

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

In the Matter of:)
)
)
PUBLIC HEARING TO DETERMINE WHETHER)
TO ADOPT A DRAFT CEASE AND DESIST)
ORDER AGAINST THOMAS HILL, STEVEN)
GOMES, AND MILLVIEW COUNTY WATER)
DISTRICT)
~~~~~ )

JOE SERNA JR./CALEPA BUILDING

1001 I STREET

COASTAL HEARING ROOM

SACRAMENTO, CALIFORNIA

Tuesday, January 26, 2010

9:00 A.M.

LINDA KAY RIGEL, CSR  
CERTIFIED SHORTHAND REPORTER  
LICENSE NUMBER 13196

A P P E A R A N C E S

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CO-HEARING OFFICERS

Arthur G. Baggett, Jr.

Tam M. Dudoc

HEARING TEAM:

Dana Heinrich, Staff Counsel

Ernest Mona, Water Resource Control Engineer

Jean McCue, Water Resource Control Engineer

Charles (Larry) Lindsay, Hearings Unit Chief

PROSECUTORIAL TEAM:

David Rose, Staff Counsel

APPEARANCES continued

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD:

Office of Chief Counsel  
BY: David Rose, Staff Counsel  
1001 I Street, 22nd Floor  
Sacramento, CA 95814  
916.341.5196

THOMAS HILL and STEVE GOMES:

Carter & Monsen, LLP  
By: Jared G. Carter  
      Brian C. Carter  
      Matisse M. Knight  
444 North State Street  
Ukiah, CA 95482  
707.462.6694

MILLVIEW COUNTY WATER DISTRICT:

Christopher J. Neary, Attorney at Law  
By: Christopher J. Neary  
110 South Main Street, Suite C  
Willits, CA 95490  
707.459.5551

SONOMA COUNTY WATER AGENCY:

Bartkiewicz, Kronick & Shanahan  
BY: Alan B. Lilly  
1011 Twenty-Second Street  
Sacramento, CA 95816  
916.446.4254

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P R O C E E D I N G S

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CO-HEARING OFFICER BAGGETT: Good morning.

This is the time and the place for the hearing regarding the Draft Cease and Desist Order against Thomas Hill, Steven Gomes, and Millview County Water District. The draft CDO was issued by the Assistant Deputy Director of Water Rights on April 10, 2009.

I'm Mark Baggett, member of the State Water Board, and here with my colleague and fellow Board Member, Tam Doduc.

We are assisted today by counsel Dana Heinrich, Ernie Mona, and Jean McCue, staff engineers.

The hearing is being held in accordance with the Notice of Public Hearing dated September 3rd, 2009. The purpose of the hearing is to afford the Prosecution Team, Thomas Hill, Steven Gomes, Millview County Water District, and Sonoma County Water Agency an opportunity to present relevant oral testimony and other evidence which addresses the key issues of the September 3rd notice which is:

Should the State Water Board adopt the draft CDO issued on April 10, 2009. If the draft CDO should be adopted, should any modification be made to the measures in the draft order? And what is the basis for

1 such modifications?

2 A court reporter is present who will prepare a  
3 transcript of the proceeding. Anyone who would like a  
4 copy of the transcript must make a separate arrangement  
5 with the court reporter. To assist the court reporter,  
6 if you could please provide her a copy of your business  
7 card when you first come up to the microphone, I think  
8 it will make her job a little easier.

9 Before we get started, I would like to explain  
10 the order in which we will conduct the hearing. But  
11 first, if the alarms go off today, we have to suggest  
12 that you follow the exit signs outside the building  
13 across the street to the park and evacuate the room  
14 immediately, and leave your books behind.

15 Back to the hearing, an explanation of the  
16 order in which we will proceed. Before we begin the  
17 evidentiary portion of hearing, we will hear from any  
18 speakers who wish to make nonevidentiary policy  
19 statements. So far, I have two cards.

20 And if you wish to make a policy statement,  
21 fill out a card. If there's anyone else. Hearing none,  
22 we have two. We will also accept written policy  
23 statements.

24 A policy statement is nonevidentiary. It is  
25 subject to the limitations as identified in our hearing

1 notice. Persons making policy statements must not  
2 attempt to use the statement to present factual evidence  
3 orally or by introducing written exhibits.

4 Policy statements, we like to limit to five  
5 minutes. I think the request was for slightly longer,  
6 and we will probably accommodate that.

7 After hearing any policy statements, we will  
8 move to the evidentiary portion. The parties will  
9 present their case-in-chief or conduct cross-examination  
10 in the following order.

11 First, the Prosecution Team, the Division of  
12 Water Rights, followed by Millview County Water  
13 District, followed by Thomas Hill and Steven L. Gomes,  
14 and lastly Sonoma Water Agency.

15 At the beginning of each case-in-chief, the  
16 party may make a brief opening statement summarizing the  
17 position and the evidence you intend to establish.

18 After an opening statement, we'll hear from the  
19 parties' witnesses. Before testifying, witnesses should  
20 identify their written testimony as their own and  
21 confirm that it is true and correct. Witnesses should  
22 also summarize the key points in their written  
23 testimony.

24 And please do not read the written testimony.  
25 We have copies.

1           Direct testimony will be followed by  
2 cross-examination by other parties, Board staff, and  
3 Hearing Officers.

4           Redirect testimony and recross-examination will  
5 be limited to the scope of the redirect testimony and  
6 may be permitted.

7           After the cases-in-chief are complete, the  
8 parties may present rebuttal evidence if necessary. We  
9 will talk about that when we get to that point.

10           Parties are encouraged to be efficient in  
11 presenting their cases and their cross-examination.  
12 Except where I approve a variation, we will follow the  
13 procedures as set forth in the regulation and hearing  
14 notice.

15           Opening statements are limited to 20 minutes.  
16 For oral presentation of the direct testimony, each  
17 party is allowed up to two hours. Having reviewed this,  
18 I would hope we can present the direct testimony a  
19 little quicker than that.

20           I will limit any cross-examination to one hour  
21 per panel of witnesses for each party. Additional time  
22 may be allowed if you can make a showing of cause.

23           Oral closing arguments will not be permitted,  
24 and an opportunity will be permitted, though, for  
25 written closing briefs. We will discuss that at the end

1 of the proceeding.

2 Before we begin with the evidentiary portion,  
3 we will hear the policy statements from the two parties.  
4 Again, I just want to make it clear these are not  
5 evidentiary statements, and they will not be relied upon  
6 as evidence in any order that we write subsequent to  
7 this proceeding.

8 So with that, we have Mr. Del Piero and then  
9 Sean White, whichever order you prefer.

10 We do have your written statement, Sean.

11 MR. WHITE: Yes. Good morning, Board Members.  
12 Thank you for the opportunity to speak before you today.  
13 I will keep it as concise as I can because I know you  
14 have a very full agenda ahead of you, and we've already  
15 submitted our policy statement in writing.

16 Really what I would like to do is sort of  
17 summarize the crux of our interest in this proceeding  
18 which, from our perspective, is I think quite simple  
19 compared to everything else you'll be looking at today.

20 As you all know, the Waldteufel right was  
21 originally applied for an exercise on the west fork of  
22 the Russian River or upper mainstem.

23 That part of the river is generally considered  
24 ephemeral; and while there is sufficient flow in that  
25 part of the river during many months of the year to

1 satisfy the demands of the Waldteufel right, it's a  
2 pretty regular occurrence that during the summertime  
3 there is insufficient flow to satisfy the demand of the  
4 Waldteufel right, particularly during the months of  
5 July, August, and September, and I think the USGS gauge  
6 data from the west fork corroborates that.

7           We really became interested when Millview  
8 County Water District decided to relocate the point of  
9 diversion from the west fork to below the confluence  
10 with the east fork to their existing plant site.

11           The reason that concerned us is because the  
12 hydrologic situation below the confluence of the west  
13 and east fork changes dramatically. Once you're below  
14 the east fork, you're no longer relying on the water  
15 supply that was in the west fork. You're looking at the  
16 west fork commingled with releases from Lake Mendocino.

17           During the months when water isn't at the west  
18 fork, the water being released from Lake Mendocino is in  
19 all likelihood either water for our water right or water  
20 for Sonoma County Water Agency's water right.

21           Our concern was that by moving the point of  
22 diversion to a place where you would have access to that  
23 water would present an opportunity for water that was  
24 not ever available at the original Waldteufel point of  
25 diversion being applied to the Waldteufel right, even

1    though water at that period of time was not physically  
2    present at the original point of diversion.

3                    When we received Millview County's water rights  
4    accounting for 2008, and when I reviewed the statement  
5    submitted to you by Tim Bradley for this proceeding  
6    where he stated that they relied on the Waldteufel right  
7    for summer supply during 2009, I think that really  
8    substantiated our concern because during both 2008 and  
9    2009 in particular, if you look at the data for the west  
10   fork gauge, there simply wasn't water in the west fork  
11   at the original point of diversion to satisfy the amount  
12   of water diverted and reported under the Waldteufel  
13   right.

14                   So essentially, the water that they're  
15   allocating to the Waldteufel right during the summer is  
16   not water that was ever available at that original  
17   location and is simply an inappropriate assignment of  
18   our water.

19                   CO-HEARING OFFICER BAGGETT:   Okay.

20                   MR. WHITE:   Thank you.

21                   CO-HEARING OFFICER BAGGETT:   Thank you.

22                   And I will make it clear this is nonevidentiary  
23   so we won't be taking those facts into consideration,  
24   but I think some of them are already going to be  
25   admitted as evidence in other.   The stream gauge data is

1 already proposed to be admitted anyway.

2 MR. DEL PIERO: All right. Good morning, Mr.  
3 Bagget, Ms. Dudoc and staff. I'm Marc J. Del Piero,  
4 Mendocino County Russian River Flood Control and Water  
5 Conservation Improvement District. My comments will be  
6 brief.

7 The policy that you need to deal with today is  
8 whether or not there's any water at the current location  
9 where Millview proposes to divert water under their  
10 claim of right based on the Waldteufel right.

11 A water right exists if there's water. A water  
12 right doesn't exist if there's no water. A water right  
13 exists at the place where it was filed for the point of  
14 diversion.

15 If someone proposes to use a water right  
16 someplace else, then they need to be able to prove that  
17 they've got some kind of right there. They can't just  
18 boldly and without substantiation assert a right and  
19 then say, oh, by the way, the State Water Resources  
20 Control Board doesn't have the jurisdictional authority  
21 to take a look at or even consider whether or not what  
22 they are doing is illegal.

23 The policy issue that you need to deal with  
24 here today is whether or not the diversions taking place  
25 below the confluence are in fact resulting in the

1 diversion of water that is subject to the jurisdictional  
2 authority and responsibilities of the State Water  
3 Resources Control Board.

4 We encourage you to look very carefully at the  
5 evidence that will be subsequently presented because all  
6 of the evidence is there, we believe, to demonstrate  
7 that there is in fact no water upon which they can rely  
8 other than the contract water that they're getting from  
9 us already at that location.

10 Thank you.

11 CO-HEARING OFFICER BAGGETT: Thank you.

12 Next we'll invite the appearance of the parties  
13 who are participating in the evidentiary portion of this  
14 hearing. Those who are making an appearance, please  
15 state your name and address and whom you represent so  
16 the court reporter can enter that information into the  
17 record.

18 First, the Division of Water Rights Prosecution  
19 Team.

20 MR. ROSE: My name is David Rose, R-o-s-e, for  
21 the Division of Water Rights Prosecution Team. Our  
22 address is 1001 I Street, Sacramento, California.

23 CO-HEARING OFFICER BAGGETT: Millview County  
24 Water District.

25 MR. NEARY: Yes. My name is Christopher Neary.

1 I represent Millview County Water District. My address  
2 is 110 South Main Street, Willits, California.

3 CO-HEARING OFFICER BAGGETT: Thomas Hill and  
4 Steven L. Gomes.

5 MR. CARTER: Thank you Mr. Chairman.

6 My name is Jared Carter. I'm accompanied by my  
7 partner Brian Carter and my associate Matisse Knight.  
8 We represent Messrs. Hill and Gomes. Our address is 444  
9 North State Street, Ukiah, California.

10 CO-HEARING OFFICER BAGGETT: And Sonoma County  
11 Water Agency.

12 MR. LILLY: Good morning, Mr. Baggett.

13 Alan Lilly of Bartkiewicz, Kronick & Shanahan  
14 1011 Twenty-Second Street, Sacramento, California 95816.  
15 I represent the Sonoma County Water Agency, and with me  
16 here at the table is Pamela Jeane, Deputy Chief Engineer  
17 For Operations, and Don Seymour, Principal Engineer with  
18 the water agency.

19 CO-HEARING OFFICER BAGGETT: Thank you.

20 Before we begin, we have a few procedural  
21 issues we need to address. I think the first is Steven  
22 Gomes submitted a declaration instead of written  
23 testimony. I just to want confirm, does that constitute  
24 his testimony?

25 MR. BRIAN CARTER: Yes.

1 CO-HEARING OFFICER BAGGETT: Is that --

2 MR. BRIAN CARTER: Yes, it does.

3 CO-HEARING OFFICER BAGGETT: Thank you.

4 Millview did not submit written testimony for  
5 Tim Bradley or Sam Lambert who were listed as expert  
6 witnesses on the Notice of Intent.

7 MR. NEARY: Yes, we did submit testimony.

8 (Interruption by the reporter)

9 MR. NEARY: We're not going to present  
10 Mr. Lambert as a witness, but we did provide written  
11 testimony for Tim Bradley. That's in our list of  
12 exhibits at 14.

13 CO-HEARING OFFICER BAGGETT: Okay, so let's --  
14 maybe we should just, Mr. Neary, go over the witnesses  
15 that you have provided, you intend to call, because you  
16 had a list of two, four, six of them on your initial.

17 Why don't we just clarify which witnesses we  
18 have. Go down the list would be easier.

19 MR. NEARY: Sure. We're going to call Tim  
20 Bradley, Don McEdwards, and Dan Putnam. Three  
21 witnesses.

22 CO-HEARING OFFICER BAGGETT: Bradley, Putnam,  
23 and McEdwards. Very good. Okay. Thank you.

24 The third issue we had was Jared Carter  
25 submitted an amended Notice of Intent with -- and the

1 declaration, I assume again, also constitutes your  
2 testimony; that's correct?

3 MR. JARED CARTER: Yes, your Honor.

4 CO-HEARING OFFICER BAGGETT: And I notice most  
5 of it was authentication of the exhibits which you  
6 presented, which is fine.

7 There was some legal argument. When we get to  
8 it if there's objection, the legal argument, you'll have  
9 plenty of opportunity in closing briefs to make legal  
10 arguments but, you know, that's -- in these proceedings,  
11 we don't allow legal argument as testimony.

12 Lastly, Mr. Hill and Gomes submitted a request  
13 for judicial notice, to take official notice of six  
14 categories of documents.

15 It seemed that at least 2 through 6 were  
16 overbroad. I mean it was -- it could be reams of  
17 information. If you have -- if you could narrow that,  
18 it would make it a lot easier. I don't know if either  
19 of the other parties wants to address that.

20 MR. BRIAN CARTER: We believe that the  
21 documents that are in the submissions covered the  
22 subject matter. That request was made perhaps in an  
23 excess of caution. I think that it can essentially be  
24 withdrawn at this time to the extent it exceeds what has  
25 been submitted.

1 CO-HEARING OFFICER BAGGETT: Okay. That's  
2 fine. Thank you.

3 Millview submitted in their prehearing briefs  
4 that -- unless there's objection, the briefs, we can  
5 take the briefs under submission. You submitted briefs  
6 which aren't -- I know it's confusing.

7 This isn't like a court. It's an  
8 administrative hearing, and normally we don't accept  
9 briefs as submissions of evidence. But if there is no  
10 objection, we can do so when we get to that point.

11 MR. ROSE: Well, the Prosecution Team would  
12 object to any facts contained in there that may not be  
13 substantiated by evidence presented during the hearing.

14 And the legal conclusions, I think you already  
15 said that there will be an opportunity for closing  
16 briefs, and they can certainly resubmit their prehearing  
17 briefs with the same points and authorities at that  
18 point.

19 We intend to do the same. But otherwise, since  
20 it wasn't asked for in the Notice of Hearing and we  
21 weren't given the same opportunity by that notice to do  
22 so, I would object to consideration of those briefs.

23 CO-HEARING OFFICER BAGGETT: Any comments from  
24 Millview or other parties?

25 MR. LILLY: Excuse me, Mr. Baggett. Before you

1 ask for that response, can I just state my objection?

2 CO-HEARING OFFICER BAGGETT: Okay.

3 MR. LILLY: I just join in Mr. Rose's objection  
4 to any factual statements in those briefs. Legal  
5 arguments obviously can be made in closing, and I don't  
6 mind if they repeat their arguments.

7 But we do object to the extent those briefs  
8 give factual statements that are not supported by  
9 evidence in the record.

10 CO-HEARING OFFICER BAGGETT: Mr. Neary.

11 MR. NEARY: Yes. I'd just like to point out  
12 that the intention of our brief was to essentially  
13 identify a jurisdictional issue for your early  
14 consideration.

15 CO-HEARING OFFICER BAGGETT: Yes.

16 MR. NEARY: And I certainly have no objection  
17 to your disregard of any assertions of fact, but I  
18 believe that all of the assertions of fact in our  
19 prehearing brief pointed directly to evidence that we  
20 will be presenting.

21 So it's a modified opening statement.

22 CO-HEARING OFFICER BAGGETT: Okay, yeah.

23 That would be my understanding, having read  
24 them also, but we haven't accepted evidence into the  
25 record.

1           So I think they will probably be -- so we won't  
2 take them at this point. We won't admit them. But for  
3 closing argument, for closing briefs, you've done most  
4 of your work already, it appears -- or a lot of it,  
5 already.

6           Mr. Carter.

7           MR. CARTER: Yes, Mr. Chairman. I wanted to  
8 join with what Mr. Neary said, but I wanted to  
9 supplement with one additional point.

10           I'm not terribly familiar with your proceeding,  
11 and I don't know at what time to make a motion. But I  
12 want to move that there be no record evidence of any of  
13 these statements of water diversion and use because  
14 under Section 5108 of the Water Code those statements  
15 are not to be used for any purpose.

16           And yet the prosecution's position in this case  
17 and the Rich report seem to rely entirely for their  
18 entire forfeiture argument on a handful of statements of  
19 water diversion and use that were filed many years ago  
20 by members of the Woods family.

21           And I think they cannot be used as evidence,  
22 and I would like them excluded from the Board's  
23 consideration.

24           And if this is the right time to say so, I want  
25 to make that motion now. But in any event, that will be

1 our position throughout this hearing. I don't want to  
2 keep bobbing up and down and talking.

3 CO-HEARING OFFICER BAGGETT: I appreciate that,  
4 and it's probably appropriate to get this objection out  
5 of the way at this point before the parties that have  
6 that in their record.

7 So do we have a response? Mr. Lilly and then  
8 Mr. Rose.

9 MR. LILLY: Yes, Mr. Baggett.

10 The Legislature repealed Water Code Section  
11 5108 in the recent legislation, so -- and I believe that  
12 was effective either immediately or on January 1st. So  
13 that is no longer part of the Water Code, so therefore  
14 any objection based on that statute is no longer valid  
15 at this point.

16 MR. JARED CARTER: February 3rd, we understand,  
17 is the effective date.

18 But in any event, all of the antecedent facts  
19 that were put together here were put together in  
20 reliance upon it at a time when there had been no  
21 legislative action.

22 Our understanding is it is still effective  
23 until February 3 in any event.

24 MR. LILLY: And of course, the Board's decision  
25 will be issued after that date.

1                   So they can be on the record, and we disagree  
2 with Mr. Carter's argument. We believe that the Board  
3 may rely on the information in those statements. I'm  
4 not sure that 5108 even supported his argument to begin  
5 with, but if it's not going to be on the books anymore,  
6 we don't have to get to that point.

7                   CO-HEARING OFFICER BAGGETT: Mr. Rose.

8                   MR. ROSE: Yeah.

9                   I believe Mr. Lilly just brought up the issue  
10 of if 5108 is applicable in this case that it does say  
11 that the information shall be for informational  
12 purposes, which is what the Division is using it for,  
13 and says:

14                   Neither the failure to file nor any error  
15                   in the information shall have any legal  
16                   consequences.

17                   And we're not alleging that there was an error  
18 in the information filed or that this is a failure to  
19 file.

20                   We're simply using the information that was  
21 provided to the Division of Water Rights for  
22 informational purposes to determine whether there is a  
23 right at issue here.

24                   CO-HEARING OFFICER BAGGETT: I think that's a  
25 plain reading of the statute, and I don't know that we

1 need to go to whether it's effective February 3rd or  
2 not.

3 The statute, I think, speaks for itself. And  
4 it will be a legal argument which we'll -- the  
5 objection's noted. We'll proceed. We'll allow the  
6 information in as stated on the face of 5108.

7 And like I said, we will take the objection  
8 under submission so that you can feel free to make those  
9 legal arguments in the closing briefs.

10 With that, I think that's all of the beginning.  
11 I will now administer the oath. Those who plan to  
12 testify, can you please stand and raise your right hand.

13 Do you promise to tell the truth in these  
14 proceedings?

15 THE PROSPECTIVE WITNESSES (Collectively): Yes.

16 CO-HEARING OFFICER BAGGETT: Thank you.

17 We'll now hear the Prosecution Team's opening  
18 statement followed by their direct testimony and then  
19 cross-examine by Millview; Thomas Hill, et al.; and  
20 Sonoma County Water Agency.

21 MR. ROSE: Before we begin, if this is the  
22 appropriate time, I'd like to make a few objections to  
23 the written testimony of the other parties, specifically  
24 Hill and Gomes testimony.

25 Would you rather I do that now or later?

1 CO-HEARING OFFICER BAGGETT: You can make them,  
2 but I thought we ruled. But proceed.

3 MR. ROSE: These are other than the one --

4 CO-HEARING OFFICER BAGGETT: Other than --

5 MR. ROSE: -- specifically brought up.

6 CO-HEARING OFFICER BAGGETT: Okay.

7 MR. ROSE: First we'd like to object to the  
8 testimony submitted by Hill and Gomes. It's as Exhibit  
9 A, testimony of Steven Gomes. Point to page 4,  
10 paragraph ten.

11 We'd object that this is hearsay and  
12 speculation and ask that you not consider the written  
13 testimony at this point.

14 CO-HEARING OFFICER BAGGETT: If the objection  
15 is hearsay, I think you are aware this Board can take  
16 hearsay. We just can't use it to rely upon for a  
17 Finding and an Order.

18 MR. ROSE: I agree. I think that it's also  
19 speculation, and it is unsubstantiated at this point.

20 I'm objecting as it being written, in the  
21 written testimony. If it is substantiated or in other  
22 ways backed up or supported during the oral testimony --

23 CO-HEARING OFFICER BAGGETT: Okay. Then let's  
24 wait till they present their case. Why don't we --  
25 there are objections to their specific testimony; are

1 the other objections similar?

2 MR. ROSE: I object to that testimony as being  
3 speculation as well.

4 CO-HEARING OFFICER BAGGETT: Okay. Maybe  
5 just -- why don't you just outline it so counsel can  
6 think about it, and we won't rule on these objections  
7 until their witnesses come forward.

8 MR. ROSE: Okay.

9 Page 4, paragraph ten of Steven Gomes'  
10 testimony, his testimony that:

11 The soil was sandy, it did not hold  
12 water, and was not good agricultural  
13 land. Mr. Wood had to run his pump  
14 almost all the time.

15 I object to that as being hearsay and  
16 speculation as this is Mr. Gomes' testimony.

17 CO-HEARING OFFICER BAGGETT: Okay.

18 MR. ROSE: I also have others if you're not  
19 going to rule on that at this point.

20 CO-HEARING OFFICER BAGGETT: No, I think let's  
21 just wait until they come up with their testimony and  
22 see what they corroborate and what they don't, and maybe  
23 hold your objections till that time.

24 MR. ROSE: Okay.

25 CO-HEARING OFFICER BAGGETT: I think it will be

1 more efficient.

2 MR. ROSE: I would make one other objection  
3 that the testimony of Mr. Carter calls for legal  
4 conclusions, and he's testifying as a fact witness.

5 CO-HEARING OFFICER BAGGETT: I think we dealt  
6 with that in the opening, that to the extent they're  
7 legal arguments, they will be -- can be held with the  
8 closing brief.

9 Most of his testimony, I think, was to  
10 authenticate documents which is appropriate.

11 MR. ROSE: Just wanted to note my objection to  
12 the other portion.

13 CO-HEARING OFFICER BAGGETT: Okay.

14 MR. ROSE: Good morning, Board Member Baggett,  
15 Board Member Dudoc, members of the hearing team. Again,  
16 my name is David Rose. I'm representing the Division of  
17 Water Rights Prosecution Team in this matter.

18 The purpose of this hearing is to determine  
19 whether the Draft Cease and Desist Order should be  
20 adopted pursuant to Water Code Section 1831.

21 A few questions will have to be answered first,  
22 including whether there's sufficient evidence to support  
23 that water from the west fork Russian River was ever  
24 used pursuant to the pre-14 claim of right known as the  
25 Waldteufel right in any amount greater than the 15 acre

1 feet per annum determined by the June 2007 Staff Report  
2 of Investigation and, if so, whether any portion of that  
3 right was thereafter lost for nonuse.

4 The Prosecution Team's evidence will show the  
5 Waldteufel claim of right was initiated by a posting of  
6 a notice on March 24, 1914 pursuant to the Civil Code.

7 Between 1914 and 1967, the Waldteufel property  
8 was held by at least eight different parties.

9 Despite repeated requests from staff, there's  
10 no documentation showing that any of these parties put  
11 any specific amount of water from the west fork Russian  
12 River to use pursuant to the Waldteufel claim.

13 From 1947 to 1998, Lester Wood and his family  
14 owned approximately 20 percent of the place of use  
15 identified in the Waldteufel posting.

16 In 1967, Lester Wood filed Statement of Water  
17 Diversion and Use S-000272 with the State Water Board.

18 Supplement statements are also filed for the  
19 years 1970 to '72, 1979 to '81, 1985 to '87 by Mr. Wood  
20 or his son.

21 These statements reported diversions and  
22 beneficial use pursuant to the Waldteufel claim of right  
23 ranging from 7.5 to 15 acre feet of water per annum at a  
24 rate of 500 gallons per minute or 1.1 cubic feet per  
25 second.

1           These reports are the only evidence that has  
2 been provided to the Division for use pursuant to the  
3 Waldteufel claim from the time of the initial notice to  
4 the purchase of the Wood portion of the property by  
5 Thomas Hill and Steven Gomes in 1998.

6           Since 1998, it's unclear who owns the  
7 Waldteufel claim of right, in what proportion, and how  
8 much water has been diverted pursuant to that claim.

9           The Division received a complaint on March 6,  
10 2006 from Lee Howard alleging that the Waldteufel claim  
11 had been lost due to nonuse and that the point of  
12 diversion had been moved downstream to the mainstem of  
13 the Russian River to access water not available from the  
14 west fork.

15           Division staff conducted an investigation in  
16 response to the complaint and concluded the Waldteufel  
17 right was either never perfected or else was forfeited  
18 for nonuse to the maximum of 1.1 cubic feet per second  
19 and 15 acre feet per year.

20           Division staff likewise concluded that  
21 increasing the right from the historically used amount  
22 up to the claimed 1450 acre feet per annum would  
23 severely impact both instream natural resources and  
24 diligently perfected water rights in the Russian River  
25 system.



1 Q How long have you held your current position?

2 A My current position for 11 and a half years.

3 Q How long have you worked in the Division of  
4 Water Rights?

5 A I started with the Division in 1973 and have  
6 worked exclusively with the Division except for a small  
7 stint with the solid waste management board in the mid  
8 to late 1970s.

9 Q Have you reviewed your written testimony for  
10 this hearing?

11 A Yes, I have.

12 Q Would you say that it is true and accurate?

13 A Yes, I would.

14 Q Is there anything you would like to correct  
15 from your written testimony?

16 A No.

17 Q Mr. Rich, I'm going to ask you a few questions  
18 regarding your processing of complaints.

19 What is your normal process for reviewing  
20 complaints?

21 A When we receive a complaint, we read it over,  
22 check it out to see what the allegations are, and  
23 determine if we have jurisdiction to deal with the  
24 complaint.

25 Once we've determined we have jurisdiction, we

1 will generally ask for a response from the party against  
2 whom the complaint was lodged.

3           Once we get the response in, we go over the  
4 information, determine if we have enough to proceed.

5           In the vast majority of the cases, we end up  
6 doing a field investigation to go out and collect  
7 additional evidence that's site-specific.

8           Then we prepare a report of investigation that  
9 outlines what the evidence is, the facts in the  
10 situation, how the law applies to them, and what our  
11 conclusions and recommendations are.

12         Q     What information do you look at when you're  
13 investigating complaints?

14         A     We look at information provided by the parties.  
15 We look at information available on the Internet from  
16 other public agencies, from other interested private  
17 parties that might step forward and provide information.

18           We will go just about anywhere to get  
19 information if we believe it has a valid bearing and we  
20 can substantiate its authenticity.

21         Q     How do you weigh information you receive, if  
22 you receive it from anywhere?

23         A     Information that has documentation, historical  
24 information where we can provide -- determine who came  
25 up with the old information, first-hand information that

1 people can testify to definitively, information that  
2 we've collected in the field through measurements and  
3 things like that we will give a higher weight than  
4 someone's mere I think it's this.

5 Allegations don't get a very high weight unless  
6 they can be supported with some back-up information.

7 Q What types of water right complaints do you  
8 deal with?

9 A We have four basic types of water rights  
10 complaints that we have jurisdiction over.

11 One is violation of a term or condition  
12 contained in a permit or license issued by the State  
13 Water Resources Control Board.

14 The second one is an unauthorized diversion  
15 where someone is -- a diversion either wholly or  
16 partially without a basis of right.

17 The third would be waste and unreasonable use  
18 or unreasonable method of diversion, which is commonly  
19 known as misuse.

20 And the fourth would be an unreasonable adverse  
21 impact to Public Trust resources.

22 Q What type is at issue here?

23 A Unauthorized diversion.

24 Q Did you follow your normal process that you  
25 just described in the case?

1           A     Yes, we did.

2           Q     Were the responses to your request for further  
3 information -- you said you usually request further  
4 information?

5           A     Mm-hmm.

6           Q     Were the responses to your request for further  
7 information sufficient to rebut the allegations in this  
8 complaint?

9           A     At the time we received the complaint, it was  
10 not clear who was holding and acting with the water  
11 right. There was some question that had arisen.

12                     So my initial request for an answer was sent to  
13 multiple parties, but Millview, Creekridge Homes, and  
14 Mr. Hill and Gomes. I asked all of them to kind of tell  
15 me what was going on, who was responsible for what  
16 diversion.

17                     They did respond to those requests. However,  
18 they only gave me information regarding the use of water  
19 since Mr. Wood sold his interest in the claim. They did  
20 not go any further back than that.

21           Q     What conclusions did you reach based on this  
22 information?

23           A     That I didn't have enough information to  
24 determine that a pre-14 claim of right appeared to be  
25 valid and capable of justifying all diversion.

1 Q How did you go about getting the additional  
2 information you needed or asking for the additional  
3 information you needed?

4 A I conducted a field investigation, and during  
5 the course of the investigation, I repeatedly asked for  
6 information regarding historical use of water that would  
7 predate the current parties' interest.

8 Q Has anything you've seen since you wrote the  
9 report of investigation changed your mind about the  
10 conclusions you made in that report?

11 A No.

12 Q Mr. Rich, I'd like to direct your attention to  
13 Prosecution Team Exhibit 5, statement of Floyd Lawrence.

14 A Yes.

15 Q Did you review Mr. Lawrence's statement prior  
16 to issuing the Staff Report of Investigation?

17 A Yes, I did.

18 Q Please describe your impression of Mr.  
19 Lawrence's statement.

20 A Mr. Lawrence was very confused, especially at  
21 the start of the statement. He didn't seem to know what  
22 direction things were. He was having a hard time  
23 remembering things. He tended to ramble on, which was  
24 not uncommon for a person who's 92 years old. He spent  
25 more time talking about flooding conditions than he did

1 about water use.

2 Just didn't seem to have a whole lot of  
3 information that was really relevant to my needs.

4 Q Why did you conclude that Mr. Lawrence's  
5 statement was insufficient to establish that the claimed  
6 right was ever perfected?

7 A He didn't seem to have any special information  
8 regarding irrigation operations, whether the water came  
9 out of the river, whether it came from a well, whether  
10 there was subirrigation.

11 He had some general information on crops that  
12 he might have observed driving down the road, but he  
13 just didn't have a whole lot of information about what  
14 was actually going on on the property.

15 He had only been on the property a few times  
16 and just was not very familiar at all with what had  
17 happened over the years.

18 Q Did Mr. Lawrence say how much of the property  
19 was planted with alfalfa?

20 A No, he did not.

21 Q Did Mr. Lawrence say how much of the property  
22 was planted with any other crop, other than the small  
23 orchard?

24 A He mentioned at one point he thought there  
25 might have been six to eight acres of beans.

1           Q     Mr. Rich, I'd like to ask you a few questions  
2 regarding water use claimed under this claim of right  
3 since 1998. Hill and Gomes purchased the Wood property  
4 in 1998; is that correct?

5           A     Yes, it is.

6           Q     Is the parcel purchased by Hill and Gomes the  
7 entire place of use listed in the Waldteufel posting?

8           A     No, it's not. It only accounts for about  
9 20 percent of the original place of use listed in the  
10 claim that was filed with the county recorder's Office.

11          Q     And what's been the status of the Waldteufel  
12 claim since then?

13          A     The property has changed hands numerous times.  
14 I've not seen any deed that would indicate whether the  
15 water right actually went with the property or not.

16                 Because a pre-14 appropriative right can be  
17 separated from the property, it would have been  
18 important for the deeds to also have transferred the  
19 water right with it. But I have no information. No  
20 one's ever provided copies of the deeds that show that  
21 that happened.

22                 Thereafter, Mr. Woods got the property. When  
23 he did transfer it to Mr. Hill and Gomes, he did sign a  
24 document saying he was transferring whatever claim of  
25 right he held to them.

1           And since that time, they entered into -- or  
2 Mr. Hill and Gomes entered into a lease agreement with  
3 Millview County Water District. And I understand,  
4 although I've not seen the document, that within the  
5 last year or so that a purchase agreement has been  
6 consummated and that Millview is now the purported owner  
7 of whatever interest exists in that water right.

8           MR. ROSE: Mr. Rich created a visual  
9 representation of some of the evidence he's already  
10 presented. I'd like to pass that out for reference for  
11 the next few questions.

12           MR. NEARY: I would object to the presentation  
13 of an exhibit that wasn't previously disclosed. I  
14 understood that we had to provide our exhibits by a date  
15 certain in January.

16           MR. ROSE: I could respond.

17           I agree. This is not an exhibit. All the  
18 information claimed -- relied upon and used in this  
19 visual aid has already been submitted in other exhibits  
20 and testimony of Mr. Rich.

21           So this is nothing new. This is simply a  
22 visual aid to assist the hearing team and anybody else,  
23 including Mr. Rich, in explaining the next few points  
24 which he's going to testify to.

25           CO-HEARING OFFICER BAGGETT: Have you provided

1 copies to everybody?

2 MR. ROSE: I have copies right here to provide  
3 to everyone.

4 MR. NEARY: I've never seen a copy. Why  
5 doesn't he just refer to the exhibits that were provided  
6 to us?

7 CO-HEARING OFFICER BAGGETT: It's fine if it's  
8 a summary. If it's just a visual representation, and we  
9 aren't accepting the exhibit as evidence, only for  
10 illustrative purposes, it's fine.

11 But could you pass it out? It would be a lot  
12 easier if everybody could see what we're deciding  
13 whether to allow or not.

14 MR. ROSE: I was waiting until you had  
15 expressed that.

