



1 APPEARANCES

2 CALIFORNIA WATER RESOURCES BOARD

3 Division of Water Rights

4 Board Members Present:

5 Tam Doduc, Co-Hearing Officer

Felicia Marcus, Chair & Co-Hearing Officer

6 Dorene D'Adamo, Board Member

7 Staff Present:

8 Andrew Deeringer, Senior Staff Attorney

Conny Mitterhofer, Supervising Water Resource Control

9 Engineer

Jean McCue, Water Resources Control Engineer

10

11 PART 2

12 For Petitioners:

13 California Department of Water Resources:

14 James (Tripp) Mizell

Jolie-Anne Ansley

15

The U.S. Department of the Interior:

16

Amy L. Aufdenberge, Esq.

17

18 INTERESTED PARTIES:

19 For Grassland Water District:

20 Ellen Wehr

21 For California Water Research:

22 Deirdre Des Jardins

David Fries, Ph.D.

23

24

25

1 APPEARANCES (Continued)

2 For State Water Contractors:

3 Stefanie Morris

4 For California Sportfishing Protection Alliance (CSPA),  
5 California Water Impact Network (C-WIN), and  
6 AquAlliance:

7 Michael Jackson

8 For North Delta Water Agency & Member Districts,  
9 City of Brentwood, Reclamation District No. 800 (Byron  
10 Tract), Brannan-Andrus Levee Maintenance District;  
11 Reclamation District 407; Reclamation District 2067;  
12 Reclamation District 317; Reclamation District 551;  
13 Reclamation District 563; Reclamation District 150;  
14 Reclamation District 2098, Sacramento Municipal Utility  
15 District (SMUD), Sacramento Valley Group, Tehama-Colusa  
16 Canal Authority & water service contractors in its  
17 service area:

18 Meredith Nikkel

19 For Central Delta Water Agency, South Delta Water  
20 Agency (Delta Agencies), Lafayette Ranch, Heritage  
21 Lands Inc., Mark Bachetti Farms and Rudy Mussi  
22 Investments L.P.:

23 Dean Ruiz, Esq.

24 For Restore the Delta:

25 Tim Stroshane

For San Luis & Delta-Mendota Water Authority:

Daniel J. O'Hanlon  
Rebecca R. Akroyd

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APPEARANCES (Continued)

For The Environmental Justice Coalition for Water, Islands, Inc., Islands, Inc., Local Agencies of the North Delta, Bogle Vineyards/Delta Watershed Landowner Coalition, Diablo Vineyards and Brad Lange/Delta Watershed Landowner Coalition, Stillwater Orchards/Delta Watershed Landowner Coalition, Brett G. Baker and Daniel Wilson, SAVE OUR SANDHILL CRANES, Friends of Stone Lakes National Wildlife Refuge, The County of Yolo:

Osha Meserve

For The City of Roseville, Sacramento Suburban Water District, San Juan Water District, The City of Folsom, and Yuba County Water Agency:

Ryan Bezerra

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1 Friday, March 9, 2018 9:30 a.m.

2 PROCEEDINGS

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4 CO-HEARING OFFICER DODUC: Good morning,  
5 everyone. Welcome back.

6 Since it's Friday, I'll skip the formalities.

7 You should know where you are.

8 You should know who we are.

9 You should know what to do in the event an  
10 alarm sounds.

11 You should know what to do when providing  
12 comments for the purpose of the Webcast and reporting.

13 And you most definitely should know what to  
14 do -- Miss Aufdemberge -- with all your noise-making  
15 devices.

16 All right. Any questions? Any matters?

17 MS. WEHR: Good morning. Ellen Wehr for  
18 Grassland Water District, Group 44.

19 We're scheduled to appear on Panel 5. We  
20 expected that that panel would go today.

21 Given the remaining cross-examine and the  
22 San Luis and Delta-Mendota Water Authority panel on  
23 cross, we doubt that that will happen.

24 Dr. Mark Petrie has been waiting to testify.  
25 Unfortunately, he will be in Alaska on a river trip

1 next week, and so I just wanted to inform you that we  
2 will work with other parties to try and rearrange our  
3 schedule so that our panel can potentially present next  
4 week, late next week.

5 CO-HEARING OFFICER DODUC: Thank you. Thank  
6 you.

7 And thank you, Doctor, for bearing with us.

8 WITNESS PETRI: No problem.

9 CO-HEARING OFFICER DODUC: Miss Des Jardins?

10 MS. DES JARDINS: Yes. I have objections that  
11 I want to make to: Testimony of Gwen Buchholz, Exhibit  
12 DWR-1010; testimony of Marin Greenwood, Exhibit  
13 DWR-1012; testimony of Richard Wilder, Exhibit  
14 DWR-1013; testimony of Tara Smith, Exhibit DWR-15;  
15 testimony of Erik Reyes, Exhibit DWR-1016; testimony of  
16 Douglas Rischbieter, Exhibit DWR-1024 and Exhibit  
17 DWR-1069.

18 CO-HEARING OFFICER DODUC: Are they based on  
19 the same grounds, or do you have different grounds for  
20 each objection?

21 MS. DES JARDINS: They are based on the same  
22 grounds.

23 CO-HEARING OFFICER DODUC: And what is that  
24 ground?

25 MS. DES JARDINS: The grounds are that -- I

1 would like to lodge a timely objection based on  
2 Evidence Code 801 and 802, and the standards in Sargon  
3 Enterprises vs. University of Southern California  
4 (2012), 55 Cal. 4th 747.

5 The Supreme Court held that, under Evidence  
6 Code 801 Subdivision (b) and 802 (reading):

7 "The trial court acts as a  
8 gatekeeper to exclude expert opinion  
9 testimony that is (1) based on a matter  
10 of a type on which an expert may not  
11 reasonably rely, (2) based on reasons  
12 unsupported by the material on which the  
13 expert relies, or (3) speculative."

14 The second case which is cited by Sargon is In  
15 re: Lockheed Litigation Cases (2004), 115 Cal.  
16 4th 558. The court stated with respect to Evidence  
17 Code 801(b) (reading):

18 "We construe this to mean . . . the  
19 matter" that -- that the expert relies  
20 on -- "must provide a reasonable basis  
21 for the particular opinion offered, and  
22 that an expert opinion based on  
23 speculation or conjecture is  
24 inadmissible."

25 The CWF scenario is fundamentally speculative.



1 Chapter 3 of the Final EIR/EIS, Exhibit

2 SWRCB-102 states (reading):

3 "While the analysis for  
4 Alternative A (sic) in the resource  
5 chapters utilizes H3+ modeling results,  
6 actual operations will ultimately depend  
7 on the results of the adaptive management  
8 program."

9 This is on Page 3-262.

10 The cross-examination of Gwen Buchholz,  
11 Kristin White, Erik Reyes and other Panel 1 and Panel 2  
12 witnesses also show that the CWF H3+ and BA H3+  
13 operational scenarios are speculative.

14 For example, the Coordinated Operating  
15 Agreement assumptions about withdrawals from upstream  
16 reservoirs are speculative. Transcript, March 1st,  
17 2008, 181-3 to 182-2.

18 The cross-examination testimony of Mr. Reyes  
19 also shows that the CWF H3+ CalSim modeling does not  
20 accurately represent current or proposed future  
21 operations.

22 The -- For example, the Oroville carryover  
23 storage targets do not represent current operations  
24 carried into the future. Transcript, March 1st, 2017,  
25 88-1 to 94-7 and 124-17 to 125-14.

1           The CWF H3+ modeling thus fails the basic  
2 steps of verification and validation which is defined  
3 in Exhibit DDJ-105, Page 15.

4           The CalSim II model outputs are inputs to the  
5 DSM-II temperature and biological models. DSM-II is  
6 documented in Exhibit DWR-1015, testimony of Tara  
7 Smith, Page 3-9 to 11; and biological models is  
8 documented in Exhibit DWR-1012, testimony of Marin  
9 Greenwood, Page 54 at 12 to 14.

10           The Petitioners' tiered modeling of CWF H3+  
11 and BA H3+ operational impacts is thus fundamentally  
12 deficient to be used as foundational evidence for a  
13 major water right change.

14           Based on the above points and authorities, I'm  
15 moving to exclude:

16           Page 10 at 13 to 26 and Page 12 at 2 to 11 of  
17 the testimony of Gwen Buchholz, Exhibit DWR-1010;

18           Page 3 at 21 to Page 4 at 2; Page 4 at 28 to  
19 Page 5 at 6; Page 6 at 24 to Page 8 at 11; Page 8 at 22  
20 to Page 9 at 5; Page 22 and 20 to Page 22 -- at 20 to  
21 22; Page 22 at 25 to 26; Page 23 at 6 to Page 29 at 9;  
22 Page 23 at 13 to 19; Page 24 at 13 to 15; Page 25 at 2  
23 to 26 at 2; Page 26 at 7 to 26 at 9; Page 26 at 19 to  
24 21; Page 27 at 14 to 28; Page 28 at 15 to 29; Page 28  
25 at 15 to Page 29 at 4 -- correction -- Page 34 at 14 to

1 30 -- Page 34 at 14 to Page 36 at 10; Page 38 at 14 to  
2 19; Page 39 at 9 to 39 at 17 -- Page 39 at 9 to Page 39  
3 at 17; Page 43 at 2 to 7; Page 47 at 7 to 11; Page 48  
4 at 28 to 49 at 5; Page 49 at 13 to 50 at 9; Page 50 at  
5 19 to 22; Page 51 at 9 to 15; Page 53 at 10 to 54 at 7;  
6 Page 54 at 17 to 73 at 5; and Page 73 at 6 to 74 at 17,  
7 of the testimony of Marin Greenwood, Exhibit DWR-1012.

8           The testimony of Richard Wilder, Exhibit  
9 DWR-1013, I'm moving to exclude: Page 2 at 21 to 25;  
10 Page 6 at 9 -- 9 at 7 at 11; Page 7 at 16 to 28; Page 8  
11 at 8 to 8 at 21; Page 10 at 3 to 14, at 28; Page 13 at  
12 14 to 16 of 16; Page 17 at 3 to 5; Page 19 at 1 to 7,  
13 Page 30 at 12 to 31 -- Page 30 at 12 to 31 at 7;  
14 Page 32 at 9 to 17; Page 33 at 10 to 13; Page 34 at 14  
15 to 35 at 11; Page 37 at 7 -- at 7 to Page 40 at 3;  
16 Page 42 at 11 to Page 44 at 13; Page 44 at 17 to 26;  
17 Page 45 at 18 to 46 at 2; Page 49 at 18 to Page 56 at  
18 8; Page 57 at 5 to 57 at 22.

19           For the testimony of Tara Smith, Exhibit  
20 DWR-1015, I'm moving to exclude: Page 3 at 13; and  
21 Page 42 at 14.

22           The testimony of Erik Reyes, Exhibit DWR-1016,  
23 I'm moving to exclude: Page 3 at 7 to Page 4 at 12;  
24 Page 6 at 26 to Page 7 at 18; Page 8 at 5 to Page 8 at  
25 18; Page 9 at 2 to Page 12 at 24; Page 14 at 20 to

1 Page 15 at 21; Page 17 at 8 to 12.

2 The testimony of Douglas Rischbieter, Exhibit  
3 DWR-1024: Page 3 at 5 to 12; Page 4 at 22 to 24;  
4 Page 5 at 9 to 13 and 22 to 25; and Page 7 at 8 to 9.

5 And I'm also moving to exclude the graphs in  
6 Exhibit DWR-1069 at Page 24 to 75 showing proposed  
7 compliance.

8 All of this is -- All of these objections are  
9 on the basis of Sargon Enterprises vs. University of  
10 California and In Re: Lockheed Litigation Cases.

11 Both of these cases have -- have occurred  
12 since Decision 1641. And the standards on admission of  
13 scientific evidence under Evidence Code 801 and 802,  
14 which is part of the Board's standards for admissions  
15 of -- of evidence, have changed.

16 So, on -- on this basis, I move to exclude  
17 this testimony and evidence.

18 Thank you.

19 CO-HEARING OFFICER DODUC: Thank you,  
20 Miss Des Jardins.

21 Mr. Mizell or Miss Ansley, your response?

22 MS. ANSLEY: I think that what we would  
23 request of the Hearing Officer: It was clear that  
24 Miss Des Jardins was reading a lengthy list -- or  
25 reading a motion that was pretty much already written,

1 I suppose, and we would request that that be submitted  
2 in writing as there was a lot of lines cited there.

3           If that would be amenable to the Hearing  
4 Officer, we would be happy to respond in writing to any  
5 such motion.

6           CO-HEARING OFFICER DODUC: Miss Morris,  
7 perhaps you have a different suggestion?

8           MS. MORRIS: A couple. Stefanie Morris, State  
9 Water Contractors.

10           I would obviously oppose that. The Board has  
11 allowed this kind of evidence in already in Part 1 and  
12 Part 2 -- I'm sorry -- in Part 1, this exact kind of  
13 evidence. And so I -- I would move to oppose it right  
14 now.

15           And to the extent that the Board would like  
16 a -- is going to entertain motions that move to strike  
17 multiple pieces of testimony, instead of reading those  
18 motions into the record, perhaps we could have some  
19 kind of procedure where the nature -- and very brief --  
20 and which testimony, just these three people. And then  
21 the Board could decide whether it should be read orally  
22 or whether it should be submitted in writing for  
23 efficiency purposes.

24           CO-HEARING OFFICER DODUC: Miss Wehr, did you  
25 wish to add something or are you just moving closer?

1 MS. MORRIS: We have a separate issue.

2 CO-HEARING OFFICER DODUC: Oh, separate issue.

3 MS. ANSLEY: And I would be happy to argue  
4 some of those points if the Hearing Officer would like  
5 to entertain oral argument.

6 CO-HEARING OFFICER DODUC: All right. That's  
7 enough.

8 Miss Des Jardins, I appreciate the research  
9 you did. Obviously, you put a lot of time into this.  
10 However, I am overruling your objection and striking  
11 your motion based on -- Government Code 11513(c) which  
12 we operate under, says, if responsible people relied on  
13 data and evidence in conduct of serious affairs, we are  
14 admitting it.

15 As far as your other citations or concern,  
16 some of it goes to the weight of the evidence which we  
17 will accord to this testimony, but other than that, I  
18 am denying your motion and we are now moving on to  
19 Miss Wehr.

20 Oh, unless Miss Morris has a different issue.

21 MS. MORRIS: Yes. Sorry. I wasn't quick  
22 enough.

23 Miss Wehr and I were discussing her witness  
24 Dr. Petrie, and she has informed me that she tried to  
25 trade positions with San Luis Delta-Mendota Water

1 Authority and Westlands, and that wasn't available as  
2 an option.

3           So I was hoping to suggest that -- and  
4 Miss Wehr can say if it's amenable to her -- that this  
5 witness go separate from the panel later this afternoon  
6 so that, given the late notice and the 48-hour  
7 requirement, in fact, that we're trying to be as  
8 efficient in cross, trying to trade a party now for  
9 Monday would be extremely difficult and I would rather  
10 try to move this witness or set aside.

11           I understand his direct testimony is 15  
12 minutes. And I've conferred with the Department and  
13 State Water Contractors I speak for, so we think we  
14 have about maybe 10 to 15 minutes of cross for this  
15 witness.

16           CO-HEARING OFFICER DODUC: But you don't  
17 know --

18           MS. MORRIS: I --

19           CO-HEARING OFFICER DODUC: -- what other  
20 parties may have.

21           MS. MORRIS: I apologize. I don't know what  
22 other parties may have.

23           CO-HEARING OFFICER DODUC: You need to take  
24 lesson from Miss Meserve in terms of doing these  
25 informal time estimates.

1           So the proposal is to carve out a separate day  
2 and time for your witness?

3           MS. WEHR: I will try to switch with the  
4 parties that immediately aren't -- succeed our panel so  
5 as not to disturb folks' preparation for cross.

6           If there is at the end of the day some time  
7 for Mr. Petrie to testify directly, the rest of my  
8 panel, we would prefer that. But I know the Water  
9 Authority's panel would like to conclude, if possible,  
10 today.

11           So I don't know --

12           CO-HEARING OFFICER DODUC: Well, to the extent  
13 there are no objections from someone who's perhaps  
14 watching who wants to conduct cross-examination and  
15 expected that he would appear next week so he's hereby  
16 not here today.

17           All right. With that, we will now turn to  
18 cross-examination by Miss Des Jardins with some  
19 assistance from Dr. Fries.

20           MS. DES JARDINS: This is Dierdre Des Jardins  
21 with California Research. And assisting me with  
22 examination is Dr. David Fries, who is the Conservation  
23 Chair for the San Joaquin County Audubon Society and  
24 has birded in the Delta for 20 years, and has also  
25 participated in surveys -- bird surveys that have been



1 the basis of published scientific studies.

2 Dr. Fries' Statement of Qualifications is  
3 Exhibit DDJ-214.

4 I'm going to begin -- Oh, I'm going to begin  
5 by asking a question to John Bednarski about the  
6 Alternative 4A, and then I'll turn my cross-examination  
7 over to Dr. Fries.

8 We may have more than an hour. If we do,  
9 I'll -- I'll ask Dr. Fries to estimate the time  
10 remaining. He does have extensive written questions  
11 prepared on the impacts on terrestrial species from  
12 this very large project.

13

14 Chris Earle,  
15 Doug Rischbieter,  
16 and  
17 John Bednarski

18 called as witnesses by the Petitioners, having  
19 previously been duly sworn, were examined and testified  
20 further as follows:

21

22 MS. DES JARDINS: So can we pull up Exhibit  
23 DDJ-254, please.

24 (Exhibit displayed on screen.)

25 MS. DES JARDINS: This is --

1 CROSS-EXAMINATION BY

2 MS. DES JARDINS: Mr. Bednarski, you're doing  
3 a request for qualifications for an Engineering Design  
4 Manager?

5 MS. ANSLEY: I'm sorry?

6 MS. DES JARDINS: This was a request for  
7 qualifications for an Engineering Design Manager.

8 Are you aware of this process?

9 WITNESS BEDNARSKI: Yes, I am.

10 MS. DES JARDINS: Let's go to Page 30.

11 MS. ANSLEY: Pardon me. The screens aren't  
12 on, so --

13 MS. DES JARDINS: This is a request for  
14 qualifications number 10138585 for a California  
15 WaterFix Engineering Design Manager.

16 And Mr. Bednarski recognized it.

17 I'd like to go to Page 30.

18 MR. MIZELL: I'd like to lodge an objection.

19 The witness wasn't able to recognize it  
20 because it wasn't on the screen. He may have answered  
21 that he was --

22 MS. DES JARDINS: Are you familiar with this  
23 request for qualifications?

24 WITNESS BEDNARSKI: Yes, I am.

25 My previous response was geared more towards

1 did I know that that was out being advertised right  
2 now, and, yes, I do know it is.

3 MS. DES JARDINS: Okay. Let's go to Page 30.

4 (Exhibit displayed on screen.)

5 MS. DES JARDINS: Let's scroll down.

6 (Exhibit displayed on screen.)

7 MS. DES JARDINS: Can we zoom out, please.

8 (Exhibit displayed on screen.)

9 MS. DES JARDINS: Yeah. Keep scrolling.

10 (Exhibit displayed on screen.)

11 MS. DES JARDINS: See where it says (reading):

12 "Design services by EDM Contractor."

13 So this -- Let's go to the next page.

14 (Exhibit displayed on screen.)

15 MS. DES JARDINS: And it says (reading):

16 "The EDM will provide the following  
17 design services" including, "Conduct  
18 operational studies to establish or  
19 verify design criteria for facility sizes  
20 and establish the flow and control  
21 requirements between new and existing  
22 facilities."

23 So the design criteria are subject to change  
24 once you get into more detailed preliminary design  
25 for -- for facility sizes and flow and control?

1 WITNESS BEDNARSKI: That -- That's a question?

2 MS. DES JARDINS: Yes.

3 WITNESS BEDNARSKI: Are they?

4 I would say they're open for refinement around  
5 the basic criteria that's already been set up in the  
6 Final EIR/EIS and the Conceptual Engineering Report.  
7 It would not include a complete reconfiguration of the  
8 design criteria.

9 MS. DES JARDINS: Let's go to -- Can we scroll  
10 down to Number 10, please.

11 (Exhibit displayed on screen.)

12 MS. DES JARDINS: (Reading):

13 "Advance the conceptual engineering  
14 to set final configuration of the  
15 following facilities:

16 "Tunnel sizes, alignments, and  
17 grades, determine location and  
18 configuration of all shaft sites and  
19 other related appurtenances including  
20 access roads and barge landings."

21 So this is -- seems to indicate that the  
22 conceptual engineering doesn't have the final tunnel  
23 sizes, aligns -- and alignments?

24 WITNESS BEDNARSKI: Yeah. It -- It's our  
25 understanding that the information that's presented in

1 the Conceptual Engineering Report, again, along with my  
2 previous testimony, is a worst-case situation to  
3 identify the maximum im -- impacts as far as footprints  
4 of facilities and things like this. Again, this would  
5 be refinements of the existing criteria, not wholesale  
6 changes to that.

