GRINNELL: Yes.

9 MR. RUBIN: And there are two circumstances in
10 which that could occur; is that correct?

11 MR. GRINNELL: That's correct.

12 MR. RUBIN: And there is -- one of the
13 circumstances that's articulated is that there are
14 deficiencies based upon, I believe, Section 7.2.2 of the
15 exhibit; is that correct?

16 MR. GRINNELL: That's correct.

17 MR. RUBIN: And if you turn to Section 7.2.2 of
18 Exhibit 1, page 14, if I understand this section
19 correctly, the deficiencies might be caused because of
20 limitations in groundwater substitution water?

21 MR. GRINNELL: Yes, it does refer to 7.2.2. There
22 is a reference to Exhibit 3, which is the Groundwater
23 Monitoring Operation Plan.

24 MR. RUBIN: And I understand that this Exhibit 1
25 is very complex. But again, through these questions, if I

1 understand it correctly, what this accounting exhibit is
2 intended to do is recognize a limitation on the amount of
3 component one water that might be available because of
4 groundwater monitoring and reporting requirements or
5 limitations that are caused because of that?

6 MR. GRINNELL: I'm sorry. Could you repeat the
7 question?

8 MR. RUBIN: If I understand the intent of
9 Exhibit 1, specifically Section 7, dealing with the
10 accounting of the components of transfer water, the amount
11 of component one water could be limited based upon the
12 provisions of Exhibit 3?

13 MR. GRINNELL: Well, that's actually not correct.
14 The component one water is made available through surface
15 water or storage releases. So groundwater substitution
16 would not be used to meet component one.

17 MR. RUBIN: Groundwater could be used to meet the
18 requirements for components two, three, and four water.
19 Is that true?

20 MR. GRINNELL: That's correct.

21 MR. RUBIN: Under section 7.7 of Exhibit 1, can
22 the amount of components two or three water be limited
23 based upon constraints on groundwater pumping?

24 MR. GRINNELL: Yes. It first would have to meet
25 determination of how much water is under each of those

1 components. And but then there would be a determination
2 of how much total water would be available for transfer,
3 both surface water and then groundwater -- with Exhibit 3
4 governing -- in the mitigation measures of the EIR/EIS
5 which are essentially the same -- would be limiting,
6 potentially, the amount of groundwater that would be
7 available based on a determination of overdraft and
8 impacts to third parties and willingness of local pumpers
9 to provide the water.

10 MR. RUBIN: In Section 7.7 of Exhibit 1, Yuba
11 County Water Agency Exhibit 11, does not address component
12 four water; is that correct?

13 MR. GRINNELL: That's correct. Component four
14 water is -- there is no provision for any amount to be
15 agreed upon in the agreement, specifically for that. That
16 is water that is made available on a year-to-year basis,
17 based on the same determination, how much surface water
18 would be available through storage reduction and also how
19 much groundwater would be made available through willing
20 member units to pump the water.

21 MR. RUBIN: If I understand your answer correctly,
22 component four water is water that is offered by Yuba
23 County Water Agency at its discretion; is that correct?

24 MR. GRINNELL: That's correct.

25 MR. RUBIN: And the discretion by Yuba County

1 Water Agency would be exercised consistent with Exhibit 3
2 to Exhibit 1?

3 MR. GRINNELL: That's correct.

4 MR. RUBIN: I have no further questions.

5 HEARING OFFICER BAGGETT: Thank you.

6 Mr. Walter?

7 MR. WALTER: No questions.

8 HEARING OFFICER BAGGETT: Anglers Committee. Is
9 it Dr. Smith, do you have any questions?

10 DR. SMITH: My first question, Dr. Draper, is, can
11 you help us out? In your temperature chart, I was not
12 able to understand that or read it. And if you wouldn't
13 mind reviewing that in terms of the temperatures, the max,
14 and minimum temperatures that that chart displays, month
15 by month, please, just orally.

16 MR. DRAPER: Are you referring to the exceedance
17 box which Exhibit 23, I think -- I believe?

18 DR. SMITH: You know, it was tough to read it. So
19 it was a display that -- a visual display that you had.

20 MR. DRAPER: Sure. That diagram is not the result
21 of modeling output. That was simply to -- Amanda, can you
22 turn to that.

23 MR. LILLY: Slide 16.

24 MR. DRAPER: Slide 16.

25 Okay. What this slide shows, first of all, there

1 are three exceedance plots of average monthly temperature
2 in the Lower Yuba River. Those are the three charts on
3 the upper right. There is exhibit 23, YCWA 23, I believe,
4 and these charts, which is month by month for water
5 temperatures at Marysville. This was purely indicative as
6 part of a support for the presentation.

7 The charts on the left of the diagram on the
8 bottom left is illustrative. It is not modeling results.
9 I believe those -- the numbers on those charts, which are
10 difficult to read at this distance, refer to a particular
11 month and a particular year and they were historical data.
12 This chart is presented in -- is taken from the EIR/EIS,
13 and what it was showing is the warming as you move from
14 New Bullards Bar down to Marysville Gage.

15 DR. SMITH: Thank you.

16 Could you tell me exactly what the maximum
17 temperatures would be and the minimums, please?

18 MR. DRAPER: Not without referring to the
19 exceedance plots. We can pull those out, go through them
20 one by one, if you would like.

21 DR. SMITH: Well, I would like to be able to
22 understand your presentation. But without that, I'm
23 afraid I'm at a deficit here.

24 MR. DRAPER: Amanda, could you pull up these
25 exceedance plots of water temperature at Marysville?

1 It's Exhibit YCWA 23. Sorry. That's a lot of
2 material that we presented.

3 Which month would you like to look at?

4 DR. SMITH: Well, if I understand it, what you
5 were proposing to show us was what we might expect month
6 by month in terms of minimum and maximum water
7 temperatures in the riverbed. And from that chart, I
8 wasn't able to gather that.

9 MR. DRAPER: Well, we can step through these month
10 by month. We start -- they follow the water year, so even
11 on the screen they are going to be a little hard to read.

12 DR. SMITH: I understand.

13 MR. DRAPER: They start with the water year,
14 October through to September. We're looking at water
15 temperatures at Marysville. There are a lot of different
16 lines on this chart. It's a comparative analysis. So the
17 dark blue line is CEQA no-project alternative. This is
18 operations under RD 1644, long term.

19 And the pinkish line is -- looking at the
20 legend -- the operations of the Yuba Accord. And because
21 they are so similar to operations, under the first phase
22 of the Yuba Accord, you will find that the red line is
23 actually lying on top of the pink line.

24 So I would like you to focus on the red line
25 compared to the blue line. The temperature -- the Y axis

1 is temperatures in degrees Fahrenheit, and then the X axis
2 is the probability of exceedance.

3 DR. SMITH: If I understand it, though, this is
4 the arithmetic mean; right?

5 MR. DRAPER: It's not the arithmetic mean.

6 What you're looking at is we ran the temperature
7 model for 72 years of hydrology. So you are looking at,
8 what would the temperatures be in the Lower Yuba River
9 under very dry conditions and very wet conditions and all
10 the hydrologic range in between those two extremes.

11 So this is 73 years worth of data for October. So
12 we've got 73 values, and then they have been sorted to --
13 so that the --

14 DR. SMITH: I gotcha.

15 MR. DRAPER: Sorted by temperature.

16 So on the left-hand side, we have the warmer
17 temperatures, and on the right-hand side, we have the --

18 DR. SMITH: So the mean refers to the average of
19 those years, not the average -- not the arithmetic mean
20 between the lowest temperature during the day and the
21 highest temperature; is that correct?

22 MR. LILLY: I'm going to object. He said "the
23 mean." We don't know what mean he's talking about.

24 DR. SMITH: Arithmetic mean. There are --

25 MR. LILLY: Wait. Excuse me. The EIR/EIS talks

1 about a whole bunch of different means. Unless we have
2 some specific reference, the phrase "the mean" in his
3 question is ambiguous and not comprehensible to the
4 witness.

5 DR. SMITH: Dr. Draper, do you understand
6 arithmetic mean?

7 MR. DRAPER: I think I need to clarify something
8 more about the temperature modeling. The temperature
9 modeling uses a monthly time step. So discussion about
10 diurnal fluctuations or daily means, maximums, minimums,
11 it's relevant to what's shown on these charts.

12 DR. SMITH: I gotcha. Okay.

13 MR. DRAPER: We're looking at monthly
14 temperatures. If you like to call them average monthly
15 temperatures, but there's only one value coming out in the
16 model for a month, for a particular year -- so in this
17 case, you are looking at 73 values, temperature values,
18 water temperatures values, at Marysville, for October.
19 And this is, if you like, giving you the range that could
20 occur. Given that we don't know what the future hydrology
21 is going to be, under very wet conditions, you are going
22 to have colder water temperatures. Those are the
23 temperatures on the right-hand side and the wetter --
24 sorry the drier conditions, you are going to have warmer
25 temperatures. So those would be the temperatures on the

1 left-hand side.

2 DR. SMITH: Good. Thank you.

3 Another question for you, sir. Can you give me
4 what the water fluctuations will be in the streambed
5 please?

6 MR. DRAPER: The flow?

7 DR. SMITH: Yes, sir.

8 MR. DRAPER: We would have to pull up another
9 series of plots that we can do. What we did is we
10 presented two sets of exceedance plots, YCWA Exhibit 22,
11 so you are able to put the flow exceedance plots adjacent
12 to the temperature exceedance plots and see the
13 relationships.

14 DR. SMITH: Would it be reasonable to assume that
15 these flow fluctuations would be experienced from day to
16 day, week to week, or would they....

17 MR. DRAPER: Again, we're looking at a reservoir
18 operations model that has a monthly time step.

19 DR. SMITH: I gotcha.

20 MR. DRAPER: So looking at day-to-day operations
21 is a different -- is a difference case. We're looking at
22 typical monthly operations as we move through the water
23 year and what those monthly operations -- we're
24 characterizing those monthly operations under dry
25 conditions and under wet conditions.

1 DR. SMITH: Okay. Thank you very much.

2 My next questions is for Mr. Bratovich. Is that
3 correct? Did I mutilate your name?

4 MR. BRATOVICH: Not very badly. It's Bratovich.

5 DR. SMITH: Oh, Bratovich.

6 MR. BRATOVICH: Yes, sir.

7 DR. SMITH: Okay. I've got a question regarding
8 water fluctuations and what those do for the habitat. Can
9 you explain to me if -- what water fluctuations have on
10 spawning and fry survival, please.

11 MR. BRATOVICH: Relative to our EIR/EIS impact
12 assessment?

13 DR. SMITH: You know what? I haven't read that.
14 I have to back off on that.

15 MR. BRATOVICH: Well, when Andy was presenting the
16 exceedance plots of flows, that really is a cumulative
17 probability distribution function. So it doesn't -- it
18 does not address day-to-day fluctuations.

19 DR. SMITH: Okay.

20 MR. BRATOVICH: Not at all.

21 And on our modeling output, we have those monthly
22 mean cumulative probability distribution functions
23 exceedances for alternatives comparisons for alternative
24 scenarios. And that was the basis for much of our --
25 expressed in different ways for much of our impact

1 assessment. So that really is not a day-to-day
2 fluctuation. It's not addressed in, specifically, the
3 output for the impact determination.

4 However, it is my understanding that the flow
5 fluctuation and the ramping rates, that it is assumed that
6 the Accord would be operating under which are the
7 constraints on a day-to-day variation and flow. It would
8 be in accordance with the 2005 FERC license amendment and
9 the 2005 NMFS biological opinion for the license amendment
10 associated with the full flow bypass. So there are
11 restrictions and limitations on the day-to-day variation
12 in flow in accordance with those regulatory documents.

13 DR. SMITH: Did the biological opinion that you
14 refer to, did that take into account edge water flow
15 requirements for fry?

16 MR. BRATOVICH: I'm trying to recollect the
17 specificities of that biological opinion. And I'm sorry
18 sir, I can't quite recall.

19 DR. SMITH: Okay. All right. Okay.

20 Mr. Baggett, is this the limit of
21 cross-examination that I'm going to have an opportunity
22 for?

23 If it is, then I have some other questions that
24 Mr. Baggett, since he wasn't able to be here --

25 HEARING OFFICER BAGGETT: I'm Mr. Baggett. You're

1 taking about Mr. Baiocchi.

2 DR. SMITH: Baiocchi. Well, they are both good
3 guys. Okay. So it's hard for me to differentiate between
4 the two.

5 (Laughter.)

6 HEARING OFFICER BAGGETT: Mr. Baiocchi, are you
7 listening?

8 I think now's the opportunity to ask questions of
9 Yuba County, any questions you want. You don't have to
10 attribute where the questions came from. Just ask away.
11 This is appropriate. We want you to understand -- and I
12 think there's nothing to hide here. There's a lot of
13 information, and I can understand getting lost in these
14 volumes and the millions and millions of dollars worth of
15 information that has been provided. So ask.

16 DR. SMITH: Well, your goal and my goal are
17 exactly the same in terms of transparency. And that's why
18 I mentioned where these questions came from.

19 HEARING OFFICER BAGGETT: And you will have an
20 opportunity, when Department of Water Resources comes up
21 next to ask questions about how it affects --

22 DR. SMITH: Yes, sir.

23 HEARING OFFICER BAGGETT: Here's your opportunity
24 on the Yuba River fisheries, these types of questions.

25 DR. SMITH: Okay. Thank you very much. I've got

1 some questions then for the Yuba County Water Agency, and
2 any panel member can answer this.

3 Does the Yuba County Water Agency have a federal
4 license issued by the Federal Energy Regulatory Commission
5 to operate the Yuba River Project No. 2246 and also
6 operate the New Bullards Bar Dam and Reservoir?

7 MR. AIKENS: Yes, we do.

8 DR. SMITH: Would you explain that, please?

9 MR. AIKENS: Yes, we do.

10 We have a Federal Energy regulatory license for
11 project 2246.

12 DR. SMITH: Thank you very much.

13 Next question: Did the Yuba County Water Agency
14 obtain an amendment to its federal license for the major
15 change in operations of the Yuba River Project No. 2246
16 for the proposed long-term water transfer?