16 CO-HEARING OFFICER BAGGETT: Mr. Neary, does  
17 this -- still have your objection?

18 MR. NEARY: You know, I think that there's --  
19 if you're just going to use it as an aid, I would  
20 reserve the right to cross-examine him on this exhibit  
21 and --

22 CO-HEARING OFFICER BAGGETT: Of course.

23 MR. NEARY: -- the basis on which it was  
24 prepared.

25 CO-HEARING OFFICER BAGGETT: Okay. Very good.

1 Then proceed.

2 BY MR. ROSE:

3 Q Mr. Rich, when did Millview sign the lease  
4 agreement with Hill and Gomes to use this claimed right?

5 A I believe it was October 2002.

6 Q When did Millview begin recording use under  
7 this claimed right?

8 A Pursuant to the Public Records Act request  
9 response that they provided us after the Report of  
10 Investigation was completed, and I believe April of  
11 2001.

12 Q 2001?

13 A Yes.

14 Q Did you review water use data provided by  
15 Millview for the years 2002 to 2008?

16 A Yes, I did.

17 Q In almost all of those years, Millview claimed  
18 it diverted more than 15 acre feet under the Waldteufel  
19 claim of right. How did you reconcile this data with  
20 your conclusion that Millview had not increased its  
21 diversion pursuant to the right?

22 A As this document or visual aid shows,  
23 Millview's use stayed pretty much constant over that  
24 period of time.

25 What they changed was their reporting as to

1 what right they were allocating the water to. However,  
2 their total use was within what would have been  
3 authorized under their permit, their license, their  
4 contract with the Russian River Flood Control District,  
5 and a 15-acre-foot-per-annum limit on the Waldteufel  
6 claim of right.

7 Q So what do these numbers tell you?

8 A It tells me they're changing their reporting  
9 mechanisms back and forth.

10 At the time that I went out and did the  
11 investigation, they were telling me one thing as how  
12 they were using water; and when they submitted an answer  
13 to the Public Records Act request, they changed their  
14 accounting and starting allocating more water to the  
15 Waldteufel right.

16 Q So this visual aid that you prepared is based  
17 on what they initially gave to you as information or  
18 what they subsequently gave you?

19 A This is subsequently which came out of the  
20 Public Record Act request response that was not  
21 available when I did the Report of Investigation.

22 Q Mr. Rich, I have just a few more questions.

23 Has there been sufficient water in the west  
24 fork Russian River to support greater diversion amounts  
25 than Millview or Hill or Gomes were taking during this

1 period that you have on your visual aid and PT-11?

2 A Over the course of the summer irrigation  
3 season, there's been more water available in the west  
4 fork of the Russian River than what has been diverted by  
5 Millview pursuant to their claim of pre-14 right.

6 Q What's the current status of the watershed?

7 A The watershed is currently right now fully  
8 appropriated. It's contained on the Board's listing,  
9 has been since 19 -- well, the listing was in '98, but  
10 it's based on a decision of 1963, and that decision  
11 refers back to a 1961 decision.

12 So the Board has determined that the system has  
13 been fully appropriated for probably over 40, almost 50  
14 years.

15 Q In your opinion, what would the impact be on  
16 the watershed were the full amount claimed under this  
17 claim of right to be put to beneficial use?

18 A Downstream right holders that would be --

19 MR. JARED CARTER: I object, your Honor.  
20 There's no indication that Mr. Rich is qualified to  
21 testify on the impact on everybody downstream in this  
22 watershed.

23 MR. ROSE: I believe I asked him what his  
24 opinion would be. We gave the statement of his  
25 qualifications that I believe would establish him as an

1 expert in this, and I'm merely asking him his opinion.

2 MR. JARED CARTER: It doesn't establish him as  
3 an expert to talk about -- it talks -- his  
4 qualifications indicate he has no expertise other than  
5 from what he's doing. That doesn't talk about the  
6 impact on all users downstream in the Russian River  
7 system.

8 MR. ROSE: Mr. Rich's qualifications of over 30  
9 years working for the Division of Water Rights I think  
10 are sufficient to establish him as an expert in what  
11 would happen to other junior and downstream water right  
12 users were a senior right that is claimed to be  
13 increased a hundredfold.

14 MR. CARTER: Moreover, it's not in his  
15 testimony, and he's not authorized to talk about  
16 information that's not in his submitted testimony.

17 MR. ROSE: I can point to paragraph 11, pages 9  
18 to 10 of Mr. Rich's written testimony.

19 CO-HEARING OFFICER BAGGETT: Can you rephrase  
20 the question? I think the objection to the impact on --  
21 just rephrase the question.

22 BY MR. ROSE:

23 Q Mr. Rich, in your opinion, what possible  
24 effects might there be in the watershed were diversions  
25 to be increased under this claim of right?

1           A     If you went from an historic diversion of 15 to  
2     50 acre foot and you increased it to almost 1500 acre  
3     foot, it would result in other diverters downstream who  
4     had previously seen water at their points of diversion  
5     are going to see less water.  They're not going to be  
6     able to divert as much as they have in the past.

7                     It may result in flows being lower at times,  
8     depending on how fast the operators at Coyote Dam can  
9     keep up with it to maintain minimum required flows for  
10    Public Trust resources.

11                    So I would expect there will be adverse impacts  
12    both on right holders who have invested a great deal of  
13    money in their projects as well as potential adverse  
14    impacts to Public Trust resources.

15           Q     Mr. Rich, do you see any other --

16                    MR. JARED CARTER:  Excuse me, your Honor.  Did  
17    you rule on my objection?

18                    CO-HEARING OFFICER BAGGETT:  I asked him to  
19    rephrase the question.

20                    MR. JARED CARTER:  And he did, and we had the  
21    witness start blurting out an answer.

22                    CO-HEARING OFFICER BAGGETT:  So you object to  
23    the rephrasing of the question?

24                    MR. ROSE:  I believe that objection is untimely  
25    at this point.  Mr. Rich has already answered the

1 question.

2 CO-HEARING OFFICER BAGGETT: I would overrule  
3 the objection then. It's noted for the record.

4 BY MR. ROSE:

5 Q Mr. Rich, do you see any other reasons why the  
6 full use of this claim could cause problems?

7 A It sets up a very significant precedent where  
8 you have an old claim that may not have been used very  
9 much, if at all, and is on the books; and if you accept  
10 it, there are numerous other old notices that have been  
11 filed in Mendocino County and probably Sonoma County as  
12 well within the Russian River watershed. If they were  
13 all of a sudden to be reactivated --

14 MR. JARED CARTER: Your Honor, I object. It's  
15 nonresponsive. This is speculative. There's no factual  
16 foundation for all of these fears and apprehensions that  
17 he's articulating.

18 These are policy questions that have no  
19 justification from Mr. Rich as a water engineer here  
20 supposedly telling the Board what the facts are.

21 CO-HEARING OFFICER BAGGETT: Mr. Rose.

22 MR. ROSE: Inasmuch as Mr. Rich is testifying  
23 as an expert witness because of his experience  
24 long-standing with the Division in these types of  
25 issues, I'm merely asking him what his opinion would be

1 were this diversion to be increased, what problems this  
2 might cause.

3           The Board is going to make decisions on facts  
4 and policy. I think that Mr. Rich's opinion could  
5 inform either in both of these situations.

6           CO-HEARING OFFICER BAGGETT: I would sustain  
7 the objection to the extent he's making policy and, I  
8 guess, quasi-legal arguments.

9           If you could rephrase the question specifically  
10 to the impacts of this diversion, if this was allowed to  
11 stand, I will allow that. So rephrase the question.  
12 Make it narrower.

13 BY MR. ROSE:

14       Q     Mr. Rich, considering what you know about the  
15 Russian River watershed, do you see any other reasons  
16 why full use of this claim could cause problems?

17       A     Basically, it's going to adversely impact other  
18 right holders that have enjoyed a water supply that now  
19 are going to see that water supply disappear.

20           And it could also impact Public Trust resources  
21 that have seen water flow, that now that water could be  
22 diverted into a system, taken away from the river.

23       Q     Are you aware of any other similar claims that  
24 could be initiated --

25           MR. NEARY: I'm going to interpose an objection

1 of relevancy.

2 The issue here is whether the right exists or  
3 not and so, you know, to talk about how --

4 CO-HEARING OFFICER BAGGETT: Go on.

5 MR. ROSE: I think that's one issue.

6 But the issue as described in the Notice of  
7 Public Hearing is whether the Draft Cease and Desist  
8 Order should be adopted, and Mr. Rich's testimony  
9 regarding the issues that could come from a 15-acre-foot  
10 right being increased a hundredfold are certainly  
11 relevant to that particular issue, the threat of  
12 unauthorized diversion.

13 CO-HEARING OFFICER BAGGETT: I would sustain  
14 the objection. Try to keep it to this particular water  
15 right and its impact.

16 I think we've allowed that testimony on how it  
17 would impact other legal uses of water downstream if  
18 it's allowed to stand, and we understand that. So why  
19 don't you focus on this water right.

20 MR. ROSE: That's fine. I have no further  
21 questions.

22 CO-HEARING OFFICER BAGGETT: Okay. Thank you.  
23 With that, Millview?

24 (Discussion off the record)

25 CO-HEARING OFFICER BAGGETT: Okay. We're back

1 on the record.

2 CROSS-EXAMINATION BY MR. NEARY  
3 FOR MILLVIEW COUNTY WATER DISTRICT

4 BY MR. NEARY:

5 Q Would it be correct to characterize  
6 Mr. Howard's complaint as alleging that the Waldteufel  
7 right had been forfeited for nonuse?

8 A Yes.

9 Q And would it be correct to characterize  
10 Mr. Howard's complaint as also alleging that Millview's  
11 present point of diversion injured downstream users?

12 A Yes.

13 Q Now, was Lee Howard known to you prior to his  
14 making the complaint?

15 A No.

16 Q Do you know of anyone at the Division who  
17 discussed his complaint prior to the filing of the  
18 complaint?

19 MR. ROSE: Objection; calls for speculation.

20 MR. NEARY: I asked for his personal knowledge.

21 CO-HEARING OFFICER BAGGETT: Overruled.

22 MR. RICH: No, I do not.

23 BY MR. NEARY:

24 Q Now did the complaint refer to any conflicting  
25 use of water by Mr. Howard?

1           A     No, it did not.

2           Q     Are you aware as you sit here today of Mr.  
3     Howard having any conflicting use of water?

4           A     No, I'm not.

5           Q     Are you aware through your investigation of any  
6     judgments by a court of competent jurisdiction declaring  
7     a forfeiture of any portion of the Waldteufel right?

8           A     No, I'm not.

9           Q     Are you aware of any judgments of a court of  
10    competent jurisdiction determining that the Millview  
11    point of diversion injures anybody?

12          A     No.

13          Q     And was the time spent by you on this  
14    investigation motivated in part by the fact that it, in  
15    your words, sets up a precedent?

16          A     No.

17          Q     So how much time have you spent on this  
18    complaint prior to the Notice of Hearing?

19                   MR. ROSE:  Objection; relevance.

20                   CO-HEARING OFFICER BAGGETT:  Do you have a  
21    response?

22                   MR. NEARY:  Well, he's testified that -- you  
23    permitted him to testify that the recognition of this  
24    right would set up a precedent, and I'm just inquiring  
25    into the motivation for the great expenditure of

1 resources to pursue this complaint.

2 MR. ROSE: My objection is still on relevance.

3 CO-HEARING OFFICER BAGGETT: We did allow that  
4 information in, so please answer. Overruled.

5 MR. RICH: I can't tell you exactly how many  
6 hours or days I spent on it, but I would say that I  
7 spent less than the average amount of time that I spend  
8 on a complaint; that this one, because of the parties  
9 and the fact that it was one field investigation and  
10 write it up, I probably spent maybe 40 percent of the  
11 time -- or not 40 percent. Let's say 80 percent of the  
12 time as I would on an average complaint.

13 BY MR. NEARY:

14 Q Okay. Have you ever held the position that the  
15 Waldteufel right has a valid basis?

16 A I've held the position that it could have some  
17 basis.

18 Q I'd like to refer you to your staff report. I  
19 guess scroll down to get to page 16. On my computer it  
20 has a place where you can -- maybe this is --

21 CHIEF LINDSAY: I can get you to 16. There you  
22 go.

23 MR. NEARY: Okay. This is . . .

24 BY MR. NEARY:

25 Q Would you read into the record the highlighted

1 portion?

2 A (Reading:)

3 The pre-19 appropriative claim of right  
4 originated by Mr. Waldteufel in December  
5 1914 and transferred over time to the  
6 Woods, Messrs. Hill and Gomes, and  
7 Millview has a valid basis. However, due  
8 to the forfeiture provisions of  
9 California water law, the right has  
10 degraded to the point where the maximum  
11 authorized diversion is 15 acre feet per  
12 annum.

13 Q Now, your -- this was written by you in a staff  
14 report?

15 A Yes.

16 Q And at the time you wrote this staff report, it  
17 was your determination that the Waldteufel water right  
18 has a valid basis?

19 A It was my belief that it could be found  
20 possibly by a court that the right did exist to that  
21 amount.

22 Q Would you agree that you did not place any  
23 qualifying statements in your staff report as to whether  
24 it was --

25 A I wrote what I wrote.

1 Q Okay. It stands for itself.

2 Also at page 8, did you also state that  
3 consequently the October 2002 agreement, which is  
4 Millview Exhibit 15, appears to have conveyed or  
5 transferred a valid pre-1914 appropriative claim of  
6 right to Messrs. Hill and Gomes?

7 MR. ROSE: Objection; the document speaks for  
8 itself.

9 BY MR. NEARY:

10 Q Would you agree that that was an opinion that  
11 was held by you at the time you prepared the staff  
12 report in 2007?

13 CO-HEARING OFFICER BAGGETT: Overruled. Answer  
14 to the extent you can.

15 MR. RICH: You want me to answer?

16 CO-HEARING OFFICER BAGGETT: Yes.

17 MR. RICH: Where specifically are you  
18 referring? I don't have a highlighted section up there.

19 BY MR. NEARY:

20 Q I'm sorry. Oh, page 7. Right here.

21 CO-HEARING OFFICER BAGGETT: Referring to?

22 BY MR. NEARY:

23 Q The word starting "consequently."

24 A Okay. It transferred whatever interest Mr.  
25 Woods had in that claim of right to Mr. Hill and Mr.

1 Gomes.

2 Q And I just want to ask you whether the  
3 reference to December 14, 1914: You really meant to say  
4 March of 1914; is that correct?

5 A Where is the reference you are referring to?

6 Q Well, throughout, you referred to the  
7 Waldteufel right as being a December 1914 right.

8 A If I did, the notice was filed in March.

9 Q Okay. Now when you prepared your testimony,  
10 you qualified your observations by saying that the  
11 appropriate claim by Mr. Waldteufel was initiated by  
12 Mr. Waldteufel in December of 1914.

13 A Yes.

14 Q And my original question at the outset was:  
15 Did you ever change your position as to whether or not  
16 the Waldteufel right was a valid right? I understand  
17 your testimony to be that you didn't, did not hold that  
18 position at one time or that you did?

19 A I don't believe that my position has changed.

20 Q Okay. So when you said in the staff report  
21 that the Waldteufel right has a valid basis, that's  
22 still your opinion?

23 A I believe it could have a valid basis up to 15  
24 acre feet per annum.

25 Q If the Waldteufel right had a valid basis,

1 would that equate in your mind to the right being a  
2 vested right?

3 A If a court were to find that it was a valid  
4 basis of right, then it might have vested. I mean it's  
5 not so much what the court finds as what the conditions  
6 are that the court would confirm.

7 Q Do you believe that for the right to be vested  
8 that there needs to be a court adjudication?

9 A Not necessarily, no.

10 Q Now, is it safe to say that the staff report  
11 that you prepared in 2007 was premised upon the notion  
12 that there was a forfeiture of a portion of the  
13 Waldteufel right?

14 A Yes.

15 Q And in fact, you used the term "degrade,"  
16 stating that the maximum authorized diversion degraded  
17 to 15 acre feet?

18 A Yes, I did.

19 Q And your use of the word "degrade" was  
20 essentially equivalent to forfeit; is that correct?

21 A That would be your words. Mine is that the  
22 right lessened in value.

23 Q Do you know of there being a doctrine of  
24 degradation of a water right?

25 A Yes.

1 Q Okay. And you've stated just as a doctrine of  
2 degradation?

3 A It's stated that when you file a notice of  
4 appropriation you have an inchoate right.

5 To the extent that the water is not put to  
6 actual beneficial use, the portion that is not put to  
7 actual beneficial use, under western water law, goes  
8 away.

9 Q And if it is put to actual beneficial use, it  
10 becomes a vested right?

11 A It can be, yes.

12 Q Now, is the Draft Cease and Desist Order based  
13 upon a finding of forfeiture?

14 A Not directly.

15 Q Well, isn't it true that the Draft Cease and  
16 Desist Order is premised upon the theory that the  
17 Waldteufel right has degraded to 15 acre feet?

18 A Yes, I would agree with that.

19 Q And it has degraded by the doctrine of  
20 forfeiture?

21 MR. ROSE: I believe that's been asked and  
22 answered.

23 CO-HEARING OFFICER BAGGETT: Proceed.

24 MR. RICH: Okay.

25 My view is that it probably has never vested.

1 I have no evidence to suggest that it has vested for  
2 anything more than 15 acre foot.

3 Now whether you want to call it degraded or  
4 forfeited or whatever else, you can put all sorts of  
5 different terms on it. But I have no evidence that that  
6 water was ever used in any more than 15 acre foot per  
7 annum prior to 1998, and that would be 84 years after  
8 the notice of appropriation was filed.

9 And I believe there's some references in the  
10 Civil Code that say you're supposed to proceed very  
11 diligently, sometimes within 60 days, to put the water  
12 to beneficial use. I have no evidence it was ever put  
13 to use above 15 acre foot.

14 BY MR. NEARY:

15 Q Okay. We'll come back to that.

16 Now, in your testimony at page 8, did you reach  
17 the conclusion that Mr. Howard has a sufficient clash of  
18 right to assert a complaint?

19 A Where -- are you referring to my report?

20 Q Your testimony at page 8.

21 A Testimony, page 8. Okay.

22 CO-HEARING OFFICER BAGGETT: Could you be more  
23 specific?

24 MR. NEARY: I can take you right there. I'm  
25 sorry, it's page 9.

1 BY MR. NEARY:

2 Q So my question is: Did you conclude that Mr.  
3 Howard had a sufficient clash of rights to assert his  
4 claim of forfeiture of the Waldteufel right?

5 A I believe he had a basis to be a concerned  
6 citizen who was expressing a potential problem to people  
7 in the watershed that could indirectly impact him.

8 Q As I understand your testimony that you  
9 reviewed this case, the North Kern Water Storage  
10 District versus Kern Delta Water District, and concluded  
11 that the standard therein announced that there be a  
12 clash of rights was satisfied with the Howard complaint?

13 A I believe that it would, yes.

14 Q Now, you don't have any legal training, do you?

15 A Just 35 years of working with water rights on a  
16 daily basis.

17 Q I don't want to denigrate that at all. I  
18 learned more about water law having lunch with you once  
19 than I did in any other hour period in my life.

20 But you don't -- do you understand that -- what  
21 the impact of a depublishation of a case is?

22 A Yes.

23 Q And are you aware that the citation here to the  
24 North Kern case, 146 Cal.App.4th 424, was depublished by  
25 the applicable court of appeals?

1           A     I believe the original case was depublished,  
2     and after it went forward to the Supreme Court, I  
3     believe it came out and was published.

4           Q     Well, now, it never went to the Supreme Court.  
5     What happened was that the case in 2003, which is the  
6     citation that you have up there -- although you have  
7     wrong year, 146 Cal.App.4th, is -- was actually  
8     withdrawn by that appellate panel and a new decision put  
9     in its place. And that citation is 147 Cal.App.4th 555.

10                   And you weren't aware of that?

11           A     I am aware of the case that I got off of Lexis  
12     that was provided me by staff that was dated  
13     February 5th, 2007.

14                   And you're right. I do have the wrong cite  
15     because the case I reviewed has 555 on it. It does not  
16     have 424.

17                   I had also seen the earlier case that had the  
18     clear statement that said that it was depublished.

19           Q     But -- perhaps this would be best left in  
20     detail to our closing briefs.

21                   CO-HEARING OFFICER BAGGETT: I would agree.

22     BY MR. NEARY:

23           Q     I would ask whether you were aware that the  
24     republished case provides that forfeiture of the right  
25     to appropriate water from a natural watercourse can be

1 established through a quiet title or declaratory  
2 judgment action brought by one with a conflicting claim  
3 to the unused water such as an owner of a junior right  
4 to use the water in the same watercourse?

5           You weren't aware that that was the standard  
6 that was ultimately announced in North Kern?

7           A     I'm not sure I would say that's the sole  
8 standard.

9           Q     Okay.

10           CO-HEARING OFFICER BAGGETT: Move on. I think  
11 these are going to be legal questions that will be  
12 briefed.

13           MR. NEARY: Right. I agree.

14 BY MR. NEARY:

15           Q     So your staff report looked to the usage by Mr.  
16 Wood in 1966 when he filed a statement of diversion  
17 showing that for that year he diverted 15 acre feet?

18           A     I believe it was 1967; but yes, his initial  
19 statement.

20           Q     It was filed in 1967 for the year 1966?

21           A     Okay.

22           Q     And that's what you relied upon? That's where  
23 the 15 acre feet comes from?

24           A     That and his subsequent statements that he  
25 filed several supplemental statements, and none of them

1 indicate use greater than 15.

2 In fact, his initial statement said maximum use  
3 in recent years, I believe, was limited to seven and a  
4 half.

5 Q In fact, the subsequent statements filed by him  
6 did not state any quantity?

7 A They didn't indicate that anything had changed.

8 Q Okay. But you didn't answer my question. The  
9 first report referred to 15 acre feet, and the  
10 subsequent reports did not contain a quantity of usage?

11 MR. ROSE: Can you point Mr. Rich to a specific  
12 portion of his testimony or exhibits, if that's what  
13 you're relying on.

14 BY MR. NEARY:

15 Q I guess it's number 6.

16 A I have that in front of me. Actually, his  
17 supplemental statement for the years 1970, '71, and '72,  
18 he defines a rate and a number of hours; and if you  
19 compute those all the way out, you get 13.7 acre feet  
20 that was used during those years.

21 Q So your conclusion of the right having degraded  
22 to 15 acre feet was based upon the -- that one year  
23 where he reported 15 acre feet?

24 A No. It's based upon four years of record plus  
25 additional record thereafter where he didn't say he'd

1 done anything different.

2 He made an affirmation under penalty of perjury  
3 that this was all the water I've been using. He  
4 affirmed that. He didn't -- there was no other  
5 information available to indicate that anything else had  
6 been used.

7 Q All right. What I'm asking is: Is there any  
8 other place where the term "15 acre feet" appears so as  
9 to justify your conclusion that it degraded to that  
10 level?

11 A I'm not aware of any other documents that  
12 report use, so these are it.

13 Q So that's the -- so your --

14 A Those four years would be the only quantitative  
15 information we have.

16 Q And those years were not consecutive?

17 A No, they were not.

18 Q Now when you reviewed Mr. Howard's complaint,  
19 what period of forfeiture did you use?

20 A I didn't so much use period of forfeiture as I  
21 used, you know -- the term forfeiture and vested here  
22 were probably used interchangeably.

23 At the time the report of investigation was  
24 prepared, I did not have access to the North Kern case.  
25 So I was going with the information that was available

1 to me; and at that point, it did not look like there had  
2 been any use greater than 15 acre feet.

3           And whether you call it forfeiture of the  
4 inchoate right, the initial filing, or whether you call  
5 it lack of vesture, either way, I think the facts under  
6 the law are that the water did not appear to have been  
7 used in sufficient quantity to justify a finding by  
8 either this Board or the courts that there was more  
9 water available under the right.

10         Q     In fact, you used the term "degrade." You  
11 didn't use the term "inchoate right" in your staff  
12 report.

13         A     Okay.

14         Q     And the Draft Cease and Desist Order is based  
15 on the staff report; isn't that right?

16         A     It is one of the foundations for it, yes.

17         Q     And the North Kern decision was adopted prior  
18 to your preparation of your report June of 19 -- or  
19 2007?

20         A     Just prior to that.

21         Q     And it provides that -- were you aware that it  
22 provides at page 560 that in order to establish a  
23 forfeiture, the plaintiff must prove the defendant  
24 failed to use some portion of its water entitlement  
25 continuously over a span of five years immediately prior

1 to plaintiff's assertion of a conflicting right to the  
2 water?

3 A I'm not going to argue. If someone filed a  
4 court -- case in court and argued that their right had  
5 been adversely impacted, that would probably be  
6 criteria.

7 In this particular case, I had a complaint on  
8 behalf of large numbers of people in the watershed,  
9 and -- saying that he didn't think the right was there.

10 And I went out and investigated and said yes, I  
11 would agree; I don't have evidence to support the claim  
12 of right.

13 Q But when you looked for the usage, you actually  
14 in fact looked at the five-year period prior to  
15 Mr. Howard's complaint in February 2006. You looked  
16 back five years, didn't you?

17 A When we got ready to do testimony, at that  
18 point, we still believed that the right hasn't vested.

19 If the Board or a court were to disagree with  
20 my opinion and say yes, it has invested, then we  
21 would -- we went to the second level and say okay, if it  
22 has vested, what happened during the period most  
23 recently that we have the Public Records Act request  
24 information available, and that would be the 2001  
25 through 2008, and we would say okay, what's the -- what

1 happened in that period of time.

2 Q If this was the court, I might move to have the  
3 question stricken as being nonresponsive but I just want  
4 to go back and ask this question again.

5 You actually used the 2006 -- or 2005, 2004,  
6 2003, 2001 period to determine whether or not there had  
7 been sufficient basis to determine this right that has a  
8 valid basis had degraded.

9 MR. ROSE: Could you please point Mr. Rich to  
10 where he did that? You're suggesting he looked at those  
11 specific years. Could you please point out where he did  
12 that?

13 MR. NEARY: I'm asking him.

14 MR. ROSE: Sounded like you were pointing to  
15 something in particular. So I would object that you're  
16 misstating the evidence unless you can point to where  
17 Mr. Rich had already done so.

18 MR. NEARY: He's testifying. So I'm requesting  
19 him -- I'm requesting him to state what forfeiture  
20 period he used.

21 MR. ROSE: I didn't understand the question  
22 that way. That would be fine with me.

23 MR. RICH: If you're talking what period would  
24 I use with respect to my testimony? I would say it  
25 would be the period preceding Mr. Howard's complaint.

1 BY MR. NEARY:

2 Q Okay. And when you looked at that, did you  
3 learn that in approximately 2001 the Waldteufel right  
4 was changed from an agricultural use to a domestic use  
5 serving residential structures?

6 A I'm not aware of that, that it was done in  
7 2001. My understanding was CreekBridge Homes was doing  
8 construction but was not supplying domestic water at  
9 that point in time.

10 Q When is your understanding of when the  
11 CreekBridge subdivision opened up?

12 A Probably sometime in 2002 when the first homes  
13 were -- you know, it's whenever Millview first started  
14 to supply a domestic potable supply through their  
15 pipelines to a house.

16 Prior to that time, all water that was diverted  
17 from the west fork of the Russian River, as was  
18 explained to me during the complaint investigation on  
19 the field trip, was that all water prior to that time  
20 was used for dust control and possibly some make-up  
21 water for construction. But not for domestic purposes.

22 Q Okay. So you did understand that for the  
23 period of 2000 -- at least 2002 to the time of your  
24 investigation that Millview was relying upon the  
25 Waldteufel water right to serve the CreekBridge

1 subdivision, 125 homes, with water?

2 A As I recall, the statement was the only water  
3 that is being used under the Waldteufel right is being  
4 used to serve the domestic needs of whatever homes were  
5 constructed up until the time of full construction at  
6 the CreekBridge Homes situation.

7 Q And you're referring to Mr. Bradley's  
8 April 24th letter to you in response to your --

9 A Well, both --

10 Q -- request for information?

11 A Both that letter and the representations that  
12 both he and you made during the field investigation.  
13 You confirmed everything that was in that letter.

14 And we went -- we spent about an hour and a  
15 half going over eight very detailed questions, and you  
16 guys confirmed it and said this is the best of your  
17 knowledge what you're doing.

18 Q Well, did you understand that the only use by  
19 Millview was for the CreekBridge subdivision?

20 A Yes. That was made fairly clear to me during  
21 both the response letter by Millview and the answers to  
22 the questions during the field investigation.

23 Q Let's take a look at the response letter.

24 Now in this paragraph C, is this the response  
25 that you're referring to?

1           A     What exhibit is that?

2           Q     That's Prosecution Team 3.

3           A     Okay.  What specifically do you want to know?

4           Q     My question was:  Is that the statement that  
5     you are relying upon for the proposition that Millview  
6     claimed that its only use of the Waldteufel right was to  
7     supply the CreekBridge subdivision?

8           A     I'd have to look at the exhibit here since  
9     you're not pointing to a specific section.

10          Q     Paragraph C.

11          A     Paragraph C.

12          Q     Yes.

13          A     (Reading:)

14                     In the lease agreement attached to your  
15                     letter, Mr. Hill and Mr. Gomes granted,  
16                     conveyed, and assigned all right, title,  
17                     and interest to the water right statement  
18                     272 to the District.  Excepting a  
19                     collective reservation of 125,000 gallons  
20                     per day for use by Mr. Hill and Mr. Gomes  
21                     or their assignees.  It is our  
22                     understanding the reservation was divided  
23                     and one share deeded to each home  
24                     constructed by CreekBridge.

25           I mean that's -- so they assigned everything

1     except 125,000 gallons per day through the lease  
2     agreement to Millview, and that's all it says in there  
3     is that's where they did it.

4           Q     So it's your understanding that you were  
5     provided with the lease agreement, that October 2002  
6     lease agreement, at the time of your investigation?

7           A     Yes.

8           Q     And it provided that Millview could use the  
9     Waldteufel right, all of the Waldteufel right except for  
10    the CreekBridge-reserved 125,000 gallons per day?

11           MR. ROSE: I'm going to object that Mr. Neary  
12    is misstating the evidence.

13           He's pointing to paragraph C to point to what  
14    Mr. Rich had previously relied on for paragraph B as  
15    though that isn't there. I think that that's misstating  
16    the evidence, and then asking Mr. Rich a question on  
17    that behalf.

18           MR. NEARY: Do you want to go back to B?

19           CO-HEARING OFFICER BAGGETT: Yes. Go back to B  
20    if that's what the question's on.

21           MR. NEARY: So Mr. --

22           CO-HEARING OFFICER BAGGETT: Objection  
23    sustained; continue.

24    BY MR. NEARY:

25           Q     Okay. Mr. Rich, does paragraph B change your

1 position?

2 A I think paragraph B says that the water is used  
3 exclusively at the Waldteufel place of use in the  
4 original which, at the time, was the approximately 33  
5 and a half acres that -- of which 28 and a half I  
6 believe was the CreekBridge subdivision.

7 Q Do you see the word "exclusively" in that  
8 paragraph?

9 A No. But it also says is used. It doesn't say  
10 it's used anywhere else.

11 Q So your testimony here that Millview  
12 represented to you that they used only the 125,000  
13 CreekBridge reservation is based on paragraphs B and C?

14 A No. It's based on that and the representations  
15 that you and Mr. Bradley made during the field  
16 investigation.

17 Q And those were your understandings of those  
18 representations?

19 A You were pretty clear about it. We talked  
20 about it several times. It was not a passing question.  
21 It was a detailed, in-depth attempt to understand what  
22 was going on.

23 Q Did it ever appear to you curious that Millview  
24 would go out and lease the Waldteufel right to have the  
25 right to use the entire right but for the CreekBridge

1 reservation?

2           A     No. I thought that if they were going to do  
3 something else they would tell me they were going to do  
4 something else. The fact that they didn't tell me, and  
5 I probed and asked, told me for whatever reason that  
6 Millview decided only use it there.

7           Q     Didn't you tell Mr. Bradley during that field  
8 inspection that he should report water usage under the  
9 Waldteufel right?

10           MR. ROSE: Objection. That calls for hearsay  
11 that -- unless Mr. Rich can substantiate that, asking  
12 what he told Mr. Bradley in 2006. I don't believe  
13 that's reported anywhere in the testimony.

14           MR. NEARY: He's present, testifying.

15           MR. ROSE: Are you asking him if he said  
16 something in particular?

17           MR. NEARY: Yes. That was the question.

18           CO-HEARING OFFICER BAGGETT: Overruled.

19           Answer the question to the extent of your  
20 recollection.

21           MR. RICH: I don't recall the specific  
22 statement. I probably would have told him that if  
23 Millview was going to divert the water under the claim  
24 that they needed to continue to file the statement of  
25 water diversion and use as the diverter and report what

1 they were using.

2 Not that he -- I wouldn't have given him legal  
3 advice that told him he should, you know, claim and  
4 additional use somewhere else. That would be up for his  
5 legal counsel to tell him that.

6 BY MR. NEARY:

7 Q Now, have you examined Millview Exhibit No. 1,  
8 which is a deed in 1913 where Mr. Chandon deeded certain  
9 property to Mr. Waldteufel?

10 A I have vaguely or cursory looked at it, yes.

11 Q And do you agree that it constitutes evidence  
12 that alfalfa was being grown on the Waldteufel property  
13 as it existed in 1914?

14 MR. LILLY: Excuse me, Mr. Baggett.

15 CO-HEARING OFFICER BAGGETT: Yes.

16 MR. LILLY: I object to that. This document  
17 speaks for itself, and it does not help the  
18 decisionmaker at all to hear Mr. Rich's interpretation  
19 of a deed that was executed in 1913.

20 The Board can make its own interpretations of  
21 this deed, and Mr. Rich doesn't have any particular  
22 expertise that would facilitate the Board's  
23 interpretation of this deed.

24 MR. JARED CARTER: Your Honor, this is Jared  
25 Carter, and I'd like to be heard on that point though.

1           Mr. Rich testified vehemently and often that  
2 there was no evidence he had ever seen of any use beyond  
3 a certain amount, and he's being shown evidence that he  
4 has seen.

5           His credibility or competence is being attacked  
6 which is perfectly valid for cross-examination.

7           CO-HEARING OFFICER BAGGETT: Mr. Neary?

8           MR. NEARY: Yes. And that's precisely the  
9 point. This is a cross-examination to --

10          CO-HEARING OFFICER BAGGETT: I understand.

11          MR. NEARY: -- test his direct testimony.

12          His direct testimony was he has not seen any  
13 evidence that there was any use of the agricultural use  
14 of the property prior to 1967 or '66, whichever year is  
15 appropriate.

16          CO-HEARING OFFICER BAGGETT: Okay. The  
17 objections are overruled. Continue.

18          MR. RICH: Okay. To answer that question,  
19 first of all, I don't believe I said there isn't any  
20 evidence of agricultural use. I said there was no  
21 evidence of diversion of water to supply that  
22 agricultural use.

23          You've got a statement there. It doesn't  
24 indicate how many acres were there. It doesn't indicate  
25 whether it was grown as a dry farm, whether it was a

1 well, whether, you know, any other thing.

2           There's no indication as to where the water  
3 came from for a crop. It could have been a half acre.  
4 It could have been ten acres. It could have been dry  
5 crop. It could have been pumped from a well.

6           I can't tell you based on that information  
7 where the water came from.

8           MR. NEARY: Well, I would move that that answer  
9 be stricken as nonresponsive because the question was  
10 whether it constitutes evidence that alfalfa was being  
11 grown on the property in 1913.

12           MR. ROSE: I didn't hear the --

13           MR. RICH: I believe you asked me in the  
14 question if that was evidence of water use.

15           CO-HEARING OFFICER BAGGETT: I would overrule  
16 the motion to strike the testimony. He answered the  
17 question you asked.