7           And as far as the -- the final location of  
8 facilities, if we were to come upon, after doing  
9 detailed surveying and mapping of the different  
10 locations, perhaps some wetlands that needed to be  
11 avoided, then we would probably make recommendations to  
12 slightly move the location of some of these facilities  
13 to avoid those types of situations.

14           MS. DES JARDINS: So the -- the maps that have  
15 been put out to date are -- are still -- are subject to  
16 further refinement; is that correct?

17           WITNESS BEDNARSKI: Yes. I believe that's  
18 been our position all along, that our conceptual  
19 engineering represents a -- a 5 to 10 percent design  
20 effort.

21           As we get additional information in place,  
22 such as the mapping, such as the geotechnical  
23 information, such as our meetings with some of the  
24 regulatory bodies that we need to meet with in order to  
25 get permits, that there could be modifications made to

1 the -- the facilities that are presently shown in the  
2 mapbooks and the CER.

3 MS. DES JARDINS: And so, just verifying:  
4 That goes for the location and configuration of all  
5 shaft sites?

6 WITNESS BEDNARSKI: I'm -- I'm sorry?

7 MS. DES JARDINS: It says that -- under A,  
8 that you will -- that the -- you will -- you will set  
9 final configuration of the location -- you will  
10 determine the location and configuration of all shaft  
11 sites, the Engineering Design Manager.

12 WITNESS BEDNARSKI: Yes, they will. But their  
13 starting point will be what is presently indicated in  
14 the Conceptual Engineering Report and --

15 MS. DES JARDINS: And, again (reading):  
16 ". . . Will set final configuration of  
17 the intakes, including sedimentation,  
18 basin, drying lagoons, conduits, and  
19 outlets."

20 WITNESS BEDNARSKI: Yes. As I've presented in  
21 Part 1 and also in my testimony in Panel 1 and in  
22 Panel 3 now, we have a 5 to cent -- 5 to 10 percent  
23 design effort on the intakes, including all of these  
24 facilities that are listed under Bullet B, and we will  
25 be refining those.

1           There will be Fish Facility Technical Teams  
2 set up to be providing additional input into the  
3 design. And we will be expecting that the Engineering  
4 Design Manager may be involved in making those  
5 revisions to the intakes in those areas that it's  
6 necessary.

7           MS. DES JARDINS: And it also -- You also -- C  
8 indicates that (reading):

9           ". . . The final configuration of the  
10           Intermediate Forebay with inlet and  
11           outlet structures and control" --  
12           Has yet to be finished?

13           WITNESS BEDNARSKI: Again, a global response  
14 to all these items is that, as I've indicated before,  
15 that we have completed a 5 to 10 percent design effort  
16 for all of these facilities, and there is more work,  
17 obviously, that needs to be done.

18           And so we have provided ourselves with this  
19 RFQ at the Engineering Design Manager, the flexibility  
20 to have this firm commence that work so that we can get  
21 it to the point that we can turn it over to the final  
22 Design Engineers that can then take that finalized  
23 concept and turn it into a complete set of drawings and  
24 specifications for construction bids.

25           MS. DES JARDINS: What about Number 8, which

1 says (reading):

2                   "Prepare hydraulic and surge  
3                   analyses to conform (sic) facility  
4                   configuration/sizing and to determine  
5                   system response under various operational  
6                   scenarios."

7                   What kind of hydraulic and surge analyses is  
8 this talking about?

9                   WITNESS BEDNARSKI: We have conducted, again,  
10 a preliminary conceptual-level hydraulic and surge  
11 analysis of the entire system. That's been documented  
12 in the CER.

13                   We plan to now conduct a final -- set the  
14 final hydraulic rate and do an analysis of potential  
15 surge through that system.

16                   Once the systems are finally configured and  
17 the location of each is exactly determined, you know,  
18 as one of our very early activities, work activities.

19                   MS. DES JARDINS: And so -- Let's go to --  
20 down for Number 10e, the next page.

21                   (Exhibit displayed on screen.)

22                   MS. DES JARDINS: And it says (reading):

23                   ". . . Have not yet determined the final  
24                   configuration of the pumping plant and  
25                   the surge protect -- surge structures."



1 Is that correct?

2 WITNESS BEDNARSKI: Yes. Again, as I  
3 mentioned just a few minutes ago, as to the extent of  
4 our existing design, the extent of our existing  
5 geotechnical information, the extent of our existing  
6 mapping in the areas, we would be refining each of  
7 these different facilities as part of the California  
8 WaterFix.

9 MS. DES JARDINS: And let's go back up to  
10 Item 4.

11 (Exhibit displayed on screen.)

12 MS. DES JARDINS: So it says (reading):

13 "Geotechnical Investigation  
14 Teams . . . will perform primary  
15 geotechnical exploration for the  
16 California WaterFix."

17 Is it the case that geotechnical data may  
18 change the configuration proposed in the Conceptual  
19 Engineering Report for alignments?

20 WITNESS BEDNARSKI: Yes, I think there is that  
21 possibility.

22 As I discuss this matter in responding to the  
23 question with Mr. Brodsky yesterday, there is a  
24 question about what type of pile system would be used  
25 at the intakes for one example.

1           And our geotechnical information will help us  
2 finalize both the -- the understanding of the -- the  
3 ground conditions at each of the intakes, and then the  
4 design criteria that we'll need for developing the  
5 design of these piles.

6           So that would just be one example of many,  
7 many throughout the entire length of the WaterFix  
8 facilities.

9           MS. DES JARDINS: And then when it says, under  
10 9 (reading):

11                   "Conduct seismic hazards assessment  
12                   to establish criteria for seismic design  
13                   of Project facilities."

14           Has the seismic design criterion not yet been  
15 determined?

16           WITNESS BEDNARSKI: It has generally been set  
17 in the CER. And, again, there is a chapter in the  
18 Conceptual Engineering Report that addresses this. But  
19 a more detailed analysis would be conducted now in this  
20 stage of the work, and a better understanding of how  
21 different structures would interact with one another  
22 under the final conditions would be -- would be  
23 developed.

24           MS. DES JARDINS: And so you're not going to  
25 use the seismic -- seismic criteria from the Delta Risk

1 Management Study?

2 WITNESS BEDNARSKI: I'm not sure if that's  
3 referenced in the CER. I don't recall.

4 But our initial assumptions for the seismic  
5 hazards for the WaterFix facilities are outlined in the  
6 CER.

7 MS. DES JARDINS: Okay. Thank you.

8 That's all. And now I wanted to turn the  
9 cross-examination over to David.

10 CROSS-EXAMINATION BY

11 DR. FRIES: Okay. Let's go.

12 I'm going to start asking some questions of  
13 Dr. Earle.

14 And your testimony, as you gave it earlier,  
15 addressed only a few of the many controversial aspects  
16 of the WaterFront -- Fix and was aimed mostly as  
17 aspects in Stone Lakes.

18 So, if we Project Dr. Earle's testimony,  
19 DWR-1014, Page 3, please.

20 And I don't think we need to read through that  
21 because I don't think Dr. Earle will have any problem  
22 with my next few questions.

23 (Exhibit displayed on screen.)

24 MS. DES JARDINS: Let -- Let's go ahead and  
25 read it for a minute. I want to -- It's at Line 9.

1 (Reading):

2 "The 2017 Certified Final EIR,  
3 composed in part of the 2016 FEIR/S,  
4 examines impacts to numerous species that  
5 collectively comprise all wildlife  
6 potentially presently in the Project  
7 vicinity . . ."

8 And gives citations about where the impact  
9 determinations for biological resources are and states  
10 (reading):

11 "None of the FEIR/S impacts to  
12 species are significant and unavoidable;  
13 all are less than significant, or less  
14 than significant with mitigation."

15 Do you recognize that statement, Dr. Earle?

16 WITNESS EARLE: Yes, I do.

17 MS. DES JARDINS: Okay. So Dr. Fries has some  
18 questions about various wildlife.

19 CO-HEARING OFFICER DODUC: Miss Ansley?

20 MS. ANSLEY: I'm going to object on two  
21 grounds:

22 I'm -- I'm going for, again, to starting the  
23 process of extensively reading into the record  
24 testimony. But I'm not objecting specifically to just  
25 the reading of that short excerpt.

1           But I will object to someone reading the first  
2 part of what they intend to quote, then paraphrasing  
3 the middle -- and I understand why she did it -- and  
4 then picking up the quote elsewhere.

5           If we're going to quote from the testimony, I  
6 prefer the record to be absolutely clear. And that's  
7 all I have to say.

8           CO-HEARING OFFICER DODUC: I think that's  
9 enough. Thank you, Miss Ansley.

10           Let's -- Let's do this, just to help speed  
11 things along:

12           When you bring up a portion of -- this goes  
13 for everybody -- of a witness' testimony, just  
14 reference the line number, allow the witness a chance  
15 to review it. We do not need to quote or paraphrase;  
16 okay?

17           DR. FRIES: Thank you.

18           My questions were going to be to that effect  
19 and it would be:

20           Dr. Earle, your testimony states that the  
21 WaterFix Final EIR includes the changes made in the --  
22 made in the development after the document that's part  
23 of the EIR, and it examines impacts to all wide life --  
24 wildlife potentially present in Project vicinity; is  
25 that correct?

1           WITNESS EARLE: I didn't entirely follow the  
2 first part of your question.

3           But if you're asking if the 2017 Certified  
4 FEIR examines impacts to all wildlife present in the  
5 Project vicinity, then I would say that, generally,  
6 that is an accurate statement.

7           There is possibly some wiggle room in the  
8 definition of "wildlife." For instance, it does not  
9 address noxious non-native species such as Norway Rat,  
10 for instance.

11          DR. FRIES: That's fine.

12          And then, as it states in the document on the  
13 Board, that the EIR has stated that (reading):

14                 ". . . Impacts . . . are less than  
15                 significant, or less than significant  
16                 with mitigation" of all the species  
17                 considered.

18          Is that correct?

19          WITNESS EARLE: Yes, that is correct.

20          DR. FRIES: Okay. Please go to Page 12.

21                 (Exhibit displayed on screen.)

22          DR. FRIES: And, here, you're addressing  
23 wildlife at Stone Lakes.

24          And my question would be: Do the same details  
25 and your opinion apply to the entire California

1 WaterFix construction zones or areas?

2 WITNESS EARLE: Would you please clarify your  
3 question?

4 DR. FRIES: Well, you --

5 WITNESS EARLE: When you say "the same  
6 details," I'm not sure --

7 DR. FRIES: You're making statements here  
8 about effects on wildlife in Stone Lakes.

9 And I'm saying if that same specie lives,  
10 habitats, forages in areas throughout the construction  
11 zone, do the same principles for protection apply?

12 WITNESS EARLE: In general, I would agree with  
13 that statement.

14 Again, I'm still unclear what details you are  
15 referring to. The -- The text that's currently  
16 projected on screen refers to, for instance, managing  
17 (reading):

18 ". . . Habitat to shift Crane roost sites  
19 away from risk zones created by new  
20 transmission lines."

21 That is an example of a detail, if you will,  
22 that would apply regardless of where in the Project  
23 area we're discussing.

24 DR. FRIES: Okay. Let's keep going.

25 So my question, then, would be: If, in --

1 Well, let's go to Lines 9 to 11.

2 (Exhibit displayed on screen.)

3 DR. FRIES: And it says (reading):

4 "California WaterFix would avoid  
5 most potential impacts by performing  
6 surveys and avoiding occupied habitat for  
7 most sensitive wildlife species."

8 Again, this is applied here to Stone Lakes.

9 And my question: Does it apply throughout  
10 construction zone?

11 WITNESS EARLE: I think you may be referring  
12 to another part of my testimony. That -- That text  
13 does not appear on this page.

14 DR. FRIES: That's Page 11 (sic). On -- On  
15 Page 13, Page 9 -- I mean, Line 11, Page 13.

16 MS. DES JARDINS: Let's go to Page 13 and pull  
17 up Line 9.

18 Yeah.

19 WITNESS EARLE: If you're referring to the  
20 text on Page -- on Lines 9 to 11, starting with,  
21 "CDF -- CWF would avoid most potential impacts," then,  
22 yes, that -- that is my testimony.

23 DR. FRIES: Yes.

24 And then my question to that was: That's  
25 applied -- You -- You made that statement relative to



1 wildlife in Stone Lakes.

2           And my question: Are we applying that same  
3 principle throughout the construction zone?

4           WITNESS EARLE: That commitment applies to all  
5 impacts potentially attributed to --

6           DR. FRIES: Thank you.

7           WITNESS EARLE: -- WaterFix.

8           DR. FRIES: So if a sensitive wildlife species  
9 is found, what happens to construction in that zone?

10          WITNESS EARLE: That is somewhat variable  
11 between species.

12          In general, if -- if occupation of the site by  
13 a species is seasonal, such as in the case of the  
14 Greater Sandhill Crane or, indeed, most of the wildlife  
15 species out there, then clearing of its habitat would  
16 occur at a time of the year when it has been verified  
17 by surveys that the species are not present.

18          DR. FRIES: But if you find a -- say, a  
19 protected species in the zone, what happens to  
20 construction at that time in that zone?

21          MS. ANSLEY: Objection.

22          CO-HEARING OFFICER DODUC: Miss Ansley.

23          MS. ANSLEY: The witness --

24          CO-HEARING OFFICER DODUC: Sorry. Is it  
25 Anzlee (phonetic) or Aneslee (phonetic)? I keep saying

1 different things.

2 MS. ANSLEY: I think sometimes I do, too,  
3 because people have trouble spelling it.

4 Aneslee (phonetic).

5 CO-HEARING OFFICER DODUC: Ansley.

6 MS. ANSLEY: And then my objection is that  
7 merely the -- the witness just answered -- So the  
8 question is vague and ambiguous because the witness  
9 answered that it's dependent upon the species we are  
10 talking about.

11

12 And so the last question, again, asked, "If  
13 you would find a listed species in a construction zone,  
14 what would you do?"

15 I'm sure Dr. Earle is happy to answer specific  
16 questions about specific --

17 DR. FRIES: I asked --

18 MS. ANSLEY: -- species.

19 DR. FRIES: -- specifically a protected  
20 species in the zone.

21 CO-HEARING OFFICER DODUC: Any --

22 DR. FRIES: First was a broader question;  
23 second was a specific question as to a protected  
24 species where there's no take.

25 CO-HEARING OFFICER DODUC: Two -- Two things,

1 Dr. Fries.

2 First of all, welcome.

3 DR. FRIES: Thank you.

4 CO-HEARING OFFICER DODUC: But please keep in  
5 mind that the court reporter cannot handle multiple  
6 conversations, so only one person speaks at a time. No  
7 jumping in, interrupting, overlapping.

8 And, secondly, Dr. Earle, are you able to  
9 answer just on the listed specie caveat or do you need  
10 more information?

11 WITNESS EARLE: I would note that the term  
12 "listed species" addresses approximately 30 different  
13 species that are potentially present in the Project  
14 area.

15 However, I also did note that Dr. Fries'  
16 question addressed the effects that might occur after  
17 construction had begun once, presumably, the site had  
18 been cleared.

19 And, there again, protocols are specified in  
20 the avoidance and minimization measures describing what  
21 would be done if an animal is found there.

22 Such protocols are also specified in the  
23 Incidental Take Permit and in the -- the Biological  
24 Opinion issued by U.S. Fish and Wildlife Service.

25 In general, a . . . authorized biologist

1 recognized by CDFW and/or U.S. Fish would -- would be  
2 called to supervise the -- the capture and removal of  
3 that individual from the site.

4 DR. FRIES: Let me try to phrase it a little  
5 bit different as an example.

6 So if in the middle of the -- of an active  
7 construction zone you find a Swainson's Hawk nest, what  
8 happens to construction until some mitigation or  
9 adaptive management occurs?

10 WITNESS EARLE: Well, to begin with, that  
11 particular -- particular outcome is -- is somewhat  
12 inconceivable because surveys for Swainson's Hawk nests  
13 would occur prior to construction activities.

14 And seasonal surveys would also be -- be  
15 performed. And if Swainson's Hawk were observed in the  
16 process of establishing a nest in close proximity to  
17 construction, the -- the jurisdictional wildlife  
18 agency -- which in this case is just CDFW -- would be  
19 notified and an appropriate response would be  
20 negotiated with CDFW.

21 DR. FRIES: So you don't think there would be  
22 any situation where a protected species may be found  
23 that would cause the stoppage of construction?

24 WITNESS EARLE: On the contrary. Stoppage of  
25 construction is one of the things that is mandated when

1 an individual of a protected species is found on the  
2 construction site.

3 DR. FRIES: Thank you. That's what I had  
4 thought you would reply.

5 Dr. -- Mr. Bednarski, is it correct that the  
6 large tunneling machines, when they're in operation,  
7 will cause some vibration to the surface structures?

8 WITNESS BEDNARSKI: I believe that there is  
9 the potential for that to occur. We -- We believe that  
10 that possibility is -- is very low and possibly, if it  
11 was, would not be noticeable, or it would be at a  
12 negligible level.

13 DR. FRIES: Would that depend on what you're  
14 boring through?

15 WITNESS BEDNARSKI: Conceivably, it could,  
16 based on the technology of the machines that are being  
17 used.

18 But our analysis was based on what we  
19 understand the ground to be in the Delta: Saturated  
20 silt, sands, and clay material, not -- not hard rock  
21 conditions.

22 DR. FRIES: But you don't know because you're  
23 going to do all these technical -- geological technical  
24 surveys; correct?

25 WITNESS BEDNARSKI: We don't know with

1 absolute certainty, but we do have some information,  
2 and we have not come across any out -- rock  
3 outcroppings in any of those investigations so far.

4 DR. FRIES: Okay. Can we make it an "if"  
5 question?

6 If vibrations are caused on the surface, and  
7 if these vibrations cause disruption of nesting of  
8 certain protected species, say, a California Black  
9 Rail, would the machines be shut down?

10 MR. MIZELL: Objection: So --

11 CO-HEARING OFFICER DODUC: Mr. Mizell.

12 MR. MIZELL: Yes.

13 I'd like to think that I've been rather  
14 patient. We've allowed a -- a fair amount of  
15 questioning this morning of Mr. Bednarski on general  
16 engineering concepts contained in Requests for  
17 Proposals and the design of the facilities.

18 I'd like to remind the questioners that  
19 Mr. Bednarski is here for recreation-based impacts due  
20 to the construction, not to discuss, necessarily,  
21 impacts of vibrations on an avian species, as the  
22 question would like an answer to.

23 CO-HEARING OFFICER DODUC: But might that  
24 question be answered by Dr. Earle?

25 DR. FRIES: That's where I meant to direct the

1 question. Thank you.

2 MR. MIZELL: Exactly.

3 So if the questioner can redirect it to the  
4 appropriate witness, that would be nice.

5 CO-HEARING OFFICER DODUC: The question is  
6 hereby redirected to Dr. Earle.

7 WITNESS EARLE: Would you please repeat --  
8 repeat the question?

9 DR. FRIES: If I may, if I can remember.

10 If vibrations by the machines are caused on  
11 the surface -- or any other underground activity, and  
12 you're putting these big concrete cylinders in place,  
13 so forth -- could cause vibrations on the surface.

14 If that occurs, and if it disturbs a nesting  
15 species -- protected species such as the California  
16 Black Rail, would machines be shut down?

17 WITNESS EARLE: I understand your question to  
18 concern the effects of construction-caused noise and  
19 vibration on wildlife species potentially present in  
20 the construction vicinity.

21 This is a potential impact that's addressed in  
22 the EIR and in the Incidental Take Permit Application  
23 and the -- the Biological Assessment.

24 In general, there has been no evidence found  
25 that construction by noise and vib -- that vibrations

1 specifically caused by sources such as heavy road  
2 traffic, would have effects on the species that are  
3 addressed in these documents.

4           For some of these species, such as the  
5 California Red Lake Frog and the Giant Garter Snake  
6 when it's in a burrow, there is some evidence that  
7 there may be a behavioral response. Some measures  
8 would be implemented to minimize the risk of that.

9           But, in general, this is -- this is an  
10 indirect effect that would potentially affect the  
11 species. It was not identified as potentially causing  
12 incidental take, and the avoidance and minimization  
13 measures that are presented in the wildlife evaluation  
14 documents were found by the agencies to be sufficiently  
15 protective.

16           I would note that there is no evidence that we  
17 encountered that tunnel boring machine-generated  
18 vibration has potential effects on these species.

19           Also, the -- the question specifically  
20 mentioned California Black Rail. I should note the  
21 California Black Rail is a protected species. I  
22 believe it's listed as endangered under the Endangered  
23 Species Act.

24           U.S. Fish and Wildlife Service has agreed that  
25 there's no potential for it to occur in the Project



1 area.

2 DR. FRIES: Okay. I think -- I don't . . .

3 Just . . .

4 Okay. Let me ask Dr. Earle one -- one more  
5 question right now.

6 Still, we're going to look at DWR-1014. I'm  
7 on Page 12, and I'm looking at Lines 20 to 26.

8 (Exhibit displayed on screen.)

