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STATE WATER RESOURCES CONTROL BOARD

PUBLIC HEARING

CALIFORNIA DEPARTMENT OF FISH AND GAME'S
LOWER YUBA RIVER FISHERIES MANAGEMENT PLAN

AND A COMPLAINT BY

THE UNITED GROUP AGAINST YUBA COUNTY WATER AGENCY
AND OTHER DIVERTERS OF WATER FROM THE LOWER YUBA RIVER
IN YUBA COUNTY

PAUL R. BONDERSON BUILDING
SACRAMENTO, CALIFORNIA

WEDNESDAY, FEBRUARY 23, 2000

9:00 A.M.

REPORTED BY:

ESTHER F. WIATRE
CSR NO. 1564

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SACRAMENTO, CALIFORNIA

WEDNESDAY, FEBRUARY 23, 2000, 9:00 A.M.

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HEARING OFFICER BROWN: Call the hearing back to order.

Mr. Edmondson, I understand you have another exhibit that you may wish to add for consideration.

MR. EDMONDSON: Yes, sir. Yesterday in my direct oral testimony I updated my written testimony with the fact that the proposed listing for steelhead had been made final on February 6th or proposed for critical habitat for spring-run or steelhead had been made final on February 16th. I have a copy of that Federal Register notice.

H.O. BROWN: Do you wish to add that to your list of exhibits?

MR. EDMONDSON: Yes, sir.

H.O. BROWN: Counselor, any problem with that?

MR. FRINK: I was just unclear on what the listing is. You said spring-run chinook salmon and steelhead or is it just spring-run chinook salmon?

MR. EDMONDSON: We are including the same Federal Register notice for critical habitat.

H.O. BROWN: Are there any objections to adding that to the exhibits?

MR. LILLY: Mr. Brown, we would suggest that the

1 exhibit be numbered on the record so it is clear what we are
2 talking about. And also, we'd like to just review the
3 exhibit before the Hearing Officer rules on whether or not
4 there would be any objections to that. We haven't seen it
5 yet.

6 H.O. BROWN: Pass out the exhibits, and later on in the
7 day, at the appropriate time, I will -- let's do it first
8 thing after lunch. We will consider the admission of that
9 exhibit into evidence after lunch. That should give us
10 plenty of time between now and then for everyone to take a
11 look at it.

12 MR. LILLY: Thank you.

13 H.O. BROWN: Mr. Minasian, do you have a comment?

14 MR. MINASIAN: No. Mr. Lilly covered it. Thank you.

15 MR. FRINK: I note that the exhibit was marked I
16 believe as S-NMFS-13.

17 H.O. BROWN: Mr. Edmondson, we will take that issue up
18 first thing after lunch, if you would remind me in case it
19 slips.

20 MR. EDMONDSON: Thank you.

21 H.O. BROWN: Mr. Lilly, I am going to rule on your
22 request that you had made yesterday for additional time.
23 Would you mind coming to the microphone and restating that
24 request to make sure I understand it?

25 MR. LILLY: Thank you. I will be glad to restate it.

1 The situation is this: Bill Mitchell who is one of the
2 two fishery biologists from Jones & Stokes that has been
3 listed in the witness list for the Yuba County Water Agency
4 had a previously scheduled vacation out of the country with
5 his family, which covers the second week scheduled for the
6 hearing. I believe the hearings are scheduled for March 6,
7 7 and 9. And he had scheduled to be out of the country with
8 previously paid for nonrefundable airline tickets and
9 reservations and so forth.

10 We expect the way the schedule is going we will be able
11 to put on our direct case, we are hoping, Thursday and
12 Friday of this week, including cross-examination of the
13 witnesses and at least of Mr. Mitchell. We do not
14 anticipate there will be a problem with that.

15 Then the sequence of evidence would be that the other
16 districts would be putting on their direct cases, and the
17 Fish and Game going last will be putting on its case,
18 because of the request from Fish and Game that they go last
19 to accommodate John Nelson's vacation schedule this week.

20 Where the potential problem would come up, is for
21 rebuttal testimony. After the other parties have put on
22 their evidence, in particular after Fish and Game has put on
23 its evidence, we may very well have rebuttal evidence which,
24 of course, Notice of Hearing and Board's rules allow us to
25 put, and that we would want to put on. Particularly,

1 regarding the fishery issues and some of the field
2 investigation issues. Mr. Mitchell is our most qualified
3 witness because he spent hundreds of days doing professional
4 fieldwork on the river.

5 Our request is that the Board, if the hearing finishes
6 by the last day, which I believe is March 9th, that the
7 Board schedule an additional short amount of time. We
8 expect an hour would be sufficient, sometime the following
9 week or thereafter, I believe Mr. Mitchell returns to the
10 country on March 12th, for him to present that rebuttal. As
11 I say, this really is just a similar request to that which
12 the Board already granted for the Department of Fish and
13 Game with John Nelson's vacation scheduling.

14 Fish and Game did send a letter to Mr. Mona with notice
15 of intent to appear on an ex parte and never sent copies to
16 any of the other parties, and staff agreed to that before we
17 even had a chance to discuss it. We are just asking for
18 similar consideration here.

19 Now, Mr. Frink correctly pointed out yesterday
20 afternoon this whole issue may be moot because we may not
21 finish within the allotted seven days, anyway, depending on
22 how long cross-examination takes. So we may have to have an
23 additional day of hearing anyway just to complete all the
24 testimony that is being offered by other parties. So this
25 may be moot. We are asking for this consideration in the

1 event the hearing does finish within those seven days.

2 H.O. BROWN: Okay. Mr. Frink, I see where we were able
3 to accommodate the request by Fish and Game without
4 scheduling additional days. There is a difference there. I
5 am reluctant to go ahead and schedule an additional day for
6 40, 50 people in this room if we are finished by the 9th.

7 MR. FRINK: Yes, Mr. Brown, I would agree.

8 The only additional thing I wanted to mention is if it
9 looks as though the hearing is not going to run over, then
10 Mr. Mitchell would not be here at the time his rebuttal
11 presentation would normally be expected. He can address
12 that problem in part simply by presenting any rebuttal
13 evidence that he wishes to present at the conclusion of his
14 direct.

15 All of the exhibits have been available to both Mr.
16 Mitchell and others for a couple of weeks now. So, the most
17 -- for the most part, anything he would want to present on
18 rebuttal I think he can do as a part of his direct.

19 With regard to the issue of staff discussing
20 scheduling, we do that as a matter of routine with a number
21 of parties on all sides of the hearing. It is a procedural
22 matter, in our view. We try to accommodate everybody as
23 well as we can within the days that the hearing has been
24 scheduled.

25 H.O. BROWN: Mr. Lilly, well, we would try to

1 accommodate your request if there is some way that we can.
2 I am reluctant to have all these folks come in for an
3 additional day. It may only take an hour, but those hours
4 will run into at least a half day or at least a day. I am
5 really reluctant to go ahead and schedule another day if we
6 don't need it.

7 If there is some way that we can work Mr. Mitchell in,
8 as Mr. Frink suggests, within March 6th, 7th, or 9th or the
9 days preceding when he is giving direct, we will of course
10 do that. But otherwise don't count on an extra day past the
11 9th if we don't need it.

12 MR. LILLY: We will try to work him in this week on the
13 24th or 25th. He is not available on the 6th, 7th or 9th.
14 We will try to work him in if we can. I am not sure we will
15 be able to. There may be additional evidence given on the
16 6th, 7th or 9th that gives rise to the need for rebuttal.
17 We will do what we can to work within the Board's schedule.

18 H.O. BROWN: Feel free, of course, and I know you will,
19 to raise the issue later if it looks like we are in the
20 direction that needs additional help along those lines with
21 Mr. Mitchell, and we will -- again, we will do our best to
22 try to accommodate your needs.

23 MR. LILLY: We will do that.

24 Thank you.

25 H.O. BROWN: It is time for direct now with the

1 Department of the Interior.

2 Mr. Gee, are you ready to give direct?

3 MR. GEE: Yes, Mr. Brown. Give a brief statement.

4 Members of the Board, board staff, I am Edmund Gee, and
5 am attorney with the Department of Interior. Today I am
6 here to represent the U.S. Fish and Wildlife Service in this
7 proceeding.

8 With me today are two fisheries biologist from the U.S.
9 Fish and Wildlife Service, Roger Guinee and Craig Flemming.
10 They each will provide testimony and address key issues of
11 this hearing.

12 Mr. Guinee will testify as to the U.S. Fish and
13 Wildlife Service efforts in coordination with other agency
14 entities in identifying flows needed for anadromous fish
15 restoration in the Lower Yuba River.

16 Mr. Flemming will testify as to specific actions taken
17 by the U.S. Fish and Wildlife Service in cooperation with
18 other agencies and environmental groups and also through the
19 Cal/Fed process to improve the ecosystem and to carry out
20 anadromous fish restoration in the Lower Yuba River.

21 Following the direct examination of Mr. Guinee and Mr.
22 Flemming, they will be available for cross-examination as a
23 panel.

24 The U.S. Fish and Wildlife Service supports the Draft
25 Decision to adopt improved flow and temperature criteria

1 which are needed to protect anadromous fish in the Lower
2 Yuba River. The U.S. Fish and Wildlife Service commends the
3 Board for recognizing the need for this protection.
4 However, since the closing of the hearing record in August
5 of 1992, new circumstances have arisen which require higher
6 flows and improved temperature conditions beyond those set
7 forth in the Draft Decision. Chief among these new
8 circumstances are the following:

9 First of all, since the 1992 hearing, in October of
10 1992 Congress enacted the Central Valley Project Improvement
11 Act. Now the Central Valley Project Improvement Act
12 requires, among other things, the development and
13 implementation of a program to double the natural production
14 of anadromous fish in the streams and rivers of the Central
15 Valley by the year 2002. This program has become known as
16 the Anadromous Fish Restoration Program.

17 Secondly, as the Board has learned yesterday from the
18 testimony of Steven Edmondson from the National Marine
19 Fishery Service, since the 1992 hearing, some species of
20 anadromous fish in the Yuba River have been listed as
21 threatened.

22 In light of these new circumstances, the U.S. Fish and
23 Wildlife Service urges the Board to implement higher flow
24 and improved temperature conditions in the Lower Yuba River
25 beyond those set forth in the Draft Decision. At a minimum

1 the Board should adopt the Draft Decision.

2 At this time I will call the U.S. Fish and Wildlife
3 Service's first witness, Mr. Guinee.

4 ---oOo---

5 DIRECT EXAMINATION OF U.S. FISH & WILDLIFE SERVICE

6 BY MR. GEE

7 H.O. BROWN: Mr. Guinee, you have taken the oath?

8 MR. GUINEE: Yes, I was here yesterday, Mr. Brown.

9 MR. GEE: Mr. Guinee, I want to direct your attention
10 to the Exhibit S-DOI-1.

11 MR. GUINEE: I have it in front of me.

12 MR. GEE: Would you take a look at it first. What is
13 that, DOI-1? Is that a statement of your qualifications?

14 MR. GUINEE: Yes, it is.

15 MR. GEE: Is it a true and correct copy of your
16 qualifications?

17 MR. GUINEE: Yes, it is.

18 MR. GEE: Could you tell the Board what your current
19 occupation is?

20 MR. GUINEE: Currently I am a fishery biologist, a
21 management fishery biologist working for the U.S. Fish and
22 Wildlife Service.

23 MR. GEE: Could you summarize your qualifications.

24 MR. GUINEE: I've worked as fisheries biologist for
25 Fish and Wildlife Service for more than 20, focusing on

1 instream flow studies and flows necessary for fish and
2 wildlife protection for the past 15 years, in Delta issues
3 for the past seven. And my current responsibility is to
4 coordinate the planning, the implementation of flow-related
5 measures for the Central Valley Project Improvement Act and
6 Anadromous Fish Restoration Program.

7 MR. GEE: Did you prepare a written statement of your
8 testimony for today's hearing?

9 MR. GUINEE: Yes, I did.

10 MR. GEE: I refer the Board and also the witness to
11 Exhibit S-DOI-7.

12 MR. FRINK: That's correct.

13 MR. GEE: What is S-DOI-7, Mr. Guinee?

14 MR. GUINEE: It is a correct copy of my testimony, to
15 briefly summarize three things that I wanted to tell the
16 Board today.

17 First, I will share relevant new information,
18 specifically regarding the Anadromous Fish Restoration
19 Program.

20 Second, I believe that the Board's Draft Decision flows
21 represent appreciable improvement, that the Board has
22 adequate information to adopt this decision immediately.

23 And third, Fish and Wildlife Service urges the Board to
24 implement improved flows in the Lower Yuba River consistent
25 with the Anadromous Fish Restoration Program level flows and

1 what Fish and Game recommended in '92.

2 MR. GEE: Mr. Guinee, in your brief summary you
3 mentioned that Fish and Wildlife Service recommends improved
4 flows?

5 MR. FRINK: That's correct.

6 MR. GEE: Are these improved flows different from those
7 flows proposed by the Board in its Draft Decision?

8 MR. GUINEE: Yes. They are somewhat different.

9 MR. GEE: Can you explain? Are they higher or lower?

10 MR. GUINEE: They are actually a little bit higher.
11 The Board's Draft Decision, as I said, represents an
12 improvement according to the existing level of flows and
13 anadromous fish restoration flows which are consistent with
14 Fish and Game's flows from 1992 are another increment of
15 improvement.

16 MR. GEE: Why is the U.S. Fish and Wildlife Service
17 recommending the higher flows?

18 MR. GUINEE: I think it is important for the Board to
19 consider that these improved flows and temperatures are
20 necessary to maintain the fishery population in the Lower
21 Yuba River in good condition, and they will also contribute
22 to meeting the goals of the Anadromous Fish Restoration
23 Program which I identified measures to restore or at least
24 double anadromous fish and giving the first priority to
25 measures which protect and restore natural channel riparian

1 habitat values.

2 MR. GEE: Again, the AFRP is applicable systemwide for
3 CVP?

4 MR. GUINEE: As you mentioned, the Central Valley
5 Project Improvement Act was passed in October 1992 with this
6 goal of restoring anadromous fish throughout the Central
7 Valley. A lot of the focus was on Central Valley Project
8 streams. And it also indicated that the restoration of
9 salmon was important in all the Central Valley streams.

10 MR. GEE: What is the basis of these higher flows which
11 the Fish and Wildlife Service recommends?

12 MR. GUINEE: That would be the 1995 working paper which
13 is one of my exhibits I submitted to the Board.

14 MR. GEE: I want to direct the Board to Exhibit
15 S-DOI-3.

16 Mr. Guinee, I would ask you to describe what that is?

17 MR. GUINEE: Basically, I guess the short form of
18 S-DOI-3 is that after the Central Valley Project Improvement
19 Act law was passed in '92, the Fish and Wildlife Service
20 established what we call the core group and then technical
21 teams for all watersheds in the Central Valley composed of
22 biologists from several different agencies as well as
23 consulting firms and even water districts in some cases.

24 Through this process, identified flows needed for all
25 the Central Valley streams that would contribute to the

1 restoration of anadromous fish in those streams.

2 MR. GEE: If you can review S-DOI-3 and tell me that
3 that is a true and correct copy of the working paper.

4 MR. GUINEE: It is a true and correct copy of a portion
5 of the AFRP working paper. For the benefit of the parties
6 reviewing the information, we photocopied the section from
7 Volume III, as well as Volume I that applied specifically to
8 the Yuba River.

9 MR. GEE: As a point of clarification, I did submit a
10 full copy to Board staff and notified all the parties if
11 they needed a full copy to notify me. And there has been
12 one party that requested a full copy and that was provided.

13 Now, was the Fish and Wildlife Service involved in
14 developing the 1995 AFRP?

15 MR. GUINEE: Yes, we were in that process.

16 MR. GEE: Were you involved in that process?

17 MR. GUINEE: Yes, I was. I was part of a technical
18 team, as well as the core group.

19 MR. GEE: The AFRP working paper recommends flows for
20 the Lower Yuba River; is that correct?

21 MR. GUINEE: That's correct.

22 MR. GEE: Are these higher flows described in your
23 written testimony?

24 MR. GUINEE: Yes, they are, in Exhibit 7.

25 MR. GEE: Are you familiar with the flows recommended

1 by the Department of Fish and Game for the Lower Yuba
2 River?

3 MR. GUINEE: Yes, I am. If you are referring to the
4 Fish and Game 1991 report and what they recommended in the
5 '92 hearing, I am familiar with those.

6 MR. GEE: Are these flows that are recommended in the
7 1995 working paper, are they consistent with the flows
8 recommended by the Department of Fish and Game?

9 MR. GUINEE: Yes, they are consistent.

10 MR. GEE: Mr. Guinee, did you prepare illustrations
11 that summarize the flows recommended by the Draft Decision
12 and AFRP working paper as well as current flows?

13 MR. GUINEE: Yes, I did.

14 MR. GEE: Do you believe these will be helpful to the
15 Board understanding the differences between the two?

16 MR. GUINEE: I do.

17 MR. GEE: Why don't you go ahead.

18 MR. GUINEE: Before I put them up, I want to mention
19 that Exhibit Number 5, which we put together, was very
20 similar to the Board's Figure 7 in its Draft Decision, on
21 Page 108 of its Draft Decision. So, when I tried to -- when
22 I asked staff to create that overhead, I call it a pretty
23 picture with colors and everything, they couldn't get those
24 overlapping lines to show up.

25 So what you are going to see is a little bit of a

1 variation using the same numbers and how it is displayed.

2 MR. GEE: Before you proceed, the Fish and Wildlife
3 Service provided two exhibits, S-DOI-5 and -6; is that
4 correct?

5 MR. GUINEE: That's correct.

6 MR. GEE: Are you saying that what you are going to be
7 showing today, the way it is shown is a little different
8 than those exhibits?

9 MR. GUINEE: Right. The S-DOI-5 and -6, basically,
10 squared off the graph almost like a histogram-type approach,
11 where this is going to be more of a line graph.

12 MR. GEE: They are based on the same numbers.

13 MR. GUINEE: That's correct. The same numbers were
14 used to generate both.

15 Okay. Do you want me to just pop through that?

16 MR. GEE: Sure.

17 MR. GUINEE: As you can see, that the orange line along
18 the bottom represents the DFG 1965 level flows, which are
19 displayed in the box at the bottom. That is why I added to
20 the Board's Figure 7 is that box so you can see the flows
21 ranging 400 in the fall, October through December, 245 cubic
22 feet per second, January through June, and 70 cubic feet per
23 second July through September.

24 The next line is the blue line with the squares
25 representing the State Board's Draft Decision flows, 500

1 cubic feet per second, October through March. April was a
2 split month. It shows up here as an average of 667.

3 It is actually 500 cubic feet per second for most of
4 April and then a thousand cubic feet per second for, like,
5 the last ten days. And then May, the numbers come together
6 at the top, 2000, and June 800 cubic feet per second. The
7 summer flow, July to September, 250 feet per second.

8 Then, thirdly, the AFRP, the Anadromous Fish
9 Restoration Program, flows again being consistent with Fish
10 and Wildlife Service and Fish and Game recommended in 1992,
11 showing 700 cubic feet per second from October to March; a
12 thousand cfs in April; 2000 in May; 1500 in June; and then
13 450 cfs during the summer, July, August and September.

14 MR. GEE: You have another graph; is that correct?

15 MR. GUINEE: Yes, I do.

16 One of the other things that I thought was important
17 for the Board to see is that information provided to the
18 Board was the AFRP flows which on this graph are in pink
19 along the bottom, same numbers as what you saw in the
20 previous one, on a different scale. It is presented as
21 compared to the unimpaired flows. And you can see then as
22 you look at the unimpaired flows, October through September,
23 they range from 334 cfs on the low end in September to 6,727
24 cfs in May. And just to give an indication of the relative
25 difference between the AFRP flows and unimpaired flows.

1 MR. GEE: Thank you, Mr. Guinee.

2 How do those improved flows which were recommended in
3 the 1995 AFRP working paper, how do those improved flows
4 contribute to the Anadromous Fish Restoration Program?

5 MR. GUINEE: The way they contribute is these improved
6 flows will provide improved habitat, improved spawning
7 habitat, in the fall for spawning, fall-run chinook salmon;
8 improved habitat in the winter for spawning steelhead as
9 well as rearing chinook salmon; and then, the April, May,
10 June period providing improved migration flows, flows needed
11 during the time that the salmon are moving downstream from
12 the river through the Delta into the ocean.

13 MR. GEE: In your testimony you made mention of
14 listings of threatened anadromous fish species in the Lower
15 Yuba River; is that correct?

16 MR. GUINEE: That's correct.

17 MR. GEE: What is the basis of that information?

18 MR. GUINEE: Well, essentially, as we heard from
19 National Marine Fisheries Service yesterday, the Service is
20 aware that two of the anadromous fish species that were
21 listed in the Central Valley Project Improvement Act and in
22 the Anadromous Fish Restoration Program, that is the
23 steelhead and the spring-run chinook salmon, have now been
24 listed as threatened by the National Marine Fisheries
25 Service and the spring-run chinook salmon is also listed as

1 state threatened species by the Department of Fish and
2 Game.

3 MR. GEE: Do those new listings bear upon the
4 recommendation by the Fish and Wildlife Service?

5 MR. GUINEE: Actually, it is important for the Board to
6 know that these flow recommendations were developed before
7 the species were listed. So, we recognize the importance of
8 restoring habitat for these species, but did not give them
9 special consideration that National Marine Fisheries Service
10 or Fish and Game gives them now and which we think is
11 important for the Board to also give.

12 MR. GEE: Are there any other benefits provided by the
13 improved flows recommended by Fish and Wildlife Service in
14 its Anadromous Fish Restoration Program working paper?

15 MR. GUINEE: One other thing I wanted to say about the
16 listing of the species that I did indicate in my testimony
17 as well, that I would urge the Board to consider National
18 Marine Fisheries Service and Fish and Game's recommendations
19 to protect spring-run chinook and steelhead, particularly
20 since they are listed in the Yuba River and have been listed
21 as critical habitat for these species.

22 And then, in answer to the last question, Mr. Gee, it's
23 important I think for the Board to understand that the Yuba
24 River biologically and hydrologically are connected to the
25 Delta. The salmon and steelhead in the Yuba and other

1 Central Valley rivers migrate through the Delta on the way
2 to the ocean, and then as adults, two and a half to four
3 years later, come back through the Delta and back to those
4 rivers to spawn and lay their eggs.

5 So, consequently, the improved flows that we're
6 recommending will benefit only the fishery resources in the
7 Yuba River, but I think will also benefit the Delta and
8 should be integrated in the Board's Phase VIII decision for
9 implementation of the Bay-Delta Water Quality Control Plan.

10 MR. GEE: Thank you, Mr. Guinee.

11 MR. GUINEE: Thank you.

12 MR. GEE: You can stay there.

13 Mr. Flemming.

14 Morning, Mr. Flemming.

15 MR. FLEMMING: Morning.

16 MR. GEE: Did you prepare a statement of qualifications
17 for today's hearing?

18 MR. FLEMMING: Yes, I did.

19 MR. GEE: I want to refer the Board and the witness to
20 S-DOI-2.

21 MR. Flemming, can you take a look at Exhibit S-DOI-2?

22 MR. FLEMMING: Yes.

23 MR. GEE: Do you recognize it?

24 MR. FLEMMING: Yes, I do.

25 MR. GEE: What is it?

1 MR. FLEMMING: Statement of my qualifications.

2 MR. GEE: Is it a true and correct copy of your
3 statement of qualifications?

4 MR. FLEMMING: Yes, it is.

5 MR. GEE: Could you tell the Board what your current
6 occupation is?

7 MR. FLEMMING: I am a fishery biologist, and my actual
8 title is Anadromous Fish -- excuse me, Assistant Habitat
9 Restoration Coordinator. I am a fishery biologist and I
10 work for the Anadromous Fish Restoration Program for the
11 U.S. Fish and Wildlife Service.

12 MR. GEE: Can you briefly summarize your
13 qualifications.

14 MR. FLEMMING: Sure. I have been a salmon biologist
15 for six years since 1993 for U.S. Fish and Wildlife Service.
16 And before that I was -- I worked with salmon since 1990.

17 MR. GEE: Have you prepared a written statement of your
18 testimony for today's hearing?

19 MR. FLEMMING: Yes, I have.

20 MR. GEE: I want to refer the Board, as well as the
21 witness, to S-DOI-8. Do you have that in front of you, Mr.
22 Flemming?

23 MR. FLEMMING: Yes, I do.

24 MR. GEE: If you can review and tell me whether it is a
25 true and correct copy of your testimony?

1 MR. FLEMMING: Yes, it is.

2 MR. GEE: Would you please briefly summarize your
3 testimony?

4 MR. FLEMMING: Yes.

5 As in 1992, the U.S. Fish and Wildlife Service is
6 interested in protecting the aquatic resources of the Yuba
7 River. Since 1992 the U.S. Fish and Wildlife Service and
8 the Bureau of Reclamation have developed the Anadromous Fish
9 Restoration Program to make all reasonable efforts to double
10 anadromous fish natural production in the Central Valley
11 streams and rivers.

12 Our program has gone through a public process as Roger
13 explained, and we have developed the draft -- Revised Draft
14 Restoration Plan, which lists actions and evaluations that
15 will contribute to the program's goal of doubling natural
16 production of anadromous fishes.

17 And then the final part of my testimony, just briefly,
18 discusses the work that we have done, the Anadromous Fish
19 Restoration Program has done on the Yuba River.

20 MR. GEE: Can you explain for the Board, briefly, what
21 the Anadromous Fish Restoration Program is.

22 MR. FLEMMING: Yes. The Anadromous Fish Restoration
23 Program is a subsection of the 1992 CVPIA legislation, and
24 the section directs the Secretary of Interior to establish a
25 program, and within three years to make all reasonable

1 efforts to ensure that by the year 2002 natural production
2 of the anadromous fish in Central Valley rivers and streams
3 will be sustainable on a long-term basis at levels not less
4 than twice the average levels attained during the period of
5 1967 to 1991. And the program is directed to give first
6 priority to measures that protect and restore channel and
7 riparian habitat values through habitat restoration.

8 MR. GEE: Would this necessarily cover the anadromous
9 fish population in the Lower Yuba River?

10 MR. FLEMMING: Yes, it would.

11 MR. GEE: You made mention of a revised draft
12 restoration plan. Did you provide that to the Board?

13 MR. FLEMMING: We provided pertinent sections to the
14 Board, yes.

15 MR. GEE: I want to direct the Board to Exhibit
16 S-DOI-4.

17 Mr. Flemming, is S-DOI-4 the relevant portions of the
18 Revised Draft Restoration Plan?

19 MR. FLEMMING: Yes.

20 MR. GEE: Are you familiar with the contents of the
21 Revised Restoration Plan?

22 MR. FLEMMING: Yes, I am.

23 MR. GEE: Can you describe what it is?

24 MR. FLEMMING: The Revised Draft Restoration Plan is a
25 document that was produced to provide guidance to the

1 Anadromous Fish Restoration Program and also to inform the
2 public of the direction that the Anadromous Fish Restoration
3 Program was taking.

4 MR. GEE: When was the Revised Draft Restoration Plan
5 prepared?

6 MR. FLEMMING: It was first put out in draft form in
7 December '95 and then went through an extensive public
8 comment period and was finally published in this form as a
9 revised draft in May of 1997.

10 MR. GEE: Was a full copy of this Revised Draft
11 Restoration Plan provided to the Board?

12 MR. FLEMMING: Yes, it was.

13 MR. GEE: All of this has occurred since the 1992
14 hearings?

15 MR. FLEMMING: Yes, it has.

16 MR. GEE: Why was the Draft Restoration Plan developed?

17 MR. FLEMMING: To provide guidance for the Anadromous
18 Fish Restoration Program. And it does that through listing
19 actions and evaluations that have occurred in it and will
20 contribute to the doubling goal that the program has.

21 MR. GEE: Are you aware of certain key issues that were
22 set forth in the notice of the hearing?

23 MR. FLEMMING: Yes, I am.

24 MR. GEE: Does the Revised Draft Restoration Program
25 address the issues?

1 MR. FLEMMING: Yes, it does.

2 MR. GEE: Can you explain to the Board how?

3 MR. FLEMMING: Yes. The key issues that are listed in
4 the notice, the first key issue was population, factors that
5 influence population trends. And the Draft Restoration
6 Plan, Revised Draft Restoration Plan, addresses that factor
7 in a couple of different ways.

8 The habitat loss and degradation and passage are two
9 issues that affect population trends. And the Anadromous
10 Fish Restoration Program has actions in the Revised Draft
11 Restoration Plan that address that. For instance, we have
12 an action to purchase stream bank easements to improve
13 salmonid habitat by restoring flood plans and riparian
14 habitat, and we have structural actions that facilitate
15 passage.

16 One of the actions is to valuate passage and fix
17 passage at Daguerre Point Dam.

18 Then the second key issue is instream flow and water
19 temperature. The AFRP has provided a flow schedule as Roger
20 discussed earlier. And also we have some evaluations in the
21 plan to evaluate the effectiveness of pulse flows to
22 facilitate successful juvenile outmigration, to evaluate the
23 enhancement of water temperature control via the shutter
24 device on New Bullards Bar via a shutter device, New
25 Bullards Bar, and also the management of the cold water pool

1 at New Bullards Bar as an effective way of controlling water
2 temperature in the lower river.

3 And also we have an action that is directed at
4 identifying and attempting to implement action that will
5 maintain mean daily water temperatures for shad during the
6 time of April 1 through June 30.

7 The third key issue that the Revised Draft Restoration
8 Plan addresses is the diversion screening, diversion and
9 screening of fish ladders, et cetera. We have many
10 structural actions in the revised plan that address that
11 by improved screen efficiency, improved by passing
12 efficiency, reducing passage problems and efforts like
13 that.

14 MR. GEE: Thank you.

15 Now, the Revised Draft Restoration Plan by its very
16 name has been finalized?

17 MR. FLEMMING: No, it hasn't.

18 MR. GEE: Can you explain why?

19 MR. FLEMMING: Yes. The Department of Interior has
20 made the decision to publish it as a draft because the
21 programmatic environmental impact statement has not been
22 completed, and we can't make a final plan until that
23 statement, the decision of record is made. The PEIS is
24 underway presently.

25 MR. GEE: Has the Revised Draft Restoration Plan been

1 implemented?

2 MR. FLEMMING: Yes, it has. Since about 1995 first
3 actions were being implemented.

4 MR. GEE: Have any actions, according to the Revised
5 Draft Restoration Plan, been initiated in the Lower Yuba
6 River?

7 MR. FLEMMING: Yes.

8 MR. GEE: When were they initiated?

9 MR. FLEMMING: The first was initiated in 1996. It was
10 an evaluation of passage at Daguerre Point Dam.

11 MR. GEE: These actions are described in your written
12 testimony; is that correct?

13 MR. FLEMMING: Yes, they are.

14 MR. GEE: I just want to direct the Board to Paragraph
15 5 of his testimony. If you wish the witness to go over
16 these points, he will.

17 H.O. BROWN: Your call.

18 MR. GEE: Do you wish to describe these actions, Mr.
19 Flemming?

20 MR. FLEMMING: Sure. Make sure I get them all here.

21 Summary of the actions are, we have done a feasibility
22 and preliminary engineering study on the Yuba Goldfields
23 Adult Fish Exclusion Barrier. We have been involved in the
24 Yuba River Steelhead Live History Study. We have done an
25 Upper Yuba River temperature model. Been involved in the

1 extension of the salvage operations at Hallwood-Cordua fish
2 screens, and as I mentioned, we have done the Daguerre Point
3 Dam feasibility and preliminary engineering study.

4 MR. GEE: Thank you.

5 Also, in your testimony you made reference to the Yuba
6 River Technical Fisheries Workgroup; is that correct?

7 MR. FLEMMING: Yes, I did.

8 MR. GEE: What is the purpose of that Yuba River
9 Technical Fisheries Workgroup?

10 MR. FLEMMING: The goal of the Yuba River Fisheries
11 Technical working group is to enhance Yuba River resources
12 by restoring ecosystem processes and minimizing or
13 eliminating stressors associated with anadromous fish
14 habitat throughout the watershed. And that is from
15 Englebright to the confluence.

16 MR. GEE: What entities are involved with this working
17 group?

18 MR. FLEMMING: PG&E, Yuba County Water Agency, Friends
19 of the River, Fish and Wildlife Service, California
20 Department of Fish and Game, South Yuba River Citizens
21 League, National Marine Fisheries Service, Cal/Fed. And I
22 believe that is everybody.

23 MR. GEE: And has the working group made any progress
24 towards the goal of restoring anadromous fish to the Yuba
25 River?

