

STATE OF CALIFORNIA

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

STATE WATER RESOURCES CONTROL BOARD

In the Matter of:)
)
 Hearing to Consider a Petition to)
 Change the Place of Use involving)
 Water Right Permits 16478, 16479,)
 16481, 16482 and 16483 (Applications)
 5630, 14443, 14445A, 17512, and)
 17514A) of the California Department)
 of Water Resources and Water Right)
 Permits 11315, 11316, 11885, 11886,)
 11887, 11967, 11968, 11969, 11970,)
 11971, 11972, 11973, 12364, 12721,)
 12722, 12723, 12725, 12726, 12727,)
 12860, and 15735 (Applications 13370,)
 13371, 234, 1465, 5638, 5628, 15374,)
 15375, 15376, 16767, 16768, 17374,)
 17376, 5626, 9363, 9366, 9367, 9368,)
 15764, 22316) and License 1986)
 (Application 000023) of the United)
 States Bureau of Reclamation.)
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VOLUME II

JOE SERNA JR./CALEPA BUILDING

1001 I STREET

COASTAL HEARING ROOM

SACRAMENTO, CALIFORNIA

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 LICENSE NUMBER 13196

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## I N D E X

--o0o--

|                         | Page |
|-------------------------|------|
| Closing Statements      | 1    |
| Mr. Jackson             | 1    |
| Mr. Basofin             | 7    |
| Ms. Jackson             | 19   |
| Ms. Gillick             | 22   |
| Mr. Herrick             | 27   |
| Mr. Rubin               | 39   |
| Ms. Aufdemberge         | 60   |
| Mr. Soderlund           | 62   |
| Adjournment             | 82   |
| Certificate of Reporter | 83   |

--o0o--

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

2 --o0o--

3 CO-HEARING OFFICER BAGGETT: Let's go on the  
4 record for closing statements. We'll start out with  
5 CalSPA, Mr. Jackson with closing statements.

6 MR. JACKSON: Yes, sir.

7 In terms of the California Sportfishing  
8 Alliance closing statement, we would like to ask you to  
9 deny the petition.

10 We understand that it's a time in which the  
11 Governor has asked to expedite various drought  
12 programs, but there's nothing in the emergency order  
13 that indicates you need to make a decision in a  
14 particular way.

15 As far as I can tell, you have carried out the  
16 request or order, or whatever it is, of the drought  
17 declaration in that you have expedited the petition,  
18 given everybody an opportunity within a short time  
19 period to lay out their position, and have carried out  
20 your duties under the drought declaration.

21 First, the petition itself relies upon  
22 relatively stale information which was updated in the  
23 hearing and shows it's probably a little bit late to  
24 gain a whole lot in the way of water supply for this  
25 year.

1           We would ask that, whatever you do, you don't  
2 grant this petition for two years. The reason behind  
3 that, of course, was explained in the testimony, that  
4 we can't tell, nor can anybody else, where water would  
5 be coming from, where it would be going, and what  
6 purpose it would be serving.

7           And consequently, to evaluate the 2010 Drought  
8 Water Bank to determine whether or not you're going to  
9 need -- first of all, whether we're going to need the  
10 Drought Water Bank in 2010, is an important item.

11           If it turns out to be the biggest water year  
12 of the 21st century so far, people would be using this  
13 joint place of use to transfer water in areas where we  
14 haven't seen transfers before from areas that we  
15 haven't seen transfers before.

16           Our main objection to the consolidated place  
17 of use is basically the fear that it opens up the  
18 federal system to begin to serve urban southern  
19 California, and so there's no real top limit that we  
20 can discern from what could happen next year.

21           I mean, the description of what was available  
22 this year was very small. But for next year, they  
23 could be geared up with this approval already in hand.

24           CO-HEARING OFFICER BAGGETT: Let me ask a  
25 couple questions related to that.

1 MR. JACKSON: Sure.

2 CO-HEARING OFFICER BAGGETT: I think we all  
3 are all trying to grapple with some of the vagueness  
4 issues here. And I think that was clear yesterday with  
5 the questioning from ourselves and from many of the  
6 cross.

7 And these are probably similar questions  
8 everybody else can maybe contemplate.

9 I guess, one: What if there was -- even in  
10 the petition, they talked about reporting, accounting  
11 process, and approval process. What if there was some  
12 specific plan required and there was Hearing Officers,  
13 we actually conducted an open process to hear that  
14 plan, a more detailed plan? Would that --

15 MR. JACKSON: It would certainly be a step  
16 forward, sir.

17 CO-HEARING OFFICER BAGGETT: Would be helpful?

18 I guess the other thing I'm really struggling  
19 with is: Why does it matter if they have a coterminous  
20 place of use since water is being imported, exported,  
21 and moved to those places by one party to the other.  
22 Why does it matter that it be the same for both  
23 projects?

24 MR. JACKSON: Sure.

25 CO-HEARING OFFICER BAGGETT: I understand the



1 drainage issue, and I think they've addressed that in  
2 the petition, saying it will not result in increased  
3 flows, but -- and that we'll ask the Bureau and DWR  
4 about, what they meant by that statement.

5 But assuming that, why does it matter?

6 MR. JACKSON: Well, it matters substantially  
7 to the -- potentially to the environment and  
8 potentially to the Sacramento Valley groundwater users.

9 If there was a large substitution program that  
10 was relying on this change in place of use, the federal  
11 areas within the Sacramento Valley could supply water  
12 to the urban areas within the State Water Project's  
13 place of use.

14 That's never happened before, to my knowledge,  
15 and is a major change in the amount of demand on the  
16 federal system.

17 And so it seems to me that it's solely the  
18 question of the increased demand and what would be  
19 possible in terms of trying to serve that demand from  
20 various places within the federal system.

21 As you saw from the testimony yesterday, the  
22 area in which there is the least amount of water in  
23 storage is in the Trinity system.

24 We are not sure that -- nor was the Bureau  
25 sure -- that they were going to be able to meet the

1 fish and wildlife requirements on the Sacramento  
2 system.

3           So it would seem that if water is not  
4 preserved for that, if it becomes capable -- if you're  
5 farming within the Glenn-Colusa Irrigation District or  
6 somewhere else and the Met wants to buy your water,  
7 it's not clear at all that the sale price would not be  
8 high enough that it would cause folks to move water  
9 right on by.

10           CO-HEARING OFFICER BAGGETT: Okay. That's  
11 helpful. Sorry to interrupt.

12           MR. JACKSON: The second conditions that we  
13 would -- that we would like to see, other than the time  
14 limit, would be that you do order a drought program.

15           Now, as a condition, if you give this permit,  
16 this could either be a -- next year, like every year in  
17 the future, could be a large water year or could be the  
18 fourth year of the drought.

19           And if we are setting up conditions in which  
20 people can move water without knowing how much is going  
21 to be available, we're basically setting up a condition  
22 in which all of those people in the Sacramento Valley  
23 who are dependent upon groundwater are basically  
24 competing with the end users, either in southern  
25 California municipalities or in the San Joaquin Valley,

1 to pump groundwater out of the Sacramento Valley.

2 And there are a number of laws which are set  
3 up to favor the area of origin and to keep water in a  
4 drainage if in fact there are people in the drainage  
5 who need the water. And we're not going to know that  
6 until next year.

7 So consequently, seems there ought to be some  
8 sort of drought program designed by the Bureau and DWR  
9 that if conditions are this, this is what we're going  
10 to do. If conditions are that, then we're going to do  
11 something else.

12 CO-HEARING OFFICER BAGGETT: I guess you would  
13 be requiring 1641 to be amended to incorporate that as  
14 part of the water right?

15 MR. JACKSON: Well, if the water right is  
16 going to be amended to allow the consolidated place of  
17 use, yes; we'd like those to be conditions of such  
18 temporary --

19 CO-HEARING OFFICER BAGGETT: But another  
20 critical year alternative, I guess it would be. Okay.  
21 Got it.

22 MR. JACKSON: Yes, sir.

23 And the last -- as long as we're talking about  
24 conditions, the last condition we would like to see is  
25 that there be some preference for use of fallowed land

1 or groundwater substitution for the people within the  
2 neighborhood from which the water is taken.

3 I mean it's an incredible sight to see, for  
4 instance, in this case the Tehama Colusa Canal  
5 Authority short of water in the Sacramento valley and  
6 have the neighbor's water at Glen-Colusa pumped right  
7 on past some of them to the highest bidder.

8 So it seems that if you were attempting to  
9 solve problems, there would be a preference for the  
10 drainage that the water comes from that needed to be  
11 satisfied first if there is water available rather than  
12 simply allowing it to go to the highest bidder.

13 Thank you for the opportunity.

14 CO-HEARING OFFICER BAGGETT: Okay. Thank you.  
15 With that, Defenders? And we'll follow that with the  
16 California Water Impact Network.

17 MR. BASOFIN: Good morning, Board Members.  
18 Joshua Basofin representing Defenders of Wildlife.  
19 First of all, thank you for the opportunity to  
20 participate in this proceeding.

21 Defenders recognizes the current climatic  
22 conditions prevailing in the State of California.  
23 Although we believe the water shortages facing  
24 agriculture and municipal areas south of the Delta  
25 would be ameliorated by more thoughtful long-term water

1 planning, including conservation, recycled water, and  
2 less water-intensive crops, we understand the situation  
3 that we're facing in the state at the moment with  
4 regards to water supplies.

5           Therefore, we don't necessarily oppose the  
6 Drought Water Bank or the granting of this petition;  
7 however, the Board ought not allow prevailing drought  
8 conditions to be a smokescreen for cursory  
9 environmental analysis.

10           Several wildlife impacts may result from the  
11 implementation of the Drought Water Bank and its  
12 proposed transfers as planned.

13           You heard representatives from the Bureau and  
14 DWR yesterday tell you that the purpose of the two-year  
15 program is to allow for water exchanges enabling return  
16 water to go back to the transfers in the Sacramento  
17 Valley in 2010.

18           However, as came out in cross-examination,  
19 this rationale was not stated in the petition, and  
20 neither the Bureau nor DWR could tell you why that  
21 rationale was not in the petition, that rationale for  
22 the two-year period for the petition to be in effect.

23           One thing we do know from the giant garter  
24 snake Biological Opinion on the Drought Water Bank is  
25 that the Bureau has consulted with Fish and Wildlife,

1 US Department of Fish and Wildlife, approximately one  
2 half dozen times over the past eight years on  
3 crop-idling transfers of water for delivery south of  
4 the Delta and its effect on giant garter snakes.

5 For that reason, the Fish and Wildlife Service  
6 has stated that the need to consult with such frequency  
7 suggests the need for a programmatic Biological  
8 Opinion.

9 If transfers south of the Delta are to occur  
10 in 2010 or 2011 or any time thereafter, a programmatic  
11 Biological Opinion is crucial, particularly if those  
12 transfers will involve crop idling.

13 We can't just go on having a year-to-year  
14 drought program without some sort of umbrella  
15 programmatic planning.

16 Although the giant garter snake has had extant  
17 populations in the San Joaquin Valley and the  
18 Sacramento Valley, the population in the San Joaquin  
19 Valley has been extirpated due to the reduction and  
20 modification of its native vernal pools, so the snake  
21 now primarily relies on flooded rice fields for  
22 foraging and breeding habitat.