17 MR. LILLY: I'm sorry, but I have to object to
18 that question. It assumes a fact not in evidence, the
19 word "major change." There will be changes but whether or
20 not they are major are not -- is a value judgment and so
21 forth.

22 HEARING OFFICER BAGGETT: Can you rephrase the
23 question?

24 MR. LILLY: If he asks the question without
25 "major," it's all right.

1 DR. SMITH: We'll just say, hey, how about an
2 amendment? Let's go with that.

3 MR. AIKENS: Let us understand. As Mr. Bratovich
4 mentioned, there was a biological opinion and FERC license
5 amendment in 2005. So that was obtained. And that was
6 all that's been obtained.

7 DR. SMITH: Super. Thank you.

8 Next one: How will money and fees increase the
9 Yuba County Water Agency paid the Federal Energy
10 Regulatory Commission annually for power produced at the
11 Yuba Project 2264?

12 MR. AIKENS: Could you repeat the question? I
13 don't think I understand.

14 DR. SMITH: You bet I can.

15 How will money and fees increase the Yuba County
16 Water Agency that is paid to the Federal Energy Regulatory
17 Commission annually for power produced at the Yuba River
18 Project No. 2246? And how much more money in fees will be
19 paid to the Federal Energy Regulatory for the additional
20 power produced as a result of the long-term water
21 transfer?

22 And if you would like, I would be happy to bring
23 this question over to you so you can take a look at it.

24 MR. LILLY: You know what? I am going to object
25 because I don't think it's relevant to this proceeding.

1 How much -- and of course it also assumes that there will
2 be a major change, which there's no evidence on. So I
3 object on the grounds, it assumes facts not in evidence
4 and it is completely irrelevant to this proceeding. How
5 much Yuba County Water Agency pays FERC now and how much
6 it pays FERC in the future, I don't see how that's going
7 to affect the State Board's decision making on the hearing
8 issues in this matter at all.

9 DR. SMITH: I think it is a reasonable question.
10 And I think it provides a transparency for what's going
11 on. And so --

12 HEARING OFFICER BAGGETT: I think for the hearing
13 record, I will sustain the objection.

14 But let me see if I can help clarify here. The
15 information is a public agency. Any information on any
16 fees that are paying the federal government or anyone else
17 is obviously public information available.

18 DR. SMITH: Yeah.

19 HEARING OFFICER BAGGETT: And maybe I would
20 sustain the objection. I don't believe it's relevant to
21 this hearing. But if Yuba County felt like it, they could
22 probably provide that information to you outside of the
23 record of this hearing, if that would -- it's public
24 information. I'm sure Mr. Aikens knows where that is in
25 his budget and he could maybe provide you his documents

1 outside of this hearing.

2 Would that be helpful?

3 DR. SMITH: Sure. Yeah.

4 How has the water store at New Bullards Bar
5 Reservoir that will be used for the long-term water
6 transfer been put to full beneficial use for the past 20
7 years?

8 MR. LILLY: Mr. Aikens, you want to try to answer
9 that question?

10 Again, these questions assume facts that are
11 incorrect. The permits give the agency until 2010 to
12 apply water to full beneficial use. There's no
13 requirements that they have done that up till now, and
14 they haven't. They are still developing it. It's exactly
15 what water right permits allow a permittee to do.

16 Mr. Aikens can talk about the beneficial uses that
17 the water has been put to for the last 20 years but the
18 question makes some incorrect assumptions about the law.

19 HEARING OFFICER BAGGETT: Mr. Aikens, can you
20 answer what beneficial uses you put in your water?

21 MR. AIKENS: You know, beneficial uses are two
22 main areas: Water use for our customers, and those are
23 the member units that we have water supply contracts with;
24 and then occasionally, we have transferred surface water
25 supplies. And my understanding is that that's a

1 beneficial use too.

2 DR. SMITH: It's been full beneficial use?

3 MR. AIKENS: And on the other side of the coin,
4 too, is there's all the fisheries water that is put down
5 for minimum instream flow requirements from one of the
6 regulatory agencies. So three primary areas of beneficial
7 use.

8 DR. SMITH: Okay. And has been full beneficial
9 use for the 20 years?

10 MR. AIKENS: I don't know what you mean --

11 MR. LILLY: Same objection.

12 MR. AIKENS: "Full beneficial use." We will --

13 HEARING OFFICER BAGGETT: I will overrule. But
14 you can -- can you explain within your understanding of
15 the question? And clarify if you need to, Mr. Smith, your
16 question.

17 MR. AIKENS: We put water to use for fishery
18 purposes, as required by our regulators. We put water to
19 use for our member units, and we have been expanding the
20 use of that as we've had the opportunity to bring new
21 customers online, and that's been a primary mission of the
22 water agency to expand that.

23 And we've also put water to use in terms of water
24 transfers for the benefit of the State of California,
25 where there's scarcity of water supply and we've had

1 excess supplies that we can put to beneficial use in that
2 manner.

3 DR. SMITH: Thank you.

4 How many acres of lands managed by the members of
5 the Yuba County Water Agency will be fallow as a result of
6 the proposed long-term water transfer?

7 MR. AIKENS: None.

8 DR. SMITH: None? Okay.

9 Are all of the water diversions along the Yuba
10 River that are used by the members' districts of the Yuba
11 County Water Agency to divert water from the Yuba River
12 screened, quote, unquote, to prevent the entrainment of
13 spring-run chinook salmon and threatened steelhead
14 species?

15 MR. AIKENS: They are screened.

16 DR. SMITH: They are? Okay.

17 All of them?

18 MR. AIKENS: Yes.

19 DR. SMITH: Okay. Thank you.

20 MR. AIKENS: For our member units.

21 DR. SMITH: Yes, sir.

22 What are the losses to the Central Valley
23 endangered spring-run chinook salmon at all screen
24 diversions?

25 MR. AIKENS: I don't have that information.

1 DR. SMITH: Okay. All right.

2 What are the losses to Central Valley threatened
3 steelhead trout at all screen diversions? And that was
4 the similar kind of a question.

5 MR. AIKENS: I don't have that information.

6 DR. SMITH: What are the losses to the Central
7 Valley fall-run chinook salmon at all screen diversions?

8 MR. AIKENS: I don't have that information either.

9 DR. SMITH: Okay.

10 Did the U.S. National Marine Fisheries Service
11 issue, quote, unquote, incidental take permits to the
12 member districts of the Yuba County Water Agency for the
13 losses to Central Valley Endangered Species chinook salmon
14 and Central Valley threatened steelhead at the point of
15 their diversions in the Yuba River?

16 MR. LILLY: Again, I'm sorry that I have to keep
17 objecting, but these questions keep assuming things that
18 aren't correct.

19 Spring-run are not endangered. They are a
20 threatened species. And secondly, how much incidental
21 take, if any, is occurring by -- at the member units is
22 not relevant to this hearing. We are not talking about
23 diversions by member units as part of this proposed
24 transfer and the proposed instream flow requirements.

25 HEARING OFFICER BAGGETT: I would sustain that.

1 So Dr. Smith, I think this counsel has -- his
2 objection is that you are not -- the questions are going
3 to how the member units are acting, not how this transfer
4 affects those things.

5 DR. SMITH: I gotcha. Thanks.

6 As a result of the operations of the Yuba River
7 Project No 2246, did the U.S. National Marine Fisheries
8 issue an incidental take permit or take permits to Yuba
9 County Water Agency or its member diverters for the taking
10 of Central Valley endangered spring-run chinook salmon and
11 Central Valley threatened steelhead species?

12 MR. LILLY: And I state the same objection.

13 HEARING OFFICER BAGGETT: If you could rephrase
14 it, since it's the same.

15 DR. SMITH: Sure. Be glad to.

16 I guess the best way to do it would be to say
17 that, has the Yuba River Project 2246 been issued an
18 incidental take permit by the U.S. National Marine
19 Fisheries?

20 HEARING OFFICER BAGGETT: Very good.

21 MR. AIKENS: We have a biological opinion, and I
22 would defer on the specifics of that, perhaps to
23 Mr. Bratovich.

24 Do you recall the particular provisions of that
25 biological opinion?

1 MR. BRATOVICH: Not offhand, I don't recall the
2 specific provisions.

3 MR. JOHNSON: Tom Johnson for Yuba County Water
4 Agency.

5 There is a biological opinion that was issued in
6 November of 2005. It does have incidental take
7 authorities for certain actions of the Yuba River
8 Development Project including the construction of a
9 full-flow bypass and for flow fluctuation as authorized by
10 the FERC license amendment.

11 DR. SMITH: For the chinook salmon?

12 MR. JOHNSON: Yes, for all species.

13 DR. SMITH: Okay. For all species?

14 MR. JOHNSON: All NMFS jurisdictional species.

15 DR. SMITH: I gotcha. Okay. Thank you.

16 Has the Yuba County Water Agency conducted
17 detailed studies to determine the effects to the fisheries
18 in all life stages and wildlife resources in the New
19 Bullards Bar Reservoir resulting from the long-term water
20 transfer?

21 MR. BRATOVICH: Well, I can certainly address the
22 fisheries component of that, and the answer is yes, for
23 fisheries.

24 DR. SMITH: And can you explain that?

25 MR. BRATOVICH: Yes. The fisheries impact

1 assessment methodology for reservoir fisheries addressed
2 both warm water fish community and the cold water fish
3 community. So for New Bullards Bar Reservoir, impact
4 indicators were established by which changes in water
5 surface elevation or changes in storage would occur over
6 the 70-some-year period of analysis that Dr. Draper
7 described.

8 For warm water fishes, studies conducted by the
9 California Department of Fish and Game indicated that a
10 long-term self-sustaining centrarchid fishery, the
11 sunfish, the basses, the other warm water fishes, would be
12 maintained with a 60 percent nest survival rate, which
13 equates to a change in -- a decrease in water surface
14 elevation of 6 feet per month.

15 So an impact indicator during the centrarchid
16 potential spawning season, which, as I recall, I think
17 extended through March through June for the warm water
18 fisheries, was included in the model evaluation on the
19 probability analysis, and actual counts of individual
20 months, of individual years, for that entire period, over
21 that whole 70-some-year record and compared the number of
22 times that it decreased -- a monthly decrease in water
23 surface elevation in the reservoir of 6 feet or more a
24 month would occur and compared those counts between, for,
25 in this instance, the Yuba and the no-project alternative.

1 For cold water fisheries, there was a less
2 quantitative evaluation, but there was an evaluation of
3 changes of storage in the potential completion of cold
4 water pool as represented by changes in storage that would
5 either affect physical habitat availability or the primary
6 forage base for the cold water fishes in the reservoirs.

7 DR. SMITH: Okay. Thank you.

8 MR. LILLY: And just so we're clear, Dianne
9 Simodynes is prepared to talk about wildlife if it's
10 necessary.

11 HEARING OFFICER BAGGETT: I don't know -- that
12 wasn't the question, that it's necessary. But it might be
13 helpful for the record just to cite where that is in case
14 Dr. Smith or Mr. Baiocchi want to look it up. Just give
15 us a cite just for the record.

16 MR. BRATOVICH: I can tell you, it's in Chapter
17 10.

18 Is that sufficient?

19 HEARING OFFICER BAGGETT: Yeah.

20 DR. SMITH: Great. Thank you.

21 Another question for you. You mentioned in your
22 testimony that you were really looking at two
23 possibilities, this project or no project. Was there a
24 third that you were given an opportunity to evaluate which
25 might provide more mitigation for fish?

1 MR. BRATOVICH: Yes. We actually did, as I
2 recollect, seven quantitative comparative scenarios, not
3 just -- this was one quantitative scenario comparison in
4 the document itself.

5 DR. SMITH: Okay. All right.

6 And did you try and quantify at the end in your
7 summary, this project versus no project? Or was there a
8 gradation in terms of desirability from a fish standpoint
9 versus some of the other alternatives?

10 MR. BRATOVICH: I think I understand your
11 question. For all of the comparisons, they were all --
12 use the same methodology.

13 So for each of the reservoirs, the rivers, the
14 species, the life stages, that was all conducted the same
15 way for each of these comparative scenarios. And as I
16 recollect, and it was -- and I believe it's in Chapter 10,
17 but certainly the evaluations are, that, yeah, it was
18 concluded that the Yuba Accord alternative was the
19 scenario that provided the most beneficial effects to
20 fisheries resources throughout the system.

21 DR. SMITH: Okay. All right.

22 MR. BRATOVICH: Yes, sir.

23 DR. SMITH: Another question that I've got, and it
24 can come from anybody -- I'm not an expert. I'm not a
25 biologist; I'm not an attorney, it's obvious.

1 But one of the terms that you used, that has been
2 used today, that I would like somewhat of an explanation
3 for and that is -- I want to make sure that I got it right
4 here. "Would not unreasonably affect." And that's been
5 used considerably today -- "unreasonably affect." And I
6 guess, you know, depending on where you are coming from,
7 reasonable is kind of like what Attorney Lilly was talking
8 about, before, you know, if we're going to use some of
9 these words, I think it's important for us to understand
10 what they mean.

11 MR. BRATOVICH: Yes, sir. I will give it a try.
12 I'm not an attorney, and I'm not going to issue a legal
13 opinion either.

14 DR. SMITH: Okay. All right.

15 MR. BRATOVICH: But from a
16 fisheries-biologist-environmental-compliance perspective,
17 my understanding is that from Water Code section 1736,
18 specifies that unreasonable effects cannot be derived on
19 the beneficial uses of water, including fish and wildlife
20 and others.

21 So in CEQA language, we use significant impacts as
22 a basis of a conclusion, and for Water Code purposes, we
23 use "unreasonable effect."

24 And then as it was stated earlier, relative to
25 comparing the Yuba Accord to a long-term 1644, which is

1 represented by the no-project alternative and why we
2 included that as our major example, today, the additional
3 conclusion is necessary, to my understanding, of also
4 applying -- of providing an equivalent or higher level of
5 protection.