1 MR. FLEMMING: We made some progress as a group.
2 Recently, as an example, we as a group submitted a proposal
3 to Cal/Fed to put together an implementation plan for the
4 Lower Yuba River, and we did get funded. So we are moving,
5 as a group, towards putting together -- actually, the name
6 of the whole project is -- or the goal of the project is to
7 develop an implementation plan for the Lower Yuba River
8 anadromous fish habitat restoration.

9 MR. GEE: You mentioned you received funding from
10 Cal/Fed. When did the funding come through?

11 MR. FLEMMING: I don't know that it has come through.
12 We were accepted as a project, and I don't believe the group
13 has received any money yet.

14 MR. GEE: Thank you.

15 Mr. Guinee and Mr. Flemming are available for
16 cross-examination as a panel.

17 H.O. BROWN: All right.

18 Mr. Edmondson.

19 MR. EDMONDSON: National Marine Fisheries Service has
20 no questions.

21 H.O. BROWN: Mr. Baiocchi.

22 MR. BAIOCCHI: Thank you, Mr. Brown. I have a few
23 questions.

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1 CROSS-EXAMINATION OF U.S. FISH AND WILDLIFE SERVICE

2 BY CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

3 BY MR. BAIOCCHI

4 MR. BAIOCCHI: Mr. Guinee, Mr. Flemming, I will ask
5 some questions and you can, you know, whoever wants to
6 comment or answer the questions, please do. Okay.

7 Now, yesterday there was discussion through
8 cross-examination, et cetera, on cold water and I want to
9 get into steelhead.

10 It is my understanding that threatened Yuba River
11 steelhead exist in the river year-round; is that true?

12 MR. GUINEE: Yes, that is correct.

13 MR. BAIOCCHI: By existing in the river do we need
14 spawning habitat for steelhead?

15 MR. GUINEE: Yes.

16 MR. BAIOCCHI: By existing in the river do we need
17 marine habitat for steelhead?

18 MR. GUINEE: Yes.

19 MR. BAIOCCHI: For existing in the river year-round do
20 we need resting habitat for steelhead?

21 MR. GUINEE: Yes.

22 MR. BAIOCCHI: And do we need food producing habitat in
23 the river for steelhead?

24 MR. GUINEE: Yes. Fish need to eat.

25 MR. BAIOCCHI: Would you -- very simple questions. And

1 with respect to cold water, do we need cold water for
2 steelhead?

3 MR. GUINEE: That's correct.

4 MR. BAIOCCHI: Now, the lifestages of steelhead, it is
5 my understanding that they don't enter a river, spawn and
6 then return to the ocean immediately; is that true?

7 MR. GUINEE: Yes, that is true.

8 MR. BAIOCCHI: Is it true that they may remain in a
9 river system for one to two to three years?

10 MR. GUINEE: Yes. Steelhead tend to outmigrate over a
11 range time and age, so they may reside in the river up to
12 one or two years.

13 MR. BAIOCCHI: Thank you.

14 Do they return as an -- do adults migrate downstream?

15 MR. GUINEE: No. The juvenile steelhead would migrate
16 downstream from the river through the Delta into the ocean.

17 MR. BAIOCCHI: Would adult steelhead that have spawned
18 and are living, would they migrate to the ocean?

19 MR. GUINEE: Adult steelhead that survive the riggers
20 of spawning because oftentimes steelhead adults will die
21 after they spawn, not in every case like salmon, but the
22 ones that do survive may then go back downstream. That's
23 true.

24 MR. BAIOCCHI: Thank you.

25 Now the food producing habitat for steelhead, the macro

1 invertebrates, populations and habitat, do those populations
2 need cold water?

3 MR. GUINEE: Yes, they do.

4 MR. BAIOCCHI: Thank you.

5 Now with respect to the spring-run, juveniles, based on
6 your review of literature, and you have been doing this for
7 a number of years -- 20 years?

8 MR. GUINEE: That's correct.

9 MR. BAIOCCHI: Do spring-run juvenile fish -- and I am
10 going to use the terminology "juvenile fish," the word
11 "juvenile" -- do they have the potential of remaining in the
12 river system for a year or more?

13 MR. GUINEE: Yes, the life history of spring-run
14 juveniles is different than fall-run. They may go out
15 before, like, as smaller size smolts, but they often do
16 reside for a year.

17 MR. BAIOCCHI: So, theoretically, what we have -- not
18 theoretically, what we have is we have steelhead that the
19 Yuba River sustains, steelhead year-round, and potentially,
20 I will use that word, we have spring-run fish that may be in
21 the system for a year?

22 MR. GUINEE: That's correct.

23 MR. BAIOCCHI: Thank you.

24 And would it be also true that the spring-run juvenile
25 fish, again I am using that terminology "juvenile," that

1 remain in the river for a year or more, need food producing
2 habitat? The insects, the bugs and all that?

3 MR. GUINEE: Yes, they would be feeding.

4 MR. BAIOCCHI: Thank you very much.

5 Now, have you -- have any of you done any work on the
6 Sacramento River winter-run, been involved in any issues at
7 all?

8 MR. FLEMMING: Yes.

9 MR. GUINEE: And yes, for the Anadromous Fish
10 Restoration Program I have been involved in lower releases
11 in the Sacramento River.

12 MR. BAIOCCHI: You are familiar with the winter-run
13 endangered Sacramento River --

14 MR. GUINEE: Yes.

15 MR. BAIOCCHI: Now, would it be true to say that fish
16 screens, the screening diversions, on the Sacramento River
17 are very, very common?

18 MR. GUINEE: I am not sure what you mean by "common."

19 MR. BAIOCCHI: By common, there has been federal money
20 available, et cetera, to screen outlet facilities and so a
21 lot of the diversions are being screened?

22 MR. GUINEE: Through the Central Valley Project
23 Improvement Act there is a screening program.

24 MR. FLEMMING: Larger screen.

25 MR. BAIOCCHI: So it is a no-brainer, with the funding

1 available screen diversions on any waterway where anadromous
2 fish, particularly where there is threatened species; is
3 that correct?

4 MR. LILLY: I'm going to object. The question, is it a
5 no-brainer, is vague and ambiguous.

6 H.O. BROWN: Perhaps.

7 MR. BAIOCCHI: Strike that no-brainer.

8 H.O. BROWN: Rephrase, Mr. Baiocchi.

9 MR. BAIOCCHI: Let's rephrase.

10 With funding available and cooperation by the water
11 user, screens can be -- fish screens can be implemented?

12 MR. FLEMMING: Yes.

13 MR. BAIOCCHI: Thank you.

14 How do either of you, both of you or individually, how
15 do you feel about adaptive management with respect to during
16 very dry or drought conditions with -- okay.

17 With respect to very dry, drought conditions and
18 respect to flows and water temperatures used in an adaptive
19 management approach.

20 MR. GEE: Can you clarify, approach to what?

21 MR. BAIOCCHI: Let's say there is only -- there is only
22 a limited supply of water. Wouldn't it be true in some
23 cases that the Service will work with water users so the
24 water is used in a fashion that there is enough water to go
25 around for the fish and for the water users, like, in a

1 drought condition?

2 MR. GUINEE: I guess, you know, that gets to my
3 experience with the adaptive management as many different
4 people have different understandings or definitions of what
5 it is. In the Anadromous Fish Restoration Program the
6 Service has approached adaptive management meaning that the
7 Board or FERC or whatever entity that would provide improved
8 flows or through the Anadromous Fish Restoration Program we
9 may provide improved flows on CVP streams, and the adaptive
10 management would be to evaluate the improved flows, monitor
11 the response to the fish population and see if those
12 improved flows were, in fact, moving us in the direction of
13 meeting the fish population objectives and restoring of
14 those populations.

15 MR. BAIOCCHI: Thank you.

16 You were here in 1992, during the 1992 two Lower Yuba
17 River hearings, right, as I recall?

18 MR. GUINEE: Yes, I was.

19 MR. FLEMMING: I was not.

20 MR. BAIOCCHI: Roger, as I recall, the Fish and
21 Wildlife Service was -- one of their specific concerns was
22 water transfers and the affects to reduction of storage at
23 New Bullards Bar and the effects on the following year
24 concerning spilling flows, et cetera, into the Yuba River;
25 isn't that true?

1 MR. GUINEE: I recall that as well. I should clarify
2 for the Board, in 1992 I was actually a witness for the
3 Department of Fish and Game and so -- but I do recall the
4 Fish and Wildlife Service as being concerned about that.

5 MR. BAIOCCHI: Is that still an issue with Fish and
6 Wildlife Service if there was ongoing water transfers
7 following the Board's decision in this matter?

8 MR. GUINEE: Are you asking me a policy question or are
9 you asking me a technical question?

10 MR. BAIOCCHI: I am asking a technical question, not
11 policy.

12 MR. GUINEE: As a biologist we would be concerned about
13 water transfers in the sense that they would be done on a
14 fish friendly schedule and that the impacts on carryover
15 storage would be addressed somehow so that they did not have
16 adverse effects on fish in the following year or subsequent
17 years.

18 MR. BAIOCCHI: Are there other endangered and
19 threatened species in the Lower Yuba River aside from the
20 steelhead and spring-run salmon?

21 MR. GUINEE: Not that I can recall.

22 MR. FLEMMING: I believe there are. Fish? Are you
23 asking fish?

24 MR. BAIOCCHI: Aquatic.

25 MR. FLEMMING: Not that I know.

1 MR. BAIOCCHI: What about red-legged frogs? There
2 isn't any red-legged frogs?

3 MR. FLEMMING: I believe there are. I have not been
4 involved in any of that. But in a document that I read --

5 MR. BAIOCCHI: I will stay away from that. We can get
6 to that.

7 MR. GUINEE: We are fishery biologist. Frogs are
8 amphibians.

9 MR. BAIOCCHI: Just trying to make a point.

10 Mr. Flemming, you indicated there is a Yuba River
11 technical working group; there is a number of entities? Do
12 you recall a meeting with Dr. Mike Fitzwater at any of those
13 meetings?

14 MR. FLEMMING: No.

15 MR. BAIOCCHI: It is my understanding that Mr.
16 Fitzwater represents the California Sportfishing Protection
17 Alliance on that working group. So, when you addressed all
18 the people, all the organizations that were stakeholders, et
19 cetera, that were on that group, it is my understanding,
20 anyway, that California Sportfishing Protection Alliance is
21 a member of that group.

22 MR. FLEMMING: I never met him.

23 MR. BAIOCCHI: To the best of your knowledge, is
24 California Sportfishing Protection Alliance a member of the
25 working group?

1 MR. FLEMMING: They've never attended, but that doesn't
2 mean they're not able to attend.

3 MR. BAIOCCHI: Thank you.

4 With respect to S-DOI-4, which is entitled Revised
5 Draft Restoration Plan for the Anadromous Fish, it goes to
6 Page 71 and it commences with Yuba River.

7 Now, under involved parties --

8 MR. FLEMMING: Yes.

9 MR. BAIOCCHI: Could you so state who the involved
10 parties are?

11 MR. FLEMMING: It lists Yuba County Water Agency,
12 State Water Resources Control Board, California Department
13 of Fish and Game, U.S. Fish and Wildlife Service, U.S.
14 Bureau of Reclamation for action Number 1.

15 MR. BAIOCCHI: But if you go through that involved
16 party list, when you go through your actions, isn't it true
17 just about all the parties are named?

18 MR. FLEMMING: Yes. There's a lot of -- I would just
19 state that these are just lists of people who -- the group
20 who prepared the Anadromous Fish Restoration Program.
21 Thought would or could be involved. It should be a pretty
22 comprehensive list.

23 MR. BAIOCCHI: I am going to ask a question and either
24 Roger or Craig please answer it.

25 If the Board has a term and condition of the Draft

1 Decision put in place, the Yuba River technical working
2 group, whereas they so ordered that the group continue to
3 work and that the group report back to the State Board, say,
4 every six months, twice a year, would you be opposed to
5 that? Would the Fish and Wildlife Service be opposed to
6 having the Board bring in the Yuba River technical working
7 group?

8 MR. FLEMMING: No.

9 MR. BAIOCCHI: Thank you.

10 H.O. BROWN: Thank you, Mr. Baiocchi.

11 Mr. Sanders.

12 ----oOo----

13 CROSS-EXAMINATION OF U.S. FISH AND WILDLIFE SERVICE

14 BY SOUTH YUBA RIVER CITIZENS LEAGUE

15 BY MR. SANDERS

16 MR. SANDERS: Morning.

17 MR. FLEMMING: Good morning.

18 MR. SANDERS: I just have a few questions starting with
19 the working paper on restoration needs, S-DOI-3, that was
20 drafted. Let's just get this straight.

21 Was that, the restoration needs for the Yuba River,
22 were they arrived at through the core group or through a
23 technical team?

24 MR. GUINEE: The process was that the technical teams
25 met, developed a list of actions and then forwarded those to

1 the core group, who essentially reviewed the actions from
2 all the technical teams.

3 MR. SANDERS: Was there a specific technical team for,
4 say, the Yuba River or was it a little bit broader? How did
5 that work?

6 MR. GUINEE: It was a little bit broader. I think we
7 refer to it as the Lower Sacramento Tributaries, so it
8 included the Yuba and American Rivers. As I recall.

9 MR. SANDERS: The core group came up with the flow
10 recommendations or the technical team came up with the flow
11 recommendations, passed them on to the core group and the
12 core group ultimately put out the working papers.

13 Is that how it worked?

14 MR. GUINEE: That is correct. Although I would say the
15 Fish and Wildlife Service staff did the primary work of
16 putting the, I shouldn't say pen to paper, but typed out the
17 actual document and then the core group reviewed it and
18 after several revisions the Fish and Wildlife Service
19 published it in May of 1995.

20 MR. SANDERS: Who besides yourself was on the core
21 group?

22 MR. GUINEE: The agencies representatives include
23 National Marine Fisheries Service, Department of Fish and
24 Game, Bureau of Reclamation, Fish and Wildlife Service,
25 Department of Water Resources. I have to go back and look

1 at a document. I think it lists who they are. That's
2 generally the resource agencies who were part of the core
3 group.

4 MR. SANDERS: State and federal resource agencies?

5 MR. GUINEE: That's correct.

6 MR. SANDERS: What about representatives of interest
7 groups or water user groups, they weren't in the core
8 group?

9 MR. GUINEE: They were not part of the core group. The
10 stakeholder process was an integral part of the development
11 of the working paper, but was done separately in terms of
12 public meetings where not all stakeholders but all of the
13 public were invited to come, give the core group feedback on
14 the development of the working paper.

15 MR. SANDERS: Now, for the technical team, you were a
16 member of the technical team as well, that we just talked
17 about, for the lower Sacramento River --

18 MR. GUINEE: Tributaries, that is correct.

19 MR. SANDERS: Who else was on that technical team with
20 you?

21 MR. GUINEE: The technical team, again, included
22 representatives from California Department of Fish and Game.
23 Department of Water Resources, Bureau of Reclamation and a
24 couple of consultants from Beak Consultants.

25 MR. SANDERS: Do you recall who those consultants were?

1 MR. GUINEE: My recollection was Paul Bratovich and
2 Mike Bryan.

3 MR. SANDERS: Those are the same consultants that the
4 Yuba County Water Agency has hired for this proceeding?

5 MR. GUINEE: That is my understanding, yeah.

6 MR. SANDERS: You testified that the technical team
7 made recommendations as to flows?

8 MR. GUINEE: That's correct. Based on the existing
9 literature available to them and the knowledge of the
10 participants, they developed the flow recommendations that
11 were forwarded to the core group.

12 MR. SANDERS: Do you recall anyone dissenting from
13 those recommendations when they were made?

14 MR. GUINEE: The process was an attempt to be a
15 consensus process, as biologist looking at what was needed
16 to improve habitat for the anadromous fish. And in terms of
17 the Yuba River recommendation, I don't remember any
18 dissenting opinions.

19 MR. SANDERS: And you testified that the technical
20 teams recommendations, which are ultimately the AFRP flow
21 recommendations, are different from those being recommended
22 in the Draft Decision; is that correct?

23 MR. LILLY: I am going to object. That misstates the
24 prior testimony. What Mr. Guinee said was the core group
25 made the final AFRP recommendations, not the technical

1 group. The question said just the technical became the
2 final AFRP recommendations. That misstates Mr. Guinee's
3 prior testimony.

4 MR. SANDERS: I stand corrected.

5 H.O. BROWN: Thank you, Mr. Lilly.

6 Please restate the question, Mr. Sanders.

7 MR. SANDERS: Did the technical group recommend those
8 to the core group?

9 MR. GUINEE: Yes, they did.

10 MR. SANDERS: For the Yuba River?

11 MR. GUINEE: Yes.

12 MR. SANDERS: Did those flows substantially change from
13 -- when the core group finally published the working paper,
14 were the flows recommended by the technical team changed?

15 MR. GUINEE: No, I don't think the core made any
16 modifications to the Yuba River flow recommendation.

17 MR. SANDERS: And the flows you testified are
18 consistent with the Draft Order but somewhat different?

19 MR. GUINEE: As I showed on the board, the flows
20 recommended in the working paper for salmon and steelhead,
21 specifically, were a little bit higher than the Board's
22 Draft Decision flows.

23 MR. SANDERS: If I recall your overhead for the months
24 of -- it was summer months -- July, August, September, the
25 AFRP flows are 450 cfs; is that correct?

1 MR. GUINEE: That's correct.

2 MR. SANDERS: The flows -- the Draft Order flows were
3 200 --

4 MR. GUINEE: Would it be helpful if I --

5 MR. SANDERS: I think that would help both of us.

6 We are looking at the months July, August, September
7 for now. July, August, September.

8 MR. GUINEE: Okay.

9 MR. SANDERS: The Draft Order is 250 cfs; is that
10 correct?

11 MR. GUINEE: That's correct.

12 MR. SANDERS: The AFRP recommends 450 cfs?

13 MR. GUINEE: That's correct.

14 MR. SANDERS: Now, again, this is -- to the best of
15 your recollection of the technical team meetings, did Mr.
16 Bratovich or Mr. Bryan object to that 450 cfs recommendation?

17 MR. GUINEE: No. I don't recall any objections.

18 MR. SANDERS: They didn't say 250 cfs?

19 MR. GUINEE: In the process of those meetings there was
20 a lot of discussion back and forth among the biologist about
21 what the flows should be in terms of a recommendation. But
22 to answer the question, you know, it did end up pretty much
23 on a consensus on the Yuba River for these flows.

24 MR. SANDERS: Everybody agreed to recommend 450 cfs for
25 July, August, September?

1 MR. GUINEE: Yes. To the best of my memory, that's
2 correct.

3 MR. SANDERS: There was no -- was there an opportunity
4 to dissent if a member of your group didn't agree?

5 MR. GUINEE: Yes, there was.

6 MR. SANDERS: And there was no dissent?

7 MR. GUINEE: Not in this instance that I can recall.

8 MR. SANDERS: I want to move on to S-DOI-4. Just one
9 or two questions on that one. I'm looking at Page 71.
10 First action:

11 Supplement water flows or supplement flows
12 with water acquired from willing sellers
13 consistent with applicable guidelines or
14 negotiate agreements to improve conditions
15 for all life history stages of chinook salmon
16 and steelhead. (Reading.)

17 That is listed there as priority of high.

18 Why is that high priority?

19 MR. GUINEE: In terms of the flows needed to restore
20 fish, as you go through this document, you see that flows
21 generally improved -- improved flows generally improve
22 habitat for salmon and steelhead. So it becomes a high
23 priority.

24 MR. SANDERS: Under this thing that says tools, what is
25 3406(b)(3)?

1 MR. GUINEE: That refers to the water acquisition
2 program pursuant to the Central Valley Project Improvement
3 Act.

4 MR. SANDERS: If I'm getting that straight, there is
5 money available to do that? Is that what that means?

6 MR. GUINEE: That's -- the law provided funds for water
7 acquisition for anadromous fish restoration.

8 MR. SANDERS: Potentially there are federal funds
9 available to compensate Yuba County Water Agency, for
10 instance, for increased flows on the Yuba River?

11 MR. GUINEE: Potentially, and, in fact, through that
12 program there have been water acquisitions from the Yuba in
13 the past.

14 MR. SANDERS: Now I am going down to the next page,
15 Number 5:

16 Improve efficiency of screening devices at
17 Hallwood, Cordua and Brophy-South Yuba and
18 construct screens at Browns Valley water
19 diversion and other unscreened diversions.

20 (Reading.)

21 That gets a medium priority. Why is that lower
22 priority?

23 MR. FLEMMING: Just -- it's still -- the priority
24 system is kind of a relative -- just a tool that they use to
25 rank actions within each watershed.

1 For instance, getting flow for the fish was a high
2 priority compared to improving screening on the Yuba River.
3 So it is a Yuba River specific categorization.

4 MR. GUINEE: To add to Craig's answer, the priority
5 system was basically a high, medium, low rather than debate
6 or come up with some sort of numerical which would have
7 taken a long time. It was in terms of getting a consensus
8 on the priority system, the high, medium, the low, it was a
9 way we could get consensus.

10 MR. SANDERS: Just to go back for a minute. This is
11 the draft restoration plan. Was this published in the same
12 way with technical teams and a core group or was that a
13 different process?

14 MR. FLEMMING: No. The working paper produced all of
15 the recommendations and didn't regard reasonableness
16 implementing those actions as something to be considered at
17 that time. And after that paper came out, they went into
18 the public process and reasonableness was applied. Then
19 they went through many public meetings and reiterations and
20 the Draft Restoration Plan was actually produced after going
21 through all those comments and stuff. And it was pretty
22 strictly by the AFRP programs.

23 MR. GUINEE: Another way of saying that is the revised
24 draft plan is a subset of what was identified in the working
25 paper as needed for the restoration of anadromous fish.

1 MR. SANDERS: So the AFRP in their Draft Restoration
2 Plan considers flows to be of higher priority than improving
3 the fish screens?

4 MR. GUINEE: I would say that is correct.

5 MR. SANDERS: Just one more -- couple more quick
6 questions about Sacramento River winter-run chinook salmon
7 that Mr. Baiocchi mentioned.

8 The winter-run salmon are designated as endangered; is
9 that correct?

10 MR. FLEMMING: Yes.

11 MR. SANDERS: Is that -- I notice there is some kind of
12 confusion in terminology. When we talk about spring-run and
13 the steelhead, the run is called the Central Valley run.
14 But when we talk about winter-run chinook it is called the
15 Sacramento River run.

16 Is there some reason for the difference in
17 terminology?

18 MR. GUINEE: My understanding is that the winter-run
19 chinook salmon, which are present in the Sacramento River,
20 and my recollection is that National Marine Fisheries
21 Service designated Sacramento River as critical habitat that
22 they are -- they weren't historically found in any other
23 Central Valley streams except maybe Battle Creek, where the
24 spring-run chinook salmon are found in other streams. As
25 you heard yesterday, Yuba River, Mill Creek, Deer Creek,

1 Yuba River.

2 MR. SANDERS: Historically, the Yuba River didn't have
3 a winter-run, is that what you are saying?

4 MR. GUINEE: That's correct. Not -- to the best of my
5 knowledge, there were never any winter-run found in the Yuba
6 River.

7 MR. SANDERS: Thank you very much.

8 H.O. BROWN: Thank you, Mr. Sanders.

9 Mr. Cook.

10 ----oOo---

11 CROSS-EXAMINATION OF U.S. FISH AND WILDLIFE SERVICE

12 BY MR. COOK

13 MR. COOK: Good morning, gentlemen.

14 MR. FLEMMING: Good morning.

15 MR. GUINEE: Morning.

16 MR. COOK: I would like to ask a few questions about
17 physical conditions of the Lower Yuba River.

18 Are you gentlemen familiar with the river and the area
19 called the Goldfields?

20 MR. FLEMMING: Yes.

21 MR. GUINEE: Yes, in general.

22 MR. COOK: Now, isn't it true that the Goldfields
23 consist of substantial, let me say, piles or walls of
24 cobblestones?

25 MR. FLEMMING: Yes.

1 MR. COOK: Isn't it true that the Yuba River water
2 percolates through these walls or piles?

3 MR. FLEMMING: Yes.

4 MR. COOK: And isn't it true that the water percolating
5 through the piles or walls creates substantial flows of
6 water within the Goldfields themselves, semi-adjacent to the
7 river?

8 MR. FLEMMING: Yeah. Could you clarify "substantial"?

9 MR. COOK: Well, I am not sure about cubic feet per
10 second-type of question. Maybe you might be able to tell me
11 that.

12 MR. FLEMMING: Does it produce -- does the Yuba River
13 water moving through the Goldfields produce an outflow of
14 water? Yes. I couldn't say how much at all.

15 MR. COOK: Is there any direct surface connection from
16 the main stem of the Yuba to the water that flows in the
17 Goldfields?

18 MR. FLEMMING: Yes. Through the --

19 MR. COOK: What connection would that be?

20 MR. FLEMMING: The outfall.

21 MR. COOK: What about the inflow?

22 MR. FLEMMING: Direct connection via the gabion weir,
23 if that is what you are asking for.

24 MR. COOK: Pardon me?

25 MR. FLEMMING: Direct access in the Yuba Goldfields

1 from my understanding is basically only through the outfall.

2 MR. COOK: Let's say above the South Canal. There is
3 water flowing in that area, is there not, in the Goldfields?

4 MR. MINASIAN: I am going to object. The question is
5 unclear.

6 May I make a suggestion? I think a solution would be
7 for Mr. Cook to tell us all what he means when he uses the
8 term "South Canal." He may be referring to a place where
9 water comes back into the Yuba River or he may be referring
10 to what we call the Brophy-South Yuba takeout, which is
11 about three miles to the south.

12 H.O. BROWN: Thank you, Mr. Minasian.

13 I agree, Mr. Cook. I am having difficulty following
14 myself. Is there a map?

15 MR. COOK: I have an overhead. I am not sure these
16 gentlemen --

17 H.O. BROWN: Let's try it and see what it looks like.
18 It may help.

19 Is it part of your exhibits?

20 MR. COOK: This was Exhibit Q in the prior hearing.

21 I think it was presented by us.

22 Now, on this exhibit can you tell -- is it correct that
23 the Yuba River generally travels in that direction?

24 MR. FLEMMING: Yes.

25 MR. COOK: That would be to the left of this overhead.

1 And then can you see the area pointed out as Daguerra Point
2 Dam, which is right here?

3 MR. GUINEE: Yes.

4 MR. COOK: And then can you see this area here which
5 would be the outflow from the reservoir of the Daguerra
6 Point Dam?

7 MR. FLEMMING: You mean that is the -- I don't
8 understand your question.

9 MR. FRINK: Mr. Cook, could you describe on the map
10 when you say "this area." If you could describe it relative
11 to the river or give some other description so that in
12 reading the transcript we would be able to follow.

13 MR. COOK: Very well.

14 Actually, as Daguerra Point Dam it does, in fact, back
15 up water, does it not? It creates somewhat of a reservoir?

16 MR. FLEMMING: Yes.

17 MR. COOK: There is a pond adjacent or part of this
18 reservoir, is there not?

19 MR. FLEMMING: Behind the dam?

20 MR. COOK: Yes, behind the dam.

21 MR. FLEMMING: Yes.

22 MR. COOK: At that pond there is outflow of water which
23 contains a gabion screen. In other words, a gabion screen
24 prevents fish from going into this canal?

25 MR. FLEMMING: Yes.

1 MR. COOK: And this canal, would that be the
2 approximate location? This runs from the Daguerre Point Dam
3 area off to the right on this overhead or which I believe
4 would be south. This drawing in there appears to be, is it
5 not, a canal where irrigation water is taken from the river
6 and delivered to the south?

7 MR. FLEMMING: Yes, it appears to be. And to clarify
8 the statement I just made, you said that water flows through
9 the gabion and you said that it stops fish from going
10 through the gabion. I didn't mean to verify that.

11 MR. COOK: Very well.

12 MR. FLEMMING: Fish don't go through the gabion.

13 MR. COOK: That is the purpose of the gabion, whether
14 it works is another question?

15 MR. FLEMMING: Yes. Thank you.

16 MR. COOK: Now, toward the top of this overhead off to
17 the south from the Yuba River which is somewhat to the left
18 of this map, there are water flows above this canal -- or,
19 first, if I can withdraw that. I might ask:

20 When I refer to this as the South Canal, does that ring
21 a bell with you?

22 MR. FLEMMING: In general.

23 MR. COOK: In general?

24 MR. FLEMMING: Yes.

25 MR. COOK: Are you familiar with the Brophy-Hallwood

1 Canal?

2 MR. FLEMMING: Yes, South Yuba-Brophy?

3 MR. COOK: Yes. Would that be a better term than the
4 South Canal?

5 MR. FLEMMING: Yes.

6 MR. COOK: In any event the canal -- above this Brophy
7 Canal, the one we just talked about, the Goldfields extend a
8 substantial distance to the, I guess it would be to the,
9 east or the north -- to the east --

10 MR. GUINEE: Mr. Cook, it may be helpful if I point
11 out. The Fish and Wildlife Service did an evaluation on the
12 Goldfields, and the presence of adult salmon got in there
13 and spawned and juvenile salmon as well. And that report is
14 in the Board's record. It was provided by the Fish and
15 Wildlife Service at the '92 hearing. I was not the
16 biologist that worked on that, so I don't have the level of
17 detail you are asking about. I don't have that
18 understanding.

19 Within that report, refer the Board to that, some of
20 this information may be available.

21 MR. COOK: The basic conclusions from the report were
22 to the effect that salmon did, in fact, spawn in the Yuba
23 Goldfields; is that correct?

24 MR. GUINEE: That is my recollection, although I
25 pointed out the spawning habitat was very poor.

1 MR. COOK: Did it point out that there was substantial
2 predation and high temperature of water in the area where
3 there was spawning in the Goldfields?

4 MR. GUINEE: That is my recollection. I didn't come
5 prepared to testify on the contents of the report, but that
6 is my recollection from reviewing it again before this
7 hearing.

8 MR. COOK: Now, if I may point again to another channel
9 which heads downstream and reenters the Yuba River a mile or
10 so below the Daguerre Point Dam.

11 Are you familiar with that channel?

12 MR. FLEMMING: Yes.

13 MR. COOK: That channel is used, is it not, for purpose
14 of maintaining the flow levels within this Brophy Canal, up
15 here?

16 MR. FLEMMING: I am not sure I understand the
17 hydraulics of that well.

18 MR. COOK: I will withdraw that.

19 The channel itself does have perhaps a hundred cfs of
20 water flowing through it from the South Canal; is that
21 correct, or from the Brophy Canal?

22 MR. FLEMMING: I couldn't verify the amount. I know
23 there is water flowing out of that, and sometimes it can be
24 substantial. It is considerably more than a hundred cfs.

25 MR. COOK: And in that canal or channel, let's call it

1 the diversion channel, the diversion channel flows back into
2 the Yuba River?

3 MR. FLEMMING: Yes, it does.

4 MR. COOK: It flows into the Yuba River below the
5 Daguerra Point Dam?

6 MR. FLEMMING: Yes.

7 MR. COOK: Do you know or have you studied whether or
8 not there is any turbidity in water reentering that river?

9 MR. FLEMMING: No.

10 MR. COOK: What about temperature?

11 MR. GEE: Mr. Brown, I need to object at this point.
12 Mr. Cook, although I appreciate his questions, they are
13 reaching the level of detail which I feel my witnesses
14 cannot answer without a certain level of reliability.

15 H.O. BROWN: All right. I will instruct the witness to
16 answer the question if you know the answer. If you don't
17 know the answer, then it is purely all right to say you
18 don't know.

19 MR. GEE: Thank you.

20 MR. GUINEE: I did not do that evaluation that I
21 referred to. Fish and Wildlife Service did it back in '89
22 or '90, and that report is in the Board's record.

23 MR. COOK: Let me ask it this way, then: In the course
24 of your studies for steelhead and salmon in the Yuba River,
25 are you considering temperature flows of water coming into

1 the main stem of the Yuba River from the Yuba Goldfields?

2 MR. GUINEE: When the Anadromous Fish Restoration
3 Program recommended flows in the Yuba, it was the intent of
4 also providing cold water temperature for those anadromous
5 fish in the Yuba River.

6 I am not sure I followed your question as to how it
7 related to Goldfields.

8 MR. COOK: There is a reentry of water into the main
9 stem of the Yuba River. You are familiar with that?

10 MR. GUINEE: Are you referring to the outfall from
11 Goldfields back to the river?

12 MR. COOK: Yes.

13 MR. GUINEE: Right. And in that report it recommended
14 that that outfall -- a barrier be constructed to prevent the
15 salmon from getting into the Goldfields.