23 The scale at which this Drought Water Bank has  
24 been proposed could have disastrous implications for  
25 the giant garter snake.

1           The Bureau has told you that, despite having  
2 done a Biological Assessment, an Environmental  
3 Assessment, a Finding of No Significant Impact, and  
4 initiated formal consultation on the giant garter  
5 snake, they decline to include any information  
6 whatsoever on impacts to the giant garter snake from  
7 crop-idling water transfers in their petition to you.

8           Although they have claimed this information  
9 wasn't available until recently, in fact their  
10 Biological Assessment was released in March.

11           The fact is you don't have to make any  
12 inferences from the testimony available to you to  
13 determine that there will be impacts on the giant  
14 garter snake.

15           You don't have to listen to the Bureau or to  
16 DWR or to Defenders of Wildlife. It's right there in  
17 the Biological Assessment and the Biological Opinion  
18 for the giant garter snake.

19           According to the Biological Assessment, the  
20 proposed project may reduce foraging habitat by as much  
21 as 20 percent, forcing individual snakes to relocate  
22 and subjecting them to greater risk of predation as  
23 they move to find a new suitable foraging area.

24           Some individuals are likely to be displaced  
25 and will need to relocate to elsewhere. Of these, it

1 is expected that some will successfully relocate and  
2 that some may be lost through predation or other forms  
3 of mortality caused by loss of foraging opportunities  
4 either through competition with the other individuals  
5 or loss of body condition and failure to thrive,  
6 particularly the young snakes.

7           Although the Bureau is certain that some  
8 snakes will face mortality or that take will occur, to  
9 use the Endangered Species Act nomenclature, they have  
10 proposed no mitigation to reduce these mortalities or  
11 to prevent the project from jeopardizing the snake  
12 through all or part of its range.

13           In addition, you heard testimony from CSPA and  
14 C-WIN concerning the potential for adverse effects on  
15 Central Valley Chinook salmon and steelhead trout.

16           According to a DWR report, groundwater  
17 extraction in the Sacramento Valley may reduce stream  
18 flow and essential habitat condition for these  
19 fisheries.

20           The Bureau during this proceeding has at times  
21 said there would be groundwater substitutions occurring  
22 from the Drought Water Bank and at times said that  
23 hypothetically there may not be groundwater  
24 substitutions.

25           Clearly, there has not been an appropriate



1 project description informing us as to what types of  
2 transfers will take place.

3 Despite the possibility of groundwater  
4 substitutions, however, and the possibility that  
5 groundwater extraction may affect stream flow in the  
6 Sacramento Valley and its tributaries, the Bureau has  
7 failed to initiate consultation with the National  
8 Marine Fisheries Service on potential take of Central  
9 Valley Chinook and steelhead trout.

10 As I said at the beginning of my closing  
11 argument, Defenders does not necessarily oppose this  
12 petition or the need for a Drought Water Bank; however,  
13 we do submit to the Board that several conditions must  
14 be imposed on the affected permits for the protection  
15 of fish and wildlife.

16 The Board has ample authority to impose such  
17 conditions on petitions for change. You have done so  
18 in the past.

19 In Order No. WR 2009-003-DWR, the State Water  
20 Board imposed conditions on DWR's plan to fallow  
21 agricultural land in the Delta. Some of those  
22 conditions were imposed in order to protect riparian  
23 wildlife and aquatic species.

24 I would also direct your attention to Order  
25 2008-0012-DWR in which the State Water Board approved a

1 water right application with conditions for  
2 conservation of giant garter snake, stating in section  
3 22 of the Order that:

4 Compliance with the ESA and CESA will be  
5 required for affected giant garter  
6 snakes and additional habitat  
7 compensation or species protection  
8 measures may be developed in  
9 consultation with Fish and Wildlife and  
10 DFG.

11 In light of the potential impacts to giant  
12 garter snakes from crop-idling water transfers, and in  
13 light of the potential impacts to Central Valley  
14 Chinook salmon and steelhead trout, Defenders believes  
15 the following conditions are appropriate, and I will  
16 reiterate them from our submission:

17 Condition number one, including a compensatory  
18 mitigation program with land acquisition to compensate  
19 for adverse effects to giant garter snake as a result  
20 of crop-idling transfers involving fallowing of rice  
21 fields where giant garter snake is present.

22 Condition two, a comprehensive environmental  
23 assessment including a monitoring program analyzing  
24 potential impacts to salmonids resulting from  
25 groundwater pumping in the Sacramento Valley.

1           Condition number three, a description of the  
2 changes to Central Valley Project and State Water  
3 Project operations as a result of the place of use  
4 consolidation and Drought Water Bank implementation  
5 including a proposal for complying with the current  
6 Biological Opinion for smelt and the forthcoming  
7 Biological Opinion for salmon.

8           Thank you.

9           CO-HEARING OFFICER BAGGETT: Questions?

10          BOARD MEMBER HOPPIN: Mr. Basofin, I have a  
11 question for you. And Mr. Jackson, you can feel free  
12 to chime in if you like.

13          I appreciate most of your comments,  
14 Mr. Basofin, but one of them confuses me in particular;  
15 and that has to do with the impacts of fallowing land  
16 for any potential transfer as it pertains to the giant  
17 garter snake.

18          And it would seem that you're taking the  
19 approach -- and please correct me if you don't agree  
20 with me; I don't think you do -- that the rice land  
21 that would potentially be fallowed would be a permanent  
22 wetland, and I would look at it more in the perspective  
23 that a landowner would have the ability to rotate his  
24 crops however he saw fit.

25          And given one of two scenarios, it would seem

1 to me that the fallowing of land would be much less  
2 intrusive to the giant garter snake, given the  
3 considerations that I think you are correct in, that  
4 they would more susceptible to predation and moving  
5 from one area to another which is, quite frankly, a  
6 natural process.

7           The other alternative would be if the same  
8 person, absent an opportunity to put water into a water  
9 bank, decided to rotate his crops, went out and tilled  
10 the soil, cultivated it -- and to me, that would be  
11 much more detrimental, intrusive to the habitat of the  
12 giant garter snake than actually fallowing land.

13           If you could explain to me, any of you, the  
14 difference between my opinion and your opinion, it  
15 would be helpful.

16           MR. BASOFIN: Sure. Thank you for your  
17 question, Mr. Hoppin.

18           My understanding from staff of the US Fish and  
19 Wildlife Service is that the water deliveries that are  
20 used for rice agriculture are earmarked for that.

21           BOARD MEMBER HOPPIN: No. That is not the  
22 case.

23           MR. BASOFIN: Okay.

24           BOARD MEMBER HOPPIN: Not even close to the  
25 case.

1           MR. BASOFIN: There is something that triggers  
2 the need to consult with US Fish and Wildlife for giant  
3 garter snake when fallowing of flooded rice fields  
4 occurs; and whether it's an earmark for delivery of  
5 water or some other mechanism, there is a trigger to  
6 consult.

7           And as I said in my remarks, that consultation  
8 has occurred at least six times over the past eight  
9 years. And crop idling transfers, as far as I know,  
10 have not occurred on a large scale pursuant to those  
11 consultations.

12           BOARD MEMBER HOPPIN: I know there is a  
13 Biological Opinion that deals with the effects of  
14 multiple-year fallowing. But I think what you're  
15 talking about here is potentially a single-year  
16 fallowing.

17           And I'm -- Mr. Jackson, am I missing something  
18 here that you're informed on? Because obviously at  
19 this point, Mr. Basofin and I are both confused to a  
20 degree potentially.

21           MR. JACKSON: Well, I'm not sure how much of  
22 it is that you have different information. It may just  
23 be a different view. And I'll give you mine from what  
24 I know.

25           The giant garter snake would be in substantial

1 trouble without the rice fields. Rice turns out to be  
2 a crop that is absolutely consistent with the survival  
3 of the garter snake as it is consistent in terms of  
4 producing area for the flyway.

5 The key here is that the size of the  
6 fallowing -- the snake moves mostly through the canals  
7 and waterways that provide the water to the rice  
8 fields, and that's a very good mechanism for the snake.

9 The problem is that when the fallowing takes  
10 place, if the area that's fallowed is too large -- and  
11 we believe that 320 acres is too large.

12 BOARD MEMBER HOPPIN: You believe how much is  
13 too large?

14 MR. JACKSON: 320, which is the minimum -- or  
15 the maximum that's allowed to be fallowed in this  
16 program. If it was 160, we probably wouldn't be here.  
17 That's what the rule had always been.

18 And so we don't know what the environmental  
19 criteria were that changed from 320 to 160 for this  
20 program nor how necessary it was in order to get the  
21 water. That's one of the environmental aspects we'd  
22 like to have looked at.

23 But basically, the snake needs water on a  
24 seasonal basis, and the season just happens to fit with  
25 rice. So I guess for the rice farmers, it's not only

1 those beautiful white heron that turn out to be  
2 protection for their industry but the snake as well,  
3 operated in the appropriate fashion.

4 MR. BASOFIN: Let me see if I can just follow  
5 up on that a little bit.

6 The Bureau consulted with US Fish and Wildlife  
7 regarding some crop-idling transfers that had been  
8 anticipated for the environmental water account in the  
9 early 2000s.

10 And there was a Biological Opinion issued to  
11 the Bureau on crop-idling transfers for the EWA.  
12 However, those transfers never manifested, never came  
13 into being.

14 There has not been crop-idling transfers from  
15 this area of this scale, whether it's for one year or  
16 several years, I don't think ever. And so what we're  
17 looking at is something totally new.

18 There have been different approximations for  
19 acreage. I've seen 67,000 acres in some documents;  
20 I've seen 55,000 acres in other documents.

21 But the fact is that this is a major portion  
22 of the snake's range in the Sacramento Valley.

23 And although there are mitigation techniques  
24 that are being used to minimize -- I will concede -- to  
25 minimize the effect on the snakes, some of those being

1 retaining a certain water level in drainage canals that  
2 the snake uses for mobility, creating a patchwork of  
3 crop fallowing so that you have parcels abutting each  
4 other, some of which are fallowed and some of which are  
5 flooded, however, as Mr. Jackson alluded to, we don't  
6 feel that the block sizes of 320 acres are appropriate.

7 In fact, if you go back and look at the  
8 Biological Opinion in the documents from the  
9 consultation in the environmental water account,  
10 limitation on block sizes to 160 acres was included as  
11 one of the mitigation measures.

12 And when the Bureau and DWR raised that block  
13 size to 320, they gave very little substantiation for  
14 it. It was really an arbitrary change, especially  
15 considering that the limitation to 160 acres was a  
16 mitigation measure.

17 So that raises the potential for adverse  
18 effects to the snake to a greater degree.

19 BOARD MEMBER HOPPIN: Thank you.

20 CO-HEARING OFFICER BAGGETT: Thank you.

21 California Water Impact followed by County of  
22 San Joaquin.

23 MS. JACKSON: Julia Jackson, California Water  
24 Impact Network. Mr. Baggett, Mr. Hoppin, thank you so  
25 much for allowing us to participate in your hearings.