18           If you have another question you want to  
19 clarify, proceed.

20           MR. NEARY: All right.

21 BY MR. NEARY:

22           Q     The question is: Does this exhibit constitute  
23 evidence that alfalfa was being grown on the Waldteufel  
24 property in 1913?

25           A     Yes.

1 Q And it was being grown on multiple cuttings?

2 A Maybe, maybe not. You can't say after the  
3 first cutting whether there was a second.

4 Q Now does -- is there any quantitative evidence  
5 that points to a continuous nonuse of the Waldteufel  
6 right for five consecutive years during any five-year  
7 period?

8 A Only the lack of affirmation that there was  
9 use.

10 Q So there was no quantitative evidence?

11 A Not directly, no.

12 Q In your investigation, did you require that the  
13 holder of the right demonstrate to you that there had  
14 been no forfeiture?

15 A I asked them to produce evidence of use.

16 Q And did you state in your staff report at  
17 page 11 that Mr. Lawrence's sworn statement describing  
18 the use of the property from 1917, from the time of his  
19 first memory, through 1998, that it provided very little  
20 quantifiable information?

21 A Yes, I believe that's the case.

22 Q And now, did Mr. Howard provide you with any  
23 quantifiable information of nonuse?

24 A No.

25 Q So the posture of your investigation was you

1 were requiring Millview to establish quantifiable  
2 information of use, and you made a determination of  
3 forfeiture without there being any quantifiable  
4 information of nonuse?

5 MR. ROSE: Objection. I believe that misstates  
6 Mr. Rich's -- everything he said, written testimony and  
7 oral testimony. Asking that as a yes-or-no question is  
8 inappropriate.

9 MR. NEARY: I think that's a legal argument,  
10 but I think it is an appropriate question.

11 CO-HEARING OFFICER BAGGETT: Could you rephrase  
12 the question? Sustain the objection.

13 MR. NEARY: I'll take it in smaller steps then.

14 CO-HEARING OFFICER BAGGETT: That would be  
15 helpful.

16 BY MR. NEARY:

17 Q If -- it's true that you requested Millview and  
18 Hill and Gomes to provide you with quantifiable evidence  
19 of use of water prior to 1967?

20 A Yes.

21 Q And that you did not require Mr. Howard or any  
22 other person to provide you quantifiable evidence of  
23 nonuse?

24 A I did not ask him to do that. I did not expect  
25 him to have to be able to do that.

1           Q     So is it safe then to say that you required the  
2 owners to -- of the right -- to provide quantifiable  
3 information of usage after 1914?

4           A     If you're going to claim ownership of a  
5 property right, generally you need to be able to  
6 demonstrate that it's a valid right and exists. That's  
7 all I was asking.

8           Q     Okay. Now, let's just talk a little bit about  
9 the Lawrence testimony.

10                   The Lawrence sworn statement established that  
11 Mr. Lawrence was born in 1914 in a house directly across  
12 from the Waldteufel diversion point; is that correct?

13           A     Yes, I believe that is.

14           Q     And that he lived on the property at the  
15 time -- from 1914 up until 2006, I believe, when the  
16 statement was given?

17           A     I think with the exception of a small break  
18 during World War II when he served overseas.

19           Q     And in your testimony, you -- at page 5, for  
20 the benefit of your counsel -- you stated that there was  
21 no evidence that the Waldteufel right was not diverted  
22 from a source other than the Waldteufel right?

23           A     Can you rephrase that question?

24           Q     In your testimony at page 5 --

25           A     Okay.

1 Q And I'll just take you to that. Would you just  
2 read that highlighted portion into the record?

3 A Sure:

4 While the sworn statement suggests that  
5 some farming occurred on the property  
6 from the early 1920s, it does not  
7 indicate whether water was actually  
8 diverted from the west fork of the  
9 Russian River on a regular or continuous  
10 basis or whether the property was  
11 irrigated with percolating groundwater  
12 from a well on the property, irrigated  
13 with water obtained from a water district  
14 pipeline, or dry-farmed relying on  
15 rainfall and a high groundwater table to  
16 provide sufficient water for limited  
17 agricultural production.

18 Q Okay. And you provided the Lawrence statement  
19 that was provided to you as one of the Prosecution Team  
20 exhibits; is that correct?

21 A Which one are you referring to?

22 Q Prosecution Team No. 5.

23 A Okay. The statement of Floyd Lawrence.

24 Q Now do you see at page 20 to 21 where the  
25 question was:

1                   When was the first time that you saw that  
2                   pump?

3                   And Mr. Lawrence answered:

4                   Probably when I was about three years  
5                   old. We used to swim down there right  
6                   where the pump was. It was one of the  
7                   few places where there was a nice big  
8                   hole. It was a big hole in there about  
9                   eight feet deep.

10                  A     Yes, I see that.

11                  Q     And is that -- did you consider that as being  
12                  evidence that there was water being pumped to service  
13                  the Waldteufel property out of the Russian River?

14                  A     No. I took that as evidence that there was a  
15                  pump there. Whether it was used or not, you know, and  
16                  how often it was used, whether it was used once every 20  
17                  years, whether it was used on a regular basis, there was  
18                  no indication in his testimony as to how often it was  
19                  using used.

20                  Q     Well, going back to your written testimony, you  
21                  said that the -- there was no evidence to indicate  
22                  whether water was actually diverted from the west fork  
23                  of the Russian River.

24                  A     On a regular or continuous basis. There is a  
25                  qualifier there, sir.

1 Q Okay. And that's the qualification you relied  
2 upon for your testimony?

3 A Pardon me?

4 Q That's the qualification you relied upon for  
5 making your conclusion?

6 A Yes.

7 Q Okay. Now, in connection with your  
8 investigation, were you provided with the actual  
9 Waldteufel right?

10 A You mean a copy of the notice --

11 Q Correct.

12 A -- filed with county recorder?

13 Q Yeah.

14 A I believe we had a copy that was filed by Mr.  
15 Woods or Mr. Hill or Gomes in a statement. I'm not sure  
16 who submitted it, but in the statement 272 there was a  
17 copy of the notice.

18 Q And it also refers to the diversion work; is  
19 that correct?

20 A I'm not sure that it refers to an existing one  
21 or whether a proposed one. Are you referring to the  
22 yellow area up there?

23 Q Correct.

24 A It says I intend to divert. It does not say I  
25 have been diverting it. It says I intend to. Which

1 would lead me to believe that it was prospective in  
2 nature, that he was filing this before he actually did  
3 any diversion of water.

4 Q Now, does the statement that, as contained  
5 here, plus the fact that a pump was actually seen by  
6 Mr. Lawrence lead you to the conclusion that Mr.  
7 Waldteufel's notice was not a speculative claim on the  
8 water right?

9 A No, it would not.

10 Q So you hold the opinion that it is possible  
11 that the Waldteufel filing was a speculative claim?

12 A I believe everything written in there would  
13 indicate that it was. At three years of age, would have  
14 been 1917 which would have been three years later than  
15 this was filed.

16 Whether the pump was put in after, whether the  
17 pump was an old pump that had been there for years and  
18 years and was rarely used, if ever, I don't know.  
19 There's not enough information to sort that out.

20 Q You testified that Mr. Lawrence appeared to you  
21 to be confused.

22 A Yes. Based on the -- all I have is the written  
23 record.

24 Q So is it safe to characterize your assessment  
25 of Mr. Lawrence's statement as you made a determination

1 as to his credibility?

2 A He didn't seem to have total command of  
3 everything that was going on. He didn't seem to have a  
4 lot of information. Throughout his statement, he would  
5 make statements like well, I wasn't really involved in  
6 that.

7 He did have some very vivid memories when  
8 flooding occurred and having to move cattle to higher  
9 ground and things like that.

10 But as I recall, there were several statements  
11 in there talking about water use when he was probed and  
12 he said I just wasn't that involved in that.

13 Q Do you recall Mr. Lawrence stating that he  
14 worked for Mr. Dowling on the Waldteufel property as an  
15 employee?

16 A I believe he did early on, possibly in some  
17 alfalfa operation, although he didn't reference what the  
18 source of water was. I think they were haying, so there  
19 was no water being applied at the time he would have  
20 been working there.

21 Q Now, Mr. Lawrence also stated that he  
22 remembered the pump as being an old style pump with a  
23 gasoline engine and that the pipe that left the pump was  
24 either 8 inches or 10 inches in diameter. Do you recall  
25 that?

1           A     Yes.

2           Q     And do you recall that he testified that  
3 Mr. Dowling irrigated by flood irrigation at page 22?

4           A     He said he pumped water. I don't see where he  
5 said that he flood irrigated.

6           Q     Well, this document stands for itself.

7                     If it does say that he irrigated by flood  
8 irrigation, would that pretty much rule out the concept  
9 of dry farming?

10          A     Not necessarily. I mean you're in an area  
11 where we know that the flow later in the summer gets  
12 incredibly low. There probably wouldn't have been  
13 enough water to fully irrigate that property with an  
14 alfalfa crop all the way through the summer.

15                     Whether he irrigated at one time, he could  
16 have. Whether he irrigated it on a regular basis that  
17 way, you can't say. Farming operations, by nature,  
18 change over time quite often within a season.

19          Q     Now Mr. Lawrence testified that that pump was  
20 used for at least 50 years, page 22.

21          A     No, he says it was there for 50 years. I don't  
22 think he said it was used.

23                     As I recall, Mr. Gomes said he recalled seeing  
24 it in 1998, but I don't know how good a condition it  
25 was. And especially if it was there during the flood

1 times, it probably wasn't in very good condition at all.

2 Q Would you look at page 22, lines 16 to 19,  
3 where Mr. Lawrence testified that Mr. Wood had used that  
4 pump?

5 A Yes.

6 Q Would you take that into account in making your  
7 staff report?

8 A Yes. Mr. Wood told me he pumped in his  
9 statements of water diversion use. He said I pumped  
10 water from the river, 15 acre foot a year.

11 Q So going back to the -- to your statement that  
12 there's no indication that water was actually diverted  
13 from the west fork on a regular and continuous basis is  
14 consistent with the fact that Mr. Wood was using it?

15 MR. ROSE: I believe Mr. Rich already answered  
16 this line of questioning. So I'll object to continued  
17 questioning on this line as asked and answered.

18 CO-HEARING OFFICER BAGGETT: Asked and  
19 answered.

20 MR. NEARY: Okay.

21 BY MR. NEARY:

22 Q On your site visit, did -- were you taken to a  
23 crib inlet that had remnants of a 6-inch pipe?

24 A Yes.

25 Q And did it appear that that 6-inch pipe was

1 used for diversion?

2 A Hard to say. The pipe was not connected to a  
3 pump. It didn't go very far. It was an older pipe. As  
4 I recall, it was riveted. It was not newer pipe.

5 The parties said they thought that's what had  
6 been used, but no one had any recollections prior to  
7 1998 so I couldn't say exactly what it was or wasn't  
8 used for.

9 Q I just want to show you a picture here. This  
10 picture that's in the McEdwards testimony, does that  
11 illustrate the crib inlet that you referred to?

12 A Yes, I believe it does.

13 Q And does this -- the remnant pipe, is that the  
14 pipe that you saw for --

15 MR. ROSE: I'll object that these paragraphs  
16 have not been authenticated, and Mr. Rich, unless he's  
17 seen these, can't speak to whether that is the pipe.

18 I believe his answer to the first question was  
19 he believes that is or does look like what he saw.

20 But inasmuch as he's being asked to testify  
21 that these paragraphs are what he saw, Mr. Rich hasn't  
22 authenticated these, and neither have we heard any  
23 testimony to that regard.

24 MR. NEARY: Perhaps he could help us  
25 authenticate it. Might we just ask the question.

1 BY MR. NEARY:

2 Q Does this appear to be the crib inlet wall that  
3 you saw when you were at the site?

4 A It looks very similar to what I saw.

5 CO-HEARING OFFICER BAGGETT: Sustain that.  
6 Continue.

7 BY MR. NEARY:

8 Q And the pipe is shown in the picture?

9 A Yes, it looks about like what I recall seeing  
10 out there. It's been several years, but.

11 Q And you actually took some pictures of that  
12 pipe, didn't you, while you were out there?

13 A I don't recall whether I took pictures. I  
14 don't believe there are any in the file. I'm not a big  
15 picture taker when I'm out in the field.

16 Q Now, did your analysis rely in any way upon --  
17 strike that.

18 Is it true that your conclusion of right --  
19 well, strike that also. You've already answered it.

20 I want to take you to the Wood statement of  
21 diversion. Is it true that statements of diversion  
22 weren't provided for by code prior to 1967?

23 A That is correct.

24 Q So that would explain why there would be no  
25 statements of diversion filed between 1914 and 1967?

1           A     That would be correct.

2           Q     Now, did Mr. Howard's complaint actually  
3 address the use of the Waldteufel right to supply the  
4 west fork subdivision?

5           A     I don't recall that.

6           CO-HEARING OFFICER BAGGETT:  Mr. Neary, I  
7 should just let you know.  I don't know if you can see  
8 the clock from where you are.  You've got about five  
9 minutes.

10          MR. NEARY:  Okay.  I didn't know that -- I have  
11 about another 15 minutes.

12          CO-HEARING OFFICER BAGGETT:  Let's see where  
13 you're at when you got there, and we'll decide.  Tell me  
14 what you want to ask.

15          MR. NEARY:  When we get to five minutes?

16          CO-HEARING OFFICER BAGGETT:  You're at five  
17 minutes.

18          MR. NEARY:  So when we get to where?  When I  
19 get to the --

20          CO-HEARING OFFICER BAGGETT:  When you get to  
21 the end of the hour, if you have a compelling question,  
22 we may allow it.  But we've been -- there's been a lot  
23 of asked and answered here.  So continue.

24 BY MR. NEARY:

25          Q     Now is it true that statements of diversion do

1 not record availability?

2 A That is true.

3 Q And by availability, I mean availability of  
4 water?

5 A They record what was diverted, so you would say  
6 availability at least up to that amount, but not  
7 necessarily anything above it.

8 Q So you conducted an analysis of the USGS flow  
9 data that shows that, at least in some years, the  
10 surface flow was insufficient to supply diversion in the  
11 amount claimed by Waldteufel?

12 A Throughout the post season, yes.

13 Q Now, in your written statement you testified at  
14 page 12 that Judge Schafer suggested that this Board  
15 should take a reviewable action regarding the validity  
16 of the Waldteufel right?

17 A That is what I was informed.

18 Q Is it true that -- did you review Judge  
19 Schafer's decision?

20 A No, I did not.

21 Q So who informed you that that was what Judge  
22 Schafer had determined?

23 MR. ROSE: I'll object. I believe that  
24 Millview and Hill and Gomes submitted the order from  
25 Judge Schafer, and the document speaks for itself.

1 That's exactly what it says.

2 If Mr. Rich didn't read it, then the document  
3 speaks for itself, and he's answered the question to the  
4 best of his ability already.

5 MR. NEARY: He testified that he's been told  
6 that Judge Schafer said something, and the document's in  
7 the record.

8 CO-HEARING OFFICER BAGGETT: Overruled. Ask --

9 MR. NEARY: Okay.

10 CO-HEARING OFFICER BAGGETT: Answer the  
11 question if you can.

12 MR. RICH: Okay. My supervisor, John O'Hagan,  
13 was present and mentioned it to me. And it was either  
14 legal counsel who was working here at the time, Matthew  
15 Bullock, or David. I can't recall exactly who was  
16 present.

17 But they both said that the judge had issued a  
18 ruling, and that we needed to come up with some sort of  
19 an action in order to comply with his request.

20 BY MR. NEARY:

21 Q Okay. Now in your testimony, you refer to  
22 this, I guess, aid for benefit of the Board, Millview's  
23 water use 2001, 2008?

24 A Yes.

25 Q And in your testimony you stated that:

1                   Water right law does not allow right  
2                   holders to cycle their diversions through  
3                   multiple water rights to avoid forfeiture  
4                   of any one right.

5                   Do you recall making that statement?

6           A        I believe so, yes.

7           Q        What law are you referring to?

8           A        Well, typically, when you have a water right,  
9           if you are -- if you have a high priority right, it  
10          should be used first to the extent that you can use it,  
11          season, amount, et cetera.

12                   Once you've exhausted that right, then you  
13          would move to your next highest priority right.

14                   But you can't go along and use one year say  
15          well, I'm going to use my highest priority right, and  
16          the next year I'm not going to use it at all. I'm going  
17          to use my lowest priority right just to try to keep that  
18          right in place.

19                   That provides an unreasonable impact to other  
20          diverters because it allows you to horde water rights,  
21          basically, and preclude other people from making  
22          beneficial use that they should be able to make use of.

23          Q        Are you aware that most of Millview's  
24          summertime water use is -- aside from the Waldteufel  
25          right -- is based upon the Mendocino Right?

1           A     You are referring to the contract with the  
2 flood control district?

3           Q     Correct.

4           A     Yes.

5           Q     And that that is -- that right is merely a  
6 contractual right that Millview has with the Russian  
7 River district?

8           A     Yes.

9           Q     And it's revocable for any given number of  
10 reasons at the subjective determination of the Mendocino  
11 district?

12          A     I believe it would be based on the contract.  
13 It is a contract between the District and Millview, and  
14 the conditions should dictate how it's operated.

15          Q     So it is -- when your testimony referred to  
16 cycling between multiple water rights, would your  
17 testimony be the same if the question was whether it  
18 would be appropriate for Millview to decide whether it  
19 was going to use a water right or a contractual right  
20 from Russian River?

21          A     I would say had the District -- had the flood  
22 control district gone to Millview and said, based on our  
23 contract, you can only have so much this year, then --  
24 number one, that contract is secondary.

25                   I would probably have used the pre-1914 first

1 as the better right because you have more control over  
2 it than you do the contractual, per se, or there are  
3 less exclusions.

4 But the District reported use under the permit,  
5 paid the District for water, and then turned around in a  
6 Public Records Act request and said oh, no, that never  
7 occurred.

8 I mean Mr. Bradley filed under penalty of  
9 perjury a statement -- or a progress report that said we  
10 took this amount of water under our water right. And  
11 then in a Public Record Act request a couple of years  
12 later, he says, oh, no. That's not true. We didn't do  
13 that. And that to me looks like it's cycling.

14 MR. NEARY: I would make a request that that  
15 answer be stricken as nonresponsive. And that certainly  
16 was a nonresponsive answer.

17 MR. ROSE: I disagree.

18 I think that that -- based on the question that  
19 was asked, Mr. Rich's response went directly to that.  
20 Cycling through water rights. Mr. Rich addressed issues  
21 that that's not exactly what's happening here.

22 MR. NEARY: I was drawing the distinction  
23 between water rights and a mere contractual right that's  
24 revocable and expires.

25 CO-HEARING OFFICER BAGGETT: I'll allow the

1 testimony. Continue to the extent -- your time is out.

2 If you have other questions related to this  
3 illustrative chart, I will allow those because it was  
4 just provided to you.

5 MR. NEARY: Would I be able to just follow it  
6 up with a few questions about the Cease and Desist  
7 Order?

8 CO-HEARING OFFICER BAGGETT: Couple questions,  
9 then let's conclude.

10 MR. NEARY: All right.

11 There's a pending question.

12 MR. ROSE: There is?

13 CO-HEARING OFFICER BAGGETT: What?

14 MR. NEARY: You overruled the objection?

15 CO-HEARING OFFICER BAGGETT: Yeah -- no, no. I  
16 sustained it.

17 MR. NEARY: Okay. I'm sorry. All right. Well  
18 then, I just have a few more questions about the Cease  
19 and Desist Order.

20 BY MR. NEARY:

21 Q The Draft Cease and Desist Order, if adopted,  
22 would require Millview to restrict diversions to less  
23 than 15 acre feet under the Waldteufel right?

24 A Yes, I believe so.

25 Q And essentially, the Draft CDO and your staff

1 report upon which it's based recognizes that the  
2 Waldteufel right is vested but for the fact that it has  
3 been forfeited to 15 acre feet?

4 MR. ROSE: I'll object that that misstates the  
5 evidence that Mr. Rich has already provided.

6 CO-HEARING OFFICER BAGGETT: Sustained. You  
7 can re-ask.

8 BY MR. NEARY:

9 Q Well, if the Board were to adopt the position  
10 that it does not have jurisdiction to determine that the  
11 right has been forfeited, would that leave us with the  
12 proposition that the Waldteufel right is vested?

13 MR. ROSE: I'll object that that's hypothetical  
14 and beyond Mr. Rich's expertise. It involves  
15 speculation.

16 CO-HEARING OFFICER BAGGETT: I would sustain  
17 that to the extent that could you -- it was a compound  
18 question. Could you break the question down?

19 MR. NEARY: All right.

20 BY MR. NEARY:

21 Q If this Board were to adopt the position that  
22 it does not have jurisdiction to determine whether a  
23 vested right has been forfeited, would that then leave  
24 us with the proposition that this right was vested at  
25 least to 15 acre feet?

1           MR. ROSE: Again, I'm going to object that this  
2 question assumes facts that are not in evidence such  
3 that it's assuming that this right is vested and that  
4 the Board will make jurisdictional conclusions.

5           So I think it's I'm objecting on the grounds of  
6 speculation. I'm objecting on the grounds that it  
7 misstates evidence in asking Mr. Rich the question.

8           CO-HEARING OFFICER BAGGETT: I'll overrule  
9 that. I think he's asking a hypothetical.

10          MR. NEARY: That's correct.

11          CO-HEARING OFFICER BAGGETT: Maybe you could  
12 break the hypothetical down. It would be simpler.

13 BY MR. NEARY:

14          Q     Let's just assume as a hypothetical that this  
15 Board were to adopt the jurisdiction -- adopt the  
16 determination that the Board doesn't have the  
17 jurisdiction to declare that a pre-1914 right is  
18 forfeited. Okay?

19                 And if that were the operative proposition, is  
20 it then true that at least a portion of the Waldteufel  
21 right has vested?

22          A     No, not necessarily. If the Board decides it  
23 can't make a finding on its own about the forfeiture, it  
24 does not preclude the Board as a separate entity from  
25 staff to going -- approaching the Attorney General's

1 office and asking that they go direct to court and ask  
2 the court to determine that the right has or has not  
3 been vested.

4 I don't think it precludes the Board with that  
5 finding from any action that the Board wants to do.

6 And as far as staff is, we made a finding that  
7 we would not argue over 15 acre feet, that above that we  
8 would take a position we don't think it exists.

9 But I don't think we made a finding that 15  
10 acre foot is vested. We just said we're not going to  
11 argue about it. That's our prosecutorial discretion  
12 that we choose not to go there.

13 MR. NEARY: Thank you.

14 CO-HEARING OFFICER BAGGETT: Thank you. Let's  
15 take ten minutes, and then we'll come back. Go off the  
16 record.

17 (Recess)

18 CO-HEARING OFFICER BAGGETT: Let's go back on  
19 the record.

20 Cross-examination of Prosecution Team witness  
21 by Mr. Carter. You're up.

22 MR. CARTER: Thank you, Hearing Officer  
23 Baggett. Before I begin, I would like to say how much I  
24 have appreciated the courtesies you and your excellent  
25 staff have extended to me as I make the transition from

1 superior court to administration, and I apologize for  
2 any inconveniences that I may have caused.

3 CO-HEARING OFFICER BAGGETT: We appreciate  
4 that. Our goal in administrative proceedings is to get  
5 a full and complete record because we realize that's all  
6 everyone has to take to the court.

7 So we provide some leniency. We just ask that  
8 we try to refrain from legal arguments and just get to  
9 the facts of the case. So far, I think we've done a  
10 good job. So continue.

11 MR. CARTER: Thank you.

12 CROSS-EXAMINATION BY MR. BRIAN CARTER

13 FOR THOMAS HILL and STEVEN GOMES

14 BY MR. BRIAN CARTER:

15 Q Good morning, Mr. Rich. How are you?

16 A Fine.

17 Q My name is Brian Carter. I represent Tom Hill  
18 and Steve Gomes. This exhibit that your counsel handed  
19 out. Do you have that in front of you?

20 A I think it's a visual aid.

21 Q Visual aid.

22 MR. BRIAN CARTER: Shouldn't we give this a  
23 name or a number, Mr. Baggett? Exhibit 1 --

24 CO-HEARING OFFICER BAGGETT: We could use it as  
25 Prosecution Exhibit 14, if there's no objection, for

1 illustrative -- okay. We'll call it that. Okay. Very  
2 good. We'll take care of the exhibits when we're done  
3 with the case-in-chief, but we'll note that.

4 MR. BRIAN CARTER: Okay.

5 BY MR. BRIAN CARTER:

6 Q Looking at Prosecution Exhibit 14, Mr. Rich, it  
7 appears that in 2005 there was a whole bunch of water  
8 used under the pre-1914 water right, doesn't it?

9 A That's the amount that was listed in the  
10 information provided by the District.

11 Q And 2005 was in the five years preceding the  
12 complaint by Lee Howard, correct?

13 A Yes.

14 Q Now, in your report that came out in 2007, what  
15 did you conclude was the most amount of water that  
16 Millview had used in the immediately preceding five  
17 years?

18 A Based on the information available to me, 15  
19 acre feet.

20 Q Okay. So what -- the information you now have  
21 is different from the information that you had when you  
22 published your report; is that what you're testifying?

23 A Yes.

24 Q Okay. And the additional information reflected  
25 in Exhibit 14 came from where?

1           A     Initially, it was a subpoena that was issued to  
2 Millview. They didn't respond. Then they did respond  
3 to a Public Record Act request. The bottom of every  
4 page says subpoena response, I believe, or something  
5 like that. But that's the information where it came  
6 from.

7           Q     And the subpoena was issued in connection with  
8 the superior court lawsuit, correct?

9           A     I am not sure I could testify to that.

10          Q     But in connection with your investigation, what  
11 efforts did you take to obtain documents and thorough  
12 and complete information about Millview's use?

13          A     I asked the parties to provide me all the  
14 information they could regarding the use of water. I  
15 reviewed the Division files, you know.

16                   And to the extent there was information in the  
17 Division files and what the parties provided me was  
18 pretty much what I was limited to.

19          Q     The notice that you gave to Millview and others  
20 regarding your investigation consisted of your letter  
21 and a copy of the Howard complaint, correct?

22          A     Yes. That was my initial request for answer.

23          Q     Okay. That was the entirety of the notice to  
24 Millview, Gomes, and Hill that their water right was  
25 being tested and subject to forfeiture; wasn't it?

1           A     I don't know whether I'd call it notice.  I  
2     mean I informed them of a complaint.  And the complaint  
3     made allegations.  I asked them to respond to the  
4     allegations.

5           Q     And this complaint and your investigation  
6     resulted in the conclusion that the water right has been  
7     forfeited to the extent of 99 percent, correct?

8           A     Yes.

9           Q     And the -- it now emerges that Millview says  
10    they used a whole heck of a lot more water under that  
11    water right than you concluded they had?

12          A     That's what they're claiming, yes.

13          Q     And was there a hearing during the course of  
14    your investigation and prior to your issuance of a  
15    report?

16          A     No, there was not.

17          Q     And were there any written notices given to  
18    Millview, Hill, or Gomes other than the letter you sent  
19    them shortly after receiving the Howard complaint?

20          A     They were sent the Staff Report of  
21    Investigation with a request to provide additional  
22    evidence, comments, whatever, you know, that they felt  
23    like.  And they were provided an opportunity to review  
24    the report and comment on it, and I did receive some  
25    comment letters.

1 Q I wasn't clear. I apologize.

2 Before you issued your report, the notice that  
3 was given to these people that their right might be  
4 forfeited 99 percent was one letter from you and the  
5 Howard complaint, correct?

6 MR. LILLY: Excuse me, Mr. Baggett. I object  
7 to the statement of forfeited 99 percent. That  
8 mischaracterizes prior testimony.

9 Mr. Rich said it might be -- you might use the  
10 legal term forfeit; you might use the legal term the  
11 water right was never perfected.

12 So I just want to make sure we're clear on the  
13 record because I believe that question may be misstating  
14 Mr. Rich's prior testimony.

15 MR. JARED CARTER: Mr. Baggett, I'd like to be  
16 heard on that.

17 CO-HEARING OFFICER BAGGETT: Mr. Carter.

18 MR. BRIAN CARTER: I don't know of any kind of  
19 testimony that I object to in my heart of hearts more  
20 than testimony that hurts my case, and that's what  
21 Mr. Lilly is complaining about.

22 This antagonistic witness has just testified,  
23 and now Mr. Lilly wants to get him to change his mind;  
24 and I think that is a totally uncalled for interjection,  
25 and it should be overruled peremptorily.

1           MR. NEARY: And I'd just like to point out that  
2 that Mr. Rich did testify that the actual findings in  
3 his report were that it was a valid right, that it had a  
4 valid -- has a valid basis, and that he applied a  
5 forfeiture determination, the word "degrade" being  
6 essentially equivalent with forfeiture.

7           CO-HEARING OFFICER BAGGETT: We'll allow the  
8 testimony to stand.

9           Continue, but I think we understand the  
10 confusion between "forfeiture" and "degrade" and that  
11 discussion.

12           MR. NEARY: Thank you.

13 BY MR. BRIAN CARTER:

14         Q     Are you employed by a court?

15         A     No.

16         Q     Were you employed by a court at the relevant  
17 times?

18         A     No.

19         Q     You were employed by the State of California,  
20 correct?

21         A     That is correct.

22         Q     The Division of Water Rights?

23         A     That is correct.

24         Q     And are you familiar with -- do you have my  
25 Exhibit AA in front of you, Mr. Rich? Could you turn

1 turn to that real quickly?

2 MR. BRIAN CARTER: For the record, this is a  
3 document entitled State Water Resources Control Board  
4 Information Pertaining to Water Rights in California  
5 1990.

6 BY MR. BRIAN CARTER:

7 Q Do you have that?

8 A Yes, I do.

9 Q Will you read into the record the sentence that  
10 starts at the very end of page 7 and carries over to  
11 page 8?

12 MR. ROSE: I'll object to Mr. Rich being asked  
13 to read it into the record. It's already been  
14 admitted -- or proposed as an exhibit. The document  
15 speaks for itself.

16 CO-HEARING OFFICER BAGGETT: Overruled. Just  
17 if it's a sentence, read it.

18 MR. RICH: Okay. The last sentence that  
19 starts?

20 BY MR. BRIAN CARTER:

21 Q The carryover sentence, yes.

22 A (Reading:)

23 The State Water Resources Control Board  
24 does not have the authority to determine  
25 the validity of vested rights other than

1                   appropriative rights initiated December  
2                   19, 1914 or later.

3           Q     Mr. Rich, do you believe that is an accurate  
4 statement of your employer's authority?

5           A     No, I do not.

6           Q     Have you ever seen Exhibit AA before?

7           A     Numerous times throughout my career.

8           Q     Have you ever done anything to get it to  
9 conform to what you think is an accurate statement of  
10 your employer's authority?

11          A     This document I don't believe is considered to  
12 be dicta for the Board. I don't believe the Board  
13 believes that it has to follow it. It has evolved over  
14 the years.

15                   I think that the intent of the statement was  
16 that the Board is not obligated to pursue those things,  
17 but the Board has the discretion to do it.

18          Q     Mr. Rich, are you familiar with contents of  
19 California Water Code Section 1831 subdivision (e)?

20          A     Vaguely. I'm not going to cite it to you verse  
21 and chapter.

22          Q     Well, let me read it for you:

23                   This article shall not authorize the  
24                   Board to regulate in any manner the  
25                   diversion or use of water not otherwise

1                   subject to regulation of the Board under  
2                   this part.

3                   Section 1831 of the Water Code is in part 2 of  
4                   division 2, part 2 being entitled Appropriation of  
5                   Water.

6                   Now is it your understanding that Section  
7                   1831(e) says that the water board that you work for is  
8                   not authorized to regulate in any manner a pre-1914  
9                   water right?

10                  A     I think I would disagree with that because the  
11                   reasonableness provisions of Article 10, Section 2 and  
12                   Section 100 and Section 275 of the Water Code clearly  
13                   give the Board authority to regulate all water in the  
14                   state of California.

15                  Q     And that's what you were doing when you did  
16                   your investigation; wasn't it?

17                  A     I was investigating a complaint with  
18                   allegations.

19                  Q     And the fact that this was a pre-1914 right  
20                   that you were investigating didn't give you any pause,  
21                   did it?

22                  A     To issue an opinion? No.

23                  Q     To investigate, much less issue an opinion?

24                  A     Section 1825 of the Water Code is an admonition  
25                   by the Legislature that this Board take a very proactive

1 stance to look at unauthorized diversion. You cannot  
2 look at unauthorized diversion unless you develop an  
3 opinion as to whether it exists or not.

4 CO-HEARING OFFICER BAGGETT: Let me interject  
5 here.

6 If we -- these are legal arguments which will  
7 be taken up afterwards. To the extent you can go to the  
8 factual issues before us would be, I think, a much more  
9 expeditious -- you'll get ample opportunities to brief  
10 this legal issue of whether this is beyond the Board's  
11 authority or not.

12 MR. BRIAN CARTER: Thank you, Mr. Baggett.

13 BY MR. BRIAN CARTER:

14 Q Now, the only scenario under which the  
15 diversion that Mr. Howard complained of was unauthorized  
16 is if they were diverting water that was coming out of  
17 the Coyote -- Lake Mendocino; wasn't it?

18 A I'm not sure I would go that far.

19 Q Because if Millview's point of diversion were  
20 still back at the spot where Waldteufel did it on the  
21 west fork, there would be no possibility that they were  
22 diverting project water, correct?

23 A If they were up at Lake Mendocino Drive, no,  
24 they could not divert water released from Lake  
25 Mendocino.

1 Q So then there would be no chance that Millview  
2 was pumping water that actually should have gone down to  
3 other users under the project?

4 A No, I would not say that. If they were taking  
5 water they didn't have a right to, and they didn't take  
6 the water, that water would have gone on downstream  
7 about 600 foot where it would have entered the mainstem  
8 and commingled with water released from Lake Mendocino.

9 So downstream parties -- if I'm below that  
10 confluence, I have a hard time telling which side of the  
11 confluence the water comes from. It's all muddy ground  
12 to me at that point.

13 Q Now when you first saw the complaint from Lee  
14 Howard -- that's Exhibit G to my evidence, one page,  
15 February 27, 2006 letter from Lee O. Howard to Victoria  
16 Whitney. Do you recall when you first saw that?

17 A I don't recall specifically, no.

18 Q Do you recall who handed it to you, if anybody?

19 A Probably dropped into my in basket.

20 Q Do you recall whether it had any instructions  
21 attached to it or verbally given to you when you  
22 received it?

23 A I don't recall receiving any.

24 Q Okay. What do you recall thinking upon reading  
25 this document for the first time?

1           A     You know, this was almost four years ago. I  
2     could not tell you what I thought at the first moment.  
3     I couldn't tell you what I was doing at the time,  
4     whether I had other things on my mind or not. I have no  
5     idea.

6           Q     The second sentence in the first paragraph says  
7     that a pre-1914 water right is what's being -- the  
8     subject of this complaint, doesn't it? Did that give  
9     you any pause?

10          A     No.

11          Q     Did you think hey, maybe I don't have to  
12     investigate this because it's out of my jurisdiction?

13          A     No. If there's no basis of right, it wouldn't  
14     be.

15          Q     Did you ever speak to Lee Howard about his  
16     complaint?

17          A     During the field investigation, Mr. Howard was  
18     not able to make it, and I met with Mr. Hill, Mr. Gomes,  
19     Mr. Bradley, and Mr. Neary.

20                     And I told them at that time that I was going  
21     to try to hook up with Mr. Howard thereafter so that he  
22     could understand what we did, to give him his  
23     opportunity to put in his side of the story.

24                     And I did meet with him for probably a half  
25     hour thereafter at the hotel we were staying at, and we

1 managed to hook up on a cell phone, and he came by and  
2 listened to what I told him we'd seen and what had been  
3 there.