6 So as my non-attorney fisheries biologist
7 understanding, it's a term of art, a specific word usage.

8 DR. SMITH: And does it include economic, social,
9 cultural aspects in it?

10 MR. BRATOVICH: I'm afraid that's not in any
11 venue. I can't respond to that.

12 DR. SMITH: Okay. Thanks.

13 Has the Yuba County Water Agency conducted
14 detailed studies to determine the effects to the public
15 recreation such as public boating, public camping, public
16 fishing at New Bullards Bar Reservoir resulting from the
17 long-term water transfer?

18 MS. SIMODYNES: My name is Dianne Simodynes.

19 And, yes, the EIR/EIS included a chapter on
20 recreation resources. The impact assessment methodology
21 looked at changes in water surface elevations and
22 potential effects on boat ramp elevations in New Bullards
23 Bar Reservoir. We also looked at changes in flows in the
24 Lower Yuba River for potential effects on recreation.

25 DR. SMITH: Okay. All right. Thank you.

1 What about the boat ramp facilities? The drawdown
2 in the dam, will it ever be at the point where a boat ramp
3 is -- doesn't exist for anything other than
4 four-wheel-drive vehicles?

5 MS. OHIOSUMUA: In the recreation chapter, we
6 included various boat ramp levels identified for the
7 reservoirs that we looked at, which is New Bullards Bar
8 and Oroville Reservoir and San Luis Reservoir within the
9 project area. Each reservoir has a different boat ramp
10 level, so, again, we looked at the hydrologic modeling
11 results for flows that Dr. Draper talked about over the
12 72-year period of record, and we looked at month-to-month
13 changes over the recreation season.

14 DR. SMITH: Okay. Are there going to be periods
15 of time during the year where boat access is probably not
16 going to be reasonable?

17 MS. OHIOSUMUA: To my recollection, overall, no,
18 there was -- when you look at all of the months within the
19 simulation period, there may have been one or two months,
20 which we could look at the model output to verify. But
21 overall, that would be, you know, perhaps one out of 72.
22 But overall, no, which led to our conclusion that
23 recreation resources would not be unreasonably affected.

24 DR. SMITH: Okay. Great. Thank you.

25 During the period of the long-term water transfer,

1 will the Yuba County Water Agency implement a, quote,
2 unquote, truck-and-haul program which will allow for the
3 upstream migration of endangered spring-run and threatened
4 steelhead to their historic spawning grounds in the Yuba
5 River above New Bullards Dam Reservoir?

6 MR. LILLY: I think this is beyond the scope of
7 the hearing. I object on that basis. But depending on
8 the hearing officer's ruling, I believe Mr. Aikens can say
9 something about that. I don't think it has nothing to do
10 with the hearing issues, though.

11 HEARING OFFICER BAGGETT: I will sustain the
12 objection, but if you would like to answer --

13 DR. SMITH: All right.

14 HEARING OFFICER BAGGETT: I sustain that it's not
15 relevant.

16 MR. LILLY: Since you are sustaining it, we will
17 not answer. Thank you.

18 DR. SMITH: Water from the New Bullards Bar
19 Reservoir would be diverted and used for the proposed
20 long-term water transfer.

21 Will the Yuba County Water Agency release water
22 directly below and from the New Bullards Dam into the
23 North Yuba River riverbed to protect the navigable waters
24 of the Yuba river?

25 MR. AIKENS: We will meet our regulatory

1 requirements for New Bullards Bar releases below the dam.

2 DR. SMITH: What are the daily river flow
3 requirements from the dam?

4 MR. AIKENS: I would have to check, but I believe
5 they are 5 CFS.

6 DR. SMITH: Okay.

7 The proposed long-term water transfer will be
8 used -- will use the riverbed of the North Yuba River
9 below New Bullards Bar Dam. Is the riverbed of the Yuba
10 River below New Bullards Bar Dam the property of the
11 people of the State of California?

12 MR. LILLY: I'm sorry to keep objecting, but these
13 questions keep assuming facts that are not in evidence
14 and, in this case, are not true.

15 HEARING OFFICER BAGGETT: I will sustain.

16 Can you rephrase? I'm not quite sure how that
17 helps.

18 DR. SMITH: Well, you are doing a pretty good job
19 so far.

20 HEARING OFFICER BAGGETT: I mean, Mr. Lilly's
21 correct.

22 DR. SMITH: Let me ask then, who owns the property
23 below the dam?

24 MR. AIKENS: I believe there's a variety of
25 owners. YCWA owns some land. The state and federal

1 government may own some land. The private parties may own
2 some land.

3 DR. SMITH: Great. Thank you.

4 Has the Yuba County Water Agency filed an
5 application for water quality certification with the State
6 Water Resources Control Board for the proposed long-term
7 water transfer?

8 MR. LILLY: I don't think anybody knows, there's
9 no legal requirement for one, so I think the answer is
10 probably no.

11 DR. SMITH: Thank you.

12 Has Yuba County Water Agency received water
13 quality certification from the State Water Resources
14 Control Board for the proposed long-term water transfer?

15 MR. LILLY: I think that's the same question, and
16 we'll give the same answer. Not legally required, so no
17 application filed.

18 DR. SMITH: Okay. Thank you.

19 Has the Yuba County Water Agency conducted
20 detailed studies to determine the effects to elevated
21 water temperatures and the taking of endangered and
22 threatened anadromous fish species in the Lower Yuba River
23 resulting from the long-term water transfer under all
24 types of water year conditions that affect storage levels
25 at the New Bullards Bar Reservoir and river flows in the

1 Lower Yuba River?

2 And if that's too long, I would be happy to come
3 and let whoever wants to answer that look at it.

4 MR. LILLY: I'm sorry. I have to object.

5 It assumes that the Accord will provide elevated
6 temperatures, which is not correct, and it makes various
7 other assumptions. It also assumed that there are
8 endangered species there, which is not correct. So I
9 think it needs to be broken up into questions that are --
10 that have correct facts.

11 HEARING OFFICER BAGGETT: Sustained.

12 MR. LILLY: Thank you.

13 MR. RUBIN: I just would like to object. I've
14 been holding this back in terms of an objection, but maybe
15 it would help with further questions. A lot of the
16 questions that are being asked are characterized in terms
17 of what the Water Transfer Agreement will provide, and I
18 don't believe the Water Transfer Agreement provides
19 anything here. The questions, I think, are more
20 appropriately focused on what the Yuba River Accord would
21 provide.

22 HEARING OFFICER BAGGETT: Thank you.

23 DR. SMITH: That's it. I've got some for the
24 Bureau.

25 HEARING OFFICER BAGGETT: Okay. They will be up

1 in a -- probably after lunch at this point.

2 DR. SMITH: Thanks a lot for your help.

3 HEARING OFFICER BAGGETT: Thank you. I think I
4 would like to get through at least the cross from the
5 staff here. Any other party -- well.

6 MR. TURNER: On behalf of Bureau of Reclamation --

7 THE REPORTER: State your name, please.

8 MR. TURNER: My name is Jim Turner for the Bureau
9 of Reclamation. You said the Bureau is going to be up
10 after lunch.

11 HEARING OFFICER BAGGETT: He meant the Department
12 of Water Resources.

13 MR. TURNER: Oh, okay. Thank you.

14 HEARING OFFICER BAGGETT: Mr. Rogers is glad he
15 retired.

16 Anyway, with that, I think we have a few questions
17 from our fishery folks. And both Charlie and I have a
18 couple of questions, so let's try to go through those
19 before lunch.

20 Ernie or Jane, do you have some fishery questions?
21 We're trying to clarify the record to make sure we've got
22 everything we need.

23 STAFF ENGINEER MONA: Hi. I'm Ernie Mona. This
24 isn't really a fishery question, but I'd like to follow up
25 on a question that Mr. Smith asked Mr. Aikens regarding

1 screening of all diversions along the Lower Yuba River.

2 If Mr. Aikens, if you could follow up, when you
3 said all diversions on the Lower Yuba River, did you
4 include the diversions that are currently under contract
5 with Yuba County Water Agency?

6 MR. LILLY: And I object. This is nothing to do
7 with this hearing or the hearing issues. For whatever
8 those contracts provide, they will have the same
9 diversions whether the Board approves the petitions or
10 does not approve the petitions. They are not involved at
11 all in this proposed project or the pending petitions.

12 HEARING OFFICER BAGGETT: I would agree. But I
13 think since we've got this in the record, if we can
14 clarify, it would be helpful. I understand the relevancy
15 issue to the hearing, but we've already got the statement
16 in the record.

17 MR. LILLY: Wait. Excuse me. We have a statement
18 in the record about the diversions to member units. The
19 question Mr. Mona is asking is about diversions by other
20 entities with contractors. Those are different
21 facilities, and we don't have anything in the record on
22 them, and they are not in any way involved in this
23 proceeding.

24 STAFF ENGINEER MONA: If I may clarify, one simple
25 question. Does Yuba County Water Agency contract with the

1 diverters located in the Dantoni area downstream of
2 Daguerre Point Dam?

3 MR. AIKENS: We do have contracts. I would have
4 to check to see the last time any of those diversions or
5 active diversions were made on those contracts. As I
6 recall, all -- maybe not all have stopped diversions for a
7 variety of reasons.

8 STAFF ENGINEER MONA: So there's therefore no
9 intention by the agency to describe those diversions as
10 points of diversion/rediversion that are under the water
11 rights?

12 MR. LILLY: That question, I object to. Has
13 nothing to do with this proceeding. What the agency may
14 do in the future about its water rights, we don't -- it's
15 not part of this proceeding.

16 STAFF ENGINEER MONA: That's fine. I will move on
17 if that's --

18 HEARING OFFICER BAGGETT: The entire water right
19 file is in the hearing.

20 MR. LILLY: I understand. But the hearing issues
21 are narrower than the whole file?

22 STAFF ENGINEER MONA: Okay. Let's move to Yuba
23 County Water Agency's Exhibit No. 7. I think it's Exhibit
24 7, page 7 of that exhibit. It's the dry year storage
25 adjustment language that Yuba County has requested be

1 incorporated into any permits -- be incorporated into the
2 modified under the Yuba County Water Agency's permits as a
3 new operating condition.

4 Am I correct in understanding that this dry year
5 storage adjustment language will not become effective
6 unless the fishery agreement is -- becomes ineffective?

7 MR. LILLY: It might be helpful if you tell us
8 what page of Exhibit 7 you are referring to.

9 STAFF ENGINEER MONA: It's page 7.

10 MR. LILLY: And Mr. Baggett, I'm not under oath
11 and I'm not a witness. But this is a legal question, and
12 I would like to give an answer. I mean, it's asking for
13 an interpretation of a petition that requests specific
14 legal action. And the answer is really very simple. You
15 can look at C on page 5 of that Exhibit 7, to Exhibit 7,
16 which has the qualifier that, basically, if the Fisheries
17 Agreement terminates early, then the following things
18 require -- requirements will go into effect. And that
19 goes -- that carries on through to the dry storage
20 adjustment on page 7 that Mr. Mona is talking about.

21 So I think the language is pretty clear. I don't
22 see any real benefit to asking some witness without legal
23 training to give a legal interpretation of a petition.

24 HEARING OFFICER BAGGETT: Why don't you ask your
25 question again, Ernie? I think I understand. And I think

1 he was asking a very specific question: How often is it
2 going to occur?

3 STAFF ENGINEER MONA: Is it going to occur --

4 HEARING OFFICER BAGGETT: That's not a legal
5 question.

6 MR. LILLY: Well, the legal question is what
7 contingency would cause it to occur. The answer is we
8 don't expect it will ever occur, because if the Fisheries
9 Agreement remains in effect, as it says on page 5 of that
10 Exhibit 7, then these provisions will never happen. So
11 the answer is no, we don't think it will ever happen.

12 STAFF ENGINEER MONA: Can someone explain why you
13 are then requesting the Board to incorporate this language
14 in the permits if it's never going to occur?

15 MR. LILLY: The answer is that when we negotiated
16 the Fisheries Agreement, the Department of Fish and Game
17 and the NGOs insisted on a backup in case, for some
18 reason, the Fisheries Agreement was going to ever
19 terminate early, they wanted a backup that these
20 provisions then would go into effect in the water right
21 permits. So it was a carefully negotiated backup that's
22 in there.

23 STAFF ENGINEER MONA: Was there ever any analysis
24 conducted to determine how often these dry year storage
25 adjustments were expected to occur?

1 MR. LILLY: Now, if we're shifting over from that
2 provision to the provisions in the Fisheries Agreement
3 regarding dry year storage adjustments, then Mr. Grinnell
4 or Mr. Draper can talk about those.

5 HEARING OFFICER BAGGETT: That's the question, I
6 think.

7 MR. LILLY: Okay. He was just referring to the
8 wrong document.

9 But if the question is, how often would they occur
10 in a hydrological modeling with the Fisheries Agreement,
11 Mr. Grinnell or Mr. Draper can answer that.

12 HEARING OFFICER BAGGETT: I will be addressing the
13 enforceability issue, which is later on. But let's talk
14 fishery. I think Mr. Mona's question is fishery issue and
15 modeling.

16 MR. DRAPER: We incorporated the dry year storage
17 adjustment into the model for Schedule 5 years. We would
18 have to look at model results to tell you how many times
19 that went into effect because it's a combination of both
20 the Schedule 5 and storage conditions. But we can pull up
21 that information and provide it.

22 STAFF ENGINEER MONA: Well, instead of doing that,
23 could you just maybe refer to where it's located so that
24 we can look at it later on?

25 MR. DRAPER: I think the answer to that is, you

1 would have to look at the modeling appendix output, look
2 at monthly storage conditions, and look to see whether
3 there's a Schedule 5 year.

4 HEARING OFFICER BAGGETT: Maybe I can save some
5 time here. I would suggest some of these questions, if
6 you don't immediately have it, we're going to take a
7 break, and when we come back for redirect, maybe counsel
8 can work with his witnesses to answer some of the these
9 more detailed -- like where, to save you spending 15
10 minutes trying to find it so you can be accurate, and it
11 helps us help you, and makes it much more efficient.

12 MR. LILLY: We're more than happy to do that.
13 It's a good suggestion.

14 HEARING OFFICER BAGGETT: So if there's a question
15 that you don't -- you will have an opportunity to come
16 back.

17 STAFF ENGINEER MONA: Okay. The agency has
18 operated under the Yuba Accord for the last few years.
19 And has -- can anybody provide me with what the state of
20 the fishery resources are in the Lower River Accord now,
21 having operated for two years under the Accord?