9 DR. FRIES: And I think maybe you just  
10 answered this but I want to get it repeated.

11 In your list of affected wildlife species  
12 here, you have left out other species such as the  
13 California Black Rail.

14 And why is that?

15 WITNESS EARLE: As I've mentioned, the Black  
16 Rail has been determined and agreed by the fish and  
17 wildlife agencies not to occur in the area potentially  
18 affected by the California WaterFix.

19 The -- Parenthetically, I might mention that  
20 the list of species presented here is essentially a  
21 short list of all the different species and species  
22 groups addressed in the Final EIR/EIS.

23 DR. FRIES: Okay. Let me make a big jump  
24 right here in my questions and just get right to this  
25 point.

1 Let me find my place. Just a second.

2 Please put up Exhibit DDJ-246, please.

3 (Exhibit displayed on screen.)

4 DR. FRIES: And scroll down to the title page,  
5 please.

6 (Exhibit displayed on screen.)

7 DR. FRIES: Dr. Earle, are you familiar with  
8 this paper?

9 WITNESS EARLE: I am not familiar with this  
10 paper. I have seen it before; I have not read through  
11 it recently.

12 DR. FRIES: You have seen it before.

13 WITNESS EARLE: Yes.

14 DR. FRIES: Good.

15 This article "Distribution and Habitat  
16 Associations of the California Black Rail" is familiar  
17 to you, as you state.

18 Can we go to Page 7.

19 MS. ANSLEY: Objection: Misstates his  
20 testimony.

21 He said that he was -- he -- I'm going to try  
22 not to butcher my words now.

23 He said that he was aware of the study, he had  
24 reviewed the study, but he is not currently familiar  
25 with this study.

1 And I'm sorry to be so picky, but he says--

2 CO-HEARING OFFICER DODUC: That's what  
3 attorneys do.

4 So noted.

5 MS. ANSLEY: Thank you.

6 CO-HEARING OFFICER DODUC: We'll allow  
7 Dr. Fries to continue and Dr. Earle will answer to the  
8 best of his recollection.

9 DR. FRIES: Let's go to Page 7, please.  
10 There's a map on Page 7.

11 (Exhibit displayed on screen.)

12 DR. FRIES: You can see it much better on the  
13 far one than the -- than the close one.

14 I don't know if you can see the --

15 WITNESS EARLE: Mr. Baker --

16 DR. FRIES: -- table at the top --

17 WITNESS EARLE: -- could we zoom in, please.

18 DR. FRIES: Can you see the table at the top?

19 (Exhibit displayed on screen.)

20 DR. FRIES: And it's comparing two surveys.

21 But the survey at the top is the 2009-2011  
22 survey done by the authors of this paper we're looking  
23 at.

24 And can you see that they surveyed 107 sites  
25 in the Delta. And in those sites, they found 20 --

1 Among those sites, they found 21 sites where Black  
2 Rails are present.

3 WITNESS EARLE: I see that.

4 DR. FRIES: And can you see on the map that  
5 the authors have shaded areas red where they found  
6 Black Rails?

7 WITNESS EARLE: Yes, I see that.

8 DR. FRIES: Thank you.

9 You made a statement earlier that Black Rails  
10 weren't present.

11 Do you still stand by that statement?

12 WITNESS EARLE: I believe I made a statement  
13 to the effect that the fish and wildlife agencies had  
14 agreed that Black Rails were not present.

15 DR. FRIES: Thank you.

16 Just to kind of clarify this study and how it  
17 was done:

18 If we roll back to Page -- to the title page  
19 quickly.

20 (Exhibit displayed on screen.)

21 DR. FRIES: Just roll down just a little  
22 farther to the Abstract.

23 (Exhibit displayed on screen.)

24 DR. FRIES: And you can see there in about the  
25 third or fourth line when the survey was done.

1 And what time of year was that, Dr. Earle?

2 WITNESS EARLE: (Examining document.)

3 Could we please scroll to the Methods section  
4 of the paper.

5 DR. FRIES: Well, it's in the Abstract but we  
6 could go to Methods, too.

7 (Exhibit displayed on screen.)

8 WITNESS EARLE: And you've just passed it.

9 MS. DES JARDINS: There it is. Go back.

10 (Exhibit displayed on screen.)

11 WITNESS EARLE: Where it says "Survey Methods"  
12 in the right column. If you --

13 (Exhibit displayed on screen.)

14 WITNESS EARLE: There we go .

15 It says (reading):

16 "Call-playback Surveys performed  
17 by -- on foot from March to May 2009 to  
18 2011."

19 DR. FRIES: Okay. My question to that would  
20 be:

21 Is that time of year the breeding system --  
22 the breeding season for the Black Rail?

23 WITNESS EARLE: Although the breeding season  
24 is somewhat variable depending on where you are in the  
25 range of this species, I presume that, for a

1 Call-Playback Survey to be effective, the birds would  
2 have to be breeding at that time.

3 DR. FRIES: Thank you.

4 So you do know -- Do you agree that only the  
5 male Black Rail makes the call "kick-ee-doo"; is that  
6 correct?

7 WITNESS EARLE: I agree that that is the  
8 general interpretation --

9 DR. FRIES: Okay.

10 WITNESS EARLE: -- of the call-playback  
11 response.

12 DR. FRIES: And so when call-playback is made  
13 and the male answers, there's probably a female around,  
14 too; is that correct?

15 Possibly --

16 WITNESS EARLE: That -- That is --

17 DR. FRIES: -- a female around, too; is that  
18 correct?

19 WITNESS EARLE: The -- The male that is  
20 responding to the call is responding because they've  
21 established a territory, and that indicates that they  
22 have either acquired or are seeking to acquire a mate.

23 DR. FRIES: Yes.

24 And when one plays a Rail call, if there's no  
25 answer, does that mean no Rails are present?

1           WITNESS EARLE: It does not necessarily mean  
2 that.

3           DR. FRIES: So other sites surveyed may also  
4 have Black Rails; is that correct?

5           WITNESS EARLE: That is the purpose of  
6 performing the report -- repeated surveys at each site  
7 is to identify the potential for those false negatives.

8           DR. FRIES: So, finding Black Rails in 21  
9 sites, plus a strong possibility that more Rails are  
10 present at other sites, establishes that there are  
11 quite a few numbered -- or quite a -- a few Black Rails  
12 in the Delta.

13           Do you agree?

14           WITNESS EARLE: I would note that my previous  
15 remarks did not state that Black Rails are not present  
16 in the Delta. The presence of Black Rails in the Delta  
17 has been known for decades.

18           What I stated was that the agencies had agreed  
19 that California WaterFix was not going to affect the  
20 Black Rails. California WaterFix footprint is much  
21 smaller than the extent of the entire Delta.

22           DR. FRIES: I've read through the EIR, and I  
23 don't see any reference in it of this kind of numbers  
24 listed in the EIR of Black Rails in this construction  
25 zone.

1           And if we go to the maps, say, on Page 13 --  
2           Well, there's another couple questions about  
3 it.

4           The -- The paper also talks about habitat  
5 association.

6           Would you describe what "habitat association"  
7 is.

8           WITNESS EARLE: Are you asking me about  
9 habitat associations referred to --

10          DR. FRIES: I am asking you --

11          WITNESS EARLE: -- in the paper --

12          DR. FRIES: -- to explain the habitat.

13          WITNESS EARLE: -- that we're -- that we have  
14 up on the screen?

15          CO-HEARING OFFICER DODUC: Dr. Fries, one at a  
16 time.

17          DR. FRIES: I'm sorry.

18          WITNESS EARLE: I -- I previously indicated  
19 that I've not reviewed this paper closely and,  
20 therefore, I do not know what the interpretation they  
21 give of the words "habitat association."

22          DR. FRIES: I think it's a general term that  
23 biologists use to identify . . . habitat with certain  
24 animal occupation.

25          CO-HEARING OFFICER DODUC: Is that a -- Was



1 that a question?

2 DR. FRIES: Is that your understanding of this  
3 term?

4 WITNESS EARLE: I would agree that biologists  
5 often use the term in that sense. I would also note  
6 that they often argue about it.

7 And I would note that, at least in the BDCP --  
8 which was a proposed action that would have potentially  
9 affected the California Black Rail -- we developed a  
10 model of the distribution of Black Rail habitat in the  
11 Delta and -- and provided a map of where it's  
12 potentially going to be occurring.

13 The analysis of that kind did not appear in  
14 the EIR/EIS because, as I've previously indicated,  
15 the -- the fish and wildlife agencies indicated that  
16 they felt the species was not going to be present in  
17 the area affected by the California WaterFix.

18 Consequently, discussion of the Black Rail in  
19 the EIR/EIS is limited to a table --

20 And, I'm sorry, I can't refer exactly where it  
21 is without going back and going through the EIR/EIS. I  
22 believe it's in an appendix.

23 -- a table of species that were considered for  
24 potential impacts and stated rationale for excluding  
25 those species from the analysis.

1 DR. FRIES: Please scroll back to the title  
2 page.

3 (Exhibit displayed on screen.)

4 DR. FRIES: And look at the authors of this  
5 article.

6 (Exhibit displayed on screen.)

7 DR. FRIES: Dr. Earle, do you know the authors  
8 of this article?

9 WITNESS EARLE: I know Mr. Bradbury.

10 DR. FRIES: Do you know that all three of  
11 these authors work for or at least have strong  
12 connections with DWR?

13 WITNESS EARLE: The text currently projected  
14 on scr -- the screen indicates that each of those  
15 authors has some formal connection with California  
16 Department of Water Resources.

17 DR. FRIES: Did you write the EIR on the  
18 terrestrial species?

19 WITNESS EARLE: I was not an author of the  
20 EIR.

21 DR. FRIES: Who -- Who wrote the EIR? Who was  
22 responsible for writing it?

23 WITNESS EARLE: Many people.

24 I . . . I can't give you a comprehensive  
25 list.

1 DR. FRIES: Do you know who they worked for?

2 WITNESS EARLE: It's . . . It's kind of hard  
3 to say.

4 They all either worked for or were  
5 subcontractors to either ICF or DWR.

6 DR. FRIES: So, DWR scientists published this  
7 paper on Black Rails, and DWR scientists must have had  
8 a footprint -- an input into writing the EIR.

9 Do you agree?

10 WITNESS EARLE: I agree. Certainly,  
11 Mr. Bradbury did.

12 DR. FRIES: Then how do you think this  
13 article, this paper, got missed in writing the EIR?

14 MR. MIZELL: Objection: Both assumes facts  
15 not in evidence, as well as speculating.

16 CO-HEARING OFFICER DODUC: Sustained.

17 DR. FRIES: Do you think this article should  
18 have been missed in writing the EIR?

19 MR. MIZELL: Objection: Similar grounds.

20 CO-HEARING OFFICER DODUC: Sustained.

21 MS. DES JARDINS: May I phrase a question?

22 I'd like to say: Do you think this article  
23 should have been included and referenced in the EIR?

24 MR. MIZELL: Objection: Same implication,  
25 that this article is not included in any references to

1 the EIR/EIS.

2 CO-HEARING OFFICER DODUC: Try asking whether  
3 Dr. Earle knows if this study was considered in the  
4 analysis.

5 WITNESS EARLE: As I've previously stated, the  
6 fish and wildlife agencies indicated that, in their  
7 opinion, Black Rail was not present in the areas that  
8 would be subject to effects of construction and  
9 operation of the California WaterFix and, for that  
10 reason, the species was excluded from the analysis.

11 At no time was it stated in any of the  
12 environmental documents that I've discussed in my  
13 testimony that Black Rail does not occur in the  
14 Sacramento-San Joaquin Delta.

15 CO-HEARING OFFICER DODUC: But, as far as this  
16 particular article is concerned, do you have any  
17 information as to whether it was considered?

18 WITNESS EARLE: I do not.

19 CO-HEARING OFFICER DODUC: Thank you.

20 DR. FRIES: Let's talk about good science.  
21 If good science is followed, would this  
22 article have been discovered?

23 MR. MIZELL: Objection: Vague and ambiguous  
24 as to what the questioner means by "good science."

25 CO-HEARING OFFICER DODUC: Thank you.

1 Dr. Fries, "good science"?

2 DR. FRIES: Should I define "good science" for  
3 you? Is that what you would like?

4 CO-HEARING OFFICER DODUC: I'm sustaining the  
5 objection, yes.

6 DR. FRIES: Okay. I think throughout this  
7 EIR --

8 CO-HEARING OFFICER DODUC: Don't explain it to  
9 me, Dr. Fries. Explain it to Dr. Earle in the context  
10 of how you would like him to answer your question.

11 Because his definition of "good science" may  
12 be different from yours, may be different from mine,  
13 and it is his expertise that you are seeking at the  
14 moment.

15 DR. FRIES: Dr. Earle, to your knowledge, in  
16 the preparation of the EIR and all of the work by the  
17 Delta Stewardship Council, are you aware that,  
18 consistently, the . . . preparers of the EIR argued  
19 that best science was used in writing the ER -- EIR?

20 WITNESS EARLE: I believe the standard you're  
21 referring to is "best-available science."

22 And, yes, I'm aware that that was one of the  
23 performance standards adhered to in preparation of the  
24 EIR and also of the Incidental Take Permit Application  
25 and the Biological Assessment.

1 DR. FRIES: Okay. That -- Fine.

2 In terms of best-available science, was or  
3 should have this article been available?

4 WITNESS EARLE: I . . . believe that this  
5 article was published in 2011, in which case it was  
6 available.

7 DR. FRIES: It was published in '15. It  
8 was -- The survey was done earlier.

9 WITNESS EARLE: In that case, it would have  
10 been available to documents prepared subsequent to its  
11 publication.

12 DR. FRIES: So, then, my answer (sic) to, "Was  
13 best-available science followed," do you agree that it  
14 was or wasn't?

15 WITNESS EARLE: I would -- I believe that it  
16 was.

17 DR. FRIES: How so? Would you please explain.

18 If this article is available and wasn't  
19 considered, how is that best -- following best science  
20 available?

21 CO-HEARING OFFICER DODUC: Objection.

22 The witness has not -- has said that he does  
23 not know whether or not it was considered.

24 Mr. Mizell, pay attention, please.

25 (Laughter.)

1 DR. FRIES: Okay. Let's just follow this  
2 article just a little bit further.

3 Let's go back to -- Well, let's go to Page 18  
4 the citations.

5 (Exhibit displayed on screen.)

6 DR. FRIES: And, here, I'm looking at the  
7 citation of work by Gifford and Karlton, referring to  
8 Black Rail Survey performed in 1992-93.

9 And if we went back to Page 7, then . . .

10 (Exhibit displayed on screen.)

11 DR. FRIES: . . . in the table at the top,  
12 that -- findings of that article are -- or that survey  
13 are listed.

14 And that would be the 1992-93 survey. That's  
15 the survey of Mr. Gifford -- Gifford.

16 Now would you please put up DDJ-240 -- 247.

17 (Exhibit displayed on screen.)

18 DR. FRIES: I know you don't recognize this or  
19 I doubt you do.

20 Do you recognize it at all?

21 WITNESS EARLE: It looks like a familiar part  
22 of the world.

23 DR. FRIES: It's -- It is; isn't it?

24 This is the map that Dan Gifford made of his  
25 survey.

1           All right. Are -- The red spots are the spots  
2 where Black Rails were detected. The blue spots is  
3 where he surveyed and they weren't detected.

4           Mr. Gifford worked at that time -- he's  
5 retired now -- for California Fish and Wildlife and the  
6 survey is done for them. And this is the article that  
7 is referenced and found by the authors -- the DWR  
8 authors of the previous paper.

9           MR. MIZELL: I'd like to lodge an objection.

10          CO-HEARING OFFICER DODUC: Mr. Mizell,  
11 objection on what grounds?

12          MR. MIZELL: On what grounds.

13          That this map doesn't set forth any of the  
14 detail that was just made on the record.

15          I do understand that we will proceed under the  
16 assertion that the questioner is correct, but I do have  
17 to make that timely objection.

18          CO-HEARING OFFICER DODUC: So noted, but we  
19 will proceed.

20          Dr. Fries, please ask your question.

21          DR. FRIES: Well, it's a simple question.

22          Do you see that, in 1992-93, a number of Rail  
23 sites with live Rails responding to calls are found in  
24 the Delta?

25          WITNESS EARLE: I see that there are a number



1 of red and blue dots depicted on this figure.

2 I have not reviewed the research by California  
3 Department of Fish and wildlife to which you refer.  
4 Therefore, I'm not familiar with -- with either the  
5 methods that they used or the significance of a  
6 positive finding as presumably indicated by a red dot  
7 on this figure.

8 DR. FRIES: Can you look at this map and see  
9 that many of the areas where the red dots are were  
10 red -- where Black Rails were found is -- or are in the  
11 construction zones?

12 WITNESS EARLE: Frankly, no. It would -- It  
13 would help a great deal to see a version of this map  
14 that had the construction footprint included on it.

15 MS. DES JARDINS: Are they in the vicinity of  
16 the proposed construction zone?

17 WITNESS EARLE: It would help a great deal to  
18 have a version of this map that had the construction  
19 footprint shown on it.

20 DR. FRIES: Do you see on this map the very  
21 top? There's a lot of blue dots right there.

22 As it turns out -- Do you know which island is  
23 to the north and the south of those dots?

24 WITNESS EARLE: Perhaps if we could zoom in,  
25 they are labeled.

1 (Exhibit displayed on screen.)

2 DR. FRIES: I don't think they're labeled on  
3 this map.

4 Do you see that the waterway going through the  
5 top is Potato Slough?

6 WITNESS EARLE: If it is so labeled, it is  
7 illegible to me.

8 DR. FRIES: The -- The island at top is  
9 Bouldin Island. Do -- in the top middle.

10 Do you agree?

11 CO-HEARING OFFICER DODUC: I don't think he  
12 can agree, so let -- because none of us can actually  
13 read it.

14 So why don't we assume that is the case and,  
15 Dr. Fries, ask your question.

16 Miss Morris.

17 MS. MORRIS: Sorry. I'm -- I -- I have to  
18 object just assuming that's the case.

19 I mean, this is a -- a document that has  
20 specific things that the witness -- or that the  
21 questioner is trying to point out. And we don't have  
22 the right location. We cannot -- It's illegible. I  
23 don't think we should -- I -- I object to assuming --

24 CO-HEARING OFFICER DODUC: Miss Morris --

25 MS. MORRIS: -- a location on the record.

1 CO-HEARING OFFICER DODUC: -- we don't even  
2 know what his question is, so let's wait until he asks  
3 the question.

4 And you may voice your objection then or  
5 Mr. Mizell may voice his objection then, but let's hear  
6 what the question is.

7 Dr. Fries.

8 DR. FRIES: And perhaps I can get a better  
9 map. Let's see how this other map is labeled.

10 CO-HEARING OFFICER DODUC: Dr. Fries, is it  
11 possible to ask your question without referring to a  
12 map?

13 DR. FRIES: I thought the geography of -- of  
14 the experts would be better than it is.

15 I mean, anyone who's really done much work in  
16 the Delta --

17 CO-HEARING OFFICER DODUC: Yes. Well,  
18 he'll -- I will anticipate an objection to strike, and  
19 we'll just -- just move on from there. Let's not go  
20 there, Dr. Fries.

21 DR. FRIES: Okay. I can be vague -- ask vague  
22 questions at this particular point.

23 If the island at the top is Bouldin Island --

24 CO-HEARING OFFICER DODUC: Let's stop right  
25 there.

1 Dr. Earle, are you familiar with the specifics  
2 of Bouldin Island?

3 WITNESS EARLE: I would not describe myself as  
4 familiar with Bouldin Island. I've not, to my  
5 knowledge, visited that island.

6 However, that doesn't necessarily mean that  
7 I'm incapable of answering the mysterious question that  
8 lies in our future.

9 CO-HEARING OFFICER DODUC: All right.  
10 Dr. Fries, ask your question.

11 DR. FRIES: Well, I can also ask  
12 Mr. Bednarski. He -- I think he could identify Bouldin  
13 Island and --

14 CO-HEARING OFFICER DODUC: Can I --

15 DR. FRIES: -- tell us.

16 CO-HEARING OFFICER DODUC: Can I hear -- yes.  
17 Tell us. Tell us the question.

18 DR. FRIES: And tell us what construction is  
19 planned on that island.

20 CO-HEARING OFFICER DODUC: Miss Morris, are  
21 you objecting now?

22 MS. MORRIS: Can we be clear that, for the  
23 record, the question is the Bouldin Island?

24 CO-HEARING OFFICER DODUC: I'm sorry?

25 MS. MORRIS: Can we be clear for the record

1 that the question is the Bouldin Island. He said "that  
2 island."

3 CO-HEARING OFFICER DODUC: Bouldin Island.

4 DR. FRIES: It's Bouldin Island. What did I  
5 say?

6 What construction is planned on Bouldin Island  
7 as far as California WaterFix is concerned?

8 WITNESS BEDNARSKI: The main activities --  
9 Because there's -- there's a number of activities that  
10 will take place there.