4           And he said thank you. He didn't provide a  
5 whole lot of information, nor did -- you know, he wasn't  
6 really proactive. His complaint pretty well stood for  
7 his position.

8           That was my recollection of the conversation.  
9 It wasn't --

10          Q     Had you spoken to him before the field  
11 investigation to tell him that you were going to be up  
12 there and to invite him to join in?

13          A     I probably did at that point. But I can't tell  
14 you whether I spoke to him on the phone, whether I left  
15 a voicemail. I know a lot of times that's what happens.  
16 You leave people a voicemail.

17          Q     Okay.

18          A     But I can't tell you. I don't recall having a  
19 great deal of conversation with him prior to the release  
20 of the Report of Investigation.

21          Q     So having received the letter from Mr. Howard,  
22 you felt yourself compelled to conduct this  
23 investigation and to prepare this report, but you only  
24 spoke to him once after your cite inspection to -- and  
25 you never dug down with him as to the basis or validity

1 of his complaint; is that correct?

2 A I didn't ask him. He had very little  
3 information to provide.

4 Q Did anybody tell you to perform an  
5 investigation and prepare a report regarding the Howard  
6 complaint?

7 A Not specifically. But generally, that's the  
8 way we handle complaints. Probably 98 percent of our  
9 complaints have a Report of Investigation done on them.

10 Q So how did the letter get from Whitney to you?

11 A We have an interoffice mail system.

12 Q And there were no communications that you  
13 recall between Whitney and you or anybody else on your  
14 staff about this letter, and you just ran off and did  
15 your investigation and prepared your report, correct?

16 A Yes. That's why I'm Chief of the Complaint  
17 Unit.

18 Q Okay. Now did you ever conclude that some of  
19 the things stated in Mr. Howard's letter are inaccurate?

20 A I considered the possibility they could be.

21 Q That's not my question, sir.

22 A Okay.

23 Q Did you ever conclude that any of the things  
24 stated in his letter are inaccurate?

25 A I don't know that I ever went there.

1 Q And you conducted a -- you spent approximately  
2 80 percent of the time that you devote to an average  
3 complaint to your work on this complaint, correct?

4 A That would be correct.

5 Q There was no hearing in court?

6 A No.

7 Q And the result was a 99 percent forfeiture of a  
8 pre-1914 water right?

9 A No. It was not.

10 Q Did you have a result in mind, a result you  
11 desired, when you began your investigation into the  
12 Howard complaint?

13 A Absolutely not.

14 Q You indicated upon Mr. Neary's cross-exam that  
15 hoarding water rights is bad, and that a better result  
16 is for water to be released down the river to more  
17 users; is that your --

18 A Can you state that again?

19 Q Entities such as Millview cannot cycle its use  
20 through various water rights because that results in  
21 hoarding, and the better result is for them to have --  
22 Millview to have less water rights so more water can go  
23 down to the river to other users. Is that an accurate  
24 statement of your attitude about water?

25 A No.

1 Q Okay. Do you have an opinion as to whether  
2 underflow would be validly pumped under a pre-1914 water  
3 right?

4 For example, Lawrence testified there's an  
5 eight-foot swimming hole in the Russian River where this  
6 pump and pipe was from the Waldteufel right, and the  
7 water was eight feet deep, even when the rest of the  
8 river was dry.

9 Is it your understanding that a person could  
10 pump that hole dry under a pre-1914 water right if he or  
11 she wanted to --

12 MR. ROSE: I'll object on the grounds that this  
13 is --

14 MR. BRIAN CARTER: -- or trying to --

15 MR. ROSE: -- conflating a hypothetical.

16 MR. BRIAN CARTER: I'm sorry. I should  
17 complete the sentence.

18 BY MR. BRIAN CARTER:

19 Q Pump that hole dry or try to pump that hole dry  
20 if she wanted to?

21 MR. BRIAN CARTER: I apologize for  
22 interrupting, counsel.

23 MR. ROSE: That's fine.

24 I will object on the grounds that this question  
25 is conflating a hypothetical situation with facts that

1 they're trying to prove and misstating the evidence as  
2 to those.

3 MR. NEARY: I'm not sure what conflate means,  
4 your Honor. But this is very much a fact that is in  
5 evidence which is that there was an eight-foot swimming  
6 hole, and that's the hole where the pump and pipe were.

7 So my question is: Even though the rest of the  
8 river is dry, and the gauging station upstream says it's  
9 dry, there's water available to be pumped. And I'm  
10 asking the witness whether under his understanding it's  
11 proper to pump that.

12 CO-HEARING OFFICER BAGGETT: Overruled.

13 Answer please.

14 MR. RICH: First of all, I'm not sure that an  
15 eight-foot hole represents that there's more water. If  
16 that hole is down in the bedrock, there could be no more  
17 additional flow there.

18 To the extent that there is water that is  
19 available, either in the hole which is -- and the hole  
20 is not part of an underflow, and I'm not sure that this  
21 Board recognizes underflow.

22 But if it's there, and you have a valid basis  
23 of right, you can pump the water.

24 If you don't have a valid basis of right, you  
25 shouldn't pump the water.

1 BY MR. BRIAN CARTER:

2 Q You've repeatedly indicated that you were --  
3 you found an absence of evidence that would indicate the  
4 validity of the Waldteufel right, correct?

5 A I found lack of evidence to substantiate that  
6 the right had vested.

7 Q Right. And you indicated that one in  
8 Millview's position needs to be able to demonstrate the  
9 validity of that right. My question is: To whom does  
10 Millview have to demonstrate the validity of its  
11 pre-1914 water right?

12 A If Millview can't demonstrate it, then the  
13 prosecution staff of the State Board can do what we did,  
14 initiate an enforcement action.

15 If the Board upholds that enforcement action  
16 and it goes on to court, ultimately Millview or whoever  
17 claims to hold the right will have to be able to  
18 demonstrate to a court.

19 And if the court says we don't think there's a  
20 valid basis of right here, and we don't think it exists,  
21 it can go to the appellate court. And eventually you  
22 reach the end of the line where it doesn't exist.

23 Q Thank you. At one point in your testimony  
24 under Mr. Neary's cross-examination, you indicated that  
25 you had a complaint, the Howard complaint, on behalf of

1 large numbers of persons in the watershed.

2 Did you believe that the Lee Howard complaint  
3 was made on behalf of a large number of persons in the  
4 watershed or on behalf of one individual?

5 A I believe it was an individual complaint made  
6 to protect the benefit of the people in the watershed.

7 He certainly wasn't saying my personal right  
8 has been directly impacted. So the only thing I could  
9 conclude was he was saying there's an unauthorized  
10 diversion out here. It's impacting other people  
11 possibly.

12 And he was, if you want to call him, a good  
13 citizen who was trying to look out for the needs of his  
14 neighbors or whatever. He filed a complaint.

15 That would have been my best guess. I can't  
16 read his mind, and he didn't particularly -- you know, I  
17 didn't call him up, and he didn't give me a long-winded  
18 explanation.

19 But that would have been my assumption is that  
20 he's attempting to protect everybody else in the  
21 watershed and possibly Public Trust resources, although  
22 he certainly didn't specifically state it.

23 Q And you didn't seek any clarification from him  
24 on that point, did you?

25 A I wasn't required to. He had made a valid

1 complaint on an issue that we deal with.

2 Q And I'm sorry if I'm making you defensive, sir.

3 I'm just asking questions here.

4 A I'm not trying to be defensive. I'm just  
5 trying to answer.

6 Q Okay. Now do you believe that the finding you  
7 made and that the Draft CDO embodies that Millview can  
8 only pump 15 acre feet a year amounts to a regulation of  
9 the Waldteufel water right?

10 A I believe my finding is an opinion. If the  
11 Board upholds it, it will be based on the lack of a  
12 water right being present, in which case the Legislature  
13 has empowered the Board to take action.

14 Q In your testimony, you mentioned a number of  
15 reasons about a number of things that you found  
16 problematic with Mr. Lawrence's testimony. He was  
17 confused. He didn't know what direction was what.

18 Isn't it true that you had that sworn statement  
19 of Mr. Lawrence before you issued your report, you  
20 considered it, you read it, and you actually referred to  
21 it in your report; but your report doesn't contain any  
22 of the statements about how you didn't find it credible.

23 Why didn't you include any statements in your  
24 report explaining why you didn't like -- you didn't  
25 choose to adopt some of his statements?

1           A     Unfortunately, the Complaint Unit had, at that  
2     time, four staff people. We're now down to a little  
3     more than one, not quite two. We have a large number of  
4     complaints.

5                     I don't have the option of writing ad  
6     infinitum, ad infinitum.

7                     I didn't find a whole lot of information in  
8     there that was useful. I needed to address it because  
9     it certainly had been provided. But to go through and  
10    say why I didn't find it credible, I -- you know, other  
11    than to say he seemed to be confused.

12                    In the first few pages, he argued extensively  
13    with the questioner regarding which way was north and  
14    where his property was. And throughout it, there were  
15    times when they broke from the record to try to get him  
16    squared away.

17                    You know, he had no quantifiable numbers. He  
18    didn't have --

19            Q     The question is why you didn't refute his  
20    testimony in your report.

21                    MR. ROSE: I believe that's --

22                    MR. BRIAN CARTER: He's answered it. Thank you  
23    Mr. Rich.

24                    MR. RICH: Okay.

25    ///

1 BY MR. BRIAN CARTER:

2 Q On page 21 of Mr. Lawrence's statement --  
3 that's your Exhibit 5.

4 A Okay.

5 Q At line 14 and 15, Mr. Lawrence referred to  
6 flood irrigation occurring on the property described in  
7 the Waldteufel filing, correct?

8 A Yes.

9 Q And you read that before you issued your  
10 report?

11 A Yes.

12 Q And on line 23 that same page, he states that  
13 he heard the pump running quote many, many times, end  
14 quote, correct?

15 A Yes.

16 Q Okay. And still you conclude that there wasn't  
17 very much water being used for agricultural purposes on  
18 that property, correct?

19 A No, I'm not sure I would conclude it wasn't  
20 being used for agricultural purposes.

21 I think my conclusion was that this didn't  
22 document a specific diversion or amount, whether it was  
23 continuous, whether, you know, if it happened once in a  
24 while. Many, many times. Was that two or three times  
25 over a 50-year period? Was it five times a year?

1 Q You don't know?

2 A I don't know.

3 Q Right? Isn't it possible that Waldteufel and  
4 his successors in the 1910s just irrigated the heck out  
5 of that land and used 1500 acre feet or more running  
6 that pump practically a hundred percent of the time, but  
7 we wouldn't know about it, and then the use maybe went  
8 down later? Isn't that possible based on what you know?

9 A Yes.

10 Q Okay. Looking at one of these statements of  
11 use. It is under tab 6 of my Exhibit 14. It says  
12 number 272 in the upper right, and it was signed on  
13 2-12-1970.

14 MR. ROSE: I'm sorry. Did you say your  
15 Exhibit 14? Hill and Gomes Exhibit 14?

16 MR. BRIAN CARTER: Yeah. My Exhibit 14 is the  
17 administrative record. It's got 39 tabs. Do you have  
18 that?

19 MR. ROSE: I thought your exhibits were by  
20 letter, so.

21 BY MR. BRIAN CARTER:

22 Q Under Exhibit 6 -- tab 6 on that is this  
23 supplemental statement of water diversion and use. It's  
24 Bates stamped 10,014 in the lower right corner.

25 Do you have that document in front of you?

1           A     Okay.

2           Q     Okay.  Mr. Rich, to what extent did you rely  
3 upon this document in concluding as to the amount of use  
4 that was made of the Waldteufel right?

5           A     Well, I took the fact that he reported so many  
6 hours at a certain rate.  And if you total up -- he's  
7 got, I think, 149 hours at 500 gallons per minute which  
8 as I recall, if you compute that out, that's 13.7 acre  
9 foot.  That's what he was showing for those year  
10 periods, the use.

11                   CO-HEARING OFFICER BAGGETT:  Just for the  
12 record, this is Exhibit U?  Page or tab 6, correct?  My  
13 copy says Exhibit U.

14                   MR. BRIAN CARTER:  You are correct, your Honor.  
15 I apologize.

16                   CO-HEARING OFFICER BAGGETT:  I just want to  
17 make sure so --

18                   MR. BRIAN CARTER:  My tab 14 and my clip -- it  
19 is Exhibit U.

20 BY MR. BRIAN CARTER:

21           Q     Now you said 249?

22           A     249 hours.  25 plus a hundred plus -- I mean  
23 149.  Excuse me.

24                   149 hours at 500 gallons per minute.  If you  
25 compute it out, I believe it comes out to 13.7 acre

1 foot.

2 Q Okay. That's 149 hours, right?

3 A Correct.

4 Q And it says a minimum of X hours on each of  
5 those lines, m-i-n period. Do you see that?

6 A Okay.

7 Q Did you notice that when you performed your  
8 analysis?

9 MR. LILLY: I object. That's misstating. It  
10 says gallons per minute. It doesn't say minimum.

11 MR. RICH: Yes. That is right.

12 CO-HEARING OFFICER BAGGETT: Sustain that.

13 MR. BRIAN CARTER: That may be right, Mr.  
14 Lilly. Very confusing document.

15 BY MR. BRIAN CARTER:

16 Q Did you conclude that any of these statements  
17 of use contained projections of future use as opposed to  
18 statements of prior use?

19 A Well, I did note a relative pattern that they  
20 all seemed to be fairly consistent regarding season and  
21 types of crops and usage. It indicated that not much  
22 was changing while Mr. Wood owned the property, was the  
23 impression I was left with.

24 Certainly I didn't see anything to contradict  
25 that impression there.

1           Q     Now have you discussed with Millview in the  
2 course of your work on this the possibility of them  
3 moving their point of diversion back to the west fork  
4 and thereby eliminating your concerns about the improper  
5 use of the project water?

6           A     No.

7           Q     At the bottom of page 1 of your sworn written  
8 testimony, the last sentence says:

9                     The complaint contains allegations that  
10                    the pre-1914 appropriative claim of right  
11                    of Messrs. Hill and Gomes for water from  
12                    the west fork Russian River had been lost  
13                    due to nonuse and that the point of  
14                    diversion for this claim of right had  
15                    been moved downstream to the mainstem of  
16                    the Russian River below Coyote Dam in  
17                    order to access additional flow of water  
18                    that is not available on the west fork  
19                    Russian River.

20                    My question is to you, sir, is: Where in  
21 Exhibit G does it say that? Exhibit G is Lee Howard's  
22 one-page complaint.

23           A     The last sentence says:

24                    It is my contention that pre-1914 no  
25                    longer exists, and the individuals as

1 well as Millview County Water District  
2 have no basis of proof that this water  
3 has been used in like amounts and like  
4 manner since 1914.

5 And then the paragraph before it says:

6 This pre-14 statement also indicates the  
7 diversion point was relocated to the  
8 south 400 feet. The original point of  
9 diversion was on the west fork of the  
10 Russian River as stated in the  
11 description of water rights recorded in  
12 the county records. The point of  
13 diversion is now shown on the east fork  
14 Russian River.

15 Q The last line and three words in your written  
16 testimony says:

17 In order to access additional flow of  
18 water that is not available on the west  
19 fork Russian River.

20 Does that language appear anywhere in the  
21 Howard complaint?

22 A No, it does not.

23 Q Why is it in your written testimony?

24 A Because that's what I believe was his  
25 contention.

1 Q And what is the basis for that belief?

2 A It may have been the discussion I had with him,  
3 the short discussion we had at the time of the field  
4 investigation. But that is -- as far back as I can  
5 remember, that is what I believed his contention was.

6 Q So Mr. Howard was complaining about the  
7 movement of the point of diversion, right?

8 A I believe he was concerned with that, yes, that  
9 it would provide additional water that would not have  
10 been available upstream.

11 Q Did you notice Mr. Howard's statement about 350  
12 homes in the subdivision?

13 A I see it there.

14 Q In fact, there's 125 homes, right?

15 A I believe you're correct.

16 Q So as you sit here today, is there anybody  
17 involved in this proceeding who claims to have a junior  
18 right to the Waldteufel right who is in fact involved in  
19 this dispute?

20 A Yes. Sonoma County Water Agency.

21 Q Was Sonoma County Water Agency involved in your  
22 investigation?

23 A No, they were not a party to the complaint.

24 Q Did you speak to them at all before you  
25 concluded there was a forfeiture of the Waldteufel

1 right?

2 A No, I did not.

3 Q And the result of your report and your  
4 recommendation was that Millview be allowed to pump 15  
5 acre feet per year whereas they contend they have a  
6 right to 1500-something.

7 The result of your -- the adoption of this  
8 Draft Cease and Desist Order would be that some several  
9 hundred acre feet would be released to people down the  
10 river, correct?

11 A No.

12 Q In -- and I'm just about finished.

13 In your written testimony on page 9, paragraph  
14 10 where you're talking about North Kern case, your  
15 second of three bullets says:

16 Forfeiture occurs not because the right  
17 holder is misusing the resource but  
18 instead so the State can assign the water  
19 right to someone who will use it.

20 So under your scenario, your understanding, of  
21 your job and your employer's authority, you go out and  
22 you look for forfeitures of pre-1914 rights so that you  
23 can go around and assign the resulting surplus to other  
24 users; is that correct?

25 A No.

1                   MR. BRIAN CARTER: That's all I have. Thank  
2 you very much.

3                   CO-HEARING OFFICER BAGGETT: Thank you.

4 Mr. Lilly. Five minutes, huh?

5                   CROSS-EXAMINATION BY MR. LILLY

6                   FOR SONOMA COUNTY WATER AGENCY

7 BY MR. LILLY:

8           Q        Good morning, Mr. Rich. I'm Alan Lilly, and I  
9 represent Sonoma County Water Agency in this hearing.

10                    Could you please go to page 4 of your  
11 testimony, Exhibit PT-1?

12           A        Okay.

13           Q        Do you have that?

14           A        Yes, I do.

15           Q        Good. In paragraph -- in numbered paragraph 1,  
16 the second sentence says:

17                    According to this notice, Mr. Waldteufel  
18                    claimed a right to divert 100 miner's  
19                    inches under a 4-inch pressure, or 2  
20                    cubic feet per second.

21                    Do you see that?

22           A        Yes, I do.

23           Q        Can you just explain to us how you convert  
24 miner's inches to cubic feet per second and what the  
25 relevance of the inches of pressure is?

1           A     Okay.  Typically in California, miner's inches  
2     are rated as either 4-inch pressure or 6-inch pressure.

3                     Under a 4-inch pressure, it's 50 miner's inches  
4     is equivalent to 1 cubic foot per second.  Under a  
5     6-inch pressure it's 40 miner's inches is equivalent to  
6     1 cubic foot per second.

7           Q     So basically, when there's higher pressure,  
8     there's a little higher flow?

9           A     Correct.

10          Q     All right.  My next question is referring to  
11     numbered paragraph 2 on page 4 of your testimony,  
12     Exhibit PT-1.

13                     The first sentence says:

14                     The Waldteufel property consisted of  
15                     about 165 acres circa 1914 located both  
16                     north and south of what is now Lake  
17                     Mendocino Drive and on the west side of  
18                     the west fork of the Russian River.

19                     Do you see that?

20          A     Yes, I do.

21          Q     What is the basis for your statement that this  
22     property consisted of about 150 -- 165 acres in about  
23     1914?

24          A     In the response that the Millview Water  
25     District provided to the complaint initially, they sent

1 in a map that showed an area that they contended was the  
2 lot 103 of the Rancho Yokayo, I believe it is, which is  
3 the place of use as listed in the notice that was filed  
4 with the county recorder in 1914.

5 Q So do you have any other basis for knowing  
6 whether or not Mr. Waldteufel actually owned this entire  
7 lot 103 and therefore the entire 165 acres?

8 A I have no information as to whether he owned  
9 all of that land or not or what portion of the land he  
10 may have owned.

11 There's been one deed produced that indicates  
12 there was a 33-acre parcel that he bought from the  
13 Chaney's, I believe it was.

14 Q In about 1913?

15 A Correct. But whether he still owned it at the  
16 time, I don't know.

17 Q So it's possible in fact that he owned  
18 significantly less than 165 acres in 1914?

19 A It's certainly possible.

20 MR. LILLY: I have no further questions. Thank  
21 you.

22 CO-HEARING OFFICER BAGGETT: Thank you.

23 Staff, any questions?

24 WATER RESOURCE CONTROL ENGINEER MONA: One  
25 question.

1 EXAMINATION BY  
2 HEARING OFFICERS AND/OR BOARD STAFF  
3 FOR STATE WATER RESOURCES CONTROL BOARD  
4 BY WATER RESOURCE CONTROL ENGINEER MONA:

5 Q Mr. Rich, on page 7 of the CDO order under the  
6 "it is hereby ordered" section, on number 1, you  
7 restrict the instantaneous rate of diversion to 1.1 cfs  
8 and also the annual amount to 15 acre feet.

9 Is there a reason why you didn't restrict the  
10 season of diversion? Or are we talking about year-round  
11 restriction? Are we talking about a 12-month diversion  
12 period or a lesser period?

13 MR. RICH: It probably would have been a lesser  
14 period. The statements of water diversion use filed by  
15 Mr. Wood indicated that water had only been used during  
16 the irrigation season, specifically probably no earlier  
17 than April and probably no later than October.

18 The original right indicated that it was -- or  
19 the original notice indicated culinary and irrigation  
20 uses. I'm not sure what -- whether the culinary was  
21 domestic. It might have been year round.

22 I've seen no indication that water was used on  
23 a year-round basis. Every indication that we got was  
24 that water was only used during the irrigation season,  
25 whatever that might be.

1           So yeah, that probably was an oversight on our  
2 part when we drafted the CDO. We probably should have  
3 limited it to an irrigation season.

4           WATER RESOURCE CONTROL ENGINEER MONA: June  
5 through November, or more specific dates?

6           MR. RICH: I'd have to look at the statements.  
7 One statement shows June and July. Others show April  
8 through September.

9           I doubt that staff would object to whatever  
10 extent we can to anything between April and September.  
11 We would believe that that might be supportable.

12          WATER RESOURCE CONTROL ENGINEER MONA: That's  
13 all. Thank you.

14          CO-HEARING OFFICER BAGGETT: Jane, Dana? Tam?  
15 I have no questions. Any redirect?

16          MR. ROSE: I do have some redirect. Should I  
17 sit over there?

18          CO-HEARING OFFICER BAGGETT: That would be  
19 helpful.

20          We'll allow recross limited to the very narrow  
21 scope of the redirect.

22                         REDIRECT-EXAMINATION BY MR. ROSE

23                                 FOR PROSECUTION TEAM

24 BY MR. ROSE:

25         Q     Mr. Rich, just a few questions.

1           You were asked on cross-examination about this  
2 visual aid that you prepared, specifically about 2005  
3 usage; is that correct?

4           A     Yes.

5           Q     The specific question, or some of the specific  
6 questions, you were asked referred to the 2005 usage  
7 reported pursuant to the Waldteufel claim of right.  
8 Does that ring a bell?

9           A     Yes.

10          Q     You also stated that you concluded that this  
11 was not -- these numbers were not necessarily accurate.  
12 Can you explain that conclusion?

13          A     Well, we had conflicting bases. We had  
14 information that provided -- the flood control district,  
15 I asked them for copies of how much water was purchased.  
16 They sent me their itemized billing that indicated a  
17 certain amount of water had been purchased that did not  
18 agree with the number that was in here.

19                I looked at our progress reports in which case  
20 the District had indicated how much water had been  
21 diverted pursuant to the permit. It didn't match that  
22 at all.

23          Q     This will go in a completely different  
24 direction.

25                You were also asked questions about the nature

1 of the conclusions you made in the staff report. What  
2 is the nature of your staff report?

3 A My staff report is a recommendation by staff  
4 that holds no regulatory authority per se. I  
5 investigated a complaint. I came up and said based upon  
6 the information that's available to me, this is what I  
7 believe the water right is worth.

8 Q Would you say the same is true for the Draft  
9 Cease and Desist Order?

10 A It is a recommendation by staff that we believe  
11 that there's a potential unauthorized diversion or a  
12 threatened unauthorized diversion that could occur.

13 We're not saying it has occurred as of yet. We  
14 think it could occur in the future.

15 MR. ROSE: Thank you. I don't have any further  
16 questions.

17 CO-HEARING OFFICER BAGGETT: Very good.

18 Is there any recross?

19 MR. NEARY: Yes.

20 RE-CROSS-EXAMINATION BY MR. NEARY

21 FOR MILLVIEW COUNTY WATER DISTRICT

22 BY MR. NEARY:

23 Q On your visual aid, you report in green the  
24 water that Millview purchased from the Russian River  
25 Flood Control District for the years 2001 -- well, for

1 every year; is that right?

2 A The --

3 Q My question is --

4 A No. The only -- well, the visual aid shows all  
5 the numbers that are here came from my Exhibit 11 which  
6 is based upon the Public Records Act response that  
7 Millview provided.

8 So every number on this chart came out of that  
9 Public Records Act request response documents that are  
10 included in PT-11.

11 Q So exhibit -- this -- the areas in green  
12 represent a Millview determination of how much of the  
13 Russian River water used for a specific year?

14 A Based upon the numbers that are shown in PT-11,  
15 yes.

16 Q And how much of your determination was based  
17 upon the billing records that you obtained from Russian  
18 River Flood Control District showing that Russian River  
19 billed Millview for water usage?

20 A Which determination are you talking about?

21 Q The determination that's depicted on this  
22 visual aid.

23 A There is no determination made in there, per  
24 se. I mean it doesn't show the billing records for --  
25 the number from the billing records isn't displayed on

1 this graph.

2 Q So you didn't rely upon the billing records  
3 from Russian River Flood Control District to establish  
4 the amount that Millview used under the Russian River  
5 contract?

6 A Not in developing this graph. In developing my  
7 conclusion, I did.

8 Q Okay.

9 A That it -- the numbers have changed. There was  
10 a definite discrepancy here.

11 Q So if there was a -- if there is a discrepancy  
12 between the billing records and the statements by  
13 Millview, you relied more heavily upon the information  
14 you received from the Russian River district than you  
15 did from Millview?

16 A No, I just relied -- that's what the District  
17 said they charged and they were paid, and this is what  
18 Millview -- I mean both of them made a statement.

19 Q Moving away from the visual aid for a moment,  
20 did you rely upon the fact that Russian River Flood  
21 Control District billed Millview for water usage in  
22 making your determination of how much water Millview  
23 used of the Russian River allotment?

24 A Yes.

25 Q And so is it your belief that it is the Russian

1 River district that determines how much water to bill  
2 for each year?

3 A My understanding was that in 2005 the Russian  
4 River Flood Control District was utilizing the meters of  
5 individual customers to determine how much water was  
6 taken. And therefore, they would have relied upon  
7 numbers provided by Millview at the time as to how much  
8 water was taken under the contract.

9 Q Do those meters determine how much water is  
10 taken under the contract, or just how much water is  
11 delivered to customers?

12 A They're utilized to develop the numbers.

13 My understanding is the numbers in 2005 -- and  
14 I'm not sure it's the same way today -- but that in 2005  
15 the District was relying upon a statement from the  
16 customer as to how much water they were taking under the  
17 contract, whatever meter they used.

18 Q Have you seen that statement?

19 CO-HEARING OFFICER BAGGETT: Let me interject.  
20 This is well beyond. I've been lenient. This is well  
21 beyond the redirect.

22 MR. NEARY: That's fine. Okay. That's all I  
23 have then.

24 CO-HEARING OFFICER BAGGETT: Thank you.

25 Mr. Carters, either of you? No.

1           Mr. Lilly?

2           MR. LILLY: No further questions.

3           CO-HEARING OFFICER BAGGETT: Okay. With that,  
4 exhibits. Well, first we should put on the record: You  
5 did take the oath?

6           MR. RICH: Yes, I did.

7           CO-HEARING OFFICER BAGGETT: Thank you.

8           And exhibits, we have Exhibits 1 through 14?

9           MR. ROSE: That's right. The Prosecution Team  
10 would like to move Exhibits 1 through 14 into the  
11 record.

12           CO-HEARING OFFICER BAGGETT: If there's no  
13 objection?

14           MR. LILLY: Mr. Baggett, I do have some  
15 objections that I'd like to state.

16           In Exhibit PT-1, pages 4 to 5, paragraph three,  
17 there are discussions of the so-called sworn statement  
18 of Mr. Lawrence. And then Exhibit PT-5, the entire  
19 exhibit, is in fact the so-called sworn statement of  
20 Mr. Lawrence.

21           And these -- the sworn statement itself is  
22 hearsay, and the descriptions of statement are probably  
23 double hearsay. And I understand that the Board admits  
24 hearsay, but I just want to make sure that it's clear  
25 that we object to any use of that hearsay evidence

1 beyond the limitations that are provided for in Section  
2 648.5.1 of the Board's regulations and Government Code  
3 Section 11513 subdivision (d).

4 So I don't object to them coming in, but I do  
5 object to any use beyond those limitations which are  
6 significant limitations here.

7 CO-HEARING OFFICER BAGGETT: Right, considering  
8 the witness is not here.

9 Any objection?

10 MR. NEARY: May I be heard on that?

11 CO-HEARING OFFICER BAGGETT: Sure.

12 MR. NEARY: The witness has testified that he  
13 relied upon the Lawrence testimony for his determination  
14 so -- I mean that's what he testified to.

15 CO-HEARING OFFICER BAGGETT: Mr. Lilly.

16 MR. LILLY: Mr. Rich did what he did as part of  
17 his investigation. I'm talking about what the Board may  
18 or may not do in its decision.

19 I think the Board is limited by the Government  
20 Code regardless of what Mr. Rich did.

21 CO-HEARING OFFICER BAGGETT: I would concur.  
22 It will limit our ability to make findings.

23 MR. LILLY: The other objection I have is to  
24 Exhibit PT-3. This is the April 24th, 2006 letter from  
25 Mr. Bradley, the manager of Millview, to Mr. Rich.

1           And the objection I have is there are two pages  
2 of text. In that text, it says map attached as Exhibit  
3 A at the very bottom of the first page. And then there  
4 are two maps, and in between one what appears to be an  
5 old deed enclosed. And we have no foundation whatsoever  
6 regarding these last three pages of this exhibit.

7           And frankly, I really cannot tell which of  
8 these two maps is supposed to be Exhibit A, and we've  
9 had no foundation of that.

10           So I just object to any use of this by the  
11 Board of these last three pages unless there's some  
12 foundation for what they are or -- and some  
13 authentication.

14           CO-HEARING OFFICER BAGGETT: Anybody else want  
15 to be heard on that?

16           I would assume that Millview -- well, are these  
17 part of their exhibits later on, these maps? I concur  
18 there's no foundation. I mean the report speaks for  
19 itself, but -- okay.

20           Then we'll accept -- giving those  
21 clarifications, we'll accept Exhibits 1 through 14,  
22 Prosecution Team.

23           (Whereupon Exhibits PT 1-14 were admitted  
24 in evidence.)

25           MR. JARED CARTER: Your Honor, just want to

1 renew our objection, so it's clear on the record, just  
2 to any use of those statements of water diversion and  
3 use.

4 CO-HEARING OFFICER BAGGETT: Microphone.

5 MR. JARED CARTER: I want to make sure that my  
6 continuing objection to the use of -- any use of those  
7 statements of water diversion and use are in the record.

8 CO-HEARING OFFICER BAGGETT: The objection is  
9 noted on the record.

10 We also have some other exhibits we should  
11 probably deal with at this point. Millview, we cited  
12 Exhibit 1, 2, and 7. Do we want to admit those now or  
13 wait till Millview's up? They were used in  
14 cross-examination.

15 And then we had other exhibit by Gomes et al.  
16 that was used in cross-exam. I guess we can wait till  
17 you bring them up in your --

18 MR. NEARY: Well, certainly we would have the  
19 ability to present direct evidence of --

20 CO-HEARING OFFICER BAGGETT: Right. No, I  
21 would concur. I was just saying do we want to enter  
22 them now. We'll just wait. I just wanted to note that  
23 they were used, so they need to be admitted at some  
24 point. Okay.

25 MR. ROSE: Board Member Baggett, can I ask for

1 clarification as to what your ruling was in regard to  
2 Mr. Lilly's objections? I'm not sure if I --

3 CO-HEARING OFFICER BAGGETT: That it was  
4 hearsay. That the Board can use that evidence under our  
5 hearsay rules, but we cannot use it for the truth of the  
6 matter since the witness whose testimony you relied upon  
7 is not here.

8 MR. ROSE: Thank you. I just wanted to hear  
9 what the final wording was.

10 CO-HEARING OFFICER BAGGETT: Okay. Anything  
11 else? If not, let's break for lunch.

12 (Lunch recess)

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A F T E R N O O N S E S S I O N

--o0o--

CO-HEARING OFFICER BAGGETT: Good afternoon. I think we're up with Millview, opening statement, and then you've got three witnesses, right?

MR. NEARY: Good afternoon. Hopefully, we'll -- it always seems that after lunch things move along a lot faster, and I predict that they will this afternoon.

I want to join in Mr. Carter's comments, Brian Carter's comments, that is, thanking the staff in helping us prepare for this hearing.

I really did appreciate all the help I received, especially from Mr. Mona. It was very much appreciated.

I'm not going to go through any legal argument or any conceptual argument about jurisdiction. I played that out in prehearing brief, and I think that you have had an opportunity to review that, so I'm not going to go through that now. But I don't want to leave any impression that that's not the foremost issue in my mind.

I just want to briefly lay out the evidence that's going to follow so that you just have a preview of it, and I'll just do it very briefly and let the

1 evidence speak for itself.

2           Our first witness -- well, first of all, I'm  
3 just going to give you a background on the Waldteufel  
4 right. You've seen a little bit of disjointed  
5 presentation as to this right. I want to just go back  
6 and put it in chronological order in terms of an  
7 overview and then go through our projected evidence.

8           The first documentary evidence that we see of  
9 any use on this property is that 1913 deed where Mr.  
10 Waldteufel bought 32 acres in the vicinity where he had  
11 other property.

12           And the deed itself said that the seller of the  
13 property was reserving the right to come back and get  
14 the first cutting of alfalfa, and that alfalfa is the  
15 first indication of what was going on on the property in  
16 1913.

17           Mr. Waldteufel acquired property, I think it's  
18 in April 1913, owned it all through the following summer  
19 irrigation season, and in March of 1914, he recorded a  
20 claim of right indicating the amount of water that he  
21 was claiming, where he was diverting it, and where he  
22 intended to use it.

23           The amount that he claimed was this 100 miner's  
24 inches, which has -- you know, it was not the most exact  
25 term. It's not -- certainly doesn't have any

1 engineering precision. But it -- we think it translates  
2 out to about 1500 acre feet per year.

3           The evidence that the property was in  
4 agricultural use comes from, first -- and then let me  
5 just point out that the actual diversion facilities that  
6 are referred to in Mr. Waldteufel's claim of right are  
7 partially remaining on the ground today, and we're going  
8 to see -- you've seen some pictures of those facilities  
9 or what's left of them.

10           But it's fairly clear that not only did Mr.  
11 Waldteufel have a plan, and in fact I think the correct  
12 inference is that his -- he was actually using the water  
13 at the time he filed the claim of right, but that he  
14 actually diverted it because there's the remnant  
15 facilities in place, and there is corroborating evidence  
16 in the form of Mr. Lawrence's sworn statement when he  
17 was 94 years old. He's now almost 97 years old.

18           And that was that there was -- the diversion  
19 was at that point and that there was a long diversion of  
20 that water from that point for what he said was over 50  
21 years.

22           The agricultural use of the property changed  
23 from era to era. Alfalfa was the most prominent crop in  
24 the early part of the twentieth century, and the Ukiah  
25 Valley the crops changed to was more likely to produce

1 the greater profit.