22 MR. BRATOVICH: Yes, sir, Mr. Mona.

23 The River Management Team has become engaged and
24 has been operating as if the -- for many intents and
25 purposes as if the accord were in place for a couple of

1 reasons. Perhaps the most important reason is to start
2 establishing baseline data to do long-term trend analyses
3 to evaluate the efficacy of implementing the Yuba Accord
4 flow schedules and resultant flows from those flow
5 schedule requirements.

6 The RMT or the Yuba River Accord itself has only
7 really funded certain studies this past year with some
8 partial funding from previous years.

9 But what I can tell you is that whether it was
10 funded by the River Management Fund of the Accord or
11 whether some of the additional monitoring was ongoing
12 monitoring conducted by the Department of Fish and Game
13 through various funding mechanisms, including the AFRP
14 administered by the U.S. Fish and Wildlife Service.

15 So over the past couple of years, the monitoring
16 that has continued hasn't been the full suite of
17 monitoring that's envisioned under the accord, but it's
18 been in what we refer to as a couple of core elements.
19 And again, whether it was funded by the accord or
20 otherwise, the core monitoring that has continued these
21 past couple years includes the spawning stock escapement
22 surveys during the fall. Fish and Game has continued some
23 visual observation of reds during September, presumed to
24 be the spring-run spawning period, and has continued to
25 operate the rotary screw traps down at Hallwood. We had a

1 more vigorous and multi-location plan anticipated.

2 But again, without assurance of funding, because
3 of the accord not being implemented, they have maintained
4 that singular location.

5 And also, part of the monitoring that's occurred
6 these past few years has been, since 2003, the Vockie
7 River Watcher fish imaging and census device at both
8 ladders at Daguerre Point Dam.

9 In 2005 and '06, the spawning stock escapement
10 estimates for chinook have come in. They have been
11 completed for the recent reports by Fish and Game, for the
12 Lower Yuba River as well as for elsewhere, throughout the
13 Central Valley.

14 The 2007 has not been compiled yet. They are
15 still doing the spawning stock escapement estimates.

16 In 2006, the spawning stock escapement counts were
17 down in the Lower Yuba River relative to the prior few
18 years as they were down in other rivers throughout the
19 Central Valley.

20 The rotary screw trapping has been conducted and
21 it has shown essentially the timing and distributional
22 patterns of outmigrating juvenile salmons, vast majority
23 of which are chinook, some of which recently have been
24 tried to be run and identified by Fish and Game by
25 applying the size at time-run specification tables

1 developed by Frank Fisher, modified by Sheila Green. So
2 that effort's been ongoing as well. They essentially
3 confirm the results of the rotary screw trap monitoring
4 that has been conducted since 1999 with the exception of
5 one year that -- where rotary screw trapping wasn't
6 completed, which essentially shows the temporal
7 distribution of outmigration as well as provides
8 information on the condition of the individuals.

9 The visual observations of reds during September
10 is mostly an anecdotal observational format. The River
11 Management Team is working to develop protocols for focus
12 studies including September surveys. And to the best of
13 my recollection -- I am not sure about this. But to the
14 best of my recollection is there's pretty much an
15 intermediate number of spring -- of September spawning
16 fish presumed to be spring-run.

17 The VAKI River Watcher results have been
18 preliminarily gone through -- the data reduction process.
19 Fish and Game is quite cautious about releasing those
20 results until they've gone through their QAQC process,
21 because my understanding from the River Management Team is
22 that it really is quite a data-intensive process, looking
23 at the infrared images, trying to determine which fish are
24 adipose clipped or which fish are not, trying to ascribe a
25 species identification to them, so they are quite cautious

1 about those results.

2 Preliminary information is that -- again, I don't
3 know if this comes under hearsay, but through the River
4 Management Team is that in 2007, the spring of 2007, that
5 the fish that have migrated up during what is reportedly
6 the spring-run upstream migration period was intermediate
7 to the past few years. Again, it's been in place since
8 2003. Fish and Game is working towards more definitive
9 stock identification using the Vockie River Watcher. And
10 they have separated out and reported those fish to simply
11 come up in May this past year and reported more fish
12 coming up in May than there has been in any of the other
13 previous years.

14 I think as an overview, that's what I can tell
15 you.

16 STAFF ENGINEER MONA: Thank you.

17 Does the River Management Team produce some type
18 of annual report that summarizes an assessment of the
19 conditions after each operational year?

20 MR. BRATOVICH: I am providing technical input on
21 behalf of the agency. Tom Johnson is more involved in the
22 management of the process. Perhaps that would be an
23 answer for him.

24 MR. JOHNSON: Tom Johnson for Yuba County Water
25 Agency.

1 At this point in time, we have not produced annual
2 reports. It is clearly anticipated in the Accord
3 Fisheries Agreement that we will be doing annual reports,
4 making RMT data available, publicly, and various other
5 things. Since we have been operating in an in-between
6 mode, if you will, during the course of these pilot
7 programs, there's a number of initiatives that we have not
8 taken on that we will establish as soon as we are a more
9 permanent entity.

10 Just as an aside, I would like to invite any state
11 board staff members to an RMT meeting and I will make sure
12 that you have notice of the next half dozen meetings,
13 irregardless of this proceeding. It might be of help or
14 of benefit in understanding the Lower Yuba River.

15 STAFF ENGINEER MONA: Thank you. Just a couple
16 more specific questions.

17 In responses to our comments on the Draft
18 Environmental Document, the proposed Yuba Accord, the
19 final environmental document say that various changes were
20 expected in the near future.

21 Can you please, someone on the panel, indicate
22 whether the following amendments have happened: Has the
23 Fishery Agreement been amended to reflect that the
24 necessary approvals for ramping rates have been received?

25 MR. LILLY: It might help if you refer to what

1 page of the final EIR you are talking about.

2 STAFF ENGINEER MONA: The pages are pages 4-47 to
3 4-48.

4 HEARING OFFICER BAGGETT: There's a list of
5 agreements and amendments. We're just trying to figure
6 out whether they are done or not. You have already told
7 us a few, like the Water Purchase Agreements have been
8 executed. We just need a status of this.

9 MR. LILLY: Yeah, and the answer is, that one, it
10 has been changed.

11 Basically, Mr. Mona, what happened was, when the
12 draft agreement was prepared in '05, we were still waiting
13 for the final biological opinion from National Marine
14 Fisheries and the final license amendment order from FERC,
15 and those have come. And now, the changes are, in fact,
16 reflected. It's all very clearly set out in Exhibit YCWA
17 9. That's the final agreement, and where those sections
18 are, and now it's set -- where the -- it's been satisfied.
19 It says that on page 7.

20 HEARING OFFICER BAGGETT: We have a challenge
21 here. I don't think you are sworn in as a witness, for
22 one. But I think we can -- maybe ask the questions and
23 then some of these are probably more legal -- they are
24 legal questions and they can be addressed in your closing
25 brief or closing comments. So why don't we just get the

1 questions, and you can answer them, I think, as part of
2 brief -- what seems to be more appropriate than as a
3 witness.

4 MR. LILLY: That's fine. Then I can just refer to
5 exhibits in the record, and I will be happy to do that.

6 STAFF ENGINEER MONA: Okay. The first one, as I
7 already asked, has the Fishery Agreement been amended to
8 reflect that necessary approvals for ramping rates have
9 been received?

10 Two, has the Fisheries Agreement been amended to
11 reflect that implementation of the agreement does not
12 depend on approval of a Feather River point of diversion?

13 Three, has the Fisheries Agreement been amended to
14 delete the sections regarding technical flow violations?

15 HEARING OFFICER BAGGETT: Let me -- maybe we can
16 cut to the case here.

17 I assume that the manager would know whether these
18 agreements have been signed, and he's sworn.

19 MR. LILLY: The problem we have -- the answer to
20 all of those questions is, yes, they are all set out in
21 Exhibit 9. We can easily cite to the sections that do
22 that.

23 HEARING OFFICER BAGGETT: To make the record clear
24 and save your writing the brief, Mr. Aikens, do you
25 understand the questions we're asking? Have those been

1 signed, and where can we find them?

2 MR. AIKENS: I believe they are answered under
3 Section 4.4 of the Fisheries Agreement. For example,
4 Section 4.1.2 is Amendment of YCWA's FERC License. "This
5 condition precedent, which was described in earlier
6 drafts, has been satisfied."

7 The Feather River Point of Rediversion --
8 Diversion/Rediversion is 4.1.3. "This condition
9 precedent, which was described in earlier drafts of this
10 agreement, has been deleted from the agreement. It is no
11 longer a condition precedent of the agreement. YCWA
12 retains the right to pursue that Feather River diversion
13 facility and to redivert Yuba Project Water from the
14 Feather River at this facility after the term of this
15 agreement."

16 MR. LILLY: And Mr. Aikens, why don't you read, on
17 page 25, section -- or just refer to Section 6.2.5 to
18 Section 6.2.8 in response to the question about technical
19 variations of agreement flow schedules.

20 MR. AIKENS: 6.2.5, Technical Variations of
21 Agreement Flow Schedules. "In earlier drafts, this
22 section concerned 'Technical Variations Of Agreement Flow
23 Schedules,' which could only -- which could occur only
24 before the Narrows II Powerhouse Full Flow Bypass was in
25 operation. Because this bypass now is in operation, this

1 section has been deleted from the agreement."

2 Remedies for Technical Variations of Agreement,
3 Flow Schedules. "For reasons discussed in Section 6.2.5,
4 this section has been deleted from this agreement."

5 Determination of Technical Variation of Agreement
6 Flow Schedules. "For the reasons discussed in Section
7 6.2.5, this section has been deleted from this agreement."

8 Payments for Technical Variation of Agreement Flow
9 Schedules. "For reasons discussed in 6.2.5, this section
10 has been deleted from this agreement."

11 Was there also 6.2.9, Mr. Lilly?

12 MR. LILLY: No, I think you have covered it.

13 MR. AIKENS: Thanks.

14 STAFF ENGINEER MONA: Thanks. That's all I have.

15 HEARING OFFICER BAGGETT: I am just debating
16 whether we should break now or not. We've got three or
17 four more questions.

18 THE REPORTER: I need a five-minute break.

19 HEARING OFFICER BAGGETT: Let's take five minutes.
20 Let's come back because I would like to get this panel
21 done at 1:00 o'clock.

22 (Thereupon a break was taken in
23 proceedings.)

24 HEARING OFFICER BAGGETT: Let's press onward and
25 see if we can -- I think Jane had three or four questions

1 and I have got a couple.

2 STAFF SCIENTIST FARWELL: Jane Farwell.

3 My first question is, I'm going to address this to
4 the whole panel because I'm not sure which one of you can
5 answer it best.

6 The first question is, on a month-by-month basis,
7 what is the effect of the project on Old River and Middle
8 River flows as compared to the CEQA no-project
9 alternative?

10 I can repeat the question.

11 MR. DRAPER: Yes, please. Please, could you
12 repeat the question?

13 STAFF SCIENTIST FARWELL: Of course.

14 On a month-by-months basis, what is the effect of
15 the project on Old River and Middle River flows as
16 compared to the CEQA no-project alternative?

17 HEARING OFFICER BAGGETT: And again, I think I
18 will expedite things. If there's a place where it's
19 specifically answered in your record in the tens of
20 thousands of pages, if you could help us, that would be --
21 I don't think we need a 30-minute discourse if you have
22 got it already clearly defined for us.

23 MR. LILLY: We'll have Mr. Draper give the
24 response.

25 MR. DRAPER: I think that might be one that I need

1 to spend five, ten minutes and come back to you on.

2 MR. LILLY: We'll add it to our list. We have two
3 now. We'll come back with it.

4 STAFF SCIENTIST FARWELL: I think there's a third
5 one coming up.

6 This is a bit longer. The conference year, as I
7 understand it, was calculated to occur one in a hundred
8 years. Based on an evaluation of data over the past 91
9 years, the EIR/EIS presented data suggesting that flow and
10 storage amounts under a severe global warming water supply
11 model are within the ranges studied in the document. And
12 I'm referring to pages 4-61 to 4-64.

13 There's a little more. There's a little more to
14 that question.

15 However, the EIR/EIS, the final EIR/EIS, does not
16 address the potential impacts of global warming on the
17 frequency of the very dry years. How would the global
18 warming scenarios referenced in the final EIR/EIS affect
19 the estimate of the frequency of conference years?

20 MR. DRAPER: We'll add that to the list.

21 STAFF SCIENTIST FARWELL: Great.

22 Okay. The next one is shorter.

23 The draft EIR/EIS notes on page 10-118 that in
24 warmer water years there is a high chance that May water
25 temperatures will exceed those of the CEQA no-project

1 alternative to the potential detriment of incubating
2 steelhead embryos.

3 Would you please explain briefly why this would
4 not constitute an unreasonable effect?

5 MR. BRATOVICH: Paul Bratovich.

6 The impact evaluation considers each species, each
7 run, each life stage, each month that occurs during that
8 life stage throughout the probability of occurrence in
9 covering the suite of hydrologic scenarios. It is -- we
10 intentionally do not make a conclusion whether a
11 significance or an unreasonable effect conclusion on one
12 life stage or one impact indicator. So that's sort of a
13 global response, is that our effects assessment is based
14 on the entire suite of flows, temperatures, habitat
15 availabilities, all months of the year, all life stages.

16 So my initial answer would be, that's why that
17 doesn't constitute an unreasonable effect or an impact to
18 steelhead due to that one factor for that one monthly
19 period.

20 STAFF SCIENTIST FARWELL: Okay. Thank you,
21 Mr. Bratovich.

22 My final question is, please explain how component
23 two, three, and four water will result in changes in flows
24 in different months, in different water year types.

25 MR. GRINNELL: Steven Grinnell. Let me see if I

1 can try to answer that.

2 The components of water in the Water Purchase
3 Agreement are an accounting mechanism. They, in fact,
4 don't specifically drive the operations of the accord flow
5 schedules. What they do is embody essentially the demand
6 statewide for the water supply for transfer.