16 Craig may know a little bit more about that.

17 MR. FLEMMING: To specifically address your question, I
18 don't believe there is -- the U.S. Fish and Wildlife Service
19 doesn't have any information about increased temperatures of
20 the Yuba Goldfields outflow.

21 MR. COOK: Do you plan on studying that issue?

22 MR. FLEMMING: I don't.

23 MR. COOK: Are you familiar with the location of the
24 Marysville gauge?

25 MR. FLEMMING: In general.

1 MR. COOK: Are you familiar with the fact there is no
2 gauge to measure water flow at the Daguerra Point Dam?

3 MR. FLEMMING: Yes.

4 MR. COOK: Are you familiar with the fact that as part
5 of the Department of Fish and Game's agreement the water
6 across that dam should be measured at the dam?

7 MR. FLEMMING: No.

8 MR. COOK: Are you familiar also with the fact that
9 below the Marysville gauge there are at least nine
10 diversions of water? Are you familiar with that?

11 MR. FLEMMING: No.

12 MR. COOK: Have you considered any other diversions
13 below the Daguerra Point Dam in your studies as to salmon
14 and steelhead?

15 MR. GUINEE: What do you mean by "considered"? Other
16 diversions?

17 MR. COOK: Well, I am not sure if you are familiar with
18 any diversions below Daguerra Point Dam. If not, you
19 probably haven't considered it.

20 MR. GUINEE: I guess the Fish and Wildlife Service
21 through the Anadromous Fish Screening Program has been
22 looking at all the diversions in the Central Valley streams,
23 primarily focusing on the unscreened ones and screens that
24 need to be upgraded. But I am not here to testify what the
25 Anadromous Fish Screen Program has been doing. There are

1 other witnesses that can better answer those questions.

2 MR. COOK: Mr. Flemming, do you have anything to add to
3 that?

4 MR. FLEMMING: As a member of the AFRP, the fact that I
5 am not aware of them right now and there isn't an action
6 listed on this, does not mean that that would not be
7 something we would continue to look to in the future, to
8 continue to restore habitat and reduce impacts to salmon and
9 steelhead.

10 Does that answer your question?

11 MR. COOK: I think so.

12 Thank you.

13 That is all the questions I have.

14 H.O. BROWN: Complete your cross, Mr. Cook?

15 MR. COOK: Yes.

16 H.O. BROWN: What we will do is take a 12-minute
17 recess. Again, I will allow you to bring drinks in the
18 room. Just make sure they have a lid on them. We will take
19 a 12-minute recess.

20 (Break taken.)

21 H.O. BROWN: Back on the record.

22 Mr. Lilly.

23 MR. MINASIAN: Mr. Chairman, I have asked Mr. Lilly if
24 I could move forward. I have to leave at the earliest
25 possible time. Mr. Lilly has agreed if that is acceptable

1 to the Chair.

2 H.O. BROWN: Yes, of course. Please.

3 ---oOo---

4 CROSS-EXAMINATION OF U.S. FISH AND WILDLIFE SERVICE

5 BY CORDUA IRRIGATION DISTRICT & SOUTH YUBA WATER DISTRICT

6 BY MR. MINASIAN

7 MR. MINASIAN: Gentlemen, on behalf of South Yuba Water
8 District and Cordua Irrigation District, I ask you a series
9 of questions relating to your application of the Endangered
10 Species Act to this circumstance.

11 Mr. Guinee, as I understand it you are recommending
12 that the 1991 recommended flows under the Department of Fish
13 and Game's restoration proposal and water management
14 proposal be adopted by the Board in regard to the Yuba
15 River; is that correct?

16 MR. GUINEE: Essentially what I recommended is that the
17 flows found in the 1995 AFRP document be implemented and
18 they are consistent with the 1991 flows recommended by Fish
19 and Game.

20 MR. MINASIAN: You are also recommending the Board
21 adopt the temperature requirements as proposed in the
22 Department of Fish and Game 1991 plan? Or are you
23 recommending the temperature proposals made by Steven
24 Edmondson yesterday?

25 MR. GUINEE: My testimony addressed the 1991 plan, and

1 I had not had the opportunity to review those flows when I
2 prepared this testimony.

3 MR. MINASIAN: Administering the Endangered Species
4 Act, the United States Fish and Wildlife Service is
5 basically
6 -- excuse me.

7 H.O. BROWN: Mr. Gee.

8 MR. GEE: Mr. Minasian, if I am correct, the National
9 Marine Fisheries Service is the relevant agency when making
10 determinations under the Endangered Species Act. I do not
11 believe my witnesses are competent to make any assessments
12 on the ESA.

13 H.O. BROWN: Thank you.

14 MR. MINASIAN: I think my question will go to exactly
15 that point.

16 In administering the Endangered Species Act, all
17 federal agencies are supposed to consult and cooperate and
18 implement the terms; aren't they?

19 MR. GUINEE: As Fish and Wildlife Service is not
20 administering the Endangered Species Act for anadromous
21 fish. That is the responsibility of the National Marine
22 Fisheries Service.

23 MR. MINASIAN: The United States Fish and Wildlife
24 Service is required to administer the program in regard to
25 nonanadromous fish, nonanadromous species, is it not?

1 MR. GUINEE: That is my understanding, but I am not in
2 the endangered species branch of our office. I don't do
3 that administration.

4 MR. MINASIAN: Waterfowl, some waterfowl that migrate
5 through Yuba County are on the threatened and endangered
6 species list, are they not?

7 MR. GUINEE: Could you repeat the question?

8 MR. MINASIAN: Yes. That is certain waterfowl that
9 migrate through Yuba County are on the threatened and
10 endangered species list?

11 H.O. BROWN: Mr. Gee.

12 MR. GEE: Mr. Guinee and Mr. Flemming are fishery
13 biologist and --

14 H.O. BROWN: Can you hear Mr. Gee in the back?

15 You may be seated if that is more comfortable, Mr.
16 Gee.

17 MR. GEE: Mr. Guinee and Mr. Flemming are fishery
18 biologists. They are not competent to speak on waterfowl.
19 Correct me if I am wrong.

20 MR. MINASIAN: It would be quite sufficient if they
21 don't know to simply indicate they don't know.

22 H.O. BROWN: That is my instructions.

23 MR. GUINEE: Yeah, I have not reviewed the list of
24 waterfowl in California.

25 MR. MINASIAN: Are you aware if, in fact, the flow

1 requirements that you're recommending are adopted by the
2 Board, that there will be substantially less irrigation and
3 flooding of waterfowl habitat, at least in the area north
4 and to a degree in the area south of the Yuba --

5 MR. SANDERS: I have to object.

6 H.O. BROWN: Mr. Sanders.

7 MR. SANDERS: These guys are fishery biologists. They
8 just testified that they don't have any expertise in the
9 Endangered Species Act enforcement. They really are not
10 competent to testify on these questions.

11 H.O. BROWN: Thank you, Mr. Sanders.

12 Again, I will remind all of you, on cross-examination
13 we are very liberal in what you ask. I will instruct the
14 witnesses, if you don't know, just simply say you don't
15 know.

16 Mr. Minasian, you may ask whatever question you want
17 within reason.

18 MR. MINASIAN: Thank you, Mr. Board Member.

19 MR. GUINEE: Could you repeat the question, please?

20 MR. MINASIAN: Roger, basically, the flows recommended
21 by U.S. Fish and Wildlife Service through your testimony and
22 Craig's testimony today would result in a substantial amount
23 of water being consumed for instream needs as opposed to
24 being available for creating waterfowl habitat in the areas
25 north of the Yuba River and south of the Yuba River.

1 Are you aware of that?

2 MR. GUINEE: I haven't done that analysis.

3 MR. MINASIAN: The Board doesn't have an EIR and it
4 doesn't have an EIS to examine implications for waterfowl
5 compared to fish of the flow regime which is being
6 recommended. Could you recommend to them how to obtain that
7 information to balance those two needs?

8 MR. GUINEE: I haven't done that analysis.

9 MR. MINASIAN: Do you know if anybody has done that
10 analysis?

11 MR. GUINEE: Not to my knowledge.

12 MR. MINASIAN: So the AFRP draft, basically, was not
13 accompanied by an EIS or any programmatic document to try to
14 weigh those facts; is that correct?

15 MR. FLEMMING: There is a programmatic EIS underway
16 right now for the Revised Draft Restoration Plan.

17 MR. MINASIAN: Will that, in fact, take the work of
18 people like Joe Fleskes of the U.S. Fish and Wildlife
19 Service who studied the waterfowl uses in the area north of
20 the Yuba River? Would it take that information and give a
21 balance to it for the Board?

22 MR. GUINEE: I haven't reviewed that programmatic EIS,
23 to that level of detail. I primarily reviewed the fishery
24 portion.

25 MR. MINASIAN: Just as a biologist trained to preserve

1 to understand species, would it be an important thing to
2 balance the impacts of water being utilized for instream
3 purposes versus water being utilized for waterfowl habitat
4 purposes?

5 MR. GUINEE: Generally, as biologist we don't like to
6 see tradeoffs of fish water for waterfowl water or even vice
7 versa. I think that's -- you know, the Board will find a
8 way to balance the needs.

9 MR. MINASIAN: Roger, you sat through this hearing in
10 1992 and you sat through this part of it in 1994, other than
11 the Cordua Irrigation District bringing in Dr. Fritz Reid
12 and Mickey Heitmeyer, has anybody put on any evidence to
13 balance waterfowl and use of water for instream purposes?
14 I am not asking about the value of it. I am just asking
15 whether or not he's seen any evidence, anything that the
16 Board may use.

17 MR. GEE: Mr. Brown, may I speak?

18 H.O. BROWN: Excuse me, Mr. Gee, I was writing.

19 By all means.

20 MR. GEE: I object. I think the question is asking Mr.
21 Guinee to weigh evidence that has been proposed to the
22 Board. That is not his role in these proceedings.

23 H.O. BROWN: I understood that he was asking for
24 opinion.

25 Is that correct?

1 MR. MINASIAN: Yes. And actually recollection.

2 H.O. BROWN: Do you have an opinion from your expertise
3 knowledge within the area? I would like to hear it.

4 MR. GUINEE: I am here as a fishery biologist
5 recommending that the Board require approved flows in the
6 Lower Yuba River for the benefit of anadromous fish. In my
7 opinion I would encourage the Board to look and balance
8 those needs throughout the system as it generally does when
9 it makes these decisions. And I thought the Board's Draft
10 Decision did a good job of balancing that.

11 MR. MINASIAN: Now, Mr. Guinee, if I asked you a series
12 of questions of what the affect would be upon the waterfowl
13 of implementing the AFRP recommended flows in the 1991 Fish
14 and Game recommended flows and took you to the year '76-77
15 drought, which we talked about extensively in regard to the
16 model, is it still your opinion that the Board proposed
17 decision or the AFRP flows are the best thing for the
18 aquatic species that you were talking about today; that is,
19 the anadromous fish?

20 MR. GUINEE: Yes.

21 MR. MINASIAN: So how do you -- tell us how you square
22 everything having the river dry, water unavailable for
23 either waterfowl habitat or for anadromous fish October,
24 November, December, January, February and a part of March of
25 1996-'7 with your opinion?

1 MR. CUNNINGHAM: Mr. Brown.

2 H.O. BROWN: Mr. Cunningham.

3 MR. CUNNINGHAM: I appreciate the fact you are letting
4 Mr. Minasian pursue a variety of questions in
5 cross-examination. I don't think Mr. Minasian's present
6 question properly states, correctly states the evidence
7 before this Board. There is no evidence that in 1976 and
8 1977 such a hypothetical occurred or would have occurred.
9 No evidence has currently been presented to this Board what
10 actual flows were diverted by various districts during that
11 period of time.

12 What you have received so far is only a hypothetical
13 modeling study based upon potential diversions during that
14 time, not what actually occurred.

15 So the question, again, misstates what is actually in
16 evidence before this Board.

17 H.O. BROWN: Thank you, Mr. Cunningham.

18 MR. GEE: I will join in that objection.

19 H.O. BROWN: I was wondering how you got there, Mr.
20 Minasian. Perhaps you can rephrase the question.

21 MR. MINASIAN: Perhaps I can.

22 You sat through the testimony yesterday of Dr. Arora,
23 did you not, Mr. Guinee?

24 MR. GUINEE: Yes. I listened to him.

25 MR. MINASIAN: As a fishery biologist, water operation

1 models are an important tool in your profession, are they
2 not?

3 MR. GUINEE: My understanding is the water operation
4 model is a planning theoretical model.

5 MR. MINASIAN: You're aware of what Dr. Arora testified
6 on direct and cross-examination in regard to a Study No. 9,
7 are you not?

8 MR. GUINEE: Right. I heard his testimony yesterday.

9 MR. MINASIAN: You remember that Study No. 9 assumes
10 that we have full development in Yuba County, that we have
11 the same hydrologic cycle, actual conditions, and that we
12 implement the proposed decision of the Board?

13 MR. GUINEE: I heard that testimony.

14 MR. MINASIAN: Do you remember the testimony that
15 showed that there would be a dead storage pool condition at
16 Bullards Bar from October through some portion of March in
17 the year 1976-77?

18 MR. GUINEE: With all due respect, what I heard Dr.
19 Arora say is that was a planning model, and so that was a
20 theoretical dead storage, and he didn't deal with the real
21 live situation.

22 MR. MINASIAN: But giving you the hypothetical, if that
23 is actually what occurred, would that be good or bad for the
24 anadromous fish that you are concerned with?

25 MR. GUINEE: I am not sure what you are asking because

1 I am not sure that is actually what occurred.

2 MR. MINASIAN: Obviously, that isn't what occurred in
3 1976-77, is it? It's a model that he was talking about.

4 MR. GUINEE: He was talking about a hypothetical,
5 theoretical model, and I am not sure what occurred on the
6 Yuba River on 1977-78.

7 MR. MINASIAN: Do you have any opinion for the Board
8 what they should do to avoid that model becoming a reality
9 if, in fact, they adopt their proposed decision?

10 MR. GUINEE: From a fishery perspective?

11 MR. MINASIAN: Yes.

12 MR. GUINEE: From a fishery perspective flows in the
13 river for anadromous fish are really the best and primary
14 source of water for the health of those fish. Whereas,
15 irrigation districts and other water users have other
16 alternatives such as conjunctive use, groundwater, things
17 like that, which are available to them.

18 MR. MINASIAN: You're offering an opinion and yet you
19 really haven't studied availability of water north of the
20 river and south of the river for waterfowl habitat, have
21 you?

22 MR. GUINEE: You asked my opinion, so I offered an
23 opinion. And you're right, I haven't done those studies.

24 MR. MINASIAN: So, it's a supposition on your part that
25 leads to that opinion, and that is there is other water

1 available and there will be no change in farming or
2 waterfowl cultivation practices north and south of the
3 river?

4 MR. FRINK: Mr. Brown, I would object. I don't
5 believe the witness stated that there would be no change in
6 farming practices north and south of the river. If Mr.
7 Minasian wants to ask a question, I believe that is proper,
8 stating --

9 MR. MINASIAN: Let me withdraw. Let me get on.

10 MR. GUINEE: Thank you, Mr. Frink.

11 MR. MINASIAN: Mr. Flemming, would you do me a favor,
12 you sat here with the testimony of Mr. Edmondson yesterday
13 in regard to temperatures in the Yuba River. Do you
14 recognize the underlined language as part of your
15 testimony?

16 MR. FLEMMING: Yes.

17 MR. MINASIAN: Do you see that you're recommending to
18 the Board in Number 3, the last portion of the underlined
19 green line:

20 Identify and attempt to implement actions
21 that will maintain mean daily water
22 temperatures between 61 and 65 degrees
23 Fahrenheit for at least one month, from April
24 1 to June 30, for American shad. (Reading.)

25 MR. FLEMMING: Do I recognize it? Yes.

1 MR. MINASIAN: Is that your opinion and recommendation
2 to the Board?

3 MR. FLEMMING: That is an action listed in the
4 Anadromous Fish Revised Restoration Plan.

5 MR. MINASIAN: Is it something that you recommend?

6 MR. FLEMMING: At this time I would say it's an action
7 that is listed in the plan. And as an entity responsible
8 for doubling anadromous fish natural production, that it is
9 an action we would pursue.

10 MR. MINASIAN: And you remember the testimony of Mr.
11 Edmondson in which he believed that if you raised the
12 temperature of the water in the vicinity of Marysville into
13 the 60s that you would have some mortality on anadromous
14 fish?

15 MR. FLEMMING: Yes.

16 MR. MINASIAN: How would you recommend that the Board
17 square this interest in American shad and the temperature
18 that your cohort, Mr. Edmondson, wanted to see maintained at
19 Marysville?

20 MR. FLEMMING: The National Marine Fisheries Service
21 and the Anadromous Fish Restoration Program are two very
22 different purposes. The National Marine Fisheries Service
23 is obligated to take care of an endangered species. The
24 Anadromous Fish Restoration Program is tasked with doubling
25 anadromous fish populations. And many times in this real

1 world there are conflicting agendas.

2 And the Board would need to weigh the priorities and
3 make the right choice.

4 MR. MINASIAN: But shouldn't the Board have from you as
5 a fishery biologist your best guess or proposal as to
6 balancing?

7 MR. FLEMMING: I am not understanding your question.

8 MR. MINASIAN: How would you have the Board balance the
9 temperature requirement? You saw that Mr. Edmondson wanted
10 56 degrees at Marysville through June 30th, didn't you?

11 MR. FLEMMING: As a point of clarification, it seems
12 like you're assuming that I'm not supportive of the
13 testimony that Steve Edmondson made yesterday.

14 MR. MINASIAN: No, no. I am not assuming that all. I
15 just want you to tell us how to compromise.

16 MR. FLEMMING: I think that there is conflicting
17 agendas and --

18 MR. MINASIAN: Do you want to explain that?

19 MR. GUINEE: Can I offer you an opinion, Mr. Minasian?

20 MR. MINASIAN: Yes, Mr. Guinee. How do you take care
21 of these conflicting goals?

22 MR. GUINEE: Very carefully.

23 MR. MINASIAN: Do we advance that by coming in and
24 making recommendations without telling the Board how torn
25 you are by the alternative factors which could make your

1 recommendation totally inappropriate?

2 MR. GUINEE: I don't believe "torn" is the right word.
3 I wouldn't say my recommendation is inappropriate. I would
4 say that the flows we're recommending are primarily
5 targeting the salmon/steelhead. And I would say the
6 National Marine Fisheries Service, as Craig pointed out, has
7 the responsibility for the endangered species designation of
8 anadromous fish and that the Fish and Wildlife Service in
9 general considers actions to help protect endangered species
10 as a high priority.

11 So, in terms of what the Board should do on the Yuba
12 River relative to shad or salmon and steelhead, in general,
13 my opinion is that I would encourage the Board to provide
14 the best habitat for the salmon and steelhead. And the shad
15 will, you know, do what they can do in terms of spawning and
16 things like that based on the conditions that are being
17 provided for salmon and steelhead.

18 MR. MINASIAN: So, Mr. Flemming, would you join in that
19 the Board should disregard recommendation three from the
20 AFRP?

21 MR. GUINEE: I don't think that's what I said.

22 MR. MINASIAN: That isn't what you said.

23 Mr. Flemming, would you state that?

24 MR. FLEMMING: I would not state they should disregard
25 statement three. I would agree with Roger's statement that

1 the priority would be salmon and steelhead flows,
2 temperature and habitat. And that it would be the
3 responsibility of the AFRP to, you know, try and do good
4 things for shad.

5 MR. MINASIAN: As to waterfowl, would you recommend
6 that the Board ignore the impacts upon waterfowl, if there
7 are any, from the flow regime that is being recommended?

8 MR. FLEMMING: There are some, would I -- I am trying
9 to restate it. If there are impacts, would I ask the Board
10 to ignore them? No.

11 MR. MINASIAN: What would you recommend they do about
12 those impacts?

13 MR. FLEMMING: As Roger stated earlier, they need to
14 review all the available information and balance and
15 prioritize and make their decision according to the best
16 information they have.

17 MR. MINASIAN: Would that include lowering the flows
18 below either the proposed decision, the AFRP or the 1991 DFG
19 plan?

20 MR. FLEMMING: I am not following.

21 MR. GEE: May I interpose an objection at this point?

22 H.O. BROWN: What is the objection?

23 MR. GEE: Mr. Minasian is asking the witnesses to stand
24 in the shoes of the Board, and they are not competent to
25 weigh evidence and determine the recommendation in that

1 regard.

2 H.O. BROWN: I would like to hear their opinion, if
3 they have it. If you don't have an opinion, just say so.

4 MR. MINASIAN: Restate it, Craig. Let's do it as a
5 hypothetical.

6 The Board has a set of facts in front of it. There
7 isn't enough water to do the 1991 flows or the proposed
8 decision flows and also to maintain waterfowl habitat and
9 also to do what is called for in regard to the shad.

10 Which species should they prefer, and what reductions
11 in flows should they permit in regard to anadromous fish to
12 balance?

13 MR. GUINEE: I was just going to say in the response
14 to that hypothetical question, I guess you are asking for a
15 hypothetical answer, and I would encourage the Board to the
16 best of its ability to balance in a way that the needs of
17 all the fish and waterfowl are met.

18 MR. FLEMMING: Also, in that hypothetical I think the
19 weight of the endangered species would fair on the side of
20 the salmon and steelhead as listed species.

21 MR. MINASIAN: So, do you know of anything that says an
22 endangered species of waterfowl --

23 H.O. BROWN: Excuse me, Paul.

24 MR. BEZERRA: I would like to make a point of
25 clarification.

1 H.O. BROWN: I missed your name.

2 MR. BEZERRA: Ryan Bezerra for Browns Valley.

3 H.O. BROWN: Sorry.

4 MR. BEZERRA: That's okay.

5 I wanted to clarify that answer. The witness stated
6 that the species are endangered species. I wanted to
7 clarify that they are not actually endangered.

8 MR. FLEMMING: Thank you. That is correct.

9 MR. MINASIAN: Thank you. Let's use the phrase
10 "threatened." Let's assume for a moment we have threatened
11 waterfowl whose habitat is going to be disrupted by the
12 regime proposed in regard to the water operations.

13 Do you have any guidance for the Board as a biologist
14 as to how they should value the species as one more
15 important than the other?

16 MR. FLEMMING: In my opinion in the hypothetical
17 question, one, as a biologist. One species under the
18 Endangered Species Act is not necessarily more important
19 than another. There may be more greater impacts affecting
20 one or it may be closer to extinction than other. Those
21 may have weight in the Board's decision in a hypothetical
22 decision like that.

23 MR. GUINEE: I would add to that, Mr. Minasian, that
24 the fish in the Yuba River have as their sole source of
25 water supply the Yuba River flows. Whereas the waterfowl

1 are mobile. They are able to fly. If they can't find water
2 adjacent to the Yuba River, they could find it elsewhere in
3 the Central Valley, maybe adjacent to the Sacramento River
4 or Feather River.

5 MR. MINASIAN: But you don't know from your
6 conversations with Joe Fleskes, the expert from U.S. Fish
7 and Wildlife Service who studied the area north of the Yuba,
8 do you?

9 MR. GUINEE: Like I said earlier, I haven't done that
10 specific analysis.

11 MR. MINASIAN: Mr. Guinee, you've also worked on the
12 Stanislaus River. You've done substantial review of work on
13 that river since 1992, have you not?

14 MR. GUINEE: That's correct.

15 MR. MINASIAN: Is it a correct statement or proposition
16 since 1992 we have learned pulse flows and temperature
17 management of water to basically warm the temperature so
18 food supplies are expanded and fish are advanced in their
19 maturation is a very usable technique to, in fact, allow
20 fish to have better survivability?

21 MR. GUINEE: I do not agree with that statement.

22 MR. MINASIAN: What do you disagree with?

23 MR. GUINEE: Maybe you could ask it one part at a
24 time.

25 MR. MINASIAN: You have looked at the Stanislaus River

1 populations of juvenile out-migration, have you not?

2 MR. GUINEE: That's correct.

3 MR. MINASIAN: You have looked at it in regard to pulse
4 flows?

5 MR. GUINEE: Actually, on the Stanislaus River what the
6 management, pursuant to Anadromous Restoration Program, has
7 attempted to do is provide a sustained outmigration flow of
8 1500 cubic feet per second for the months of April, May and
9 June. And in years where the water supply is limiting it
10 may be reduced down to a 31-day period from April 15th
11 through May 15th.

12 Again, as Mr. Edmondson pointed out, outmigration of
13 these juvenile salmon smolt-size fish generally occurs
14 April, May and June on the Stanislaus River.

15 MR. MINASIAN: In fact, the data from Stanislaus River
16 indicates a bell curve very rapidly occurring if the pulse
17 flow is properly timed, does it not?

18 MR. GUINEE: I don't think I would agree with that
19 assessment of the data.

20 MR. MINASIAN: Do you agree that temperature management
21 in terms of warming the water so that there is a greater
22 food supply, so maturation of the smolts it is advanced, is
23 a technique that has proven itself since 1992?

24 MR. GUINEE: I would disagree with that.

25 MR. MINASIAN: Give me an example in a case in which

1 that is disproved.

2 MR. GUINEE: In the Stanislaus River we have not made
3 any attempts to manage pulse flows or other flows in a way
4 that would increase temperatures during any lifestage of the
5 salmon and steelhead that reside there.

6 MR. MINASIAN: Maybe I misstated my question and
7 confused you. There are natural events which result in
8 pulses of water occurring, are there not?

9 Craig, would you like to answer that?

10 MR. FLEMMING: I wanted to respond to your previous
11 question, if I may.

12 MR. MINASIAN: Sure.

13 MR. FLEMMING: Most of the information that exists on
14 fishes, growth rates, the affects of temperatures and what
15 have you, are all laboratory and don't necessarily have
16 direct extrapolation value to the field. As fish biologists
17 we are taught to maintain diversity in habitat and diversity
18 in life history, so -- I won't go into that. So, to
19 increase the temperatures and push fish out is not
20 necessarily a desirable management tactic from the diversity
21 and stability of a genetic population standpoint. And I
22 don't know that there has been ever -- I have been involved
23 on the Stanislaus since 1994 myself, and I don't know that
24 there has ever been a specific temperature-related pulse
25 flow event that's documented.

1 Are you specifically citing a particular report by
2 somebody?

3 MR. MINASIAN: Let's go to the question of the
4 laboratory results versus the real-time monitoring of fish.
5 Are you indicating to us that you don't know of any
6 publications or studies which are generally accepted in the
7 fish biologist profession which show a relationship between
8 rising temperatures of water, increasing food supply,
9 advancing maturation of smolt levels and greater
10 survivability?

11 MR. FLEMMING: Not on the Stanislaus.

12 MR. MINASIAN: How about on the rest of the rivers of
13 California, Oregon or Washington?

14 MR. FLEMMING: There are some studies.

15 MR. MINASIAN: Now let's go back to the Stanislaus. We
16 have had pulse flow events, both natural and man-made since
17 1992 in which fyke traps have been monitored and
18 outmigration rates profiled on graphs, have they not?

19 MR. FLEMMING: Fyke traps from when to when? What was
20 the date?

21 MR. MINASIAN: After 1992.

22 MR. FLEMMING: After the 1991 on the Stanislaus --

23 MR. MINASIAN: Each studied outmigration by capturing
24 populations of juveniles and smolts as they go out, have
25 they not?

1 MR. FLEMMING: To my knowledge, I -- yes, we have
2 captured juveniles. To my knowledge, the only fyke trap
3 that has been on the Stanislaus was mine and it was only for
4 a week, and we gathered absolutely no information.

5 MR. MINASIAN: So, you're indicating to us we haven't
6 learned anything that would change or suggest a modification
7 of and of these recommendations since 1992 as a result of
8 work on the Stanislaus?

9 MR. GUINEE: No. What I'm suggesting is since 1992,
10 pursuant to Central Valley Project Improvement Act and the
11 Anadromous Fish Restoration Program, the Bureau of
12 Reclamation has provided improved flows in the Stanislaus
13 River for the benefit of salmon and steelhead in that
14 river.

15 I'm suggesting we have an adaptive management program
16 that we are monitoring the outmigration of those fish, using
17 rotary screw traps. There is also adult escapement
18 monitoring and surveys being done by California Department
19 of Fish and Game.

20 So, we are gathering data as I said earlier. That will
21 help us get more insight as to whether these improved flows
22 are helping us to reach the population objectives for the
23 Stanislaus.

24 As far as pulse flows, what we have seen since 1992 is
25 one year, 1994, where we had a short duration pulse flow,

1 five days in April and, I believe, five days in May, I
2 believe where the flows were increased up to 1,500 cfs,
3 since then we've had primarily sustained flows of 1,500
4 cubic feet per second or higher in the April, May, June
5 period and so we are evaluating the benefit of those flows
6 to the downstream migration of anadromous fish.

7 I wouldn't say -- it is incorrect to state it as a
8 pulse flow evaluation.

9 H.O. BROWN: How much more time do you need?

10 MR. MINASIAN: I think I am done.

11 Mr. Flemming, I think, wants to qualify something.

12 MR. FLEMMING: Right. Your last question was, so have
13 we learned nothing on the Stanislaus?

14 MR. MINASIAN: Yes.

15 MR. FLEMMING: We have learned a lot. And we have
16 learned some information relating to pulse flow events,
17 large natural flow events. What in general we have learned
18 about outmigration is, as the managers of the smolt
19 outmigration, we were targeting a small window of time when
20 smolts were emigrating. What we have learned is that
21 significant portions of the life history of juvenile salmon
22 are moving out as fry and in other times, other than that
23 small window and that large increases in flows have made
24 that obvious to us.

25 So, we have learned a lot. Have we learned that pulse

1 flows, heated temperatures and pulse flows benefit those
2 fish? I don't think that's even been addressed. We have
3 learned that we don't have a complete handle on outmigration
4 because we weren't looking at the whole picture, the
5 diversity of the life history.

6 MR. MINASIAN: Why are we still recommending levelized
7 flows for specific calendar months?

8 MR. FLEMMING: We are recommending minimum flows.

9 MR. GUINEE: These are minimum flows that as the Yuba
10 River and the Stanislaus River, both rivers, oftentime the
11 flows exceed those minimums. We are just asking the Board
12 to require a minimum to protect the fish in those drier
13 periods where the flows may not exceed those minimums.

14 MR. MINASIAN: One final question, if I could.

15 If we use water to maintain those minimums and that
16 results in this running out water in October, November,
17 December, January and February, is that good use of
18 resources?

19 MR. GUINEE: I am not aware that those flows would make
20 us run out of water in October, November.

21 MR. MINASIAN: Thank you.

22 H.O. BROWN: Mr. Lilly.

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24 CROSS-EXAMINATION OF U.S. FISH AND WILDLIFE SERVICE

25 BY YUBA COUNTY WATER AGENCY

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BY MR. LILLY

MR. LILLY: Good morning, Mr. Flemming. I met you on the field trip last week. I am Alan Lilly, attorney for the Yuba County Water Agency.

MR. FLEMMING: Good morning.

MR. LILLY: Mr. Guinee, I know you from the 1992 hearing. Welcome back.

MR. GUINEE: Thank you.

MR. LILLY: I would like to start with Exhibit S-DOI-3, and ask if you can get that in front of you.

Do you have that handy?

MR. GUINEE: I have it in front of me.

MR. LILLY: Mr. Guinee, that is the 1995 AFRP working paper; is that correct?

MR. GUINEE: Right. That is the portion relative to the Yuba River.

MR. LILLY: My understanding is the entire document is going to be submitted into the record, but what you have in front of you is just a portion for the Yuba River; is that correct?

MR. GUINEE: That's correct.

MR. LILLY: And that 1995 paper has some instream flow recommendations for the Lower Yuba River; is that correct?

MR. GUINEE: Yes, it does.

MR. LILLY: Those recommendations repeat month by month

1 the same recommendations as are made in the 1991 Department
2 of Fish and Game plan, correct?

3 MR. GUINEE: Essentially they are consistent.

4 MR. LILLY: In fact, your Exhibit S-DOI-5 has one line
5 for the flows that says 1991 DFG and 1995 AFRP
6 recommendation, and it has the same line for both of those
7 documents; is that correct?

8 MR. GUINEE: That is correct. And to clarify, when I
9 say essentially they are consistent, the AFRP flow initiates
10 at 700 cubic feet per second for small spawning and winter
11 rearing on October 1; the Fish and Game report initiated on
12 November 15th.

13 MR. LILLY: That is the only distinction?

14 MR. GUINEE: That is correct. Although the AFRP
15 working paper did also identify flows for shad in April and
16 May that I am not discussing because, again, I said I am
17 focusing on the salmon and steelhead portions of the flow
18 recommendations.