1 I just have some very short closing comments.

2 After participating in the hearing yesterday,  
3 reading all the information, and having the testimony  
4 of the witnesses, California Water Impact Network is  
5 left with as many questions today as we had coming into  
6 the hearing.

7 The lack of the project description still  
8 leaves questions about specificity of the timing of  
9 transfers, the amount of transfers, the sources for the  
10 transfers, and who the end users will be.

11 We believe that this is information that  
12 should be before the Board before you make a decision,  
13 and testimony was given yesterday that petitions are  
14 still being filed, that they won't know who all the end  
15 users are, where all the water is coming from, until  
16 June, obviously after you have made your decision on  
17 this permit.

18 There has been no environmental review. It's  
19 almost impossible to ensure protection of the  
20 environment and wildlife or to know how it will be  
21 substantially affected if that information is not  
22 before you.

23 Flexibility has been talked about quite a lot.  
24 And while flexibility can sound great on paper, it  
25 shouldn't come at the expense of environmental

1 protections and laws that have been in place for these  
2 systems.

3 Relevant new information was presented during  
4 testimony.

5 Since filing the petition, the hydrology has  
6 substantially improved.

7 Information about the giant garter snake has  
8 been released in the Biological Opinion. It states  
9 that the giant garter snake will be adversely impacted,  
10 as you just heard about.

11 There is also an increase in expected  
12 allocation because the hydrology has improved.

13 None of this information was updated. The  
14 petition wasn't amended, even though all of these three  
15 things have changed since the time the petition was  
16 first filed.

17 Testimony was also presented that indicated a  
18 two-year program may not be necessary; however, no  
19 specific dates could be given for how long parties  
20 would need to enable transfers to go back and forth.

21 The amount of questions that are still before  
22 you would indicate that the parties have not met their  
23 burden for a change of petition at this time, and we  
24 would ask that you have this information before you  
25 make a decision and that petitioner's request be

1 denied.

2 Thank you.

3 CO-HEARING OFFICER BAGGETT: Thank you.

4 San Joaquin and then South Delta.

5 MS. GILLICK: Good morning. DeeAnne Gillick  
6 on behalf of the County of San Joaquin and the San  
7 Joaquin County Flood Control and Water Conservation  
8 District.

9 The County is not opposed to the petition for  
10 temporary consolidation of place of use. We recognize  
11 it is drought times, and that reasonable and flexible  
12 things need to occur.

13 However, the County requests the State Board  
14 make a specific condition on the petition that the  
15 water quality standards in the South Delta must be met  
16 in order for the water transfers to occur.

17 We heard from the testimony yesterday that  
18 JPODs would not be impacted by this transfer. However,  
19 we also heard that Joint Points of Diversion will be  
20 used this summer at the same -- and this summer the  
21 transfers will occur.

22 So obviously, there's being placed additional  
23 burden on the system and additional water to be  
24 transferred through the Delta and through the pumps.

25 So whether or not you label the water that's

1 going through the right pump as the transfer water and  
2 any additional which isn't the transfer water as other  
3 water that's being used by joint points, I think is an  
4 anomaly, and the joint points will obviously be  
5 impacted.

6 We heard a statement from both the Bureau and  
7 the DWR in their petition and their testimony and the  
8 witnesses yesterday that they will meet the  
9 requirements of D1641.

10 However, we also heard the testimony from the  
11 Bureau representative that they are considering an  
12 urgency petition regarding joint points.

13 Well, based upon our experience from last  
14 summer, the petition will most likely involve meeting  
15 the salinity objectives. So we heard that they are  
16 contemplating asking relief from meeting the salinity  
17 objectives.

18 Well then, that's not meeting the requirements  
19 of D1641; and we ask the State Board to make a specific  
20 condition on this transfer that the conditions of 1641,  
21 specifically the water quality conditions, are met.

22 DWR and the Bureau provide water to areas  
23 which would not naturally have that water. The  
24 transfers are allowing water to be delivered to areas  
25 which would not in the normal course have the water

1 without specific permission from the State Water Board.

2 And DWR and the Bureau through the transfers  
3 is allowing for purchase of water to be applied to  
4 areas that don't normally have the water.

5 However, at the same time, the Bureau and DWR  
6 has not considered purchases of water to meet the  
7 salinity requirements in the South Delta, and that's an  
8 obligation of their permit terms.

9 DWR and the Bureau have made a determination  
10 not to meet its obligation regarding salinity control  
11 to protect the Delta farmers so the Delta farmers have  
12 the water supply and the water quality needed.

13 That is an obligation of the Bureau. And it  
14 is an obligation in order to allow the Bureau and DWR  
15 to make the water available to the areas of the state  
16 that don't normally have the water.

17 CO-HEARING OFFICER BAGGETT: But they can  
18 already do that. All they're allowing is that they can  
19 have a coterminous. They can already move the water to  
20 areas of the state --

21 MS. GILLICK: Well, it's the County's position  
22 that their obligation, in order to be able to move the  
23 water, they must meet salinity requirements --

24 CO-HEARING OFFICER BAGGETT: Right.

25 MS. GILLICK: -- and they don't do that.

1           And so if the State Board can do something to  
2 impress upon the Bureau and DWR that that is an  
3 obligation, and they need to do that.

4           CO-HEARING OFFICER BAGGETT: Right. But  
5 that's a separate issue from the fact that they can  
6 already transfer water to areas that normally wouldn't  
7 have the water. I mean that's --

8           MS. GILLICK: But a condition --

9           CO-HEARING OFFICER BAGGETT: -- been well  
10 established.

11          MS. GILLICK: -- of doing that is meeting --

12          CO-HEARING OFFICER BAGGETT: Right.

13          MS. GILLICK: -- salinity objectives.

14          CO-HEARING OFFICER BAGGETT: I understand.

15          MS. GILLICK: That's the thing.

16          I mean they transfer water; the condition is  
17 to meet the salinity objectives. They're not doing  
18 that.

19          CO-HEARING OFFICER BAGGETT: Right.

20          MS. GILLICK: So there is an opportunity  
21 before this Board to place a condition that places more  
22 responsibility or makes them more aware that that needs  
23 to occur; and if it doesn't occur, then these transfers  
24 which are at issue today can't occur.

25          CO-HEARING OFFICER BAGGETT: I understand

1 that. And the petition specifically says:

2 The petition will not result in a  
3 reduction in San Joaquin River flows or  
4 an increase in drainage of the San  
5 Joaquin River.

6 But then they have: Beyond that typically  
7 experienced.

8 So I guess what you're proposing is we put  
9 that sentence in there but put a period after "San  
10 Joaquin River."

11 MS. GILLICK: I'm sorry; I don't --

12 CO-HEARING OFFICER BAGGETT: So it says:

13 The petition will not result in a  
14 reduction in San Joaquin River flows or  
15 an increase in drainage of the San  
16 Joaquin River.

17 Period.

18 MS. GILLICK: Well, you know, an obligation --

19 they're stating that they're going to meet the  
20 requirements of D1641.

21 CO-HEARING OFFICER BAGGETT: Right.

22 MS. GILLICK: From past practices, we know  
23 they're not.

24 So similar to joint points, joint points is  
25 not to occur if they're specifically not meeting the

1 salinity obligations. So a similar condition that  
2 these transfers at issue should not occur, cannot  
3 occur, if the salinity obligations are not being met.

4 And just in conclusion, you know, when the  
5 Projects were created, DWR and the Bureau agreed to  
6 that. The State Board required it. The Legislature  
7 required it, and the Delta protection statutes and the  
8 other statutes.

9 But in reality, the -- it's not occurring. In  
10 this time of drought, you know, transfers and water  
11 things are occurring to meet critical needs of other  
12 areas of the state.

13 But at the same time, the critical needs of  
14 the Delta tend to be ignored. And those critical needs  
15 require a water supply in an adequate quality for those  
16 that naturally had water and naturally had that water  
17 supply.

18 So thank you very much.

19 CO-HEARING OFFICER BAGGETT: Thank you.

20 MR. HERRICK: Thank you, Mr. Chairman, Board  
21 Member. John Herrick for the South Delta Water Agency,  
22 Central Delta Water Agency, and Lafayette Ranch.

23 Let me just introduce this, my close, by  
24 saying I fully understand the Board's position to try  
25 to work things out in order to assist areas that are



1 suffering from the drought. And normally, I would say  
2 that's a laudable position.

3 But I believe in hindsight we see that that's  
4 the wrong position. You as the regulator need to  
5 tighten the screws. You need to buckle down and to  
6 enforce the various statutes and regulations with which  
7 you are charged.

8 And that is because we are facing a crisis,  
9 not just from the drought for water users south of us;  
10 we're facing a crisis in the Delta.

11 Your legacy -- and this is not meant as a  
12 bitter comment. Your legacy may be that during your  
13 tenure on the Board a number of species became extinct,  
14 and that extinction was used as a reason to not enforce  
15 other water quality standards thereafter.

16 Now the petition before you today seeks to do  
17 a couple things.

18 DWR said it's only a very small amount of  
19 water, less than 10,000 acre feet, which will move from  
20 north to south, and then there are a number of listed  
21 exchanges or transfers in the materials talking about  
22 whether it's Kern County and Westlands exchanging  
23 water.

24 Then it talks about "and other" potential  
25 projects or transfers that may come up later.

1           So your question today is: What am I going to  
2 approve? Am I going to approve a transfer of 10,000  
3 acre feet of water under the Drought Water Bank? Well,  
4 I don't see any reason why you can't do that. It may  
5 need more evaluation. It may need approval. But  
6 that's okay.

7           The listed exchanges between the parties south  
8 of the Delta, well, you could do that if there's a  
9 proper showing and somebody shows you the impacts and  
10 there's no impacts to other users.

11           But the unknown ones? I don't know how you  
12 can approve unknowns.

13           Now let me just start out, let me just move on  
14 by saying there should be a few rules. And these are  
15 John Herrick's rules for the State Water Resources  
16 Control Board.

17           Rule No. 1. If the Bureau and DWR come before  
18 you with a petition, and the fishery agencies don't  
19 show up to comment, and not one biologist is in the  
20 room, the petition has to be denied.

21           Smelt are going extinct probably. The salmon  
22 runs are all at historic lows generally. We have other  
23 species of concern.

24           And there wasn't one biologist in the room to  
25 tell you whether or not consolidating the entire place

1 of use for the Bureau and DWR will have an effect on  
2 fish. Not one biologist. Now, we didn't even have a  
3 biologist from DWR or the Bureau. Now that's what's  
4 known as a glaring absence of input.

5 Now that's not John Herrick being snide.

6 Well, it is John Herrick being snide.

7 (Laughter)

8 MR. HERRICK: But it doesn't change the fact  
9 that one of your jobs in evaluating any petition like  
10 this is to say okay, let's make sure -- this is the  
11 law, now -- let's make sure it doesn't have an adverse  
12 effect on fisheries.

13 Now, nobody cares if it's -- you know, one  
14 tule falls down because of this. That's not the issue.

15 We're in the middle of a crisis for fisheries  
16 in the Delta, and not one biologist was asked to come  
17 here. Now my rebuttal case was going to be: I tried  
18 to subpoena the biologists from the three fishery  
19 agencies.