7 So the operation is not driven by the Water
8 Transfer Agreement other than groundwater substitution
9 operations that would be undertaken to meet those
10 components. And in essence, groundwater substitution
11 operations in general would result in higher flows in the
12 summertime to deliver that water.

13 STAFF SCIENTIST FARWELL: Thank you, Mr. Grinnell.
14 That's all I have.

15 HEARING OFFICER BAGGETT: Any other?

16 CO-HEARING OFFICER HOPPIN: Mr. Aikens, I have a
17 question. I think it's appropriate for you, but you can
18 pass it off if you would like.

19 For our record, EWA hypothetically, potentially,
20 will disappear after 2008. What will happen to that
21 component of the water if it, in fact -- if EWA, in fact,
22 goes away?

23 MR. AIKENS: There's provisions in the Fisheries
24 Agreement that discusses how that is done, and maybe
25 somebody can give me the specific reference point of that.

1 MR. LILLY: I think we're getting Section 23D of
2 the Water Purchase Agreement.

3 HEARING OFFICER BAGGETT: Well, let the witness
4 answer, please.

5 MR. AIKENS: Yeah, 23D on page 29. I don't know
6 if you want me to read that off or not, Charlie. That's a
7 reference point to that.

8 CO-HEARING OFFICER HOPPIN: I thought
9 Mr. Bartkiewicz was just going to pull up his sleeve like
10 a quarterback and read it off his wrist.

11 HEARING OFFICER BAGGETT: It takes two attorneys
12 to keep you under control.

13 I've got one. It's probably a legal question
14 which will probably end up being dealt with in the closing
15 brief, or maybe you can figure it out in your closing
16 statement and we can talk about it at that point.

17 But the one concern I have is the enforceability
18 of a third-party agreement as part of a state water right
19 order.

20 And I don't know, maybe Mr. Aikens is the
21 appropriate one now. If you want to address it, then
22 later -- I'm just struggling with how we -- we've done it
23 in Shasta. If any of you are familiar with 1641, in that
24 order, there's a number of delegations and where a
25 committee will come back to our division chief and she

1 will ultimately have veto or approval power over that, or
2 rebuttal resumption that the flows in a conference year
3 for example are -- we have some final blessing or veto.

4 In this case, I've got the agreement, and I am
5 fairly familiar with it, not like you all. But I'm just
6 trying to understand how we are not delegating our
7 authority to enforce flows on a river or under a water
8 right permit based on this contract.

9 MR. AIKENS: In general, I know that we spent a
10 whole lot of time with this particular enforceability and
11 having enough penalties in here to make sure that we would
12 implement the Fisheries Agreement the way it was intended
13 to be implemented.

14 When we're getting down into the specific legal
15 things, I think you may be right, that the closing brief
16 may be the appropriate way to address that. That's beyond
17 my capabilities at this time.

18 HEARING OFFICER BAGGETT: I understand with the
19 funds, it's a very complex issue. I understand some of
20 the challenges here, but you've got to appreciate that we
21 also have challenges here because we do have the public
22 trust, which we are obligated, especially in this
23 particular order, to enforce.

24 And we've got to make sure that just because some
25 parties on the side are cutting a deal, we've got to make

1 sure that there is some -- if something happens -- and we
2 understand, in the agreement, there's all kinds of
3 clauses. But they aren't -- we aren't parties to that
4 agreement. So that's what, I think, the single biggest
5 issue in this whole proceeding that I'm struggling with.
6 I think the fishery flows, there's all kind of evidence
7 there. You have done an incredible amount of research.
8 You've worked with all the major stakeholders, and I can
9 appreciate that.

10 But in the end, it's got to be a water right order
11 that isn't -- has some enforceability by my -- our
12 predecessors, likely. So anyway, I will throw that out
13 there. I don't expect an answer now. This isn't -- maybe
14 in a closing statement.

15 MR. LILLY: I think that's a closing brief point,
16 and we frankly appreciate your asking it so we know to
17 make sure to address that in the closing brief.

18 HEARING OFFICER BAGGETT: And if we do have any
19 closing arguments this afternoon, maybe we can explore it
20 further, not an answer but for at least -- so we can start
21 thinking about it and, obviously, you will be thinking
22 about it.

23 Any other questions?

24 If not, then why don't we take an hour -- 45
25 minutes.

1 We're off the record.

2 (Thereupon a discussion was held off the
3 record.)

4 HEARING OFFICER BAGGETT: On the record. We're
5 breaking until 1:30. We'll resume then.

6 (Thereupon a break was taken in
7 proceedings.)

8 HEARING OFFICER BAGGETT: Let's go back on the
9 record.

10 Is there any redirect?

11 MR. LILLY: Yes. I have redirect to answer the
12 three questions that were raised by staff immediately
13 before the break, and I am just going right into that.

14 First, Mr. Grinnell, based on the hydrological
15 modeling for the Yuba Accord, how often would the dry year
16 storage adjustment go into effect under the period of
17 hydrological record?

18 MR. GRINNELL: For the period of record that was
19 analyzed 1922 to '94, there are, first of all, four years
20 that are Schedule 5 years, and that's when the storage
21 adjustment could potentially go into effect.

22 Of those four years, three of those years would
23 meet the criteria of having storage at the end of
24 September, below 400,000 acre-feet, and therefore, the
25 adjustment in flows at Marysville Gage would go into

1 effect, which is a reduction inflow from 500 CFS to
2 400 CFS starting to November.

3 The one year the storage is above 400,000 but
4 below 450,000, which would make it a discretionary action,
5 and that was not modeled because it was the end of the
6 hydrologic period that was modeled. But all of these
7 other storage adjustments were actually modeled. The
8 reductions were modeled. It was part of the results.

9 Just a note that that adjustment was done in
10 concert with discussions with the Fishery Team putting the
11 accord together, and the reasoning was to -- for priority,
12 that this adjustment would essentially allow for shifting
13 of flow from the wintertime to the spring and summer when
14 it was felt, by that team, that those flows were more
15 important at that time.

16 MR. LILLY: And just to clarify for the record,
17 the actual optative provision of the dry year storage
18 adjustment is in the Lower Yuba River Fisheries Agreement,
19 which is YCWA 9, and it's Exhibit 3 to that agreement.
20 It's -- it has the same language which is what Mr. Mona
21 asked about. But that is the actual operative exhibit.

22 And with what, I will go on to Mr. Draper,
23 Dr. Draper, for question two. Since the conference year
24 one is a shorter question, we'll just jump to that and
25 then we'll come back to the second one.

1 Basically, Dr. Draper, how would the frequency of
2 occurrence of conference years change with the global
3 warming analysis that you have discussed in the final
4 EIR/EIS at pages 4-61 to 4-64?

5 MR. DRAPER: The quick answer is they don't
6 change. But I would just like to put up one of the
7 figures from the final EIR/EIS to explain the reasoning.

8 Firstly, when we looked at a global climate change
9 scenario, we're looking at the 2050 horizon, so we're
10 looking at a long way into the future.

11 Secondly, the main changes that we're going to see
12 in the Yuba Watershed are due to changes in temperature
13 and a shifting of the hydrograph pattern rather than
14 necessarily drier conditions. They are hard to see on
15 this figure, but if you look on the top left-hand chart,
16 the darker line, which is the climate change scenario, and
17 the lighter line is the basis scenario without climate
18 change, and what you will see in the hydrograph is peak
19 year. You are seeing under wet conditions that you get a
20 higher runoff in the spring and lower runoff in the late
21 spring, early summer.

22 So when you look at dry hydrologic conditions, the
23 time -- the shift in timing of the hydrograph becomes less
24 important because there is enough available storage in New
25 Bullards Bar to store the whole hydrograph. So when you

1 look at another set of charts -- will show you the change
2 in storage in New Bullards Bar, and you will see that
3 under the Schedule 3, 4, 5, and 6 years. They look very
4 similar.

5 So go back to the first point of no change in the
6 number of conference years. Just the one in the repeat of
7 the 1977 hydrology.

8 MR. LILLY: And just so the record is clear what
9 we found up on the screen is page 4-64 of the final
10 EIR/EIS, which is Exhibit YCWA 2.

11 The final question for Dr. Draper, again --
12 Ms. Farwell asked if you could locate in the draft EIR/EIS
13 appendix the tables that list the month -- month-by-month
14 effects of the project compared to the CEQA no-project
15 alternative on Old and Middle River flows.

16 So please tell us what pages you located in
17 response to that question.

18 MR. DRAPER: The discussion is in two places: In
19 the draft EIR/EIS, it's in Chapter 9, the Surface Water
20 Quality. Page 980 and 981, summarizes the impacts to the
21 Old and Middle River reverse flows;

22 And then it's in appendix F5, and there's a folder
23 which compares scenario three to scenario two, which is
24 Yuba Accord alternative compared to the no-project
25 alternative, pages 300 and 313. And what those -- what

1 those tables present are results from DSM-2. So we're
2 looking at a 16-year period of analysis. We're using a
3 hydrodynamic model so we can look at flows in particular
4 reaches with the Old River and Middle River. And they
5 compare, on a monthly basis, average monthly flows in the
6 Old River and then in the Middle River for all years and
7 then by water year type.

8 MR. LILLY: And that completes our redirect.

9 We didn't have any other redirect other than to
10 respond to staff's questions.

11 HEARING OFFICER BAGGETT: Any other questions?

12 STAFF SCIENTIST FARWELL: I had a question
13 about -- another question about reverse flows in Old and
14 Middle River. Why the environmental document did not use
15 those as a significant impact.

16 MR. DRAPER: We used them as a significant impact
17 in the surface water quality chapter. The time -- when we
18 formulated criteria for surface water supply and
19 management, I mean, that was before we considered going
20 back a couple of years and, you know, before the Flood
21 Action Plan and the interim remedies order.

22 We did do the supplemental modeling analysis to
23 look at what effects the interim remedies order would have
24 on the Yuba Accord. And I can tell you that for most
25 years in the analysis we did -- the interim remedies order

1 was controlling the reverse flows in the Old and Middle
2 River.

3 STAFF SCIENTIST FARWELL: I see. Thank you,
4 Dr. Draper.

5 Was that used in fisheries impact, the impacts on
6 Old and Middle River, in studying the fisheries impact?

7 MR. BRATOVICH: Is your question, was Old and
8 Middle River flow -- some limitation on Old and Middle
9 River flows used as an impact indicator?

10 STAFF SCIENTIST FARWELL: Yes, sir.

11 MR. BRATOVICH: Directly, no.

12 But as Dr. Draper just discussed, when we looked
13 at the subsequent modeling, there were operational
14 constraints in the hydrologic modeling that incorporated
15 the interim draft remedies order. Then the subsequent
16 salvage estimates associated with that were evaluated.

17 HEARING OFFICER BAGGETT: I guess maybe I should
18 follow up just to make sure I understand.

19 So you are basically saying that the CalSim,
20 whatever model, had already incorporated those
21 restrictions?

22 MR. DRAPER: The original CalSim model that we
23 used was developed prior to the interim remedies order --

24 HEARING OFFICER BAGGETT: I understand.

25 MR. DRAPER: As part of our analyses, we

1 incorporated the interim remedies order into CalSim so we
2 could specifically look at how the accord would operate.

3 HEARING OFFICER BAGGETT: That answered my
4 question.

5 If there's no other -- any other party have any
6 recross or redirect?

7 If not, if you would like to enter your exhibits,
8 put your exhibits in order.

9 MR. LILLY: At this time, I would like to offer
10 Exhibits YCWA 1 through YWCA 28 into the hearing record.

11 HEARING OFFICER BAGGETT: Is there any objection?
12 If not, then they are admitted.

13 MR. LILLY: Thank you. And that concludes our
14 presentation.

15 HEARING OFFICER BAGGETT: Thank you very much.
16 The Department of Water Resources is up.

17 MS. CROTHERS: Good afternoon. My name is Cathy
18 Crothers. I am the attorney with the Department of Water
19 Resources. I would like to introduce the two witnesses
20 that are from the Department of Water Resources. And as
21 before, I think we'll just have the witnesses give their
22 testimony and then have questions afterwards.

23 Our first witness is Teresa Geimer. Teresa -- DWR
24 Exhibit 1 is a -- first of all, Teresa, can you introduce
25 yourself and spell your name for the court reporter.

1 MS. GEIMER: I'm Teresa Geimer, and my last name
2 is spelled G-E-I-M as in Mary -E-R.

3 MS. CROTHERS: And is DWR 1, Exhibit 1, a summary
4 of your professional qualifications?

5 MS. GEIMER: Yes.

6 MS. CROTHERS: Is DWR Exhibit 2 -- no, Exhibit 3 a
7 summary of your testimony?

8 MS. GEIMER: Yes.

9 MS. CROTHERS: Could you please present your
10 testimony?

11 MS. GEIMER: Okay. And I did swear myself in.

12 The Department of Water Resources supports the
13 Yuba County Agency petitions for the -- to implement the
14 Yuba Accord for the benefits of municipal, agricultural,
15 and environmental uses.

16 In 2006 and 2007, we implemented pilot programs of
17 the accord. In 2006 --

18 HEARING OFFICER BAGGETT: Excuse me?

19 DR. SMITH: Aren't they supposed to swear?

20 HEARING OFFICER BAGGETT: You took the oath?

21 MS. GEIMER: I did take the oath.

22 MS. CROTHERS: Yeah, both of our witnesses were
23 sworn in at the beginning of the testimony.

24 DR. SMITH: Sorry.

25 HEARING OFFICER BAGGETT: Thank you.

1 Okay. Continue.

2 MS. GEIMER: In 2006 and 2007, we had implemented
3 pilot programs of the accord. And in 2006, it was -- the
4 Delta was out of the balance so we weren't able to do the
5 transfer in that year. However, in 2007, this year, we
6 were able to implement the accord more as envisioned to
7 occur, and, through that, have gained a lot of experience
8 and knowledge that we used in order to put the Yuba Water
9 Purchase Agreement together.

10 And basically, with the water transfer for the
11 accord, we would be under all of the regulatory
12 obligations that we are now and anything that comes in the
13 future in order to move that water, and that will not
14 change.