19 MR. LILLY: Were the salmon and steelhead
20 recommendations based on the same data and analysis that had
21 previously been used to develop the 1991 Department of Fish
22 and Game plan?

23 MR. GUINEE: I don't know that it was exactly
24 same. There was basically review of all the existing
25 information on the Yuba. So that was definitely a major

1 consideration of the best information available at the
2 time.

3 MR. LILLY: Did you or anyone else at the Fish and
4 Wildlife Service collect any additional fisheries data on
5 the Lower Yuba River between 1991, when the Fish and Game
6 plan came out, and 1995, when the working paper came out?

7 MR. GUINEE: Personally I did not, but there have been
8 other Fish and Wildlife Service biologist working on the
9 Yuba River in this time period.

10 MR. LILLY: What was the particular data collected by
11 other Fish and Wildlife biologists that was used to develop
12 the recommendations in the working paper?

13 MR. GUINEE: In terms of the flows, there is a whole
14 list of references in the working paper and, as I recall it,
15 I don't have the list or references committed to
16 memory, there are numerous. I recall the Yuba River Fish
17 and Game Report. I believe one of the references was the
18 Beak Report. And I believe -- I can't recall whether the
19 Fish and Wildlife Service report that I referred to earlier,
20 the 1990 report, was considered there or not.

21 MR. LILLY: That is all you can remember as you sit
22 here today?

23 MR. GUINEE: Right. As I sit here today, those were
24 the primary sources of the flow recommendations on the
25 Yuba.

1 MR. LILLY: What was the goal of the 1995 working paper
2 recommendations?

3 MR. GUINEE: The goal was to identify flows that would
4 restore or sustain natural production of anadromous fish at
5 least twice the levels in the '67 and '91 period.

6 MR. LILLY: Could you please refer to Exhibit 3 to Page
7 3-XC-14.

8 MR. GUINEE: I have it in front of me.

9 MR. LILLY: I am going to ask about action one, which
10 looks like about the second paragraph there, is headed
11 Restoration Action. And action one says:

12 Maintain minimum flows of 700 cfs from
13 October 1 through March 31 in all water
14 years. (Reading.)

15 Do you see that?

16 MR. GUINEE: That's correct.

17 MR. LILLY: What was the objective of this recommended
18 action?

19 MR. GUINEE: To provide improved migrations, spawning
20 and incubation flows for the Lower Yuba River.

21 MR. LILLY: Does the next sentence actually say to
22 optimize? It does say:

23 Improve, optimize migration, spawning and
24 incubation conditions in the Lower Yuba
25 River. (Reading.)

1 MR. GUINEE: That is what it says.

2 MR. LILLY: Was that, in fact, the goal?

3 MR. GUINEE: I guess, you know, as biologists, I
4 personally would not agree that that 700 cfs would optimize
5 conditions for anadromous fish in the Yuba.

6 MR. LILLY: Are you saying you believe this working
7 paper is incorrect on that point?

8 MR. GUINEE: I am sorry, I missed the question.

9 MR. LILLY: Is your testimony that the working paper
10 then is incorrect on that point?

11 MR. GUINEE: No. I'm not saying that the working paper
12 is incorrect. I am just saying that I, as a biologist,
13 don't agree those flows would optimize the conditions for
14 anadromous fish in the Yuba River. I have seen flows higher
15 than that during the fall and salmon were spawning very
16 well.

17 MR. LILLY: You agree the purpose of this action in the
18 working paper, the objective of the working paper, was to
19 optimize these conditions?

20 MR. GUINEE: I was just going to say, as I pointed out
21 earlier, these flows were based on the available information
22 at the time, which was Department of Fish and Game study and
23 other studies by Beak. So, I don't think there is any other
24 data to base the flows on. So this is what they came up
25 with. I don't disagree with that.

1 MR. LILLY: For the goal of optimization; is that
2 correct?

3 MR. GUINEE: That is the way it is worded.

4 MR. LILLY: Would you please go forward two pages later
5 to Page 3-XC-16. And the second sentence there on that page
6 says:

7 Because instream flows and temperatures are
8 believed to be the two most limiting factors
9 to salmonid production in the Lower Yuba
10 River, reservoir reoperations to meet target
11 flows and temperatures must be pursued within
12 the constraints of all other uses of
13 reservoir and river waters. (Reading.)

14 Do you see that sentence?

15 MR. GUINEE: I am trying to follow where you are. Can
16 you refer me to which paragraph you are reading from?

17 MR. LILLY: Page 16 --

18 MR. GUINEE: I am there.

19 MR. LILLY: -- the second sentence, which starts on
20 Line 3. There is a period and another sentence starts.

21 MR. GUINEE: Because of --

22 MR. LILLY: Because instream flows and temperatures
23 are believed to be the two most limiting factors
24 to salmonid production in the Lower Yuba River,
25 reservoir reoperations to meet target flows and

1 temperatures must be pursued within the
2 constraints of all other uses of reservoir and
3 river waters. (Reading.)

4 Do you see that sentence?

5 MR. GUINEE: Yes. That sentence is there.

6 MR. LILLY: Do you agree with this statement?

7 MR. GUINEE: It speaks for itself.

8 MR. LILLY: My question is: Do you agree or disagree
9 with it?

10 MR. GUINEE: I think it goes back to my earlier
11 comments the recommendations that we're making to the Board,
12 the Board will then have to balance those recommendations as
13 they did in their Draft Decision and then implement those.

14 MR. LILLY: Let's go forward to that same page, down
15 about the second full paragraph where it says action two.

16 Do you see that?

17 It says:

18 Action two, maintain minimal flows of 100 cfs
19 during April, 200 cfs during May and 1500 in
20 June in all years. (Reading.)

21 MR. GUINEE: I see that.

22 MR. LILLY: Do you see on the following line for the
23 objective it says:

24 Optimize juvenile rearing and outmigration
25 conditions in the Lower Yuba River.

1 (Reading.)

2 Do you see that?

3 MR. GUINEE: I think optimize is a poor choice of word.

4 MR. LILLY: You disagree with the working paper's use
5 of that word?

6 MR. GUINEE: I think these are minimum flows of 1000,
7 2000, 1500. And in general during the springtime of above
8 normal wet years, the flows exceed that, which I think is
9 also beneficial to juvenile rearing and outmigration.

10 So, I guess the concern I have is to make sure that the
11 Board understands these are minimum flows, not something
12 that we would want to try to meet as a maximum flow.

13 MR. LILLY: Even this technical team met and went
14 through several iterations of the recommendations and even
15 though the core group went through several iterations of its
16 recommendation to develop this paper, you are saying you
17 disagree with the conclusion in the paper on this point of
18 optimization?

19 MR. GUINEE: No. What I'm saying is that "optimize" is
20 a poor choice of word.

21 MR. LILLY: So, you disagree, then?

22 MR. GUINEE: I would have used a different word, that's
23 right.

24 MR. LILLY: Why don't you go forward to Page 20 of the
25 same document. I am going to ask you to look at the third

1 paragraph, which starts with the words "for effective
2 management."

3 Do you see that?

4 MR. GUINEE: On Page 20, yes.

5 MR. LILLY: The second sentence of that paragraph, the
6 sentence says:

7 Adequate uncommitted water currently exists
8 in the Yuba River system, i.e., Englebright,
9 New Bullards Bar Reservoirs to restore the
10 river's anadromous fishery. (Reading.)

11 Do you see that?

12 MR. GUINEE: Yes.

13 MR. LILLY: For either Mr. Flemming or Mr. Guinee, what
14 is meant by the term "uncommitted water"?

15 MR. GUINEE: I didn't author that specific sentence,
16 but my understanding is in general the flows in the Yuba
17 River exceed the capacity of the reservoir. So that two
18 things. One is generally the flows are higher than the
19 existing minimum flow schedule.

20 And, two, I am also aware Yuba County Water Agency has
21 sold water in the past, it had available in excess of its
22 needs and so it may also refer to that.

23 MR. LILLY: Did you or anyone else at Fish and Wildlife
24 Service ever make any hydrologic analyses to determine the
25 availability of Yuba River water to meet the instream flow

1 proposals that are contained in this paper?

2 MR. GUINEE: Actually, we do have a hydrologist on
3 staff that has looked at Yuba River flows and particularly
4 relevant to how often the flow objectives of the Service was
5 recommended here were being met in the river.

6 And I don't have analysis committed to memory, but as I
7 recall it did show most of those flows, most years these
8 flows could be met, not only the Board Draft Decision flows
9 but the AFRP recommended flows.

10 MR. LILLY: Have you submitted any of that analysis for
11 evidence in this hearing? This is a yes or no question.

12 MR. GUINEE: No, I have not.

13 MR. LILLY: Mr. Flemming, I am going to go forward and
14 ask you some questions regarding Exhibit S-DOI-4. In
15 particular, if you could turn to Page 71 of that which is
16 the first page of the table regarding Yuba River actions.

17 MR. FLEMMING: I have it.

18 MR. LILLY: For action one, you over there on the
19 right-hand side in the tools column it says 3406 (b)(3).

20 Do you see that?

21 MR. FLEMMING: Yes.

22 MR. LILLY: Is that a reference to that section with
23 that number in the Central Valley Project Improvement Act?

24 MR. FLEMMING: Yes.

25 MR. LILLY: What does that section provide? In general

1 terms what is that statute?

2 MR. GUINEE: Basically to help meet the goals of the
3 Anadromous Fish Restoration Program money is provided, funds
4 are provided to acquire water, not just purchase but through
5 either water conservation measures, conjunctive use, even
6 land retirement programs that would help meet those flow
7 goals.

8 MR. LILLY: It involves, basically, purchases of water
9 or spending of money for measures that will result in higher
10 river flows; is that correct?

11 MR. GUINEE: Yes. As a clarification, the acquisition
12 program is intended to acquire flows to achieve, move toward
13 the restoration goals. We think that the State Board and
14 FERC and other agencies should ensure that water users
15 maintain the fishery in good condition with what we call the
16 mitigation flows.

17 MR. LILLY: Either Mr. Flemming or Mr. Guinee, does
18 this statute, 3406(b)(3), contemplate any involuntary
19 reallocations of water without compensation?

20 MR. GUINEE: Again, that program is a separate program
21 from this process, so that program is intended, and after
22 mitigation flows are established, to acquire flows that
23 would achieve the restoration goals from willing sellers.

24 MR. LILLY: Mr. Guinee, what is the difference between
25 mitigation and restoration?

1 MR. GUINEE: You know, I have an opinion that it's --
2 the mitigation, in my opinion, are flows that the diverter
3 should maintain and be required in their permit to maintain
4 by the State Board or their FERC license to maintain the
5 fishery in good condition. And then the restoration flows
6 would be another increment of flow above that to help
7 restore those anadromous fish populations to at least twice
8 the '67 and '91 levels.

9 MR. LILLY: Mr. Flemming or Mr. Guinee, when was
10 Exhibit 4 prepared, what year?

11 MR. FLEMMING: May 19- -- May 30, 1997. That is when
12 it was actually published as a draft.

13 MR. LILLY: Fair enough.

14 That was about two years after the working paper, this
15 Exhibit 3?

16 MR. FLEMMING: Yes.

17 MR. LILLY: Is it fair to say that Exhibit 4 is the
18 next step in the AFRP process after the 1994 working paper,
19 the next document?

20 MR. FLEMMING: It certainly was the next document. The
21 first draft of this came out in December of 1995.

22 MR. LILLY: Fair enough.

23 So it is, maybe, another step in the AFRP process?

24 MR. GUINEE: Of an ongoing process, right. That
25 process continues.

1 MR. LILLY: I think, Mr. Flemming, you said or maybe it
2 was Mr. Guinee, one of you testified that the issue of
3 reasonableness to flows was not considered in the 1995
4 paper, but then was factored in the 1997 paper; is that
5 correct?

6 MR. FLEMMING: The actions listed in the AFRP working
7 paper were those actions that were deemed necessary to meet
8 the goal of doubling anadromous fish populations or natural
9 production of anadromous fish populations. And the actions
10 and evaluations listed in the Revised Draft Restoration Plan
11 have gone through a reasonableness filter, and these are
12 actions, a subset of those original actions that will only
13 contribute to reaching our goal.

14 MR. GUINEE: To clarify the reasonableness filter, it
15 was considering the tools being provided by the Central
16 Valley Project Improvement Act specifically what would be
17 reasonably implemented. And so it did not consider the
18 State Board process or processes, things like that.
19 Endangered Species Act processes happen in addition to
20 Anadromous Fish Restoration Program.

21 MR. LILLY: Mr. Flemming, just to clarify, Exhibit 3
22 was before what you have called the reasonableness filter
23 and Exhibit 4 was after the reasonableness filter?

24 MR. FLEMMING: Yes.

25 MR. LILLY: Thank you. I note we have discussed the

1 specific instream goals for the Lower Yuba River that were
2 in Exhibit S-DOI-3. Does Exhibit S-DOI-4 contain any
3 specific instream flow goals for the Lower Yuba River?

4 MR. FLEMMING: It does not.

5 MR. GUINEE: That was primarily because on the Yuba
6 River the Central Valley Project Improvement Act had no
7 authority to require any additional flows, as it did on the
8 American River, the Sacramento River, Stanislaus River,
9 which are controlled by the Central Valley Project.

10 MR. LILLY: Mr. Flemming, I think you testified
11 regarding Exhibit 4 about a new water temperature control
12 device; is that correct?

13 MR. FLEMMING: One of the -- I mentioned that one of
14 the actions identifies a shutter control device. Is that
15 what --

16 MR. LILLY: Yes. Maybe you can look at Page 73. I
17 think it is right there in Exhibit 4. This is Exhibit
18 S-DOI-4.

19 MR. FLEMMING: Yes.

20 MR. LILLY: As I understand it from reading this, and
21 please correct me if I am wrong, the evaluation to evaluate
22 the device that is already in place at New Bullards Bar Dam
23 and then to consider modifying release outlets at
24 Englebright Dam and to give enhancement of water temperature
25 through that would be effective; is that correct?

1 MR. FLEMMING: Yes.

2 MR. LILLY: So, basically, there is no temperature
3 control device at Englebright Dam today; is that correct?

4 MR. FLEMMING: Yes.

5 MR. LILLY: If you can go forward, Mr. Flemming, in
6 your testimony. Exhibit 8. Page 4, Paragraph 5.

7 Do you have that handy?

8 MR. FLEMMING: Yes, I do.

9 MR. LILLY: Paragraph 5, the fourth line of Paragraph
10 5, starts as follows and then says:

11 Yuba Goldfields adult fish exclusion barrier
12 preliminary engineering. (Reading.)

13 Do you see that?

14 MR. FLEMMING: Yes.

15 MR. LILLY: Could you tell us what that proposed
16 project is?

17 MR. FLEMMING: It's a project where we've worked with
18 Western Aggregates and Department of Fish and Game and we
19 have looked at the outflow from the Yuba Goldfields. And
20 the problem there is that adult salmon enter the Goldfields
21 through the outflow, and we have done preliminary
22 engineering to construct a barrier to that.

23 MR. LILLY: So, is the basic goal of that project to
24 keep adult salmon out of the Goldfields?

25 MR. FLEMMING: Yes.

1 MR. LILLY: Does the Department of Interior intend to
2 continue to work to pursue that project?

3 MR. FLEMMING: The Anadromous Fish Restoration Program
4 is going to pursue that.

5 MR. LILLY: I am going to try to wrap up here although
6 I have a few more questions.

7 Mr. Guinee, your Exhibit S-DOI-5, I think you had an
8 overhead of that. I wonder if you could put that up on the
9 projector.

10 MR. GUINEE: Yes, I can.

11 MR. LILLY: Or ask Mr. Gee to do it for you, if you
12 want to.

13 Mr. Guinee, this just shows the Marysville flow
14 requirements contained in the State Board's Draft Decision;
15 is that correct?

16 MR. GUINEE: That's correct.

17 MR. LILLY: The Draft Decision, in fact, also contains
18 minimum flow requirements at the Smartville gauge from a
19 period starting in October and going through April; is that
20 correct?

21 MR. GUINEE: That's correct.

22 MR. LILLY: Those are not shown on Exhibit 5?

23 MR. GUINEE: No, they are not. These are Marysville,
24 as stated earlier.

25 MR. LILLY: I think you testified earlier, Mr. Guinee,

1 that Fish and Wildlife Service was concerned about the
2 impacts of water transfers on carryover storage in New
3 Bullards Bar Reservoir in 1991; is that correct?

4 MR. GUINEE: That is my recollection. As I mentioned,
5 I worked for the Department of Fish and Game during that
6 hearing, but I do recall Fish and Wildlife Service experts
7 expressing that concern.

8 MR. LILLY: Does Fish and Wildlife Service have any
9 concern about the effects of the proposed instream flow
10 requirements that are shown on Exhibit 5 on carryover
11 storage in New Bullards Bar Reservoir?

12 MR. GUINEE: I think we are cognizant of the potential
13 effects on that carryover storage. And I think there is a
14 way that it can be managed to meet the flows in the stream
15 and also meet storage.

16 MR. LILLY: Just so we are clear, would it be good for
17 the anadromous fish if carryover storage were reduced down
18 to the dead pool and then in November of the critically dry
19 year the flows in the Lower Yuba River were zero?

20 MR. GUINEE: Zero flow is not good for fish. Not sure
21 that that would be the result of the AFRP flows, though.

22 MR. LILLY: I just asked you if zero flows would be
23 good for fish.

24 MR. GUINEE: No, they would not.

25 MR. LILLY: While we have this exhibit up, has anyone

1 at Fish and Wildlife Service analyzed the affect that the
2 Draft Decision would have on Yuba County Water Agency's
3 ability to supply water to its customers?

4 MR. GUINEE: I mentioned that we have a hydrologist on
5 our staff who did a cursory analysis that indicated the
6 Board's Draft Decision flows could be met in all years
7 without impacts to water supply, except for 1997 -- or '77,
8 excuse me.

9 MR. LILLY: You haven't submitted any of that analysis
10 for this hearing, have you?

11 MR. GUINEE: No, I have not.

12 MR. LILLY: I think you said earlier it was your
13 opinion that offstream uses of Yuba River water can be
14 substituted with conjunctive use programs or pumping or
15 other sources of supply; is that correct?

16 MR. GUINEE: I did say that earlier that the Central
17 Valley Project Improvement Act has identified numerous
18 programs like that that it can implement in the Central
19 Valley.

20 MR. LILLY: Has anyone at Fish and Wildlife Service
21 analyzed the adequacy of the groundwater supplies or other
22 alternative water supplies for water users that currently
23 receive Yuba River water?

24 MR. GUINEE: Personally, I have not. I am not aware of
25 anyone from Fish and Wildlife Service doing an analysis.

1 MR. LILLY: Last series of questions involves overhead
2 S-DOI-6. Could you put that up over there?

3 Now, Mr. Guinee, you testified about the upper line in
4 this exhibit which is the unimpaired flows of the Yuba
5 River; is that correct?

6 MR. GUINEE: That's correct.

7 MR. LILLY: What are unimpaired flows?

8 MR. GUINEE: Unimpaired flows refer to the historical
9 flows found at this location without assuming that there is
10 not a reservoir up there to capture those flows.

11 MR. LILLY: This curve shows the averages over all
12 water year types?

13 MR. GUINEE: This curve -- let me move that real quick.
14 Wanted to move that so you can see my reference.

15 The curve is based on the Department of Water Resources
16 1994, basically, represents the averages for the 1921 to
17 1992 period.

18 MR. LILLY: Do unimpaired flows in the Yuba River vary
19 from year to year?

20 MR. GUINEE: Oh, yes, they do. You bet.

21 MR. LILLY: So, in fact, are they substantially lower
22 in critically dry years than they are on average?

23 MR. GUINEE: Right. The range would be lower in dry
24 years and higher in wet years.

25 MR. LILLY: That range is not shown on this Exhibit 6,

1 correct?

2 MR. GUINEE: That's correct. I did not show that
3 range.

4 MR. LILLY: Did you and/or anyone else at the Fish and
5 Wildlife Service analyze how unimpaired flows in the Lower
6 Yuba River are affected by upstream diversions of water out
7 of basin by Pacific Gas & Electric Company's Drum-Spaulding
8 Project?

9 MR. GUINEE: No, I did not, but I do recall the Fish
10 and Game 1991 report, which is in the previous hearing
11 record, I think, showed a flow curve accounting for some of
12 those upstream diversions.

13 MR. LILLY: Did you analyze the affect on unimpaired
14 flows of the diversions out of the Yuba River Basin by the
15 Nevada Irrigation District's Yuba Bear Project?

16 MR. GUINEE: Again, this doesn't account for that, but
17 I believe in '91 we had a graphic that illustrated the flows
18 at Marysville after those diversions.

19 MR. LILLY: Is it fair to say that after those
20 diversions out of the basin the unimpaired flows would be
21 reduced?

22 MR. GUINEE: That is fair to say. Didn't show up very
23 well. The line, as I recall from the '91 report and it
24 didn't show up, I apologize, basically showed that sort of a
25 peak of a hydrograph was taken off.

1 So you had lower of April, May flows which extend -- at
2 Marysville was then extended into higher flows at Marysville
3 in the summer. So, you had kind of a shift.

4 MR. LILLY: That is after the effects of the upstream
5 impacts are factored in?

6 MR. GUINEE: Right. Including the diversions at
7 Daguerre.

8 MR. LILLY: Finally, just to complete my questioning,
9 did you analyze the affect on unimpaired flows in the Lower
10 Yuba River of the upstream diversions out of basin by the
11 Oroville Wyandotte Irrigation District's South Fork Feather
12 River Project?

13 MR. GUINEE: No. This unimpaired graphic does not
14 account for those.

15 MR. LILLY: Thank you, Mr. Guinee and Mr. Flemming.

16 I have no further questions.

17 H.O. BROWN: Thank you, Mr. Lilly.

18 If there is no further business, we will adjourn till
19 1:00.

20 Before you leave, staff, do you have anything?

21 MR. FRINK: We do have questions.

22 H.O. BROWN: We will come back. Adjourn for lunch and
23 be back here at 1:00.

24 (Luncheon break taken.)

25 ---oOo---

1 AFTERNOON SESSION

2 ---oOo---

3 H.O. BROWN: Back on the record.

4 The next up for cross-examination is Mr. Gallery, and I
5 don't see him here. Is he outside?

6 MR. LILLY: Would you like me to go check?

7 H.O. BROWN: Would you, Alan?

8 MR. LILLY: Mr. Aikens will check. He was over in the
9 lobby.

10 MR. SANDERS: I requested the SYRCL be allowed to
11 testify next rather than after California Sportfishing
12 Protection Alliance, assuming that is all right with you and
13 the other parties. We have some people that have to go get
14 back to work.

15 H.O. BROWN: You want to do your direct next?

16 MR. SANDERS: Yes.

17 H.O. BROWN: We will finish with the cross and then we
18 will do you next.

19 Mr. Gallery is not here.

20 Mr. Bezerra.

21 MR. LILLY: Mr. Brown, Alan Lilly pinch hitting for Mr.
22 Bezerra and Browns Valley Irrigation District. He had
23 another commitment this afternoon. For Browns Valley we do
24 not have any cross-examination.

25 H.O. BROWN: Thank you, Mr. Lilly.

1 Mr. Morris.

2 MR. MORRIS: Thank you, Mr. Brown.

3 ---oOo---

4 CROSS-EXAMINATION OF U.S. FISH AND WILDLIFE SERVICE

5 BY WESTERN WATER COMPANY & WESTERN AGGREGATES, INC.

6 BY MR. MORRIS

7 MR. MORRIS: Good afternoon, gentlemen.

8 I have only a few questions to ask you on cross
9 primarily concerned with the Yuba Goldfields area, just to
10 orient you. Some of these are going to be a little
11 repetitive because we have been on lunch break. I just want
12 to make sure.

13 I understand, Mr. Guinee, you participated in the 1992
14 hearing, but you did not?

15 MR. FLEMMING: That's correct.

16 MR. MORRIS: Have either of you or both of you
17 participated in studies of the Lower Yuba River since 1992?

18 MR. GUINEE: I have not participated in studies since
19 1992 on the Yuba River.

20 MR. FLEMMING: Physically I have been on the river as
21 part of a study and been involved in feasibility studies
22 like that. I guess, yeah.

23 MR. MORRIS: The exhibits that you just presented, you
24 did not personally participate in either of those?

25 MR. GUINEE: I did participate on the technical team

1 for the Lower Yuba River, and I had the opportunity to get
2 out on the river during that time. And I participated as
3 part of the Anadromous Restoration Program's core group that
4 then took the recommendation from the technical team and
5 incorporated it into the working paper which is the document
6 I was referring to in Exhibit 3.

7 MR. FLEMMING: And I did not have anything to do with
8 the working paper or the production of the revised draft
9 restoration plan.

10 MR. MORRIS: Both of you sound like you have been out
11 on the Yuba River since 1992. Have either of you been on
12 the Goldfields property since that time?

13 MR. FLEMMING: I have.

14 MR. GUINEE: I was out there last week.

15 MR. MORRIS: You were out there on the tour last week?

16 MR. GUINEE: Right.

17 MR. MORRIS: What I'm particularly interested in is
18 whether or not there has been any changes in particular in
19 downstream diversions since 1992 in the Yuba Goldfields area
20 that you are aware of, either of you.

21 MR. GUINEE: I am not aware of any. But I am not the
22 right person to ask that. I have not been close to the
23 stream issues there.

24 MR. FLEMMING: There is at Browns Valley screen, has
25 just been created. Other than that, no.

1 MR. MORRIS: Are you aware of any modifications to the
2 South Brophy diversion structure where they did some work on
3 the gabions in that area?

4 MR. GUINEE: I am not aware of that.

5 MR. FLEMMING: No.

6 MR. MORRIS: Now I want to move to Exhibit S-DOI-3,
7 which is the working paper restoration needs document. And
8 I believe, Mr. Guinee, that was the one that was primarily
9 associated with your testimony. I would just ask you to
10 summarize briefly, if you could, what improvements are
11 recommended in that document to the Yuba Goldfields area.

12 MR. GUINEE: Okay. I actually testified to the flows
13 that were in that document. I would have to leaf through
14 the document to find recommendations regarding Goldfields.

15 Do you want to ask me a specific question relative to
16 that?

17 MR. MORRIS: I am wondering if there are any specific
18 recommendations to the Goldfields?

19 MR. GUINEE: I'm still looking.

20 I see here a recommendation of improving the efficiency
21 of fish screen devices and fish bypasses at Hallwood-Cordua,
22 South Yuba and Browns Valley water diversion facilities
23 modifying timing and rate of water diversion in the river
24 annually with the objective reduced losses of salmonids.

25 Is that what you are referring to?

1 MR. MORRIS: Yes.

2 So those are specifically flows and diversion
3 structures. Is there anything beyond that in that document?

4 MR. GUINEE: That section points out how the diversions
5 are not effective at screening fish and need to be modified
6 or replaced.

7 There is another piece on the minimizing predation of
8 salmon in those vicinities, modifying the fish ladders at
9 Daguerre Point Dam and terms of the actual actions. I think
10 I would have to refer you back to the report the Fish and
11 Wildlife Service did back, I think it was, in 1990. As I
12 mentioned earlier as part of the Board's record from the
13 previous hearing as to what actions the Fish and Wildlife
14 Service might recommend.

15 MR. MORRIS: But you personally are not familiar with
16 that document or what --

17 MR. GUINEE: No.

18 MR. MORRIS: -- what those recommendations are?

19 MR. GUINEE: No, I haven't memorized what the
20 recommendations are. It is in the record.

21 MR. MORRIS: Mr. Flemming, I am going to move to
22 Exhibit S-DOI-8 for a moment. Mr. Lilly earlier asked you a
23 question about the Yuba Goldfields adult exclusion barrier
24 which you mentioned on Page 4, Number 5 of that document.
25 You went into a little bit of detail on that document.

1 I was wondering if you could enlighten me and the Board
2 a little more about what is involved in that project, what
3 you would expect to be involved in project.

4 MR. FLEMMING: Okay. The project has gone through --
5 we have gone out with some engineers from the Department of
6 Water Resources and the Western Aggregates people and
7 reviewed the outflow situation, because there hasn't always
8 been just one outflow, and have gone through some
9 feasibility and preliminary engineering drawings to create a
10 somewhat more permanent barrier to the outflow to eliminate
11 adult fish access to the Goldfields. We have gone through
12 all that, and I have the report.

13 MR. MORRIS: Those types of preliminary analysis,
14 engineering analysis, things like fish screens or some kind
15 of rock gabion structure or both of the above?

16 MR. FLEMMING: Yes. A couple of different alternatives
17 were looked at. The alternative that was selected was a
18 large rock gabion, graduated rock gabion structure.

19 MR. MORRIS: Is there any schedule for implementation
20 that you are aware of?

21 MR. FLEMMING: Now we have -- no.

22 MR. MORRIS: The same document on Page 73. This is
23 Exhibit S-DOI-2 on Page 73.

24 MR. FLEMMING: Yes.

25 MR. MORRIS: Item Number 4 on that page basically says

1 that one of your -- one of the tasks would be to evaluate
2 the benefits for restoring stream channels for riparian
3 habitat to the Yuba River, including the creation of side
4 channels for spawning, for rearing habitat for salmonids.

5 Could you please explain the benefits of these side
6 channels?

7 MR. FLEMMING: The benefit is that it provides off
8 stream habitat, off the main channel, somewhat better
9 habitat, more structured, less flows, peripheral flows, and
10 it's been identified as a nursery-type of area.

11 MR. MORRIS: In your opinion, would the outflow channel
12 that we are talking about be one of these side channels that
13 might potentially have this benefit or not?

14 MR. FLEMMING: Not with a gabion structure there.

15 MR. MORRIS: If the gabion structure wasn't there?

16 MR. FLEMMING: No. I don't think I ever considered it
17 part of that.

18 MR. MORRIS: I am just wondering -- so you can
19 reconcile the recommendation of number four versus the
20 outflow things you were looking at under the engineering
21 study. You don't have a problem with reconciling the two?

22 MR. FLEMMING: I don't. I am not really clear on what
23 you are asking.

24 MR. MORRIS: I am just trying to determine the
25 difference between the two, why it doesn't qualify or isn't

1 a number four side channel?

2 MR. FLEMMING: My understanding -- Yuba Goldfields is
3 more of a sink than a side channel environment. There is
4 not a distinct head and distinct tail that are easily
5 accessed by the fish.

6 MR. MORRIS: But isn't the problem that they are going
7 up?

8 MR. FLEMMING: Adults, yeah, adults.

9 MR. MORRIS: I don't know -- have you had an
10 opportunity to read the draft opinion by the Board for Yuba
11 River decision?

12 MR. FLEMMING: Yeah.

13 MR. MORRIS: Are you aware that one of the requirements
14 is for the Yuba Goldfields development, which is now
15 Western Water and Western Aggregates, to prepare a study to
16 deal with the fisheries problems, quote-unquote, from the
17 side channel or outflow, I should say?

18 MR. FLEMMING: I read the Draft Decision. That doesn't
19 stand out as something I remember.

20 MR. MORRIS: Do you think the actions that are being
21 taken now to study this solution to the outflow channel that
22 we were just discussing might satisfy those needs?

23 MR. FLEMMING: I think in part it could, yes.

24 MR. MORRIS: Would you be willing to -- so it is
25 possible that we may be able to satisfy that condition with

1 the study that is ongoing?

2 MR. FLEMMING: It's possible.

3 MR. MORRIS: I have no additional questions.

4 Thank you.

5 H.O. BROWN: Thank you, Mr. Morris.

6 Mr. Gallery.

7 MR. GALLERY: No questions, Mr. Chairman.

8 H.O. BROWN: Do you have anything? Do you have a
9 cross, Mr. Gallery?

10 MR. GALLERY: No, I do not. No questions.

11 H.O. BROWN: Mr. Cunningham.

12 MR. CUNNINGHAM: Thank you, sir.

13 ---oOo---

14 CROSS-EXAMINATION OF U.S. FISH AND WILDLIFE SERVICE

15 BY DEPARTMENT OF FISH AND GAME

16 BY MR. CUNNINGHAM

17 MR. CUNNINGHAM: Afternoon, gentlemen. Bill Cunningham
18 with the Department of Fish and Game, and I am representing
19 them today. I am not with them. I have just a few
20 questions for you.

21 And let me start off from where you finished up talking
22 about the south diversion location above Daguerre Dam, the
23 pool leading to the South Canals and the gabions attached to
24 those pools.

25 In looking at your testimony I think you had only a

1 brief testimony about those gabions, and you have been asked
2 a variety of questions since.