20 Now, I'm not blaming them, that the federal  
21 government was, let's just say, less than willing  
22 because it was at the last minute. And the state  
23 government tried but was unable to get someone here.

24 But anyway, no fishery biologist --

25 BOARD MEMBER HOPPIN: Even though you asked

1 biologists to come yourself, they wouldn't come?

2 MR. HERRICK: Yes.

3 Now, why is that important? Well, one of the  
4 environmental documents that was submitted by DWR was  
5 the Biological Opinion for Delta smelt. So, well, that  
6 anticipated 600,000 acres of transfers over some  
7 conditions.

8 Page 169 of DWR number 5 from that Biological  
9 Opinion, in the discussion of water transfers in that  
10 Biological Opinion, the Fish and Wildlife Service says:

11 All transfers up to that time have been  
12 in accordance with all existing  
13 regulations and requirements.

14 Well, that's wrong. Right?

15 2007, we had joint point of diversion  
16 transfers while standards were being exceeded. I'll  
17 use their term; not violated.

18 And under the cease and desist order, it  
19 doesn't matter whose fault it is. If those standards  
20 aren't being met, those diversions, those transfers,  
21 were illegal.

22 Now, that's what the Executive Director of the  
23 State Board said in a letter after it happened. You  
24 guys didn't take any action on that.

25 So the Biological Opinion examining transfers

1 assumed that everything was going okay. But it wasn't.

2 It wasn't going according to the rules.

3 Now the most recent example of that was the  
4 last hearing we had in February. And there you saw  
5 that, rather than have 4,000 additional cfs of outflow  
6 in the Delta, the Projects exported that 4,000 cfs. It  
7 wasn't storage water. It was unregulated flow. But  
8 that 4,000 was needed to meet the Delta outflow.

9 So we know --

10 BOARD MEMBER HOPPIN: My recollection was that  
11 it was 2,000.

12 MR. HERRICK: It went from 2,000 to 4,000 on  
13 February 12th or 14th, so it was 4,000 cfs by the time  
14 we came into the hearing.

15 Anyway, so the Projects chose -- it wasn't a  
16 mistake. They chose to not meet the fishery standard.

17 So that leads to John Herrick's rule No. 2 for  
18 the Board. When a petitioner comes in before you and  
19 says I would like you to approve this because I'm  
20 promising that I will meet the standards under which I  
21 am obligated -- the standards which I am obligated to  
22 meet under D1641, and then they tell you that they are  
23 contemplating new petitions to change some of those  
24 obligations in the short-term, you must deny it.

25 Because they told you: Approve this because

1 we're going to protect fisheries, but then they were  
2 forced to tell you but by the way, we may ask you to  
3 not make us protect fisheries later, and they wrung  
4 their hands a little bit.

5 Now again, that sounds really snide, but  
6 that's exactly what they told us. They told us they  
7 would ask, maybe, for change in Delta outflow  
8 requirements.

9 And I'm not sure what the answer was for joint  
10 point, but I think Mr. Milligan said yes, we're  
11 contemplating perhaps some petition on joint point too.

12 So none of that adds up to a reason to approve  
13 a project based upon a promise to meet standards under  
14 D1641.

15 Now the most important thing today is that  
16 there is no analysis of the impacts on third parties.  
17 One of the things you're supposed to do is to determine  
18 whether or not a legal user of water will be adversely  
19 impacted.

20 Now we did hear some testimony that the  
21 parties concluded -- the witnesses; excuse me --  
22 concluded no impacts. However, the materials presented  
23 don't even have an analysis of the impacts of the  
24 specified exchanges.

25 Whether it's the Westlands, Kern County, the

1 Santa Clara -- whatever those were, there is no  
2 information that says this is what we're doing and this  
3 is our conclusion about other legal users. There's  
4 none of that.

5 Now, when you get a petition where somebody  
6 doesn't give you an analysis of the impacts on third  
7 parties but just says there are no impacts, you know,  
8 seriously, you just have to say that's a good try, but  
9 try again because you haven't done what you're supposed  
10 to do. There isn't any of that.

11 Now we also heard on cross-examination that  
12 that promise that nobody would be hurt applied to all  
13 of the CVP service area except New Melones. I mean, I  
14 hope you all remember that. They cut that out of the  
15 picture.

16 So I don't know how it will affect New  
17 Melones. They are not promising it won't affect New  
18 Melones, and there isn't any analysis of how it might  
19 affect New Melones.

20 Now this is important because the base case  
21 issue which was raised by other people's testimony has  
22 simply not been addressed.

23 In the absence of the petition, X amount of  
24 water would be delivered to the CVP service area south  
25 of us. That amount of water would generate some level

1 of either surface or subsurface drainage into the  
2 river. I don't know what is because there's no  
3 analysis.

4 But that's the base case: In the absence of  
5 the petition, a certain amount of water would go there  
6 and generate a certain amount of drainage.

7 With the petition, we don't know if the  
8 unknown transfers -- and we actually don't know if the  
9 specified exchanges, but with those, with the petition,  
10 then some additional amount of water could, may, might,  
11 will, be delivered to areas that generate drainage.

12 So there's a difference there. There's Y  
13 amount of drainage with -- excuse me. There's Y amount  
14 of drainage without the petition, and then there's Y  
15 plus something with the petition.

16 It may even be Y minus something, but we're  
17 not told that.

18 So there isn't any analysis on which you can  
19 conclude that the petition won't harm any legal user.  
20 If you add more salt. If you have a different flow.  
21 If New Melones is taxed.

22 That's what you have to have before you, and  
23 you don't have that before you. That's not our fault.

24 Now let me move on to the issue of joint  
25 point. Although I tried, and I'm not the most



1 qualified attorney, I really am not sure still what the  
2 joint point -- how joint point relates to this  
3 petition.

4           And if you should stumble and make a horrible  
5 decision and actually approve this, there has to be  
6 some clarification that says this applies to what? The  
7 10,000 acre feet of transfer from north to south?  
8 Whatever. And that either does or does not affect  
9 joint point rules.

10           Because if you are going to change joint point  
11 rules, you'll probably hear from me that that wasn't  
12 really a topic of this hearing.

13           But please, if you do approve this, you need  
14 to specify whether or not and under what conditions  
15 joint point applies with this approval because it is  
16 not clear.

17           Now, with that, a lot of people have given you  
18 good suggestions. The County, I believe, did a very  
19 nice job in defending South Delta salinity issues.

20           I think it's absolutely imperative that the  
21 Board take a stand on salinity.

22           Every time we have one of these issues, there  
23 are tangential discussions. Maybe they're not directly  
24 germane, but we always go through the discussion: Is  
25 it an exceedance or is it a violation? Is it an

1 obligation or is it not an obligation under certain  
2 conditions?

3 My answer to that is that's a whole lot of  
4 bunk.

5 And I encourage the Board Members to go back  
6 and read the cease and desist order. Because I think,  
7 once you read that, everything becomes very clear.

8 And the cease and desist order does not say if  
9 you haven't done anything and you haven't been able to  
10 build permanent barriers, you don't have an obligation  
11 to meet water quality standards.

12 It doesn't say that.

13 It says you've got until July 1st of 2009 to  
14 get rid of the threatened violations at all four of the  
15 southern -- three of the southern Delta stations.

16 Now 2009, July 1st is a very short time away.

17 It also says, whether or not you think it's  
18 your fault, if the standards are violated or exceeded,  
19 you can't do joint point.

20 It doesn't say if you think you have an excuse  
21 for not meeting a standard, you can still pump. It  
22 doesn't say that. It says the exact opposite. Because  
23 that issue was directly dealt with in the CDO.

24 So what you have been told is that we're  
25 probably going to have violations. We haven't examined

1 the impacts on third parties. We have no fishery  
2 biologists available. But we want you to combine the  
3 entire service areas of the CVP and State Water Project  
4 because we want to move 10,000 acre feet of water from  
5 north to south.

6 Now, come on. That's nuts.

7 If you don't think a consolidated point of use  
8 next year will result in a slew of transfers from  
9 districts north of the Delta to water-hungry districts  
10 south of the Delta, then you're not paying attention.

11 And I would say that, if they get this passed,  
12 next year there will be hundreds of thousands of acres  
13 of transfers that will be argued at that time: Well,  
14 they don't need any review because the consolidated  
15 point of use allows us to just move it from one end of  
16 the system to the other.

17 That's exactly what will happen.

18 And when DWR witnesses say I don't see any  
19 incentive that this creates, that's nuts. That's just  
20 plain nuts.

21 So my suggestion is you turn the petition back  
22 to the parties and say once you do an analysis of  
23 impacts, we will consider it.

24 If you're thinking of approving it, which I  
25 hope you don't, I think you should add stringent

1 conditions along the lines of what has already been  
2 talked about, that, you know, if you make an effort to  
3 comply with the requirements of your permits, we might  
4 help you; but if you don't make an effort, we're not  
5 going to help you.

6 Now let me leave you with the highlight of  
7 this whole thing. And I'm currently in discussions  
8 with your staff about this disagreement, but: There is  
9 no VAMP pulse flow this year. We're in the middle of  
10 the 30-day pulse flow; there's no pulse flow.

11 You heard the Bureau witness say, I think,  
12 under the terms and conditions of D1641 that the 30-day  
13 pulse flow goes away under certain circumstances.

14 If this Board's position is that an adopted  
15 water quality standard for fish and wildlife's  
16 beneficial use goes away under drought condition, then  
17 we all need to start over because that ain't the law.

18 And with that, I thank you very much.

19 CO-HEARING OFFICER BAGGETT: Thank you.

20 Mr. Rubin? And then the Bureau and DWR in whatever  
21 order you all decide you want to go.

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

25 I apologize if I'm a little bit disorganized.

1 I did prepare something in writing, and I will get to  
2 that. I did want to respond to a couple of the issues  
3 up front that were raised by comments, closing remarks.

4 CO-HEARING OFFICER BAGGETT: We have a few  
5 questions too.

6 MR. RUBIN: I imagine.

7 First I wanted to respond to a statement that  
8 CalSPA made suggesting that this process is intended to  
9 be a process to gain water.

10 I think that's an incorrect view. This is not  
11 the intent of the process. I'll get into my  
12 perspective of what the intent, but this is not to  
13 increase the overall water supply south of the Delta.  
14 That's not the goal.

15 Second, this is not a process that should be  
16 used to leverage participants' positions that are  
17 unrelated to the petition, and I think it's being used  
18 for that purpose.

19 I think CalSPA is doing it. I think C-WIN is  
20 doing it, South Central Delta, San Joaquin County, all  
21 trying to advance issues, agendas that are unrelated to  
22 the petition.

23 You hear issues about South Delta salinity.  
24 You hear issues about impacts in the Sacramento Valley.  
25 They may be legitimate concerns. I don't pass judgment

1 on those here.

2 But the process that we're talking about, the  
3 change petitions before you, are unrelated to that.  
4 You have -- and let me get a little bit to my prepared  
5 statement to address the issue.

6 The petitions before you are intended to  
7 facilitate the movement of water that is conveyed south  
8 of the Delta. It's already moved south of the Delta.