11 But the main activities will be driving  
12 tunnels from that location and placing the reusable  
13 tunnel material in stockpiled areas for permanent  
14 storage there.

15 DR. FRIES: And there's a dock there, too; is  
16 that correct?

17 WITNESS BEDNARSKI: There is not an existing  
18 dock, no.

19 DR. FRIES: There is a planned barge landing  
20 for the south part of this island.

21 Is that not correct?

22 WITNESS BEDNARSKI: Yes, it is, along Potato  
23 Slough.

24 DR. FRIES: Thank you.

25 And the island to the south is Venice Island?

1 WITNESS BEDNARSKI: To the best of my  
2 knowledge -- I can't read that, but I believe Venice is  
3 immediately south of Bouldin Island, yes.

4 DR. FRIES: Yes. And there's construction  
5 planned for that island also.

6 WITNESS BEDNARSKI: There is the potential for  
7 a tunnel shaft at that lo -- on Venice island, and that  
8 will be determined in the preliminary and final design  
9 as to whether we need that location or not.

10 DR. FRIES: And, Mr. Bednarski, does the  
11 tunnel route and construction area continue just for --  
12 straight south almost from there through Venice, down  
13 to Mandeville, down to Bacon Islands?

14 WITNESS BEDNARSKI: Generally speaking, yes,  
15 it continues south from --

16 DR. FRIES: And --

17 WITNESS BEDNARSKI: -- that location.

18 DR. FRIES: -- can you see that these  
19 locations where Rails are found, both on this map and  
20 on the previous map, are all in the vicinity -- or many  
21 are in the vicinity of the construction area?

22 CO-HEARING OFFICER DODUC: Miss Morris.

23 MS. MORRIS: Objection as to being able to see  
24 anything on this map, which is not labeled, and is --

25 DR. FRIES: We could go back, please -- I'm

1 sorry.

2 WITNESS EARLE: If -- If I may interject.

3 It was my understanding, according to  
4 Dr. Fries' earlier testimony, that these many blue dots  
5 that we see in Venice Island --

6 CO-HEARING OFFICER DODUC: He's not  
7 testifying.

8 WITNESS EARLE: -- are places where the  
9 authors of this map did not succeed in finding Black  
10 Rails; that, in fact, the red dots correspond to  
11 locations of Black Rails as they were located in 1993.

12 DR. FRIES: Yeah, but --

13 CO-HEARING OFFICER DODUC: Dr. Fries.

14 DR. FRIES: Let's go back to Page 7 of

15 DDJ . . .

16 MS. DES JARDINS: 246.

17 DR. FRIES: 246. Maybe it's a clearer map.

18 (Exhibit displayed on screen.)

19 DR. FRIES: Yes.

20 Same zones, same areas of Rail discovery.

21 And my question is simple: Aren't Rails found  
22 often in the vicinity of the construction area?

23 CO-HEARING OFFICER DODUC: Asked and answered.

24 DR. FRIES: Do you agree?

25 CO-HEARING OFFICER DODUC: Asked --

1 MR. MIZELL: Objection: Asked and answered.

2 CO-HEARING OFFICER DODUC: Sustained.

3 DR. FRIES: And I didn't hear the answer.

4 CO-HEARING OFFICER DODUC: Dr. Earle has  
5 previously answered -- Unless you're directing the  
6 question elsewhere, Dr. Earle had twice now, I believe,  
7 said that he would need to have the construction zone  
8 superimposed on this graph.

9 Correct, Dr. Earle?

10 WITNESS EARLE: That is correct.

11 CO-HEARING OFFICER DODUC: Miss Meserve.

12 MS. MESERVE: Thank you. Osha Meserve for  
13 LAND, et al.

14 I would like to make a request that I think  
15 would make me and maybe other Protestants a little more  
16 comfortable in that the defending attorneys make the  
17 objections initially.

18 Obviously, the Hearing Officer must rule on  
19 them, and I understand you're trying to move the  
20 hearing forward, but it does make me pretty  
21 uncomfortable to have the objections coming from up  
22 there.

23 CO-HEARING OFFICER DODUC: So noted,  
24 Miss Meserve. I will not be the same when your  
25 witnesses are up here.



1 Mr. Jackson.

2 But to the extent, though, that we are  
3 repeating, retreading grounds, it is inefficient, and I  
4 do reserve the right to move things along.

5 MR. JACKSON: Yes. I'd like to agree with  
6 Miss Meserve.

7 It -- I understand you're moving things along,  
8 but, to -- to build our record in regard to a number of  
9 issues, it is important that we be allowed to ask  
10 questions.

11 CO-HEARING OFFICER DODUC: I agree.

12 MR. JACKSON: And to -- to talk about this  
13 labeling problem, the -- I would object --

14 CO-HEARING OFFICER DODUC: I'm sorry,  
15 Mr. Jackson, the labeling problem?

16 MR. JACKSON: Yeah. The -- The -- The maps  
17 don't have particular names on them. They don't have  
18 the footprint on them.

19 These are maps from the files of public  
20 agencies. As such, we're allowed to rely on them for  
21 cross-examination.

22 CO-HEARING OFFICER DODUC: Yes.

23 MR. JACKSON: And so the -- Anybody who lives  
24 in the Delta can see that the locations of the red dots  
25 are along the -- are along the -- the line for the

1 tunnels.

2           So, arguing about that from government  
3 documents seems to me to be simply trying to continue  
4 the fact that these documents in the government's hands  
5 were not used.

6           And this Rail is in the fully protected part  
7 of California law.

8           So . . . It just seems to me that we ought to  
9 be able to use government maps, and I -- I object until  
10 we can.

11           CO-HEARING OFFICER DODUC: I am totally  
12 confused because haven't we spent the last half an hour  
13 on these documents? Which means we are using them.

14           MR. JACKSON: The point we're trying to make  
15 is that they were either negligent or intentionally  
16 excluded the locations of the Rails from the government  
17 documents when they wrote the EIR.

18           CO-HEARING OFFICER DODUC: That is your --  
19 Never mind.

20           MS. ANSLEY: Yeah. I would make that  
21 objection. I'm sure Tripp was about to as well, and  
22 Stef.

23           CO-HEARING OFFICER DODUC: Fine. Sustained.  
24 Move on, please.

25           You are running out of time, Dr. Fries. How

1 much additional questioning do you have?

2           And I would suggest that, if you have a more  
3 critical line of questioning, we move on to it.

4           DR. FRIES: I think there's an important line.

5           Let's go to SWRCB-108, Page 108.

6           CO-HEARING OFFICER DODUC: Let's do this:

7           I need to give the court reporter --

8           (Exhibit displayed on screen.)

9           CO-HEARING OFFICER DODUC: -- a break at  
10 around 11:00. I will give you until that time to wrap  
11 up your cross-examination.

12           MS. DES JARDINS: I also wanted to ask -- I  
13 have a question about funding for U.S. Fish and  
14 Wildlife Service that goes with this line of  
15 questioning, and I would like to request some time to  
16 ask -- And I can give an offer of proof about what the  
17 question is, if required.

18           But I would like -- Dr. Earle did spend quite  
19 a lot of time, and I know he's not the most efficient  
20 questioner, but I would like to have a chance to ask  
21 his questions as well.

22           CO-HEARING OFFICER DODUC: Let Dr. Fries  
23 finish up his line of questioning.

24           I believe we have the pleasure of your  
25 cross-examination for another hour on behalf of

1 Mr. Porgans, and perhaps --

2 MS. DES JARDINS: If -- If I can introduce the  
3 exhibits that I have under DDJ under Porgans, but I  
4 don't have -- might have to rename some.

5 CO-HEARING OFFICER DODUC: I didn't catch that  
6 last part.

7 MS. DES JARDINS: I have exhibits that are  
8 named DDJ that have to do with the fish and wildlife  
9 funding, and I'd have to rename them to Porgans,  
10 because I can't introduce documents for Porgans -- for  
11 Patrick Porgans as -- as Dierdre Des Jardins.

12 CO-HEARING OFFICER DODUC: Ah, I understand  
13 your dilemma.

14 (Ms. Morris approaches podium.)

15 MR. DEERINGER: Sorry. Go ahead.

16 MS. MORRIS: I don't object -- I don't -- I  
17 think any wit -- any cross-examiner can use any other  
18 exhibits that are put up, so I don't object to  
19 Miss Des Jar-- Des Jardins using her exhibits to  
20 cross-examine for Porgans if it's Mr. Porgans'  
21 questions that she's actually asking.

22 CO-HEARING OFFICER DODUC: I believe she wants  
23 to ask her questions.

24 MS. DES JARDINS: No.

25 CO-HEARING OFFICER DODUC: Never mind.

1 MS. DES JARDINS: No. I did work with Patrick  
2 Porgans on his own line of questioning.

3 This was mine. And I did have some followup  
4 questions that related to Fish and Wildlife Service --

5 CO-HEARING OFFICER DODUC: Okay. Let's --

6 MS. DES JARDINS: -- funding.

7 CO-HEARING OFFICER DODUC: We're using up  
8 Dr. Fries' time, so let him finish his  
9 cross-examination, please.

10 MS. DES JARDINS: Thank you.

11 CO-HEARING OFFICER DODUC: Oh, let's give him  
12 until 11:00.

13 DR. FRIES: I have so much I'd like to cover.

14 CO-HEARING OFFICER DODUC: And, Dr. Fries,  
15 you --

16 DR. FRIES: Let me --

17 CO-HEARING OFFICER DODUC: Hang on. Hang on.  
18 We won't start the clock yet.

19 One of the things that I typically ask  
20 everyone is to give me an outline of topics you'll be  
21 covering. That helps me consider extra time as needed.

22 So, what additional lines of questioning do  
23 you have for these witnesses?

24 DR. FRIES: I have a number of -- number of  
25 other questions about Black Rail and Black Rail

1 habitat, and some comments in the EIR.

2 I have a number of questions about how the  
3 Tricolored Blackbird is mitigated.

4 I have a number of questions about what is  
5 good science and how it should have been used.

6 I have a couple questions about, particularly,  
7 the barge site at the south of Bouldin Island and how  
8 it impacts all three of the testimonies that the  
9 witnesses have given, both transportation, navigation,  
10 and recreation, and wildlife.

11 I have a statement relative -- I think it's  
12 important -- to California public trust and how we  
13 should be considering it as a part of this,  
14 particularly some of the things with good science, and  
15 a couple of things I have to -- I'd like to be put into  
16 the record.

17 CO-HEARING OFFICER DODUC: All right. I would  
18 encourage you to move as quickly as possible through  
19 that.

20 DR. FRIES: Okay. So --

21 CO-HEARING OFFICER DODUC: We'll revisit at  
22 1:00 -- We will revisit after the break.

23 But do move things along. And to the extent  
24 that we have already covered some of this issue, we  
25 will not be repeating them.

1 DR. FRIES: So we have projected on Page 108  
2 at the bottom of the page, please.

3 (Exhibit displayed on screen.)

4 DR. FRIES: It says (reading):

5 "With regard to California Black

6 Rail" populations . . ."

7 And it reads through, and it says (reading):

8 ". . . the Tidal Natural Communities

9 Restoration proposed for the Delta Smelt

10 would serve as nesting and foraging

11 habitat for . . . Rails (sic)."

12 I challenge the word -- use of the word

13 "would" there.

14 And I would like Dr. Earle to tell me if

15 habitat for Black Rail is the same or even nearly the

16 same as habitat used by Delta Smelt.

17 WITNESS EARLE: I would first note that I'm

18 not appearing here as an expert on Delta Smelt habitat.

19 However, the proposed mitigation in managed

20 Wetland Natural -- in Tidal Natural Communities --

21 restoration of Tidal Natural Communities, would be

22 cited in areas approved as being sufficient as Delta

23 Smelt habitat.

24 This is because California WaterFix has

25 commitments for restoring Tidal Natural Communities for

1 the benefit of Delta Smelt. It has no such commitments  
2 for Black Rail.

3 To the extent that that habitat was suitable  
4 for Black Rail, it would potentially serve as nesting  
5 and foraging habitat for the Rail.

6 It is not the intent of the EIR/EIS to -- to  
7 represent all of that habitat, which has not yet been  
8 cited as being suitable for Black Rail. And site  
9 selection and design would only be contingent upon the  
10 needs of Black Rail insofar as it was prescribed by  
11 California Department of Fish and Wildlife.

12 DR. FRIES: So my point is that "would" there  
13 is a positive statement, and based on that word, it's  
14 concluded somewhere downline that no significant impact  
15 occurs.

16 I mean, I think "would" -- use of "would"  
17 there is a positive statement that it -- Maybe a  
18 better -- Would you agree a better word there might be  
19 "might"?

20 WITNESS EARLE: I think in order to really  
21 answer that question, we would have to scroll down and  
22 see what the -- the conclusion of this impact analysis  
23 is.

24 (Exhibit displayed on screen.)

25 DR. FRIES: I don't want to do that, but



1 that's okay if you'd like to.

2 I'd like for you to go to the last sentence of  
3 that -- this paragraph and explain what that sentence  
4 means, please.

5 WITNESS EARLE: (Examining document.)

6 The sentence you're referring to states  
7 (reading):

8 "In consideration of these factors,  
9 the description of less-than-significant  
10 impacts to this species under  
11 Alternative 4A, presented in Chapter 12,  
12 remains accurate."

13 DR. FRIES: No. I'm looking, I think --

14 WITNESS EARLE: That is the final sentence in  
15 the paragraph.

16 DR. FRIES: I'm looking at the sentence -- If  
17 we read through -- We started with a paragraph "With  
18 regard to." And I guess I didn't copy out the full  
19 paragraph in what I'm look -- looking at.

20 I'm looking at the sentence (reading):

21 "Should such refinement (sic) --  
22 Should such refrinements (sic) --  
23 refinements entail unexpected impacts, it  
24 is possible that supplemental review  
25 documents may be necessary under CEQA and

1 (sic) NEPA."

2 WITNESS EARLE: And I believe that doc -- that  
3 is self-explanatory, but to provide a little  
4 background:

5 The specific sites for mitigation of impacts  
6 to both terrestrial and wildlife species have, for the  
7 most part, not been identified in the environmental  
8 documents completed to date.

9 And once specific sites are selected, it may  
10 be appropriate to reinitiate consultation on species  
11 affected by restoration at those sites. And it may be  
12 necessary to -- to have additional CEQA or NEPA  
13 compliance in order to -- to achieve the proposed  
14 restoration.

15 DR. FRIES: So such things are dependent on  
16 what's described earlier in that paragraph as  
17 "unexpected impacts"; is that correct?

18 WITNESS EARLE: I don't think this paragraph  
19 provides a -- a full explanation of the potential legal  
20 drivers of Reinitiation of Consultation or potential  
21 for additional CEQA or NEPA analysis, but certainly  
22 that -- that is one potential mechanism.

23 DR. FRIES: Yeah. I'm looking up a couple.  
24 It says, as detailed in Chapter 3, Section 3322.  
25 "However, potential impacts to such habitat,"

1 et cetera.

2           So, my question is, then, who decides when  
3 these unexpected impacts are significant?

4           And then who decides when supplement --  
5 supplemental reviews are necessary?

6           WITNESS EARLE: Apart from the CEQA and NEPA  
7 processes completed already, determ -- determination of  
8 significant impacts would -- would occur in subsequent  
9 CEQA reviews, as -- as we've been discussing.

10          DR. FRIES: As I read it, it says that if  
11 significant discoveries are made, new discoveries that  
12 impact protected species such as the Black Rail are  
13 found, that supplemental documents are necessary for  
14 CEQA -- or could be necessary for CEQA and NEPA.

15          Do you agree with that?

16          WITNESS EARLE: Yes.

17          DR. FRIES: Thank you.

18          If Supplemental EIR documents to CEQA are  
19 required, is there an opportunity for public input?

20          WITNESS EARLE: I believe that there is.

21          DR. FRIES: Thank you.

22          CO-HEARING OFFICER DODUC: Dr. Fries, if  
23 you're moving on to a next line of questioning, now  
24 would be a good time for a break.

25          DR. FRIES: Fine. Thank you.

1 CO-HEARING OFFICER DODUC: All right. We'll  
2 return at 11:15.

3 (Recess taken at 10:59 a.m.)

4 (Proceedings resumed at 11:15 a.m.):

5 CO-HEARING OFFICER DODUC: All right. It is  
6 11:15. We are back in session.

7 Dr. Fries, how much additional time do you  
8 anticipate needing?

9 DR. FRIES: As much as you'll give me.

10 (Laughter.)

11 CO-HEARING OFFICER DODUC: Nice try. Nice  
12 try.

13 DR. FRIES: I'm going to try to ask some  
14 questions about best-available science, maybe one or  
15 two.

16 I would like --

17 CO-HEARING OFFICER DODUC: Let's go there,  
18 then. Let's go to public trust.

19 DR. FRIES: You want to go to public trust?

20 CO-HEARING OFFICER DODUC: I mean, good  
21 science, public trust, those were two things that --  
22 that you mentioned in your list earlier.

23 DR. FRIES: I would like to go there to that,  
24 and I would really like to look at the map construction  
25 on --

1 CO-HEARING OFFICER DODUC: Microphone, please.

2 DR. FRIES: -- the dock at Bouldin Island.

3 CO-HEARING OFFICER DODUC: Microphone.

4 DR. FRIES: Oh, I'm sorry.

5 I'd like to look at the map also of the

6 proposed barge landing at Bouldin Island.

7 CO-HEARING OFFICER DODUC: Let's do this:

8 I -- I would -- At this time, Mr. Mizell, do you

9 anticipate redirect?

10 Or how much redirect do you anticipate?

11 MR. MIZELL: I can only anticipate one,

12 potentially two, questions at this time.

13 CO-HEARING OFFICER DODUC: All right. I would

14 like to be able to complete cross-examination before we

15 take our lunch break, if possible, also redirect and

16 recross, so that these witnesses may be dismissed.

17 So we'll see how it goes.

18 Dr. Fries, let's see if you can wrap up in

19 another 15 minutes so that Miss Des Jardins can then

20 have her shot.

21 DR. FRIES: Please project DDJ-216.

22 (Exhibit displayed on screen.)

23 DR. FRIES: And this is the "Independent

24 Review Panel Report" from "the 2016 . . . California

25 WaterFix Aquatic Science Review . . ."

1 And jump to Page 60, please.

2 MR. MIZELL: Can we have it on screen, please.

3 CO-HEARING OFFICER DODUC: Oh, no screen.

4 MR. BAKER: Pardon me.

5 (Exhibit displayed on screen.)

6 DR. FRIES: Six oh. 60.

7 MR. MIZELL: And if I might just ask my  
8 witnesses:

9 Were you guys able to see the cover Page  
10 sufficiently?

11 WITNESS EARLE: Yes.

12 MR. MIZELL: Okay.

13 DR. FRIES: I'm seeing a Table 3 on Page 60 of  
14 what I have.

15 It's numbered at the bottom.

16 MS. DES JARDINS: Can we search for "Panel  
17 Recommendations" in quotes, please.

18 (Exhibit displayed on screen.)

19 MS. DES JARDINS: "Panel and Recommendations"  
20 in quotes.

21 (Exhibit displayed on screen.)

22 MS. DES JARDINS: In quotes.

23 I'll find it.

24 DR. FRIES: Maybe I should jump to this map.

25 MS. DES JARDINS: Yeah. Go to the map -- Go

1 to the map and I'll find the page number.

2 DR. FRIES: Let's come back there -- I'm  
3 sorry -- to the things -- I thought it was clear.

4 Let me look at my notes.

5 CO-HEARING OFFICER DODUC: Perhaps while  
6 Dr. Fries is looking for his place, Miss Des Jardins,  
7 do you want to ask your questions so that we're not  
8 wasting additional time?

9 MS. DES JARDINS: Yes, that would be great.

10 DR. FRIES: Okay. I have it.

11 MS. DES JARDINS: Oh, he has it.

12 DR. FRIES: Okay. We're looking for the map  
13 for Bouldin Island. It's LAND-2 -- 121, Page 91 --  
14 LAND-121, Page 91, Sheet 43.

15 (Exhibit displayed on screen.)

16 DR. FRIES: Thank you. That's the map I'm  
17 referring to.

18 (Exhibit displayed on screen.)

19 DR. FRIES: Excellent.

20 Dr. -- Or Mr. Bed . . . Bednarski, do you  
21 recognize this map?

22 WITNESS BEDNARSKI: Could -- Could I -- I'm  
23 sorry.

24 Can I go down to the bottom there for the key?

25 (Exhibit displayed on screen.)

1           WITNESS BEDNARSKI: Yeah, I generally do. I  
2 don't have a specific recollection of that map but I --  
3 I generally know where that is.

4           DR. FRIES: I think it's -- Well, it's  
5 certainly from the California WaterFix.

6           If I may quickly describe the map, and maybe  
7 it could be accepted.

8           At the top is Bouldin Island. In the middle,  
9 the waterway, is Potato Slough. And the bottom becomes  
10 Venice Island.