2           And by the time that the property was sold in  
3 1998 by the last person to have farmed it, they were  
4 growing grapes and had a completely different type of  
5 use of the property.

6           The -- we're going to enter -- enter into  
7 evidence the testimony of Daniel Putnam who is  
8 designated as an expert witness. He's going to testify  
9 as to the probable amount of water usage or the range of  
10 water usage necessary to support a typical 1913 alfalfa  
11 operation on 165 acres.

12           We don't have pumping records for Mr.  
13 Waldteufel. We don't have meters. We don't, you know,  
14 have that type of evidence. So the best that we can do  
15 when Mr. Rich says give us evidence of what use was made  
16 to this property is to provide the best evidence that we  
17 can reconstruct almost 100 years later.

18           But one thing that I think it is important to  
19 note, and despite the -- this -- the references in the  
20 staff report and the draft CDO upon which this is  
21 premised, is that there is evidence there was  
22 agricultural use of the property in 1913, and that  
23 agricultural use is shown to have continued all the way  
24 through until 1998 when the property was sold for  
25 conversion to a residential subdivision.

1           And even while it was being converted to a  
2 residential subdivision, it was -- the water was used  
3 for dust control during construction.

4           So essentially, what you have is evidence that  
5 starting in 1913 there was probable usage of water on  
6 this property and that the usage was continuous until  
7 the present because starting in 2001, when the  
8 subdivision units were first starting to be sold, the  
9 water was being used to supply those houses.

10           And incidentally, the point of diversion and  
11 the whole place of use is within the Millview  
12 traditional boundaries.

13           So along -- and then we'll have the testimony  
14 of Don McEdwards who is an engineer who is going to  
15 testify as to the capacity of the remnant facilities to  
16 determine what it could -- whether it could have  
17 produced the type of flow necessary for the flood  
18 irrigation that was referred to by Mr. Lawrence.

19           And lastly, the general manager of Millview  
20 will testify as to the -- to authenticate several  
21 documents and to testify as to what Millview's need for  
22 the water is, how its position has changed under various  
23 water rights, what water rights it has, and the  
24 challenges it faces in providing service to its  
25 customers.

1           But the evidence will establish that this right  
2 was properly claimed under the statutory procedure. I  
3 don't think there's any question there.

4           I don't think there's any question in the  
5 evidence that the diversion was completed. The remnant  
6 facilities are still there today and corroborated by the  
7 Lawrence testimony.

8           And I don't think that there's any question  
9 that the water was put to beneficial use. We don't have  
10 pumping regards to provide you, so we have to provide  
11 you with inferential-type evidence as to the beneficial  
12 use.

13           Now all of this evidence that I'm talking about  
14 is without prejudice to our argument that we shouldn't  
15 be put in this position of having to come in and prove,  
16 as Mr. Rich required us to do, how much water was used  
17 at any particular point in time.

18           The conclusion made in Mr. Rich's staff report  
19 which -- upon which the draft CDO is based is that there  
20 was a valid Waldteufel water right, that the right was  
21 valid, but that it had been forfeited to 15 acre feet  
22 because the only quantifiable evidence that he could  
23 find is a statement of diversion in 1967. For that  
24 particular year, there was 15 acre feet.

25           And we will reserve for the legal briefs

1 whether or not that establishes forfeiture under the law  
2 or can establish forfeiture. And I think that the  
3 argument is not -- and if that's the case, then I think  
4 that putting us to the burden of establishing what our  
5 usage was, or what the usage of our predecessors was, is  
6 then irrelevant.

7 But I don't want to presuppose what your ruling  
8 will be on the jurisdictional issue, and this evidence  
9 is being presented to preserve the record, not to  
10 establish our right.

11 So with that, my first witness will be Daniel  
12 Putnam.

13 DANIEL PUTNAM, PhD  
14 University of California, Davis  
15 Called by MILLVIEW COUNTY WATER DISTRICT  
16 DIRECT EXAMINATION BY MR. NEARY

17 BY MR. NEARY:

18 Q Mr. Putnam, would you state your name and  
19 address for the record?

20 A My name is Daniel H. Putnam P-u-t-n-a-m. I  
21 live at 2318 Regis Drive in Davis, California.

22 Q Could you briefly summarize your educational  
23 background.

24 A Yes. I have a PhD in plant and soil sciences  
25 from the University of Massachusetts, Amherst, and

1 I've --

2 Q And what has basically been your employment  
3 history, just generally summarized?

4 A Okay. I spent six years at the University of  
5 Minnesota working on field crops including some  
6 irrigation work.

7 And the last 17 years, I've been the alfalfa  
8 specialist at UC Davis working on a whole range of  
9 issues associated with alfalfa, essentially statewide  
10 specialist for California's number one acreage crop.

11 Q So is it safe to characterize your area of  
12 specialty is the -- is alfalfa?

13 A Yes, that's safe to say.

14 Q And you have been requested by Millview County  
15 Water District to extrapolate the water -- potential  
16 water use in 1913 for an alfalfa crop on a 165-acre  
17 tract; is that correct?

18 A Correct.

19 Q And you have prepared a written report of  
20 that -- of your findings?

21 A Yes.

22 Q And it's been provided in the Millview  
23 documents at tab 10.

24 Is that your -- does that report reflect your  
25 opinion as to the usage that a crop of alfalfa on a

1 165-acre tract in 1913 would have required?

2 A Yes.

3 Q And would you briefly summarize what your  
4 conclusion is in terms of the amount of water that would  
5 be used for such a crop?

6 A Yeah. After thinking through this issue pretty  
7 carefully, I came to the conclusion that it would be, on  
8 the low end, water application of about 300 -- 932 acre  
9 feet per annum and on a high end about 310 acre feet per  
10 annum for an alfalfa crop in that region.

11 Q And is it possible that conveyance losses could  
12 be higher than the conveyance losses --

13 A Well --

14 Q -- you assumed?

15 A -- it's certainly possible.

16 I considered conveyance losses here of  
17 approximately 15 percent. The estimates depend upon a  
18 whole range of factors including soil type, length of  
19 conveyance, lots of different kinds of issues like that.

20 Q And did you have any information about the soil  
21 types?

22 A Yes. I had information about the soil types on  
23 the property. I was able to access the Soil  
24 Conservation Service records and on that particular  
25 site.

1 Q Okay. And what were your -- did those records  
2 disclose?

3 A Well, it's essentially a fairly sandy, gravelly  
4 area in many parts, although there's some variation on  
5 the site, with -- certainly it's a site that is  
6 something that can be farmed.

7 But it does have somewhat excess drainage, I  
8 think, is fair to say with -- but again, it's an  
9 agriculturally suitable soil.

10 Q So when soil is sandy, it tends to not hold  
11 water and --

12 A Correct.

13 Q -- require greater usage?

14 A That's correct.

15 MR. NEARY: That's all I have.

16 CO-HEARING OFFICER BAGGETT: Why don't we just  
17 have your next witness come up and we'll leave the  
18 panel. I'll let them cross-examine all three witnesses  
19 at once.

20 You have no other witnesses? If you've got  
21 other witnesses, why don't you put them on.

22 MR. NEARY: Mr. Putnam wants to get back to  
23 work. Would it be possible to proceed with his  
24 cross-examination?

25 CO-HEARING OFFICER BAGGETT: Sure. We can do

1 that.

2 Prosecution Team?

3 CROSS-EXAMINATION BY MR. ROSE

4 FOR PROSECUTION TEAM

5 BY MR. ROSE:

6 Q Good afternoon, Mr. Putnam. I'd like to ask  
7 you a few questions regarding your written testimony.

8 First, I'd like to point you to page 1,  
9 paragraph two, where you state that the parcel you  
10 considered contained 162 acres of alfalfa and two acres  
11 of orchards.

12 Did you -- you assumed that this tract  
13 contained 162 acres of alfalfa and two acres of orchards  
14 in 1913; is that correct?

15 A That's correct.

16 Q I'd point you to paragraph four on page 2 of  
17 your testimony. In that paragraph, you assume the  
18 adequacy of available water; is that correct?

19 A Yes, that's correct.

20 Q And you assume the availability of labor; is  
21 that correct?

22 A That's correct. Somebody would have had to  
23 have irrigated.

24 Q And you assume adequate pump capacity; is that  
25 correct?

1           A     Assuming that the water could be delivered in  
2     some fashion or another, whether through a pump or  
3     through gravity-fed, yes.

4           Q     Right.  You're assuming that the water could  
5     get from --

6           A     Exactly.

7           Q     You assumed it was available, and you assumed  
8     that it could get to the --

9           A     Correct.

10          Q     -- land?  Okay.

11                   MR. ROSE:  I have no further questions.

12                   CO-HEARING OFFICER BAGGETT:  Mr. Carter, do you  
13     have any?  Mr. Lilly?

14                                 CROSS-EXAMINATION BY MR. LILLY

15                                 FOR SONOMA COUNTY WATER AGENCY

16     BY MR. LILLY:

17          Q     Good afternoon, Dr. Putnam.  I'm Alan Lilly,  
18     and I represent Sonoma County Water Agency.

19                   Do you have your testimony, your report,  
20     Exhibit 10 in front of you?

21          A     Talking about my report or somebody else's?

22          Q     Your report for this proceeding which has been  
23     marked as Millview Exhibit 10?

24          A     Okay.  Yes, I do.

25          Q     Down near the bottom of the first page, the

1 second to last bullet says:

2 We would assume approximately 50 to

3 60 percent irrigation efficiency.

4 Do you see that?

5 A Yes.

6 Q Now can you explain for us what irrigation

7 efficiency means?

8 A Yes. The amount of -- here, it's the amount of

9 water applied in relationship to the true water demand

10 of the cop. So this would assume that the, for example,

11 efficiencies common in irrigation systems might range

12 from a very low end of 40 to 50 percent up to, for

13 example, 90 percent or 95 percent.

14 There is no irrigation system that I know of

15 that is 100-percent efficient.

16 Q So basically, the percent -- your numbers are

17 the percent of the applied water that actually turns

18 into evapotranspiration?

19 A Correct.

20 Q So if you have a 50 to 60 percent irrigation

21 efficiency, then what happens to the other water, the

22 other 50 to 40 --

23 A Well --

24 Q -- percent of the water?

25 A Yeah. The -- well, some of that water may be

1 lost through a conveyance, for example, which is  
2 calculated in my table there.

3           Some of the water may be lost through deep  
4 percolation or through runoff off of the fields.

5       Q     Okay. Well, you actually have the conveyance  
6 losses --

7       A     Separate.

8       Q     -- as separate?

9       A     That's correct.

10      Q     Okay. So it certainly is possible that some  
11 and even a significant portion of that water that did  
12 not turn into evapotranspiration actually flowed back  
13 into the Russian River?

14      A     That is possible, yes.

15      Q     Now, regarding the 15 percent conveyance  
16 loss -- and I believe that's on the second page of  
17 your --

18      A     Right.

19      Q     -- report down near the bottom, again, what  
20 happens to that 15 percent of the water that's lost  
21 through conveyance?

22      A     It could be, usually through deep percolation  
23 in -- particularly in sandy soils, you would have much  
24 greater conveyance losses than you would have under,  
25 say, a tighter clay-type soil.

1 Q So again, some or even a significant portion of  
2 that water could go back to the river?

3 A It certainly is possible.

4 Q All right. Are you familiar with the concept  
5 of return flows?

6 A Yes.

7 Q What are return flows?

8 A Return flows are those waters which are -- come  
9 from irrigated fields which in some fashion or another  
10 come back to the source of the water.

11 Q Okay. And in your work for this project, did  
12 you calculate or estimate the return flows that would be  
13 associated with this?

14 A No, I did not. It was -- I estimated the  
15 applied water.

16 Q Okay. So again, just so we're clear, applied  
17 water, in this case, it's actually the total amount that  
18 would be delivered to the head of the ditch before  
19 conveyance losses and before application?

20 A That's correct.

21 Q Okay. Have you ever been out to the site of  
22 this property?

23 A No, I have not.

24 Q Is that something you normally do in your  
25 professional work?

1           A     I -- do I visit farms?

2           Q     When you're reviewing or doing calculations for  
3 water balance for a particular farm or other area, do  
4 you normally go out and look at the site and look at the  
5 soil and do a field investigation?

6           A     Depends on the situation. I think -- in this  
7 case, I felt that I had adequate information from the  
8 soil type estimates and the information that was  
9 provided to me to make that estimate.

10          Q     Okay. And did you make any analysis of the  
11 return flows that occur from the present water usage by  
12 Millview County Water District's customers?

13          A     No.

14               MR. LILLY: No further questions. Thank you.

15               MR. NEARY: Mr. Chairman, just one thing.

16               It's just been called to my attention that I  
17 did not ask Mr. Putnam to verify the accuracy of his  
18 statement, and I would ask him to do that now.

19               CO-HEARING OFFICER BAGGETT: Would you verify  
20 the accuracy of your statements, and have you taken the  
21 oath?

22               DR. PUTMAN: Yes, I have.

23               CO-HEARING OFFICER BAGGETT: Okay. Thank you.

24               Questions? Ernie, Jean, Dana? Anybody?

25               I only have one, Dr. Putman. I'm looking at

1 your summary, and you've got a low and high. So your  
2 low numbers, it appears, are based on wet years, and the  
3 higher numbers are based on a dry year? Is that --

4 DR. PUTMAN: Yes. Generally speaking, in a low  
5 application year, this would be a situation where  
6 adequate ET was supplied from spring rains for the first  
7 cutting or the second cutting.

8 We certainly see that in -- we see both  
9 situations where inadequate rains are provided for the  
10 first grow period or situations where adequate rains are  
11 supplied from the first grow period.

12 CO-HEARING OFFICER BAGGETT: But you didn't  
13 calculate in a dry year whether there would even be  
14 water available to --

15 DR. PUTMAN: That was an assumption --

16 CO-HEARING OFFICER BAGGETT: -- irrigate in  
17 August, September?

18 DR. PUTMAN: -- that I made that water would be  
19 available for irrigation. That's correct.

20 CO-HEARING OFFICER BAGGETT: And all -- so  
21 these numbers would have to be -- looking at the  
22 hydrograph for different water year types, these numbers  
23 would change based on that also, whether there actually  
24 was water.

25 DR. PUTMAN: Yeah. I didn't make a

1 determination as to whether water would be available for  
2 irrigation. I assumed that as a given.

3 CO-HEARING OFFICER BAGGETT: So you might only  
4 get four cuttings in a dry year instead of six. So  
5 these weren't based on crops or cuttings so much as --

6 DR. PUTMAN: Well, actually, the cuttings  
7 figured in because, generally speaking, dry land  
8 alfalfa, you're not going to be able to obtain four  
9 cuttings of alfalfa hay. That's an irrigated crop,  
10 generally speaking.

11 Current cutting schedules are closer to five or  
12 six cuttings, but that's with modern equipment.

13 CO-HEARING OFFICER BAGGETT: Right.

14 DR. PUTMAN: And we're talking about different  
15 systems back then.

16 CO-HEARING OFFICER BAGGETT: Okay. Thank you.

17 Any redirect? No redirect. Thank you.

18 Mr. Neary, you're back up with two other  
19 witnesses.

20 MR. NEARY: Yes. We call Don McEdwards.

21 DONALD G. McEDWARDS, PhD

22 Principal Hydrologist, The McEdwards Group

23 Called by MILLVIEW COUNTY WATER DISTRICT

24 DIRECT EXAMINATION OF DR. MCEDWARDS BY MR. NEARY

25 ///

1 BY MR. NEARY:

2 Q Dr. McEdwards, would you state your name and  
3 address?

4 A Donald G. McEdwards. 1025 First Willits Road,  
5 Willits, California.

6 Q And you've presented a statement of  
7 qualifications in this proceeding. It's tab 7. That  
8 summarizes your experience. I'm just going to ask you:  
9 What is your educational background?

10 A I have a BS in geology and an MS and PhD in  
11 engineering science.

12 Q And what registrations and licenses do you  
13 hold?

14 A I'm a Registered Civil Engineer, geologist, and  
15 a Certified Hydrogeologist and a Certified Engineering  
16 Geologist.

17 Q And did you -- were you asked by Millview  
18 County Water District to perform an investigation on the  
19 property adjacent to the Russian River?

20 A Yes. At the Waldteufel diversion site, I was  
21 told it was called.

22 Q And what were you asked to do?

23 A To look at what structures remained and see if  
24 those structures had any possibility of conveyance of  
25 flow and, if so, what amount of flow.

1 Q And you prepared a written report?

2 A Yes.

3 Q Is that a true and accurate recitation of your  
4 findings?

5 A Yes.

6 Q Would you summarize your findings?

7 A The -- I found a crib-like enclosure, retaining  
8 wall, maybe 10 feet by 20 feet, open end facing the  
9 river.

10 And in there was a 6-inch steel pipe. It was  
11 detached. You could see where it was coming out of the  
12 very end of the crib wall. It was kind of crushed, but  
13 it was through-going at one time, based on my  
14 observations.

15 I measured the diameter by putting a tape  
16 around it and getting a circumference, and it was a  
17 6-inch steel pipe.

18 And then I went to a handy reference book, how  
19 to measure flows. And from a horizontal discharge, it  
20 tells you how many inches of drop -- 4 inches of drop,  
21 how long does it take for 4 inches of drop to occur?  
22 How far is that from the pipe? And from that, you can  
23 determine the flow in the pipe, given the diameter of  
24 the pipe.

25 Q And what was your conclusion?

1           A     You asked me to find out if you could convey  
2     2 cfs, 2 cubic feet per second, and it could easily  
3     convey that.

4           Q     Could it convey up to 2.6 cubic feet per  
5     second?

6           A     I was asked later what is the capacity, and  
7     I -- and the same table shows for 4 inches in two feet  
8     is 1120 gallons a minute from a 6-inch pipe.

9           MR. NEARY:    Could we have Exhibit No. 10 put up  
10    on the screen?

11   BY MR. NEARY:

12          Q     Would you just walk us through each of these  
13    pictures and tell us what they depict?

14          A     The upper right is hard to see, but looking out  
15    toward the river.  And the downstream wall is what you  
16    see there.

17                 And it's hard to see, but there's a pipe at the  
18    very end going out the river.  The upper left -- I'm  
19    sorry; that was the upper left.  The upper right shows  
20    the pipe in better detail.

21                 The lower left, if you look at the second post  
22    next to the green grass, at the base of it, you can see  
23    what looks like -- it's a squashed metal pipe.  That --  
24    right in middle of the picture, actually.

25                 Then the other last picture there is my tape

1 around the pipe showing, as I say, 1.6 feet in  
2 circumference which is 6 inches diameter.

3 Q And in your opinion, would these facilities be  
4 sufficient with an electric pump to lift 2.6 cubic feet  
5 per second 15 feet onto the Waldteufel property?

6 A Yes. If the person wanted to pump that much,  
7 he'd get an electric or gasoline pump, and you could --  
8 if you want to pump more water, just get a bigger pump.

9 The pipe is adequate to deliver 1200 gallons a  
10 minute or more.

11 Q And when was your -- when were these pictures  
12 taken?

13 A Oh, boy. August or September, I think.

14 Q Of 2009?

15 A Yes.

16 Q So you found these facilities in place when you  
17 were there?

18 A Yes.

19 MR. NEARY: That's all I have.

20 CO-HEARING OFFICER BAGGETT: Thank you.

21 Prosecution Team?

22 MR. ROSE: Would you prefer we do the witnesses  
23 one at a time?

24 CO-HEARING OFFICER BAGGETT: Do you want to do  
25 them as a panel, we can do both. Save some time here.

1 Do you have another witness?

2 MR. NEARY: Yes. Call Tim Bradley.

3 CO-HEARING OFFICER BAGGETT: You can stay up  
4 there. Might as well do both of you. Little more  
5 efficient.

6 TIM BRADLEY

7 General Manager, Millview County Water District

8 Called by MILLVIEW COUNTY WATER DISTRICT

9 DIRECT EXAMINATION BY MR. NEARY

10 BY MR. NEARY:

11 Q Mr. Bradley, would you state your name and  
12 address for the record?

13 A Tim Bradley, 3081 North State Street, Ukiah,  
14 California.

15 Q And how are you employed?

16 A General manager of the Millview County Water  
17 District.

18 Q Approximately how long have you been general  
19 manager?

20 A Approximately nine years.

21 Q What are the duties of the general manager of  
22 the County Water District?

23 A Oversee general day-to-day operations,  
24 budgetary items.

25 Q And what is the size of the Millview Water

1 District?

2 A It covers an area approximately 8 to 10 square  
3 miles, serves a population of about 5,000 customers  
4 through 1500 service connections.

5 Q Would you briefly summarize what water rights  
6 Millview holds at present.

7 A Currently we have permit 13936. I believe  
8 that's the correct number. For 3 cubic feet second from  
9 November 1st through June 30th.

10 License 492, which is through -- I believe  
11 diversion date is June 15th to -- or June 1st to  
12 August 15th. That's for approximately 27 acre feet.

13 We have a contract with the Russian River Flood  
14 Control District for approximately 970 acre feet.

15 And pre-1914 water right.

16 Q And what is the nature of the arrangement with  
17 the Russian River Flood Control District?

18 A Well, we do have a contract with them for 970  
19 acre feet. However, that is subject to reduction. And  
20 that is part of the reason that the District was placed  
21 under a moratorium for service connections.

22 Q And when -- the District is presently under a  
23 moratorium for service connections?

24 A That's correct, due to insufficient source  
25 capacity.

1 Q And who imposed the moratorium?

2 A It was the Department of Health Services.

3 Q And do you know under what circumstances it was  
4 imposed?

5 A Well again, because of insufficient source  
6 capacity, summertime water supply.

7 Q And was the characteristic of the Russian River  
8 contract factored into that decision?

9 A It was.

10 MR. LILLY: Excuse me. I'm going to object to  
11 this, Mr. Baggett.

12 If we're going to get evidence about the  
13 Department of Health Services or Department of Public  
14 Health order, we need to have that order rather than  
15 Mr. Bradley's characterization of that order.

16 CO-HEARING OFFICER BAGGETT: I would --

17 MR. NEARY: Well, he can certainly testify as  
18 the general manager of the District to matters which are  
19 in his personal knowledge.

20 CO-HEARING OFFICER BAGGETT: I would sustain  
21 the objection on the fact that he's stating what's in an  
22 order.

23 To the extent that, as a manager of the  
24 District, he can say how he's managing the District  
25 under requirements set forth, that's acceptable.

1           So why don't you just rephrase the question, I  
2 think. How it affects his operations is one thing, but  
3 to state what an order says when we don't have the order  
4 in front of us, I don't think is appropriate.

5           How you operate the District, I would agree.  
6 That's administrative.

7 BY MR. NEARY:

8           Q     Does the order prohibit -- have you been  
9 prohibited from making any new service connections as a  
10 result of an order issued by the Department of Public  
11 Health?

12          A     Well, the District has been allowed some  
13 service connections based on a request, but they're very  
14 limited. And as of this date, any new connection would  
15 require that it brings its own water supply in order to  
16 be served by the District.

17          Q     And is it your understanding that the Russian  
18 River contract would be sufficient to demonstrate source  
19 supply to the Department of Public Health to relieve the  
20 District of the moratorium?

21               MR. LILLY: And excuse me; I'm going to object  
22 to that on the grounds of lack of foundation. We're now  
23 asking this witness to speculate what the Department of  
24 Public Health might do in response to something.

25               CO-HEARING OFFICER BAGGETT: Sustained.

1                   Can you lay a foundation?

2   BY MR. NEARY:

3           Q     Have you cited to the Department of Public  
4   Health the existence of the Russian River contract to  
5   demonstrate the ability to supply water in the dry  
6   weather period?

7           A     Yes, I have.  And because of the nature of the  
8   contract -- it is subject to reduction -- he does not  
9   consider it a reliable source of supply.

10          Q     And does the Russian River contract have an  
11   expiration date?

12          A     I believe it's up for renewal in this coming  
13   year, 2010.

14          Q     Do you have any information as you sit here  
15   today whether it will be renewed?

16          A     We're hoping it will be renewed.

17          Q     Do you have any information that it will be?

18          A     No.

19          Q     Have you requested from the Russian River Flood  
20   Control District that you be given -- that Millview be  
21   given a permanent right that could be relied upon?

22          A     We have requested that, and that may be  
23   something that will be considered in 2010.  But again,  
24   that's the flood control district, that's -- it's a  
25   request that we have made.

1 Q In addition to arrangements with regard to the  
2 Waldteufel water right, has Millview made any other  
3 efforts to resolve its summertime source deficiency?

4 A We did negotiation with the Masonite  
5 Corporation for a year-round license that was -- I  
6 believe the amount was 4200 acre feet per year from the  
7 Russian River underflow. A complaint was filed on that  
8 by Mr. Howard, and a request to revoke the license is  
9 pending hearing.

10 Q Is Mr. Howard known to you to hold any official  
11 position at present?

12 A I believe he's the president of the flood  
13 control district.

14 Q And that's the -- when you say flood control  
15 district, that's synonymous with the Russian River --

16 A Russian River Flood Control District.

17 Q And is the resolution of the Masonite  
18 forfeiture still pending before this Board?

19 A Yes, it is.

20 Q When did Millview first have any involvement  
21 with the Waldteufel water right?

22 A I believe it was October. Well, probably  
23 October 2001 or October 2002 is when we entered into an  
24 agreement.

25 Q And was that agreement -- did that shortly

1 follow the installation of a procedure by the Russian  
2 River Flood Control District to put strict limits on  
3 contractual use of the Mendocino right?

4 A Well, it was December 2001 or January 2002 the  
5 flood control district declared that all water under  
6 their permit had been fully allocated, and that prompted  
7 us to go out and seek additional sources of water.

8 Q And prior to 2001, had Millview been required  
9 to make any formal reporting to the Russian River Flood  
10 Control District?

11 A We did report our annual usage to the flood  
12 control district.

13 Q And do you do that today?

14 A Yes, we do.

15 Q In what fashion?

16 A Basically now we submit a worksheet or --  
17 truthfully, it seems to change every year.

18 Now that they have a new executive director or  
19 general manager, they are reading our meters; but we  
20 also submit our own readings.

21 Q When did they start reading the Millview  
22 meters?

23 A Just this past year.

24 Q And for prior years, when -- what information  
25 did you supply to the Russian River Flood Control

1 District?

2 A We tried to provide them with a breakdown, a  
3 worksheet with all the water rights. The general  
4 manager at the time chose not to accept that and  
5 allocated the water how they felt was necessary.

6 Q And who was that former general manager?

7 A Barbara Spazek.

8 Q Now, you've provided written testimony in this  
9 proceeding?

10 A Yes.

11 Q And are all the statements in that testimony  
12 true and correct?

13 A Yes.

14 MR. NEARY: That's all I have.

15 CO-HEARING OFFICER BAGGETT: Thank you. And  
16 you have taken the oath, correct? You took the oath  
17 earlier?

18 DR. McEDWARDS: Yes, I did.

19 CO-HEARING OFFICER BAGGETT: Thank you. Okay.

20 Your witnesses, if you like. You're up,  
21 prosecution.

22 CROSS-EXAMINATION BY MR. ROSE

23 FOR PROSECUTION TEAM

24 BY MR. ROSE:

25 Q Good afternoon, Mr. McEdwards, Mr. Bradley.

1 Mr. McEdwards, I'll ask you a few questions first.

2 Your opinions as stated in your testimony,  
3 Millview Exhibit 009, those opinions are based on the  
4 pipe that you saw in 2009; is that correct?

5 A Yes. Is this Exhibit 9? I don't know what  
6 Exhibit 9 is.

7 Q It's -- I believe it's Exhibit 9.

8 CO-HEARING OFFICER BAGGETT: Yes.

9 BY MR. ROSE:

10 Q Yeah. Your testimony.

11 A Yes. The question again?

12 Q Your opinions and your testimony are based on a  
13 pipe seen at the site in 2009; is that correct?

14 A That's correct.

15 Q And you didn't go out to the site before this,  
16 did you?

17 A No.

18 Q And your conclusions don't make any accounting  
19 for a pump or any other ability to make full use of the  
20 pipes' capacity, do they?

21 A The pump was not there when I saw it, so, but  
22 I . . .

23 Q So --

24 A I don't know what you're asking actually.

25 Q Your conclusions are based solely on the pipe's

1 capacity?

2 A That's what I was asked to quantify, yes.

3 Q Right. So that you don't make any conclusions  
4 regarding whether there would be other limitations on  
5 what could flow through the pipe; is that correct?

6 A No.

7 Q And you didn't see a pump?

8 A No, I did not.

9 Q Okay. You don't know how much water actually  
10 went through the pipe?

11 A No, I do not.

12 Q Okay.

13 MR. ROSE: I have no further questions for  
14 Mr. McEdwards. I have a few questions for Mr. Bradley.

15 CO-HEARING OFFICER BAGGETT: Okay.

16 BY MR. ROSE:

17 Q Mr. Bradley, you said that you are the general  
18 manager for the Millview County Water District; is that  
19 correct?

20 A That's correct.

21 Q And you said that you have been the general  
22 manager for approximately nine years; is that correct?

23 A Yes.

24 Q Okay. Going to point to Millview Exhibit 014  
25 which I believe from your exhibit identification index

1 is your testimony. I'd like to point to page 4 of your  
2 testimony, Mr. Bradley. On page 4 of your testimony --  
3 are you there?

4 A Okay.

5 Q Looking at the second full paragraph, the one  
6 that begins with "in 2005," in this paragraph, you say:

7 In 2005, Millview endeavored to attribute  
8 as much of its summertime use as possible  
9 to the Waldteufel right due to the  
10 owner's encouragement for use of the  
11 right and Millview's continuing concern  
12 that the contract right with the RRFCWCID  
13 right could not be relied on the long  
14 run.

15 Is that accurate for what you said?

16 A Yes, sir.

17 Q I'd like to point to document Prosecution Team  
18 No. 12. I'm not sure if you have that available online.

19 A I don't have it.

20 Q Mr. Bradley, this is Prosecution Team Exhibit  
21 No. 12. Do you recognize this?

22 A Yes, I do.

23 Q Okay. This document reports -- do you  
24 recognize, just to be clear, do you recognize this as  
25 the progress report submitted for 2005 for the Millview

1 County Water District for permit 13936? You can scroll  
2 down --

3 A Yes, it is.

4 Q -- if that helps you or I can provide you a  
5 hard copy. Did you say yes?

6 A Yes, I did.

7 Q Thank you. This document reports that Millview  
8 used 740.75 acre feet of water in the year 2005 pursuant  
9 to permit 13936; does it not?

10 A Yes, it does.

11 Q And if you could scroll to the bottom of the  
12 document, the bottom of the page -- right there is fine.  
13 Is that your signature at the bottom?

14 A Yes.

15 Q Thank you.

16 MR. ROSE: I have no further questions.

17 CO-HEARING OFFICER BAGGETT: Mr. Carter, do you  
18 have any?

19 MR. JARED CARTER: Thank you, Mr. Chairman.

20 CROSS-EXAMINATION BY MR. JARED CARTER

21 FOR THOMAS HILL and STEVE GOMES

22 BY MR. JARED CARTER:

23 Q I'm Jared Carter, I represent Messrs. Hill and  
24 Gomes. Mr. Bradley, there are a couple of questions I  
25 have that I don't believe you covered on your report,

1 but maybe you did, and that is: How many customers does  
2 Millview have?

3 A Approximately 1500 service connections and a  
4 population of about 5,000.

5 Q And how long -- how large is the service area?

6 A Between 8 and 10 square miles.

7 Q And have you been forced to curtail service in  
8 the last two or three years for lack of adequate water  
9 supply?

10 A Yes. As far as a lack of -- unable to add  
11 additional service connections.

12 Q Well, isn't it true that you were unable to  
13 supply all the water that all of your customers wanted  
14 in the last summer?

15 MR. ROSE: Objection; that's a leading -- I'll  
16 withdraw my objection.

17 CO-HEARING OFFICER BAGGETT: Continue.

18 MR. BRADLEY: Well, no. We weren't able to  
19 serve all of their needs. There was a mandatory  
20 50 percent reduction imposed by the State.

21 BY MR. JARED CARTER:

22 Q So the State imposed a requirement on you to  
23 reduce your service level?

24 A Yes.

25 Q And was that because you didn't have adequate

1 water supply to meet your customers' needs?

2 A That's correct. But it wasn't just Millview in  
3 this past year. That would have been everybody in the  
4 area.

5 MR. JARED CARTER: I have no further questions.

6 CO-HEARING OFFICER BAGGETT: Now Mr. Lilly.

7 CROSS-EXAMINATION BY MR. LILLY

8 FOR SONOMA COUNTY WATER AGENCY

9 BY MR. LILLY:

10 Q Good afternoon, Mr. Bradley. I do have some  
11 questions for you.

12 Mr. McEdwards, you can relax. I'm not going to  
13 ask you any questions today. Mr. Rose covered it.  
14 Don't worry.

15 Mr. Bradley, I do have some questions for you.  
16 Can you get your testimony, Exhibit Millview 14, in  
17 front of you? Do you have that Millview?

18 A I don't have an exhibit number. If you can  
19 tell me what it is.

20 Q It's your written testimony.

21 A I do have a copy of that, yes.

22 Q Okay. And please refer to page 4 of that.

23 A (Complying)

24 Q Okay. Do you have page 4? They're numbered at  
25 the bottom left.

1 A Yes.

2 Q Okay. The very first line says "it," referring  
3 to Millview:

4 . . . also acquired most of the amount  
5 reserved by Messrs. Hill and Gomes to  
6 serve the 125-home subdivision so as to  
7 guarantee its legal ability to provide  
8 service to that subdivision.

9 Do you see that?

10 A Yes, I do.

11 Q Okay. What amount of this reservation did  
12 Millview acquire?

13 A We acquired all of it.

14 Q Oh. Okay. It says most. It actually should  
15 say all?

16 A Yes.

17 Q Okay.

18 A Well, I -- read my --

19 Q I'm sorry. You need to speak into the  
20 microphone?

21 A It does say that the option remained in effect  
22 until August of 2009. And that is when Millview did  
23 acquire its water right with the -- there is an  
24 outstanding reservation, I believe, for the 125 homes.

25 Q Okay. That's what I'm trying to get at.

1 Because it says Millview acquired most of the amount  
2 reserved for these 125 homes, so I'm just wondering if  
3 you can tell me what amount Millview acquired of that  
4 125-home reservation and what amount Millview does not  
5 have.

6 A To the best of my understanding, it -- we hope  
7 to get that reservation back that may have been deeded.  
8 There's still some question as to that.

9 Q So you don't know what part of the reservation  
10 Millview has right now?

11 A I'm going to make the assumption that the  
12 125,000 is included in our agreement with Hill and  
13 Gomes.

14 Q Okay. So then to the best of your  
15 understanding, Hill and Gomes have transferred all of  
16 their interest in this alleged Waldteufel right?

17 A That's correct.

18 Q To Millview?

19 A Yes.

20 Q Okay. So what is Millview's position regarding  
21 the maximum rate in cubic feet per second at which it  
22 now may divert water under this alleged water right?

23 A It's interesting. Mr. Rich quoted a formula  
24 earlier. Mine wasn't quite as scientific.

25 I was told that a miner's inch was either nine

1 gallons per minute or 12 gallons per minute, depending  
2 on the location in the state.

3 Now, whether I have it correctly or not, I was  
4 under the impression it was nine gallons per minute.  
5 I've been told that it's 12 gallons per minute in  
6 northern California and nine in southern California, but  
7 I --

8 Q So can you convert to cubic feet per second  
9 regarding what Millview's position is regarding its  
10 right to divert water on this alleged water right? How  
11 many cubic feet per second?

12 A Roughly 2 cubic feet per second.

13 Q Okay. And what is Millview's position  
14 regarding the maximum number of acre feet per year that  
15 it may divert under this alleged water right?