9 Regardless of the action you take, that water  
10 will move south. You have testimony before you that  
11 says the Drought Water Bank will buy water, move it  
12 south.

13 What this petition will do is allow for the  
14 opening up of that water to people that may not  
15 otherwise receive it, but it will be purchased.

16 You had testimony from the Department of Water  
17 Resources that said if there is State Water Project  
18 water that is being sold to the Drought Water Bank,  
19 that will be purchased by State Water Project  
20 contractors if you don't authorize the change.

21 What the change will do is open up the ability  
22 for critical needs of Central Valley Project  
23 contractors to get that water.

24 It doesn't mean that it won't move south. It  
25 just means instead of a State Water Project contractor

1 receiving that water, a Central Valley Project  
2 contractor may receive that water.

3 And that's the testimony before you that's  
4 undisputed. And the other transfers and exchanges that  
5 are discussed are with water that's already moved south  
6 of the Delta or water from the Friant Division that  
7 would not otherwise be released to the San Joaquin  
8 River.

9 CO-HEARING OFFICER BAGGETT: But one of the  
10 questions I think I've got goes to that. From the  
11 testimony, it was less than 10,000 acre feet that we're  
12 talking about from north to south. I mean that's what  
13 I understood.

14 MR. RUBIN: The testimony as I heard it,  
15 and -- and I do believe it's captured in writing on  
16 Exhibit DWR 04, is that the Drought Water Bank is  
17 contemplating a purchase -- or purchases; excuse me --  
18 of far in excess of that but the amount of project  
19 water, Central Valley Project water --

20 CO-HEARING OFFICER BAGGETT: Right.

21 MR. RUBIN: -- State Water Project is much  
22 more limited.

23 The testimony indicates approximately 10,000  
24 acre feet. Through questioning, I asked DWR and  
25 Reclamation, the maximum I think was 16,000 acre feet,

1 absolute maximum.

2 CO-HEARING OFFICER BAGGETT: Right.

3 MR. RUBIN: So there may be a little bit of a  
4 discrepancy but we're still talking about, you know,  
5 less than 20,000 acre feet of Project water that's the  
6 subject of --

7 CO-HEARING OFFICER BAGGETT: The drought.

8 MR. RUBIN: -- of the issue -- well, not the  
9 Drought Water Bank, but of water that might be  
10 purchased by the Drought Water Bank and that could  
11 benefit from an action by you, an action that would  
12 allow for, once that water is moved south of the Delta,  
13 to be used by those areas that are in most critical  
14 need, whether it was in the CVP or SWP.

15 And so I -- maybe your question gets to an  
16 issue that I have again, and I'm taking my presentation  
17 a little bit out of order, but you had the Defenders of  
18 Wildlife stand up here and raise concerns about  
19 analysis in environmental documents that considered a  
20 Drought Water Bank that's much greater than what will  
21 occur in reality.

22 CO-HEARING OFFICER BAGGETT: Right.

23 MR. RUBIN: The environmental documents, as I  
24 understand it, contemplated a potential purchase of up  
25 to, I think it was, 600,000 acre feet. And that was



1 for planning purposes to give flexibility.

2 But in reality, what we're talking about, and  
3 the testimony reflects this, is a Drought Water Bank  
4 that might purchase up to 100,000.

5 Again, this gets to my point. This whole  
6 discussion about impacts from the Drought Water Bank is  
7 irrelevant for this proceeding. Whether 100,000 acre  
8 feet are purchased and whether there's going to be  
9 impacts has nothing to do with the action before you.

10 That -- if you take no action, the Drought  
11 Water Bank will purchase the water, and it will be  
12 sold.

13 The question is whether you're going to allow,  
14 once that water is purchased, moved to be used within  
15 areas that have -- that, you know, critical needs, more  
16 critical needs. That's the question.

17 And it's not the hundred thousand acre feet.  
18 It's 10, 20,000 acre feet.

19 And there's a lot of criticism about the  
20 vagueness of the petition. Uncertainty. I agree that  
21 there is some uncertainty, but it's not to the extent  
22 that it's been presented to you.

23 If you look at the petition, there's clear  
24 description of the Drought Water Bank, the amount of  
25 water, particularly when you read it in context with

1 the testimony, of the amount of water that would  
2 benefit from your action. There's a fairly clear  
3 description of the transfers and exchanges that are  
4 being proposed.

5 The vagueness may come in in terms of future  
6 transfers and exchanges that may benefit and the term,  
7 but I think a lot of that has been addressed through  
8 the testimony that's been presented.

9 Just to highlight a couple of points. The  
10 testimony, I think, is very clear that a granting of  
11 the petition will not change the amount of groundwater  
12 pumped out of the Sacramento Valley and will not  
13 increase the amount of water conveyed south of the  
14 Delta.

15 The evidence shows that the approval of the  
16 petition will not affect water quality in the Delta,  
17 that the action before you will not affect water  
18 quality in the Delta, and there is no evidence that  
19 even if there were a change in water quality that that  
20 would injure a legal user of water.

21 It's the same thing with drainage. There is  
22 no evidence that any change in water quality will cause  
23 an impact.

24 The fact that salinity may change -- if you  
25 accept the position, you -- the fact that salinity may

1 change, the fact that there's more drainage discharged  
2 into the San Joaquin does not mean that there's going  
3 to be an injury, whether it's to a legal user of water  
4 or to fish and wildlife.

5 CO-HEARING OFFICER BAGGETT: But the petition  
6 itself stated on its face:

7 The petition will not result in a  
8 reduction in San Joaquin River flow or  
9 an increase in drainage of the San  
10 Joaquin River.

11 So that's an acceptable condition?

12 MR. RUBIN: I frankly don't have any  
13 information to tell you whether that's acceptable or  
14 not.

15 CO-HEARING OFFICER BAGGETT: Well, it's going  
16 to affect your clients.

17 MR. RUBIN: Well -- no; whether -- I don't  
18 know --

19 CO-HEARING OFFICER BAGGETT: That's in the  
20 petition language.

21 MR. RUBIN: Frankly, I don't know -- I thought  
22 the language in the petition had a caveat there in  
23 terms of the --

24 CO-HEARING OFFICER BAGGETT: Beyond the  
25 typical -- that typically experienced.

1 MR. RUBIN: Right.

2 CO-HEARING OFFICER BAGGETT: Which is, you  
3 know.

4 MR. RUBIN: And I don't know whether there  
5 might be or might not be an increase in the amount of  
6 drainage water that's released into the San Joaquin.

7 What I do know is that -- if there -- any  
8 discharges into the San Joaquin are done pursuant to  
9 regulations that are intended to protect the San  
10 Joaquin River.

11 CO-HEARING OFFICER BAGGETT: And that's  
12 acceptable?

13 MR. RUBIN: They're in place now. There's no  
14 discharges that are coming from any of these lands.

15 Grassland Bypass Project is discharging, and  
16 it's discharging pursuant to a permit. There's a  
17 program in place to address the discharges. And -- but  
18 I don't want you to ignore my prior statement.

19 If there is a change in the amount of drainage  
20 water that's discharged, if there is an increase, that  
21 does not mean there is going to be an impact to a legal  
22 user of water or to fish and wildlife.

23 There's been no evidence to that effect.  
24 There's been people that have postured and presented  
25 you with rhetoric that there's going to be these

1 impacts, and there's no evidence to support that.

2           There is one area that we need to highlight  
3 that I think -- that's been overlooked to some degree.

4           There has been evidence presented to you of  
5 potential harm caused by pumping in the Sacramento  
6 Valley. And I again reiterate my position that your  
7 action will not change the amount of groundwater that's  
8 been pumped or that will be pumped. But if you get  
9 past that --

10           CO-HEARING OFFICER BAGGETT: This is in the  
11 San Joaquin Valley.

12           MR. RUBIN: No, no. In the Sacramento Valley.

13           You had a witness here who presented testimony  
14 to you indicating that in Butte County there may be  
15 injury to legal users of water because of the pumping  
16 of groundwater.

17           And I get past my first kind of threshold  
18 comment that your action will not change the amount of  
19 groundwater that's pumped.

20           Again, whether the water is pumped and sold to  
21 the Drought Water Bank will occur whether you take your  
22 action or not. But putting that aside --

23           CO-HEARING OFFICER BAGGETT: So under that  
24 theory then, transferring 16,000 acre feet doesn't  
25 matter one way or the other because it will occur with

1 or without.

2 MR. RUBIN: Well, no. It's -- the transfer is  
3 going to occur. It's going to be moved south of the  
4 Delta and purchased.

5 The importance of your action is to provide  
6 the Drought Water Bank with the flexibility to -- if  
7 that 16,000 acre feet, for argument's sake, is purely  
8 State Water Project water, that that 16,000 acre feet  
9 can be used within the Central Valley Project place of  
10 use if there is a critical demand there. It gives the  
11 Drought Water Bank the flexibility to move that water  
12 to the areas of critical need.

13 Right now, there would be --

14 CO-HEARING OFFICER BAGGETT: And further, what  
15 appears, it will also cause a change in the joint point  
16 policy.

17 MR. RUBIN: There is conflicting testimony  
18 there, and I was just as confused as you were.

19 I think there was testimony that said that  
20 joint point is not necessary to move that water, that  
21 the State Water Project has the capacity to move it if  
22 it's State Water Project water, and Central Valley  
23 Project has capacity to move it if it's Central Valley  
24 Project water.

25 CO-HEARING OFFICER BAGGETT: But that's a

1 question for the Projects. Okay.

2 MR. RUBIN: But getting back to the issue of  
3 the testimony by the grower from Butte County: Her  
4 testimony alleged harm, and it was based upon the 1994  
5 Drought Water Bank.

6 And again, I think it's outside the scope of  
7 this proceeding. That type of harm, it's not  
8 something -- the type of activities that occurred in  
9 the '94 Drought Bank are not what's being contemplated  
10 today in Butte County.

11 Testimony clearly drew a distinction. A  
12 significant amount of groundwater was sold from Butte  
13 County into the Drought Water Bank in '94. That's not  
14 what's being proposed now.

15 In fact, there's no in lieu groundwater sales  
16 proposed within Butte County, and therefore I don't  
17 think it's relevant to your considerations.

18 CO-HEARING OFFICER BAGGETT: So a condition so  
19 stating would not be a problem for the transferee, I  
20 guess.

21 MR. RUBIN: Well, I don't know.

22 At this point, the testimony is that there is  
23 none. I would still question why would you condition  
24 that? It's not a -- even if there were that harm, it's  
25 not a result of your action.

1           There is sufficient demand for the water  
2 regardless of whether you approve the change. I might  
3 not be explaining myself --

4           CO-HEARING OFFICER BAGGETT: No, I understand.

5           MR. RUBIN: If -- whether or not --

6           CO-HEARING OFFICER BAGGETT: Why would you --

7           MR. RUBIN: -- the place of use is  
8 consolidated, some -- DWR is going to be out there as  
9 part of the Drought Water Bank.

10           If there is an issue with that, if there is a  
11 concern that the Drought Water Bank is going to cause  
12 impacts, then the challenge is not to your action; it's  
13 to the Drought Water Bank.