11           The area on the left that looks like a dock I  
12 think represents the dock that's proposed to be built  
13 on Bouldin Island.

14           Is that clear?

15           WITNESS BEDNARSKI: Yes, I -- I believe that's  
16 the barge landing at Bouldin Island on Potato Slough.

17           DR. FRIES: And I think this map was submitted  
18 to the Army Corps of Engineers for approval of the  
19 building of this dock; is that correct?

20           WITNESS BEDNARSKI: I don't believe that's  
21 correct. I don't believe we've submitted anything to  
22 the Army Corps for permits to build any -- any  
23 facilities on this Project at this point.

24           MS. DES JARDINS: This -- LAND-121 is the  
25 submission by the Department of Water Resources to the



1 U.S. Army Corps of Engineers, and the associated maps,  
2 on August 24th, 2015. We could go to Page 1 if  
3 necessary.

4 DR. FRIES: So that would be my point, too.  
5 That's where I got this map, from the application to  
6 the Corps of Engineers.

7 WITNESS BEDNARSKI: Yeah. I just want to  
8 clarify: You specifically said "to build this dock."  
9 I don't know that this submission was made to build the  
10 dock at this point in time.

11 DR. FRIES: Well, I'm very confused. I think  
12 when one applies to the Corps of Engineers to alter a  
13 waterway, they have to be very precise in what they --  
14 what they pretend or intend to do; is that correct?

15 MR. MIZELL: Objection: Calls for a legal  
16 conclusion as to the adequacy of the 404 Permit that's  
17 before the Army Corps of Engineers.

18 CO-HEARING OFFICER DODUC: I don't believe  
19 he's asking about the adequacy. He's asking about the  
20 intention in submitting the application.

21 I don't know that the witness can answer.

22 WITNESS RISCHBIETER: If I could just add:

23 The legend indicates that this is a wetland  
24 delineation map and it was presumably submitted to the  
25 Corps to support application for 404 Permit.

1 DR. FRIES: I -- I didn't understand what he  
2 said.

3 CO-HEARING OFFICER DODUC: And your question  
4 again was, Dr. Fries?

5 DR. FRIES: I was just trying to verify this  
6 map as being specific and where this landing barge --  
7 barge landing would be placed.

8 CO-HEARING OFFICER DODUC: Can anyone answer?

9 WITNESS BEDNARSKI: Yes. That is the location  
10 of our proposed site for the barge landing.

11 DR. FRIES: Then my next question -- Well, I  
12 have three or four of them to all three, of each of the  
13 witnesses.

14 My first question, and I'll ask to  
15 Mr. Bednarski:

16 You often talk about navigation, and you talk  
17 about water depth -- no -- water width.

18 Do you also consider water depth when you say  
19 these waters are navigable?

20 WITNESS BEDNARSKI: That -- That is being  
21 considered. We recognize the fact that these sloughs  
22 and waterways have different depths that would  
23 accommodate different barges with different draft  
24 depths.

25 DR. FRIES: This is an area that I sailed in

1 and am very familiar with. And my question next would  
2 be maybe to Mr. Rischbieter.

3 Are you aware that Potato Slough is the main  
4 anchorage area for sailboats and larger powerboats  
5 during the summer recreational months?

6 MR. MIZELL: Objection: Assumes facts not in  
7 evidence.

8 CO-HEARING OFFICER DODUC: It's a question of  
9 whether he's aware.

10 Overruled.

11 Are you familiar enough to answer,  
12 Mr. Rischbieter?

13 WITNESS RISCHBIETER: No. I am not personally  
14 familiar with the scope or distribution of recreation  
15 activities at this site.

16 DR. FRIES: But in measuring impacts on  
17 recreation, should one know where major recreation  
18 occurs?

19 WITNESS RISCHBIETER: The environmental  
20 analysis in Chapter 15 of the EIR/EIS does acknowledge  
21 that there are some constrictions, though not closures,  
22 to waterways at a number of specific construction  
23 sites.

24 So we do anticipate that there will be impacts  
25 to some recreation activities at the individual

1 construction sites that -- that -- that occur on this  
2 and other waterways, barge landing sites. And the EIR  
3 acknowledges that it -- it is not -- that we do have  
4 mitigation measures in place, though not every impact  
5 is fully mitigated at every site.

6 DR. FRIES: Are you aware of an event called  
7 the Delta Doo Dah?

8 WITNESS RISCHBIETER: No, I'm not familiar  
9 with that special event.

10 DR. FRIES: May I describe it sort of quickly?

11 CO-HEARING OFFICER DODUC: Let's not, since  
12 you are running out of time again.

13 And ask your question, please.

14 DR. FRIES: If this is a major recreational  
15 site for anchorages of sailboats and powerboats during  
16 the summer months, do you agree that there is a  
17 significant, if not detrimental and unavoidable, impact  
18 on recreation in the area?

19 WITNESS RISCHBIETER: The EIR acknowledges  
20 that there is a zone around construction areas which  
21 may impact recreation activities there, though my  
22 testimony does speak to the -- to the diversity of  
23 opportunities and -- and, in fact, the -- the expanse  
24 of recreation opportunities of the type described in  
25 the vicinity of the Delta in terms of miles of

1 waterways and surface acres and so forth.

2 DR. FRIES: Dr. Earle, the island in the  
3 middle of this is identified in the publication by Sal  
4 (phonetic), et al., about Black Rails -- as being  
5 suitable habitat for Black Rails.

6 Are you aware of that?

7 WITNESS EARLE: I am aware that it is  
8 identified in the California WaterFix Final EIR/EIS  
9 as -- as potentially suitable as modeled habitat for  
10 Black Rails.

11 DR. FRIES: If Black Rails are there, should a  
12 dock be built adjacent to it -- or could a jock -- dock  
13 be built adjacent to it without disrupting those Rails'  
14 nesting, foraging activities?

15 WITNESS EARLE: Well, to -- to address this,  
16 I'm afraid I have to -- I have to admit that I was  
17 somewhat misleading in some of my earlier responses to  
18 questions.

19 During the break, I had an opportunity to  
20 review the treatment of Black Rail in the  
21 Final EIR/EIS, and -- And, in fact, impacts to that  
22 species are acknowledged.

23 It's a fully protected species. No incidental  
24 take would occur. That is performance commitment  
25 presented in there.

1           But it is acknowledged that some acres of  
2 habitat would be lost. In fact, a total of  
3 approximately 13.5 acres of model habitat would be lost  
4 and would have to be mitigated --

5           DR. FRIES: How --

6           WITNESS EARLE: -- as --

7           DR. FRIES: How many acres? I'm sorry.

8           WITNESS EARLE: 13.5, I believe.

9           If you'd like, we can pull up the -- the  
10 relevant citation within the Final EIR/EIS.

11           And that anchorage would be mitigated, as we  
12 discussed earlier, through the tidal wetland mitigation  
13 that would be provided for Delta Smelt. At least -- I  
14 think it works out to approximately 8/10ths of  
15 1 percent of the Delta Smelt mitigation would have to  
16 also be suitable habitat for the Black Rail.

17           Now, this island, I believe, is -- is a  
18 portion, perhaps the majority, of the Black Rail  
19 habitat that would be so impacted.

20           DR. FRIES: So this is a potential for a major  
21 impact at this point. Potential for it.

22           WITNESS EARLE: No. This is potential for  
23 loss of Black Rail habitat that would be mitigated  
24 through compensation at another location.

25           (Timer rings.)

1 DR. FRIES: But if the Rail's there, there's a  
2 major impact.

3 THE WITNESS: Impact --

4 MR. MIZELL: Objection: There's no question  
5 pending.

6 DR. FRIES: Isn't that so?

7 CO-HEARING OFFICER DODUC: Dr. Earle.

8 MR. MIZELL: Objection: Asked and answered.

9 CO-HEARING OFFICER DODUC: Sustained.

10 MS. DES JARDINS: Dr. Earle, the EIR proposes  
11 one-to-one restoration of habitat.

12 In your professional opinion, is this  
13 acceptable as good science?

14 WITNESS EARLE: I have not evaluated the  
15 literature on prior habitat mitigation of this kind on  
16 Black Rail, which I would like to do prior to rendering  
17 an opinion whether one-to-one mitigation is acceptable.

18 I would simply note that the agency whose  
19 jurisdiction over protection of this species, the CDFW  
20 has agreed to that habitat mitigation ratio.

21 MS. DES JARDINS: Dr. Earle, do you agree that  
22 mitigation should occur before the existing habitat is  
23 destroyed?

24 WITNESS EARLE: Yes, I do.

25 And I would note that that is the performance

1 commitment identified in the environmental documents.

2 MS. DES JARDINS: To your knowledge, has  
3 mitigation of Black Rails been attempted?

4 WITNESS EARLE: As I just indicated, I have  
5 not yet reviewed the literature on Black Rail  
6 Mitigation Projects and -- and their effectiveness.

7 CO-HEARING OFFICER DODUC: Miss Des Jardins,  
8 Dr. Fries, I've added another 10 minutes. That will be  
9 all the time you have to wrap up your cross-examination  
10 of this panel.

11 On behalf of DDJ, we will then turn to  
12 Miss Des Jardins to conduct cross-examination on behalf  
13 of Mr. Porgans.

14 MS. DES JARDINS: I'm going to ask one those  
15 questions on Tricolored Blackbird while he's looking  
16 through.

17 Do you have --

18 DR. FRIES: We're talking a bit about use of  
19 available best science; correct?

20 Have I asked questions about that?

21 WITNESS EARLE: We have previously discussed  
22 the use of best-available science --

23 DR. FRIES: I have a --

24 WITNESS EARLE: -- in this process.

25 DR. FRIES: -- question going to --



1 CO-HEARING OFFICER DODUC: One at --

2 DR. FRIES: -- DDJ-256.

3 CO-HEARING OFFICER DODUC: One at a time,  
4 please.

5 DR. FRIES: I'd like to quickly go to Page --  
6 to Exhibit DDJ-256.

7 (Exhibit displayed on screen.)

8 CO-HEARING OFFICER DODUC: What page?

9 DR. FRIES: I want -- I would like to look at  
10 Page 12.

11 (Exhibit displayed on screen.)

12 DR. FRIES: And specifically those middle  
13 paragraphs, even though the whole article is very  
14 interesting and should be reviewed.

15 CO-HEARING OFFICER DODUC: Why don't -- Excuse  
16 me. Are --

17 DR. FRIES: I --

18 CO-HEARING OFFICER DODUC: -- you familiar --

19 DR. FRIES: -- have a question --

20 CO-HEARING OFFICER DODUC: -- Quit.

21 Are you familiar with this document?

22 WITNESS EARLE: I am not familiar with this  
23 document. I am aware of its existence. I have not  
24 looked at it since it came out approximately a year and  
25 nine months ago.

1 DR. FRIES: So let's just look at the  
2 paragraph that starts with (reading):

3 "We also express concern that  
4 important recent scientific work was not  
5 included in the massive compilations."

6 Speaking of the EIR there.

7 "In an instant regarding climate  
8 change science, we were told that the  
9 information used in the EIR/EIS was  
10 current enough, and that an EIR/EIS kept  
11 up -- that kept up would 'never get  
12 finished.'"

13 Do you think that's a valid criticism of the  
14 EIR submitted by California WaterFix?

15 MR. MIZELL: Objection.

16 MS. DES JARDINS: Submitted by the Delta  
17 Independent Science Board.

18 DR. FRIES: The comment was submitted by the  
19 Independent Science Board, but it refers to the  
20 EIR/EIS.

21 CO-HEARING OFFICER DODUC: What is your  
22 objection?

23 MR. MIZELL: Compound question.

24 The statement that was just read into the  
25 record consists of two distinct -- no -- two distinct

1 concepts, and I'd like to break them apart so that  
2 Dr. Earle's not asked the question in a confusing  
3 manner.

4 CO-HEARING OFFICER DODUC: Dr. Fries, break it  
5 up.

6 MS. DES JARDINS: (Reading):

7 "We also expressed concern that  
8 important recent scientific work was not  
9 included in the massive compilations."

10 Dr. Earle, was that your impression as well of  
11 the impacts that you testified to?

12 WITNESS EARLE: I am not aware that I  
13 testified to an impasse (sic).

14 I would note, however, that if we look at the  
15 preceding paragraph, it refers to past reviews that  
16 have been performed by this council, which, in fact,  
17 has provided oversight throughout the BDCP Process  
18 going back approximately a decade at this point, and --  
19 and refers to having assessed the scientific  
20 adequacy -- beginning in the previous paragraph -- of  
21 over 50,000 pages of BDCP and California WaterFix Draft  
22 and Final Reports.

23 I acknowledge that there have been multiple  
24 episodes of review and numerous criticisms have --

25 MS. DES JARDINS: Dr. --

1           WITNESS EARLE: -- been addressed in these  
2 past -- past -- in the -- in the course of producing  
3 these documents.

4           So the criticism which you cite to  
5 specifically is not necessarily germane to the  
6 California WaterFix as currently presented.

7           MS. DES JARDINS: Dr. Earle, it states  
8 (reading):

9                   "The absence of coherent and useful  
10 summaries in such massive documents  
11 diminishes the value and perhaps  
12 credibility of this important document as  
13 a comparative guide to the expected  
14 environmental effects of the alternatives  
15 considered."

16           Are you aware of that criticism?

17           MR. MIZELL: Objection: Asked and answered.

18           This is essentially the same question that  
19 Dr. Earle just answered.

20           CO-HEARING OFFICER DODUC: Sustained.

21           DR. FRIES: In your opinion, should have the  
22 EIR/EIS for WaterFix considered climate change and  
23 tidal rise past the 2030 date that is used?

24           WITNESS EARLE: I do not have an opinion on  
25 that point.

1 DR. FRIES: Do you agree that scientific  
2 review boards that have reviewed the EIR/EIS have  
3 constantly criticized this point and recommended that  
4 modeling and projections should be made well beyond  
5 2030?

6 WITNESS EARLE: As, among other things, a  
7 geologist, I recognize that planning and governmental  
8 actions often occur within rather constrained  
9 timeframe.

10 I think it would be interesting to look at the  
11 effects of climate change several hundred years out.

12 But it was determined by lead agencies, in  
13 agreement with each other, that this was an appropriate  
14 timeframe for evaluation of climate change effects, and  
15 I'm willing to respect that determination.

16 DR. FRIES: Then the other half of my comment  
17 questions is the second sentence in that paragraph that  
18 starts with "we."

19 (Reading):

20 "In an instant regarding climate  
21 change scientist (sic), we were told that  
22 the information used in the EIR/EIS was  
23 current enough, and that an EIR/EIS that  
24 kept up to date would 'never get  
25 finished.'"

1           And my question would be, then: Do you agree  
2 with that?

3           WITNESS EARLE: Could we look at that  
4 footnote --

5           MS. ANSLEY: And I'd --

6           WITNESS EARLE: -- as that's a footnote to the  
7 quote.

8           MS. ANSLEY: -- like to lodge an objection as  
9 well.

10          CO-HEARING OFFICER DODUC: Miss Ansley.

11          MS. ANSLEY: There is a lot -- There is a --  
12 Well, one, you know, it's hard to interpret from one  
13 sentence the full intent of the entire independent  
14 science peer review.

15          But, two, there's a fine line between  
16 criticizing the EIR/EIS from a CEQA perspective and the  
17 data relied upon here.

18          So this witness is relying upon data from the  
19 EIR/EIS but is not necessarily criticizing -- is not  
20 necessarily offering an opinion on the adequacy of the  
21 document as a CEQA document.

22          And so I think that this --

23          CO-HEARING OFFICER DODUC: Good point.

24          MS. ANSLEY: -- questioning verges very close  
25 to the lines and may muddy the record about what we're

1 actually talking about.

2           So whether he thinks he's relied on the  
3 best-available data in performing his conclusion, it  
4 may be in a different matter than this critique.

5           CO-HEARING OFFICER DODUC: Miss Des Jardins.

6           MS. DES JARDINS: Dr. Earle did rely on the  
7 Final EIR/EIS in forming his opinions.

8           CO-HEARING OFFICER DODUC: Yes, he did.

9           Sustained.

10          MS. DES JARDINS: Dr. Earle, are you aware of  
11 how long the Permit term applied for in this  
12 proceedings is?

13          Is it just through 2030? Is it just through  
14 2030?

15          CO-HEARING OFFICER DODUC: If --

16          WITNESS EARLE: I --

17          CO-HEARING OFFICER DODUC: -- you do not  
18 know --

19          WITNESS EARLE: -- do not recall a specific  
20 Permit term. And -- And I believe, in fact, that there  
21 are a variety of different Permits that are needed for  
22 this Project, and I'm not sure that they all have the  
23 same term.

24          MS. DES JARDINS: I'm asking about the water  
25 right change.

1 Are you aware of how long the period --

2 WITNESS EARLE: No --

3 MS. DES JARDINS: -- would be?

4 WITNESS EARLE: -- I'm not.

5 DR. FRIES: I guess, finally -- We were on  
6 this map. Let's jump back there. LAND-121, Page 91.

7 (Exhibit displayed on screen.)

8 DR. FRIES: Thank you. That's -- Yes.

9 And my question would be to Mr. Bednarski.

10 If you look at this map, can you see in the  
11 more deeply shaded green areas that this is a shoal or  
12 shallow water?

13 WITNESS BEDNARSKI: I'll accept your  
14 characterization of that area.

15 DR. FRIES: And can you see that it would be  
16 very difficult for -- with a landing dock placed at  
17 this point for any vessel of any size to pass this  
18 dock -- this waterway, especially when there's a  
19 tugboat and a large barge operating in the area?

20 MS. ANSLEY: I'm sorry. Objection.

21 I had trouble reading the fine print at the  
22 bottom of the map.

23 I don't believe there's any color  
24 identification of shoals. Is there a representation  
25 that this is a shoal? Did I mishear?



1           WITNESS BEDNARSKI: I'm assuming he's  
2 referring to this dark green area in the middle of the  
3 water. If it's something --

4           DR. FRIES: The very dark green --

5           WITNESS BEDNARSKI: -- something other than  
6 that --

7           DR. FRIES: -- area in the --

8           WITNESS BEDNARSKI: -- that you're referring  
9 to --

10          DR. FRIES: -- very middle is an island.

11          WITNESS BEDNARSKI: Oh.

12          MS. DES JARDINS: Lighter dark green areas are  
13 really --

14                 (Timer rings.)

15          DR. FRIES: -- indicating shallow water.

16          MS. ANSLEY: So the natural colorations are  
17 not the colors that have been superimposed on this --  
18 what looks like a satellite image?

19          DR. FRIES: Well, I have a sailboat and I've  
20 taken it through there 50 times, and I can tell you  
21 that it's very narrow.

22                 The area that you can navigate is closer to  
23 the levee because that's where the steam shovels  
24 scooped out the dirt and piled it up for the levee.  
25 And if you veer to the right there, your boat runs

1 aground.

2           And I'm asking if that's -- shallow -- Did  
3 this -- placing this landing dock there allow for free  
4 navigation of the waterway?

5           CO-HEARING OFFICER DODUC: Are you able to  
6 answer, Mr. Bednarski?

7           WITNESS BEDNARSKI: I guess my one comment  
8 would be that the depiction of the landing dock there,  
9 I'm -- I'm not sure without scaling it off if that  
10 meets the dimensions that I -- I testified to in my --  
11 my testimony of being 50 feet in width and then the  
12 length of it being up to 300 feet. That -- That looks  
13 like more than what 50-by-300-foot dock would be.

14           But besides that, no, I wouldn't be able to  
15 make any conclusion about where the depth of the water  
16 is around that or how far out that -- that depth  
17 extends.

18           CO-HEARING OFFICER DODUC: Thank you.

19           And that concludes DDJ's cross-examination of  
20 this panel.

21           Thank you, Dr. Fries.

22           Miss Des Jardins, you may now conduct  
23 cross-examination on behalf of Mr. Porgans.

24           MS. DES JARDINS: Thank you.

25           I'd like to bring up Dr. Earle's testimony,

1 Exhibit 1014, Page --

2 CO-HEARING OFFICER DODUC: And what are the  
3 topic areas that Mr. Porgans would like you to explore?

4 MS. DES JARDINS: What "adaptive management"  
5 means under the Delta Reform Act.

6 (Exhibit displayed on screen.)

7 MS. DES JARDINS: Mr. Porgans had a question  
8 about studies on Delta Smelt near extinction and Delta  
9 Smelt abundance, how that was taken account in -- I'd  
10 like to ask how that's taken account in Dr. Earle's  
11 opinion about adaptive management.

12 I also have questions about the  
13 recommendations, the Delta Science Program, for . . .  
14 objectives, and the NMFS Aquatic Science peer review on  
15 recommendations on adaptive management and compliance.

16 And also questions for Mr --

17 Is it Mr. Risch -- Rischbieter? Rischbieter.

18 WITNESS RISCHBIETER: Yes, please.

19 MS. DES JARDINS: -- Rischbieter on the Rec --  
20 his testimony on the REC-1 and REC 2 standards which  
21 govern -- particularly REC-1 which govern fishing and  
22 water contact sports and so -- and about those  
23 beneficial uses.