3 Could you help me clarify a little about these gabions.
4 Is it your testimony that the gabions we are talking about,
5 whether there is one or several, are designed to be screens
6 to prohibit adult and juvenile salmonids from going through
7 the system into these canals?

8 MR. FLEMMING: It is my understanding that that is
9 their purpose, yes.

10 MR. CUNNINGHAM: I think you earlier testified that you
11 know that apparently they at least are not successful,
12 talking about overtopping; is that correct?

13 MR. FLEMMING: Yes.

14 MR. CUNNINGHAM: Does the gabion or if there is more
15 than one, the gabions, work effectively to stop the
16 migration of juvenile salmonids into the diversion works?

17 MR. FLEMMING: There is evidence that fish have been on
18 both sides. It was obvious that they overtopped -- not so
19 obvious they overtopped, but they were on the other side.

20 MR. GUINEE: I would add to that in Exhibit 3 there is
21 a discussion on the recommendations from the people on the
22 working paper for new screens to be built there. The
23 gabions have been shown to be ineffective based on surveys.

24 MR. CUNNINGHAM: Leads me into another area I wanted to
25 talk to you about, and that is your Exhibit DOI, S-DOI-3,

1 which I believe is the working paper on restoration needs.
2 There were quite a few questions asked earlier of you.
3 Perhaps you could help me understand it. Since one of the
4 lines of questioning brought to you by Mr. Lilly is a
5 subject near and dear to my heart, it is this constant
6 fascination with the word "optimize."

7 Could I call your attention, both of you gentlemen,
8 please, to Page 14 of that document. I believe it is
9 actually called 3-XC-14. I believe Mr. Lilly asked both of
10 you about the word "optimize," where it says action one
11 objective.

12 Can I ask both of you gentlemen, I don't know which one
13 would be the better witness on this, is it your
14 understanding that the subsequent recommendation will
15 obtain, optimize or is just the objective of what is being
16 attempted?

17 MR. GUINEE: My understanding --

18 MR. LILLY: Excuse me.

19 H.O. BROWN: Mr. Lilly.

20 MR. LILLY: I object on the ground that the term
21 subsequent recommendation is ambiguous. I don't know what
22 counsel is referring to.

23 H.O. BROWN: Mr. Cunningham.

24 MR. CUNNINGHAM: Mr. Lilly and the witnesses, what I am
25 referring to is the subsequent two pages following action

1 one, where it starts off with a narrative description and
2 then it lists a variety of ideas or possibilities to be
3 recommended for implementation, if possible. That is the
4 subsequent two pages from action one; objective, optimize
5 migration, spawning and incubation in the Lower Yuba River.

6 May I restate my question again? Gentlemen, is it your
7 understanding that when the report or action plan uses the
8 word "optimize" that it is suggesting that all of the goals
9 followed in the subsequent two pages are going to be
10 obtained or they should be attempted?

11 H.O. BROWN: Just a minute.

12 Mr. Lilly, you have an objection on the floor. Do you
13 wish to withdraw or is that satisfactory?

14 MR. LILLY: The clarification is helpful. I think the
15 question is still very hard to follow and ambiguous. Before
16 it was unclear whether he meant subsequent in time and
17 subsequent pages in the document. But I would request that
18 he clarify the question so it is not so compound. At this
19 point there is three different components to the question.

20 H.O. BROWN: Mr. Guinee, do you understand the
21 question?

22 MR. GUINEE: I think I followed it. Did you want to
23 restate it or do you want me to try to answer what I thought
24 I heard you ask?

25 H.O. BROWN: Perhaps, Mr. Cunningham.

1 MR. CUNNINGHAM: I will try one more time, Mr. Brown.
2 You concede -- let me ask this. Go piece by piece.
3 You see where under action one it says objective,
4 gentlemen?

5 MR. GUINEE: Yes, I do.

6 MR. CUNNINGHAM: Do you see the first word of the
7 phrase follows, the underlined word objective?

8 MR. GUINEE: Yes.

9 MR. CUNNINGHAM: Is that word optimize?

10 MR. GUINEE: The word is optimize.

11 MR. CUNNINGHAM: Is it your understanding and used at
12 that point in that phrase that this document is saying will
13 optimize the following modifiers?

14 MR. GUINEE: Okay. As I mentioned earlier, I would not
15 use the word optimize. In that context my understanding is
16 it is trying to say the objective is to optimize. It is not
17 saying that these flows will necessarily achieve
18 optimization of the habitat conditions.

19 MR. CUNNINGHAM: Mr. Guinee, doesn't it, in fact, in
20 the next, on Page 3-XC-15, under the paragraph titled
21 Actions for Improving Instream Flows, doesn't the same plan
22 actually discuss that there are multiple flows that will be
23 perhaps optimal for separate lifestages, but then strikes a
24 compromise with trying to come up with the numbers
25 recommended? Isn't that what I am reading there?

1 MR. GUINEE: You're right. You are reading the
2 discussion about some of the things the biologists
3 considered when developing the post schedule. And then it
4 concludes that the flows it came up with is 700, based on
5 best available information at the time would be
6 recommended.

7 MR. CUNNINGHAM: Would it be safe to say, at least in
8 your understanding, the 700 cfs recommendation out of this
9 document was a compromise recommendation rather than an
10 attempt to optimize all lifestage salmonid issues?

11 MR. GUINEE: Yes. I think that is safe to say.

12 MR. CUNNINGHAM: Either Mr. Guinee or Mr. Flemming, I
13 notice this document is dated 1995. Is it your
14 understanding this document addressed either the steelhead
15 or the spring-run salmon as a threatened species under the
16 federal Endangered Species Act?

17 MR. GUINEE: No. Spring-run chinook nor steelhead were
18 not listed at the time this document was produced.

19 MR. CUNNINGHAM: In fact, can either of you tell me
20 from this document is spring-run salmon even addressed,
21 spring-run chinook salmon even addressed in this document?
22 It makes multiple references to chinook salmon. Are we
23 talking about fall-run or spring-run?

24 MR. GUINEE: My recollection is that the focus is on
25 fall-run chinook salmon. I believe, based on the Fish and

1 Game report, the flow study that was done, the habitat
2 transects were measured, I think, primarily focused on
3 fall-run chinook salmon. There is a recognition that
4 spring-run chinook and steelhead reside in the Yuba River in
5 this document. However, the flows were primarily targeting
6 fall-run chinook.

7 MR. FLEMMING: The entire document, the three volumes,
8 do address spring-run and steelhead. But they don't
9 provide flows for them and things like that because there
10 wasn't enough data, I think, to make those determinations.

11 MR. CUNNINGHAM: The entire document actually addresses
12 the entire Central Valley of California, right?

13 MR. FLEMMING: Yes, Sacramento and San Joaquin and
14 Delta.

15 MR. GUINEE: Including shad in the Yuba.

16 MR. CUNNINGHAM: Shad leads me to one last question.

17 I believe Mr. Minasian was asking you to play, perhaps
18 I will put it crudely, to play God, if you were able to
19 choose which species you would try to manage on the system.

20 There appears to be a conflict with the flows for
21 management of American shad and proposed flows for
22 management of spring-run chinook salmon and steelhead.

23 H.O. BROWN: Mr. Lilly.

24 MR. LILLY: I object to the --

25 MR. CUNNINGHAM: I haven't asked the question yet.

1 H.O. BROWN: I know. He is objecting to the -- I will
2 find out in a minute.

3 Just a moment.

4 MR. LILLY: I was going to wait until he finished the
5 question. But since you asked me, I will be glad to
6 answer.

7 That misstates the prior question and answer. Mr.
8 Minasian never said anything about asking to play God. Just
9 asked them what their recommendation to the Board was.

10 H.O. BROWN: Rephrase your question, Mr. Cunningham.

11 MR. CUNNINGHAM: Rephrase my question.

12 I believe Mr. Minasian specifically said, if you had to
13 make the choice, what would you do. I am sorry. That is
14 playing God, Mr. Brown, all definitions of the phrase.

15 H.O. BROWN: I sustain the objection. Rephrase the
16 question.

17 MR. CUNNINGHAM: Rephrase the question.

18 Gentlemen, if you were asked in a hypothetical
19 situation to evaluate this report and provide -- this is the
20 report working paper on restoration needs, were talks about
21 the American shad. It also talks about salmon and
22 steelhead. To the extent there is a conflict in the
23 recommendations of flows, would either of you gentlemen have
24 a personal opinion as to which species should be managed
25 first or attempted to be provided ideal flows first?

1 MR. GUINEE: I think I mentioned earlier that, in
2 general, as a biologist I would recommend the flows for the
3 endangered salmon and steelhead as well as the other salmon
4 in the stream as a priority compared to shad. And I would
5 also recommend that the Board try to implement those actions
6 in a way that could also benefit shad. It may not have to
7 be either/or. Shad may be able to continue spawning
8 downstream of Marysville, as an example.

9 The thing I wanted to add to that is that the Fish and
10 Wildlife Service, even though we don't administer the
11 Endangered Species Act for the anadromous fish species, we
12 do have a responsibility in any of your actions to help meet
13 those objectives of the Endangered Species Act that NMFS is
14 administering on behalf of those fish. I think the
15 endangered species would be high priority.

16 MR. CUNNINGHAM: Mr. Flemming, I think you had
17 something to add, if you don't have a question for me.

18 MR. FLEMMING: Go ahead.

19 MR. CUNNINGHAM: You testified in this same area about
20 the Anadromous Fish Restoration Act, and that all of these
21 fish were recognized as anadromous fish for consideration
22 and care. Does the act differentiate between native or
23 indigenous species and nonnative species?

24 MR. FLEMMING: The Anadromous Fish Restoration Program
25 does not distinguish between native and nonnative. It was

1 handed down through CVPIA legislation and so there wasn't a
2 distinct line that said, "Take care of the natives first."
3 As a biologist, that would be my bent, but --

4 MR. GUINEE: I would add to that that the anadromous
5 fish, the Central Valley Project Improvement Act did
6 specifically task Interior with restoring the salmon, the
7 chinook salmon, in the Central Valley, steelhead, green
8 sturgeon and white sturgeon, and striped bass and American
9 shad. Those last two which are not native.

10 MR. CUNNINGHAM: That was my last question for you.
11 On the Yuba River is the American shad a native species?

12 MR. FLEMMING: No.

13 MR. GUINEE: No, it is not.

14 MR. FLEMMING: Not anywhere in Central Valley?

15 MR. GUINEE: It is an East Coast transplant.

16 MR. CUNNINGHAM: Isn't it true that American shad is
17 strictly an East Coast transplant?

18 MR. FLEMMING: Yes.

19 MR. CUNNINGHAM: I have no further questions.

20 Thank you, Mr. Brown.

21 Thank you, witnesses.

22 MR. FLEMMING: Thank you.

23 H.O. BROWN: Is Mr. Sandino here?

24 MR. CUNNINGHAM: Mr. Brown, Mr. Sandino was not
25 planning on being here except on call or as necessary.

1 H.O. BROWN: Thank you, Mr. Cunningham.

2 Staff.

3 MS. LOW: Yes, I have a few questions for you.

4 ---oOo---

5 CROSS-EXAMINATION OF U.S. FISH AND WILDLIFE SERVICE

6 BY MR. STAFF

7 MS. LOW: We have heard today and also in the
8 cross-examination of your panel today and also yesterday of
9 National Marine Fisheries Service about the pulse flow
10 issue. I am assuming that the parties are referring to
11 pulse flows as higher. Short duration flows in the spring
12 months to improve the survival of outmigrating juvenile
13 salmon.

14 Did you make any recommendations for pulse flow
15 releases on the Lower Yuba River in your testimony?

16 MR. GUINEE: In my testimony I did not. I was focusing
17 on asking the Board to maintain the minimum flows I
18 described earlier. However, the working paper does discuss
19 evaluating the effectiveness of pulse flows which would be
20 some additional flows over and above the minimum flows that
21 I was recommending, that I am recommending.

22 MS. LOW: Okay.

23 MR. FLEMMING: And my testimony did address pulse flows
24 in that the Revised Draft Restoration Plan lists evaluation
25 number one under the Yuba River section, is to evaluate the

1 effectiveness of pulse flows to facilitate successful
2 juvenile salmonid migration, and I did mention that.

3 MS. LOW: But the pulse flows that you are referring
4 you would have in mind as being over and above what the
5 minimum flow recommendations for April, May and June are
6 currently in your testimony?

7 MR. GUINEE: That's correct.

8 MR. FLEMMING: Yes.

9 MS. LOW: So, at a minimum do you think that the
10 sustained flow throughout the chinook salmon and steelhead
11 spring emigration period at an adequate level may result in
12 as good or better survival than a shorter term pulse flow in
13 spring? Not talking about any particular levels now, but in
14 general could a sustained flow throughout that period result
15 in as good or better survival than a shorter duration pulse
16 flow?

17 MR. GUINEE: In my opinion, I think it could result not
18 only as good but likely better. Because if we sustain a
19 minute flow that is high enough for the fish to successfully
20 migrate downstream, then the fish can leave when they are
21 ready to leave. When they have matured to the point or they
22 are smolting and are ready to go to the ocean, then they can
23 have good habitat conditions to migrate to the ocean, as
24 compared to if we have a very low base flow and just relying
25 on pulse flows, and trying to guess as to the timing of when

1 most of the fish may be ready to go. I don't think that is
2 effective. In the Stanislaus River the approach we took was
3 to try to sustain 1,500 cubic feet per second for the
4 three-month or 90-day period to allow the fish to leave when
5 they were ready and have good conditions to migrate.

6 MR. FLEMMING: I would like to add to that that those
7 recommendations were not made with base level of 1,500 cfs
8 or whatever it was as the peak. That is just a base and
9 that there was high variability inflows or highly variable
10 flows that accentuated and facilitated the emigration. And
11 we are not just saying we want, you know, a flat line flow.

12 MR. GUINEE: That is correct, too.

13 MS. LOW: In that particular river, then, you were
14 talking about a minimum flow that was sustained over the
15 majority of the outmigration period, if not all of it, to
16 maximize or to improve survival throughout that entire
17 period is the objective?

18 MR. FLEMMING: Of smolt emigration.

19 MS. LOW: Of smolt?

20 MR. FLEMMING: Specifically smolts.

21 MR. GUINEE: That's correct.

22 MS. LOW: Thank you.

23 The other questions I had for you related to the
24 evaluation studies you made. There are evaluation studies
25 included in both the working paper and the Final Draft AFRP

1 Plan; is that correct, there are some evaluations in both
2 plans?

3 MR. FLEMMING: Yes.

4 MR. GUINEE: That's correct.

5 MS. LOW: Do you believe there are -- other than those
6 studies, evaluations, that are included in Exhibit 8, and I
7 think we looked at those earlier, Page 3, I think, of
8 Exhibit 8, lists, I think, three of the evaluation studies
9 from the Draft AFRP Plan. Are there any further fisheries
10 studies that may be needed to define instream flow needs in
11 the Lower Yuba River other than those studies that are
12 included there? Are there any studies that the Service
13 would recommend to further define instream flow needs in the
14 Lower Yuba River?

15 MR. FLEMMING: Yes. I think so. Specifically, right
16 now the information on outmigration juveniles is very
17 limited. And I think it would be good to try and understand
18 that better. Just -- I am speaking off the top of my head.
19 It is not something I am planning or have planned.
20 Year-round sampling would be a really important effort.

21 MR. GUINEE: The thing I wanted to add to that is the
22 evaluations identified in the Anadromous Fish Restoration
23 Program were not intended to be an exhaustive list of all
24 the evaluations that we were intending to do. They were
25 ones that could reasonably be done in the Anadromous Fish

1 Program.

2 So the evaluations I would add and encourage the Board
3 to adopt National Marine Fisheries Service made some
4 recommendations yesterday. And the Department of Fish and
5 Game, in reviewing their testimony, is very concerned about
6 habitat for spring-run chinook salmon and steelhead in the
7 Yuba River. I would encourage the additional conditions or
8 evaluation needed for improved conditions for the
9 restoration of those species.

10 MS. LOW: Are there any further studies, types of
11 fishery studies, that you would recommend at this time, any
12 general categories of studies?

13 MR. GUINEE: You know, in the spirit of what we have
14 been doing on the Stanislaus River where we used tools
15 provided by the Central Valley Project Improvement Act to
16 increase the flows, and through the monitoring and
17 evaluation of juvenile fish and adult fish in response to
18 those flows, can sort of -- we can adaptively manage them,
19 whether we need the full 90 days or how effective can a
20 30-day pulse be. Things like that.

21 I would urge the Board that it require at a minimum the
22 immediate implementation of the Draft Decision flows. And
23 then I encourage them to implement the AFRP level flows and
24 monitor and evaluate those flows to see if, in fact, they
25 are achieving the improved conditions for the fish that we

1 are recommending, that implemented improvement that we will
2 see. And then, you know, that process could continue to
3 inform the Board about how effective those flows are for
4 protection and restoration of the fish in the system in the
5 Yuba River.

6 MS. LOW: Mr. Flemming.

7 MR. FLEMMING: Continuing the question are there other
8 studies.

9 There is very little information available on
10 steelhead, steelhead life history, spring-run, their life
11 history. And actually there is not a whole lot of
12 information on fall-run life history and their strategies on
13 the Yuba River.

14 So studies to evaluate habitat usage, rearing times,
15 all those kinds of life histories studies would be
16 important, I think, for all involved to get a handle on what
17 the populations really are and how stable they are and what
18 strategies they are using. I think those life histories for
19 each particular species would be helpful.

20 MS. LOW: I have noted in particular there are not good
21 spawning surveys for either spring-run or steelhead on the
22 Lower Yuba River. Would those studies be something that you
23 could see as being necessary for monitoring the
24 effectiveness of instream flows in the future or other
25 measures that could be implemented?

1 MR. FLEMMING: Yes.

2 MR. GUINEE: Yes. I would agree they would be very
3 helpful.

4 MS. LOW: Thank you very much.

5 That is all the questions I have.

6 MR. FRINK: I do have some questions on the fish
7 screening facilities.

8 There was a discussion earlier about a barrier project
9 has been proposed at the outfall from the Yuba Goldfields.
10 Has funding been identified or provided for that project?

11 MR. FLEMMING: The Anadromous Fish Restoration funded
12 the feasibility study, feasibility and preliminary
13 engineering, and that was just completed. I haven't even
14 looked at it. It's in my box.

15 But the next step for the Anadromous Fish Restoration
16 Program would be to develop partners and pursue funding for
17 that. But has funding been identified? No.

18 MR. FRINK: Have you reviewed the specific designs
19 proposed for that project?

20 MR. FLEMMING: I was involved in the process and know
21 what it is and happy with the alternative selected and
22 design.

23 MR. FRINK: Do you believe, then, that if the project
24 were built it would be effective in preventing adult salmon
25 from ending the Yuba Goldfields?

1 MR. FLEMMING: At all flows, except hundred-year
2 events, yes.

3 MR. FRINK: Would they be swimming upstream during
4 hundred year events?

5 MR. FLEMMING: I don't know.

6 MR. FRINK: Are you familiar with the new fish screen
7 at the Browns Valley Irrigation District diversion facility?

8 MR. FLEMMING: I saw it.

9 MR. FRINK: In your opinion, does that screen work
10 satisfactorily?

11 MR. FLEMMING: I am not an engineer and hadn't had a
12 whole lot of experience with it. From my understanding of
13 screens, it looked like it was a very good system.

14 MR. FRINK: Mr. Guinee, would it be your opinion that
15 the new screen installed at Browns Valley Irrigation
16 District's facility is a satisfactory fish screen facility?

17 MR. GUINEE: I wasn't directly involved with the
18 Anadromous Fish Screen Program. I believe it was Mr.
19 Odenweller from the department who testified. My
20 understanding is that that screen was built to meet
21 Department of Fish and Game and National Marine Fisheries
22 Service criteria. And my understanding, the criteria -- if
23 a screen is built to those specifications, they are
24 generally very effective, much more so than the diversion
25 structures out there prior to the construction of the

1 screen.

2 MR. FRINK: So, I would take it that the Fish and
3 Wildlife Service is not recommending further improvement on
4 fish screen facilities at that point at this time; is that
5 correct?

6 MR. FLEMMING: At that location?

7 MR. FRINK: Yes.

8 MR. GUINEE: I would agree with you. In fact, going
9 back to Exhibit 3, that was one of the three primary screens
10 we recommended be either modified or replaced. Browns
11 Valley has apparently done that. The other two are
12 Brophy-Yuba South and Hallwood-Cordua.

13 MR. FRINK: Are you familiar with the Hallwood-Cordua
14 fish screen, either of you?

15 MR. FLEMMING: Yes.

16 MR. GUINEE: I have been there a few times.

17 MR. FRINK: As you mentioned, the Department of
18 Interior's Exhibit 4 recommended improvement of the fish
19 screens at that location. What are the problems with the
20 existing screen?

21 MR. GUINEE: You know, I can tell you what it says here
22 in Exhibit 3. I primarily prepared to talk to you about my
23 flow recommendation. Essentially it talks about the screen
24 is inefficient in preventing the entrainment, the
25 impingement of smolt-sized salmonids or actually it's fairly

1 efficient in preventing the entrainment and impingement.
2 However, losses do occur near the screen face and the intake
3 channel due to predation.

4 I believe Department of Fish and Game has collected
5 some data on that. And then I am not sure, but I believe,
6 the bypass which then, after the fish entered -- because the
7 screen sets back off of the river, the fish have to come
8 into the channel. Whereas, Brown's Valley built their
9 screen right on the river. The fish are bypassing and
10 staying in the river. At Hallwood-Cordua they go down the
11 channel and then have to get back to the river either by
12 swimming upstream against the flow, which isn't likely for
13 juveniles, then there is a bypass which, my understanding,
14 is inefficient. That's just the two mentioned in the
15 report.

16 MR. FRINK: Mr. Flemming, is there anything you were
17 going to add to that?

18 MR. FLEMMING: No.

19 MR. FRINK: Has any action been taken to improve that
20 screen since the preparation of your report, since the
21 preparation of Exhibit 4?

22 MR. GUINEE: Not that I am aware of.

23 MR. FLEMMING: I believe there -- no, no.

24 MR. FRINK: Are you aware if any plans have been
25 prepared for improvement or replacement of that fish

1 screen?

2 MR. FLEMMING: No.

3 MR. GUINEE: Not that I am aware of.

4 MR. FRINK: Do either of you have an opinion on how the
5 fish screen should be improved?

6 MR. FLEMMING: I do. As I mentioned, I am not an
7 engineer and I haven't spent many years working with
8 screens, but it seems that the screens that are parallel to
9 the flow are screens that are more effective, and that is
10 where everybody seems to be going.

11 So, in my opinion and my thoughts have been, that it
12 would be appropriate to move the diversion such that it is
13 parallel to the flow and provide screening at the river's
14 edge as opposed to down the Channel.

15 MR. GUINEE: I would add to that that my understanding
16 of the installation at New Browns Valley Irrigation District
17 screen is that it was an effort that included cooperation
18 from many different parties. I would encourage the Board to
19 enlist the expertise and feedback from the Department of
20 Fish and Game screening experts and their engineers, as well
21 as National Marine Fisheries Service engineers to be sure
22 that that screen was built to the criteria to protect the
23 fish in the Yuba River.

24 MR. FRINK: Do you know if federal funding remains
25 available for improving fish screening facilities at water

1 diversion locations along the Yuba River?

2 MR. FLEMMING: I think federal funding through Cal/Fed
3 is available and also --

4 MR. GUINEE: The Fish and Wildlife Service continues to
5 have, pursuant to the Central Valley Project Improvement Act
6 and the Anadromous Fish Screening Program also provides
7 funding, sort of state and federal cost share, on
8 construction of new fish screens.

9 MR. FRINK: Other than Browns Valley Irrigation
10 District fish screen, do you know if any other water
11 districts have applied for funding from the federal program
12 to improve fish screening facilities on the Lower Yuba
13 River?

14 MR. FLEMMING: Them, no.

15 MR. GUINEE: Not to my knowledge on the Lower Yuba
16 River. On the Sacramento River and other rivers they have.

17 MR. FRINK: Thank you.

18 That is all the questions I have. That is all the
19 staff questions.

20 H.O. BROWN: All right. That concludes the cross.

21 Mr. Gee, do you have redirect?

22 MR. GEE: No, sir, I don't.

23 H.O. BROWN: No redirect, so there is no recross.

24 Do you have exhibits you would like to offer into
25 evidence?

1 MR. GEE: Yes, Mr. Brown, I do.

2 At this time I would like to move into the record S-DOI
3 Exhibits 1 through 8.

4 H.O. BROWN: One through 8.

5 Mr. Baiocchi.

6 MR. BAIOCCHI: With respect to recross, even though
7 there isn't redirect a lot of things have come up in that,
8 and I believe I can ask some questions. And they are very
9 important to the proceedings, and maybe perhaps to other
10 people. But I know I am asking for a second bite out of the
11 apple, but as the first person up on cross-examination.

12 H.O. BROWN: I believe I ruled on that yesterday, Mr.
13 Baiocchi.

14 MR. BAIOCCHI: I realize that.

15 H.O. BROWN: I am not going to change the rules now.
16 That is the rules we will all play by. I think, Mr. Lilly,
17 you were the one with the objection yesterday. So there is
18 no redirect, so there is no recross.

19 Exhibits into evidence, 1 through 8?

20 MR. GEE: Yes.

21 H.O. BROWN: Are there any objections to those
22 exhibits being offered into evidence?

23 MR. LILLY: Mr. Brown, first of all, just a
24 clarification for Exhibits S-DOI-3 and S-DOI-4, excerpts
25 from those reports were circulated to the parties. I just

1 wanted to make sure that Mr. Gee confirms that the entire
2 reports, not just the experts, will be or have been
3 submitted to the State Board. Can we just have confirmation
4 of that?

5 MR. GEE: Yes, I can confirm I did deliver full sets to
6 the Board staff of these documents.

7 MR. LILLY: That is what will be admitted into evidence?

8 H.O. BROWN: Yes.

9 MR. LILLY: Thank you. I appreciate the
10 clarification. The only other objections we have, as I said
11 with the National Marine Fisheries, the documents
12 yesterday. Obviously these documents, being government
13 documents, are subject to official notice, contain numerous
14 hearsay statements. We just ask that they be received into
15 evidence subject to the limitations on the use of hearsay.

16 The other thing is, while these exhibits do provide
17 background information, they clearly were prepared with a
18 different goal, the goal being doubling of the anadromous
19 fish population in the Central Valley, which is not the
20 legal standard the State Water Board will be applying in
21 this proceeding. So, again, we do not object to them being
22 received for their background information purpose, but we do
23 believe they should be received subject to the qualification
24 that they were prepared under a different legal standard
25 than the Board will be applying in this proceeding.

1 H.O. BROWN: Thank you, Mr. Lilly. Your comments are
2 on the record and will be appropriately considered by the
3 Board.

4 Are there any other objections?

5 There being none, then I will accept those exhibits
6 into evidence.

7 MR. GEE: Mr. Brown, if I may take this opportunity to
8 make a clarification. Today I am appearing on behalf of the
9 Fish and Wildlife Service, but in later stages of this
10 proceeding I would like to reserve the right as an attorney
11 from the Department of Interior to call potential rebuttal
12 witnesses from the U.S. Bureau of Reclamation as well.

13 H.O. BROWN: That will be fine, Mr. Gee.

14 MR. GEE: Thank you.

15 H.O. BROWN: Mr. Baiocchi, with your approval, Mr.
16 Sanders would like to do direct.

17 MR. BAIOCCHI: He may, no problem.

18 H.O. BROWN: Mr. Gee, gentlemen, thank you very much
19 for your participation.

20 MR. SANDERS: I thank you for allowing me to speak
21 first or before CSPA. Some of our witnesses have to get
22 back to their day jobs.

23 I would like to start with a brief opening statement.
24 First, a little bit about the law. I would like to state
25 emphatically here for the record that this proceeding is

1 about water rights. It is not a trial of Yuba County Water
2 Agency. The legal issue here is not whether Yuba County
3 Water Agency has maintained flows in good condition. That
4 is not what we are talking about here. We are talking about
5 the public trust resources on the Lower Yuba River.

6 The State of California Constitution, Article X,
7 Section 2 hereby declares that because of the conditions
8 prevailing in the state of California water is to be put to
9 beneficial use to the fullest extent to which they are
10 capable and the waste or unreasonable use or unreasonable
11 method of use of water be prevented, and the conservation of
12 such waters is to be exercised with a view to the reasonable
13 and beneficial use thereof in the interest of the people and
14 for the public welfare.

15 At heart that is what this hearing is about. I move
16 to, of course, a case that I am sure everybody is aware of,
17 National Audubon Society versus Superior Court, where the
18 State of California Supreme Court discussed at length the
19 public trust doctrine in relation to State Water Resources
20 Control Board water rights hearing.

21 I will quote on Page 441. This is Cal 3rd at 441:

22 The public trust doctrine is an affirmation
23 of the duty of the State to protect the
24 people's common heritage of streams, lakes,
25 marshlands and tidal lands, surrendering that

1 right would have protection, only in rare
2 cases when the abandonment of that right is
3 consistent with the purposes of the trust.

4 (Reading.)

5 In other words, this Board has continuing authority
6 over the public trust resources of the State of California.

7 Next I move quickly to a few sections of the
8 California Code. Start with Public Resources Code Section
9 1001.

10 The Director of Fish and Game shall identify
11 and list those streams and watercourses
12 throughout the state for which minimum flow
13 levels need to be established in order to
14 assure the viability of stream related Fish
15 and Wildlife resources. (Reading.)

16 I move on to Section -- I'm sorry, that wasn't 1001;
17 that was 10001. And we will go to Section 10002 next where
18 the Legislature directed the Department of Fish and Game not
19 later than July 1st, 1989:

20 The director of Fish and Game shall prepare
21 proposed stream flow requirements which shall
22 be specified in terms of cubic feet of water
23 per second for each stream of water course
24 identified pursuant to Section 10001.

25 Further, upon completion of proposed stream

1 flow requirements for any individual stream
2 or water course, the Director of Fish and
3 Game shall transmit these proposed
4 requirements to the State Water Resources
5 Control Board. The State Water Resources
6 Control Board shall consider these
7 requirements within a stream as set forth in
8 Section 1257.5 of the Water Code. (Reading.)

9 So, again, that is exactly what we are doing here.
10 Pursuant to this legislation, the state Fish and Game
11 Department came up with a fisheries management plan and
12 transmitted it to this Board for adjudication subject --
13 under Section 1257.5.

14 1257.5:

15 The Board may establish such stream flow
16 requirements as it deems necessary to protect
17 fish and wildlife as conditions and permits
18 and licenses in accordance with this
19 provision. (Reading.)

20 Finally, I would like to point out the Salmon Steelhead
21 Trout and Anadromous Fish Protection Program Act, or program
22 act, is Fish and Game Code Section 6900. Section 6901, the
23 Legislature for the purposes of this chapter find,
24 Subdivision (d) reads:

25 Protection of and increase in the natural

1 spawning of salmon and steelhead trout
2 resources of this state will provide a
3 valuable public resource to the residents, a
4 large statewide economic benefit and would,
5 in addition, would provide employment
6 opportunities not otherwise available to the
7 citizens of this state, particularly in rural
8 areas of present under employment.

9 (Reading.)

10 The state Legislature has considered rural areas with
11 under employment and they have determined one way to protect
12 these or to improve this condition in rural areas, such as
13 Yuba County, is to increase the natural spawning salmon and
14 steelhead resources.

15 I go further to Subdivision (e).

16 Proper salmon and steelhead trout resource
17 management requires maintenance of adequate
18 level of natural as compared to hatchery
19 spawning and rearing. (Reading.)

20 The Yuba River supports a natural salmon and steelhead
21 fishery. There is no hatchery which again makes it
22 especially important in terms of salmon and steelhead
23 resources in the state of California.

24 I move to Subsection (g):

25 The protection of and increase in the natural

1 spawning salmon and steelhead trout of the
2 state must be accomplished primarily through
3 improvement of stream habitat. (Reading.)
4 Again, that is exactly what we are talking about here.
5 Finally, move to section, Fish and Game Code Section
6 6902.

7 The Legislature declares it is the policy of
8 the state to significantly increase the
9 natural production of salmon and steelhead
10 trout by the end of this century. (Reading.)

11 That was the end of the 20th century, and we have
12 already missed the deadline.

13 The department shall develop a plan and
14 program that strives to double the current
15 natural production of salmon and steelhead
16 trout resources. (Reading.)

17 Exactly like the AFRP program we just heard testimony
18 about. The State of California has a policy to double
19 production of these fishery resources.