15 And that's my summary of my statements.

16 MS. CROTHERS: Our next witness is John Leahigh.

17 John, could you please introduce yourself and
18 spell your name for the court reporter.

19 MR. LEAHIGH: Yes. My name is John Leahigh.

20 That last name is spelled L-E-A-H-I-G-H.

21 MS. CROTHERS: And is DWR Exhibit 2 a statement of
22 your qualifications?

23 MR. LEAHIGH: Yes, it is.

24 MS. CROTHERS: And is DWR Exhibit 4 a summary of
25 your testimony -- or is your testimony?

1 MR. LEAHIGH: Yes.

2 MS. CROTHERS: Could you please summarize your
3 testimony for the Board?

4 MR. LEAHIGH: Okay. My testimony is on the
5 potential rates and timing of Delta pumping associated
6 with the Yuba Accord.

7 Since 1987, DWR has conveyed over
8 2 million-acre-feet through Banks Pumping Plant. The
9 transfer of water has varied based on hydrology and the
10 demand for water. Water transfers have not occurred in
11 winter years because of lack of demand and/or lack of
12 surplus capacity at Banks Pumping Plant.

13 In drier years with high demand, hundreds of
14 thousands of acre-feet of transfers have occurred. For
15 example, during the '91 drought water bank, DWR conveyed
16 470,000 acre-feet across the Delta.

17 Transfer water originating from Yuba County Water
18 Agency has played an important role in providing water
19 during these years of high demand. Since 1987, DWR has
20 conveyed slightly less than 800,000 acre-feet of Yuba
21 County Water Agency water, for the benefit of both the
22 Environmental Water Account and DWR's dry year program.
23 DWR transferred this water while still meeting all Delta
24 regulatory requirements.

25 In the future, as was assumed in the environmental

1 documentation for the Yuba Accord, DWR will transfer Yuba
2 water only when surplus pumping capacity is available and
3 when regulatory requirements are being met.

4 Surplus capacity available for water transfers at
5 Banks varies with hydraulic conditions, as I said, and
6 with the amount of estimated storage in upstream
7 reservoirs carried over from the previous year.

8 In wetter years, surplus capacity is low or
9 nonexistent for transfers of non-State Water Project
10 water, because Banks is being fully utilized for State
11 Water project supplies.

12 Banks typically has unused capacity for transfers
13 in critical and most dry years.

14 In all -- with the exception of the wettest years,
15 there will be small amounts of surplus capacity available,
16 mostly with the dedicated Environmental Water Account
17 capacity in the summer months.

18 In fact, it is anticipated that the vast majority
19 of Yuba Accord water will be moved in the traditional
20 transfer window during the summer and early fall months,
21 and this is July through October.

22 This is the period when delta smelt and other
23 listed species are typically not in the South Delta and
24 not susceptible to entrainment at the pumps. There may be
25 an opportunity to move water outside the traditional

1 transfer period if the Delta is in balanced conditions,
2 there is unused export capacity available, and if the
3 exports are not constrained for fishery purposes.

4 In the spring, when the project is typically
5 constrained for fishery protections, and if the Delta
6 happens to be in balanced conditions, it is actually much
7 more likely that the Yuba flows will be regulated upstream
8 into Lake Oroville than exported at the Delta.

9 During these periods, the need for Feather River
10 releases from Oroville to meet Delta requirements will be
11 lessened because of the introduction of the Yuba Accord
12 flows.

13 And that allows for a temporary crediting of
14 Accord water in Lake Oroville, which can then later be
15 released during the traditional transfer period in the
16 summer.

17 The rates of the increased exports during this
18 traditional transfer period are likely to be 500 CFS or
19 less to capture the Yuba Accord fishery flows and possibly
20 up to an additional thousand CFS to capture supplemental
21 Yuba Accord transfer flows or to capture previously stored
22 Accord water from Lake Oroville that is being re-released
23 during that summer period.

24 Rates have increased SWP pumping outside the
25 traditional summer period -- in the rare instances that

1 they do occur are not likely to exceed 500 CFS.

2 So once again, DWR will transfer water only after
3 meeting all regulatory obligations.

4 DWR will meet requirements under Decision 1641 and
5 the biological opinions for listed species under the
6 Endangered Species Act.

7 For example, DWR will comply with the requirements
8 of the federal court order for delta smelt, that is
9 expected from Judge Wanger this month, and with any
10 additional requirements for salmon once the decision is
11 made regarding that biological opinion.

12 Over the long term, DWR will transfer Yuba Accord
13 water only after meeting all obligations imposed by any
14 current or future biological opinions water rights or
15 water rights terms and conditions and all other Delta
16 regulatory requirements.

17 Thank you. That concludes my summary of my
18 testimony.

19 MS. CROTHERS: We would be open for any questions
20 from the Board.

21 HEARING OFFICER BAGGETT: Does Yuba have any
22 questions?

23 MR. LILLY: Thank you.

24 Mr. Leahigh, I'm going to hand you a copy of a
25 letter dated November 7, 2007, from David Roose of the

1 State Water Project Operations Control Office to
2 Mr. Ronald Milligan at the Bureau of Reclamation, which
3 was also signed by him in concurrence, and ask you to just
4 take a look at that. And for the record, it's been
5 identified as Exhibit YCWA 29. I have multiple copies for
6 everybody.

7 Mr. Leahigh, have you had a chance to review this
8 exhibit?

9 MR. LEAHIGH: Yes, briefly.

10 MR. LILLY: And basically if you could just tell
11 us what this is.

12 MR. LEAHIGH: Yes. This was a letter from, as you
13 say, my boss as chief of the Operations Control Office for
14 the State Water Project to his counterpart over at the
15 Central Valley Project Operations, the Bureau's project.

16 And this was confirmation with the coordination
17 that took place in developing the accounting principles
18 for the Yuba Accord, where USBR staff took place in
19 developing those accounting principles, and this was just
20 to confirm the Bureau's agreement with the principles in
21 that agreement.

22 MR. LILLY: And then Mr. Leahigh, this morning,
23 Board Member Baggett asked some questions about the --
24 just the general situation where there's an agreement with
25 parties, not involving the State Board, for instream

1 flows, and yet it may affect or relate to instream flow
2 requirements in a water right permit.

3 Is DWR involved in any such agreements like that,
4 that was asked about this morning?

5 MR. LEAHIGH: Well, yes. DWR has many instream
6 flow requirements below Oroville Dam in the low flow
7 section and downstream of the outlet of Thermalito
8 Afterbay to the river. We have ramping criteria. And
9 these are all -- were originally part of an agreement
10 between DWR and the Department of Fish and Game. Those
11 agreements were subsequently amended to our water rights
12 permits for operating on the Feather River.

13 MR. LILLY: Okay. Are there any requirements in
14 the agreements independent of what's in the permits?

15 MR. LEAHIGH: I would have to -- I would have to
16 look to compare the two, to be able to give a complete
17 answer on that.

18 MR. LILLY: Fair enough.

19 And Ms. Geimer, I am going to hand you two more
20 exhibits and then I will be done. The first one is a
21 letter dated November 2nd, 2007, from Maria Rea of the
22 National Marine Fisheries Sacramento area to Lester Snow,
23 DWR's director; and the second exhibit, YCWA 31, is a
24 memorandum from John McCamman of Fish and Game to Lester
25 Snow.

1 And I will just ask you to look at those and then
2 tell us if those, in fact, are documents that were
3 received by Department of Water Resources.

4 MS. GEIMER: These documents are -- I haven't seen
5 them before in their entirety, but I have heard them
6 discussed from upper management and DWR that they did
7 receive such letters.

8 MR. LILLY: All right. Thank you.

9 And I have no further questions of these
10 witnesses.

11 HEARING OFFICER BAGGETT: Does the Bureau have
12 any? Bureau of Reclamation.

13 MR. TURNER: No questions.

14 HEARING OFFICER BAGGETT: Mr. Minasian?

15 MR. MINASIAN: No, thank you.

16 Excuse me. Yes, I do.

17 HEARING OFFICER BAGGETT: Please proceed.

18 MR. MINASIAN: Ms. Geimer, you are acquainted with
19 the terms and provisions of the Water Purchase Agreement?

20 MS. GEIMER: A lot of them, yes.

21 MR. MINASIAN: Okay. And you are aware that the
22 area of North Yuba County consists of an area that's
23 served by the Yuba County Water Agency and a substantial
24 area that is reliant only on groundwater?

25 MS. GEIMER: No, I couldn't say that. I've heard

1 a lot about it at this hearing so I'm assuming that that's
2 true.

3 MR. MINASIAN: Are you aware of the patterns of
4 groundwater use and development and its export in North
5 Yuba County from the EIR and from your independent work?

6 MS. GEIMER: Not -- basically, I rely on personnel
7 within the Department of Water Resources that have the
8 expertise on the groundwater, which has been John Fielding
9 and Bob Niblack. So from there, that's where I rely on to
10 get -- to have a comfort level with the transfers we've
11 done with Yuba County Water Agency that groundwater levels
12 or groundwater substitution program was you know, a viable
13 one.

14 MR. MINASIAN: Could I ask the Board to put up on
15 the draft EIR, page 6-41.

16 And Ms. Geimer, while they are doing that, you are
17 aware that this is the first instance which the DWR is
18 getting access to groundwater resources in the area north
19 of Sacramento on a long-term basis; are you not?

20 MS. GEIMER: I believe that is true.

21 MR. MINASIAN: And so it's a remarkable and a
22 precedent-setting event, isn't it?

23 MS. GEIMER: It's -- I would think that people
24 would view it that way, yeah.

25 MR. MINASIAN: And you are aware that in other

1 counties, mistakes and events have occurred which have
2 caused the reduction of reactionary ordinances which
3 depress the ability to use groundwater in a conjunctive
4 basis.

5 MS. CROTHERS: Excuse me. I think, Mr. Minasian,
6 you are getting rather -- you know, you are using some
7 terms that I think that are describing these things maybe
8 beyond Teresa's expertise to know whether they are the way
9 you are describing them. It would be better if you
10 described them a little more just objectively.

11 MR. MINASIAN: You are aware as an example in
12 Butte County and Tehema County, there are ordinances that
13 restrict the use of groundwater and the substitution of
14 surface water in allowing surface water to go outside the
15 county.

16 MS. GEIMER: I'm familiar with the Yuba County
17 one, yes.

18 MR. MINASIAN: Now, you are familiar with the Yuba
19 County. You are not familiar with --

20 MS. GEIMER: I'm sorry. The Butte County. I'm
21 sorry. I said the wrong one.

22 MR. MINASIAN: Is it generally the view of
23 yourself and the Department that having order in regard to
24 groundwater use and protecting the groundwater resources
25 in an orderly fashion is better than not having order?

1 MS. GEIMER: I'm not sure what you mean by

2 "order."

3 But with the Yuba County, because we have done
4 groundwater substitution transfers from Yuba County in the
5 past, we've always had a groundwater monitoring program in
6 place, and also part of that is to take care of any
7 problems that come about. So it's a whole plan so that,
8 you know, when no one expects to have a problem and one
9 comes up, there's a plan to have that deals with it so
10 that other parties are not expected.

11 MR. MINASIAN: Okay. Now, as I understand the
12 Water Purchase Agreement, the largest increment of water
13 basically is sold to agricultural customers south of the
14 Delta; is that correct?

15 MS. GEIMER: No, I can't say that that's correct.
16 You mean in the Yuba County Water Agency, the agreement
17 with the Department for the water purchase for the accord?

18 MR. MINASIAN: Yes.

19 MS. GEIMER: It's -- there's 60,000 acre-feet a
20 year that goes to the Environmental Water Account, and the
21 other components of water, two through four, go to State
22 Water Project contractors or the San Luis and
23 Delta-Mendota Water Authority.

24 MR. MINASIAN: And the process is, the Department
25 of Water Resources provides the facilities and through the

1 contract provides the mechanism for delivery of the water.
2 But the agricultural purchasers as to components two,
3 three, and four, have to want the water; is that correct?

4 MS. GEIMER: And they also have to -- yeah, they
5 have to want the water. They also have to agree to an --
6 to the Tier 3 agreements with the Department or -- you
7 know, it was Tier 3 for the Accord, but the Department's
8 dry year water purchase program is where we're going
9 through these agreements with. So they have to sign
10 agreements with the Department to get this water.

11 MR. MINASIAN: Okay. And so I want to take you to
12 this chart, which is in the EIR. And do you see the
13 blocks that are below the line? And do you see that the
14 label is estimated groundwater storage changes in each of
15 the years?

16 MS. GEIMER: I can't really read it from here, so
17 I will take your word for it.

18 MR. MINASIAN: And do you see the blocks in 1991,
19 as an example, and 2001?

20 MS. GEIMER: Again, I'm having a hard time to see.
21 But I can see the 2001, I think.

22 MR. MINASIAN: My question is this: In those
23 years, it appears that an amount somewhere between 25 and
24 50,000 acre-feet was storage change estimated in the North
25 Yuba Subbasin. Now my question to you is, when that

1 amount of storage exceeds a figure of 50,000, under the
2 Purchase Agreement, who says no, we're not going to pump
3 any more water?

4 MS. GEIMER: I can't answer that question. I can
5 just say that it's going to be taken care of in the
6 groundwater, you know, monitoring and plan that we have in
7 order to make sure that there's not problems. If a
8 problem occurs, the plan takes care of that. It
9 identifies who's going to do what in order to do that.
10 And basically, my recollection is, most of the actions
11 will fall upon Yuba County Water Agency to correct
12 whatever's going amiss.

13 MR. MINASIAN: So these purchasers south of the
14 Delta, would you agree, in dry periods, they are unlikely
15 to say, oh, no, we ought not to take the water because the
16 groundwater is declining in the north subbasin.

17 MS. GEIMER: I don't think it would ever be a
18 question put to them. It would just be told that we --
19 you know, either less water would be offered to them,
20 because this problem is known that, you know, with taking
21 the groundwater, or if the water was offered and the
22 problem arises later, unexpectedly, then they would be
23 told that they're not going to be able to get as much
24 water as they first thought.

25 MR. MINASIAN: So it requires the purchasers to

1 estimate that if they buy the water now, it might not be
2 available later. That's one way that the issue of
3 protecting North Subbasin water could be protected; is
4 that correct?