24 And finally, if I still have time, I had some  
25 questions about the Incidental Take Permits' reliance

1 on future plans.

2           And . . . And I would also like some  
3 clarification about statements about proposed future  
4 operations.

5           CO-HEARING OFFICER DODUC: All right. Please  
6 proceed.

7                           CROSS-EXAMINATION BY

8           MS. DES JARDINS: Okay. So, you have Exhibit  
9 1014.

10           Let's zoom out just a little so we can find  
11 the cite.

12           It's Page 4 at 10 -- at 20 to 22.

13           (Exhibit displayed on screen.)

14           MS. DES JARDINS: "The Delta" -- Dr. Earle,  
15 you say (reading):

16                           "The Delta Reform Act of 2009  
17 identifies adaptive management as the  
18 desired approach to reduce ecological  
19 uncertainty associated with management of  
20 the . . . San Joaquin Delta system."

21           Is it -- This statement's in your testimony.

22           Are you -- So -- So you're making an assertion  
23 about the Delta Reform Act -- correct? -- and adaptive  
24 management?

25           WITNESS EARLE: Yes. As stated in this

1 paragraph, I am citing the attached Adaptive Management  
2 Program for that statement.

3 MS. DES JARDINS: Let's go to -- I'd like to  
4 pull up CSPA-26, which is the Delta Reform Act, and go  
5 to Page 19, which defines adaptive management.

6 It's Group 31.

7 (Exhibit displayed on screen.)

8 MS. DES JARDINS: There you go.

9 Zoom out a little while we look for the page.

10 (Exhibit displayed on screen.)

11 MS. DES JARDINS: It's Page 19.

12 (Exhibit displayed on screen.)

13 MS. DES JARDINS: And it says here (reading):

14 "'Adaptive management' --

15 Dr. Earle, under "Chapter 4. Definitions," it  
16 says (reading):

17 "'Adaptive management' means a  
18 framework and flexible decision-making  
19 process for ongoing knowledge  
20 acquisition, monitoring, and evaluation  
21 leading to continuous improvement in  
22 management planning and implementation of  
23 a project to achieve specified  
24 objectives."

25 Are you familiar with this definition . . . in

1 the Delta Reform Act?

2 WITNESS EARLE: I am not familiar with the  
3 content of the Delta Reform Act as it applies to  
4 adaptive management. I have looked at it in the past.  
5 I've presumably read this definition in the past.

6 MS. DES JARDINS: Dr. Earle, if this --  
7 Adaptive management under the Delta Reform Act, you  
8 testified that that's the desired approach.

9 This specifically refers to achieving  
10 "specified objectives."

11 Are you -- What are the specified objectives  
12 in the WaterFix Adaptive Management Plan?

13 WITNESS EARLE: The Adaptive Management  
14 Program is not focused on objectives that are specified  
15 within the program but on objectives that are specified  
16 by the Permits and authorizations that are issued to  
17 the Project, such as the performance standards that I  
18 previously referred to in my testimony, and the terms  
19 and conditions of the Biological Opinions as well as of  
20 the Incidental Take Permit.

21 MS. DES JARDINS: But there are no specified,  
22 for example, biological objectives in the Adaptive  
23 Management Plan?

24 WITNESS EARLE: I do not recall any firm  
25 commitments, although there are a number of appendices

1 to the Adaptive Management Plan that deal with  
2 prospective subjects that are appropriate for adaptive  
3 management. And -- And some of those objectives echo  
4 things that were identified in the biological goals and  
5 objectives that were identified in BDCP.

6           There is no commitment in the Adaptive  
7 Management Plan as currently proposed to specifically  
8 address any of those questions.

9           MS. DES JARDINS: Let's go to Exhibit  
10 SWRCB-55, please, which is the Delta Science Program  
11 Workshop on Delta Outflows And Related Stressors  
12 Summary Report from May 5th, 2014.

13           And I'd like to pull up Page 39, which is --  
14           (Exhibit displayed on screen.)

15           MS. DES JARDINS: -- .pdf Page 33 -- 43.

16           (Exhibit displayed on screen.)

17           MS. DES JARDINS: Yeah. Scroll down.

18           (Exhibit displayed on screen.)

19           MS. DES JARDINS: It says -- Let's scroll --  
20 Let's scroll back up a little.

21           (Exhibit displayed on screen.)

22           MS. DES JARDINS: We can see the title.

23           It says (reading):

24                   "A range of possible flow  
25 options" --

1 It says (reading):

2 "Implementation of new flow criteria  
3 is going to be very challenging."

4 In the middle paragraph on this page

5 (reading):

6 "Given this situation, quantifiable,  
7 achievable objectives for outflow  
8 criteria need to be determined. The  
9 recent focus on specific, measurable,  
10 achievable, relevant, and time-bound or  
11 'SMART' objectives, as called for to the  
12 maximum extent possible by BDCP, is  
13 relevant here."

14 Dr. Earle, are you familiar with the Delta

15 Science Program recommendations on quantifiable,

16 achievable objectives that are discussed here?

17 WITNESS EARLE: I am not familiar with the  
18 content of this report. I'm . . .

19 I think I may have seen it before, but I'm  
20 certainly not prepared to discuss specific responses to  
21 those Science Program objectives here.

22 MS. DES JARDINS: Are you familiar with the  
23 concept of "quantifiable, achievable, specific,  
24 measurable, achievable, relevant and time-bound"  
25 objectives in Adaptive Management Programs?



1           WITNESS EARLE:  Yes.  I believe that's  
2 actually a paraphrase of language that I put in the  
3 BDCP.

4           MS. DES JARDINS:  Are there specific  
5 measurable, achievable, relevant and time-bound  
6 objectives in the Adaptive Management Program?

7           WITNESS EARLE:  As indicated in my previous  
8 response, the Adaptive Management Program itself does  
9 not set biological objectives.  These are contained in  
10 the authorizations that have been issued to the  
11 Project.

12           This rather dated reference refers to the  
13 BDCP.  The BDCP, as I've indicated in my previous  
14 responses, contained biological goals and objectives  
15 for each of the species.

16           That approach is not a feature of the -- the  
17 California and Federal Endangered Species Act  
18 approaches taken in the California WaterFix.  It's --  
19 The -- The document, the analysis, is structured  
20 differently.

21           MS. DES JARDINS:  Dr. Earle -- Let's pull  
22 up -- I'd like to ask you a question about the pelagic  
23 organism decline and the Endangered Species Act  
24 approach.

25           Let's pull up Porgans 330.

1 (Exhibit displayed on screen.)

2 MS. DES JARDINS: Now -- And this is a copy of  
3 a 2000 (sic) letter. The California Department of  
4 Water Resources Comments for the State Water Resource  
5 Control Board's Public Workshop to Consider the Pelagic  
6 Organism Decline.

7 MS. ANSLEY: Porgans --

8 MS. DES JARDINS: Dr. --

9 MS. ANSLEY: Did you say Porgans 330?

10 MS. DES JARDINS: Yes.

11 MS. ANSLEY: Is that not provided on the  
12 website you just submitted?

13 That's fine. I just want to --

14 MS. DES JARDINS: I'm introducing that at this  
15 point.

16 Dr. Earle, are you familiar with the pelagic  
17 organism decline?

18 WITNESS EARLE: I've heard of it.

19 MS. DES JARDINS: Let's go to Page 2.

20 (Exhibit displayed on screen.)

21 MS. DES JARDINS: And with respect to . . .

22 Let's go down to the -- the -- the following  
23 page.

24 (Exhibit displayed on screen.)

25 MS. DES JARDINS: There we go.

1           This is Page 2 of the letter. It says  
2 (reading):

3           "The improved decision-making and  
4           proposed actions can be implemented under  
5           the processes provided by existing  
6           regulatory requirements."

7           Are you familiar that the -- the Department of  
8 Water Resources proposed to deal with the pelagic  
9 organism decline under the existing regulatory  
10 processes, in -- including the Biological Opinions?

11           WITNESS EARLE: I am not familiar with this  
12 document. I have never seen it before. I, therefore,  
13 do not necessarily agree with that interpretation of  
14 this language.

15           MS. DES JARDINS: What . . .

16           Dr. Earle, below it, it says (reading):

17           "The U.S. -- U.S. Fish and Wildlife  
18           Service Delta Smelt Biological Opinion  
19           for the Central Valley Project and State  
20           Water Project establish the DSWT and an  
21           adaptive management process."

22           Are you familiar with the U.S. Fish and  
23 Wildlife Service adaptive management process for  
24 dealing with the pelagic organisms point?

25           WITNESS EARLE: I am not aware that such a

1 process exists, and I do not necessarily agree that  
2 this refers to such a process.

3           This -- This would seem to refer -- since this  
4 is an 11-year-old document -- to the Biological Opinion  
5 for coordinated operations of the CVP and SWP, which  
6 was in, I believe, late draft form at the time this  
7 letter was written.

8           MS. DES JARDINS: Dr. Earle, it states below  
9 (reading):

10                   "The federal and state agencies  
11                   administering the Endangered Species Act  
12                   involving unlisted species, such as U.S.  
13                   Fish and Wildlife Service and California  
14                   Department of Fish & Game, are part of  
15                   this process and have final regulatory  
16                   authority related to fish protection.  
17                   The Project agencies, DWR and  
18                   Reclamation, decide on out-world changes  
19                   based on the Water Operations Management  
20                   Team recommendations and requirements  
21                   under the Biological Opinions and permits  
22                   for operating the SWP and CVP."

23           Isn't this the same structure that is being  
24 proposed for adaptive management, it's -- under the  
25 WaterFix?

1 MS. ANSLEY: Objection: The witness has  
2 already testified that he is not familiar with this  
3 document. He -- He was asked, is he familiar with the  
4 purported adaptive management processes identified in  
5 the highlighted paragraph, and he said no.

6 And so he is not aware of whether that  
7 process -- which he's not aware of -- is in any way  
8 similar to the process that's at issue in the  
9 California WaterFix.

10 So I think these questions are now outside the  
11 relevant -- his knowledge; and he's already been asked  
12 and answered; and I also believe they are irrelevant at  
13 this point to the adaptive management process of the  
14 Cal WaterFix, at least as far as he can answer.

15 CO-HEARING OFFICER DODUC: Miss Des Jardins.

16 MS. DES JARDINS: To the extent this  
17 specifically mentions, one, the Water Operations  
18 Management Team recommendations, regulatory authority  
19 by U.S. Fish and Wildlife Service and California  
20 Department of Fish & Game, and even if Dr. Earle is not  
21 familiar with the adaptive management process that has  
22 been in place, he should at least be able to answer  
23 questions about the Water Operations Management Team,  
24 which I believe he specifically testifies is part of  
25 the adaptive management structure.

1 MS. ANSLEY: And I'm fine for him to be asked  
2 questions to the extent they're relevant and under the  
3 Hearing Officer's rulings.

4 I think what I'm objecting to here is to  
5 continue pulling sentences out of this letter.

6 CO-HEARING OFFICER DODUC: You're right that  
7 he's not familiar with it.

8 MS. ANSLEY: And he's not --

9 CO-HEARING OFFICER DODUC: I understand.

10 Sustained.

11 MS. DES JARDINS: I would like to lodge an  
12 objection at this point under Shiffer vs. CBS Corp.  
13 (2015) 240 C A 4th 246, 254, in that if Dr. Earle is  
14 not familiar with past applications of adaptive  
15 management, then he has not analyzed a complete set of  
16 facts in forming his opinion that the adaptive  
17 management will be effective in the WaterFix.

18 If he's not aware and cannot testify to  
19 current adaptive management practices, or adaptive  
20 management over the past 10 years since the pelagic  
21 organism decline, then I would argue that he is not  
22 analyzing a complete set of facts.

23 CO-HEARING OFFICER DODUC: Mr. Mizell.

24 MR. MIZELL: Yes.

25 I'd like to respond by recalling that

1 Dr. Earle listed a rather lengthy list of adaptive  
2 habitat -- Adaptive Management Programs that he is  
3 familiar with that informed his expert opinion.

4 To assert that the law states that an expert  
5 must be familiar with every instance of a topic on  
6 which they are testifying, I believe, is overly broad.

7 Here, Dr. Earle has provided a tremendous  
8 amount of testimony at this point about his extensive  
9 knowledge of adaptive management.

10 The fact that he is not prepared to discuss  
11 a . . . 11-year-old document about a . . . existing  
12 condition Adaptive Management Program is  
13 nonetheless . . .

14 Well, it is -- it's not an indictment of  
15 Dr. Earle's previous explanations, nor a -- diminish  
16 his Statement of Qualifications and the Adaptive  
17 Management Programs that he's already testified to  
18 under questions by Mr. Keeling.

19 CO-HEARING OFFICER DODUC: Miss Morris.

20 MS. MORRIS: Yes.

21 I'd like to object to Miss Des Jardins --

22 CO-HEARING OFFICER DODUC: Hold on. Hold on.

23 I thought you were going to weigh in on her objection.

24 If you're not, then --

25 MS. MORRIS: I am.

1 CO-HEARING OFFICER DODUC: You are?

2 MS. MORRIS: I am.

3 CO-HEARING OFFICER DODUC: You're objecting to  
4 her objecting?

5 MS. MORRIS: I think it's improper for a lay  
6 person who's a non-attorney, who's not representing  
7 themselves but is now representing another party, to be  
8 making legal motions.

9 In fact -- And I apologize. I have a late  
10 objection. I wasn't here yesterday.

11 But I'm not sure it's entirely proper for  
12 Miss Des Jardins to be conducting this because nothing  
13 in the APA, which pro -- is the basis for this  
14 regulatory proceeding, authorizes a non-active member  
15 of the California -- not an active member of the bar to  
16 represent another party in these proceedings unless the  
17 Board is specifically authorizing this.

18 There are -- There's a case that -- Or there's  
19 an opinion from the Attorney General, Number 14-101,  
20 from September 20, 2007, which seems to be on point and  
21 specifically recognizes that there is nothing in the  
22 APA that authorizes a party to a proceeding conducted  
23 by the Office of Administrative Hearings to be  
24 represented by a person who is a non-active member of  
25 the California State Bar.



1           So, again, sorry to the late objection. And I  
2 do object to any legal motions that Miss Des Jardins is  
3 making on behalf of another party.

4           CO-HEARING OFFICER DODUC: Ms. Morris, I  
5 think -- I don't want to get into the back-and-forth on  
6 that particular motion verbally, so I would request  
7 that you submit that in writing.

8           I will allow Miss Des Jardins and any other  
9 parties who wish to respond to your objection . . .

10           You may have until --

11           What day is today? Today's Friday.

12           -- noon Monday to submit your objection in  
13 writing. Anyone who wants to respond to it may have  
14 until noon Tuesday to do so.

15           But for now, I will allow Miss Des Jardins to  
16 continue conducting her cross-examination, but I am  
17 overruling or denying -- whatever the terminology is --  
18 her objection/motion regarding Dr. Earle.

19           MR. DEERINGER: Can I just ask a clarifying  
20 question, Miss Morris.

21           Is your response or objection specific to  
22 Miss Des Jardins lodging objections while questioning  
23 on behalf of Mr. Porgans, or is it more broadly her  
24 right to question on behalf of Mr. Porgans?

25           MS. MORRIS: It was both, but in particular

1 I'm concerned about the first.

2           And so I'm confused what I'm writing, and now  
3 my children will love me even more since I will be  
4 doing this over the weekend.

5           Am I in -- I -- I understood that if you want  
6 me -- if I want to object to Miss Des Jardins'  
7 questioning on behalf of Porgans, that I need to submit  
8 it in writing.

9           But as to the first objection, you have -- you  
10 have . . . you have sustained the motion for her to  
11 strike the testimony.

12           CO-HEARING OFFICER DODUC: No. I overruled  
13 her motion to strike the testimony -- I mean, to --

14           MS. MORRIS: Yes. Thank you. Sorry.

15           CO-HEARING OFFICER DODUC: -- whatever it is.

16           MS. DES JARDINS: I --

17           CO-HEARING OFFICER DODUC: Now -- Now, hold  
18 on. Hold on. Hold on.

19           Miss Morris, perhaps I didn't follow all the  
20 legal argument that you articulated.

21           Is your objection narrowly focused on  
22 Miss Des Jardins' cross-examination on behalf of  
23 Mr. Porgans?

24           MS. MORRIS: That was the second objection.

25           CO-HEARING OFFICER DODUC: What was the first

1 objection?

2 MS. MORRIS: I believe -- The first objection  
3 was, it's im -- It's one thing if the Board wants to  
4 allow a non-attorney to be a representative of another  
5 party. It's one thing for a party to appear pro per  
6 without an attorney for themselves.

7 So I am objecting to another non-attorney  
8 making legal arguments, or practicing law, and moving  
9 to strike on behalf of a different party.

10 CO-HEARING OFFICER DODUC: You got it?

11 MR. DEERINGER: (Nodding head.)

12 CO-HEARING OFFICER DODUC: Okay. Glad  
13 somebody got it.

14 MS. DES JARDINS: Thank you.

15 I do withdraw the objection. She is correct.

16 And I was questioning for Patrick Porgans as  
17 an expert, and I apologize. It was error on my part.

18 And -- But she's correct: I can't make legal  
19 arguments for him. I'm not an attorney. And . . .

20 I --

21 CO-HEARING OFFICER DODUC: So --

22 MS. DES JARDINS: Yeah.

23 CO-HEARING OFFICER DODUC: So you are . . .

24 MS. DES JARDINS: I -- I -- I do withdraw --

25 CO-HEARING OFFICER DODUC: So we're good?

1 MS. DES JARDINS: I'm allowed to ask questions  
2 but not to make legal argument.

3 CO-HEARING OFFICER DODUC: So we're good.  
4 Miss Morris does not have to submit anything.

5 MS. DES JARDINS: Well, she can complain about  
6 me. There is a mistake.

7 I -- I got a little confused when I have been  
8 acting as a pro per, so . . .

9 Let's go to --

10 CO-HEARING OFFICER DODUC: Hold on.

11 Miss Morris.

12 MS. MORRIS: I think you want me to say this  
13 on the record:

14 I'm going to be not submitting anything in  
15 writing. Thank you.

16 MS. DES JARDINS: You are correct.

17 CO-HEARING OFFICER DODUC: Thank you.

18 I think we have plenty of things in  
19 association with Miss Des Jardins to respond to,  
20 so . . .

21 Please proceed with your cross-examination.

22 MS. DES JARDINS: I would like to pull up  
23 Porgans 331, please.

24 (Exhibit displayed on screen.)

25 MS. DES JARDINS: And . . .

1           What is that?

2           Okay. No, that's not correct.

3           Never mind. Let's not pull up Porgans 331.

4           So I'd like to pull up Exhibit DDJ-156, the  
5 Final Draft of -- Act -- Actually, first, let's go to  
6 Porgans 333 --

7           (Exhibit displayed on screen.)

8           MS. DES JARDINS: -- which is the NMFS Aquatic  
9 Science peer review.

10          And I'd like to go to the bottom of Page 3.

11          (Exhibit displayed on screen.)

12          MS. DES JARDINS: Which states -- Which we --  
13 Specifically goes to the issue of the inclusion of  
14 stakeholders, and states (reading):

15                 "While the panel supports the  
16 inclusion of stakeholders in the  
17 implementation of adaptive management in  
18 the Delta, we are concerned about  
19 stakeholders' influence on the research  
20 prioritization since decisions associated  
21 with 'Phase 4, Adapt' may have  
22 significant positive or negative  
23 implications for different stakeholders."

24          Dr. Earle, are you familiar with the Aquatic  
25 Science Peer Review Panel report?

1 WITNESS EARLE: I have read this report  
2 before.

3 MS. DES JARDINS: And are you familiar with  
4 the specific concern about the stakeholders' influence  
5 on Phase 4 Adapt, particularly --

6 WITNESS EARLE: I see that this text states  
7 such a concern.

8 MS. DES JARDINS: If, for example, a -- an  
9 adaption (sic) had a water supply cost, and the  
10 stakeholders were the export agencies, could that  
11 impact the decisions made under Phase 4 Adapt?

12 WITNESS EARLE: I'm not quite sure I  
13 understand the question.

14 Would you rephrase, please.

15 MS. DES JARDINS: if Phase -- If adapting  
16 requires reduct -- for example, reduction in exports --  
17 and the WaterFix stakeholders are the Water Export  
18 Contractors, could that have an influence on whether or  
19 not the action is taken?

20 WITNESS EARLE: As I've stated before, the  
21 decision-making process for adaptive management is a  
22 consensus-based one.

23 The . . . I'm not sure how the panel intended  
24 to define stakeholders in here, but if they're  
25 referring to the presence of representative -- both the

1 State and Federal Water Contractors on the IICG, then I  
2 would say that those particular interests would be  
3 counterbalanced by interests advanced by the fish and  
4 wildlife agencies that are also members of the IICG.  
5 Presumably a consensus decision by this group would be  
6 implicitly acceptable to all members.