16 A We believe it's somewhere in the 1400 acre  
17 range.

18 Q Okay. Now, do you have -- or if you don't have  
19 a copy of Exhibit PT-11, I'll give you a copy so you can  
20 look at that, and I'll ask the State Board staff to put  
21 that up on the screen as well.

22 Now if you can flip to the second page.  
23 Unfortunately -- oh, there. It was twisted sideways,  
24 but now it's correctly shown on the screen.

25 Was this table prepared by Millview?

1           A     Yes, it was.

2           Q     Okay.  And how did Millview determine how much  
3 water to report as being diverted under statement S00272  
4 in 2001?

5           A     In 2001, that was water that was being used  
6 reportedly by the contractors doing work out at the  
7 subdivision.

8           Q     Okay.  Now please go forward then to the next  
9 page for 2002.  How did Millview determine the numbers  
10 to report under the statement for this year?

11          A     Again, that had to do with some construction  
12 work and some existing homes.

13          Q     Okay.  And I'll try to make this fairly quick,  
14 but for 2003, how were the numbers in the column for  
15 this statement determined by Millview?

16          A     Again, those are the same.  Housing that was  
17 being built within the subdivision and construction  
18 activities.

19          Q     Okay.  And then the same question for 2004:  
20 How were the numbers in this column determined that year  
21 by Millview?

22          A     Again, 2004 would be the same.

23          Q     Okay.  And then in 2005, on the next page, the  
24 numbers are a lot higher.  Please tell us how Millview  
25 determined the numbers to put in this column for

1 statement S00272 in 2005?

2 A As per our agreement of renewal and extension  
3 of a contract with Hill and Gomes for the lease auction,  
4 we agreed to start maximizing usage under the 1914  
5 right.

6 Q Okay. So how -- when you say maximize usage  
7 then, how did you determine what numbers to put in here?

8 A Based on how much water we were using.

9 Q So basically you put in the entire amount that  
10 you were using in this column up to the number that  
11 equates to 2 cubic feet per second?

12 A Yeah, but I would like to also point out that  
13 this was our intention for 2005, to report this water,  
14 yes.

15 Q Okay. And now going forward to 2006, how did  
16 Millview determine what numbers to put in the column for  
17 this year?

18 A Same method that we used the previous year.  
19 However, in 2005, I believe -- what you're going to get  
20 at here is a discrepancy on the progress report?

21 Q Well, these are just Millview's tables. And  
22 I'm just wondering: In 2005, the numbers that reported  
23 total 1174.75 acre feet, and 2006 they total 55.17. So  
24 I'm just wondering what method you used to determine  
25 what numbers to put into this table each year.

1           A     Oh, okay.

2           MR. NEARY: I'd like to object.

3           The question assumes that these are reports or  
4 reported amounts. There's been no foundation to  
5 establish that.

6           MR. LILLY: There is a foundation that these  
7 numbers were provided to Mr. Rich as part of his  
8 investigation, and they were prepared for by Millview;  
9 so I believe I am entitled to ask how Millview prepared  
10 them.

11          MR. NEARY: Actually, these documents were  
12 presented to the Prosecution Team in response to a  
13 public records request as it's indicated on Mr. Rich's  
14 documents. And basically, that meant that they received  
15 a file, a copy of a file.

16          And there were no representations made as to  
17 any of the documents in the file. It was a public  
18 records request. We copied it. We gave it to them.

19          MR. LILLY: I don't understand that response.

20          Millview prepared these documents. They were  
21 provided to Mr. Rich. They have been discussed by the  
22 Prosecution Team. I believe I'm entitled to ask  
23 Mr. Bradley how he prepared them.

24          MR. NEARY: He's entitled to ask how he  
25 prepared them, but he's not --

1 CO-HEARING OFFICER BAGGETT: That's what he's  
2 asking.

3 MR. NEARY: -- allowed to characterize them as  
4 reports to --

5 CO-HEARING OFFICER BAGGETT: Okay.

6 I will sustain the objection referring to it as  
7 an official report, and just re-ask the question.

8 MR. LILLY: Okay. I'm sorry. I'll call them  
9 tables to avoid that controversy.

10 CO-HEARING OFFICER BAGGETT: Very good. Thank  
11 you.

12 BY MR. LILLY:

13 Q So Mr. Bradley, how did you prepare the numbers  
14 in this table for 2006?

15 A Okay. Very similar to how I did in 2005. We  
16 had hoped to maximize usage or report maximum usage in  
17 2005; however, due to the complaint being filed, we  
18 tried to again minimize usage under the statement until  
19 we could get some resolution and some answer.

20 Q Okay. So that's why the numbers are much lower  
21 for 2006 than 2005?

22 A Yes.

23 Q All right. And how did you actually determine  
24 the numbers that are in this table for 2006?

25 A Based on the District's water usage.

1 Q Based on the District's water usage where?

2 A Within our boundaries.

3 Q I guess I'm confused. For example, if we look  
4 at -- let's just look at January.

5 On the previous page, January 2005, there's 0  
6 reported for permit 13936, and 23.57 reported for the  
7 statement.

8 Now, in 2006, the total water usage is similar,  
9 but we have 32.385 reported under the permit and 0.539  
10 reported under the statement.

11 I just would like you to explain for us why  
12 there's a difference in the way those numbers were  
13 prepared for 2005 and for 2006?

14 A We were reporting water under the statement  
15 rather than under the permit on one year; and the  
16 following year, we were reporting water under both the  
17 permit and the statement.

18 Q Okay. And why did you do it differently in  
19 those two years?

20 A Again, in 2005, we were going to try and  
21 maximize water usage under the statement. In 2006 when  
22 the complaint was filed, we reduced our water usage  
23 under the statement pending further clarification from  
24 the Division of Water Rights on the 1914.

25 Q Okay. And --

1           MR. JARED CARTER: I'm going to object to this  
2 line of questioning on the grounds that it is not  
3 relevant to any issue in this case.

4           Millview may be incompetent or they may be --  
5 have something else wrong with the way they report, but  
6 no element of this case is going to depend upon the  
7 accuracy of these reports.

8           So I object to this line of questioning and  
9 request that it -- the answers be stricken.

10          MR. LILLY: I think everything in this case  
11 depends on Millview's intent for how much water it's  
12 claiming that it's using under this particular alleged  
13 pre-14 right, and these questions are directly related  
14 to that.

15          CO-HEARING OFFICER BAGGETT: I would overrule.  
16 I think it's relevant in terms of -- I don't think it's  
17 going to competence. It's going to how you divide up  
18 which right in which year. And I think that's what  
19 we're trying to get at.

20          Maybe you could get there quicker, would be  
21 appreciated. I don't think we have to drag this out  
22 another hour.

23          MR. LILLY: All right. I'll go on to 2007  
24 then, the next page.

25 BY MR. LILLY:

1           Q     And Mr. Bradley, please tell us how you  
2 determined how much of the District's total diversions  
3 to report in the statement column in 2007.

4           A     In 2007, under the statement again, we were  
5 trying to use the water under the statement.

6                     In August of 2007, we received a letter from an  
7 Eric Oppenheimer that stated that no further use or  
8 development under the permit 13963 or license 492 should  
9 occur pending a State Board review of those two permits,  
10 so we were trying to allocate, again, our water under  
11 the statement.

12          Q     Okay. Now, I'm going to hand you a copy of a  
13 table that the District prepared for 2008. The one in  
14 the record was not for the complete year, and we  
15 received a table for the complete year in the flood  
16 control district's policy statement, so I'll ask that  
17 Exhibit SCWA-8 be put up on the screen, and I'll hand  
18 you a copy of that as well.

19                     Now Mr. Bradley, did you in fact prepare this  
20 table for 2008?

21          A     I -- it does look familiar. It does. I mean  
22 it looks like Millview's, but I don't --

23          Q     Okay. Now I realize you didn't put the  
24 handwriting in there in the rows for June, July, and  
25 August; but otherwise, this is a table prepared by

1 Millview?

2 A That's correct.

3 Q And why are there no entries under statement  
4 S00272 for September, October, November, or December of  
5 2008?

6 A I couldn't -- honestly, I don't know. I don't  
7 remember.

8 Q When you determined the number to put down for  
9 August 2008, the 38.76 million gallons, did you consider  
10 the amount of water that was flowing in the west fork of  
11 the Russian River on any particular day during that  
12 month?

13 A I don't -- no, I don't believe so.

14 Q Okay. I'm going to hand you what I'm marking  
15 as Exhibit SCWA-9 and ask you to look at that.

16 Now these are the USGS gauge flows for the west  
17 fork Russian River at its gauge which is just above  
18 where the Waldteufel alleged right point of diversion  
19 was.

20 MR. JARED CARTER: Your Honor, we object.

21 This document hasn't been verified. There is  
22 no foundation for this document. Mr. Lilly is  
23 testifying as to what it is, and that's not his office.

24 MR. LILLY: Mr. Baggett, this is a question of  
25 order of witnesses. Our witness can certainly

1 authenticate this, and I am certainly willing to have  
2 the Board delay its ruling on whether or not to offer  
3 this into evidence, and I will rephrase the question.

4 CO-HEARING OFFICER BAGGETT: Rephrase the  
5 question, and we'll deal with the evidentiary issue when  
6 you get to your witness.

7 BY MR. LILLY:

8 Q Mr. Bradley, assuming these numbers in this  
9 table for the column for August 2008 are in fact  
10 accurate depictions of the GS measured flows in the west  
11 fork Russian River, did you consider any of these flows  
12 when you prepared the diversion number that's listed in  
13 Exhibit SCWA-8 for August 2008?

14 A No.

15 Q Has Millview determined yet how much water to  
16 report as being diverted under statement S00279 for  
17 2009?

18 A Yes, but I haven't got it present, so --  
19 and I'm not going to commit from memory to tell you what  
20 it is.

21 Q Well, I'm not going to ask you the numbers.  
22 Obviously, you wouldn't remember those.

23 But can you tell us what method you used to  
24 determine how much water to report as being diverted  
25 under the statement during 2009?

1           A     Based on need, to fill the shortfall.

2           Q     Could you --

3           A     Based on our conservation that was required for  
4 this past year.

5           Q     So -- but how -- of Millview's total diversions  
6 during each month of 2009, how did you decide how much  
7 to report under this -- as being diverted under this  
8 statement versus being diverted under the other water  
9 rights that Millview has access to?

10          A     Okay. For instance, again, the District pumps  
11 flood control district water from June through  
12 November 1st, June 30th to November 1st.

13                     This year was somewhat unique in that we only  
14 had 450 -- 485 acre feet available under the flood  
15 control district contract.

16                     While we achieved a 47 1/2 percent level of  
17 conservation, we still fell somewhat short so we have  
18 also used the 1914 to make up some of that water.

19          Q     Okay. And how did you decide how much to  
20 report under the statement versus how much to report  
21 under the flood control district contract?

22          A     Based on need.

23          Q     Well --

24          A     We're still trying to maximize our use. We're  
25 trying to balance it. So here we have a flood control

1 district contract that is up for review and subject to  
2 reduction, so we're trying to balance it out.

3 Q Okay. So if on a given day there you could  
4 report some of the water as being under the statement or  
5 under the flood control district contract, how do you  
6 decide how much to report under each?

7 A Again, based on demand.

8 Q I'm not -- Mr. Bradley, I'm not following that.  
9 Demand gives you a total number. You have to  
10 decide every day or at least every month how to split up  
11 that total between the statement and the contract, and  
12 I'm just asking you how do you do that?

13 A Based on need or demand.

14 Q Okay. Doesn't demand just give you the total  
15 number? Let's split it up. Let's say for August 2009  
16 you have a certain amount of demand; is that correct?

17 A Yes.

18 Q Okay. Let's just for the sake of argument say  
19 that that's 40 million gallons during August of 2009.  
20 Now, if that were the case, and you had leeway as to how  
21 much of that to report as being diverted under the  
22 statement and how much to report as being diverted under  
23 the flood control district --

24 A Okay.

25 Q -- how are you going to decide that?

1           A     How much water is available based on cubic feet  
2 per second under the 1914 right, and the remainder would  
3 be filled in based on what's available from the flood  
4 control district.

5           Q     Okay. That's -- I'm sorry if I wasn't clear  
6 before. So basically, you report what you can under the  
7 statement and then the remainder under the flood control  
8 district correct?

9           A     (Nodding head)

10          Q     Okay.

11                   I'm going to hand you what's been marked as  
12 Exhibit SCWA-10, and I'll just ask you: Have you ever  
13 seen this table before or a table with this information  
14 before?

15          A     No.

16          Q     So did you consider the flow data for the west  
17 fork Russian River when you were deciding how much water  
18 to record under the statement during the months in 2009?

19          A     No.

20          Q     All right. Now if you can go back to your  
21 testimony, which is Exhibit 14, and flip to page 2 of  
22 that. Do you have that?

23          A     Yes.

24          Q     Okay. In the middle of the page, there's a  
25 paragraph that says:

1                   Unfortunately the expectation that  
2                   Millview could rely upon the RRFCWCID for  
3                   dependable supply of water has not been  
4                   realized.  Although Millview currently  
5                   holds the water supply contract with  
6                   RRFCWCID, it is revocable at the sole  
7                   discretion of RRFCWCID and is limited to  
8                   a term which soon expires.

9                   Do you see that testimony?

10            A     Yes.

11            Q     And first of all, I think you said earlier that  
12            the total amount of water that Millview can divert under  
13            that contract is 970 acre feet per year; is that  
14            correct?

15            A     Correct.

16            Q     Okay.  Has Millview ever reported the full 970  
17            acre feet per year as being diverted under this contract  
18            during any year since 2001?

19            A     I don't recall whether it has or not.  No, I  
20            don't believe so.

21            Q     Okay.

22            A     Not the entire amount, no.

23            Q     Okay.  If we wanted to get the exact amounts,  
24            we could look at those tables we talked about?

25            A     Mm-hmm.

1 Q Is that correct?

2 A Yes.

3 Q Okay. So in fact, during each of those years,  
4 you could have reported more water as being diverted  
5 under this contract and less water diverted under the  
6 statement; is that correct?

7 A It could, very limited amount more.

8 Q Well, up to 970; is that correct?

9 A Yes.

10 Q But of course, then Millview would have had to  
11 pay the Russian River Flood Control District for  
12 whatever the additional amount is; is that correct?

13 A That is correct.

14 Q And what is the price per acre foot that  
15 Millview pays for that?

16 A It was 47. Now it's \$100 an acre foot.

17 Q And under that -- are you familiar with that  
18 contract between your district and the flood control  
19 district?

20 A Mm-hmm.

21 Q Have you read it?

22 A Not lately, but yes, I have read it.

23 Q Are you generally familiar with that contract?

24 A Yes.

25 Q Okay. And is Millview's right to receive water

1 under this contract during any particular year affected  
2 by the amount of water that Millview diverted and paid  
3 for under this contract during the previous year?

4 A I'm sorry. I'm not quite sure I understand  
5 that.

6 Q Okay. Let's look forward to 2010. Is the  
7 amount of water that Millview may divert and pay for  
8 under its contract with the flood control district  
9 affected by the amount of water that Millview diverted  
10 and paid for during 2009?

11 A I believe it can be, yes.

12 Q Okay. And I'll hand you what we're going to  
13 mark as Exhibit SCWA-11.

14 Now I realize you don't have time to read this  
15 whole contract. Is this in fact a copy of the contract  
16 between Millview and the flood control district?

17 A Yes.

18 Q Now regarding the -- you've mentioned an order  
19 from the Department of Public Health that has caused at  
20 least a limitation, if not an absolute moratorium, on  
21 connections within your district; is that correct?

22 A That's correct.

23 Q Is your understanding that that order and the  
24 moratorium is based on lack of water treatment capacity?

25 A Initially that was cited as one of the

1 deficiencies, storage capacity, and source capacity.

2           The District was able to address its treatment  
3 capacity and its storage capacity within a year, the  
4 first year, of the compliance order being put into  
5 effect.

6           Q     So at this point, what are the limitations  
7 on -- in your understanding, the limitations on the  
8 District? Why is the moratorium still in place,  
9 according to your understanding?

10          A     Inadequate source water capacity.

11          Q     That's the sole reason?

12          A     Yes.

13          Q     Now, if you can go forward to your testimony to  
14 page 4 -- you have page 4 handy?

15          A     Okay.

16          Q     The very last sentence on page 4 says:

17                    Millview intends to divert under the  
18                    subject water right from the mainstem of  
19                    the Russian River, also referred to as  
20                    the west fork by the Division, when this  
21                    draft CDO is resolved rather than from  
22                    its water plant location.

23                    Do you see that?

24          A     Yes, I do.

25          Q     So exactly where does Millview plan to divert

1 water under this alleged water right?

2 A Somewhere near its existing diversion point on  
3 the west fork.

4 Q Okay. But the District -- but Millview would  
5 have to construct new facilities to do that?

6 A That's correct.

7 Q And the plan is to have the new facilities be  
8 where they could only divert west fork water and not  
9 water that comes out of Lake Mendocino?

10 A Most likely.

11 Q When is this Millview plan to construct these  
12 facilities?

13 A I think it's going to be based on the outcome  
14 of this hearing.

15 Q Does Millview have any plans yet, any  
16 construction plans or anything like that, for these new  
17 facilities?

18 A We do have an engineer, and we have done some  
19 preliminary work on the site.

20 Q Has Millview obtained any of the permits that  
21 would be required for this construction?

22 A Not as of yet. Only for the preliminary test  
23 well.

24 Q And will Millview attempt to continue to divert  
25 water under the alleged Waldteufel right before these

1 new facilities are in operation?

2 A It may.

3 Q And if Millview -- first of all, what's going  
4 to determine whether or not Millview attempts to do  
5 that?

6 A I think conditions for addressing water rights.

7 Q And why is Millview planning on constructing  
8 this new diversion facility on the west fork?

9 A Basically to try and appease Sonoma County  
10 Water Agency.

11 Q Okay. And before this new facility is  
12 completed and in operation, will Millview do anything to  
13 limit the amounts of water that it diverts at its  
14 existing facilities that it accounts for as being under  
15 this alleged pre-14 right?

16 A I don't think so.

17 Q So they won't -- Millview does not plan to look  
18 at the flow data for the west fork to determine how much  
19 water to report as being diverted under this alleged  
20 pre-14 right?

21 A I think we will consider the flow.

22 Q What do you mean by that? How will you  
23 consider it?

24 A We will consider the flow that's in the west  
25 fork, but it is my understanding that we can move the

1 point of diversion.

2 Q From -- excuse me. Move the point of diversion  
3 from where to where?

4 A From the existing 1914 point of diversion to  
5 our treatment facility on the mainstem.

6 Q Oh. It's your understanding you can do that;  
7 but nevertheless, you're planning on moving it back up  
8 to the west fork?

9 A Mm-hmm.

10 Q Is that right?

11 A It's something that's under discussion.

12 Q So there hasn't been a final decision by  
13 Millview on that?

14 A No.

15 Q All right.

16 If you can go forward to page 5 of your  
17 testimony, in the last paragraph, the first sentence  
18 says:

19 Mr. Howard also complained that the point  
20 of diversion was moved several hundred  
21 yards upstream to the Millview water  
22 plant.

23 Do you actually mean downstream there?

24 A Yes, I do. That was a typographical error; I'm  
25 sorry.

1 Q Okay. And then on page 6, the first full  
2 paragraph says:

3 It should be noted that the point of  
4 diversion of the Waldteufel water right  
5 and its original claimed place of use is  
6 entirely within the boundaries of  
7 Millview County Water District and has  
8 been since Millview's creation.

9 Do you see that?

10 A Yes.

11 Q Is this really true?

12 A Yes.

13 Q Didn't Millview actually annex that area in  
14 2006?

15 A That actual small parcel of land was annexed  
16 into the District. However, it was within the  
17 District's boundaries, surrounding boundaries.

18 Q But the parcel of land including the  
19 CreekBridge Homes subdivision was actually annexed in  
20 2006; was it not?

21 A I believe so.

22 Q All right. I'm going to just hand you what  
23 we've marked as Exhibit SCWA-13. Again, I'm not going  
24 to ask you to read through this, but is this in fact a  
25 copy of the documents that the LAFCO of Mendocino County

1 prepared for that annexation in 2006?

2 A Yes, but it had previously been filed with --  
3 in 1996, I believe. There was some problem with LAFCO,  
4 and in 2001 documents had been filed, the fees had been  
5 paid to the Board of Equalization, and the map was  
6 either lost or some of the documents for that annexation  
7 were lost.

8 There was two attempts made to get that  
9 straightened out, and finally in 2006 the final map was  
10 filed for annexation.

11 Q Thank you.

12 MR. LILLY: And I don't have any further  
13 questions. I would like to offer into evidence Exhibits  
14 SCWA-8, 11, and 13.

15 CO-HEARING OFFICER BAGGETT: We'll wait till  
16 we're done with cross.

17 MR. LILLY: Okay. Thank you.

18 CO-HEARING OFFICER BAGGETT: Is there any  
19 redirect of any of your witnesses?

20 MR. CARTER: No.

21 CO-HEARING OFFICER BAGGETT: With that, we have  
22 questions of staff.

23 EXAMINATION BY  
24 HEARING OFFICERS AND/OR BOARD STAFF  
25 FOR STATE WATER RESOURCES CONTROL BOARD

1 BY STAFF COUNSEL HEINRICH:

2 Q Mr. Bradley, on page 4 of your written  
3 testimony, at the top of the page there is a reference  
4 to the 125-home subdivision. I'm assuming that's a  
5 reference to the CreekBridge Homes subdivision?

6 A Yes.

7 Q Okay. And then in the second full paragraph at  
8 the end, the last sentence, you refer to the 125 "acre"  
9 subdivision. Should that be "home"?

10 A Yes.

11 Q Okay. And I'm assuming based on the allocation  
12 of 1200 acre feet that Millview made under the pre-14  
13 claim of right for 2005 that not all that water went to  
14 those 125 homes; is that correct?

15 A That's correct.

16 STAFF COUNSEL HEINRICH: Okay. That's all I  
17 had, thanks.

18 CO-HEARING OFFICER BAGGETT: Any other  
19 questions?

20 BY WATER RESOURCE CONTROL ENGINEER MONA:

21 Q Mr. Bradley, Condition 2 of the Draft CDO  
22 requires that the District maintain a record of all  
23 diversions of water on a daily basis. Does the District  
24 have the operational capability to maintain those kind  
25 of records?

1           A       The District does have flow meters on each of  
2 its diversions. So yes, we could maintain -- and we do,  
3 on a daily basis, take meter readings of what our daily  
4 flows are, so.

5           WATER RESOURCE CONTROL ENGINEER MONA: Okay.  
6 Thank you.

7           CO-HEARING OFFICER BAGGETT: Anything else? If  
8 not, now the exhibits.

9           MR. LILLY: I do have one follow-up on Ms.  
10 Heinrich's question, if we're allowed to do for recross.

11           CO-HEARING OFFICER BAGGETT: No. You can't  
12 recross -- you didn't put any redistrict on. You have  
13 had your chance. Otherwise everybody else will. You  
14 know how it will go.

15           MR. LILLY: Fair enough.

16           CO-HEARING OFFICER BAGGETT: With that,  
17 exhibits. Millview, want to submit your exhibits?

18           MR. NEARY: Yes. We'd submit Exhibits 1  
19 through 16.

20           CO-HEARING OFFICER BAGGETT: Any objections?  
21 If not, then they are admitted.

22           MR. LILLY: There are.

23           CO-HEARING OFFICER BAGGETT: Okay, Mr. Lilly.  
24 Before we accept them, what are your objections?

25           MR. LILLY: Exhibits Millview 3, 4, 5, and 6,

1 we have no foundation for. They're not referred to in  
2 any witness's testimony, and basically we don't know  
3 what they are. So I object on the grounds of lack of  
4 foundation to those.

5 MR. NEARY: I'd just point out that they are  
6 mentioned in Mr. Bradley's written testimony. But if  
7 that's determined to be inadequate, I'd ask to reopen  
8 just to have Mr. Bradley identify these three documents.

9 CO-HEARING OFFICER BAGGETT: To the extent they  
10 are referred to in his testimony, he already testified  
11 it was a true and correct statement. They will be  
12 admitted. Any other?

13 MR. LILLY: I didn't see any reference to them,  
14 but we'll address it in closing briefs.

15 My only other objection is to Exhibit 16 which  
16 is a letter from Mr. Neary to Mr. Rich. And I just  
17 object to that to the extent that there are any factual  
18 statements in there, both on the grounds of hearsay and  
19 basically lack of any witness testifying to those  
20 things.

21 MR. NEARY: I would point out that this was  
22 included because Mr. Rich testified that -- well, first  
23 of all, their exhibits did not include the assignment of  
24 water rights, which is attached. And that's the purpose  
25 of this exhibit.

1           There is an assignment of water rights three  
2 pages in signed by Mr. Robert Wood on January 7, 1998.  
3 And the assignment specifically refers to the Waldteufel  
4 right and when it was transferred from Mr. Wood to Mr.  
5 Hill and Mr. Gomes.

6           And Mr. Rich testified that they essentially  
7 quit claimed any rights they might have. This exhibit  
8 shows the actual document, and it shows that they  
9 specifically referred -- Mr. Wood, when he transferred  
10 this, specifically referred to this specific water  
11 right.

12           CO-HEARING OFFICER BAGGETT: Any --

13           MR. ROSE: Mr. Baggett, if I could, PT-7 of the  
14 Division's exhibits is the transfer -- includes the  
15 transfer documents between Robert Wood Living Trust and  
16 Messrs. Hill and Gomes.

17           CO-HEARING OFFICER BAGGETT: So they are  
18 already in the record.

19           MR. ROSE: The letter is not included with our  
20 exhibit, but what Mr. Neary was just discussing is  
21 included as our PT-7.

22           MR. NEARY: I did not find the actual  
23 assignment of water rights in that exhibit that the  
24 Prosecution Team offered, yet this letter was sent to  
25 Mr. Rich in May of 2007 and shows that we provided it.

1                   CO-HEARING OFFICER BAGGETT: We've already got  
2 the files in the record anyway. So that record will be  
3 included, Mr. Lilly, in the files which are already  
4 included in the record. That's an official  
5 correspondence.

6                   MR. LILLY: And that's fine. Then I just ask  
7 that the Board treat any hearsay statements in there  
8 under its normal limitations.

9                   CO-HEARING OFFICER BAGGETT: That would be  
10 appropriate.

11                  MR. LILLY: Thank you.

12                  CO-HEARING OFFICER BAGGETT: With that, they're  
13 admitted.

14                               (Whereupon Exhibits Millview 1-16 were  
15                               admitted in evidence.)

16                  CO-HEARING OFFICER BAGGETT: Mr. Lilly, do you  
17 want to just wait? Are your exhibits also part of your  
18 case-in-chief? You can admit them all at once if  
19 they're already in there. Or are these additional?

20                  MR. LILLY: These are additional -- Exhibits  
21 SCWA-8, 11, and 13 are new. They are not part of our  
22 case-in-chief. I ask they be admitted now. We're not  
23 planning to talk about them any more.

24                  CO-HEARING OFFICER BAGGETT: Any objection to  
25 the three exhibits Mr. Lilly used?

1           MR. NEARY: No. I'm not even sure -- well, to  
2 the certificate of completion and the uniform water  
3 supply agreement, I have no objection to that. All  
4 these tables that floated by, I'm not sure --

5           CO-HEARING OFFICER BAGGETT: The USGS tables  
6 are not part of those three exhibits.

7           MR. LILLY: That's correct. Those are  
8 Exhibits 9 and 10, we'll ask Ms. Jeane to authenticate.

9           CO-HEARING OFFICER BAGGETT: Contracts with the  
10 District, I assume those --

11          MR. LILLY: And then Exhibit 8 was the complete  
12 table for 2008.

13          CO-HEARING OFFICER BAGGETT: Okay. With that,  
14 they're admitted.

15                   (Whereupon Exhibits SCWA-8, 11, and 13  
16 were accepted in evidence.)

17          MR. NEARY: Mr. Chairman, I did check with  
18 Mr. Bradley's testimony, and I was in error. He did not  
19 refer to Exhibits 3, 4, and 5. And of particular  
20 interest is Exhibit 3, and I'd like to have -- just have  
21 Mr. Bradley issue a foundation for that.

22          CO-HEARING OFFICER BAGGETT: We'll leave that  
23 to Mr. Lilly. I've already accepted them. I mean I'm  
24 willing to accept them. We can get the witness back up  
25 here and have him verify. It is up to -- is that --

1           MR. LILLY: I think it would be valuable for  
2 him to explain what Exhibit 3 is. You've accepted it  
3 into the record, but we still don't know what it is.

4           MR. NEARY: I think it would just be two or  
5 three questions.

6           CO-HEARING OFFICER BAGGETT: Okay. Before we  
7 take a break then, we'll go back to the case-in-chief of  
8 Millview.

9           FURTHER REDIRECT EXAMINATION BY MR. NEARY  
10           FOR MILLVIEW COUNTY WATER DISTRICT  
11 BY MR. NEARY:

12         Q     Mr. Bradley, on Exhibit 3, do you recognize  
13 that document?

14         A     Yes. It's a map that we hired an engineer to  
15 plot the location of lot 103 of the Yokayo Rancho.

16         Q     Was this applied to Mr. Rich at the time of his  
17 field investigation --

18         A     Yes.

19         Q     -- in 2006?

20         A     Yes.

21         Q     And the lot number 103 is the same lot that's  
22 referred to in the Waldteufel water claim?

23         A     That's correct.

24         Q     Millview Exhibit No. 2?

25           CO-HEARING OFFICER BAGGETT: Do you want to do

1 -- 5 and 6, are those . . . While you've got him up  
2 here, I assume those are --

3 BY MR. NEARY:

4 Q Do you recognize Exhibit 5 and Exhibit 6, two  
5 aerial photographs?

6 A The actual photographs? Okay. Yes. Those  
7 were from -- those were government aerial photos  
8 obtained by Millview staff from the Mendocino County  
9 Museum, aerial photographs of the site.

10 Q Number 4 is for the date July 15, 1952?

11 A Correct.

12 Q And next one is for August 4, 1963?

13 A Yes.

14 CO-HEARING OFFICER BAGGETT: Very good. Thank  
15 you. Number 6 is for July 10, 2009. Okay.

16 Mr. Lilly?

17 MR. LILLY: If we can put Exhibit 3 back up  
18 there, now that we know what it is.

19 CROSS-EXAMINATION BY MR. LILLY

20 FOR SONOMA COUNTY WATER AGENCY

21 BY MR. LILLY:

22 Q Mr. Bradley, does the District contend that its  
23 current diversions and use of water under the alleged  
24 Waldteufel right must be used within the boundaries of  
25 this lot 103 or does the District contend that water may

1 be used throughout the district?

2 A We believe the water can be used throughout the  
3 district.

4 MR. LILLY: No further questions. Thank you.

5 CO-HEARING OFFICER BAGGETT: Prosecution, any  
6 questions? Mr. Carter, any questions?

7 MR. ROSE: No.

8 MR. BRIAN CARTER: No.

9 CO-HEARING OFFICER BAGGETT: If not, thank you  
10 very much. Let's take ten minutes, and we'll come back  
11 with, I guess, Gomes et al. case-in-chief.

12 (Recess)

13 CO-HEARING OFFICER BAGGETT: We about ready?  
14 Who is up next? I think we're down to Thomas Hill and  
15 Steven L. Gomes. Mr. Carters.

16 MR. JARED CARTER: We represent Messrs. Hill  
17 and Gomes.

18 Following -- what we intend to put on is just  
19 my declaration. I'm a witness to authenticate the  
20 various documents, and if anybody wants to cross-examine  
21 me about that, I'm available. Otherwise, we'll just  
22 submit them for the record.

23 I don't know, to be frank with you, whether any  
24 of them are new or whether we've got them duplicated. I  
25 think almost everything we're offering has already been

1 offered by somebody else.

2 We will also offer Mr. Steven Gomes to testify  
3 largely about what he's done in order, before purchasing  
4 this water right, to exercise due diligence to determine  
5 what was available.

6 And I want to give a perspective on what I see  
7 are the evidence in this case and the issues for you to  
8 consider not only Mr. Gomes' testimony but all of that  
9 testimony in this framework.

10 It seems to me that what we've seen is that all  
11 of the parties have admitted at one time or another that  
12 there was a valid pre-1914 water right in this case.

13 The State has backed way off, or attempted to  
14 back way off, of the position it initially took in the  
15 saga of differences between these parties where it  
16 originally said yes, there was a valid pre-1914 right  
17 but it either has been degraded or forfeited down to now  
18 about one percent of what it originally was.

19 We believe the right was validly established at  
20 2 cubic feet per second and that, once it became  
21 established as a pre-1914 right, it's beyond your  
22 jurisdiction.

23 If you decide you're going to examine the  
24 question of whether it was validly established, we  
25 believe that the testimony that we have seen, primarily

1 the testimony of Mr. Lawrence, though hearsay, it's  
2 certainly corroborated by the existence of various  
3 collection capacity.

4 It's corroborated by the deed showing that  
5 there was alfalfa growing there back in that 1913 deed.

6 It's corroborated by other testimony that  
7 explains why that hearsay would be valid. That is, the  
8 alfalfa expert explaining what it takes to grow a crop  
9 of alfalfa.

10 There was only one place that that water could  
11 come from. There was only one place the noise of the  
12 constantly running motor could come from.

13 And we've got a deep hole physically on the  
14 place that a lot of people have seen.

15 So that's corroborating evidence to support  
16 Mr. Lawrence's testimony, and what it shows is that 165  
17 acres of alfalfa was put into place. It was developed.  
18 It was used.

19 So once that right was established, it became a  
20 vested pre-1914 right, and it can't be taken away except  
21 through forfeiture. There's no evidence of abandonment  
22 of any kind at any place, so we're dealing only with  
23 forfeiture.

24 Now, the State's case, and particularly  
25 Mr. Rich's report, misstates almost every concept of the

1 law of forfeiture.

2           It's got to be the five years before. There's  
3 argument about that point, but the latest reported case  
4 says it's got to be in the five years before.

5           And to have a forfeiture, you have to have a  
6 contestant. There is no contestant here. Nobody else  
7 is claiming that right.

8           The most anybody is claiming is that by moving  
9 the point of diversion Millview is erroneously or  
10 intentionally, or whatever way, taking some other water  
11 that Sonoma County has a claim to.

12           It's hard to see in this case, frankly, why and  
13 how we're all taking so much time on it on the basis of  
14 the claim of the Russian River District.

15           I understand Sonoma County's position. They  
16 have got a reasonable and valid claim. But the Russian  
17 River District, Lee Howard's the president of the  
18 Russian River District.

19           Their right under D-1030 and modifications of  
20 that order that have come from this Board since 1961  
21 clearly state that the Russian River Water District,  
22 that this Board had to foist water right onto, to  
23 Mendocino County -- they didn't even want water rights  
24 out of that dam project -- but that all of their rights  
25 are subject to all previously existing appropriative

1 rights, and they pertain only to the Project water.

2 So Russian River comes in and says we want to  
3 knock off basically 99 percent of the Waldteufel right.

4 Now what happens if they succeed?

5 That means that about 14- to 1500 acre feet  
6 less are available for use in Mendocino County. So I  
7 understand Sonoma County Water Agency's position. But  
8 what valid purpose is going to be served by reducing the  
9 total water supply in Mendocino County by 1500 acre  
10 feet?

11 We've got a water district that can't meet all  
12 of its needs. We spent a bunch of time arguing about  
13 whether they know how to fill out tables and whether  
14 they're being a little skullduggerous in trying to say  
15 well, I'm using this right this day and I'm using this  
16 right next week.

17 But Members of the Board, what is wrong with  
18 maximizing your water rights?