14           And in fact, from what I understand, there is  
15 a suit pending on that claim. And so again, it's using  
16 this process as leverage.

17           CO-HEARING OFFICER BAGGETT: I understand.

18 Okay. Continue.

19           MR. RUBIN: I believe the evidence also  
20 supports a finding by the Board that granting the  
21 petition will not cause unreasonable impact to fish and  
22 wildlife.

23           The evidence is clear that there will be no  
24 change in pumping of groundwater or conveyance of water  
25 south of the Delta.



1           Approval of the petition will not affect the  
2 ability of the United States Bureau of Reclamation or  
3 the Department of Water Resources to meet those terms  
4 and conditions that are intended to protect beneficial  
5 uses.

6           And they will -- they have an obligation to  
7 comply with the Endangered Species Act.

8           I reiterate the opponents to the petition  
9 raise general concerns with the Central Valley Project  
10 and State Water Project operations; however, those  
11 general concerns are oftentimes presented by lay people  
12 that have no evidence to support their claims, and they  
13 can't be relied upon by the State Board for its  
14 decision.

15           They point to nothing which would even suggest  
16 that granting the petition would harm fish or wildlife,  
17 the specific action before you.

18           And I reiterate my point again that nothing  
19 indicates that even if there were a change in water  
20 quality, amount of water that's conveyed, that those  
21 actions would cause an impact, either to a legal user  
22 of water or an unreasonable impact to fish and  
23 wildlife.

24           And let me get to this last point,  
25 unreasonable impact. That's clearly a balancing that

1 the Board must undertake. It's not no impact to fish  
2 and wildlife. It's an unreasonable impact.

3 And again, maybe in the -- as a secondary  
4 argument here, I think that even if there were a  
5 demonstrated impact -- and again, I don't think there  
6 has been one -- but even if there were, I think that  
7 impact is reasonable under the circumstances.

8 Your action must be taken in context with the  
9 Governor's proclamation of an emergency and  
10 specifically important findings that he made in the  
11 proclamation, that the Governor made in his  
12 proclamation, which have not been subject to real  
13 disagreement in this proceeding.

14 And I want to go through a few of the findings  
15 that the Governor made.

16 The Governor identified or recognized that:

17 The state is in the third consecutive  
18 year of a drought;

19 And that in each year of the current  
20 drought, annual rainfall and the water  
21 content in the Sierra snow pack have  
22 been significantly below the amount  
23 needed to fill California's reservoir  
24 system;

25 That despite recent rains and snow, the

1           three-year cumulative water deficit is  
2           so large that there's only a 15 percent  
3           chance that California will replenish  
4           its water supply this year;

5           That because there is no way of knowing  
6           whether the drought will end, further  
7           urgency action is needed to address the  
8           water shortages and protect the people  
9           and property of California;

10          That the lack of water has forced  
11          California farmers to abandon or leave  
12          unplanted more than 100,000 acres of  
13          agricultural land;

14          And that California farmers provide  
15          nearly half of the fresh fruit, nuts,  
16          and vegetables consumed by Americans;  
17          And that the crop losses caused by the  
18          drought will increase food prices which  
19          will further adversely impact families  
20          and the economy throughout California  
21          and beyond our borders.

22                 I believe that the proclamation and the  
23          Governor's findings have legal effect. I think the  
24          proclamation and the findings are supported by the  
25          evidence that have been presented in this hearing.

1           Most simply put, Central Valley Project  
2 agricultural water service contractors south of the  
3 Delta will receive less water this year than they  
4 received in 1977, the driest year on record.

5           There were some statements today that the  
6 hydrology has not been substantially impaired this  
7 year. I think C-WIN indicated that there is -- that  
8 there has not been a substantial impairment in terms of  
9 hydrology, the amount of water that's available.

10           There was suggestion that recent rainfall has  
11 alleviated the need. And again, putting aside whether  
12 that's true or not -- I don't think it is -- but  
13 putting it aside, it doesn't change the fact that  
14 agricultural water service contractors south of the  
15 Delta have a significant shortage in water supply, that  
16 Central Valley Project agricultural water service  
17 contractors will receive ten, at the most 15, percent  
18 of their contract, maximum contract.

19           There was also a suggestion that the data  
20 that's in the petitions is not current.

21           I think that the data was current when it was  
22 filed; and to the extent it's changed, the testimony  
23 revised it. I don't think that you should place blame  
24 on the Department or the Bureau for not submitting a  
25 revised petition. We're working under a quick time

1 frame, and I think they did a good job to try to be up  
2 front with any changes that occurred.

3 Then just to conclude, the flexibility  
4 provided by approval of the petition will help  
5 facilitate the delivery of water to those areas most in  
6 need.

7 It will permit movement of water to those  
8 areas that have critical interests. Again, it's adding  
9 flexibility to water that is south of the Delta. And I  
10 believe, for the reasons I've articulated, approval of  
11 the petition to allow for that to happen is in the  
12 public interest.

13 And therefore, I believe that there's  
14 substantial evidence presented during this proceeding  
15 to support the petition.

16 CO-HEARING OFFICER BAGGETT: Couple additional  
17 questions.

18 The discussion yesterday was the term. We are  
19 being asked to approve a two-year condition. I think  
20 it was pretty clear that 24 months is not necessary for  
21 the payback.

22 I assume your clients are going to be  
23 significantly involved in some of these negotiations  
24 and purchases of water. What -- I guess what is a  
25 reasonable term? 12 months, 13 months?

1 MR. RUBIN: There's --

2 CO-HEARING OFFICER BAGGETT: Let me finish.

3 That's one question: What's a reasonable term to allow  
4 that payback.

5 And two: If there was -- after this year's  
6 season, in the fall, if there was a proceeding or  
7 reporting prior to determine what amount of water is  
8 necessary for the payback so that there can actually be  
9 a plan presented to the Hearing Officers, is that  
10 something that's reasonable within the negotiation of  
11 those contracts?

12 Because I realize we have got a contractual  
13 issue separate from a water rights issue, and I think  
14 we understand that.

15 Does that interfere with the ability to do  
16 those contracts so this body understands exactly what  
17 is being proposed, how many acre feet, what are the  
18 terms of those, I guess, pay back transfers?

19 I could ask DWR and the Bureau these  
20 questions, but I assume that you will be much more  
21 involved in the negotiation, or your clients will, and  
22 the details of these transfers.

23 I'm trying to understand that mechanism,  
24 what's the time frame required? The proposal in the  
25 petition was that staff and the Bureau and DWR staff

1 approves.

2           Quite frankly, I think this is a little bigger  
3 than having staff approve. I think this body has to  
4 approve that. And I'm trying to understand how to make  
5 that mechanism work so that it allows for the private  
6 marketing that has to happen but allows also for  
7 oversight that I think this body is obligated to  
8 perform.

9           MR. RUBIN: From my client's perspective, the  
10 intent for the -- underlying the petitions that are  
11 before you is to alleviate the impacts that are caused  
12 this year by the water shortage.

13           And part of that goal is achieved through  
14 these exchanges.

15           It's very complicated. It's something that I  
16 think a lot of people that have spoken before you fail  
17 to understand how complicated the system is, and how  
18 much analysis is required to determine when kind of  
19 some of the second part of the exchanges can be  
20 complete.

21           There is capacity and canal issues, and a lot  
22 of that I don't believe can be resolved today.

23           And so I think that there's clearly conditions  
24 that could be imposed that provide some level of  
25 assurance for those that have raised concerns for next

1 year.

2           The intent is to include a two-year term in  
3 order to complete those exchanges that have been  
4 started this year.

5           In terms of the reporting, it seems to me that  
6 the petition has already offered a condition that  
7 should satisfy your second comment. On page ten --

8           CO-HEARING OFFICER BAGGETT: I've got it in  
9 front of me.

10          MR. RUBIN: -- indicates that DWR and  
11 Reclamation will develop a reporting plan that provides  
12 you, as far as I can tell, with the assurance that the  
13 second part of the exchange that may occur into next  
14 year is related to activities this year.

15          Today, I can't tell you whether it should be a  
16 year from approval, 18 months from approval, 24 months,  
17 you know, from approval as the term for the reasons I  
18 articulated.

19          I think that there's a lot of operational  
20 issues that make that decision a lot more complicated  
21 and frankly that may not allow for a definitive term  
22 determination today.

23          CO-HEARING OFFICER BAGGETT: Okay. That's  
24 fair.

25          MR. RUBIN: Any further questions?



1 CO-HEARING OFFICER BAGGETT: Not at this  
2 point.

3 The Projects in whatever order you want to go.

4 MS. AUFDEMBERGE: Good morning. My name is  
5 Amy Aufdemberge for Department of Interior, Bureau of  
6 Reclamation.

7 First of all, I want to apologize for being  
8 late this morning. I appreciate the accommodation,  
9 although it wouldn't have broken my heart if I had  
10 inadvertently waived my right to closing. But here we  
11 are.

12 I guess the main point that we have to say at  
13 this juncture is that the focus of the petition is to  
14 facilitate exchanges or transfers south of the Delta.

15 The Water Bank issues are forecasted to be a  
16 very minor part of this -- of the consolidated place of  
17 use.

18 The impacts of the Drought Water Bank have  
19 been analyzed in connection with that program.

20 The remaining exchanges and transfers are all  
21 actions -- the remaining actions of the petition,  
22 including the Drought Water Bank, would be within the  
23 historical averages of use, and therefore the impacts  
24 fall within the existing Biological Opinions and NEPA  
25 analysis.

1           With respect to water quality standards, as  
2 you know, Interior has a serious disagreement with  
3 South Delta and San Joaquin County on the extent of  
4 federal obligation to meet South Delta salinity  
5 standards.

6           Provisions in D1641 clearly state that  
7 Reclamation's responsibility is to the extent that  
8 Reclamation can control the salinity below Vernalis. I  
9 can go on and on about that debate. In fact, I did; I  
10 scratched it out.

11           Suffice it to say that we have an outstanding  
12 lawsuit against the Board on that issue, and I suppose  
13 the Board can, if it wants to, wrap that morass into  
14 every petition it grants the Projects. But that debate  
15 will be there irrespective of what happens with this  
16 petition.

17           It is not clear whether another JPOD petition  
18 will be filed this year. If it is filed, we intend to  
19 reserve our legal arguments under that petition.

20           Other than that, nothing in this petition  
21 would affect Reclamation's ability to meet the terms  
22 and conditions of its water right.

23           And that's all I have to say.

24           CO-HEARING OFFICER BAGGETT: I don't know who  
25 to ask these questions. Maybe DWR wants to -- whoever

1 wants to go for it, I have a few related.

2 Why don't you go for your closing, then we'll  
3 ask questions and you can decide who wants to answer  
4 them.

5 MR. SODERLUND: Thank you. Good morning,  
6 Board Chair Hoppin, Board Member Baggett, Board staff.  
7 My name is Erick Soderlund, and I'm here on behalf of  
8 the Department of Water Resources.

9 In some ways, it's tough to go last because  
10 you take what you were planning on doing in a closing  
11 argument, and it gets kind of convoluted as other  
12 people bring up points. So I will try to stay on task  
13 and not get sidetracked too much.