7           In the event that the decision being made by  
8 the adaptive -- being recommended by the IICG has more  
9 extensive implications -- for instance, on stakeholders  
10 that are not party to that decision -- then  
11 opportunities for their engagement would occur during  
12 whatever regulatory processes were triggered by the  
13 effort to make that adaptive change.

14           MS. DES JARDINS: It says further on  
15 (reading):

16           "More attention needs to be paid to  
17 setting up an adaptive governance  
18 structure with clearly defined authority,  
19 boundaries, and criteria for" --  
20 Let's go to the next page, please.

21 (Exhibit displayed on screen.)

22           MS. DES JARDINS: (Reading):  
23 intervention to support a robust and  
24 effective AM program (e.g., one that  
25 avoids conflict of interest)."

1           Are you familiar with that -- with this  
2 concern about the adaptive governance structure?

3           WITNESS EARLE: Yes. That concern is stated  
4 clearly here.

5           It has also been stated clearly in earlier  
6 reviews of the Adaptive Management Program, being  
7 implicated first under BDCP and later under multiple  
8 iterations of California WaterFix.

9           And I have great confidence it will continue  
10 to be expressed in the future.

11           MS. DES JARDINS: Does the Adaptive Management  
12 Program have clearly defined criteria for intervention?

13           WITNESS EARLE: At this time, as I've  
14 indicated in my earlier testimony, subjects for review  
15 through the adaptive management are only proposed.  
16 None are firmly committed to in the Adaptive Management  
17 Program.

18           And the determination of appropriate triggers  
19 will be one of the duties of the IICG if and when the  
20 Adaptive Management Program finally gets going.

21           MS. DES JARDINS: Are there clearly defined  
22 boundaries in the Adaptive Management Program?

23           WITNESS EARLE: That is a matter of opinion.

24           In my opinion, the scope of the Adaptive  
25 Management Program and the parties to it is well



1 defined, yes.

2 MS. DES JARDINS: I'd like to go to Exhibit  
3 DDJ-156, which is the Final Draft DCE Agreement.

4 Yeah, it's on the website.

5 (Exhibit displayed on screen.)

6 MS. DES JARDINS: And then I'd like to go  
7 to -- This is -- I'm not sure if you're familiar with  
8 the Draft Agreement regarding construction of the  
9 Conveyance Project.

10 WITNESS EARLE: I've seen this agreement  
11 before. I've not reviewed it recently.

12 MS. DES JARDINS: Let's go to the document  
13 Page 4.

14 (Exhibit displayed on screen.)

15 MS. DES JARDINS: And let's scroll down,  
16 please, to where it says "Oversight."

17 (Exhibit displayed on screen.)

18 MS. DES JARDINS: And it says -- It  
19 specifically says (reading):

20 "In the event . . . a matter would  
21 have a material effect, as defined  
22 below . . . on the Conveyance Project,  
23 the Director of DWR shall make a final  
24 decision on the matter only with the  
25 written concurrence of the Authority

1 Board."

2 Are -- Are you familiar with this oversight  
3 provision, that the Authority Board has to sign off?

4 WITNESS EARLE: No, I'm not.

5 MS. DES JARDINS: Do you see under (3) where  
6 it says (reading):

7 "Any actions that, in the reasonable  
8 judgment of the Authority Board, could  
9 impact the water delivery capability,  
10 project life, or operations and  
11 maintenance costs of the Conveyance  
12 Project."

13 WITNESS EARLE: I see those words.

14 MS. DES JARDINS: If this becomes part of the  
15 final agreement, doesn't it give the Authority Board  
16 significant power over whatever decisions may be made  
17 in adaptive management?

18 MS. ANSLEY: Objection.

19 CO-HEARING OFFICER DODUC: Miss Ansley.

20 MS. ANSLEY: This is a Draft Agreement that  
21 lays out the relationship between two specific parties.

22 There's been no foundation that the  
23 relationship between the parties in these documents  
24 have anything at all to do with the Adaptive Management  
25 Plan separate and distinct between the authority over

1 construction -- over actual construction of the  
2 Project.

3           So I don't believe that there is a link  
4 between this Draft Agreement and the Adaptive  
5 Management Pro -- the functioning in the Adaptive  
6 Management Program itself.

7           I believe that the provision that  
8 Miss Des Jardins is citing -- and this is subject to  
9 legal interpretation, and it is a draft -- is between  
10 the authority and power during construction.

11           I just don't think it's the same thing. And  
12 maybe the witness would be happy to testify if he knows  
13 of any relationship between --

14           MS. DES JARDINS: May I --

15           MS. ANSLEY: -- this contract.

16           MS. DES JARDINS: -- respond?

17           It says (reading):

18           ". . . design, construction and  
19 implementation of the Conveyance  
20 Project."

21           CO-HEARING OFFICER DODUC: Are you able to  
22 respond?

23           WITNESS EARLE: I am not able to respond  
24 specifically to this point because there's much  
25 ambiguity there, in my eyes. For instance, I don't

1 know what the Authority Board is. I don't know what  
2 the precise scope of this agreement is.

3 But I will say that it appears to me to be an  
4 agreement that clarifies DWR's scope and  
5 responsibilities with regard to the California WaterFix  
6 Project.

7 If so, then it has no meaningful effect on the  
8 Adaptive Management Program. As I've previously  
9 testified, the Adaptive Management Program operates  
10 through consensus decision-making process with  
11 responses implemented by the appropriate responsible  
12 agency, which, within the scope of this agreement,  
13 would appear to be the DWR.

14 CO-HEARING OFFICER DODUC: Thank you.

15 MS. DES JARDINS: Well, I'd like to go back to  
16 Exhibit DDJ-248, please.

17 (Exhibit displayed on screen.)

18 MS. DES JARDINS: And I'd like -- No, no.  
19 That's the wrong -- Let's -- Let's bring this up right  
20 now.

21 This is -- Are you familiar with current  
22 funding issues per U.S. Fish and Wildlife Service,  
23 Dr. Earle?

24 WITNESS EARLE: No, I'm not.

25 MS. DES JARDINS: There is -- This is the

1 current -- H.R. 3354 is the current appropriations  
2 bill.

3 I'd like to bring up the DDJ-249, which is --  
4 Or, I'm sorry, Porgans -- the . . .

5 (Exhibit displayed on screen.)

6 MS. DES JARDINS: Yeah. Which is a copy of  
7 H.R. 3354 and . . .

8 Just a sec. I'd like to go to -- Let me find  
9 it. I'd like to go to Page 146.

10 (Exhibit displayed on screen.)

11 MS. DES JARDINS: Now, this is in -- Is that  
12 it -- Page -- Section 458 --

13 Let's scroll down.

14 (Exhibit displayed on screen.)

15 MS. DES JARDINS: -- states (reading):

16 "None of the funds made available by  
17 this Act may be used to implement or  
18 enforce the threatened species or  
19 endangered species listing of any plant  
20 or wildlife that has not undergone a  
21 review as required by Section 4(c)(2) of  
22 the Endangered Species Act of 1973."

23 Are you familiar with this current provision  
24 in the current appropriations bill?

25 MR. MIZELL: Objection: Asked and answered.

1 He indicated he's not familiar with the bill.

2 Furthermore, I'd like to object to questions  
3 regarding Federal funding of the U.S. Fish and Wildlife  
4 Service.

5 It has no bearing on whether or not the  
6 California WaterFix is going to be funded for the  
7 Adaptive Management Program, which is the -- which is  
8 the point that Dr. Earle's testimony raised.

9 If Miss Des Jardins can find us language in  
10 this bill that somehow implicates the funding  
11 assurances that Dr. Earle discussed earlier in his  
12 testimony, I would certainly withdraw my objection, but  
13 I don't believe that they can be found in this bill  
14 and, on that basis, I'd object to it as being  
15 irrelevant.

16 CO-HEARING OFFICER DODUC: Miss Des Jardins.

17 MS. DES JARDINS: I believe that one of the  
18 key parts of adaptive management is oversight of the  
19 Adaptive Management Program by the U.S. Fish and  
20 Wildlife Service as one of the three -- There's two --  
21 as one of the two Federal agencies charged with  
22 overseeing the Endangered Species Act.

23 Perhaps Dr. Earle could indicate if my  
24 under -- If -- If that is the case, then their  
25 oversight of, for example, conditions for Delta Smelt

1 would be relevant.

2 MS. ANSLEY: And I would like to add a further  
3 objection of relevance.

4 It appears that the provision in this bill --  
5 which I must admit I don't know what the current status  
6 of that bill is -- pertains to the listings -- the  
7 listing process.

8 And I'm not sure there's been any established  
9 relevance between funding for the purported U.S. Fish  
10 and Wildlife Service for the species listing as opposed  
11 to the adaptive management process that's laid out by  
12 Dr. Earle.

13 MS. DES JARDINS: It --

14 CO-HEARING OFFICER DODUC: Can you make that  
15 connection, Miss Des Jardins?

16 MS. DES JARDINS: It specifically says -- It  
17 specifically has to do with implementation and  
18 enforcement of endangered species -- of an endangered  
19 species list.

20 So at least the endangered species groups that  
21 we're in contact -- that people I know are in contact  
22 with, believe that this would have a significant impact  
23 on implementation of the Endangered Species Act.

24 CO-HEARING OFFICER DODUC: Do you have an  
25 opinion on that, Dr. Earle?

1 WITNESS EARLE: Yes.

2 Although I hesitate to lecture to a room full  
3 of lawyers, I believe you will find that Section  
4 4(c)(2) of the Endangered Species Act provides for  
5 listing of species and, therefore, this text  
6 essentially says that these funds may not be used for  
7 listing of additional species but does not apply to  
8 species that are already listed.

9 Since the California WaterFix deals with  
10 species that are already listed -- I don't believe any  
11 of them are merely proposed for listing at this time --  
12 then this limitation would have no bearing.

13 MS. DES JARDINS: I don't have a cite but it  
14 actually refers to five-year review.

15 CO-HEARING OFFICER DODUC: Let's --  
16 Mr. Jackson, I was about to ask Miss Des Jardins to  
17 just ask her question so that we can continue.

18 Did you have an offer --

19 MR. JACKSON: Thank you.

20 CO-HEARING OFFICER DODUC: Okay. Just ask  
21 your question.

22 The witness will answer to the best of his  
23 ability so that we can get through this.

24 MS. DES JARDINS: Are -- Are you aware that  
25 there is a five-year review required under



1 Section 4(c)(2) of the Endangered Species Act of 1973?

2 WITNESS EARLE: Yes.

3 MS. DES JARDINS: Do you know if it's -- if  
4 the U.S. Fish and Wildlife Service has done the  
5 five-year review for the Delta Smelt recently?

6 WITNESS EARLE: They probably have not yet  
7 performed a five-year review for the Delta Smelt since  
8 it was just recently listed.

9 MS. DES JARDINS: Let's go to Exhibit DDJ-250,  
10 please.

11 (Exhibit displayed on screen.)

12 MS. DES JARDINS: And I'd like to go to  
13 Page 29.

14 (Exhibit displayed on screen.)

15 MR. BAKER: Miss Des Jardins, do you want .pdf  
16 Page 29 or document Page 29?

17 MS. DES JARDINS: I think I want document  
18 Page 29. Thank you.

19 (Exhibit displayed on screen.)

20 MS. DES JARDINS: So that looks like that  
21 would be two pages down.

22 (Exhibit displayed on screen.)

23 MS. DES JARDINS: No, that's not --

24 WITNESS EARLE: I think the previous page  
25 contained a line for the Delta smell.

1 MS. DES JARDINS: What?

2 WITNESS EARLE: Two pages back is a --

3 MS. DES JARDINS: Oh, okay. Thank you.

4 WITNESS EARLE: -- line for the Delta Smelt.

5 MS. DES JARDINS: Thank you, Dr. Earle.

6 Let's go back.

7 (Exhibit displayed on screen.)

8 MS. DES JARDINS: That was correct.

9 Yeah. Smelt, Delta, hypomesus transpacificus;  
10 correct?

11 And it says the date the five-year review was  
12 completed was September 13th, 2010?

13 Is that correct?

14 WITNESS EARLE: Could we zoom in a little bit?  
15 I can't quite read that date.

16 (Exhibit displayed on screen.)

17 WITNESS EARLE: That is what it says.

18 MS. DES JARDINS: And the action was  
19 reclassified to E?

20 WITNESS EARLE: Yes.

21 MS. DES JARDINS: And that was the  
22 reclassification to "endangered," which is consistent  
23 with your recollection that the last review was --  
24 five-year review was recently in -- was reclassified to  
25 endangered.

1 THE WITNESS: Yes.

2 MS. DES JARDINS: But there has not been a  
3 five-year review since 2010; is that correct?

4 According to this table.

5 WITNESS EARLE: This document does --  
6 indicates that the last five-year review was completed  
7 in 2010.

8 MS. ANSLEY: And I would like to lodge an  
9 objection.

10 I know we flashed right by that first page but  
11 I believe the first page said that this was a 2013-2014  
12 report. So perhaps that is outdated.

13 And I am not -- I just want to make sure that  
14 we're referencing the correct time period about what  
15 this document says --

16 MS. DES JARDINS: Let's go on.

17 MS. ANSLEY: -- but she's welcome to ask if  
18 he's aware if there has been any subsequent --

19 MS. DES JARDINS: We could -- This is the most  
20 recent report to Congress on the recovery of threatened  
21 and endangered species.

22 And it's the most recent one that was -- This  
23 is the most recent report to Congress on the recovery  
24 of threatened and endangered species. And it is the  
25 one that -- the most recent one that's published.

1           Are you aware of whether there's been a more  
2 recent five-year review of Delta Smelt?

3           WITNESS EARLE: By way of explanation, I  
4 should note that, contrary to the name, five-year  
5 reviews are seldom performed as often as every five  
6 years.

7           And I am not aware that one has been produced  
8 since that time.

9           MS. DES JARDINS: Is that, in part, because of  
10 funding limitations for U.S. Fish and Wildlife Service?

11          MS. ANSLEY: That one has not been complete by  
12 this time? Or his earlier statement that five-year  
13 reviews are often not done within five years?

14          MS. DES JARDINS: Yes.

15          MS. ANSLEY: I'm not --

16          MS. DES JARDINS: Yes.

17          MS. ANSLEY: -- clear on the . . .

18          WITNESS EARLE: I would say that there is a  
19 rumor to that effect in the environmental community,  
20 but I have not seen concrete evidence that that is a  
21 fact.

22          MS. DES JARDINS: And . . . Let's see. Next  
23 question.

24          I think it's time for me to go . . .

25          CO-HEARING OFFICER DODUC: Go?

1 MS. DES JARDINS: Go to . . .

2 Yes. I'd like to go to look at the recreation  
3 impacts, so REC-1 and REC 2, Mr. Rischbieter.

4 Can -- You testified that they would be  
5 protected.

6 Can we go to Exhibit SWRCB-27, which is the  
7 2006 Water Quality Plan.

8 And . . .

9 (Exhibit displayed on screen.)

10 MS. DES JARDINS: I'd like to go to Table 1 on  
11 Page 23.

12 (Exhibit displayed on screen.)

13 MS. DES JARDINS: Mr. Rischbieter, are you  
14 familiar with -- that the Table 1 water quality  
15 standards are proposed to protect REC-1 and REC 2 uses?

16 WITNESS RISCHBIETER: I didn't testify that  
17 they were designed to do that.

18 My testimony relates -- with respect to  
19 Table 1 relates to the table and the accompanying text  
20 paragraph which describes that these water quality  
21 objectives for municipal and industrial beneficial uses  
22 were determined to also reasonably protect -- protect  
23 REC-1 and REC 2.

24 MS. DES JARDINS: I'd like to pull up Exhibit  
25 Porgans -- Well, first, I'd like to ask, just a sec,

1 while we're at this"

2 Mr. Rischbieter, the -- one of two of the  
3 intakes are at Delta-Mendota Canal at Tracy Pumping  
4 Plant.

5 And the --

6 Let's scroll down further, please.

7 (Exhibit displayed on screen.)

8 MS. DES JARDINS: No. Scroll up.

9 (Exhibit displayed on screen.)

10 MS. DES JARDINS: Please scroll up. Just go  
11 all the way back up.

12 (Exhibit displayed on screen.)

13 MS. DES JARDINS: -- and West Canal at the  
14 mouth of Clifton Court Forebay.

15 Aren't those the M&I standards at the intakes  
16 for the State Water Project and Central Valley Project?

17 MS. ANSLEY: Is -- Is that a question?

18 MS. DES JARDINS: Yes.

19 Mr. Rischbieter?

20 WITNESS RISCHBIETER: You're referring to two  
21 of the five locations --

22 MS. DES JARDINS: Yes.

23 WITNESS RISCHBIETER: -- in the bottom half of  
24 the page?

25 MS. DES JARDINS: Yes.

1 WITNESS RISCHBIETER: Those are in the  
2 vicinity, yes. I'm not exact -- I'm not personally  
3 aware of the exact location the water quality  
4 measurements are taken from geographically.

5 Yes, those are near those locations.

6 MS. DES JARDINS: But these M&I standards  
7 are -- while they're stated in the Water Quality Plan  
8 to protect beneficial uses, they're tied to  
9 specific . . . M&I intakes, including Clifton Court  
10 Forebay, Delta-Mendota Canal, North Bay Aqueduct,  
11 Contra Costa Canal; correct?

12 WITNESS RISCHBIETER: Those are listed in  
13 Table 1 as compliance locations, yes.

14 MS. DES JARDINS: Thank you.

15 I'd like to go to Exhibit Porgans 332.

16 (Exhibit displayed on screen.)

17 MS. DES JARDINS: And this is -- This is  
18 actually the previous Water Quality Plan from 1991,  
19 which was superseded.

20 And I'd like to go to Page 126 -- .pdf  
21 Page 126, which is Page 5-52.

22 (Exhibit displayed on screen.)

23 MS. DES JARDINS: And this -- I -- I just was  
24 going to see if you were aware of the history which --  
25 at 91, they said there were no Delta Plan objectives

1 for protection of the estuary recreational beneficial  
2 use.

3           So . . . Are -- Are you aware that, prior to  
4 1995, there were no -- no specific objections (sic) for  
5 protection of swimming, boating, fishing, hunting,  
6 water-skiing and house boating which are listed here?

7           WITNESS RISCHBIETER: Your question used the  
8 term "objections" but I believe you are referring to  
9 "objectives"?

10           MS. DES JARDINS: Objectives. Objectives.  
11 I'm sorry. Objections are . . .

12           WITNESS RISCHBIETER: No, I'm no longer  
13 familiar with the contents of this Plan. I vaguely  
14 recall having seen it a long time ago.

15           MS. DES JARDINS: Let's go down to -- To  
16 refresh your memory, let's go to the next page.

17           (Exhibit displayed on screen.)

18           MS. DES JARDINS: And, I think, Page 553. It  
19 might be down towards the bottom.

20           (Exhibit displayed on screen.)

21           MS. DES JARDINS: There we go.

22           And at that time, they said for REC-1, which  
23 included fishing (reading):

24                   "Water quality objectives to protect  
25                   specific fish species in marsh habitat



1           areas are intended to protect  
2           recreational uses also."

3           Are you familiar with the fact that there used  
4 to be specific water quality objectives to protect fish  
5 species in marsh habitat areas?

6           MR. MIZELL:  Objection:  Asked and answered.  
7           He's indicated he's not currently familiar  
8 with the content of this document.

9           And then, additionally, I'd like to raise an  
10 objection as to relevance.

11           The questioner herself has indicated that this  
12 plan was superseded by the existing Water Quality  
13 Control Plan.

14           So to the extent that the 2006 Water Quality  
15 Control Plan does indicate what is -- is in -- what is  
16 protective of the Recreational 1 and 2 beneficial uses,  
17 that's the appropriate document to be discussing at  
18 this point, not what was occurring in 1991.

19           CO-HEARING OFFICER DODUC:  Except to the  
20 extent that she might be exploring this as a matter of  
21 proposed conditions or . . . other aspect.

22           I mean, I -- Miss Des Jardins?

23           MS. DES JARDINS:  Yes.

24           I believe that there is quite a bit of concern  
25 and, to the extent that all of the M&I intakes that

1 were listed on -- on -- as protecting recreational  
2 uses, are going to have additional intakes at Hood or  
3 the -- you know, the Contra Costa intake at Freeport.

4 I think the issue of whether there's specific  
5 protections for specific fish species or for swimming  
6 beneficial use, are reasonable and relevant.

7 There is both the beneficial use and the  
8 existing standard. And this Board will need to make a  
9 determination as to the beneficial uses.

10 CO-HEARING OFFICER DODUC: All right. All  
11 right.

12 Overruled, Mr. Mizell.

13 MR. MIZELL: I'd like to point out that I  
14 believe the Board's current justification for the  
15 standards are found in the existing Water Quality  
16 Control Plan.