19 If you read the constitutional provision,  
20 Article 10, Section 2, it says it's in the policy of the  
21 State to maximize the beneficial use of water. We all  
22 depend on it. Our economy depends upon it. And the  
23 Water Code -- I think it's Section 106 -- says the  
24 priority right is domestic use.

25 Now what's happened here? Some intelligent

1 people saw that here's a water right that nobody's paid  
2 any attention to. There hasn't even been an erroneous  
3 statement of diversion and use filed for 40 years, and  
4 for 50 years before that, there had been nothing in the  
5 file.

6 So nobody's paid any attention to this water  
7 right, which is every bit as much property as a hunk of  
8 real estate, for some 90 years.

9 And along comes Hill and Gomes and says hey, we  
10 believe in the constitution. We want to do what the  
11 constitution says and put this to beneficial use. So  
12 let's go get it. Let's make sure it's perfected -- and  
13 Gomes is going to testify as to what they did -- and  
14 then let's sell it to a municipal district that's short  
15 of water. 5,000 people depend on it.

16 And that's what happened.

17 So the question is: Why are we trying to stop  
18 that?

19 I don't think Russian River District has the  
20 slightest concept of what their interest is or why  
21 they're involved in this whole episode unless they want  
22 more cash flow.

23 I listen to this testimony, and the question of  
24 the rate going up from \$27 to \$100 an acre foot and we  
25 don't know whether they're going to renew our contract,

1 and we're in negotiation. People are looking for  
2 leverage to maximize their water right to serve people  
3 through a municipal water district.

4 And my plea to you, my argument to you, is:  
5 That's what you're supposed to help.

6 And so Sonoma County Water Agency's claim that  
7 they're going to be hurt -- now it's not in evidence,  
8 but we all know and you know because you're involved is  
9 here they are saying we don't want to take some -- I  
10 don't know what the number was, 60- or 70,000 acre feet  
11 through a pipeline out of Lake Sonoma down to our water  
12 area. We're going to beat up Mendocino County and get  
13 1500 acre feet from them rather than exercise that  
14 right.

15 Does that make good policy sense? Is that  
16 consistent with the constitutional notion to put this  
17 water right to maximum use?

18 We say no.

19 We say under the constitutional provision and  
20 the Section 106 and under such cases as I think they  
21 were Peabody and Meridian -- I cited them before, and  
22 we'll cite them in our final argument -- they say that  
23 this Board and the courts have a duty. Not just hey,  
24 don't hurt us. They say you got a duty to help preserve  
25 these kind of rights.

1           And then I guess the most shocking thing I  
2 heard today is that this Board shouldn't pay any  
3 attention to what you've been telling the public about  
4 what your jurisdiction is.

5           I think Mr. Rich is a commendable guy, very  
6 impressive, knows a lot, works hard. But when he says I  
7 don't agree with this publication that we've been  
8 telling everybody in the state that we don't have  
9 jurisdiction over pre-1914 rights, I think that's wrong,  
10 and I don't pay any attention to it when I do my  
11 investigations, I point out, and I'm sure you're aware,  
12 that in a case presently pending before the State  
13 Supreme Court this Board's lawyers have taken the  
14 position in the Farm Bureau case -- I don't know if it's  
15 under submission. I don't think it's under submission.  
16 I don't think it's been argued, but it's been pending  
17 for something like 12 years, or whatever it is, the  
18 longest pending case before the court -- this Board took  
19 the position we don't have jurisdiction over pre-1914  
20 rights.

21           Now, if you're going to willy-nilly change  
22 that, and you're going to support this kind of a case,  
23 what is the effect on the thousands of pre-1914 rights  
24 holders that are in this state?

25           One guy comes along, president of a local

1 competing water agency, and files a complaint. Are you  
2 going to make every holder of one of those 1850 or 1870  
3 gold mining claims that have undoubtedly been passed on  
4 in families or put into local water districts in the  
5 foothills of the Sierras -- are you going to make those  
6 people go through what we've had to go through to prove  
7 our right?

8           If you're going to, I commend to you an article  
9 in Saturday's edition of the Economist magazine. That  
10 article says that the San Joaquin-Sacramento Valley is  
11 destined to be Appalachia west because the water rights  
12 aren't available to sustain the multibillion dollar  
13 economy that this state relies upon.

14           And the reason they're not reliable, partly  
15 it's geological, partly it's natural. But partly it's  
16 because of a foul regulatory system.

17           And if entrepreneurs and investors and water  
18 districts and water users and home builders can't rely  
19 upon what you say you'll do, and they can't rely upon  
20 the validity of rights that have been advertised to the  
21 world as valid as real property rights, and if they have  
22 to come in and defend them the way we have had to spend  
23 hundreds -- I bet we spent 150- or \$200,000 so far. If  
24 this has to go to court, we'll have to spend a whole  
25 bunch more.

1           People are just going to give up, and the  
2 economy's going to get a lot worse.

3           So our plea is reenforce your jurisdictional  
4 position that you have been articulating to the Supreme  
5 Court and to the public and in many cases in this state,  
6 and throw out this proceeding.

7           You don't have jurisdiction to determine the  
8 validity or the extent of a pre-1914 right.

9           If you reject that, then decide this pre-1914  
10 right is valid, and it hasn't been forfeited. You  
11 certainly don't have the jurisdiction to determine a  
12 forfeiture.

13           If somebody wants to sue us, including this  
14 agency, file a complaint and let's go to court where we  
15 can have an evidentiary hearing. Let's not jerk these  
16 people around for a policy deal where we've got one side  
17 of the staff saying this and one side of the staff  
18 saying that.

19           These are very bad proceedings for an  
20 individual property owner to have to come and defend his  
21 rights.

22           Thank you very much.

23           CO-HEARING OFFICER BAGGETT: You can bring both  
24 of your witnesses up if you want do them both at once.

25           MR. BRIAN CARTER: Thank you.

1                   CO-HEARING OFFICER BAGGETT:  Actually, Mr.  
2  Carter's might be rather quick.  I don't know.  Just  
3  basically authenticating documents.  I don't know if  
4  there's any objection from anybody with the documents  
5  he's --

6                   MR. BRIAN CARTER:  We offer Jared Carter's  
7  written testimony which authenticates documents and  
8  would be willing to submit on that basis.

9                   MR. LILLY:  Mr. Baggett, that's fine with us.  
10  And we will waive any right to cross-examine Mr. Carter,  
11  provided of course that the State Board follows the  
12  caveat that I believe you, Mr. Baggett, made earlier  
13  that there are quite a few legal arguments in his  
14  testimony.

15                   CO-HEARING OFFICER BAGGETT:  Right.

16                   MR. LILLY:  As long as those are treated as  
17  legal arguments and not evidence.

18                   CO-HEARING OFFICER BAGGETT:  They will be.  Do  
19  you have any objection, Mr. Rose?

20                   MR. ROSE:  I agree with Mr. Lilly.

21                   CO-HEARING OFFICER BAGGETT:  That was an easy  
22  witness.

23                   MR. BRIAN CARTER:  Thank you.

24  ///

25  ///

1 CO-HEARING OFFICER BAGGETT: Okay.

2 STEVEN L. GOMES

3 Called by THOMAS HILL and STEVE GOMES

4 DIRECT EXAMINATION BY MR. BRIAN CARTER

5 BY MR. BRIAN CARTER:

6 Q Steve, how are you?

7 A Very good. Yeah, Mr. Chairman and Board. My  
8 name is Steve Gomes. I live in 433 Kenwood Drive,  
9 Ukiah, California.

10 Q Did you take the oath earlier today?

11 A Yes, I did.

12 Q Okay. Have you read the Declaration of Steven  
13 Gomes that I submitted as Exhibit A in this proceeding?

14 A Yes, I have.

15 Q Is that statement accurate?

16 A Yes, it is.

17 Q Would you generally describe for this Board  
18 what you and Tom Hill did prior to purchasing the  
19 Waldteufel right to confirm its -- to check it out?

20 A Well, the first thing we were presented with  
21 was the actual document from Mr. Wood saying he had  
22 pumped this water right and they owned this property  
23 since 1947.

24 And so I called the Water Rights Division and  
25 talked to Mr. Andy Chu. And after -- actually, Tom Hill

1 made the initial contact.

2 So I followed up with Mr. Chu and asked him,  
3 you know, is this water right good?

4 And he indicated it was fine. He pulled the  
5 statements on this water right and said I have a  
6 statement here. And basically, he said as long as we  
7 know it's out there and it's being used, it exists, and  
8 to pump it to its fullest extent.

9 He never talked about anything, well, we need  
10 to investigate.

11 Q Did you hire counsel in connection with your  
12 due diligence?

13 A Yes. I hired Mr. David Rapport, an attorney in  
14 Ukiah. He's the city attorney for the City of Ukiah.

15 Q What did he tell you?

16 A He, you know, got back to me in a couple of  
17 weeks and said that he had the whole body of law that  
18 applied to these pre-1914 rights, and I didn't know  
19 about them.

20 And he gave me things, documents, you know,  
21 1872 and other years before. And, you know, his  
22 comments were that that's the body of law that governs a  
23 pre-14 right.

24 Q So you had discussions with Chu and discussions  
25 with counsel prior to paying money to Mr. Wood for the

1 water right?

2 A Right. I had a follow-up call to Mr. Chu. We  
3 talked extensively. And I was exploring whether or not  
4 this was an appropriative right.

5 And he says I can't tell you that.

6 And I said who can tell me that? And we never  
7 got to the conclusion of who could tell me if this is an  
8 appropriative right or not.

9 So there was some confusion whether or not it  
10 was an appropriative right, although during Mr. Rich's  
11 investigation he announced that somewhere in the mid  
12 '20s the Legislature had in fact defined these pre-14  
13 rights as appropriative rights.

14 Q Now Mr. Gomes, there were some photographs that  
15 Mr. Bradley testified to regarding pipes at the river's  
16 edge along this property. Have you seen such pipes?

17 A Yes.

18 Q Were the pipes that you saw those same pipes  
19 that were depicted in Millview's photographs?

20 A Yes, they were in use at the time when I met  
21 Mr. Wood.

22 Q Have you seen water from the river used on the  
23 property?

24 A Yes.

25 MR. CARTER: That's all I have. Thank you very

1 much.

2 CO-HEARING OFFICER BAGGETT: Okay. Sit by your  
3 witness, and we'll have cross-examination.

4 Do you have any questions from the Prosecution?

5 CROSS-EXAMINATION BY MR. ROSE

6 FOR PROSECUTION TEAM

7 BY MR. ROSE:

8 Q Good afternoon, Mr. Gomes. I just have a few  
9 questions for you. Just a moment ago, you testified  
10 that you spoke with Andy Chu of the Division of Water  
11 Rights?

12 A That's correct.

13 Q And you said that Mr. Chu pulled statements of  
14 water diversion and use?

15 A Yes, he did.

16 Q And you said that he told you that this claim  
17 of right was valid?

18 A That's what he said.

19 Q And you testified that he told you to use it to  
20 the fullest extent?

21 A That's correct. He read from the statement  
22 that it was a water right of 2.5 cubic feet per second.

23 Q And did you get any written confirmation of  
24 what Mr. Chu said?

25 A He sent us all the water statements, and he

1 also sent us a -- per Mr. Hill's request. And he sent  
2 us the typical handout that you get from the Water  
3 Rights Division of what's a water right, and it has  
4 miners and kind of a newspaper element. And that was  
5 all we got from him.

6 Q So you don't have anything in writing  
7 documenting what Mr. Chu said about the validity of the  
8 right or how much water to use under the right?

9 A No. He sent me the statement and said this is  
10 the statement, and that's what it is.

11 MR. ROSE: No further questions. Thank you.

12 CO-HEARING OFFICER BAGGETT: Millview, any  
13 questions?

14 MR. NEARY: Yes. Would you be able to put up  
15 Hill and Gomes Exhibit Z?

16 CO-HEARING OFFICER BAGGETT: Do you want to  
17 come up to the microphone?

18 CROSS-EXAMINATION BY MR. NEARY

19 FOR MILLVIEW COUNTY WATER DISTRICT

20 BY MR. NEARY:

21 Q Mr. Gomes, do you recognize that picture?

22 A Yes.

23 Q What does that picture depict?

24 A That's a -- approximately an 8-inch casing from  
25 a well that ended up in my lot 10, unit 1, of the west

1 fork subdivision.

2 Q And was it on the property when you purchased  
3 it?

4 A Yes, it was.

5 Q And did you ever have any discussions with Bob  
6 Wood as to this well?

7 A Yes, I did.

8 Q What did he tell you about it?

9 A Well, that it's a shallow well, that they had  
10 difficult time drilling it, digging it out. They had to  
11 use a cable tool because it was caving in because of the  
12 water that was available for it.

13 And after that, I asked him how many gallons  
14 per minute he could get.

15 And he said well, I couldn't afford the pump to  
16 pump it out. I think he had a 20 horsepower pump on  
17 that one.

18 Q And was it in operation at the time you  
19 purchased the property?

20 A Yes.

21 Q And it was lot 10 located on the Waldteufel  
22 property?

23 A Yeah. It was the northwest corner of the  
24 subdivided property.

25 MR. NEARY: That's all I have.

1 CO-HEARING OFFICER BAGGETT: Mr. Lilly.

2 CROSS-EXAMINATION BY MR. LILLY

3 FOR SONOMA COUNTY WATER AGENCY

4 BY MR. LILLY:

5 Q Good afternoon, Mr. Gomes. As you know, I'm  
6 Alan Lilly, attorney for Sonoma County Water Agency.

7 I'd like it if you could get your testimony,  
8 which is Exhibit A, in front of you and flip to page 2  
9 of that.

10 A Yes.

11 Q Okay. Now paragraph two at the top of page 2  
12 states that in early January 1998 you and Mr. Hill  
13 purchased the Waldteufel right from Mr. Robert Wood.

14 And then paragraph three right below that says  
15 at the same time you and Mr. Hill also purchased from  
16 Robert Wood the real property called the Wood property.  
17 What is the Wood property?

18 A Well, that was everything I purchased from Bob  
19 Wood. It included all of the 32 acres, approximately.  
20 It included some river frontage.

21 And also there was approximately a seven-acre  
22 parcel that's in between the two forks of the river that  
23 extend south of the Wood subdivision.

24 And it wasn't part of the developable property.  
25 In fact, that's been transferred with this sale to

1 Millview.

2 Q Okay. What was the total purchase price that  
3 you and Mr. Hill paid Mr. Wood for the land and the  
4 alleged water right?

5 A Approximately 1.2 million.

6 Q And was that purchase price divided any way  
7 between the land and the alleged water right?

8 A Not exactly, no. Not by documentation, no.

9 Q Well, did you have any understanding of the  
10 division or --

11 A Well, Mr. Wood said it was valuable. He  
12 thought it was a valuable water right, and we just made  
13 a deal for the land including this water right.

14 Q Okay. Then if you can go back to paragraph two  
15 of your testimony, the second line, line 2, the sentence  
16 in the middle starts out:

17 I understand that the Waldteufel right is  
18 memorialized or embodied in the recorded  
19 document, a copy of which is attached  
20 hereto as Exhibit C.

21 What do you mean by memorialized or embodied?

22 A Well, I mean memorialized, in my opinion, was  
23 the fact that it was recorded with the county recorder's  
24 office and gave public notice to its existence, and that  
25 the actual volume of water was clearly spelled out --

1 well, if you knew what miner's inches are -- and there  
2 was water available that's been calculated.

3 Q So is your understanding that this notice in  
4 fact was a water right?

5 A Well, it was a recording of this. And, you  
6 know, I didn't know -- I knew very little about pre-14  
7 rights, but I knew they had to be recorded and -- prior  
8 to the water act being in December of 1914.

9 Q So that was basically your understanding in  
10 1998 when you purchased this property and the alleged  
11 water right?

12 A Yeah, that's right.

13 Q Okay. On page 3, if you can go on to page 3 of  
14 your testimony. This is Exhibit A. And particularly  
15 starting at line 22, I'm just going to read this, and  
16 then I'll ask you a question. It says:

17 My recollection of the agreements with  
18 Millview was that its ability to change  
19 the point of diversion from the original  
20 point to Millview's downstream  
21 established point of diversion and  
22 pumping station was an important  
23 component of the agreement.

24 Why was changing this established -- changing  
25 this point of diversion an important component of the

1 agreement?

2 A Well, mainly because of Millview's function as  
3 a water district. They have their water treatment  
4 facility, a filtration system established downstream,  
5 and that we knew about the fact that it could be  
6 changed.

7 I actually talked to Andy Chu. That was part  
8 of my conversation with him, that we needed to change  
9 the point -- we desired to change the point of diversion  
10 to their existing pumping station.

11 Q And was that so that there would be access to  
12 the water released from Lake Mendocino at that point of  
13 diversion?

14 A No, not at all.

15 Q Oh. Why was it then?

16 A Just that they had their facilities  
17 established, and the construction of new facilities just  
18 didn't seem to be necessary at that point.

19 Q Okay. Then going on in that same paragraph, at  
20 line 28, you refer to Millview's application to change  
21 the point of diversion.

22 A Well --

23 Q What do you mean by Millview's application to  
24 change the point of diversion?

25 A Well, Millview filed their paperwork with the

1 Division of Water Rights and requested a change in the  
2 plan of diversion as normally done for this type of  
3 change.

4 Q Have you seen any such filing?

5 A I personally didn't sign off on it, no.

6 Q Okay. And then the previous sentence says:

7 The State did subsequently review and  
8 knowingly approve this application.

9 What do you -- what action by the State are you  
10 referring to there?

11 A Well, the Millview Water District conveyed to  
12 me that they had successfully got an approved change to  
13 their point of diversion.

14 Q So again, you didn't see any written order from  
15 the State. This is just based on what Millview told  
16 you?

17 A That's correct.

18 Q Okay. Then in paragraph nine on page 4 of your  
19 testimony, I believe in response to some questions from  
20 Mr. Neary, you talked about this well in the northeast  
21 corner of the property.

22 You mentioned that the well had a 20 horse pump  
23 in it. I didn't hear any reference to what the pumping  
24 capacity of that well is. Do you know what the pumping  
25 capacity was?

1           A     It's unknown.

2           Q     Okay. Do you have any handle to the nearest  
3 hundreds of gallons per minute or anything like that?

4           A     The only comment I had from Mr. Wood was that  
5 it kept caving in, and usually that means there's quite  
6 a lot of water movement through a sandy or gravel  
7 situation.

8           Q     Okay. And was this well used to irrigate  
9 crops?

10          A     Yes.

11          Q     Okay. What crops or what area was irrigated  
12 from this well?

13          A     Well, he dripped irrigation for the vineyards,  
14 and he ran both systems at once at times.

15          Q     Do you how many acres he was irrigating from  
16 this well?

17          A     Not exactly.

18          Q     Do you know what the time frame was, what years  
19 he was using this well?

20          A     All the time that I knew him, which I met him  
21 in October of 1991 until we purchased the property.

22          Q     So 1991 through when, 1998?

23          A     1998, yes.

24          Q     Okay.

25          A     Actually, I should add to that. He actually

1 used that for a few more years because he did live on  
2 the property for a while longer, and that was part of  
3 the system that fed the house.

4 MR. LILLY: Okay. I don't have any further  
5 questions. Thank you.

6 CO-HEARING OFFICER BAGGETT: Any questions of  
7 staff?

8 I just -- this 20-horsepower well intrigues me.  
9 I don't know where -- it's on, I assume, lot 103  
10 someplace, that map?

11 MR. GOMES: Yes, it is.

12 CO-HEARING OFFICER BAGGETT: Can you pull that  
13 up, Millview 003, where it has the point of diversion.  
14 I'm just curious if you can give me some idea of where  
15 it is on this map.

16 MR. GOMES: On the document there, that -- the  
17 P where the word "point" is. Just in that area.

18 CO-HEARING OFFICER BAGGETT: Pretty much in the  
19 center of the parcel.

20 MR. GOMES: Yeah, right.

21 CO-HEARING OFFICER BAGGETT: A little bit  
22 south.

23 MR. GOMES: Well, you know, I didn't purchase a  
24 little bit of that property to the west. The P is kind  
25 of my northwest corner.

1 CO-HEARING OFFICER BAGGETT: Okay. So this --  
2 so the parcel that was on is not -- it didn't serve the  
3 whole parcel, just part of this lot 103.

4 MR. GOMES: It just served everything existing  
5 the date I purchased the property.

6 CO-HEARING OFFICER BAGGETT: Okay. And I guess  
7 you -- I think I just heard the answer to my other  
8 questions. How many gallons, what is the pump running.  
9 We just know a 20-horsepower pump.

10 MR. GOMES: I really don't know. It was  
11 whatever he needed.

12 CO-HEARING OFFICER BAGGETT: And was the  
13 Prosecution Team, were they aware of this, existence of  
14 this pump?

15 MR. GOMES: I have no idea.

16 CO-HEARING OFFICER BAGGETT: In all the  
17 investigations -- or you don't know?

18 MR. GOMES: Nobody asked.

19 CO-HEARING OFFICER BAGGETT: Nobody asked.  
20 Okay.

21 Any other questions? If not, do you have any  
22 redirect?

23 MR. BRIAN CARTER: Yes.

24 REDIRECT EXAMINATION BY MR. BRIAN CARTER

25 FOR THOMAS HILL and STEVEN L. GOMES

1 BY MR. BRIAN CARTER:

2 Q Mr. Gomes, was it your understanding that  
3 Millview treated the water it pumped from the river  
4 prior to distributing it to its residential customers?

5 A Yes.

6 Q And was it your understanding that it did so at  
7 the point below the confluence of two forks of the  
8 river?

9 A Yes.

10 Q And is that why it wanted to change the point  
11 of diversion, for the Waldteufel right?

12 A For the purpose of treating it?

13 Q Yes.

14 A Yes.

15 MR. BRIAN CARTER: That's all I have.

16 CO-HEARING OFFICER BAGGETT: Any redirect by  
17 any party on that narrow -- or recross on the redirect?  
18 Okay.

19 With that, exhibits? Would you like to --

20 MR. BRIAN CARTER: We would like to offer all  
21 our exhibits, Hearing Officer, A through double B.

22 CO-HEARING OFFICER BAGGETT: And U?

23 MR. CARTER: Including U.

24 CO-HEARING OFFICER BAGGETT: Mr. Lily, can  
25 I . . .

1           MR. LILLY: Do you want me to start with my  
2 objections?

3           CO-HEARING OFFICER BAGGETT: Sure.

4           MR. LILLY: All right. I do have a few.

5           In Exhibit A, Mr. Gomes' testimony -- I don't  
6 object to the testimony coming in, obviously, but there  
7 are hearsay statements there, and I just ask that the  
8 Board have its normal rule.

9           I'm sorry I have to keep stating this  
10 objection, but the Government Code says it has to be  
11 under objection, so if I don't state it, it's unclear  
12 that the limitation applies.

13          CO-HEARING OFFICER BAGGETT: All right.

14          MR. LILLY: So I object to the hearsay  
15 statements of Mr. Chu that are in Exhibit A and also the  
16 statements of Mr. Wood that are described in Exhibit A  
17 for that basis. They can come in, but there's  
18 limitations on the Board's use of those statements.

19          The other -- next objection, this Exhibit I,  
20 we've seen this. This was a Prosecution Team letter --  
21 I mean exhibit -- which was an April 24th, 2006 letter  
22 from Mr. Bradley.

23          We've heard about the text, the first two  
24 pages, and this map that's the third page. We still  
25 have no foundation or any understanding whatsoever

1 regarding pages 4 and 5 of that letter.

2           They're not referenced in the letter. We don't  
3 know what they are. So I object to those two pages  
4 under lack of foundation.

5           CO-HEARING OFFICER BAGGETT: Is that it?

6           MR. LILLY: No. I didn't know whether you  
7 wanted to rule on each one. I'll state them all, then  
8 you can rule. Excuse me.

9           Exhibit J is the statement of Floyd Lawrence.  
10 We object on the same basis that we objected when this  
11 same exhibit was offered by the Prosecution Team. It's  
12 hearsay. Any use of it by the Board is subject to the  
13 limitations on the use of hearsay evidence.

14           And then Exhibit N, O, R, X and Y -- that's N,  
15 O, R, X and Y -- are various letters from the attorneys  
16 for, I believe, Hill and Gomes and Millview. And we  
17 just object to those to the extent they're making  
18 factual statements or hearsay.

19           Again, legal arguments can be treated as legal  
20 arguments, but we object to them having any evidentiary  
21 weight.

22           And finally, Exhibit U is this so-called  
23 administrative record that was filed in the superior  
24 court action. Many documents in this Exhibit U have in  
25 fact been offered as separate exhibits, and we've

1 addressed those as separate exhibits.

2 But we object to this simply as burdensome.

3 The parts that have not been offered as separate  
4 exhibits, Messrs. Hill and Gomes and their attorneys  
5 have not explained why it needs to be admitted into  
6 evidence.

7 This record was never certified by the State  
8 Water Resources Control Board for the court proceeding,  
9 and so therefore we object to it as unnecessarily  
10 cumulative and frankly confusing.

11 MR. BRIAN CARTER: Your Honor, the documents in  
12 that Exhibit U are shown by Mr. Jared Carter's testimony  
13 to have been the administrative record in the superior  
14 court in which proceeding Judge Schafer issued an order  
15 attesting to his conclusion that it would be an abuse of  
16 discretion for the Board and staff to adopt the posture  
17 that they had.

18 I think that as such it is relevant and  
19 material to the burdens and litigation and other expense  
20 that my clients have all had to endure and bear, and  
21 therefore I think it is relevant.

22 I do acknowledge that it's burdensome, but if  
23 this is the worst record you have to handle this month,  
24 I think you'd be in pretty good shape, frankly.

25 CO-HEARING OFFICER BAGGETT: Yeah. Any -- Mr.

1 Rose, do you have any comments?

2 MR. ROSE: I largely agree with Mr. Lily for  
3 most of the reasons he has cited.

4 I mean there are a lot of things in here that  
5 are not part of the administrative record when we  
6 initially looked at all of this and essentially are not  
7 relevant to that.

8 CO-HEARING OFFICER BAGGETT: Anything else, Mr.  
9 Lily?

10 MR. LILLY: Yeah. I'm sorry, but Mr. Carter's  
11 justification is not -- if the only reason all these  
12 docs are being offered is to show that this has been a  
13 burdensome proceeding, that's not relevant.

14 We haven't heard any other specific reason why  
15 any of these pages of Exhibit U that are not designated  
16 as other exhibits should come in.

17 So I continue with my objection.

18 CO-HEARING OFFICER BAGGETT: Okay. I would --  
19 we will note the hearsay objections which will apply to  
20 all of these exhibits as we discussed on prior issues.

21 That will apply to the endorsed file copy on  
22 Exhibit U to the extent these articles are hearsay.

23 The legal arguments raised on any of this  
24 testimony will not be -- you can remake them in your  
25 closing briefs.

1           I'm not -- I think it would be not the wisest  
2 and best use of our time to proceed to go through 40  
3 separate tabs on this binder today, so I will allow the  
4 whole thing in as -- the whole document in as a document  
5 from the court, not necessarily for the truth.

6           We'll follow the hearsay exceptions; the legal  
7 arguments, we'll parse out as we rely on them when we  
8 draft whatever order we draft.

9           So with that, the exhibits are admitted.

10          MR. CARTER: Thank you, your Honor.

11                   (Whereupon Exhibits H&G A through BB were  
12 admitted in evidence.)

13          CO-HEARING OFFICER BAGGETT: Okay.

14           With that, let's -- Mr. Lily, I think Sonoma  
15 County Water Agency is up. You said a few minutes?  
16 We'll see.

17          MR. LILLY: First of all I appreciate,  
18 Mr. Baggett, you and your colleagues, Ms. Dudoc, taking  
19 the time today. We appreciate your attention. We find  
20 these water right hearings fascinating, and I'm sure you  
21 do too.

22           But whether you do or not, I do greatly  
23 appreciate the attention and the seriousness you give to  
24 these proceedings, this one and all the others. And  
25 believe me, it's truly appreciated by all of us.

1           For an opening statement, I'm going to keep it  
2 really to the point because I know the hour is late.

3           First of all, there have been some statements  
4 that no party disputes the existence of this alleged  
5 pre-14 water right, and that's obviously not true for  
6 Sonoma County Water Agency. We've never agreed that any  
7 such appropriative right ever was perfected.

8           Obviously, a Notice of Appropriation is one of  
9 three steps that was needed to perfect the pre-14 right.  
10 It may show intent, but to perfect a pre-14 right there  
11 must be an actual diversion of water and an actual  
12 beneficial use of the diverted water.

13           So there are some significant questions as to  
14 whether there is any competent admissible evidence  
15 showing actual diversion of water under this alleged  
16 right and application of that diverted water to  
17 beneficial use.

18           Secondly, even if the alleged right was  
19 perfected for some amount of authorized diversion, we  
20 contend it's substantially less than the amount that  
21 would apply if the two cubic feet per second rate that's  
22 stated in the 1914 notice could be diverted 365 days a  
23 year, as Millview apparently now is claiming.

24           We will save our arguments for the distinction  
25 between perfection of an appropriative right and

1 forfeiture of a right for our closing brief.

2           The other point is: There's been testimony  
3 that no one has offered any evidence that diversions  
4 under this right -- basically, I guess, whether  
5 authorized or unauthorized -- will impact any other  
6 legal user of water.

7           And the bottom line is Sonoma County Water  
8 Agency is the water right holder that will be impacted,  
9 and Pamela Jeane's testimony will go to that.

10           The bottom line is that because the Sonoma  
11 County Water Agency must maintain minimum instream flows  
12 throughout the Russian River system, as specified in  
13 this Board's Decision 1610 which was then incorporated  
14 into the Sonoma County Water Agency's water right  
15 permits, any diversion of water in the Russian River  
16 water system will impact the amounts of water available  
17 for diversion and use under Sonoma's water right and, in  
18 particular, any diversion from the upper Russian River  
19 in the vicinity of Ukiah will lead normally one-for-one  
20 to Sonoma having to release additional water from Lake  
21 Mendocino storage.

22           And this Board is all too familiar with the  
23 problems that have happened with low storage levels in  
24 Lake Mendocino; and as you undoubtedly recall, we have  
25 been here for temporary urgency change petitions already

1 to address those problems in 2004, 2007, and 2009.

2 So we are concerned, and obviously the Board  
3 should be concerned, because any unauthorized diversion  
4 of water will have a direct and significant impact on  
5 frankly Sonoma supplies and the entire Russian River  
6 system.

7 With that, I'm ready to proceed with our  
8 evidence. We have one witness, Pamela Jeane.

9 PAMELA JEANE

10 Sonoma County Water Agency, Deputy Chief Engineer -  
11 Operations

12 Called by SONOMA COUNTY WATER AGENCY

13 DIRECT EXAMINATION BY MR. LILLY

14 BY MR. LILLY:

15 Q First of all, Ms. Jeane, please state your name  
16 and spell your last name for the record. After the  
17 green light goes on.

18 A My name is Pamela Jeane. The last name is  
19 J-e-a-n-e.

20 Q And have you taken the oath for this hearing  
21 today?

22 A I have.

23 Q And is Exhibit SCWA-1 an accurate statement of  
24 your testimony for this hearing?

25 A Yes, it is.

1 Q Is Exhibit SCWA-2 an accurate statement of your  
2 education and work experience?

3 A Yes, it is.

4 Q Whom do you work for now?

5 A I currently work for the Sonoma County Water  
6 Agency.

7 Q What is your current position with the Sonoma  
8 County Water Agency?

9 A My position -- my job title is Deputy Chief  
10 Engineer, which essentially means that I manage  
11 operations at the agency.

12 Q Okay. And before I go into your testimony,  
13 just so I don't forget it, I'm going to ask you to  
14 examine and ask Mr. Lindsay to put up on the screen  
15 Exhibit SCWA-9 and then Exhibit SCWA-10.

16 Is Exhibit SCWA-9 in fact a table that  
17 accurately shows the US Geology Survey flow -- daily  
18 flow data for the west fork Russian River gauge?

19 A Yes.

20 Q And is Exhibit SCWA-10 a table that shows the  
21 flow data for the same gauge for 2009?

22 A Yes, it is.

23 Q All right. Now to start your --

24 MR. JARED CARTER: Could we get some kind of  
25 authentication to verify that fact? How does Ms. Jeane

1 know?

2 MR. LILLY: We can spend as much time as you  
3 want on this. I think it's pretty clear that somebody  
4 who's Deputy Chief Engineer For Operations of the Sonoma  
5 County Water Agency will have personal knowledge of GS  
6 flow data on the Russian River.

7 MR. JARED CARTER: My point is I don't know,  
8 and I don't think it's been made clear to the record,  
9 whether this is a well-maintained flow station.

10 The fact that the USGS daily or weekly or every  
11 once in a while publishes some data doesn't make it  
12 true.

13 And so we're coming in here, and we say we got  
14 an engineer who's received some data from some other  
15 engineers, and we're going to turn the results -- is the  
16 argument we're going to turn the results of this hearing  
17 on this piece of paper?

18 I don't think that there's been a valid basis  
19 for this piece of paper establishing any facts at issue  
20 in this hearing.

21 MR. NEARY: Millview joins in the objection.

22 MR. LILLY: Those objections clearly go to the  
23 weight of the evidence, not its admissibility. They can  
24 address those on cross-examination if appropriate.

25 CO-HEARING OFFICER BAGGETT: We will note the

1 objections and allow Mr. Lilly to continue, and I would  
2 concur that on your cross you'll have a chance to verify  
3 how accurate what the knowledge is of this information,  
4 one.

5           And two, we don't have anybody from USGS, so is  
6 it hearsay? Is it an official record of USGS? That  
7 would be another question.

8           Continue, Mr. Lilly.

9 BY MR. LILLY:

10       Q     All right. If you can now summarize your  
11 direct testimony -- first of all, if we can put up  
12 Exhibit SCWA-3, then I'll ask you to just summarize  
13 Exhibit SCWA-3.

14           Might want to wait just one minute. Now it's  
15 on the screen.

16       A     Okay. The Russian River system is a managed  
17 system, as I think you all are very well aware of. In  
18 releases of water from reservoirs, both Lake Mendocino  
19 and Lake Sonoma often control river flows, especially in  
20 the summertime and into the fall during the dry season.

21           When tributary stream flows are low, the Agency  
22 releases water that was previously stored in Lake  
23 Mendocino and Lake Sonoma to supplement natural flows in  
24 the Russian River. Releases provide flows for water  
25 supply, recreation, and aquatic habit.

1           The Agency makes water supply releases from  
2 Lake Mendocino and Lake Sonoma to implement minimum  
3 instream flow requirements that are required in the  
4 Agency's water rights as laid out in Decision 1610 by  
5 this Board in 1986.

6           This exhibit here, SCWA-3 depicts the Russian  
7 River system and describes the Decision 1610 minimum  
8 stream flow requirements that apply to various reaches  
9 in the Russian River.

10           As required by 1610 and the Agency's water  
11 rights permits, the Agency sets the rate at which water  
12 is released from Lake Mendocino each day in order to  
13 have sufficient water to maintain minimum stream flow at  
14 the gauges that you can see on this diagram.

15           Those gauges are many. They lie between Lake  
16 Mendocino all the way down to Healdsburg and even  
17 downstream of that.

18           And we also operate with a bit of what I call  
19 an operational buffer that allows us to not have to know  
20 exactly what all users in the system are doing at any  
21 given time, and we release a little extra water in order  
22 to cover diversions that may happen that we are not  
23 aware of.

24           Q     All right. Let's move forward. Now please  
25 explain and summarize Exhibit SCWA-4.

1           A     So as I just described, the Agency must  
2 maintain instream flow requirements in the upper Russian  
3 River at or above the applicable Decision 1610 flow  
4 requirements regardless of the amount of water that  
5 legal or illegal diversions are made in the upper  
6 Russian River or any of the tributaries to the Russian  
7 River.

8                     If the Millview County Water District -- and I  
9 will refer to them as Millview -- makes any unauthorized  
10 diversions of water during any time that the Agency is  
11 controlling releases, the amounts of water that are  
12 being released have to be increased in order for the  
13 Agency to make up for the diversion.

14                    The amount of Millview's unauthorized diversion  
15 can in fact -- would occur -- that -- the diversions  
16 they would make if they were unauthorized would cause us  
17 to increase releases to those above what they would be  
18 if their diversion was not happening.