20 SYRCL submits that in this day and age on this river
21 diverting large quantities of water without also adopting
22 conservation programs and conjunctive use policies
23 constitutes unreasonable use of water. Likewise,
24 unscreened or inadequate screened diversions constitute a
25 unreasonable method of diversion and should be and are

1 prohibited under the Constitution of the State of California
2 and should be recognized as such by this Board.

3 I think we will submit evidence and there will be
4 evidence that there has been inadequate conservation. There
5 are no conjunctive use programs and that the screens, except
6 for the Browns Valley screen, are inadequate or even
7 unscreened during parts of the year.

8 Public trust resources, obviously salmon and steelhead,
9 are the primary thing that we have to discuss here. There
10 is legislation on those issues, as I just discussed. The
11 State of California is very interested in salmon and
12 steelhead, but there are other public trust resources that
13 this Board has some duty to consider in this hearing. Just
14 to name a few: there is recreational fishing; there is the
15 fishery also supports resident fish, not just anadromous
16 fish; and there should be some consideration for the health
17 of the fishery in adopting stream flows. Likewise, there is
18 boating.

19 Unfortunately, witness Bruce Herring will not be
20 available, he had to work or he had some child care, but he
21 was planning on testifying about boating resources on this
22 stretch of river. Then, of course, there are recreation and
23 then finally tourism.

24 We submit that this resource, if properly managed,
25 would be a potential source of tourism for Yuba County,

1 especially with the salmon and steelhead being an integral
2 part of the tourist attraction.

3 Finally, I would like to just jump in for a moment with
4 an issue about federalization of what is California's
5 resource. This hearing may be the State of California's
6 last, best opportunity to assert authority over the Yuba
7 River public trust resources. We heard yesterday from NMFS
8 about the role of the federal government, the endangered
9 species listing of two of these species means that the
10 federal government is stepping into this resource. There
11 has been -- with all due respect to Mr. Brown and to this
12 Board, there has been something of a vacuum in leadership
13 from the State; and in the interim the federal government is
14 about to step in. The species are listed.

15 We heard from Mr. Edmondson that the 4(d) rule will be
16 out by next June. Once the 4(d) rule is out, it will be a
17 federal agency or federal court that mandates construction
18 of adequate fish screens, not this Board.

19 Likewise, once the consultation occurs between NMFS and
20 the Corps and FERC, it will be a federal agency or a
21 federal court that determines what the flows should be on
22 this river. This, in a very real sense, is the State of
23 California's opportunity to step in and say, "We are going
24 to take proactive approach to protecting our public trust
25 resources." But mark my words, if you do not do this, the

1 federal government will.

2 At this time I would like to begin calling up my
3 witnesses, starting with Shawn Garvey, the Executive
4 Director of SYRCL.

5 ---oOo---

6 DIRECT EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

7 BY MR. SANDERS

8 MR. SANDERS: Please state your name for the record.

9 MR. GARVEY: My name is Shawn Garvey.

10 MR. SANDERS: Can you tell us what is your current
11 occupation?

12 MR. GARVEY: I am the Executive Director of the South
13 Yuba River Citizens League in Nevada City.

14 MR. SANDERS: Have you prepared testimony for today's
15 hearing?

16 MR. GARVEY: I have.

17 MR. SANDERS: Do you have a copy of your testimony in
18 front of you?

19 MR. GARVEY: Yes.

20 MR. SANDERS: Can you briefly review the copy and tell
21 us if it is true and correct?

22 MR. GARVEY: I believe everything in my testimony is
23 true and correct. I would for the record, I would like to
24 go over two points that I think are most important in my
25 testimony.

1 Number one, on Page 4, SYRCL is concerned about an
2 apparent lack of watershed management or water conservation
3 plans for the Lower Yuba River and Lower Yuba River water
4 suppliers. We agree with the conclusion the Draft, the
5 Lower Yuba does provide a good example of a situation with
6 progressive watershed management can be applied to protect
7 public trust resources while continuing to meet reasonable
8 water demands for agriculture and other uses.

9 The hearing record and testimony from the 1992 reveal
10 that Yuba County Water Agency and the various other water
11 districts operating on the Lower Yuba River have few
12 conjunctive use or water conservation programs or policies
13 in effect. Unfortunately, that situation has mostly not
14 changed eight years later. In 1999, late 1999, SYRCL
15 requested using the public information, Public Records Act:
16 information relating to conjunctive use, groundwater
17 management, conservation, efficiency in return flows from
18 the Yuba County Water Agency, Brophy, South Yuba, Cordua,
19 Browns Valley Districts. There was responses to these
20 requests, and I think they are very instructive.

21 A few months after the 1992 hearings Yuba County Water
22 Agency adopted an agricultural water management program,
23 which is included. This program notes that at the outset,
24 "Being primarily a wholesaler of water to other entities,
25 Yuba County Water Agency's ability to directly implement the

1 provisions of the program is limited." In fact, the Yuba
2 County Water Agency program requires little or no
3 substantive action from the various water districts.

4 The preamble to YCWA's water management programs
5 specifically notes it does not -- "does not directly address
6 on-farm water uses." Instead it suggests, but does not
7 require, that the districts create water management plans to
8 be updated every five years. The YCWA management program
9 specifies what would be included in an adequate water
10 management plan.

11 Apparently, as a result of SYRCL's public information
12 request, only Brophy has adopted a water management plan
13 that would adhere to one adopted in September of '92 by the
14 Yuba County Water Agency. Neither YCWA or any of the
15 districts provide SYRCL with a copy of their conjunctive use
16 program. We can only conclude that they have not adopted
17 such plans. Cordua and South Yuba informed us that
18 conjunctive use is "part of an ongoing operation plan of the
19 district and has been used in the past."

20 These districts last practiced conjunctive use in
21 1994. Brophy, quote, has not adopted any conjunctive use
22 program, and the district has no studies, reports or
23 memorandum concerning such a program.

24 Browns Valley has "no records" of any conjunctive use
25 program.

1 Both Cordua and South Yuba have adopted groundwater
2 management plans. However, these plans also do not provide
3 for on-farm conservation. Neither of these districts appear
4 to have developed a surface management plan or other
5 policies or practices to conserve water, increase efficiency
6 or reduce agricultural return flows.

7 Brophy, on the other hand, has developed a surface
8 water management program, but not a groundwater management
9 plan.

10 Browns Valley, "has no records."

11 Yuba County Water Agency produced no documents directly
12 in response to SYRCL's request regarding these plans.

13 The failure to develop reasonable conservation measures
14 and conjunctive use programs is truly inexcusable given the
15 current status of salmon and steelhead and the conflict over
16 water in the Lower Yuba River.

17 The second point that I would draw your attention to is
18 the characterization of the competition and the conflict for
19 water use in the Yuba River system. On January 19th of this
20 year, the Yuba County Water Agency engineer was quoted in
21 the Marysville Appeal Democrat "If we get an adverse ruling
22 in the Lower Yuba River water rights hearing, it could
23 totally bankrupt the Yuba County. Agriculture in Yuba
24 County, as it exists, at least half of it will go out of
25 business."

1 We believe that such predictions as doom vastly
2 overstate the effects of this proceeding. Indeed, Yuba
3 County Water Agency clearly anticipates having ample and
4 sufficient water to supply its local customers and to sell
5 water out of the basin. In fact, only two weeks earlier, on
6 January 5th, 2000, the Marysville Appeal Democrat again
7 reported on current discussions between Yuba County Water
8 Agency and several potential out-of-basin water purchasers.

9 The two points here are out-of-basin water sales may be
10 extremely lucrative for Yuba County Water Agency. However,
11 the profits from such sales only serve to subsidize an
12 unreasonable use of water within the YCWA service area,
13 outlined in my first point.

14 Secondly, the characterization of Yuba County economic
15 position, vis-a-vis these pending hearings, appears to be
16 drastically overstated.

17 H.O. BROWN: Mr. Garvey, have you taken the oath?

18 MR. GARVEY: Here?

19 H.O. BROWN: Yes.

20 MR. GARVEY: No.

21 MR. SANDERS: None of my witnesses were here yesterday
22 and were not sworn.

23 H.O. BROWN: I am going to ask you to take the oath to
24 swear to the truth of your statement. Since you already
25 have some information on the record, we will make it

1 retroactive.

2 All right?

3 MR. GARVEY: Yes, sir.

4 H.O. BROWN: Are your other witnesses here?

5 MR. SANDERS: I believe --

6 H.O. BROWN: Stand. Raise your right hand and answer I
7 do.

8 (Oath administered by H.O. Brown.)

9 H.O. BROWN: Retroactive for you Mr. Garvey.
10 Proceed.

11 MR. SANDERS: I think I am going to call Maureen Rose
12 up next.

13 Please state your name.

14 MS. ROSE: Maureen Rose.

15 MR. SANDERS: What is your current occupation?

16 MS. ROSE: I am Conservation Director for the South
17 Yuba River Citizens League.

18 MR. SANDERS: Have you prepared testimony for today's
19 hearing?

20 MS. ROSE: I have.

21 MR. SANDERS: Do you have a copy of your testimony in
22 front of you?

23 MS. ROSE: I do.

24 MR. SANDERS: Please take a look at your testimony and
25 tell us if it is a true and correct reproduction. In other

1 words, is that document in front of you the testimony which
2 you submitted?

3 MS. ROSE: It is.

4 MR. SANDERS: Can you briefly summarize your testimony
5 for us now.

6 MS. ROSE: Just to summarize my testimony quickly, I am
7 here today to alert the State Water Resources Control Board
8 to two major issues that SYRCL has been concerned about on
9 the Lower Yuba River. Both are related to Englebright Dam.

10 The first issue is the fact that Yuba County Water
11 Agency owns the FERC license on the Narrows to the
12 hydroelectric project. SYRCL has filed formal comments
13 regarding flows coming from the Narrows to the hydroelectro
14 electric project on three occasions. One on April 9th, one
15 on April 14th and one on August 12; all of 1998.

16 The formal complaints were based on the fact for
17 various reasons that Yuba County Water Agency has cited
18 flows on the Yuba River dropped drastically and were low
19 enough to the point that unidentified species were stranded,
20 according to eyewitnesses' accounts. Unidentified species
21 of fish were stranded and then the flows were turned up
22 rapidly and, therefore, there were no studies available to
23 document what kind of species were stranded and killed
24 during that time.

25 SYRCL is concerned that the Yuba County Water Agency

1 has had so many problems with the facility that they may not
2 be able to adhere to their FERC licenses. We wanted that on
3 the record for this proceeding.

4 Our second point is that there -- many of you may know
5 that PG&E is divesting many of their hydroelectric
6 facilities throughout the state of California. Their
7 Narrows 1 hydroelectric project is owned right now, and a
8 FERC license is obtained for PG&E. And the Yuba County
9 Water Agency has expressed interest in taking over the
10 Narrows 1 hydroelectric project.

11 SYRCL is concerned that if Yuba County Water Agency
12 takes over the hydroelectric project, which is also sited
13 right at Englebright Dam, the management of the flows for
14 the project may significantly change. Yuba County Water
15 Agency is a water user primarily. PG&E is primarily a power
16 generation company. If Yuba County Water Agency takes over
17 the license at that project, they will operate that project
18 primarily for Yuba County Water Agency use rather than power
19 generation. And SYRCL is a formal intervenor on the Public
20 Utilities Commission proceeding that is looking at that very
21 issue. There will be a California Environmental Quality Act
22 review of any kind of license transfer of that project.

23 We would like the Board to consider whatever comes out
24 of that CEQA review at the time of your decision for these
25 flows.

1 Thank you.

2 MR. SANDERS: I am going to move right along and call
3 up Robert Broda to testify.

4 Please state your name for the record.

5 MR. BRODA: Robert Broda.

6 MR. SANDERS: Can you tell the Board what your current
7 occupation is?

8 MR. BRODA: Well, I am the conservation officer of the
9 Gold Country Fly Fishers and on the Board of Directors since
10 1998.

11 MR. SANDERS: Have you prepared testimony for today's
12 hearing?

13 MR. BRODA: Yes.

14 MR. SANDERS: Do you have a copy of your testimony in
15 front of you?

16 MR. BRODA: Yes.

17 MR. SANDERS: Can you briefly review the copy and tell
18 us if it is a true and correct reproduction?

19 MR. BRODA: Yes, it is correct.

20 MR. SANDERS: Can you briefly describe your testimony
21 or summarize your testimony?

22 MR. BRODA: Well, I am speaking today as a member of
23 the public that uses the river, and I consider the fishery a
24 public trust resource. And I fish on it as often as I can,
25 usually about once a week, and I have done that for several

1 years. And I have observed several apparent violations in
2 the management of this public resource according to, for
3 instance, the FERC license of the Yuba County Water Agency.
4 Such as violations in their ramping schedule, and also
5 observations concerning the effects of it being a tailwater
6 fishery, the impoverishment of the gravel, the salmonids,
7 the need for their reproductive cycle and as well as the
8 aquatic invertebrates and the whole chain of life that
9 supports the fishery.

10 Other things I have observed are the limitations in
11 access to the spawning grounds caused by the operation or
12 inadequacy of the operation of the fish ladders on Daguerre
13 Point Dam.

14 MR. SANDERS: Is that enough? Are you through?

15 MR. BRODA: Okay. I mean my testimony is described --

16 MR. SANDERS: Your testimony will be in the record, so
17 we just need a summary. Anything else you would like to
18 say? Go ahead.

19 MR. BRODA: Well, as a member of the public, I don't --
20 I feel these clients of the diversions are entitled to the
21 water, but they are not entitled to the fish that are lost
22 in the irrigation of agricultural products. And I think it
23 is the duty of the Water Resources Control Board to make
24 sure that these fish aren't lost through inadequately
25 screened diversions.

1 MR. SANDERS: Mr. Broda, you prepared a report, July
2 22, 1999, and we submitted as SYRCL Exhibit 11.

3 Can you tell us just a little bit about what the report
4 is and give the Board a little background on that event?

5 MR. BRODA: Well, I don't have a copy of that in front
6 of me. It was an addendum to my testimony. But SYRCL was
7 notified that this was going to be a lowering of the flows
8 out of Englebright, and they wanted some observers to be
9 down there. And I was there with a fishery biologist and we
10 observed the ramping event. The water was lowered for four
11 hours and then the flows were increased and it came back.
12 And we observed as the channel retreated we made certain
13 observations that are kind of generic observations with up
14 and down flows out of the dam.

15 The observations I made had to do with the stranding
16 largely of aquatic invertebrates.

17 MR. SANDERS: I am going to provide you a copy of my
18 SYRCL 11, just for you to take a quick look at it.

19 Is that a true and correct copy of the report you
20 made?

21 MR. BRODA: Yes.

22 MR. SANDERS: One other question about that report and
23 those events. Who were you with that day?

24 MR. BRODA: Craig Williamson.

25 MR. SANDERS: Who is he?

1 MR. BRODA: He is a biologist for the Fish and Wildlife
2 Service.

3 MR. SANDERS: I think next I am going to call Mr. Bill
4 Calvert up.

5 Please state your name for the record.

6 MR. CALVERT: Bill Calvert.

7 MR. SANDERS: What is your current occupation?

8 MR. CALVERT: I am retired.

9 MR. SANDERS: You prepared testimony for today's
10 hearing?

11 MR. CALVERT: Yes.

12 MR. SANDERS: Do you have a copy of your testimony in
13 front of you?

14 MR. CALVERT: Yes.

15 MR. SANDERS: Can you briefly review that copy and tell
16 us if it is a true and correct reproduction?

17 MR. CALVERT: Yes.

18 MR. SANDERS: Along with your testimony you submitted
19 several photographs we had marked as SYRCL Exhibit 13?

20 MR. CALVERT: Yes.

21 MR. SANDERS: Do you have those photos in front of you?
22 I also -- in that folder there is also a copy of SYRCL
23 Exhibit 13 for Mr. Calvert, if you need it.

24 MR. CALVERT: Yes.

25 MR. SANDERS: Rather than ask you to summarize your

1 testimony now, I would just like you to explain to the Board
2 what these photos are and it might be a little obscure, just
3 the pictures. I am sure with a little discussion from you
4 we can --

5 MR. CALVERT: I live on a hundred-acre ranch just near
6 the Yuba River. In fact, on the bank of Yuba River. And I
7 have occasions to go down and follow the activities of what
8 is going on in the river. And I had heard that there would
9 be some flow changes and there is some favorite spots I like
10 to monitor. I went down and found a pond right near the
11 river that had small fish stranded in it. And I looked
12 closer and found that they were salmon and steelhead. I
13 noticed that the river was so low that the outflow from this
14 little pond they were stranded in was no way for them to get
15 to the river. It was just going under the rocks. And I
16 noticed that some small pools were left under the black
17 berry vines and under some small trees and birds were
18 feeding on them.

19 And I went home and got a camera and took pictures of
20 it. Basically, that is what I did and that was right near
21 the river.

22 MR. SANDERS: You say that you monitored the river.
23 About how often do you do that?

24 MR. CALVERT: Well, it is so close that you look at the
25 river, and it's almost a daily basis. But to actually get

1 on an ATV and go down to the bed of the river, I do that
2 once a month or twice a month.

3 MR. SANDERS: Over what period of time? Years?

4 MR. CALVERT: Usually just during the salmon spawning
5 time and high water events. Things would just perk your
6 curiosity.

7 MR. SANDERS: You monitor the fishery during salmon
8 spawning time every year for the past?

9 MR. CALVERT: Since 1974.

10 MR. SANDERS: Since 1974. And during that time you've
11 witnessed salmon and steelhead being stranded often?

12 MR. CALVERT: I didn't observe too much of the small
13 fish being stranded in the early years in the '70s and '80s.
14 I became more active because the fish population had dropped
15 from when I had moved there and I became interested in
16 restoring or finding out what was happening to the fish.
17 And now I am monitoring it very closely.

18 MR. SANDERS: Thank you.

19 I am going to call up our final witness who is James
20 Eicher.

21 Afternoon.

22 Please state your name for the record.

23 MR. EICHER: James Eicher.

24 MR. SANDERS: Can you please tell us what your current
25 occupation is.

1 MR. EICHER: Assistant Field Manager for the Bureau of
2 Land Management out of the Folsom field office.

3 MR. SANDERS: Have you prepared testimony for today's
4 hearing?

5 MR. EICHER: Yes, I have.

6 MR. SANDERS: Do you have a copy of your testimony in
7 front of you?

8 MR. EICHER: Yes, I do.

9 MR. SANDERS: Would you briefly review the copy and
10 tell us if that is a true and correct reproduction?

11 MR. EICHER: It appears to be.

12 MR. SANDERS: Would you briefly summarize your
13 testimony now.

14 MR. EICHER: Basically, the Bureau of Land Management
15 has been involved in Yuba Goldfields area for the last 10 or
16 12 years in looking at various issues surrounding the public
17 lands in that area. But primarily our testimony today is
18 looking at the potential for the recreational opportunities
19 for a river parkway concept for the Yuba Goldfields from
20 Marysville to Parks Bar. We believe that this area has the
21 unique characteristics that would really provide a
22 tremendous opportunity, both economic, ecologic and
23 recreational opportunities for the community of Marysville.

24 Other than that we are constantly pursuing ways to get
25 this off the ground and running, and we believe, looking at

1 other parkways throughout the state, such as the American
2 River Parkway and the San Joaquin River Parkway, are
3 examples of what we believe the Yuba Goldfields would offer
4 the community of Marysville and the surrounding area.

5 We believe it is unique to look at other opportunities
6 for especially areas around Marysville economically because
7 it is such an economically starving area. It is one of the
8 lower income/higher jobless areas, if you look at statistics
9 in the state of California, and anything we can do to
10 provide an economic boon to that area I think would be
11 beneficial. And we believe a soft approach to providing
12 recreational opportunities, environmental education, fishing
13 opportunities, wetland restoration is a good way to do
14 that.

15 MR. SANDERS: Thank you.

16 I am done with my direct examination.

17 H.O. BROWN: Thank you, Mr. Sanders.

18 We will take a 12-minute break and come back with our
19 cross-examination.

20 (Break taken.)

21 H.O. BROWN: Back on the record.

22 We are ready for cross-examination.

23 Mr. Edmondson, not here.

24 MR. BRODA: I would like to take a moment to correct
25 an inaccuracy in my testimony. The Mr. Craig Williamson

1 that I referred to in my testimony is none other than Craig
2 Flemming.

3 Sorry about the error.

4 H.O. BROWN: All right.

5 We have Mr. Gee.

6 MR. GEE: Mr. Broda just answered my questions.

7 H.O. BROWN: Mr. Baiocchi.

8 MR. BAIOCCHI: Yes, sir.

9 ---oOo---

10 CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

11 BY CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

12 BY MR. BAIOCCHI

13 MR. BAIOCCHI: You are friendly witnesses. Okay. So
14 just relax, put your feet up on the table and we will talk
15 about it.

16 You people -- isn't it true that you people represent
17 the public, aside from your public officials, but before
18 them?

19 THE COURT REPORTER: I have to have each one answer in
20 order. Not all at once, please.

21 MR. BAIOCCHI: All four people, aside from the BLM
22 manager; isn't that true?

23 MR. CALVERT: Yes.

24 MR. BRODA: Yes.

25 MR. GARVEY: Yes.

1 MS. ROSE: Yes.

2 MR. BAIOCCHI: You people are very familiar with the
3 river?

4 MR. BRODA: Yes.

5 MS. ROSE: Yes.

6 MR. CALVERT: Yes.

7 MR. GARVEY: Yes.

8 MR. BAIOCCHI: Mr. Calvert lives next to the river.
9 You folks are down at the river all the time. You are very
10 important in these proceedings. You are not here paid to
11 defend the water suppliers; you are here to defend your
12 interest in public trust resources; isn't that true?

13 MR. LILLY: Excuse me, Mr. Brown. Mr. Baiocchi has
14 just admitted that these people are friendly witnesses.

15 MR. BAIOCCHI: Oh, yeah. I admit that.

16 MR. LILLY: While this hearing is not conducted to the
17 formal rules of evidence, he's clearly asking leading
18 questions which are inappropriate for direct examination of
19 friendly witnesses. We ask that he ask nonleading questions
20 of these witnesses.

21 H.O. BROWN: Mr. Baiocchi.

22 MR. BAIOCCHI: I think it is ridiculous. I really
23 believe -- I am going to be vindictive. If someone gave
24 Alan a banana cream pie, he would be angry about the size of
25 it.

1 H.O. BROWN: We don't --

2 MR. BAIOCCHI: The point is I've done this. I did it
3 at the Salinas River hearing.

4 H.O. BROWN: Mr. Baiocchi, I am going to rule in your
5 favor.

6 MR. BAIOCCHI: Thank you.

7 It is not a big issue for me.

8 H.O. BROWN: Dan.

9 MR. GALLERY: Mr. Chairman, I agree with Mr. Lilly.
10 What Mr. Baiocchi is doing is saying, "Hear's what I would
11 like you to say and do you agree?" And they nod yes, sir.
12 He's kind of saying everything he would like them to say and
13 then they agree with him. That is really -- when you have a
14 friendly witness you are supposed to ask them a question and
15 let them state the fact rather than the way he is doing it.
16 So there is some merit to Mr. Lilly's objection.

17 H.O. BROWN: I have already ruled, but I will ask you,
18 Mr. Baiocchi, to ask the panel one at a time and then answer
19 one at a time. And if you all nod your head yes to a
20 question, the reporter has real difficulty in determining
21 what is happening for the record. And there is merit to
22 what Mr. Gallery and Mr. Lilly said.

23 So I am sure you are experienced, Mr. Baiocchi.
24 Rephrase your questions one at a time to the panel and we
25 will take the time that is necessary in order to get

1 through.

2 MR. BAIOCCHI: Mr. Broda.

3 MR. BRODA: Yes.

4 MR. BAIOCCHI: Are you familiar with fishing on the
5 Lower Yuba River?

6 MR. BRODA: Yes.

7 MR. BAIOCCHI: Have you ever fished for American shad?

8 MR. BRODA: Only unsuccessfully.

9 MR. BAIOCCHI: You don't have extensive experience
10 with fishing for American shad on the Lower Yuba River?

11 MR. BRODA: No, I don't.

12 MR. BAIOCCHI: Do you fish for other species of fish
13 on the Lower Yuba River?

14 MR. BRODA: No, I don't.

15 MR. BAIOCCHI: Mr. Calvert, you indicated you witnessed
16 a fish kill?

17 MR. CALVERT: Yes.

18 MR. BAIOCCHI: In this fish kill, what was the period?
19 What was the time?

20 MR. CALVERT: 9/3, I believe, September the 3rd is when
21 the pictures are dated. I observed it a day or so sooner,
22 lower water.

23 MR. BAIOCCHI: 1999?

24 MR. CALVERT: Yes.

25 MR. BAIOCCHI: Ms. Rose, you indicated there was three

1 events due to ramping rates where there was fish killed and
2 salmon were actually dewatered; isn't that true?

3 MS. ROSE: Yes. In my testimony, my written testimony,
4 I document three instances where we filed formal complaints.
5 There was one instance on November 11th of 1998 where we had
6 eyewitness accounts but where we did not file a formal
7 complaint.

8 MR. BAIOCCHI: Would the three complaints be in
9 conjunction with what Mr. Calvert has witnessed?

10 MS. ROSE: No, because he is actually citing a
11 different date.

12 MR. BAIOCCHI: Between two witnesses here we have
13 identified there was four fish kills?

14 MS. ROSE: Five.

15 MR. BAIOCCHI: Was a total of five?

16 MS. ROSE: There are four that SYRCL has where there
17 are eyewitness accounts. Three of which we file complaints
18 on and Bill Calvert's makes five.

19 MR. BAIOCCHI: Those fish kills, Ms. Rose, were based
20 on your testimony, would you say that was the operations of
21 the project, the Yuba Project by Yuba County Water Agency?

22 MS. ROSE: Yes.

23 MR. LILLY: Object on the grounds of lack of
24 foundation.

25 MS. ROSE: Actually --

1 H.O. BROWN: Wait a minute. There is an objection on
2 the floor.

3 Explain, Mr. Lilly.

4 MR. LILLY: There is no evidence from any of these
5 witnesses knowing whether the changes in flow fluctuations
6 that they have talked about were due to project operations
7 or natural causes or some other factors. If they were due
8 to some other factor, they could be, for example, operations
9 on Deer Creek or the Yuba River.

10 They simply saw flow fluctuations. There has been no
11 foundation that they attribute -- they have knowledge to
12 attribute this to a certain project.

13 H.O. BROWN: Thank you, Mr. Lilly.

14 MR. BAIOCCHI: May I fill the foundation, then?

15 H.O. BROWN: Yes, sir, you may.

16 MR. BAIOCCHI: Thank you.

17 Mr. Garvey, as I recall, you contacted me concerning --
18 when there was violations, theoretical, potential violations
19 of the FERC license.

20 Do you recall that?

21 MR. GARVEY: Yes, sir.

22 MR. BAIOCCHI: I advised you to file a complaint with
23 the Federal Energy Regulatory Commission.

24 MR. GARVEY: Yes.

25 MR. BAIOCCHI: Did you file a complaint with the

1 Federal Energy Regulatory Commission on the ramping rates
2 and fish kills?

3 MR. GARVEY: Yes, we did.

4 MR. BAIOCCHI: Didn't the Federal Energy Regulatory
5 Commission fly to California and meet with you?

6 MR. GARVEY: Yes, she did.

7 MR. BAIOCCHI: Could you -- what was the result of
8 FERC, Sharon -- I am trying to remember the name.

9 What was her name? Sharon?

10 MR. BRODA: Diane Shannon.

11 MR. BAIOCCHI: What was the result of the meeting?

12 MR. GARVEY: I believe, if you recall, Diane Shannon --
13 it would be described as the investigation is ongoing.

14 MR. BAIOCCHI: It is still ongoing?

15 MR. GARVEY: I believe so.

16 MR. BAIOCCHI: FERC has not determined whether or not
17 penalties, both civil and criminal penalties, should be
18 assessed against Yuba County Water Agency, have they?

19 MS. ROSE: No. Actually, can I speak to this?

20 MR. BAIOCCHI: Sure.

21 MS. ROSE: Just to document this and set a foundation,
22 Yuba County Water Agency actually released a report that we
23 cite in our exhibits. It is Exhibit S-SYRCL-10. It is
24 assessment of potential fish straining impact associated
25 with April 1998 flow reduction on the Yuba River.

1 They cite the reasons. Based in their report, their
2 reasons for the flow fluctuations. And they look at the
3 impacts associated with the flow fluctuations. So, it was
4 clear that the Yuba County Water Agency was, and their
5 powerhouse was directly related to the flow fluctuations.

6 MR. BAIOCCHI: That was -- was that in part based on
7 rewinding of the Narrows Number 1 powerhouse?

8 MS. ROSE: Actually, unassociated incident.

9 MR. BAIOCCHI: Thank you.

10 I wanted to get that on the record.

11 Now, Mrs. Rose, to the best of your knowledge, do you
12 know if the Yuba County Water Agency has ever done a
13 recreational flow study concerning boating in the Lower Yuba
14 River?

15 MS. ROSE: Not to my knowledge.

16 MR. BAIOCCHI: Would your group, SYRCL, would they
17 support the Board ordering a recreational flow study for the
18 Lower Yuba River in conjunction with this proceeding?

19 MS. ROSE: Yes.

20 MR. BAIOCCHI: Thank you.

21 Mr. Garvey, isn't it true you're involved with
22 Englebright Dam and Reservoir?

23 MR. GARVEY: I believe you are referring to the Upper
24 Yuba River Studies Program that Cal/Fed is administering.

25 MR. BAIOCCHI: Isn't there an interest of having that

1 dam removed?

2 MR. GARVEY: Or modified to allow for passage of salmon
3 and steelhead into the Yuba Rivers.

4 MR. BAIOCCHI: Thank you.

5 And your -- SYRCL is a party to the Yuba River
6 Technical Workgroup, correct?

7 MR. GARVEY: Yes, you're right. Both Maureen Rose and
8 myself.

9 MR. BAIOCCHI: You are both representatives on that
10 working group?

11 MR. GARVEY: Yes.

12 MS. ROSE: Yes.

13 MR. BAIOCCHI: In conjunction with the working group,
14 is the working group looking at reconfiguration of the
15 Daguerre Point diversion, to your knowledge?

16 MS. ROSE: They're potentially looking at
17 reconfigurations of diversions, but it is in the context of
18 analyzing the problems that are associated with the dam,
19 such as issues cited in the Fish and Game report that was
20 released in 1991 that documents potential 40 percent
21 mortality rate of fish passage at the site.

22 MR. BAIOCCHI: Thank you.

23 The gentleman from BLM, your first name is James?

24 MR. EICHER: Uh-huh.

25 MR. BAIOCCHI: Can I call you Jim?

1 MR. EICHER: Sure.

2 MR. BAIOCCHI: It is my understanding that the South
3 Canal crosses BLM property?

4 MR. EICHER: Yes, it does.

5 MR. BAIOCCHI: It is also my understanding, and please
6 correct me if I am wrong that Yuba County Water Agency at
7 Brophy or South Yuba, one of three or all of the three,
8 probably would be South Yuba and Brophy, do not have a
9 permit for your agency to utilize BLM lands for that canal;
10 is that true?

11 MR. EICHER: I can't speak specifically on that issue.
12 We're recognizing there is a trespass across public lands
13 with the South Canal. And we are in negotiations right now
14 with the Yuba County Water Agency to resolve that issue.

15 MR. BAIOCCHI: Are you going to allow public comment
16 and input on that matter at all?

17 MR. EICHER: You know, I just don't know enough about
18 the process, how it is going to shake out.

19 MR. BAIOCCHI: That concludes my comments.

20 MR. GARVEY: Could I add? Is it appropriate?

21 MR. BAIOCCHI: Okay. Go for it.

22 MR. GARVEY: As a friendly witness.

23 MR. LILLY: Mr. Brown, I object. Normally we don't
24 allow witnesses to just make statements without questions
25 being asked first.

1 MR. GARVEY: It goes directly to a question that was
2 asked.

3 H.O. BROWN: Are you clarifying a question?

4 MR. GARVEY: Me?

5 H.O. BROWN: Yes.

6 MR. GARVEY: Yes, I am. I am clarifying Maureen's
7 answer regarding Daguerre Dam.

8 H.O. BROWN: All right.

9 MR. GARVEY: Which was the last question before Mr.
10 Eicher.

11 SYRCL, as you said, we are sort of on the front lines
12 of public response. And over the last two and a half years
13 since I have been with the organization, we have gotten 70
14 and a hundred phone calls ranging from frantic and
15 hysterical to more calm. But usually related to a fish kill
16 on the Lower Yuba River or blocked ladders, blocked
17 passageways to the Daguerre Point Dam because of low flows
18 and sedimentation around the passageways.