14 I will also say that, being a newbie at this  
15 process, it's kind of hard. It's hard to know what to  
16 address.

17 CO-HEARING OFFICER BAGGETT: We'll help you.

18 MR. SODERLUND: Thank you.

19 (Laughter)

20 MR. SODERLUND: In my opening statement, I  
21 presented kind of four questions and what the testimony  
22 would, you know, provide or what evidence we would  
23 present to answer those questions.

24 And they were why are we here? What are we  
25 asking for? What are the effects? And why are we

1 asking for it? What are the benefits of this?

2 So I still kind of wanted to follow that  
3 track.

4 The why are we here: We presented evidence  
5 that we are still in a third year of drought. We have  
6 a drought proclamation, an emergency declaration, that  
7 directs the Department to look for ways to respond to  
8 the drought and to mitigate its effects and, more  
9 importantly, or more specifically for this hearing, to  
10 facilitate transfers.

11 And in that proclamation, the Governor  
12 directed the Department of Water Resources to  
13 essentially file a consolidated place of use.

14 We're not pointing fingers at the Governor.  
15 We believe that, you know, we support the position.  
16 DWR supports the petition and believes that it does  
17 facility transfers.

18 So now I'll move more into what are we asking  
19 for. That seems to be a major concern of many of the  
20 parties and maybe even with the Board as far as what is  
21 DWR asking for.

22 And I thought Mr. Rubin did a good job of  
23 talking through that, but I'll add kind of my thoughts  
24 to it.

25 In some ways, the best way to present what

1 we're asking for is to talk about what would happen in  
2 the absence of this petition.

3 In the absence of this petition, there would  
4 still be a Drought Water Bank. The Department has two  
5 hats, so to speak, in this hearing.

6 One hat is somewhat relevant, and that's the  
7 hat of maintaining and furthering the Drought Water  
8 Bank; and the other hat is as the petitioner for a  
9 consolidated place of use.

10 We'll try to keep those separate and distinct  
11 and to clarify where those differences are.

12 Like I said, without this petition, the  
13 Drought Water Bank would still go forward. We have put  
14 out a request for potential sellers, and those  
15 potential sellers have come forward with the amounts of  
16 water that they would like to sell to the Drought Water  
17 Bank.

18 Under that Drought Water Bank, there was an  
19 environmental review process, a Biological Opinion that  
20 analyzed the effects of doing the Drought Water Bank,  
21 and there was some environmental -- there was an NOE  
22 filed, before that an addendum, and again like the  
23 Biological Opinion looked at those effects. And again,  
24 that is separate from this petition.

25 Without this petition, what would happen is if

1 a settlement contractor, an SWP or CVP settlement  
2 contractor, wanted to sell some of their project  
3 supply, either we would ensure under the Drought Water  
4 Bank that that project supply would go to -- if it was  
5 SWP Project supply, it would go to an SWP contractor,  
6 and that water would still be moved.

7           If it was a CVP settlement contractor, we  
8 would make sure that water went to a CVP contractor  
9 south of the Delta, and that water would still be  
10 moved.

11           If for some reason, a settlement contractor --  
12 if we felt like it was absolutely necessary to move CVP  
13 water to an SWP contractor under the umbrella of the  
14 Drought Water Bank, then a petition would be filed.

15           All other water rights outside of the Projects  
16 are in the process of filing petitions, and many of  
17 those are before the Board, or at least the Board  
18 staff, right now.

19           So again, this petition does not make water  
20 available. It doesn't -- it isn't needed to move that  
21 water. The only difference that this petition means is  
22 that SWP water that is made available under the Drought  
23 Water Bank can now go to a CVP contractor.

24           In my opening statement, you know, I said this  
25 petition is much more than just a normal transfer of

1 water, a petition for a transfer of water. There's  
2 several reasons for that.

3 One is the Projects are different than a  
4 normal seller of water in a transfer. Some of those  
5 main differences are, one, we are, for lack of a better  
6 term, on the hook for many flow requirements and many  
7 Delta water quality requirements and objectives no  
8 matter what.

9 Many of these other water right users who may  
10 be in the Sacramento Valley, when they're selling their  
11 water, analyzing the effects of, you know, pulling that  
12 water, moving it to a different place are applicable  
13 because without the transfer of water they don't have  
14 to make sure that flow requirements are met no matter  
15 what.

16 So to analyze the fact whether that injury  
17 would occur in that transfer of water is appropriate  
18 because it's not the normal business.

19 For us, if we move -- I hope I'm not being too  
20 convoluted. For the Projects, as I said, we are held  
21 to the standards and objectives of flow requirements in  
22 the Sacramento and Feather River and the Delta.

23 Moving this water would not affect, as our  
24 testimony went to, would not affect our ability to meet  
25 those requirements.

1           And I apologize; I've lost my train of  
2 thought.

3           CO-HEARING OFFICER BAGGETT: I can give you  
4 some questions.

5           MR. SODERLUND: Please do. Save me.

6           CO-HEARING OFFICER BAGGETT: One is: I  
7 understand from reading the Executive Order that you  
8 are submitting CEQA information to Cal/EPA and to the  
9 Resource Agency; and I think it would be helpful if you  
10 provided whatever CEQA documentation to the Board also.

11          MR. SODERLUND: Yes.

12          CO-HEARING OFFICER BAGGETT: We could keep the  
13 record open. I don't know how long you would need it  
14 open for, a day or two or three, to provide that  
15 information. I assume it's developed already.

16          MR. SODERLUND: It is developed, and it is  
17 before both Secretaries. And I see no issue as far as  
18 my understanding of getting all the record of our CEQA  
19 compliance before the Board.

20          CO-HEARING OFFICER BAGGETT: How quickly can  
21 that be conveyed to us?

22          MR. HERRICK: I don't know how we ask the  
23 petitioners to submit environmental review information  
24 at the close of the hearing for the Hearing Officers  
25 and Board Members to consider and nobody else to look



1 at or cross-examine on.

2 I mean, I guess you could take public notice  
3 of anything.

4 CO-HEARING OFFICER BAGGETT: We can take  
5 public notice of it.

6 MR. HERRICK: I hate to have a large  
7 environmental review be shoved into the record when  
8 nobody else had the chance to cross-examine witnesses  
9 on it.

10 CO-HEARING OFFICER BAGGETT: No, we could take  
11 it under official notice.

12 MR. HERRICK: You can. It seems unfair is  
13 what I'm saying.

14 CO-HEARING OFFICER BAGGETT: Mr. Rubin?

15 MR. HERRICK: A large part of the discussion  
16 was the lack of evaluation.

17 CO-HEARING OFFICER BAGGETT: I appreciate  
18 that.

19 MR. HERRICK: Thank you.

20 MR. RUBIN: Just two thoughts.

21 One is to reiterate the point that I think was  
22 just conveyed, and that is the environmental documents  
23 are documents that you could take official notice of.

24 And second, if I understand the process  
25 correct, and maybe I don't, but this forum is not the

1 forum to raise challenges to the environmental  
2 documents, that they are what they are for this  
3 process.

4 And so I don't think we want to get in a  
5 pattern -- I don't think it has been the Board's  
6 pattern -- to use this process as another opportunity  
7 for the public to comment on the environmental  
8 documents.

9 To the extent there's comment periods, those  
10 are provided by law under CEQA, and that's the time and  
11 place to raise your comments and concerns.

12 CO-HEARING OFFICER BAGGETT: Mr. Herrick.

13 MR. HERRICK: I'm sorry; that's just wrong.

14 This process is under 1701 et seq. Okay? So  
15 there has to be a showing of whether or not there is  
16 adverse impacts to other legal users -- and I'll just  
17 generally say the environmental under the fishery  
18 provisions.

19 To say that the documents that relate to the  
20 effects of this project aren't relevant is nonsense.  
21 Whether or not there is a CEQA process for something  
22 else going on doesn't have anything to do with whether  
23 or not the evaluation has been done.

24 There are orders of burden of proof --

25 CO-HEARING OFFICER BAGGETT: Okay.

1           MR. HERRICK: And it's the petitioners' burden  
2 to show whether or not there's adverse impacts, not to  
3 say we haven't studied it and, by the way, there's  
4 other documents we forgot to present you.

5           CO-HEARING OFFICER BAGGETT: When will -- the  
6 order requires the Secretaries to act. They haven't  
7 acted, as we understand it.

8           MR. SODERLUND: Just a point of clarification.

9           We filed an NOE yesterday afternoon. We are  
10 getting the package together to submit it to the Board  
11 as far as the Secretaries' concurrence.

12           And that's the issue, is under the order or  
13 under the proclamation -- and again, the parties can  
14 disagree about this in another forum.

15           But under the proclamation, DWR feels that  
16 this project falls under the exemptions. We believe  
17 that the proclamation stated that the exemptions,  
18 specifically 2180(b)(3), is applicable and can be  
19 applied to this project, and in light of that, we filed  
20 an NOE.

21           The environmental documents that we provided  
22 to -- it wasn't even an environmental document. We  
23 provided the NOE to the Secretaries along with the  
24 description of the project and stating why we felt that  
25 the emergency exemption should apply.

1           There was not environmental analysis that was  
2 missing from this proceeding. That was included in  
3 that.

4           CO-HEARING OFFICER BAGGETT: We could take  
5 notice of the NOE once it's adopted. Do you have a  
6 time frame?

7           MR. SODERLUND: The NOE was filed, and we  
8 should be getting the Secretaries' signature -- the  
9 actual signatures today, tomorrow. I mean soon.

10           When I go back to the office, those are the  
11 phone calls I'll make, make sure we have it in our hand  
12 so we can submit. The only reason why we didn't submit  
13 the NOE yet is because we wanted everything together.

14           CO-HEARING OFFICER BAGGETT: Okay. And I  
15 understand there's other forums to deal with the  
16 challenge to the NOE. We have enough challenges.

17           Okay. Couple other questions I have.

18           The timing issue, again, that we asked  
19 Mr. Rubin, so some of these questions I think are the  
20 same and see if you've got any thoughts.

21           The Sac Valley water, it appears we've heard  
22 everything from 6,000 to 16,000 acre feet. Do you have  
23 any idea, since the time has passed, we are -- the  
24 urgency to some extent has changed as the water type as  
25 changed since you filed this petition.

1 I don't know -- I mean I'm not saying it's not  
2 an urgency, but I guess the magnitude has clearly  
3 changed with the water type change in the last month  
4 and a half.

5 What do you anticipate to be the amount,  
6 10,000 acre feet? 16? 12? Do you have any --

7 MR. SODERLUND: The latest information I  
8 have is 10,000. That's what I have to go on. If it  
9 ends up being more, it would be because someone put in  
10 an offer or, so to speak, a package yesterday or today.  
11 That's the only reason why.

12 But we don't anticipate any more, if at all,  
13 because of the late notice.

14 CO-HEARING OFFICER BAGGETT: How many acre  
15 feet at this point do you have, I guess, approved?  
16 100,000 for your total?

17 MR. SODERLUND: It is around 100,000.

18 CO-HEARING OFFICER BAGGETT: 100,000 now. But  
19 you would -- what's the maximum amount? It is fairly  
20 open-ended.