5 MS. GEIMER: Again, it's in the plan. So I think
6 the purchasers are aware that there are a number of
7 things, not just that, that could prevent them from
8 getting the water they -- that was originally thought that
9 they would be able to get.

10 MR. MINASIAN: The Department could say, "We think
11 that aquifer ought not to be used this year. We ought to
12 preserve it for a really dry year." The Department could
13 do that, couldn't they?

14 MS. GEIMER: I really can't answer that question.

15 MR. MINASIAN: To your knowledge, has the
16 Department ever done, in any of the transfers, from any of
17 the areas in northern California, it's declined to wheel
18 water because they felt like maybe the groundwater would
19 be preserved and available for future years?

20 MS. GEIMER: No. I can't think of any time that
21 happened. Again, it's -- we see that more as a local
22 issue, and we do insist on having a plan in place so if
23 something does go wrong, some other users of groundwater
24 aren't able to pump their water, for instance, that
25 there's a plan in place in order to take care of that

1 problem.

2 MR. MINASIAN: Okay. The third party that could
3 say, "No, we better save it. The aquifer is getting
4 overtaxed. The orchards to the west in that area may be
5 impacted," would be the Yuba County Water Agency, wouldn't
6 it?

7 MS. GEIMER: I think you should ask them. But
8 that's a possibility, I would think.

9 MR. MINASIAN: Okay. Now, the Department also has
10 an information gathering function in California regarding
11 groundwater basins; doesn't it?

12 MS. GEIMER: Again, we are doing a number of
13 programs to gather information, and part of the Yuba
14 transfers has been to gather that information too, with
15 the monitoring wells that we have for groundwater in that
16 area.

17 MR. MINASIAN: And a lot of ground water basins
18 that you study are overdrafted; aren't they?

19 MS. GEIMER: I don't study them; I can't say.

20 MR. MINASIAN: Okay. You are familiar with
21 California water and particularly groundwater conditions
22 in large parts of the Santa Joaquin Valley; aren't you?

23 MS. GEIMER: No. Most of my work has actually
24 been in Sacramento, or the Sacramento Valley, I mean.

25 MR. MINASIAN: Is there a device in this document

1 to require people to review what they are doing from a
2 foresight point of view, to avoid the overdrafted
3 groundwater basins we find in other areas of California?

4 MS. GEIMER: In my opinion, that's what the
5 groundwater monitoring plan and action plan, if something
6 goes amiss with the groundwater substitution program.

7 MR. MINASIAN: Is there anything in the Water
8 Purchase Agreement that has an indicator, something that
9 requires that water purchases stop or water purchases be
10 reconsidered between those three parties that we just
11 talked about?

12 MS. GEIMER: I'm not as familiar with the plan to
13 know all the steps to it. I, again, rely on people in the
14 Department with that expertise, which is not myself.

15 MR. MINASIAN: Would you agree that when money
16 gets into the quotient, that it's hard to see the world
17 clearly?

18 MS. CROTHERS: I object to that question. I don't
19 think it's relevant.

20 HEARING OFFICER BAGGETT: Sustained.

21 MR. MINASIAN: Look at the bars now, and you see
22 the 50,000 acre-foot amounts, the line going across. And
23 if I told you that the recharge rate is estimated at about
24 11,000 acre-feet per year, 50 would take about four years
25 of no groundwater pumping to recharge; wouldn't it?

1 MS. GEIMER: If that's the case.

2 MR. MINASIAN: Now, if you don't have surface
3 water supplies to about half of the North Yuba Basin, how
4 do you recharge that area?

5 MS. GEIMER: Again, that's outside of my
6 expertise.

7 MR. MINASIAN: Okay. Thank you.

8 HEARING OFFICER BAGGETT: Thank you.

9 Westlands, do you have any questions?

10 MR. RUBIN: Westlands Water District and San Luis
11 and Delta-Mendota Water Authority have no
12 cross-examination.

13 HEARING OFFICER BAGGETT: Mr. Walter?

14 MR. WALTER: No questions.

15 HEARING OFFICER BAGGETT: Dr. Smith?

16 DR. SMITH: Yes, sir. Thank you.

17 Mr. Leahigh, you mentioned earlier that your
18 greatest pumping demand is usually during the months of
19 July through October. And you mentioned that smelt are
20 not usually there. Are the pumping rates provisions
21 changed if, in fact, smelt are present? Is there some
22 mechanism in place where you can modify that pumping rate?

23 MS. CROTHERS: Excuse me, Dr. Smith. I just want
24 to clarify something. I think you misstated what
25 Mr. Leahigh said when you said the pumping demands are

1 greatest in the summer months.

2 DR. SMITH: It probably won't be the first, and
3 it's not the last either, yeah.

4 MS. CROTHERS: I think that might be correct if
5 you are talking about in terms of transferring this water
6 for the Yuba Water Accord.

7 DR. SMITH: Okay.

8 MS. CROTHERS: But in terms of DWR operations, I
9 mean, I didn't want it to be confused with overall DWR
10 operations. DWR operates year round, and so if you're
11 just speaking as to this Yuba Accord Water.

12 DR. SMITH: Thanks for bringing that clarification
13 up.

14 MR. LEAHIGH: Okay. To answer your question, are
15 there any potential constraints to the Department's
16 pumping, during that period identified as the traditional
17 transfer period, and the answer is, yes, that if we were
18 to see large salvage of delta smelt in some of those
19 months, there are conditions, in our biological opinion,
20 in which the fishery agency, which has issued that
21 opinion, can impose restrictions on Department's pumping.

22 DR. SMITH: Okay. What measures can you
23 explain -- can you explain what measures you use to
24 determine the presence of smelt?

25 MR. LEAHIGH: Well, there are a number of surveys

1 that take place pretty much year round for the various
2 life stages of delta smelt throughout the delta. And
3 then, as I also noted, the salvage facilities themselves
4 would be an indicator of when the fish are present.

5 DR. SMITH: Gotcha. Okay.

6 You mentioned that the pumping has a number of
7 requirements for its operation, and you mentioned water
8 rights conditions, environmental requirements, etc.

9 Do water rights preempt the environmental
10 requirements? In other words -- let me rephrase it.
11 Obviously, you don't understand the question.

12 If we had an environmental requirement that
13 contradicted or conflicted with a water right, which
14 one -- would one prevail over the other?

15 MS. CROTHERS: Dr. Smith, that's almost a legal
16 question. I think you would have to look at the law and
17 look at the legal requirements for whatever that
18 environmental requirement was. And I don't think
19 Mr. Leahigh is qualified to answer a legal analysis on
20 that point. I don't know.

21 Maybe you can rephrase what you are getting at.

22 DR. SMITH: Okay. Where there's a -- I guess
23 where there's a conflict between environmental
24 requirements and your water rights, is that part of the
25 condition that determines what you are going to do?

1 MR. LEAHIGH: Well, we will be operating in
2 compliance with both water rights and our biological
3 opinions. I can't think of a specific example where
4 there's been a conflict between the two, so I haven't
5 really given it much thought. But all I know is we will
6 be, as far as I'm concerned, operating in compliance with
7 both.

8 DR. SMITH: Gotcha. I recognize that any rephrase
9 of the question really didn't do much for it. But thank
10 you for making that attempt.

11 Are the state pumps licensed with the Federal
12 Energy Regulation Commission as a project facility of the
13 California aqueduct project 2426?

14 And if you don't understand that, I will be glad
15 to bring this printed question over to you, if you would
16 like.

17 MR. LEAHIGH: Sure.

18 I don't know if that number is correct, but --
19 it's not.

20 MS. CROTHERS: Excuse me. I object to this
21 question, in terms of there's a reference to some sort of
22 a permit number. But I'm not sure what that number is
23 related to. I don't know where it came from.

24 MR. LEAHIGH: My answer is, I don't know.

25 DR. SMITH: Has the California Department of Water

1 Resources notified the Federal Energy Regulatory
2 Commission that it proposes to divert more water at the
3 California aqueduct project 2426 pursuant to the long-term
4 water transfer?

5 MR. RUBIN: I'm going to object on relevance
6 grounds. Don't know if the question is relevant to the
7 issue that's before the Board.

8 HEARING OFFICER BAGGETT: I would sustain the
9 objection. It's not relevant, and it won't be part of the
10 record like we did with Mr. Lilly. But if you know the
11 answer, and you can answer this gentleman. If you can't,
12 don't.

13 MR. LEAHIGH: I really don't understand the
14 question, so I don't think I can answer it.

15 DR. SMITH: Well, I'm afraid we'll just have to
16 let that one go. I think we've all done the best we could
17 under the circumstances.

18 Has the California Department of Water Resources
19 notified the Federal Energy Regulatory Commission about
20 Judge Wanger's decision for the state pumps at the
21 California Aqueduct Project 2426 pursuant to the long-term
22 water transfer?

23 MR. RUBIN: I'm going to object again on relevance
24 grounds.

25 HEARING OFFICER BAGGETT: Sustained. It's not

1 part of this proceeding whether FERC -- the issue of FERC
2 and the transfer -- it's not relevant. It's not an issue.
3 I would agree.

4 Maybe after we conclude today, you can talk to DWR
5 about it.

6 DR. SMITH: Okay. All right.

7 Will striped back species and American shad
8 species be diverted and/or harmed at the state pumps
9 resulting from the proposed long-term water transfer and
10 the diversion of water from the state pumps to the
11 California aqueduct?

12 MR. LEAHIGH: I don't specifically know. But I
13 think that was analyzed in the EIR/EIS.

14 DR. SMITH: Okay. Has U.S. National Marine
15 Fisheries issued a biological opinion to the California
16 Department of Water Resources for the long-term transfer
17 of water that will be diverted to the California Aqueduct
18 Project 2426 that could entrain and harm endangered and
19 threatened Central Valley chinook salmon and threatened
20 Central Valley steelhead?

21 MR. LEAHIGH: I believe what the EIR/EIS found was
22 that there was not a significant impact to those species.

23 DR. SMITH: Gotcha. Okay. Thank you.

24 Will the Oroville project, FERC project, No. 2100
25 be operated differently in conjunction with the long-term

1 water transfer?

2 MR. LEAHIGH: Yes, in that we will be exporting
3 these transfers during the period that I mentioned in
4 my -- during my testimony.

5 DR. SMITH: Okay. Will State Water Project
6 contractors pay directly for the water they will receive
7 from the Yuba County Water Agency?

8 MR. LEAHIGH: I believe the mechanism is that they
9 will be paying the Department. The Department then pays
10 Yuba.

11 DR. SMITH: Okay. Is there any payment that must
12 be made by Yuba Water -- River Water Agency to a third
13 party regarding the debt to pay off the Yuba River Project
14 No. 2246?

15 MR. LEAHIGH: I'm not aware of that.

16 DR. SMITH: Okay. Thank you very much.

17 HEARING OFFICER BAGGETT: Thank you.

18 Greg, do you have a couple of questions?

19 STAFF ENGINEER WILSON: Thank you, Art.

20 First off, for Teresa Geimer. Ms. Geimer, would
21 you please explain the future of the Environmental Water
22 Account?

23 MS. GEIMER: If I had a crystal ball, I could. We
24 don't know what's going to happen with that exactly. At
25 this time, I have funds to purchase water for the

1 Environmental Water Account -- pretty much sufficient, I
2 believe, in it really depends -- because some -- like in
3 2006, we didn't need any funds for the account. And so we
4 would like to have around \$30 million for the
5 Environmental Account. And I have 27,000 that I have --
6 27 million, I'm sorry, available for '08. It's my best
7 estimate at this time. And that excludes the Yuba Accord.

8 And so we feel pretty comfortable that we can go
9 through '08, and then after '08, it kind of depends. If
10 it -- if '08 is a wet year, we'll definitely feel like we
11 can continue on, you know, for another year because we'll
12 have these funds -- you know, in theory, have these funds
13 available.

14 So it really depends on a lot of different things.
15 I think that a lot of what EWA is doing now will continue.
16 It's really the biggest part of it is the water purchases
17 because of the funding. But we have a lot of operational
18 assets that, as far as I know, are expected to continue.

19 STAFF ENGINEER WILSON: Thank you.

20 So considering that the Environmental Water
21 Account may not exist through the period of the transfer,
22 could you explain what happens from a DWR standpoint with
23 the component one water if EWA is still in existence
24 beyond 2008, or if EWA somehow goes out of existence
25 beyond 2008, what would be the difference in any decision

1 making mechanisms that would occur with the component one
2 water, from the DWR's standpoint?

3 MS. GEIMER: Okay. Let me see if I understand.
4 You want to know what the difference would be, like, from
5 now, when EWA's in place, like '08, we expect to have EWA
6 basically in place, at least through '08.

7 And then, you know, if '09 EWA goes away, which I
8 don't think it will be an all-or-nothing kind of thing --
9 but let's say that is the case. And as was mentioned
10 before, in the Water Purchase Agreement with Yuba County
11 Water Agency, there is 23D that was word-smithed to death,
12 you know, that specifies exactly how it goes. And I would
13 rather not paraphrase it just because all the words were
14 very important to a number of the participants that were
15 involved in trying to put that together.

16 But I -- even though the Department of Fish and
17 Game is not signatory to that agreement, 23D was shown
18 them, and they, you know, concurred that they were
19 acceptable to those provisions for it. So that's
20 something that the Department would be for, signing the
21 agreement.

22 STAFF ENGINEER WILSON: Can you describe any --
23 mainly, we're looking for differences in the decision
24 making, as, for example, if EWA still exists in its water
25 purchase form, then the decisions regarding when the time

1 or when -- how to structure or the timing of the releases
2 or rediversions in the Delta, the difference between the
3 decision making process for that with and without EWA as
4 far as if the fishery agencies come and ask for specific
5 cuts of times or specific increases at times, or if EWA
6 isn't there, would that be determined, for example, by the
7 Water Operations Management team? How would those
8 decisions be made?

9 MS. GEIMER: Okay. I think you want to know more
10 about how EWA's actions will be done, which are fishery
11 actions, like curtailments. Is that what you mean rather
12 than the water purchasing?

13 STAFF ENGINEER WILSON: Well, the fishery
14 curtailments are in combination with the water purchasing
15 or the export curtailments for fisheries are combined with
16 the export increases for water purchase or water supply.