19                    Additional releases of water from Lake  
20 Mendocino normally will result in additional releases  
21 and corresponding reductions in the amount of water that  
22 remain in storage in Lake Mendocino.

23                    Such reduction in the lake often -- in lake  
24 storage will often have significant impacts later in the  
25 dry season.

1           This exhibit shows the historical amounts of  
2 water that were in Lake Mendocino storage during 2002,  
3 2004, 2007, 2008, and 2009. And as shown on this  
4 diagram, storage in Lake Mendocino declined to low  
5 levels in all of those years.

6           Such low lake levels during the late fall are  
7 severe threats to the Russian River fishery, namely to  
8 Chinook salmon who use the Russian River to migrate  
9 upstream for spawning in the fall.

10           These low storage levels also threaten water  
11 supplies for users that rely on the upper Russian River  
12 including the Sonoma County Water Agency and Mendocino  
13 County residents.

14         Q     All right. Let's go on to SCWA-5, and if you  
15 could please just summarize your testimony regarding  
16 this exhibit.

17         A     Even if some diversions of water are authorized  
18 by the allegation Waldteufel pre-1914 right, increases  
19 in diversion under this alleged right will have impacts.

20           Exhibit 5 and Exhibit 6 depict Lake Mendocino,  
21 the Russian River system in the area, various points of  
22 diversion, and several places of use that are depicted  
23 in various documents in the State Water Board's files.  
24 The details of those exhibits are described in my  
25 written testimony.

1           If the authorized point of diversion for the  
2 alleged Waldteufel right were to be moved from one point  
3 on the west fork of the -- the upper Russian River at  
4 the point labeled Millview CWD-2006 in these exhibits,  
5 then the total amounts of water that could be diverted  
6 under this alleged right would be substantially higher  
7 than the amount that could be diverted under the alleged  
8 right at one of the previous points of diversion.

9           The previous points of diversion, just to  
10 clarify for you, are the ones in the upper portion of  
11 the slide, and the proposed point of diversion is the  
12 one on the lower portion of the slide.

13           MR. LILLY: If I can just interrupt, for the  
14 record, we've shifted to Exhibit SCWA-6. And we thank  
15 Mr. Lindsay for making that shift.

16           MS. JEANE: The reason there would be an issue  
17 with moving this, the point of diversion, downstream is  
18 as I said because in the absence of Lake Mendocino water  
19 the water might not be available for diversion at those  
20 upstream points of diversion.

21           This is because the flows in the west fork of  
22 the Russian River normally drop to very low levels  
23 between mid July and mid September of each year while  
24 flows in the upper river are maintained at much higher  
25 levels due to the releases from storage in Lake

1 Mendocino.

2 MR. LILLY: Okay. Let's go on to Exhibit  
3 SCWA-7, and you can talk about that now.

4 MS. JEANE: The flow values for February 2006  
5 through 2008 for west fork and east branch of the  
6 Russian River are shown here on Exhibit 7.

7 Diversions under the alleged Waldteufel right  
8 also would increase the authorized purpose of use if the  
9 alleged right were to change for irrigation to domestic  
10 or municipal use.

11 These increases are described in my written  
12 testimony.

13 Diversions under the alleged Waldteufel right  
14 also would increase if the authorized place of use for  
15 the alleged right were increased from one of the places  
16 of use shown on our prior exhibits to Millview's entire  
17 service area which is shown in Exhibit 5.

18 These increases are described in my written  
19 testimony.

20 And as discussed in my written testimony, any  
21 of these increases in diversion would cause impacts to  
22 Lake Mendocino storage levels and the related impacts  
23 under various hydrological conditions.

24 MR. LILLY: Does this complete the summary of  
25 your direct testimony?

1 MS. JEANE: It does.

2 CO-HEARING OFFICER BAGGETT: Okay.

3 Cross-examination. Prosecution Team, do you have any  
4 questions?

5 MR. ROSE: No, we don't.

6 CO-HEARING OFFICER BAGGETT: Millview?

7 MR. NEARY: Yes, I've got a few questions.

8 CO-HEARING OFFICER BAGGETT: You're up.

9 While we're waiting, does anybody anticipate  
10 rebuttal testimony?

11 MR. LILLY: We have short rebuttal testimony,  
12 yes.

13 MR. NEARY: On that, I'd like to confer with  
14 Mr. Carter before I make a decision.

15 CO-HEARING OFFICER BAGGETT: Let's continue.  
16 Then you --

17 MR. NEARY: Okay.

18 CROSS-EXAMINATION BY MR. NEARY

19 FOR MILLVIEW COUNTY WATER DISTRICT

20 BY MR. NEARY:

21 Q Good afternoon, Ms. Jeane. As I understand  
22 your testimony, you're stating that Sonoma County Water  
23 Agency would be injured if there was an unauthorized  
24 diversion under the Waldteufel right?

25 A What I stated was that the Sonoma County

1 Water -- there would be impacts to a change in the  
2 Waldteufel right or the -- if they were to start using  
3 the right.

4 Q In your testimony, you refer to unauthorized  
5 diversions.

6 A Mm-hmm. Could you tell me what specifically  
7 you're talking about in my testimony?

8 Q Well, did you testify that the -- I don't know  
9 where it is. I don't have your testimony in front of  
10 me.

11 A In the written testimony.

12 Q Did I understand your testimony that you --  
13 that Sonoma County Water Agency would be injured or the  
14 stream flows would be injured if there was an  
15 unauthorized diversion by Millview?

16 A What I said was there would be impacts if there  
17 was unauthorized diversion.

18 Q Okay. Would those impacts also exist if the  
19 diversion was authorized?

20 A Yes, they would.

21 Q Do you know of any action by the Sonoma County  
22 Water Agency that would impart notice to any holder of  
23 the Waldteufel water right that Sonoma County Water  
24 Agency was diverting adversely to the Waldteufel water  
25 right?

1           A     I didn't understand your question.  Would you  
2 repeat it?

3           Q     Do you know of any action by Sonoma County  
4 Water Agency that would have said we're using the  
5 Waldteufel water right?

6           A     By the Sonoma County Water Agency?  No, I'm not  
7 aware of any action.

8           Q     Okay.  Now, recently Sonoma County Water Agency  
9 filed an application to amend the existing order, to  
10 reduce the stream flows; is that correct?

11          A     We filed a petition in compliance with the  
12 Biological Opinion that was issued by the National  
13 Marine Fisheries Service in September 2008 to reduce  
14 instream flow requirements for the benefit of the  
15 fishery, yes.

16          Q     And do you believe that's a meritorious  
17 application?

18          A     I don't know what you mean by meritorious,  
19 sorry.

20          Q     Do you believe it's meritorious?  Do you  
21 believe that it will be adopted by the Board?

22          A     Oh.  I do not know.

23          Q     Now, I just have a question.  If we could put  
24 up SCWA-6?  I just didn't truly understand this.

25                   There's a purple dot, there's a green dot, and

1 a rust-colored dot. Where did you get the information  
2 to determine that there was a diversion at the location  
3 of the green dot?

4 A The green dot? I'm not sure exactly what the  
5 green dot came from, but I can tell you that all of  
6 these dots that were put on this particular diagram  
7 here, or map here, were taken from State Board files.

8 And they are from statements of diversion and  
9 the 1914 claim. They're all public documents that I  
10 have with me, if you'd like to see them.

11 Q So you're saying that these documents  
12 support -- all right. Would you show me a document that  
13 supports the location of the rust-colored dot? Or I  
14 guess it's a red-colored dot?

15 A Hold on a second. Which one is that? The  
16 red-colored dot?

17 Q Yes.

18 A Do you want me to describe it to you?

19 Q Yes.

20 A This is Statement of Diversion 2000, 2003, 2004  
21 filed by Thomas Hill.

22 Q And what on that document --

23 A Actually, it's signed by Steve Gomes; I'm  
24 sorry.

25 Q And what on that document leads you to locate

1 the point of diversion at the red location?

2 A It describes the point of diversion as being  
3 400 feet -- being relocated 400 feet --

4 Q I see.

5 A -- to the south. So we obviously looked at a  
6 prior one and went 400 feet south.

7 Q I see. Thank you.

8 Do you have any knowledge as to the manner in  
9 which Millview has been diverting water from the current  
10 place of diversion?

11 A No, I don't.

12 Q Would it be of any significance to you that  
13 there are diversions from underflow wells on that site?

14 A Would it be of any significance?

15 Q Yes.

16 A Not really.

17 Q So you -- it's your -- your instream flow  
18 requirements would be affected by removal of or drawing  
19 on an underflow well at the current place of diversion?

20 A I don't know for sure without seeing some data,  
21 but I can tell you that our wells which are adjacent to  
22 the Russian River definitely impact stream flow.

23 Q Okay. But you don't have any way to tell  
24 whether that's true at the Millview location?

25 A I do not.

1 Q Okay.

2 MR. NEARY: That's all I have.

3 CO-HEARING OFFICER BAGGETT: Mr. Carter, you're  
4 up.

5 CROSS-EXAMINATION BY MR. BRIAN CARTER

6 FOR THOMAS HILL and STEVE GOMES

7 BY MR. CARTER:

8 Q Good afternoon, Ms. Jeane. My name is Brian  
9 Carter. I represent Tom Hill and Steve Gomes.

10 Is it true that Sonoma County Water Agency has  
11 recently decided not to build a pipeline to carry water  
12 from the Warm Springs Dam to the Russian River?

13 A No, that's not true.

14 Q Has the Agency dropped any plans to convey  
15 water through a pipeline anywhere?

16 A No.

17 Q The application to reduce the flow to comply  
18 with the September '08 opinion by NMFS: What body of  
19 water is that going to affect, what bodies?

20 A The Biological Opinion that was issued by NMFS  
21 will impact both the mainstem of the Russian River as  
22 well as Dry Creek.

23 Q The Russian River has been characterized as  
24 being fully appropriated; has it not?

25 A My understanding is that Mendocino County is

1 fully appropriated. I'm not sure I have that right.

2 Q How about the Russian River in Sonoma County?

3 A As far as I know, it has not been deemed fully  
4 appropriated.

5 Q Okay. Do you know whether the conclusion that  
6 the Russian River in Mendocino County is fully  
7 appropriated includes any determination or conclusion as  
8 to how much water is appropriated pursuant to the  
9 Waldteufel right that we're talking about here today?

10 A I don't have any knowledge of that.

11 Q Who would?

12 A You might ask State Water Board staff that made  
13 that determination.

14 Q And your testimony is that an unauthorized  
15 diversion by Hill and Gomes or Millview under the  
16 Waldteufel water right would damage your agency?

17 A No. Any diversion, whether it's authorized or  
18 unauthorized, could impact our operation and could  
19 impact what happens in the river.

20 Q Right. But you're here today, or your attorney  
21 has you here today, in order to prevent Millview from  
22 diverting 1500 acre feet instead of 15 correct? Because  
23 you think that will be in your agency's interest?

24 A I'm here to present testimony.

25 Q Okay. The gauging station by which the water

1 flow in the west fork of the Russian River is measured,  
2 the subject of the documents you put up, where is that  
3 located?

4 A Where is the gauge located?

5 Q Yes.

6 A The gauge -- I'm not sure the exact location,  
7 but it's upstream, just upstream is my understanding, of  
8 the point of diversion for the Waldteufel right.

9 Q If we look at Exhibit SCWA-6, it is depicted on  
10 that exhibit; isn't it?

11 A Yes, it is.

12 Q And have you ever physically seen that station?

13 A I have, although it was probably a decade ago.

14 Q Okay. I have never seen such a thing. What  
15 actually does one see when you go take a look at a  
16 gauging station?

17 A Not a whole lot.

18 Q Is it under water?

19 A Honestly, most people don't even realize  
20 they're there. A lot of the equipment itself is in the  
21 water, so you're not -- you don't see it.

22 Essentially, you see a -- usually some sort of  
23 electrical coming in because they do need electricity to  
24 operate, so there probably is some power coming in.

25 And you'll see a large cylindrical-shaped --

1 essentially just a big drum that is -- houses all the  
2 equipment. They're usually not very obvious.

3 Q And if all the water were out of the river, how  
4 much of this object would be visible? Would you see the  
5 top half? Would you see the whole thing? Or is it  
6 above the bed?

7 A In this particular location, I don't know.

8 Q All right. To what extent does this gauging  
9 station -- well, before I get -- before I get onto that,  
10 is there -- are there marks on this exhibit that show  
11 how far north of the Wood property this gauging station  
12 is. A section is a square mile. I can't tell if these  
13 are section lines or exactly how far --

14 A There's a -- there is a measurement down below,  
15 a thousand feet. It looks to me like it's about 2000,  
16 2500 feet upstream of the multicolored dots, the red,  
17 green, yellow, and blue dots. 2000 to 2500 feet  
18 upstream.

19 Q To what extent does the amount of surface flow  
20 at the gauging station tell you what the surface flow is  
21 going to be at the point of diversion down by the Wood  
22 property, if you know?

23 A I don't know. Without seeing a topographical  
24 map, I couldn't estimate.

25 Q There's some evidence to the effect that there

1 is a big eight-foot deep or more hole where kids used to  
2 swim in the 1910s where there was this diversion pipe  
3 and the pump when this water right was first asserted.  
4 To what extent would a gauging station measure  
5 underflow?

6 A These gauging stations -- this one here does  
7 not measure underflow. It measures stream flow.

8 Q Okay. I noticed in your direct testimony there  
9 was discussion of how certain things might occur if the  
10 point of diversion for this right were moved. In fact,  
11 it has been moved.

12 Is it your understanding that the point --  
13 there is an official point of diversion for the  
14 Waldteufel water right and that it's still up on the  
15 west fork of the Russian River?

16 A That's my understanding, based on the document  
17 that I read, the original claim.

18 Q Based on the 1913 -- March 1914 recorded  
19 document?

20 A Yes.

21 Q Okay. And if there were some sort of Agency  
22 decision or acknowledgement or a de facto change in  
23 point of diversion, would you have become aware of it in  
24 the course of your work?

25 MR. LILLY: I have to object to that. That

1 calls for speculation about what she might have known  
2 about something that might have been issued? I mean  
3 that's just so speculative, it's not useful.

4 MR. BRIAN CARTER: I will rephrase the  
5 question.

6 CO-HEARING OFFICER BAGGETT: Rephrase.

7 MR. BRIAN CARTER: Okay.

8 BY MR. BRIAN CARTER:

9 Q Ms. Jeane, are you aware of the points of  
10 diversion of the various appropriators from the Russian  
11 River?

12 A I am aware of ours, and I am aware of a couple  
13 of other significant ones, but I'm not aware of all of  
14 them.

15 Q Okay. To what extent does your agency's  
16 concern flow from the fact that the current point of  
17 diversion is below the confluence, and therefore could  
18 result in the pumping of Project water as opposed to on  
19 the west fork where they're clearly not getting any  
20 water out of Lake Mendocino?

21 A Our concern -- one of our three concerns is to  
22 that point, that there may be Project water available to  
23 them that they will divert.

24 Q But to the extent the Waldteufel right is valid  
25 and, to whatever extent it's valid, your agency doesn't

1 object to Millview diverting water at any point as long  
2 as it is diverting only the water to which it is  
3 entitled under that right, correct?

4 A It depends on how they are diverting and what  
5 they're diverting and where they're diverting it.

6 MR. CARTER: Thank you very much.

7 CO-HEARING OFFICER BAGGETT: Any questions from  
8 staff? Jean and then Dana.

9 EXAMINATION BY

10 HEARING OFFICERS AND/OR BOARD STAFF

11 FOR STATE WATER RESOURCES CONTROL BOARD

12 WATER RESOURCE CONTROL ENGINEER McCUE: I just  
13 had one clarifying question. I may have missed it, and  
14 I don't have the exhibits in front of me, but for SCWA-9  
15 and -10, are there units associated with those numbers?

16 MS. JEANE: I don't know if they're on here.  
17 They're cubic feet per second, but I actually don't see  
18 them on here.

19 WATER RESOURCE CONTROL ENGINEER McCUE: Thank  
20 you.

21 CO-HEARING OFFICER BAGGETT: Dana?

22 STAFF COUNSEL HEINRICH: Ms. Jeane, in your  
23 experience, is data from a USGS gauge reliable data?

24 MS. JEANE: The US Geological Survey is an  
25 organization that is very, very concerned about accuracy

1 of data.

2 And if you look at some of the tables that we  
3 put up, they actually have little designations on them  
4 that designate that they have not gone through a quality  
5 control, quality assurance process to verify the data.

6 They spend a lot of time gathering data. They  
7 spend a lot of time making sure that their data is  
8 accurate before it's ever published. And in my  
9 experience of both using their data and working with  
10 their staff, who we do work with regularly, they are a  
11 very, very reliable source of data.

12 STAFF COUNSEL HEINRICH: Thank you.

13 CO-HEARING OFFICER BAGGETT: Any other  
14 questions? Okay.

15 Exhibits?

16 MR. LILLY: Yes, we offer Exhibits SCWA 1  
17 through 7 and 9 and 10 into evidence in the record.

18 CO-HEARING OFFICER BAGGETT: Any objection?  
19 Okay. They're admitted.

20 (Whereupon Exhibits SCWA 1-7, 9, and 10  
21 were admitted in evidence.)

22 CO-HEARING OFFICER BAGGETT: That concludes the  
23 cases in chief. Any rebuttal testimony?

24 MR. ROSE: Mr. Baggett, the Prosecution Team  
25 has some rebuttal testimony.

1 CO-HEARING OFFICER BAGGETT: Do you have  
2 exhibits to -- exhibits, or just --

3 MR. ROSE: We don't have exhibits. I was  
4 simply going to call Mr. Rich to provide a little bit  
5 more information for the hearing team regarding the  
6 location of the gauge that was just in issue.

7 CO-HEARING OFFICER BAGGETT: Okay.

8 Then Mr. Lily, you said you had --

9 MR. LILLY: Ten minutes max.

10 CO-HEARING OFFICER BAGGETT: Millview? Mr.  
11 Carter? No?

12 Then let's go with the Prosecution Team, and  
13 then we'll follow with Mr. Lily. We're on a roll; we  
14 might as well keep going.

15 MR. RICH

16 Recalled by PROSECUTION TEAM

17 REBUTTAL EXAMINATION BY MR. ROSE

18 MR. ROSE: I think for the purposes of  
19 Mr. Rich's testimony, if you could bring back up Exhibit  
20 SCWA number 6 it might be helpful for these few brief  
21 questions.

22 BY MR. ROSE:

23 Q Mr. Rich, are you familiar with the gauging  
24 station on the west fork of the Russian River that was  
25 recently discussed in the Sonoma County Water Agency

1 testimony?

2 A Yes, I am.

3 Q And do you know where that gauge currently is?

4 A The gauge shown on the map has been moved. It  
5 was moved due to high flows and changes.

6 It is now located on the northern edge of the  
7 Lake Mendocino dry bridge which for purposes of that  
8 map -- if you look at the blue dot, and there's a  
9 roadway immediately above it, on the north side of that  
10 roadway on the west side of the river is where the  
11 gauging facility is located.

12 They have a permanent structure. It's not much  
13 larger than a 4-by-4 building. They use a nitrogen gas  
14 bubbleometer to measure stage.

15 USGS then goes out and does a flow correlation  
16 with stage and uses the long-term stage records from the  
17 bubbleometer to determine what the actual flow is. It  
18 has a very high degree of precision compared to most  
19 surface flow.

20 I doubt you're going to get a whole lot more  
21 accurate on the river like that than what they've got  
22 there right now.

23 Q Mr. Rich, do you see the scale at the bottom  
24 listing number of feet?

25 A Yes, I do.

1 Q Approximately how many feet, using that  
2 scale -- or how far, using that scale, from the blue dot  
3 on Exhibit SCWA-6 upstream would you say the gauge is?

4 A Oh, 100, 150 feet.

5 Q And Mr. Rich, are you familiar or do you know  
6 of any other water rights between the gauging station  
7 and the Waldteufel claimed point of diversion?

8 A I am not aware of any. When we were doing the  
9 field investigation, we looked along there, and none of  
10 the parties present knew of any other diversions of any  
11 significance, and we did not observe any facilities take  
12 any significant amounts of water out of the river.

13 MR. ROSE: I don't have any other questions.

14 CO-HEARING OFFICER BAGGETT: Either party have  
15 any cross?

16 MR. JARED CARTER: Could I just ask Mr. Rose to  
17 ask him when that station was moved? We didn't get  
18 that.

19 MR. ROSE: Are you familiar with when that  
20 station was moved?

21 MR. RICH: I can't give you an exact date.  
22 It's been within probably the last ten or 15 years. If  
23 you go onto the USGS Internet site, it will tell you  
24 exactly when the record was moved.

25 I'm not aware of any diversions between the

1 gauging location shown on the map and the current  
2 location, so I believe that the continuous record pretty  
3 much reflects the same flows.

4           There are no significant streams flowing in  
5 between the two, and USGS generally does not like to  
6 move gauging stations if it's going to have a material  
7 change in the record. They like to keep them very  
8 close, and they do everything they can to -- this one  
9 just became so much easier to access and deal with, I'm  
10 sure that's the reason they moved it.

11           CO-HEARING OFFICER BAGGETT: That's what the  
12 follow-up of my question was, the date. So we don't  
13 know within a range of 10 to 15 years.

14           MR. RICH: It's available on their published  
15 documents. It's a, you know, on their website, they've  
16 got it out there. I didn't know it was going to be an  
17 issue today or I would have had that here.

18           CO-HEARING OFFICER BAGGETT: And the second  
19 question is: So there are no diversions between the old  
20 gauging station and the new gauging station?

21           MR. RICH: I am not aware of any. I have not  
22 walked that particular stretch of the stream, but we  
23 have no reported diversions to the Board at all in that  
24 reach.

25           CO-HEARING OFFICER BAGGETT: As we know,

1 everyone reports their diversions to us.

2 (Laughter)

3 MR. RICH: The best we can do.

4 CO-HEARING OFFICER BAGGETT: Okay. Any  
5 questions? Okay. Thank you.

6 No new exhibits based on that.

7 Mr. Lilly?

8 MR. LILLY: Mr. Baggett, for a rebuttal on the  
9 question of the allocations of water between -- of  
10 Mendocino County Flood Control District water to  
11 Millview County Water District, I would like to call  
12 Sean White, the general manager of the Mendocino Flood  
13 Control District for a few questions in rebuttal.

14 CO-HEARING OFFICER BAGGETT: Okay.

15 SEAN WHITE

16 General Manager, Russian River Flood Control District

17 Called by SONOMA COUNTY WATER AGENCY

18 REBUTTAL EXAMINATION BY MR. LILLY

19 CO-HEARING OFFICER BAGGETT: Have you taken the  
20 oath?

21 MR. WHITE: Yes, I did.

22 CO-HEARING OFFICER BAGGETT: Okay.

23 BY MR. LILLY:

24 Q First of all, just before you state your name,  
25 Mr. White, for housekeeping matters, have you taken the

1 oath today?

2 A I did take the oath this morning, yes.

3 Q Please state your name and spell your last  
4 name?

5 A My name is Sean White, W-h-i-t-e.

6 Q And what is your job?

7 A I am certainly the general manager of the  
8 Russian River Flood Control District.

9 Q How long have you been in that position?

10 A About a year and a half.

11 MR. NEARY: I have an objection.

12 Mr. White was not listed as a witness. Why  
13 would he have taken the oath at the commencement of the  
14 hearing if he did not expect to testify but for  
15 rebuttal?

16 So what I'm -- my issue is: Is this a surprise  
17 at the end of this hearing at 4:10 that was anticipated  
18 long ago? Because why else would he have taken the  
19 oath? He wasn't a designated witness.

20 MR. WHITE: I can answer that question if you  
21 would like.

22 This is my first hearing ever. I didn't know  
23 any better, so when everybody took their oath, I joined  
24 the party.

25 CO-HEARING OFFICER BAGGETT: Half the audience

1 took the oath. And it is rebuttal testimony, so they  
2 can bring in a witness.

3 BY MR. LILLY:

4 Q And just very briefly describe what your  
5 responsibilities are as general manager of the Mendocino  
6 Russian River Flood Control District.

7 A Sure. In summary, my responsibilities are to  
8 administer our district's water rights that are held in  
9 Lake Mendocino.

10 Q Do you have a copy of Exhibit SCWA-11 -- that's  
11 the agreement between the flood control district and  
12 Millview County Water District -- in front of you?

13 A I have the one you provided earlier today.

14 Q All right. And if you could just briefly  
15 describe, and refer to this contract as necessary, how  
16 your district allocates water to each of the contracting  
17 parties each year?

18 A Our annual allocation is based on two things.

19 Basically, the District reads meters every  
20 month, even now for our municipal customers. We did not  
21 do that in the past, but we now do read all the meters  
22 for all of our contractors to basically verify that  
23 water was utilized.

24 But Millview is no different than the vast  
25 majority of our other customers in that they have a

1 contractual relationship with the District, and then  
2 they also have their own water rights that they can  
3 exercise as well.

4 So at the end of the year, we basically will  
5 ask the contractor to let us know how much of their  
6 gross pumping they would like applied to their district  
7 contract.

8 So in essence, we get that number from our  
9 contractors.

10 Q And does the amount of water that Millview  
11 reports as being received from the flood control  
12 district in one year affect the amount that's available  
13 for Millview from the District in following years?

14 A It certainly can. Our district's contract has,  
15 for lack of a better term, a use-it-or-lose-it clause,  
16 and if Millview basically didn't exercise the full  
17 extent of their contract for multiple years, which is  
18 basically the condition at the moment, our district  
19 would have the ability to reduce the amount of their  
20 contract. But we've not chosen to do so.

21 Q Okay. Maybe you can briefly refer to paragraph  
22 nine on pages 7 through 8 of Exhibit SCWA-11. I think  
23 there's been some confusion regarding the termination  
24 date.

25 Could you just explain what Millview's rights

1 are to continue to receive water from the district in  
2 years -- in 2010 and subsequent years?

3 A Sure. And this particular aspect of all of our  
4 contracts is identical. They all expire on the same  
5 day. That was basically done as these contracts,  
6 including Millview's, was the first round of contractual  
7 relationships the District had ever issued.

8 And they put a termination date in there so if  
9 there was something that needed to be corrected  
10 basically districtwide we could do that through the  
11 reissuance process.

12 But essentially, it says in there that if no  
13 one does anything, they renew automatically.

14 Q So is the best way for Millview to protect its  
15 contract right to 970 acre feet to report the diversion  
16 of that amount of water to the District each year?

17 A In a use-it-or-lose-it situation, that is sound  
18 advice.

19 Q And how does your district determine how much  
20 to bill or -- how much water to bill Millview for each  
21 year?

22 A Based on their reporting to us as to the amount  
23 they used.

24 MR. LILLY: Thank you. I have no further  
25 questions.

1 CO-HEARING OFFICER BAGGETT: Prosecution?

2 MR. ROSE: No.

3 CO-HEARING OFFICER BAGGETT: Millview.

4 CROSS-EXAMINATION BY MR. NEARY

5 FOR MILLVIEW COUNTY WATER DISTRICT

6 BY MR. NEARY:

7 Q Mr. White, how long have you been with the  
8 Russian River district?

9 A I started in July of 2008.

10 Q And the practice concerning the solicitation of  
11 the respective rights used by contractors, do you have  
12 any personal knowledge of how that was done prior to  
13 July of 2008?

14 A Well, I do, only because I had to ask when I  
15 took the job over. So like anything else, you ask your  
16 predecessor how this is done.

17 Interestingly, that was actually a duty that  
18 was not done by the general manager and has been  
19 abdicated to our meter reader, so I continue with that  
20 practice.

21 So basically, the solicitation of reported  
22 amounts has always been done by our meter reader, Pat  
23 Ford.

24 Q What about the solicitation of assignment to  
25 various rights?

1           A     Exactly.  The same person does that.

2                     So basically what will happen at the end of any  
3 year when we reconcile or meter readings, our meter  
4 reader, Pat Ford, will contact each and every one of our  
5 contractors and say, you know, for example you had a  
6 gross pumping of 4,000 acre feet.  How much of that  
7 would you like to apply to your contract?

8           Q     And just one last question.  Has Millview  
9 requested in writing clarification of the automatic --  
10 or of the termination on December 31st, 2010?

11          A     To my knowledge, the only thing they've asked  
12 for to date in writing was an expansion of their current  
13 agreement to a level higher than what they have now.

14                     They currently have 970 acre feet, and they  
15 have requested more.

16                     I have spoken personally to a number of their  
17 board members to let them know that we do have the water  
18 available; but to honor their request, I would have to  
19 have a certified CEQA document to execute that  
20 agreement, and I don't have one.

21          Q     Have you responded in writing to the written  
22 request by the general manager of Millview?

23          A     You know, I haven't.  And I'll tell you why.

24                     The reason I didn't do that was simply an act  
25 of charity to Millview.  Because if I was forced to do a

1 formal review of their use and their request for an  
2 expansion of their use, because they have not been  
3 exercising their contract to the fullest extent I would  
4 have actually had to reduce their amount.

5 Q And what directors of Millview have you spoken  
6 to?

7 A Mostly Will Carson. But I did come to a full  
8 board meeting about six months ago, letting them know  
9 that I was trying to secure additional supply for  
10 Millview.

11 MR. NEARY: That's all I have.

12 CO-HEARING OFFICER BAGGETT: Mr. Carter?

13 MR. JARED CARTER: Thank you, Mr. Chairman.

14 CROSS-EXAMINATION BY JARED CARTER

15 FOR THOMAS HILL and STEVE GOMES

16 BY MR. JARED CARTER:

17 Q Mr. White, my name is Jared Carter. I  
18 represent Messrs. Hill and Gomes.

19 My questions have to do with your right to  
20 Project water. Your district has a right to 8,000 acre  
21 feet of project water; isn't that true?

22 A We currently have a right to 8,000 acre feet  
23 and a pending application for an additional 6,000.

24 Q And that application has not been provided; is  
25 that correct?

1           A     No, we just went through the protest process.

2           Q     So your -- this is a permit that was initially  
3 issued when to get your 8,000 acre feet?

4           A     We originally became through the process known  
5 as partial reassignment on February 14, 1958.

6           Q     And then D 1030 formalized that right issued in  
7 1961; isn't that correct?

8           A     I would decline to say yes or no on that. I'm  
9 unsure.

10          Q     Okay. Now, we heard Mr. Lilly state that in  
11 order to appropriate water and complete an  
12 appropriation, you file an application, you get a  
13 permit, you create a point of diversion, and you put the  
14 water to beneficial use.

15                   Does the Millview district have any -- I mean  
16 does the Russian River district have any point of  
17 diversion?

18                   MR. LILLY: I have to object. That totally  
19 mischaracterizes my statement. Not totally, but that  
20 statement -- that -- Mr. Carter's question  
21 mischaracterizes my opening statement.

22                   CO-HEARING OFFICER BAGGETT: And also add, the  
23 cross is restricted to his testimony which wasn't on the  
24 general operations of the flood control district. It  
25 was very narrow on the relationship of gauging water use

1 and meter readings between the two districts, so.

2 MR. JARED CARTER: I understand.

3 What I was trying to get at, Mr. Chairman, is  
4 motivation of the Russian River district to trying to  
5 sell as much of its water to Millview.

6 CO-HEARING OFFICER BAGGETT: Okay.

7 MR. JARED CARTER: And I thought that's what he  
8 came to testify about is why they were counting and how  
9 they were counting how Millview had rights to water.  
10 And I was trying to examine into the motivation for  
11 that.

12 If it's inappropriate it's --

13 CO-HEARING OFFICER BAGGETT: Yeah, I didn't  
14 think he was -- the testimony was just more mechanical.  
15 It wasn't what they were trying to accomplish.

16 MR. JARED CARTER: I have no other questions.

17 CO-HEARING OFFICER BAGGETT: Thank you.

18 Staff? No other rebuttal questions. Your  
19 exhibit's already in the record. So no issues there.

20 Okay. With that, that concludes the testimony.

21 MR. NEARY: Mr. Chairman, I'd like to call  
22 Mr. Bradley as rebuttal witness to Mr. White. Just for  
23 a few questions.

24 CO-HEARING OFFICER BAGGETT: If they are very  
25 short. I mean, you had your chance, but I'll allow you.

1 Just a few questions?

2 MR. NEARY: Yes.

3 CO-HEARING OFFICER BAGGETT: Okay.

4 TIM BRADLEY

5 Recalled by MILLVIEW COUNTY WATER DISTRICT

6 REBUTTAL EXAMINATION BY MR. NEARY

7 BY MR. NEARY:

8 Q Mr. Bradley, you heard Mr. White testify. Have  
9 you ever had any discussions with any meter reader from  
10 the Russian River district as to allocation of  
11 Millview's various water rights?

12 A I have never met one of the flood control  
13 district's meter readers or spoken with them other than  
14 to give them authorization to read a meter at the  
15 treatment plant.

16 Q And what questions were posed by Mr. White's  
17 predecessor, Barbara Spazek, on that same issue?

18 A They just wanted a total accounting of our  
19 annual water use. There was never a separation of under  
20 what right. They made the decision.

21 MR. NEARY: That's all.

22 CO-HEARING OFFICER BAGGETT: Thank you.

23 Any cross? Okay. Thank you.

24 With that, we will not have closing oral  
25 arguments. I realize there's a lot of issues that

1 parties will want to brief, some legal arguments.

2 I mean normally on a proceeding like this, I do  
3 ten pages double-spaced, 12 point Arial type. But I  
4 would allow parties more if you think it's -- there's  
5 so few parties, and I think the issues are significant.

6 Does anybody have a suggestion what type of  
7 page limits you would propose? Mr. Carter?

8 MR. JARED CARTER: I would just suggest not  
9 over 30. I don't think anybody's going to want to write  
10 any more than they have to.

11 CO-HEARING OFFICER BAGGETT: Okay.

12 Well, normally, I would go 20, I think. 20  
13 pages is pretty significant given the record we've got  
14 before us. I would not encourage you to use all 20,  
15 like you said.

16 But I think given the legal issues and the fact  
17 that I think we all have an idea where this is heading  
18 no matter what happens, I would allow up to 20 pages.

19 MR. ROSE: Did you specify double-spaced?

20 CO-HEARING OFFICER BAGGETT: Normally we do  
21 double-space Arial font. But that's what I would like.  
22 12 point type. Off the record.

23 (Discussion off the record)

24 CO-HEARING OFFICER BAGGETT: 30 days is fine.  
25 So 30 days from the time transcripts are available, so

1 that's roughly six weeks from today. So whatever. Pick  
2 a rough date for now. What's -- April 1st.

3 April 2nd. We'll make it -- assuming the  
4 transcripts are out in two weeks, we'll say close of  
5 business April 2nd. Anything else?

6 Thank you very much.

7 \* \* \*

8 (Thereupon the WATER RESOURCES CONTROL  
9 BOARD hearing adjourned at 4:21 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, LINDA KAY RIGEL, a Certified Shorthand  
3 Reporter of the State of California, do hereby certify:

4 That I am a disinterested person herein; that  
5 the foregoing WATER RESOURCES CONTROL BOARD hearing was  
6 reported in shorthand by me, Linda Kay Rigel, a  
7 Certified Shorthand Reporter of the State of California,  
8 and thereafter transcribed into typewriting.

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

12 IN WITNESS WHEREOF, I have hereunto set my hand  
13 this February 4, 2010.

14

15

16

17

18 LINDA KAY RIGEL, CSR  
19 Certified Shorthand Reporter  
License No. 13196

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