19 We received calls about closed fish ladders. Actually
20 the gates are shut and the salmon stuck in the ladders
21 themselves unable to get through to the upper part of the
22 river. We receive reports about badly maintained fish
23 ladders, about fish ladders that have debris clogging them
24 and salmon jumping out of them. This is quite common during
25 the salmon runs.

1 I guess after receiving these calls and going down that
2 river numerous times with children who end up sitting there
3 and seeing that, dozens of salmon on the ground, dead,
4 unable to get over that dam. I did want to add to Maureen's
5 response that there is definitely a problem at Daguerre.
6 Our understanding is that Cal/Fed has put forward a 100
7 percent access above Daguerre Dam as one of their mandates
8 for ecosystem restoration. I did want to add that to the
9 record.

10 MR. BAIOCCHI: I have one more question.

11 H.O. BROWN: Thank you, Mr. Baiocchi.

12 MR. BAIOCCHI: May I ask one more question?

13 H.O. BROWN: Yes, go ahead.

14 MR. BAIOCCHI: Thank you.

15 It is my understanding that SYRCL represents 3,000
16 people that live up in that area; is that true?

17 MR. GARVEY: We have approximately 3,000 people who
18 contribute to our organization from Nevada and Yuba
19 Counties.

20 MR. BAIOCCHI: Thank you very much.

21 H.O. BROWN: Mr. Cook.

22 MR. COOK: Mr. Brown, may I ask for clarification on an
23 issue?

24 H.O. BROWN: You may.

25 MR. COOK: As the record will show, I have also listed

1 Mr. Calvert as a witness for me. I want to be make certain
2 by cross-examination at this time that I don't, in effect,
3 waive my ability to bring Mr. Calvert in as a witness. I
4 think that based on the testimony that he has delivered so
5 far that he has testified primarily about or exclusively
6 about the main stem of the Yuba River as it passes the
7 Goldfields. My questions will be primarily involving the
8 interior of the Goldfields which is somewhat different.

9 I will be careful in my later examination to try not to
10 duplicate what he has already testified to. But I want to
11 make certain I don't waive my right to bring him by bringing
12 any cross-examination questions at this time.

13 H.O. BROWN: Thank you, Mr. Cook, for bringing that to
14 our attention, and you may proceed on that basis.

15 MR. COOK: Thank you very much.

16 ----oOo----

17 CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

18 BY MR. COOK

19 MR. COOK: For the panel, I believe you're all very
20 familiar with the Yuba River below Parks Bar and perhaps to
21 Hallwood. Maybe I will ask Mr. Garvey, do you have a number
22 of people and have you yourself traveled the Yuba River in
23 canoes and kayaks?

24 MR. GARVEY: Yes, sir, numerous times.

25 MR. COOK: When you do that, is it -- do you go by

1 yourself, or do you go in groups, or how is it handled?

2 MR. GARVEY: Usually as an organization we go in
3 groups. We do a flotilla of sorts.

4 MR. COOK: The groups are approximately what size?

5 MR. GARVEY: Between six and 20.

6 MR. COOK: How often do you have groups going down the
7 river?

8 MR. GARVEY: In September, October, November, it will
9 be between once a month and once every weekend.

10 MR. COOK: Do you travel -- where do you put in when
11 you go down the river?

12 MR. GARVEY: Immediately under the Parks Bar Bridge,
13 Highway 20.

14 MR. COOK: How far do you usually travel?

15 MR. GARVEY: We take out at Hallwood-Cordua.

16 MR. COOK: That means that you do pass Daguerre Point
17 Dam?

18 MR. GARVEY: Oh, yes.

19 MR. COOK: You pass the area of the gabion screen at
20 Daguerre Point Dam?

21 MR. GARVEY: Yes, sir.

22 MR. COOK: With respect to flows over Daguerre Point
23 Dam, you have an opportunity to observe those flows?

24 MR. GARVEY: Yes, sir.

25 MR. COOK: And also the flows through the fish ladders?

1 MR. GARVEY: Yes.

2 MR. COOK: There is a fish ladder, one on each side of
3 the dam; is there not?

4 MR. GARVEY: Yes.

5 MR. COOK: Would you describe what you observed from
6 the flows across Daguerra Point Dam?

7 MR. GARVEY: Daguerra Point Dam is a wide dam. I am
8 not exactly sure how wide the river is at that point,
9 probably 200 feet. It is very wide across the face of the
10 dam. It is a 21-foot high dam. Across the face of it there
11 is a very -- usually a fairly powerful flow, at least at
12 that dam site. And the ladders are essentially off of the
13 river. The flow in those ladders varies from very little
14 to, after we complain about it, usually the situation is
15 improved somewhat.

16 Below the dam as you carry your canoes or boats around,
17 it is usually a pretty emotional site, actually. And that
18 is one reason, quite frankly, why we bring people down
19 there, is to see the tremendous population of salmon and
20 steelhead in the pool directly below the dam unable to find
21 access to the upper part of the river.

22 Usually they are slamming themselves into the dam, and
23 usually the crowd of six to 20 is very silent during those
24 times because it is not a happy site.

25 MR. COOK: Have you ever observed a bush or other

1 obstructions in the fish ladders, the upper portion of the
2 fish ladders?

3 MR. GARVEY: Personally, I have not. Two years ago
4 when we started Lower Yuba River keeper program our outreach
5 coordinator, Carlyle Holms, went down with Fish and Game
6 biologist John Nelson, and it made it into the Union
7 newspaper. She brought down six people who are monitoring
8 all that season during the spring, counting salmon coming
9 up. At that time the ladders were entirely blocked with
10 debris.

11 MR. COOK: Would you describe the river keeper program
12 that you mentioned.

13 MR. GARVEY: At this point it is a proposed
14 program, which is the reason we hired Maureen Rose to be our
15 Yuba River keeper, and it will involve, when fully blown
16 out, an aggressive monitoring program with volunteers
17 throughout the watershed.

18 MR. COOK: Ms. Rose, you've heard the questions that I
19 asked Mr. Garvey, and I am wondering without repeating each
20 one of them if you have anything to add to any of those
21 questions?

22 MS. ROSE: No. Just I would second everything that he
23 said, but I wanted to add a little bit about the river
24 keeper program and the fact that we are going to do sediment
25 monitoring above and below Daguerre Point Dam and above and

1 below Englebright Dam. We are also planning to do fish
2 population counts so we can get a more accurate figure of
3 population issues in that section of river.

4 MR. COOK: Mr. Broda, do you have anything to add to
5 those prior questions?

6 MR. BRODA: The accumulation of wood in the fish
7 ladders is practically an annual event, and sometimes it's
8 impossible to remove because of the volume of it, and some
9 years just have to wait until the low flows and then burn
10 it.

11 MR. COOK: The wood in the fish ladders, that appears
12 to be an obstruction preventing fish to go through?

13 MR. BRODA: Yes.

14 MR. COOK: Would it appear to prevent flow of water
15 from going through?

16 MR. BRODA: Sometimes, sometimes yes. It effectively
17 blocks the fish, though.

18 MR. COOK: You have indicated -- I think you said often
19 you've been on the Yuba River fly-fishing once a week I
20 believe you said?

21 MR. BRODA: Yes.

22 MR. COOK: And do you often go with other people?

23 MR. BRODA: Well, frequently.

24 MR. COOK: Perhaps you can describe what you have
25 observed with respect to the general public use of the

1 section of the river where you have been?

2 MR. BRODA: The prime water is above the Highway 20
3 bridge, the four miles between the Highway 20 bridge and
4 Daguerre Dam. And that is because the water temperature is
5 generally cooler there, and so there is a longer season of
6 fishing. It is part of the central district, so the only
7 time when you are not allowed to fish is in October and
8 November and that is to protect the salmon that are coming
9 up the fall-run.

10 There can be from 2 to 30 people fishing there,
11 certainly on benevolent weather weekends and even on --
12 whenever the water isn't discolored, there is several people
13 using it.

14 MR. COOK: How would you access the river above the
15 Parks Bar Bridge?

16 MR. BRODA: Well, the part below the bridge on either
17 side of the river and walk down to the river and then
18 proceed to walk upstream.

19 MR. COOK: Have you ever accessed the river from, I
20 believe it is called, Timbuktu Road, the road that parallels
21 the river on the left bank?

22 MR. BRODA: Well, I have in the past. But I fished all
23 the way up to Englebright from the bridge walking along the
24 river.

25 MR. COOK: Mr. Garvey, I have another question on the

1 river. As you travel down the river, you pass an outflow
2 canal where water is coming from the Yuba Goldfields; is
3 that correct?

4 MR. GARVEY: Yes, sir.

5 MR. COOK: Have you observed any discoloration or other
6 changes in the water coming from the outflow?

7 MR. GARVEY: It is usually remarkable.

8 MR. COOK: In what respect?

9 MR. GARVEY: It is discolored.

10 MR. COOK: That is usually?

11 MR. GARVEY: To my recollection, yes.

12 MR. COOK: Have you ever attempted to take the
13 temperature of the water coming from the Goldfields?

14 MR. GARVEY: I can't say that I have, but one time I
15 got out of the boat, actually twice I've gotten out of the
16 boat this summer, most recently with two young boys. And
17 it's very warm water, sort of splash through the knee-high
18 water.

19 MR. COOK: How did you determine that it was warm, with
20 your hand or --

21 MR. GARVEY: It was much warmer than the river.

22 MR. COOK: Ms. Rose, do you have anything to add on
23 that last question?

24 MS. ROSE: No.

25 MR. COOK: That is all I have, Mr. Brown.

1 H.O. BROWN: Thank you, Mr. Cook.

2 Mr. Lilly.

3 ---oOo---

4 CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

5 BY YUBA COUNTY WATER AGENCY

6 BY MR. LILLY

7 MR. LILLY: Ladies and gentlemen, my name is Alan
8 Lilly. I am the lawyer for Yuba County Water Agency. I
9 know some of you were not here this morning. I just wanted
10 to introduce myself.

11 Ms. Rose, when did you become the river keeper for the
12 South Yuba River Citizens League?

13 MS. ROSE: I actually just started in early December,
14 but my previous employment was with Friends of the River.
15 So I was working on Yuba River issues.

16 MR. LILLY: Is your testimony regarding the flow
17 fluctuations that occurred in 1998 based on your personal
18 knowledge or is that based on your review of the complaints
19 that South Yuba River Citizens League filed with FERC?

20 MS. ROSE: Actually, it is based on personal knowledge
21 of the project because I happened to be the person filing
22 the complaints for Friends of the River in 1998.

23 MR. LILLY: Were you actually out on the river or just
24 prepared the documents?

25 MS. ROSE: I prepared the document, and I got the

1 information off the gauge. So when I filed the complaints I
2 got -- I cited sightings SYRCL told me about and I cited the
3 information off of the gauge which I pulled off the
4 website.

5 MR. LILLY: You were not out on the river to personally
6 observe those events?

7 MS. ROSE: I was not.

8 MR. LILLY: Mr. Eicher, you testified regarding a
9 potential Lower Yuba River parkway; is that correct?

10 MR. EICHER: That's correct.

11 MR. LILLY: Have you done any quantitative analysis
12 regarding the potentially economic costs and the economic
13 benefits of such a parkway?

14 MR. EICHER: It's just in concept form right now.

15 MR. LILLY: Finally, Mr. Garvey, do you know who owns
16 the Daguerre Point Dam?

17 MR. GARVEY: I believe it is an Army Corps of Engineers
18 project.

19 MR. LILLY: Who operates the fish ladders at Daguerre
20 Point Dam?

21 MR. GARVEY: I believe it is Army Corps of Engineers
22 legally responsible. Although I believe there is also some
23 conflict as to who is supposed to be operating them.

24 MR. LILLY: I have no further questions.

25 Thank you.

1 H.O. BROWN: Mr. Minasian is not here.

2 Mr. Gallery.

3 ---oOo---

4 CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

5 BY BROPHY WATER DISTRICT

6 BY MR. GALLERY

7 MR. GALLERY: Ladies and gentlemen, my name is Dan
8 Gallery. I represent Brophy Water District.

9 I wanted to ask Mr. Garvey, you're the Executive
10 Director of SYRCL, the league?

11 MR. GARVEY: Yes, sir.

12 MR. GALLERY: Been so since September 1977?

13 MR. GARVEY: September 28th, yes.

14 MR. GALLERY: What is your background, Mr. Garvey,
15 educational background, career background?

16 MR. GARVEY: Prior to SYRCL, I was -- I owned a
17 consulting company for seven years, I believe, in Lake Tahoe
18 and in San Francisco.

19 MR. GALLERY: What kind of consulting did you do?

20 MR. GARVEY: We did media consulting.

21 MR. GALLERY: In connection with what kind of activity?

22 MR. GARVEY: Political campaigns, mostly.

23 MR. GALLERY: What is your educational background?

24 Could you tell us?

25 MR. GARVEY: Graduated from St. Mary's High School in

1 1983, Boston University in 1988 with a degree in finance and
2 attended University of Texas at Austin for public policy.

3 MR. GALLERY: St. Mary's in California?

4 MR. GARVEY: Westfield, Massachusetts.

5 MR. GALLERY: Have you had any experience in
6 agriculture?

7 MR. GARVEY: None whatsoever.

8 MR. GALLERY: Your headquarters of SYRCL is where?

9 MR. GARVEY: In Nevada City, 216 Main Street.

10 MR. GALLERY: Your work now with SYRCL is a full-time
11 position?

12 MR. GARVEY: Yes, sir, and then some.

13 MR. GALLERY: I take it you haven't conducted any kind
14 of studies of the agricultural products that are grown in
15 the Brophy Water District or Yuba County Water Agency or
16 Cordua Irrigation District?

17 MR. GARVEY: None whatsoever. We wouldn't have the
18 resources to do that.

19 MR. GALLERY: You don't know anything about the
20 agricultural practices or the use of water in those
21 districts?

22 MR. GARVEY: Only that there is some.

23 MR. GALLERY: Let's see, your testimony is to the
24 effect the water districts have not -- some of the water
25 districts have not adopted a groundwater management plan.

1 Can you tell us what a groundwater management plan does
2 under California law?

3 MR. GARVEY: I wouldn't be able. I am not expert on
4 that, no.

5 MR. GALLERY: Do you know whether any of these water
6 districts are required to adopt a groundwater management
7 plan?

8 MR. SANDERS: I object he is not here to testify as a
9 legal expert. He is here to testify based on his personal
10 knowledge of South Yuba Citizens League and what he has seen
11 on the river. He is being asked questions about the
12 districts' obligations under California law. That is beyond
13 his realm of expertise.

14 H.O. BROWN: Mr. Gallery.

15 MR. GALLERY: The witness made quite a point of the
16 fact, as did his attorney in his opening statement, that
17 these management plans and conservation programs have not
18 been adopted. And Mr. Garvey's testimony really
19 concentrates on those admissions, what he calls failures to
20 do what he thinks are necessary.

21 So I want to merely find out from him the basis of his
22 assertions and why he thinks there have been derelictions
23 here by the districts.

24 MR. GARVEY: I'm sorry.

25 H.O. BROWN: I overrule the objection, but I think your

1 point is made also.

2 You can proceed accordingly.

3 MR. GALLERY: You don't really know, then, Mr. Garvey,
4 whether any of the districts you referred to are actually
5 practicing water conservation programs, do you?

6 MR. GARVEY: All I know is what was in responses to our
7 public act's requests.

8 MR. GALLERY: But the question is: Do you know whether
9 they are, in fact, practicing any water conservation
10 programs?

11 MR. GARVEY: No. Not beyond what was responded to by
12 the districts.

13 MR. GALLERY: The questions that were put to the
14 districts did not ask them where they were practicing water
15 conservation programs, but whether they had documentation
16 relating to water conservation programs; isn't that
17 correct?

18 MR. GARVEY: I am not sure if that is correct. Could
19 you repeat that?

20 MR. GALLERY: The question that was put to the
21 districts under the Public Records Act was what
22 documentation they could provide to you with respect to
23 water conservation programs or practices.

24 MR. GARVEY: Yes. We asked for plans. And, for
25 instance, the response from the Brophy Water District is

1 that Brophy Water District has not adopted any conjunctive
2 use program. The response to number three was that the
3 Brophy Water District has not adopted a groundwater
4 management plan under Assembly Bill 3030, and that the
5 Brophy has records of usage of West WA water by month and
6 year. So, you had some records, but there was not a
7 groundwater management plan.

8 MR. GALLERY: The records Brophy did advise you it
9 has, there has been no request made by your organization to
10 review any of those records, has there?

11 MR. GARVEY: I am not certain of that at all.

12 MR. GALLERY: I believe that is all I have, Mr.
13 Chairman.

14 H.O. BROWN: Thank you, Mr. Gallery.
15 Mr. Morris.

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17 CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

18 WESTERN WATER COMPANY & WESTERN AGGREGATES, INC.

19 BY MR. MORRIS

20 MR. MORRIS: Thank you, and good afternoon, I only have
21 a couple of questions.

22 Mr. Calvert, you mentioned that you had gone down a
23 couple times on an ATV and observed stranded salmon. I am
24 trying to determine exactly where you found these salmon.

25 MR. CALVERT: Just north of the farm in the main stem

1 of the river, a little to the east of where I live.

2 MR. MORRIS: Is that an area known as the Yuba
3 Goldfields property?

4 MR. CALVERT: Well, Yuba Goldfields seem to claim
5 everything.

6 MR. MORRIS: Is it on the area that they claim?

7 MR. CALVERT: I just call it the main stem of Yuba
8 River. If Yuba Goldfields, Western Aggregate claims to own
9 it, then I don't think so.

10 MR. MORRIS: It is on that region of controversy?

11 MR. CALVERT: No, I don't think so.

12 MR. MORRIS: Thank you.

13 Mr. Eicher, you're with the Bureau of Land Management;
14 is that correct?

15 MR. EICHER: That's correct.

16 MR. MORRIS: You stated in your testimony that you're
17 with the Folsom field office?

18 MR. EICHER: That's correct.

19 MR. MORRIS: How does that, in the BLM lay of things,
20 does the Folsom field office report to an area office?

21 MR. EICHER: We are considered the area office. We
22 report to the state office.

23 MR. MORRIS: You report directly to the state office?

24 MR. EICHER: That's correct.

25 MR. MORRIS: Has BLM taken any official policy, for

1 lack of a better term, the Lower Yuba River riparian
2 corridor? I don't know if you have a better name for it,
3 the project

4 MR. EICHER: Position in what regard?

5 MR. MORRIS: Have they taken any official action, have
6 you gotten any direction from Congress to create this river
7 corridor or anything like that?

8 MR. EICHER: Nothing has been legislatively required
9 for us to do that. No, sir.

10 MR. MORRIS: Are you here as an official of BLM today?

11 MR. EICHER: I am.

12 MR. MORRIS: And you have talked to the Interior
13 Department counsel about being here?

14 MR. EICHER: I have not.

15 MR. MORRIS: How about the state office?

16 MR. EICHER: I have not. My supervisor may have.

17 MR. MORRIS: Thank you.

18 I only have one more question and it is for Mr.
19 Garvey.

20 Being an old Corps of Engineers' person myself, I am
21 just curious on, you mentioned there is conflict, at least
22 you perceived a conflict, in operating the Daguerre fish
23 ladders. I was wondering if you could elaborate on that?
24 Who do you see the conflict with?

25 MR. GARVEY: That would be speculation on my part, but

1 I --

2 MR. MORRIS: You brought it up.

3 MR. GARVEY: I believe some part of conflict between
4 Fish and Game and the Army Corps as to where the resources
5 come from to maintain the fish ladder.

6 MR. MORRIS: Is that the resources or the obligation?

7 MR. GARVEY: The obligation, the financial resources.

8 MR. MORRIS: Thank you.

9 That is all I have, Mr. Brown. Thank you.

10 H.O. BROWN: Thank you, Mr. Morris.

11 So the conflict is between the Corps and the
12 department?

13 MR. GARVEY: Fish and Game. But again it is
14 speculation.

15 H.O. BROWN: Mr. Cunningham.

16 MR. CUNNINGHAM: Your Honor, I have no
17 cross-examination for these witnesses, but we thank them for
18 their testimony.

19 H.O. BROWN: Thank you.
20 Department of Water Resources.
21 Staff.

22 MR. FRINK: Staff has no questions.

23 H.O. BROWN: All right.
24 Redirect, Mr. Sanders.

25 MR. SANDERS: We have no redirect and I move that all

1 of SYRCL's exhibits numbered S-SYRCL-1 through -18 be
2 admitted into the record and S-SYRCL-19, testimony of Bruce
3 Herring, be excluded because Mr. Herring was not here
4 today.

5 H.O. BROWN: Are there any objections to the admission
6 of those exhibits into evidence?

7 MR. LILLY: Could I have just a moment, Mr. Brown? I
8 have to look through all these and see.

9 H.O. BROWN: Would you like to take a two minute off
10 the record?

11 MR. LILLY: One minute is probably sufficient.

12 H.O. BROWN: One minute off the record.

13 (Brief break taken.)

14 H.O. BROWN: Back on the record.

15 MR. LILLY: Mr. Brown, I just have my standard
16 objection regarding the hearsay of content of certain of
17 these exhibits, would be Exhibits S-SYRCL-7, -8, -9, -10 and
18 -12. Again, on the Board's rule, I understand they can be
19 admitted into the record, subject to the understanding these
20 are hearsay and, therefore, subject to the limitations on
21 the use of hearsay in the Government Code.

22 And the other thing is regarding Exhibits 12 and 17, 17
23 being the testimony of Mr. Eicher. I just object on the
24 grounds of relevance. The issues of public access and
25 proposed parkway just aren't relevant to the issues in this

1 hearing.

2 MR. SANDERS: We respectfully disagree.

3 H.O. BROWN: Hold off. We will give you the last
4 go-round here. There are several behind you. We will give
5 you the final shot at the concern here.

6 Mr. Gallery.

7 MR. GALLERY: Mr. Chairman, I wanted to object to the
8 admission of testimony of Mr. Garvey insofar as he discusses
9 at length the failure of the districts to adopt certain
10 plans or programs in that he is not familiar with any
11 agricultural practices or whether any of these programs are
12 required.

13 H.O. BROWN: Which exhibit is that, which one
14 specifically?

15 MR. GALLERY: I don't have the number on the exhibit.

16 MR. SANDERS: That would be Exhibit 15.

17 MR. GALLERY: Yes. That is only to that portion of his
18 testimony. A portion of his testimony relates to other
19 matters which appear not to be objectionable. But the
20 portion I would object to begins on Page 4, Line 27 and
21 continues to Page 7, Line 2.

22 H.O. BROWN: I will come back to that before I rule.

23 Let's hearre what Mr. Morris has to say about that.

24 MR. MORRIS: Mr. Brown, I am only here to object to the
25 testimony of Mr. Eicher for relevancy as well. His

1 testimony states that he can't provide specific information
2 regarding stream flows and temperatures. Thus, I think it
3 is irrelevant to these proceedings.

4 H.O. BROWN: Mr. Eicher was listed as an expert witness
5 also, Mr. Sanders. You may respond to that in just a
6 moment.

7 Mr. Baiocchi.

8 MR. BAIOCCHI: I support that all the exhibits be
9 included in the record. It is only fair.

10 H.O. BROWN: Thank you.

11 Mr. Cook.

12 MR. COOK: Mr. Brown, I'd just like to make several
13 comments, one with respect to the public access issue.
14 Public trust is an issue, as I understand it, in these
15 proceedings. I looked in the key issues. It may not be set
16 out directly, but it underlies everything that we are
17 doing. So the public trust includes the public access and
18 public use of river and its corridor. And the California
19 Constitution includes public access to navigable waterways.
20 So, I believe with respect to the public trust it is a vital
21 issue and the public use of river itself.

22 H.O. BROWN: Thank you, Mr. Cook.

23 Mr. Sanders, you may conclude.

24 MR. SANDERS: First of all, with regard to Shawn
25 Garvey's testimony, as our little colloquy here earlier was

1 about, Mr. Garvey testified about SYRCL's activities, what
2 SYRCL did in terms of the Public Records Act. We requested
3 records. Actually it was me who did it. We requested
4 records from the agencies, and then Mr. Garvey examined what
5 records we received and based his testimony on what he
6 actually received from these agencies. He's not testifying
7 about what the law is for agricultural practices nor is he
8 testifying about agricultural practices. And, in fact, he
9 admitted he knows nothing about agricultural practices,
10 other than what he reads in these hearings and these records.

11 So I think for the purposes that it was submitted his
12 testimony is admissible.

13 With regard to Mr. Eicher, first of all, yes, we did
14 originally designate him as an expert witness. But as we
15 went on in developing his list testimony, it was apparent
16 that he was being asked to testify for very limited purposes
17 and some have argued perhaps even irrelevant purposes,
18 though I would differ on that. And these are all within his
19 personal knowledge. He is not being asked to speculate. He
20 is not being asked here as an expert. He is asked here to
21 testify for the Bureau of Land Management on their
22 interests. He did testify that they actually owned the
23 property where the south diversion exists. So BLM does have
24 some interest here, and this is just an opportunity for them
25 to put a little bit of information on the record.

1 And, as well, Mr. Cook said the public trust is a
2 broader concept than merely fish and flows, and that is the
3 reason why we tried to bring him in in this particular place
4 and time.

5 I believe that addresses all of the objections. Just
6 one other thing. SYRCL, South Yuba Citizens Legal, SYRCL,
7 S-Y-R-C-L. CERCLA, C-E-R-C-L-A, is a comprehensive
8 environmental planning and liability act. Mr. Gallery
9 referred to us CERCLA a few times, and I just wanted to set
10 it straight. We are SYRCL, not CERCLA.

11 H.O. BROWN: Give the acronym again, if you would,
12 please.

13 MR. SANDERS: South Yuba River Citizens League, SYRCL.

14 H.O. BROWN: Mr. Cook.

15 MR. COOK: I am sorry, I forgot to mention something,
16 Mr. Brown.

17 With respect to the public access issue, as far as I
18 can recall, the original Department of Fish and Game report
19 and request to the Water Resources Control Board, their
20 rather lengthy report includes the fact that there should be
21 public access to the river. I think that has been an issue
22 from the very beginning.

23 H.O. BROWN: Thank you, Mr. Cook.

24 Mr. Sanders, did I understand you correctly, with Mr.
25 Eicher you would like to change that from an expert witness

1 that may --

2 MR. SANDERS: Yes. I believe we originally said Mr.
3 Eicher and Ms. Rose were. As I said, as we developed their
4 testimony we concluded they were not experts and, therefore,
5 didn't include their qualifications in the record.

6 H.O. BROWN: I think that it would help ease the
7 concerns of some of the other parties if you change those as
8 you're suggesting here. So we will change that on the
9 record, that they are not expert witnesses and you are
10 asking for their opinions on these matters and that helps.

11 MR. SANDERS: Thank you.

12 H.O. BROWN: Mr. Gallery, your concern about the
13 agricultural and your agencies and recharge, groundwater
14 recharge, conjunctive use and such, your point was well
15 made. And that is on the record and the Board and staff
16 understands the spirit in which both of you and the
17 witnesses were providing testimony.

18 MR. GALLERY: Thank you.

19 H.O. BROWN: On that basis, then, ladies and gentlemen,
20 we will admit those exhibits as described into the record.

21 Mr. Baiocchi.

22 MR. BAIOCCHI: I am going to make an opening
23 statement.

24 H.O. BROWN: Yes, sir.

25 MR. BAIOCCHI: I am limited to 20 minutes, and I will

1 make it as short as I can.

2 To begin with, the Lower Yuba River, the complaint and
3 hearing process for me has been a very, very wild adventure.
4 I have certainly learned a lot. I started working on the
5 complaint in about 1986, '87. It was filed in 1988. I
6 prepared the complaint. I testified. I put together all
7 the exhibits. I did all the paperwork and provided all the
8 copies to the Board. It was, like I say, a very wild
9 adventure, and I am so happy I did it.

10 We've had several years of delays, and I don't want to
11 get into that and I am not here to embarrass the Board or
12 whatever, we finally made it. We have another hearing with
13 new information, and we have the opportunity to do what we
14 should be doing from the very beginning.

15 We have new information that has been through
16 cross-examination, and we've got a listed species,
17 threatened spring-run and steelhead trout that exist in the
18 river all year, and related to water temperatures in order
19 to protect those species.

20 The fall-run are also candidates for listing, and who
21 knows the way things are going in California. We have a
22 new player on the block; that is, the U.S. Marine Fisheries
23 Service. We have another new player on the block and that
24 is the South Yuba River Citizens league, aka SYRCL. They
25 have really grown and they have a lot of people, and they're

1 very, very concerned about the river and they are very, very
2 interested in it. And they are working -- a lot of people
3 working on that river. They want the river protected. I
4 believe their testimony was meaningful.

5 With respect to the testimony that we are going to
6 provide today, Felix Smith is our only witness, and there is
7 a reason why he is the only witness. That is the last
8 hearing when the complaint was first heard we had three
9 witnesses. And it was miked and we had about, as I recall,
10 36 exhibits that I submitted. And I felt strongly that you
11 come in with a witness that is the cream of the crop and we
12 don't need people like myself, who I was a witness at the
13 last hearing, to appear. For that reason nor do we need a
14 box full of new evidence. We have a very good hearing
15 record.

16 And I want to thank the Board and its staff, the people
17 that are not here who worked on that Draft Decision. It is
18 a very, very Valley good decision. They worked very hard.
19 There should be modifications to it, and Felix will hit on
20 that there. We are getting there. We are just about
21 there.

22 In closing statement I will hit on a lot of issues,
23 rather than hit on them right now in the opening statement.
24 So, when that day comes, if I am still hanging around, I
25 will do it.

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DIRECT EXAMINATION OF
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
BY MR. BAIOCCHI

MR. BAIOCCHI: Felix, did you take the oath?

MR. SMITH: Yes. I swore.

MR. BAIOCCHI: Have you reviewed the three submittals that we have, known as S-CSPA-1, S-CSPA-2, S-CSPA-3?

MR. SMITH: Yes. I don't see them as that name.

MS. BAIOCCHI: But this is how they've identified them. MR. SMITH: Yes.

MR. BAIOCCHI: Thank you.

Have you read that testimony and is it a true and correct copy of the testimony?

MR. SMITH: Yes.

MR. BAIOCCHI: Of your own testimony?

Please state your name and address.

MR. SMITH: My name is Felix E. Smith. I live at 4720 Talus Way in Carmichael, California.

MR. BAIOCCHI: What is your business or profession?

MR. SMITH: I am retired.

MR. BAIOCCHI: Please describe your background and experiences.

MR. SMITH: My background is, as indicated in my Q&E statement, I have a degree from Humboldt State in 1956. I have been a professional biologist since 1956, '57, working

1 in water and water management issues on the West Coast with
2 about 25 to 30 years now in California.

3 MR. BAIOCCHI: Would you please summarize your
4 testimony, Felix.

5 MR. SMITH: I will add some -- I haven't really made
6 any significant changes. I want to make a couple comments
7 and further clarify my position, as well as Cal SPA's
8 position in anticipation of some comments that were made
9 yesterday and this morning.

10 I believe the flows in the California Department of
11 Fish and Game's Fish and Management Plan for the Yuba River
12 and the AFRP flows of Fish and Wildlife Service should be
13 the new interim standard for the Lower Yuba and that an
14 adaptive management program be immediately implemented.

15 The need to meet temperature targets could require
16 releasing additional water above the minimum flows. The
17 actual flows released must be acknowledged and documented.
18 This is necessary to identify the various rampings that have
19 occurred since my first knowledge of it in 1991 where they
20 dropped overnight about 1,000 cubic feet per second,
21 stranding several hundreds redds from chinook salmon. This
22 flow ramping and reduction must cease if there is going to
23 be any serious restoration of salmon and steelhead in the
24 Lower Yuba River.

25 There should be studies undertaken of the salmon, both

1 spring and fall, spawning and rearing in the range of a
2 thousand, 1,500 2,000 and 2,500 cubic feet per second as
3 measured at Smartville gauge. In addition, there should be
4 an adaptive management operations team for the Lower Yuba
5 River. Part of this team's activity is real-time monitoring
6 and real-time evaluation of data.

7 Following this, there must be an ability to make
8 real-time changes in the operation of New Bullards Bar and
9 Englebright Reservoirs.

10 I want to clarify that all invasion water rights
11 holders owe a portion of their water rights to maintain
12 the salmon and steelhead in the Lower Yuba River in good
13 condition. The public trust theory being that flows needed
14 to protect public trust interests were never allocated.
15 Therefore, upstream diverters and water users must
16 contribute to the Lower Yuba River needs as well as Yuba
17 County Water Agency.