21 MR. SODERLUND: Maximum amount of Drought  
22 Water Bank total? In the Biological Opinion it was  
23 analyzed at 340,000 and some-odd -- 370,000, sorry.  
24 Almost 371,000. I can read the number now.

25 370,935 acre feet of water was the maximum

1 amount of water that was analyzed in the Biological  
2 Opinion. Of that, 120,000 involves idling, 69,000 from  
3 CVP contractors from substituting pumped groundwater.

4 CO-HEARING OFFICER BAGGETT: Where is this in  
5 the record, just to save --

6 MR. SODERLUND: This is on page 3 of the  
7 Biological Opinion of Exhibit I believe 6 of DWR.

8 CO-HEARING OFFICER BAGGETT: That's helpful.

9 BOARD MEMBER HOPPIN: Amy, if you could come  
10 up, I've got a question for both you and Erick, if you  
11 could tag-team on this.

12 Obviously, we're in a position where we need  
13 to give a degree of deference certainly to the  
14 emergency declaration.

15 But I think we would be very naive if we  
16 didn't assume that by granting this petition, or a  
17 portion of it, certainly, that we wouldn't be  
18 developing a template for a more permanent change of  
19 some sort, whether in drought conditions under  
20 permanent conditions, and that gets me back to the  
21 paragraph F, page 10 of the petition where we talk  
22 about a reporting plan.

23 And will the words "will" and "would" and --  
24 the time frame kind of eludes me on that.

25 If you could address, number one, what portion

1 of this reporting plan would be complete prior to  
2 activity, what portion of it would be complete after  
3 activity, and I can tell both of you if we were ever to  
4 consider any permanent change, certainly with the  
5 environmental rigors, that would go without saying,  
6 that the thoroughness of this reporting plan and how we  
7 could reflect on a temporary urgency as it would deal  
8 with needs in some type of a permanent change would be  
9 critical to me.

10 So if the two of you could develop on that, I  
11 would really appreciate it.

12 MR. SODERLUND: I could take a quick crack at  
13 it.

14 As far as developing the plan, we could  
15 develop what we know right now, which includes pretty  
16 much what's in the petition, and then firming up the  
17 numbers of the groundwater Drought Water Bank project  
18 water that would be moved.

19 And we could do that -- it would not be me, so  
20 I'm putting it on other people to do the work -- but I  
21 would say within the week, or two weeks?

22 I mean we would have, of what we know,  
23 identified and to the Board by any decision or the day  
24 of approval or whatever the proper time would be.

25 And then as far as how we would identify new

1 transfers or exchanges, that is something that we would  
2 definitely work with the Board, any -- I don't know if  
3 I'm going to get in trouble for saying this -- but  
4 other parties as far as timing issue, you know.

5 How far in advance would we need to notify the  
6 Board of a potential or proposed project or transfer?

7 I mean these things don't happen just like  
8 that. So there is planning involved in the first  
9 place. So once we get -- identify a project, I'm sure  
10 we could put it before the Board in enough time to have  
11 the Board have -- analyze it and ensure that it falls  
12 within any order approving this petition and is  
13 supported or has the proper information before that  
14 project goes forward.

15 We're not planning on doing after-the-fact.  
16 That's my understanding.

17 BOARD MEMBER HOPPIN: And after the fact, you  
18 wouldn't be willing to provide us with the summation of  
19 the efficacy of the petition and what you felt you  
20 accomplished by having that latitude?

21 MR. SODERLUND: I am sure the Department would  
22 be very interested in doing that, in providing kind of  
23 a final report on how this helped out.

24 Because again, I agree with other parties that  
25 there are other ways and other means to help out with



1 the drought. And in the report to the Governor, those  
2 other ways and means were identified.

3 So this is just one tool. How effective is  
4 the tool, we believe that it is going to be effective  
5 in facilitating transfers in getting water to where  
6 it's needed most. We do believe that.

7 How effective will it be? That is something  
8 that we would be very interested in finalizing a report  
9 and providing it to the Board and the public.

10 BOARD MEMBER HOPPIN: Thank you.

11 One other comment I'll make while I have both  
12 of you up here. I will agree with Mr. Rubin, and it's  
13 probably typical, a lot of issues like this.

14 Many of the objections were, although related,  
15 were on the periphery of this petition.

16 One issue that was raised certainly by  
17 Mr. Herrick has to do with JPOD and requirements as far  
18 as July 1st. I want you all to be mindful of the fact  
19 that that deadline is looming, and sometimes we're  
20 making our best efforts, don't have an awful lot of  
21 teeth in them.

22 So while this doesn't have to do with the  
23 specifics of this petition, I think you need to be  
24 mindful, as I'm sure you are, that we do have a statute  
25 ahead of us that can't be ignored.

1 Thank you.

2 CO-HEARING OFFICER BAGGETT: That's all the  
3 questions I have. Do you have any closing thoughts?

4 MR. SODERLUND: Yeah.

5 I would just like to conclude that again,  
6 going back to the standard, we needed to provide  
7 evidence that demonstrated that there would not be a  
8 reasonable likelihood of injury to other legal users  
9 and obviously with the environment.

10 And the way we demonstrated that was by  
11 providing the parameters that have already been set,  
12 that have already been identified, in D1641 and the  
13 Biological Opinion for Delta, and the Biological  
14 Opinion for the Drought Water Bank, and opened up the  
15 door for the Biological Opinion that will soon be  
16 issued by NMFS. We will comply with those.

17 And if we can't do that, we'll comply with the  
18 Biological Opinion.

19 I'm sure there's other parties who may agree  
20 with that. I can't say, you know, you can't -- that  
21 disagreement is a disagreement.

22 But the testimony provided was saying that any  
23 water or any water that is moved under this petition  
24 will be done so in accordance with the provisions that  
25 have been provided to help protect other legal users

1 and the environment.

2 Then just lastly with -- because where I think  
3 the focus needs to be is on where does this water go?  
4 That's essentially what this petition will grant.

5 It will grant water, instead of going to an  
6 SWP contractor south of the Delta, now it will open up  
7 the door for SWP water to go to CVP service area lands.

8 That's where the effect is. What is that  
9 effect?

10 And it may be an increase in drainage without  
11 the Project. And this is something that was  
12 identified, the baseline should be no Project, or the  
13 baseline should be identified as without.

14 And in CEQA, that's true. If we did a CEQA  
15 document -- and I know the parties, other parties,  
16 believe that we needed to do a CEQA document; that's a  
17 disagreement that will be addressed in another forum.

18 But if this was a CEQA document, then a no  
19 Project or a baseline would maybe be without this, what  
20 would the reason have been, you know, absent this  
21 petition.

22 However, it's not a CEQA document. It's an  
23 unreasonable effect on -- or a reasonable likelihood  
24 that this will not injure another user or reasonable  
25 likelihood that this will not affect the fish and

1 wildlife.

2           So what we provided to that was historical  
3 deliveries. What water will get to these individual  
4 districts -- what might get to these individual  
5 districts will be significantly less than what has been  
6 in the past.

7           And the argument is any drainage that may  
8 increase because of it for this year will not be  
9 anywhere near what it has been in the past.

10           With that, I'll leave it, and thank you for  
11 your time. It was a learning experience to do my first  
12 hearing before the Board. That was exciting. Have a  
13 good day.

14           Thank you.

15           CO-HEARING OFFICER BAGGETT: Thank you.

16           With that, that ends the closing comments.

17           We'll leave the record open today for any  
18 written closing comments by close of business, if you  
19 want to send us a list of proposed conditions or  
20 nonconditions or -- we'll just leave it open with no  
21 limit.

22           I don't expect tomes, but I know many of you  
23 have conditions already written. That would be helpful  
24 if you've got them and want to submit them to us by end  
25 of day electronically, or any closing thoughts.

1           So we'll keep the record open for that to  
2 close of business.

3           MR. SODERLUND: Could I add one more thought?  
4 I just wanted to address it.

5           The time, the time period. That was in a  
6 sense of not describing why we asked for two years, or  
7 why that rationale was not described, was not the fault  
8 of our witnesses. It was the fault of the drafter.

9           And I do want to make clear, and as our  
10 witnesses testified, the purpose of this petition was  
11 to facilitate transfers for this year, and the only  
12 extension of time was to move the exchanges back in the  
13 following ag season or the following season to allow  
14 that to happen.

15           So I just want to make that clear. The  
16 rationale was not left out to keep it open-ended. It  
17 was left out --

18           CO-HEARING OFFICER BAGGETT: I understand.

19           Like I said, you have to close of business if  
20 you want to be more specific. That's an opportunity to  
21 do so.

22           With that, the Board will take this matter  
23 under submission, and all persons who participated will  
24 be sent a notice of the Board's proposed order and the  
25 Board meeting at which the matter will be considered.

1           That will likely not be considered till the  
2 middle of May because this will take an action of the  
3 Board. The isn't an urgency order that can be granted  
4 by the Hearing Officers. This will take a full Board  
5 meeting, and we'll get the draft out and bring it back  
6 to the Board.

7           Mr. Rubin?

8           MR. RUBIN: Just while we're on the record, I  
9 raised this at the prehearing conference, and I just  
10 want to reiterate the -- my clients, San Luis and  
11 Delta-Mendota Water Authority and Westlands Water  
12 District, hope that and assume that you'll be looking  
13 at this as expeditiously as possible.

14           Almost as soon as you act, particularly if  
15 it's mid May, there's benefits that could be received.  
16 Santa Clara --

17           CO-HEARING OFFICER BAGGETT: We appreciate  
18 that. And there's a mid May Board meeting. But if one  
19 looks at the legal requirements for scheduling agenda  
20 items and public notice, that's about as  
21 expeditiously -- and that will be a strong push, but  
22 that is our intent, to resolve this, resolution to all  
23 parties by middle of May.

24           MR. RUBIN: I appreciate that. I didn't want  
25 to suggest that you didn't appreciate that.

1           I understand it may be already agendaized for  
2 closed session discussion at the Board meeting on I  
3 think it's the 5th.

4           That may not allow you to act on an order, but  
5 I do understand that and I think that does reflect your  
6 desire to kind of further the discussion so that we  
7 could be in a position where the Board decides at its  
8 mid May meeting.

9           CO-HEARING OFFICER BAGGETT: Right.

10          MR. RUBIN: Thank you.

11          CO-HEARING OFFICER BAGGETT: So we'll take  
12 this under submission.

13          Thank you for your interest and for, I think,  
14 working to make this process happen in a timely manner.

15          Thank you.

16                                   \*   \*   \*

17                   (Thereupon the STATE WATER RESOURCES  
18                   CONTROL BOARD hearing adjourned at 10:27  
19                   a.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 STATE WATER RESOURCES CONTROL BOARD  
6 hearing was reported in shorthand by me, Linda Kay  
7 Rigel, a Certified Shorthand Reporter of the State of  
8 California, and thereafter transcribed into  
9 typewriting.

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

13 IN WITNESS WHEREOF, I have hereunto set my  
14 hand this May 5, 2009.

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LINDA KAY RIGEL, CSR  
Certified Shorthand Reporter  
License No. 13196

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