17 At this point, you could describe how it would
18 happen now and then how that decision making would happen
19 if EWA is no longer purchasing all the component one
20 water.

21 MS. GEIMER: Okay. The way it happens now is that
22 you have the five agencies that manage EWA, which the
23 three fishery agencies -- Fish and Game, Fish and Wildlife
24 Service, and National Marine Fisheries Service; and then
25 the two projects agencies, which are the Reclamation and

1 the Department of Water Resources.

2 So it's, you know, based on the best information
3 that we have on the fisheries that, you know, is mainly
4 gathered from the fishery agencies although not solely and
5 so based on that best information of what should be done
6 at the -- at both Jones and Banks Pumping Plant. And
7 then, you know, it's discussed and agreed upon what
8 action's going to be taken by those five agencies. So
9 that's how it goes on.

10 And in the future, I can't guess how EWA is going
11 to be. I don't -- I can't envision that we won't have
12 these five agencies still working closely to do what's,
13 you know, best for fish as well as trying to meet, you
14 know, our water demands for our contractors.

15 STAFF ENGINEER WILSON: Thank you.

16 And then the five-agency mechanism that you just
17 discussed, is that also the same for the components two,
18 three, and potentially four water -- component four?

19 MS. GEIMER: Okay. Well, component one water is
20 the 60,000 that would be used to make up any of the cuts
21 that go on. So I think that discussion about with the
22 five agencies deciding what to do for fish actions or not
23 is -- it doesn't matter. We'll still have that 60,000
24 acre-feet of water to make up, you know, whatever cuts
25 come about.

1 So component two, three, four water doesn't --
2 isn't based on that. It's based on Yuba's ability, you
3 know, to provide water beyond the 60,000 for the agencies,
4 and so it's kind of a separate thing altogether, I think.

5 STAFF ENGINEER WILSON: So for the component 2, 3,
6 and 4 water, there's less fishery agency input?

7 MS. GEIMER: Right. I mean, as far as that water
8 being available -- well, I shouldn't speak for Yuba on
9 that, but I'm not aware of any fishery agency.

10 STAFF ENGINEER WILSON: This would just be
11 rediversions Delta, is what I'm referencing. If Yuba --
12 I'm not referencing water -- Yuba releases. Just --

13 MS. GEIMER: Well, let me put it this way. Where
14 I see -- where I can think of, it's not in the Water
15 Purchase Agreement, okay? It's in the Fisheries
16 Agreement, which I'm not as familiar with. But the
17 Fishery Agreement for the flows coming down, those are the
18 flows we're going to be picking up. And so the -- at
19 least Fish and Game, I believe, are signatory to the
20 fishery. And, you know, all the coordination that Yuba
21 has done, that is where that will show up is in the Yuba
22 flows that end up in the Delta to be picked up for
23 transfers.

24 STAFF ENGINEER WILSON: Thank you.

25 I also have a couple questions for Mr. Leahigh.

1 Thank you for coming today, John. We know you are very
2 busy.

3 First off, in your written testimony, it states,
4 "It is anticipated that the vast majority of the Yuba
5 River Accord water will be moved in the traditional
6 transfer window during the summer and early fall months of
7 July through October."

8 If possible, can you give a further quantification
9 of the relative percent of the annual hundred thousand
10 acre-feet maximum transfer total that will be transferred
11 between July and October? Does some of that -- just any
12 further quantification of the "vast majority."

13 MR. LEAHIGH: To take a guess at it, I would say
14 it's got to be the 90 percentile as far as the amount of
15 water that's moved during that period.

16 STAFF ENGINEER WILSON: Thank you.

17 Also to clarify some part of your testimony, you
18 state -- you stated that "the rates of increased exports
19 for the transfer" -- and I can kind of paraphrase this --
20 were up to a total of 1500 CFS between July and October,
21 and 500 CFS between November and June. And staff would
22 just like to clarify that the 1500 CFS maximum is the
23 actual maximum during the July through October period, and
24 that the 500 CFS additional is the absolute maximum during
25 the November through June period.

1 MR. LEAHIGH: Yes. That 1500 was a total that I
2 was estimating for the summer period, the July through
3 October. And the 500 CFS for the rest of the year is --
4 and that's up to 500 CFS, because that's -- that's the
5 largest difference that we would see increase due to the
6 Yuba flows, the Yuba fish flows. And those would
7 typically be the only ones to be picked up.

8 STAFF ENGINEER WILSON: We just wanted to make
9 sure that that was the max. Make sure that that's max.

10 MR. LEAHIGH: Yes, that's correct.

11 STAFF ENGINEER WILSON: And then just one more
12 question.

13 We've seen that you've done a lot of work with the
14 potential Old and Middle River flow constraints in
15 estimating the impacts of that on export rates.

16 Given the likely language range, as we understand
17 that the actual constraints have not been issued by Judge
18 Wanger -- at least that's what I heard yesterday. Given
19 the likely range of minimum Old and Middle River flows
20 that may be required by Judge Wanger's description, can
21 you give a general description of the hydrologic
22 conditions that would allow for transfer capacity to be
23 present between December 25th and June 1st of each year?

24 So kind of a -- you know, most of the time, there
25 would not be excess capacity but, generally, what would

1 the conditions be that would create this situation?

2 MR. LEAHIGH: Yeah. I think it would be extremely
3 unlikely that there would be any available capacity
4 available now with those constraints on the projects
5 that -- you know, in most years what is going to happen is
6 we were going to lose access to either excess flows or the
7 ability to move stored project water from Oroville through
8 that period.

9 So if the constraint was not in place, that's what
10 would be taking -- that's the pumping that would be
11 occurring is either the -- in both cases, it's estimated
12 picking up excess flows or its own stored water from
13 Oroville.

14 So with the constraint imposed on top of that, if
15 anything, it's as Andy indicated earlier, that we're
16 having to rerelease some of that stored water later in the
17 summer, which is potentially taking away some of the
18 transfer window in that period.

19 So I think it's highly unlikely -- you would have
20 to be an extremely dry year. But typically, that time of
21 the year, there's always going to be some supplies,
22 project supply, to be moved in the spring, if capacity is
23 available.

24 STAFF ENGINEER WILSON: And just to -- for further
25 completeness, I said December 25th through June 1st, and

1 then just for the month of June, as we understand, there's
2 still some debate as to when the Judge Wanger's
3 restrictions will go, through June 1st or June 30th.

4 MR. LEAHIGH: Yeah. But our assumptions are
5 through the end of June, yeah.

6 STAFF ENGINEER WILSON: Okay. Thank you.

7 HEARING OFFICER BAGGETT: Any redirect?

8 MS. CROTHERS: No, I have no redirect.

9 HEARING OFFICER BAGGETT: Would you like to submit
10 your evidence?

11 MS. CROTHERS: If that's all of the questions,
12 then DWR would like to submit our exhibits DWR 1, 2, 3,
13 and 4 into evidence.

14 HEARING OFFICER BAGGETT: Any objection?

15 If not, they are admitted.

16 Yuba?

17 MR. LILLY: Yuba would like to submit YCWA 29
18 through 31 into the hearing record.

19 HEARING OFFICER BAGGETT: Any objection?

20 If not, they are admitted.

21 Is there -- thank you, DWR.

22 Is there any rebuttal testimony by any of the
23 parties?

24 I hear no response, so I will take that as there's
25 no rebuttal testimony.

1 With that, we have -- before we talk about
2 closing, the first issue is, do you have any idea of when
3 the court reporter -- we can go off the record for this.

4 (A discussion was held off the record.)

5 HEARING OFFICER BAGGETT: Do you have any closing
6 comments?

7 MR. LILLY: Mr. Baggett, we're happy to just make
8 closing comments today. We did submit a detailed written
9 opening statement, and I don't really need to put a new
10 label on it and say "closing brief." So my only other
11 request is, if other parties submit a closing brief, which
12 very likely could raise new arguments that we haven't seen
13 before, we would like to have an opportunity to respond to
14 those. But if no one else is submitting anything else, we
15 don't need to have any opportunity to respond.

16 HEARING OFFICER BAGGETT: I assume there will be
17 closing briefs by -- at least we've got a request from one
18 party already, yourself. I assume Mr. Minasian wants to
19 do a closing brief. I have a feeling, once we start,
20 we'll have lots of closing briefs.

21 So I think you can anticipate those, and I guess
22 we could -- if newish -- to the extent new issues may be
23 raised which I -- consider a chance for you to provide an
24 answer to those. But I guess we really won't know at this
25 time until we see what parties have submitted. If parties

1 want that opportunity, we could say within ten days of
2 submission of closing briefs, if any party feels like they
3 want to do a short, limited-to-ten-page, answer or
4 response to those briefs, we will permit that.

5 MR. LILLY: That's fine.

6 HEARING OFFICER BAGGETT: With that, if the briefs
7 are going to be due in two -- we'll get a transcript
8 within two weeks. So is ten days long enough after -- I
9 realize that puts us right in the holidays.

10 MR. LILLY: It's fine with us.

11 HEARING OFFICER BAGGETT: Okay. So we'll allow
12 ten days after the posting and receipt of the hearing
13 transcripts, closing briefs will be due. I think we don't
14 have a lot of -- I don't expect lengthy briefs. Maybe I
15 imagine we'll have some maybe from Mr. Baiocchi, but I
16 don't think I will put a page limit on that. Just
17 understand that volume is not -- I mean quantity is not
18 quality. That's the only proviso.

19 Let me throw something out here. I'm thinking, at
20 least from Yuba's perspective, there's really two issues
21 with closing briefs. And the one -- to me, you could
22 probably start working without a transcript, and that's
23 the whole issue of enforceability that I raised.

24 MR. RUBIN: I'm sorry. I just wanted to clarify,
25 as I understood it, the transcript was going to be

1 prepared within two weeks. You indicated ten days after
2 it's posted our briefs would be due. But I understood
3 that it wouldn't be posted until 60 or 65 days after the
4 transcript is prepared.

5 HEARING OFFICER BAGGETT: We'll notify that it
6 would be out in two weeks. Once we notify the parties
7 it's available, you have ten days to enter your submittal.

8 Anyway, back to the closing briefs. It is a legal
9 issue is this whole enforceability issue, and maybe that
10 should be the form of a separate brief -- you know, one
11 brief there and the second with all the other issues. I
12 don't know if that's helpful, because then it would give
13 you an opportunity or you could begin on that part of the
14 brief right now. Whether we bifurcate it or not, I guess
15 it really doesn't matter.

16 MR. LILLY: You have told us you want briefing on
17 that. We will do that. I'd say, we can just put that in
18 your closing briefs with other discussions as well unless
19 there's some reason for a different schedule.

20 STAFF COUNSEL AUE: I'm just trying to give you a
21 chance to begin work.

22 MR. LILLY: Well, thank you. And if it's a
23 concern to you, we will definitely address it.

24 HEARING OFFICER BAGGETT: So any parties that have
25 creative ideas, I think you can, like I said earlier, look

1 at some of the Board's previous orders, and I assure many
2 of you good water right lawyers are familiar with those.

3 So -- and I think each order of this board --
4 complex issues like this is unique and different. And I
5 expect this will have its unique and different approach.
6 But I also just see this as a -- to some extent a model,
7 as I think it was said earlier, of the future of a lot of
8 California water issues, as one of the public policy
9 statements mentioned.

10 And be it Santa Joaquin River or the Klamath or
11 wherever we're next, we're going to see more and more of
12 these very creative solutions. And I think I'm looking
13 forward to some very creative concepts and legal concepts
14 on how we can enforce these types of non-traditional water
15 right issues and still protect the public, public
16 responsibility, which this Board has.

17 So any other comments?

18 MR. LILLY: Mr. Baggett, one last procedural
19 question.

20 Mr. Aikens testified that the -- that the Tier 3
21 agreements are about to be completed. There have been
22 Board approvals and then that the PG&E contract amendment
23 is pending, but is working -- still moving forward. We
24 would like to have the opportunity to have Mr. Aikens
25 submit a short letter which simply advises the Board if

1 and when those two conditions proceed and have been
2 satisfied. That's all it would say. But we would like to
3 have that opportunity so the hearing record can be
4 complete because I assume the Board staff will want to
5 know about that.

6 HEARING OFFICER BAGGETT: I would concur; there's
7 also another issue outstanding. And we will keep the
8 record open, and not close it, until, one, Judge Wanger's
9 opinion, which, as I understand, should be issued prior to
10 Christmas of this year, the 25th of December -- so we will
11 keep the record open to put that decision in, and I think,
12 likewise, we could keep it open to either have the
13 documents or a letter stating that the documents have been
14 signed, either way.

15 If you want to have the actual signed documents in
16 this also, I think, the documents are already in the
17 record. We just don't have the signatures right.

18 MR. LILLY: Some of them, yes; some of them, no.
19 But one way or the other, we'll be glad to do that.

20 HEARING OFFICER BAGGETT: So we will keep the
21 record open. Do you anticipate by the end of the month?

22 MR. LILLY: The PG&E contract mod may go into
23 January. That's my only concern. I don't know -- but as
24 soon as it's done, we'll certainly let you know. I don't
25 know. I don't think I can promise it by the end of the

1 month.

2 HEARING OFFICER BAGGETT: For that very narrow
3 scope, we will keep the record open for the PG&E past the
4 end of the month, but all other documents and court
5 orders, we'll keep the record open until the end of this
6 month and through the end of January for the PG&E
7 document.

8 Any other issues?

9 If not, thank you very much. It's not noon. It's
10 close.

11 We're done.

12 (The Lower Yuba River Hearing adjourned at
13 2:44 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, KATHRYN S. SWANK, a Certified Shorthand Reporter
3 of the State of California, do hereby certify:

4 That I am a disinterested person herein; that the
5 foregoing State Water Resources Control Board Lower Yuba
6 River hearing was reported in shorthand by me, Kathryn S.
7 Swank, a Certified Shorthand Reporter of the State of
8 California, and thereafter transcribed into typewriting.

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

12 IN WITNESS WHEREOF, I have hereunto set my hand this
13 15th of December, 2007.

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20 KATHRYN S. SWANK, CSR

21 Certified Shorthand Reporter

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