18 Yuba County Water Agency may be responsible for
19 releasing the flows, the timing of those flows and the
20 temperatures of those flows. But everybody must contribute
21 to the flows in the Lower Yuba River.

22 Fish and other aquatic life, water in which they live
23 and the bed and shore lines of the Lower Yuba River are
24 impressed by the public trust protection. Therefore, a
25 habitat conservation and management plan for the Lower Yuba

1 River, the adjacent lands of the flood plain is needed.
2 Such a plan would have aquatic and terrestrial habitat
3 components, as well as a flood dam and reduction component.
4 Recreational aesthetics, open space component activities and
5 activities would also be a part of the overall plan.

6 The primary purpose is to provide good condition to
7 aquatic life in the Lower Yuba River, based on the needs of
8 spring- and full-run chinook salmon and needs of steelhead.
9 The in-good condition is a goal that must be met, but it is
10 a moving target, under conditions of varying water supply
11 and annual runoff discharges. This is going to be the key
12 duty of the any kind of management plan, any kind of
13 adaptive management team for the Lower Yuba River.

14 Thank you.

15 MR. BAIOCCHI: That concludes the testimony of Felix
16 Smith.

17 H.O. BROWN: Expand just a moment on your flood
18 control, you mentioned and adaptive flood control management
19 plan, too. What did you mean by that, Mr. Smith?

20 MR. SMITH: If there is going to be a parkway on the
21 Lower Yuba, we are going to have to look at more than just
22 the wetted perimeter. There is terrestrial wildlife up
23 there that is just as important in many respects as the
24 aquatic wildlife.

25 When you take a river corridor, you are going to have

1 to take some portion of it and identify it. I say that you
2 take the flood plain or up to the levees, whatever it is
3 you've got up there, and run it from Bullards Bar down to
4 the confluence with the Feather. The flood reduction or are
5 a flood damage reduction is necessary so we don't allow
6 encroachments into the flood plain. When there is this high
7 water, damage occurs.

8 Let's be proactive and keep those kinds of structures
9 out of the flood plain now.

10 H.O. BROWN: Thank you.

11 Thank you, Mr. Baiocchi.

12 Ready for cross?

13 MR. BAIOCCHI: Yes, ready for cross.

14 H.O. BROWN: Mr. Edmondson.

15 Not here.

16 Mr. Gee.

17 MR. GUINEE: He had to leave. No questions.

18 H.O. BROWN: Mr. Sanders.

19 MR. SANDERS: Mr. Brown, I think you virtually asked my
20 question.

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CROSS-EXAMINATION OF
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
BY SOUTH YUBA RIVER CITIZENS LEAGUE
BY MR. SANDERS

MR. SANDERS: Can you just explain briefly what exactly do you mean when you talk about an adaptive management program? What is that?

MR. SMITH: Let me read it to you, rather than make one up. I will turn to the gods of Cal/Fed and read what they say:

Adaptive management, the process of redefining and redefining management actions as a process unfolds and as results are obtained. Adaptive management is an interactive and iterative approach to decision making that incorporates feedback loops for evaluating actions and injecting new information as it becomes available.

(Reading.)

This is the reason why, as we get data on any kind of action, there has to be some kind of way to not only put it into the loop, but to make real-time changes in the operation.

MR. SANDERS: I guess what I am asking is, does the Draft Decision set fairly strict parameters for how -- what

1 the flows should be and what the temperatures should be?
2 How does that jive with adaptive management? What would you
3 have the Board do?

4 MR. SMITH: I think the Board is and most of the
5 people are sitting on a rigid standard, minimum standard. I
6 can understand that.

7 But we are looking at a river that unimpaired flows is
8 2.4 million. We are also looking at a river system where
9 there is about 500,000 acre-feet diverted out of the
10 system. Do they have a responsibility to provide to the
11 lower river? I believe, yes. How is that water going to
12 come? We should know, the fishery manager should know, so
13 should Yuba County Water Agency know, when that water is
14 going to come down from the various upstream reservoirs into
15 the system so they can operate their system in conjunction
16 with fish needs downstream of New Bullards Bar. That is
17 just one aspect of it.

18 If there is going to be a water transfer, and I think
19 according to Yuba County's own data, there has been 800- or
20 900,000 acre-feet of water transferred in the last few
21 years. Where is the water going to come from? I know of
22 one action in 1991 where water was transferred and the flows
23 were abruptly shut down, stranding redds, ungodly amounts,
24 which is the reason why I am back in the Yuba, basically,
25 which happened in 1991. We don't need that.

1 MR. SANDERS: I have no further questions.

2 Thank you.

3 H.O. BROWN: Mr. Cook.

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5 CROSS-EXAMINATION OF

6 CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

7 BY MR. COOK

8 MR. COOK: I believe your testimony, Mr. Smith, is
9 ramping or changing the flows of the water rapidly is
10 extremely detrimental to fish, especially during spawning
11 season?

12 MR. SMITH: Correct.

13 MR. COOK: You're talking about 1991. Was that a trip
14 we took with a canoe?

15 MR. SMITH: Right, where I got dumped, when I got
16 dumped.

17 MR. COOK: Well, I apologize for that. But we, at that
18 time, we observed large number of salmon redds --

19 MR. SMITH: Right.

20 MR. COOK: -- that were effectively dewatered or at
21 least much of the water was taken away?

22 MR. SMITH: Yes.

23 MR. COOK: Now, I don't know if you have made any check
24 into the pollution of waters from the Goldfields in the Yuba
25 River, have you?

1 MR. SMITH: No, I haven't.

2 MR. COOK: Would you consider -- well, let me go to
3 this:

4 You, I believe, were the primary party responsible for
5 the studies and activities which resulted from the loss of
6 wildlife, tremendous loss of wildlife, in the Kesterson
7 area; is that right?

8 MR. SMITH: Yes.

9 MR. COOK: So you have studied the area of pollution,
10 different types of water and the impact of that on wildlife?

11 MR. SMITH: To a degree, yes.

12 MR. COOK: So, would you believe that that is an issue
13 that should be considered in reviewing the question of Yuba
14 River flows and especially flows that might come out of the
15 Yuba Goldfields?

16 MR. SMITH: I would think that the water coming from
17 the Yuba Goldfields, the Yuba Goldfields the way they are
18 constructed with mounds and valleys with ponds in them, so
19 forth, would probably heat sink and with temperatures in
20 those particular ponds rising considerably above the
21 criteria necessary for salmonids.

22 MR. COOK: I believe -- do you know that there are gold
23 mining operations in the Goldfields.

24 MR. SMITH: I assumed being the name Goldfields, that
25 they are mining gold, I guess.

1 MR. COOK: Could have been historical?

2 MR. SMITH: Right.

3 MR. COOK: Any activities in the Goldfields that would
4 tend to pollute the river would be extremely important with
5 respect to the flows in the river?

6 MR. SMITH: It would be an issue, yes.

7 MR. COOK: I believe, Mr. Smith, that that covers my
8 cross-examination.

9 Thank you very much.

10 MR. SMITH: Okay.

11 MR. COOK: Thank you, Mr. Brown.

12 H.O. BROWN: Mr. Lilly.

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14 CROSS-EXAMINATION OF
15 CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
16 BY YUBA COUNTY WATER AGENCY
17 BY MR. LILLY

18 MR. LILLY: Good afternoon, Mr. Smith.

19 As you know from the 1992 hearing, I am Alan Lilly
20 representing Yuba County Water Agency. I have just a few
21 questions regarding your written testimony which the State
22 Board staff has marked as Exhibit S-CSPA-2.

23 Do you have that in front of you?

24 MR. SMITH: What is the title of it?

25 MR. LILLY: It is titled Written Testimony of Felix

1 Smith, not the summary but the more detailed one.

2 MR. SMITH: Okay.

3 MR. LILLY: I notice you have page numbers in the upper
4 right-hand corner. Could you look at Page 2 of that?

5 MR. SMITH: Yes.

6 MR. LILLY: I have a question about the fourth
7 paragraph down. It is -- the first sentence says:

8 The chinook salmon spring-run into the Yuba
9 River has steadily declined, with only a
10 remnant run population remaining. (Reading.)

11 Do you see that?

12 MR. SMITH: Yes.

13 MR. LILLY: Are you aware that the spring-run chinook
14 salmon run in the Yuba River was actually totally extirpated
15 from the Lower Yuba River in the 1920s and '30s with the
16 construction of Daguerre Point Dam and the inadequate fish
17 ladders that occurred during the time in which the Army
18 Corps of Engineers --

19 MR. SANDERS: Objection. He is assuming facts not in
20 evidence. He's asking for -- he's assuming that they were
21 actually extirpated when there has been no evidence
22 submitted that that's actually been the case.

23 H.O. BROWN: Mr. Lilly.

24 MR. LILLY: Mr. Sanders was not here in 1992 at the
25 hearing, but there was extensive evidence at time. Mr.

1 Smith obviously was in the hearing at that time.

2 Furthermore, with an expert witness like this normally we
3 are allowed to ask leading questions like that.

4 MR. SANDERS: I stand corrected.

5 H.O. BROWN: I am going to allow the question if you
6 know the answer, Mr. Smith.

7 MR. SMITH: There is some writings to that effect. But
8 I also know that the chinook salmon are variable. They will
9 take advantage of habitat when it is available. They will
10 also say that spring-run are in the Feather. There is no
11 reason why they can't be in the Yuba, particularly when
12 conditions are favorable.

13 It wouldn't take very long for conditions that are
14 favorable, like we have had the last half a dozen years of
15 nice water supply, for a nice run to build up on its own if
16 the conditions are, in fact, favorable for spring-run
17 chinook.

18 MR. LILLY: Do you know what the current estimate is of
19 the spring-run annual adult-run into the Yuba River?

20 MR. SMITH: I think the last numbers I heard were
21 probably less than a thousand.

22 MR. LILLY: But isn't it correct if the run was
23 essential extirpated in the 1920s and '30s, now a thousand,
24 that is not a steady decline from the 1920s to now?

25 MR. SMITH: When you're dealing with a population that

1 is that low, it wouldn't take a very small change in
2 mortality to have an increase or decrease overnight. I
3 think that is evident of what is happening up on Butte
4 Creek.

5 MR. LILLY: Let me ask the question again. Has the
6 population of spring-run Yuba County Water Agency in the
7 Lower Yuba River, in fact, steadily declined from the 1920s
8 to the present?

9 MR. SMITH: I would say that it is in very low
10 population level.

11 MR. LILLY: Do you consider a change from zero in the
12 1920s to 1,000 today to be a steady decline?

13 MR. SMITH: I don't know whether there are specific
14 data that go back to that on an annual basis. I don't
15 believe that the Department of Fish and Game, for example,
16 has conducted annual spawning surveys for spring-run in the
17 Yuba River. So, therefore, the data is not there.

18 MR. LILLY: Later in that same paragraph you state the
19 spawning escapement in the Yuba River -- let me read the
20 sentence here so I get it right. About the sixth line down,
21 in same paragraph, you say:

22 However, escapement to the Yuba River was
23 only slightly above average. (Reading.)

24 Do you see that?

25 MR. SMITH: Yeah.

1 MR. LILLY: I think your next sentence says:
2 Before the project construction, the run
3 averaged 13,800 adults. (Reading.)
4 Do you see that?
5 MR. SMITH: Correct.
6 MR. LILLY: Your numbers, you have a number for 1995
7 and for 1996 you say 27,520.
8 Do you see that?
9 MR. SMITH: Uh-huh.
10 MR. LILLY: For 1997 you say 25,778.
11 MR. SMITH: Right.
12 MR. LILLY: For 1998 you say 30,802?
13 MR. SMITH: Uh-huh.
14 MR. LILLY: For 1999 you have a number of 23,049,
15 correct?
16 MR. SMITH: Uh-huh.
17 MR. LILLY: Isn't it true, Mr. Smith, that those
18 numbers are substantially above preproject average of
19 13,800?
20 MR. SMITH: Yes. If you'd look at the water years for
21 1995, '96, '97 and '98 and '99, you will see that the water
22 years and runoff in the Yuba are substantially higher than
23 what they have been for the long-term average. Fish are
24 going where the water is.
25 MR. LILLY: Let's go forward to Page 10 of Exhibit 2.

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CROSS-EXAMINATION OF
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
BY WESTERN WATER COMPANY & WESTERN AGGREGATES, INC.
BY MR. MORRIS

MR. MORRIS: Mr. Smith, this is primarily a follow-up to Mr. Cook's line of questioning. He was asking you questions about the Goldfields, which he tends to do.

Are you personally aware of -- have you personally been out on the Goldfields property?

MR. SMITH: I was out in Goldfields -- I guess the last time I was there -- I wasn't on the field trip. It was '92. I've been invited out there, but I haven't had the time to get there out of my busy retirement schedule.

MR. MORRIS: I'm envious.

So you have no personal knowledge of any pollution or anything going on out in the Goldfields property?

MR. SMITH: No. I do know the operation of it. I've seen aerial photos of some of the operations. I take what Mr. Cook says, that the water coming out of some of these ponds is tainted. So, therefore, there must be some soil agitation in there. There is some silt-laden water returning to the river.

I do realize that the Yuba Goldfields, which is mounds and ponds and so forth, that any seepage from there could very well be heated above what would be normal river

1 temperature water, temperature of the water.

2 MR. MORRIS: You are not aware of any chemical
3 pollutants or anything of that nature?

4 MR. SMITH: No, sir.

5 MR. MORRIS: That is all I have.

6 Thank you.

7 H.O. BROWN: Mr. Cunningham.

8 MR. CUNNINGHAM: Thank you. I have a few questions,
9 Mr. Brown.

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11 CROSS-EXAMINATION OF
12 CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
13 BY DEPARTMENT OF FISH AND GAME
14 BY MR. CUNNINGHAM

15 MR. CUNNINGHAM: Good afternoon, Mr. Smith. My name is
16 Bill Cunningham, representing the Department of Fish and
17 Game.

18 I had so much testimony and I have so few questions, I
19 apologize. I feel like I should have more.

20 But I did want to ask a point of clarification. You
21 were talking about, I think Mr. Lilly, spring-run salmon.
22 And Mr. Lilly's question indicated that at some point in
23 time in the early 1920s there may have been as few as no
24 spring-run salmon in the Yuba River. A subsequent question
25 about the fact that up to a thousand a day, maybe an

1 increase or decrease.

2 I wanted to know, do you have any information about
3 whether -- about what the Yuba River historically had before
4 the 1920 construction of Daguerre Dam?

5 MR. SMITH: No. I have to go back to some of the
6 documents that were done -- some of Fish and Game's
7 historical records. But I don't think that -- there were
8 the Creamer survey or surveys being done today, in many
9 areas were done, routinely done. So I think a lot of data
10 is anecdotal in the sense of the bodies are not there
11 anymore. Even today I don't think that they run spawning
12 surveys for spring-run every year up there.

13 MR. CUNNINGHAM: Do you have any idea whether or not
14 spring-run salmon were in the Yuba River before the 1920s?

15 MR. SMITH: I make the assumption that spring-run was a
16 dominant run in the Central Valley based on all the evidence
17 that you can see. They probably ran from here to the San
18 Joaquin. I recognize that the San Joaquin -- they have been
19 extirpated south of the Delta, and the only place they are
20 left are a few small tributaries to the Sacramento,
21 including the Yuba.

22 MR. CUNNINGHAM: I notice some questions about the most
23 recent surveys on the fall-run chinook salmon and the
24 numbers. And I believe in your testimony, on Page 2 of your
25 testimony, the second to the last paragraph up from the

1 bottom.

2 MR. SMITH: Yes.

3 MR. CUNNINGHAM: Where you are talking about the
4 numbers, in 1995-96 and so forth.

5 You did reach the conclusion, as I read it in that
6 paragraph, you're stating that it should be noted that
7 spawning escapement of fall-run chinook salmon in the
8 Central Sacramento Valley rivers and streams, such as the
9 Feather and American Rivers, Butte and Battle Creeks, have
10 been at or near record all time highs the past few years.
11 Then you go on to refer to what has been happening on the
12 Yuba River.

13 Is it your understanding that the returns on the
14 Feather, American, Butte and Battle Creeks, when you say all
15 time record or near record highs, that the increment of
16 return in the last couple of years on those systems is
17 greater than the increment of increase and return on the
18 Yuba River?

19 MR. SMITH: Correct.

20 MR. CUNNINGHAM: For the same period of time?

21 MR. LILLY: Excuse me.

22 H.O. BROWN: Mr. Lilly.

23 MR. LILLY: I am going to object on the ground of lack
24 of foundation as to whether this witness has any knowledge
25 regarding the actual numbers on those rivers and, therefore,

1 not qualified to make the comparisons he is being requested
2 to.

3 H.O. BROWN: Mr. Cunningham, perhaps you can lay a
4 foundation.

5 MR. CUNNINGHAM: Thank you, Mr. Brown.

6 Mr. Smith, are you familiar with the fall-run chinook
7 salmon spawning escapement into the Feather, American, Butte
8 and Battle Creeks during the recent years, from 1995 through
9 1999?

10 MR. SMITH: I am aware of the numbers. I don't have
11 them with me. This came from a discussion with Mr. Nelson
12 who I understand you are going to have as part of your
13 department's entourage up here. I am also aware of the
14 amount of fish returning to the Yuba for the size of the
15 basin is not as high as I think it should be, and others
16 think it should be, compared to what is in the American, for
17 example, or in the Feather. For the percentage amount of
18 runoff, we should be getting more fish out of the Yuba than
19 we are getting.

20 H.O. BROWN: You need to lay a foundation for those
21 kinds of statements, if you can, Mr. Cunningham.

22 MR. CUNNINGHAM: Thank you, your Honor.

23 Mr. Smith, it sounds like -- do you have any personal
24 knowledge of those actual escapement levels in those systems
25 during the period of time 1995 to 1999?

1 MR. SMITH: Just the record.

2 MR. CUNNINGHAM: When you say "just the record," in
3 conversations with representatives of the Department of
4 Fish and Game?

5 MR. SMITH: Conversations and some of the data I have
6 seen in paper and some of the information I picked up from
7 the American, the American and the Yuba are not that much
8 different in size, 2.4 to 2.6 million acre-feet long. The
9 American 2.6; the Yuba 2.4. Why can the Yuba get only 25-
10 to 30,000 and the American is getting 60- and 70,000. I
11 would say the flows and the conditions in the American are
12 one heck of a lot better than they are in the Yuba.

13 MR. CUNNINGHAM: So, you are familiar with at least the
14 return rates, for example, on rivers like the American River?

15 MR. SMITH: Yes.

16 MR. CUNNINGHAM: In the period 1995 through 1999 --

17 MR. SMITH: Yes.

18 MR. CUNNINGHAM: At least as to that information,
19 information you received from representatives of the
20 Department of Fish and Game and you saw from other papers
21 and reports; is that correct?

22 MR. SMITH: Yes.

23 MR. CUNNINGHAM: All of that information you have taken
24 into consideration making this statement suggests at least
25 that the flow of the Feather, American, Butte and Battle

1 Creeks near record levels of returns have occurred in the
2 last few years?

3 MR. SMITH: For their particular watersheds, yes.

4 MR. CUNNINGHAM: Then, based upon that information, you
5 arrived at the conclusion that returns to the Yuba River
6 during that same period of time are not in the same
7 proportion of increase as on these other rivers?

8 MR. SMITH: Correct.

9 MR. CUNNINGHAM: Thank you, Mr. Smith.

10 I think that is actually all the questions I had.

11 H.O. BROWN: Thank you, Mr. Cunningham.

12 Staff.

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14 CROSS-EXAMINATION OF
15 CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

16 BY STAFF

17 MS. LOW: Mr. Smith, I have a couple of questions to
18 ask you, and actually I have one for you and one for Mr.
19 Baiocchi.

20 Your flow recommendations on Page 10 of your testimony,
21 you made some flow recommendations for the Lower Yuba
22 River. Were these recommendations based on results of
23 fishery studies, or how were these derived? They are
24 different from Fish and Game or the flows in the Draft
25 Decision.

1 MR. SMITH: Remember what I said, I supported the AFRP
2 flows and the flows in the Fish and Management Study as
3 interim, to be instituted immediately. What I would like to
4 have is these same flows I've got here really studied. I've
5 been on the river during most of October and saw spawning
6 fish at 2,200 cubic feet per second. So the idea that
7 that's not habitat is bogus. Let's find out how much
8 habitat is there.

9 Best way to do it is do the studies.

10 MS. LOW: Would you recommend your flows done on an
11 experimental basis to monitor fish populations and their
12 response?

13 MR. SMITH: I would like to see them considered as part
14 of the adaptive management basis.

15 MS. LOW: So would you recommend that your flows be
16 implemented rather than the flows in the Draft Decision, or
17 any other flow provision?

18 MR. SMITH: No. What I said is that the flows -- I
19 think the flows in the Draft Decision have got to be
20 improved, based on I come up with 429,000 acre-feet, which
21 is 25 percent of the runoff compared. If all streams in the
22 Central Valley only contributed 24 to 25 percent of their
23 runoff to the Sacramento and Delta, would we have fish
24 coming through the Delta up to the Yuba? Would we have a
25 complete cycle? Is that enough water? I don't think so.

1 That is the reason why I have stated that.

2 I would like to see this water go from Yuba right down
3 to the Delta and, if possible, out through the Golden Gate.
4 But it is going to be necessary for these flows to go
5 downstream to maintain the Delta pool because these fish
6 have got to travel in something. I don't want to see them
7 go in box cars or tanker trucks.

8 MS. LOW: Your flow recommendations are made based on
9 needs in the Lower Yuba River and out through the Delta,
10 then? You have made recommendations based on that?

11 MR. SMITH: I would like to ask a question, but I
12 can't.

13 I would like to see -- I endorsed the AFRP flows to be
14 instituted immediately along with the California Department
15 of Fish and Game fish and management flows. And I also want
16 to see the studies done that back up the thousand, 1,500,
17 2,000, even 2,500 for spawning and rearing of chinook
18 salmon, both spring and fall, in the Lower Yuba.

19 I took the low over here, and it is about 990,000
20 acre-feet. 990,000 acre-feet still allows a significant
21 amount of water for Yuba County Water Agency for their water
22 right holders. Now if, and I say if, it should be those
23 people who divert out of the basin, Nevada Irrigation
24 District, PG&E and so forth, they should be contributing to
25 some of this flow.

1 MS. LOW: Okay.

2 MR. SMITH: They may have to contribute 33 percent or
3 25 percent of their flows. That is part of their
4 responsibility. I don't believe this Board ever allocated
5 water away from the public trust.

6 MS. LOW: I was asking about those flow recommendations
7 and specifically how those particular flow recommendations
8 were derived.

9 MR. SMITH: I have been on the ground enough to see
10 dead fish and desiccated redds from fish that spawned at
11 higher levels, and I don't believe 700, that is the base
12 flow. There have been flows down there at 2,200. If they
13 dropped to 700, what happens to those spawning? What
14 happens to the eggs in the gravel? We are hurting and we
15 are not going to restoration of any resource if ramping of
16 that nature continues. And the SYRCL group testified that
17 it is going on routinely, not to the same degree. But I
18 don't think it is, quote, within the public interest for
19 that to occur and be beneficial to the resource.

20 MS. LOW: Thank you very much, Mr. Smith.

21 My other question, I think, would be directed toward
22 Bob Baiocchi.

23 Mr. Baiocchi, in your original complaint filed with the
24 State Board in 1988, was the complaint filed in terms of
25 violations of Fish and Game Code Section 5937?

1 MR. BAIOCCHI: I haven't got the complaint in front of
2 me, but it appears that was one of the allegations.

3 MS. LOW: Was it also or did the 1988 complaint also
4 address the broader public trust concerns over the adequacy
5 of instream flow conditions in the Lower Yuba River?

6 MR. BAIOCCHI: I believe it did, but I don't have it in
7 front of me. It's been a while.

8 MS. LOW: I don't have it in front of me either is why
9 I was asking the questions.

10 Thank you very much.

11 MR. FRINK: Hello, Mr. Smith. I do have a couple
12 questions.

13 I believe you stated the emphasis of a Yuba River
14 management plan should be on the protection of chinook
15 salmon and steelhead; is that correct?

16 MR. SMITH: Yes, the aquatic part.

17 MR. FRINK: If there were a conflict between providing
18 desirable conditions for chinook salmon and steelhead on the
19 one hand and providing desirable conditions for American
20 shad on the other hand, which species would you give
21 priority to?

22 MR. SMITH: Any of the anadromous fish, salmon.

23 MR. FRINK: That means in this --

24 MR. SMITH: Salmon and steelhead, spring-run, fall-run.

25 MR. FRINK: Looking at your testimony, on Page 8, it

1 basically describes how you determine the recommended flows
2 that you believe should be applied or studied, at least as
3 part of an adaptive management plan. And it appears you
4 developed these flow recommendations as a percentage of the
5 unimpaired flows on the river that approximates the
6 percentage of instream flow requirements Judge Hodge adopted
7 on the American River; is that correct?

8 MR. SMITH: Correct.

9 MR. FRINK: In doing -- in developing your flow
10 requirements or your flow recommendations, did you make an
11 evaluation of the habitat recommendations in the Department
12 of Fish and Game Fishery Management Plan?

13 MR. SMITH: I am aware of the Fishery Management Plan.
14 I took a look at this in that the Yuba and the American are
15 sister drainages coming off of the snow pack, covering about
16 the same area. Only difference is about 200,000 acre-feet
17 of water. There has to be other similarities in the system.

18 The thing that is different on the Yuba is that you
19 have a major cold water reservoir compared to Folsom, which
20 is cold water but not as cold as it should be, and we have a
21 temperature control device that is operational at Folsom.
22 We have cold water in New Bullards Bar, that apparently we
23 can't get to in order to modify the temperatures in the
24 lower river. We don't have a temperature device on
25 Englebright Reservoir. We take what comes down it. And if

1 it happens to be a low water system in a hot water day, we
2 are going to get a higher temperatures.

3 It is important when we look at this thing is that if
4 there is going to be a management of this system, it's going
5 to have to be done day to day. And Hodge in his physical
6 solution went through all those machinations and came up
7 with these flows. He did it. I didn't.

8 The only thing missing on the Yuba is a public trust
9 lawsuit.

10 MR. FRINK: Your flow recommendations in this instance
11 aren't based on any particular site specific analysis of
12 fishery habitat; would that be correct?

13 MR. SMITH: Yes. From the long-term study, yes. I
14 have been on the river when fish have been spawning at about
15 2,200 and I was there about four days later when the flows
16 were cut and occurred over a Columbus Day long weekend, and
17 I was alerted by Fish and Wildlife Service staff: "You ought
18 to see what happened," they said.

19 MR. FRINK: In determining your flow recommendations
20 you looked at the long-term average unimpaired flows or
21 impaired flows?

22 MR. SMITH: I looked at the unimpaired flows, and then
23 I got some information as to the amount of water that was
24 being diverted out of the basin, and that is what -- still
25 believe that the downstream system, they owe part of that to

1 the system. All of this is not Yuba County ag's
2 responsibility. A portion of that has got to come from the
3 upper basin.

4 MR. FRINK: You based your recommendations on
5 unimpaired flows from the Yuba River watershed?

6 MR. SMITH: Right.

7 MR. FRINK: I note you explained your flow
8 recommendations are based on the assumption of adoption of
9 an adaptive management plan, and there would be some
10 variations. You don't intend those recommendations to be
11 hard and fast in all years; is that correct?

12 MR. SMITH: I don't want to straight jacket a system to
13 where it is stepped, where if it is above a certain point it
14 gets this level. I think we are going to have to look at
15 these things as being flexible. The fish are the ones -- we
16 think the fish are flexible. They might bend a little bit,
17 but I don't want to see the population break.

18 We can manage this river with temperature, flows and
19 timing to provide water for agriculture, to provide
20 conditions for fish and so forth. The thing that I see
21 missing here is that Yuba County Water Agency does not have
22 a conjunctive service and groundwater program.

23 MR. FRINK: I suppose if you were evaluating all of
24 those factors and attempting to determine what the flows
25 should be in a particular year, you would look at the amount

1 of water available in that year; is that correct?

2 MR. SMITH: Yes.

3 MR. FRINK: So your recommended flows for a drier,
4 critical year might well be less than your recommended flows
5 in a wet or normal year?

6 MR. SMITH: That is what adaptive management is all
7 about.

8 MR. MONA: Just one question, Mr. Smith.

9 Your Exhibit Number 2, Page 10, I note under the table
10 titled Temperature Targets, your temperature ranges seem to
11 be greater than National Marine Fisheries Service
12 recommended, the temperatures, or what Fish and Wildlife
13 Service recommended.

14 Any particular reason why?

15 MR. SMITH: The second one where it says 69, is really
16 at the Marysville gauge. And in order to get that you are
17 going to have to release water, probably, in the 65 or 60
18 degree range. I will gladly defer to Steve Edmondson when
19 he talked about optimum conditions. I don't want to see the
20 69 if I can help it, particularly in light of that we now
21 have both testified to spring-run and steelhead in the
22 system. Steelhead are fairly flexible in temperature. I
23 don't think the salmon are.

24 MR. MONA: Thank you.

25 H.O. BROWN: Mr. Smith, I have just a question or two

1 myself.

2 MR. SMITH: When the boss talks we have to listen.

3 H.O. BROWN: You obviously have a well-known background
4 in fisheries and biology, and your testimony is much
5 appreciated.

6 One of the things we struggled with as a Board with the
7 Mona Lake decision, as an example, in the public trust
8 resources, is identifying the cost of the 40- to 70,000
9 acre-feet a year that would be diverted back into those four
10 streams to improve their habitat and to help bring up the
11 lake. But in doing so, there was considerable effort
12 expended by the Board to determine what the cost of that
13 was, where the cost might come from, and then how cost might
14 be mitigated.

15 It was obvious there was not enough water in that
16 region to go around and cover all existing bases and to
17 improve those public trust resources, which needed to be
18 done. But we were able to identify the cost and come up
19 with mitigation measures, conservation, even to help pay for
20 it, to bring in treated municipal industrial waste water and
21 other conservation measures elsewhere in Southern California
22 that could can help pay for the cost of those diversions in
23 rediverting.

24 In your travels, which is riparian, have you been able
25 to identify what the cost might be of what you're proposing

1 here, and do you have any idea what the cost may be and how
2 those costs might be mitigated in these quantities water
3 being diverted away from current usages?

4 MR. SMITH: I haven't seen the evidence that all the
5 current usages are going to go to zero as was indicated by
6 some testimony. One, Mr. Minasian was concerned about the
7 waterfowl. I believe there is a tremendous amount of
8 underflow of the Yuba and a tremendous amount of groundwater
9 available up there to a farmer. This was proven when they
10 sold water around several times when the water was sold and
11 then they pumped the groundwater.

12 H.O. BROWN: Let me clear up my concern. If the water
13 is being sold, you are looking maybe at from a district or
14 agency point of view. If you broaden that scope, and my
15 concern, the question was asked you, and make the assumption
16 that the water sold or being diverted to other areas of
17 beneficial use, obviously, otherwise probably would not be
18 purchased or diverted, if you make the assumption that the
19 water was put to beneficial use someplace within the
20 vicinity, and if then it is rediverted from those beneficial
21 uses, what is that cost? And I guess my question with the
22 foundation that I have laid is have you been able to, in
23 your recommendation -- have you included those
24 considerations with your recommendations?

25 MR. SMITH: There probably could be studies done for

1 that. I don't have the capability to do them. I am sure
2 there are economists that can give economic reports on
3 intangibles that go along with the tangible part of
4 agricultural water.

5 H.O. BROWN: You would consider those costs with a
6 recommendation that you might make, would you not, if you
7 had those costs?

8 MR. SMITH: Oh, yes, yes. I recognize that the
9 adaptive management is part of the tool.

10 H.O. BROWN: Mr. Baiocchi, do you have any redirect.

11 MR. BAIOCCHI: No, sir.

12 H.O. BROWN: Do you have exhibits that you would like
13 to include?

14 MR. BAIOCCHI: I would like to request that the three
15 exhibits the CSPA has be included into the record.

16 H.O. BROWN: Are there any objections to adding those
17 exhibits to the record?

18 Seeing none, they are so added, Mr. Baiocchi.

19 Thank you very much.

20 MR. BAIOCCHI: Thank you.

21 H.O. BROWN: Mr. Smith, thank you very much.

22 We are adjourned until 9:00 in the morning.

23 ~~~~~(Hearing adjourned at 4:20 p.m.)

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REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, ESTHER F. WIATRE, certify that I was the official Court Reporter for the proceedings named herein, and that as such reporter, I reported in verbatim shorthand writing those proceedings;

That I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 236 through 465 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 16th day of March 2000.

ESTHER F. WIATRE
CSR NO. 1564