17 The previous Water Quality Control Plan does  
18 not speak to what was later implemented.

19 But I respect your overruling my objection.  
20 We can move forward.

21 CO-HEARING OFFICER DODUC: All right. Thank  
22 you for respecting my overruling your objection.

23 Miss Des Jardins.

24 MS. DES JARDINS: So, all I wanted to do,  
25 before we had this long detour, was ask:

1           Are you familiar that the previous Water  
2 Quality Control Plans, '91 and earlier, assume that  
3 water quality objectives to protect specific fish  
4 species would protect recreational uses also?

5           WITNESS RISCHBIETER: I do not recall that --  
6 knowing that that was the approach at that time.

7           MS. DES JARDINS: Okay. Thank you.

8           I'd like to pull up Exhibit Porgans 334.

9           (Exhibit displayed on screen.)

10          MS. DES JARDINS: And I'd like to -- Zoom out,  
11 please, so we can see the whole thing.

12          (Exhibit displayed on screen.)

13          MS. DES JARDINS: Mr. Rischbieter, this is a  
14 warning for Discovery Bay. And it says -- the  
15 second -- from Contra Costa Health Services, dated  
16 October 24th, 2017.

17          And it states (reading):

18                 "Environmental Health advises  
19 residents and visitors to Discovery Bay  
20 to avoid coming into contact with water  
21 in affected areas. Avoiding contact  
22 with . . . water is also advised for  
23 pets.

24                 "Based on the results obtained from  
25 the EPA in accordance with State

1 guidance, Environmental Health will post  
2 public access areas and advise  
3 residents . . . of harmful toxin levels  
4 via social media and . . . electronic  
5 communication."

6 Are you familiar with the kinds -- these kinds  
7 of warnings that are going up in the Delta about water  
8 contact?

9 MS. ANSLEY: Excuse me. Water content or --

10 MS. DES JARDINS: Water --

11 MS. ANSLEY: -- blue-green algae?

12 MS. DES JARDINS: Water contact.

13 MS. ANSLEY: Yes, but --

14 MS. DES JARDINS: Avoiding water contact in  
15 affected areas, specifically with respect to harmful  
16 alga blooms.

17 WITNESS RISCHBIETER: I have recollection of  
18 advisories that have been issued for a number of  
19 different bodies of water in California over the last  
20 year or two at respective times and recall this  
21 occurrence of harmful alga bloom in the vicinity of  
22 Discovery Bay as being reported in the media.

23 MS. DES JARDINS: Isn't REC-1 water contact  
24 sports?

25 Or doesn't it involve -- Isn't that the

1 definition?

2 WITNESS RISCHBIETER: Yes. I believe the  
3 definition of REC-1 is body contact recreation and  
4 REC 2 is water -- other water-dependent recreation.

5 MS. DES JARDINS: So aren't these -- Aren't --  
6 Isn't Contra Costa health services advising residents  
7 and visitors to Discovery Bay to -- that -- to not  
8 engage in water contact sports in affected areas?

9 WITNESS RISCHBIETER: By virtue of the Notice  
10 issued that's displayed on the screen, they did provide  
11 that notification in response to specific water quality  
12 testing results last year.

13 MS. DES JARDINS: So, based on this, do you  
14 think that REC-1 is being adequately protected  
15 currently?

16 WITNESS RISCHBIETER: Well, it is my  
17 understanding that the compliance obligations at the  
18 specific compliance points listed in Table 1 are  
19 generally being met and will be met in the future under  
20 the operation of Cal WaterFix.

21 I do not know the relationship between the  
22 parameters measured at the compliance points with the  
23 occurrence of the sighted harmful algal bloom that  
24 occurred at Discovery Bay last year.

25 MS. DES JARDINS: Mr. Rischbieter, are you

1 aware of any study that links salinity at the indu --  
2 municipal and industrial intakes in the Delta to  
3 usability of the estuary for swimming?

4 WITNESS RISCHBIETER: No, I'm not specifically  
5 aware of such study.

6 MS. DES JARDINS: Are you aware of any study  
7 which links salinity at municipal and industrial  
8 intakes to recreational fish species, such as Striped  
9 Bass?

10 WITNESS RISCHBIETER: It . . . I think I  
11 elaborated in my testimony that the protective measures  
12 for fish and wildlife resources that are outlined in  
13 Table 3 are the ones that are deemed protective of  
14 activities that might include recreation fishing,  
15 commercial fishing, and a number of other beneficial  
16 uses.

17 So it would be the parameters that are --  
18 Several parameters that are listed in Table 3 of the  
19 2006 Water Quality Control Plan would be relevant to  
20 that question.

21 MS. DES JARDINS: Thank you.

22 Are you aware of any studies which link  
23 boating and whether there is sufficient water levels  
24 for boating to municipal and industrial intake --  
25 salinity at municipal and industrial intakes?

1           WITNESS RISCHBIETER: Boating generally falls  
2 into both the REC 2 beneficial uses described in  
3 Table 1 and the navigation -- nav beneficial uses in  
4 Table 3.

5           I am not aware of any specific studies related  
6 to boating frequency or boating suitability related to  
7 the compliance points that are -- where salinity is  
8 measured.

9           MS. DES JARDINS: I'd like to go -- Finally,  
10 I'd like to go -- I just have one more set of questions  
11 and I'd like to go to Exhibit SWRCB-107, which is the  
12 Incidental Take Permit.

13           (Exhibit displayed on screen.)

14           MS. DES JARDINS: And I'd like to go to  
15 Page 44 --

16           (Exhibit displayed on screen.)

17           MS. DES JARDINS: -- which is Borrow Fill.

18           And this says that there will need to be  
19 (reading):

20           ". . . 21 million cubic yards" of  
21 borrow, "including 3 million cubic yards  
22 for tunnel shaft pads, 6 and a half  
23 million cubic yards for Clifton Court  
24 Forebay . . . 2 million . . . for the  
25 intake, 6.7 . . . at the three intake

1 sites," et cetera.

2 And it lists -- Let's -- Can we zoom out a  
3 little?

4 (Exhibit displayed on screen.)

5 MS. DES JARDINS: And it lists criteria for  
6 selection of borrow sites.

7 But, Mr. Bednarski, have these borrow areas  
8 been defined yet?

9 WITNESS BEDNARSKI: To the best of my  
10 knowledge, they have not.

11 MS. DES JARDINS: Dr. Earle, if you don't know  
12 where the borrow's going from, how are you able to  
13 determine impacts on sensitive habitat?

14 WITNESS EARLE: This is not a complete list of  
15 restrictions on the selection of borrow sites.

16 The . . . matter is treated in more detail in  
17 Chapter 3 of the Biological Assessment, for instance,  
18 or in Chapter 3 of the 2181 application. Regardless,  
19 they will be selected so as to minimize effects on  
20 sensitive species.

21 It is reasonably certain that they will be  
22 located in sites that have impacts on Tricolored  
23 Blackbirds and Swainson's Hawk because these are  
24 extremely widely dispersed species that have thousands  
25 of acres of impact as a result of the Project. It



1 should be feasible to located them in places that avoid  
2 impacts on other species.

3           Since those two species are already known to  
4 be impacted by the borrow sites, then mitigation for  
5 those impacts is included in the Project.

6           MS. DES JARDINS: Can we go to Page 46,  
7 please.

8           (Exhibit displayed on screen.)

9           MS. DES JARDINS: It states (reading):

10           "After final grading of spoil is  
11 complete, Permittee will restore the area  
12 based on site-specific conditions" --  
13 (Timer rings.)

14           MS. DES JARDINS:

15           on Project restoration guidelines."

16           It lists some enormous volumes of spoil.

17           It's -- I think it says -- Mr. Bednarski,  
18 there's projected to be a total of 30 million cubic  
19 yards of spoil; is that correct?

20           WITNESS BEDNARSKI: That's what that table  
21 indicates, yes.

22           MS. DES JARDINS: And 2,558.7 acres of  
23 disposal area?

24           WITNESS BEDNARSKI: Yes, that's what that  
25 table indicates.

1 MS. DES JARDINS: My question is respect to  
2 Project Restoration Guidelines.

3 Have the Project Restoration Guidelines been  
4 defined yet?

5 This --

6 WITNESS EARLE: There --

7 MS. DES JARDINS: -- is the Incidental Take  
8 Permit.

9 WITNESS EARLE: There is quite a bit of  
10 language that could be constituted as such guidelines  
11 that appears in the -- in the EIR/EIS and in the  
12 conservation strategy that's set forth in Chapter 5 of  
13 the Incidental Take Permit Application.

14 MS. DES JARDINS: But this is the actual  
15 Permit conditions.

16 And the Permit conditions themselves, not the  
17 EIR, just state that Project -- this talks about  
18 Project Restoration Guidelines.

19 Dr. Earle or Mr. Bednarski, are either of you  
20 aware of any Project Restoration Guidelines that have  
21 been defined?

22 WITNESS EARLE: I have not yet searched the  
23 Incidental Take Permit for occurrences of the phrase  
24 "Project Restoration Guidelines."

25 It's not a term that was used in the

1 application documents, and so I presume it's a -- a  
2 term of art that's used by CDFW in this document.

3 MS. DES JARDINS: Let's go to Page 133.

4 CO-HEARING OFFICER DODUC: How much further do  
5 you have?

6 MS. DES JARDINS: I'm not -- This is it. It's  
7 just for that document.

8 (Exhibit displayed on screen.)

9 MS. DES JARDINS: Let's go -- You know, zoom  
10 out a little.

11 (Exhibit displayed on screen.)

12 MS. DES JARDINS: Never mind.

13 That concludes my questioning. Thank you very  
14 much.

15 And I -- And I thank the Hearing Officers for  
16 their kindness and patience with my -- my birding  
17 expert.

18 CO-HEARING OFFICER DODUC: Okay. Thank you.

19 Mr. Mizell, any redirect?

20 MR. MIZELL: In order to curry favor with my  
21 witnesses, no.

22 (Laughter.)

23 MR. MIZELL: But I can verbally enter my  
24 exhibits into evidence, if you'd like.

25 CO-HEARING OFFICER DODUC: Oh, yes, that's

1 right. You're done with your case in chief.

2 Please do that.

3 And I see people lining up to make objections.

4 We will note, Miss Nikkel, that you have  
5 already voiced one objection that is still to be  
6 submitted pending our posting of the official  
7 transcript for that date during which Mr. Obegi  
8 conducted his cross-examination of Panel 2.

9 February something or other.

10 MS. NIKKEL: Yes. Thank you.

11 I heard that yesterday on the Webcast. Thank  
12 you for that update.

13 CO-HEARING OFFICER DODUC: All right.

14 MS. DES JARDINS: I --

15 CO-HEARING OFFICER DODUC: Hang on.

16 Let's -- I forgot the procedure, but I think  
17 let's go ahead and have the Petitioners officially move  
18 their exhibits --

19 MS. DES JARDINS: I would like to make an  
20 objection.

21 CO-HEARING OFFICER DODUC: Let me finish.

22 Let them --

23 MS. DES JARDINS: Okay.

24 CO-HEARING OFFICER DODUC: -- officially move  
25 their exhibits and then we will get to objections.

1 Mr. Mizell, Miss Aufdemberge, who is now  
2 Miss Ansley.

3 MR. MIZELL: Thank you.

4 I'd like to remove DWR Exhibits 1000 through  
5 1012, DWR-1013-Signed, DWR-1014 through DWR-1069,  
6 DWR-1070-errata, DWR-1071 through 1078, DWR 1081  
7 through 1095, DWR-1097, DWR-1098, DWR-1100 through  
8 1143, State Water Resource Control Board 102, and State  
9 Water Resource Control Board 104 through 112.

10 CO-HEARING OFFICER DODUC: Thank you.

11 Miss Aufdemberge.

12 MS. AUFDEMBERGE: Yes.

13 We would like to move Exhibit DOI Number 39,  
14 DOI-40, and DOI-41.

15 CO-HEARING OFFICER DODUC: All right. Let the  
16 objections begin.

17 Miss Nikkel.

18 MS. NIKKEL: Meredith Nikkel on behalf of  
19 Group 7, 9, 10. Pick a number. We'll stop there.

20 This is an objection to DWR-1143, which is the  
21 CWF H3+ Operations Criteria Table that was submitted at  
22 the request of the Hearing Officers.

23 This table appears to include additional  
24 information that was not previously the subject of oral  
25 testimony, either in direct or cross-examination, and,

1 therefore, lacks foundation and is improper,  
2 inadmissible hearsay.

3 CO-HEARING OFFICER DODUC: A question,  
4 Miss Nikkel:

5 Are you asserting that it only does not  
6 reflect -- or it goes beyond what was provided in oral  
7 testimony? What about written testimony that was  
8 submitted?

9 My understanding was that they were asked to  
10 compile data that was presented in various tables that  
11 were submitted.

12 MS. NIKKEL: Yes.

13 It includes -- It also includes commentary or  
14 interpretations of information that was submitted as  
15 part of other documents.

16 CO-HEARING OFFICER DODUC: Mr. --

17 MS. NIKKEL: It's --

18 CO-HEARING OFFICER DODUC: -- Mizell.

19 MS. NIKKEL: -- that information that would be  
20 the subject of the objection.

21 CO-HEARING OFFICER DODUC: Mr. Mizell.

22 MR. MIZELL: Yes. DWR-1143 is a -- is a --  
23 our response to what the Hearing Officers requested,  
24 which was a compilation of the Operational Criteria  
25 Tables with their sources readily noted.

1           And so it is pulling together some of the  
2 location information -- the source information as it  
3 was referred to -- for specific Operational Criteria.

4           To the extent that we were requested to make  
5 it easy to read, I'm not sure of any specifics that  
6 Miss Nikkel could provide in terms of interpretations.

7           But we attempted to make sure that the  
8 Operational Criteria reflected the latest Operational  
9 Criteria, so to the extent it is -- it is a  
10 compilation, it pulls together Operational Criteria  
11 from various locations in the record but it does not  
12 produce any new information.

13           CO-HEARING OFFICER DODUC: Can you cite a  
14 particular new --

15           MS. NIKKEL: I can give one as an example.

16           And this is on Page 6 of the .pdf.

17           CO-HEARING OFFICER DODUC: Actually,  
18 Miss Nikkel, if we could pull that up. That would be  
19 DWR-1143.

20           Actually, I should say Panel 3, you are  
21 dismissed.

22           WITNESS BEDNARSKI: Thank you.

23           CO-HEARING OFFICER DODUC: Thank you. Enjoy  
24 your lunch and appreciate your participation very much.

25           (DWR/DOI Panel 3 dismissed.)

1 (Exhibit displayed on screen.)

2 MS. NIKKEL: Yeah. Perfect.

3 On the far right corner ta -- column, "Source  
4 of the criteria," the second bullet says (reading):

5 "Further modified in CDFW Incidental  
6 Take Permit for California WaterFix  
7 Condition of Approval 9.9.4.3; and,  
8 subject to the clarification letter  
9 provided by CDFW to DWR dated  
10 October 18th, 2017."

11 That language there "subject to the  
12 clarification letter," this was the discussion of a lot  
13 of oral testimony as well as written testimony.

14 CO-HEARING OFFICER DODUC: It was.

15 MS. NIKKEL: But the -- the specific language  
16 "subject to" I think raises questions about what that  
17 means in terms of how the Project will be operated  
18 pursuant to this table. That's one example.

19 There's also a footnote in this section,  
20 Footnote 39 --

21 (Exhibit displayed on screen.)

22 MS. NIKKEL: -- which similarly describes the  
23 (reading):

24 ". . . best-available science resulting  
25 from collaborative scientific research



1 program . . ."

2 That whole footnote is one that I'm still  
3 trying to track down in other documents to see if it's  
4 new or -- or not.

5 And there may be other parts of this. We're  
6 actually in the process of trying to piece together  
7 where all of this information came from.

8 CO-HEARING OFFICER DODUC: All right. Without  
9 a listing of the specifics to which you are objecting,  
10 Mr. Mizell is not able to respond and, therefore, I'm  
11 not able to rule.

12 So let's give you some weekend homework and  
13 submit your objection in writing by 5 p.m. on Monday,  
14 and we will have -- we will give Petitioners until  
15 5 p.m. on Tuesday to respond.

16 MS. NIKKEL: Thank you.

17 CO-HEARING OFFICER DODUC: Next is Miss --  
18 Unless, Miss Meserve, your objection is related to what  
19 Miss Nikkel just said.

20 MS. MESERVE: (Nodding head.)

21 CO-HEARING OFFICER DODUC: Okay.

22 MS. MESERVE: It is.

23 And not to labor it -- I understand you would  
24 like to hear (sic) briefing -- but just to add in:

25 I -- I believe it's sort of like surprise

1 testimony. And I believe that DWR could certainly  
2 present this, for instance, in their rebuttal case in  
3 chief, and I -- My objection to it -- and I join in  
4 Ms. Nickel's objection -- is really that it's new  
5 information that hasn't been subjected to this.

6           So I guess I -- I don't really understand why  
7 it's a close question that requires briefing since we  
8 just received this document a few days ago, and it was  
9 not submitted on November --

10           CO-HEARING OFFICER DODUC: Miss --

11           MS. MESERVE: -- 30th.

12           CO-HEARING OFFICER DODUC: -- Meserve, no good  
13 deed goes unpunished.

14           MS. MESERVE: I prefer --

15           CO-HEARING OFFICER DODUC: Miss Meserve, wait  
16 a minute. Hold on. Hold on. Hold on.

17           This came about from Mr. Shutes, I believe it  
18 was -- All their faces run together.

19           Mr. Shutes did a very excellent  
20 cross-examination, upon which then he made this  
21 request, upon which, then, I believe Mr. Mizell  
22 objected but I overruled, thinking that it would be  
23 helpful to us as well as Mr. Shutes, as well as other  
24 parties.

25           So, hence, it was produced and now,

1 Miss Nikkel, and you have voiced some concerns about  
2 it.

3 I'm not requesting a briefing. That's, I  
4 guess, your legal terminology. I'm asking Miss Nikkel  
5 to put her objection in writing with a -- specific  
6 citations to which she is objecting so that we might  
7 have a clear understanding.

8 When I asked earlier, she was able to point to  
9 two examples and said there might be others. They're  
10 still in the process of reviewing this document.

11 Hence, the request that she provide her  
12 objection in writing.

13 MS. MESERVE: The only clarification I would  
14 make is: I do appreciate the effort that went into  
15 response to your request that -- that this be produced,  
16 but it is so late after the presentation of the case in  
17 chief evidence --

18 CO-HEARING OFFICER DODUC: Then you may ignore  
19 it, Miss Meserve.

20 MS. MESERVE: But it's -- it's not proper to  
21 even consider it as evidence in this part of Part 2 at  
22 this time because of the timing.

23 It's not that I don't appreciate the effort.  
24 It's just not appropriately timed. But we shall deal  
25 with that.

1 CO-HEARING OFFICER DODUC: Mr. Jackson, please  
2 let Mr. Shutes know: I will never entertain any more  
3 requests from him.

4 MR. DEERINGER: Can I ask one clarifying  
5 question of Miss Meserve, or should I --

6 CO-HEARING OFFICER DODUC: All right. Just  
7 kidding.

8 Go ahead.

9 MR. DEERINGER: And -- And this is for  
10 Miss Nikkel as well.

11 Would it be accurate to say you see the -- the  
12 argument here as: Is that column new testimony versus  
13 synthesizing testimony or evidence that already exists  
14 in the record, or is -- are we talking about a  
15 different distinction here?

16 MS. MESERVE: It's got 20-some pages of  
17 material in it, and it was submitted last week, and it  
18 is not exactly the same as anything else that was  
19 submitted in November.

20 So I'm just making a more general observation  
21 that it's -- it's not simply a compilation. So I  
22 just -- I understand it's useful to the parties and  
23 that it can be used in -- you know, in -- in an  
24 informal manner.

25 But I'm just saying, as an evidentiary matter,

1 it was not submitted at the time when evidence should  
2 be considered. That's my understanding.

3 MS. MESERVE: And -- And I think, either, if  
4 it's synthesizing or adding new information, it's --  
5 it's -- it's late. It's not properly based on oral  
6 testimony. It's hearsay.

7 CO-HEARING OFFICER DODUC: Would you like to  
8 withdraw this exhibit?

9 MS. MESERVE: Well, actually, I would add  
10 that -- that I -- I think it is a very useful piece of  
11 information. It's information that should have been  
12 submitted by the Petitioners on Day 1 of this hearing.

13 Now we have it after they've presented several  
14 panels of operations and other types of experts.

15 And now Protestants are just now getting the  
16 chance to evidence this useful information without an  
17 opportunity to cross-examine witnesses presented by  
18 Petitioners.

19 MR. MIZELL: I'd like to indicate that all the  
20 information in this exhibit is found in the record.  
21 There is nothing new about it.

22 It is a compilation, so, yes, it is producing  
23 the same information that's already been presented by  
24 the Department and which we've presented a number of  
25 witnesses to be cross-examined on. And, in fact,

1 Miss Nikkel had lengthy cross-examination on the Nikkel  
2 exhibit, which is one of her examples as to what she's  
3 objecting to.

4           So we have provided witnesses. They have been  
5 cross-examined on everything that's in this chart.  
6 This is simply a convenient way of characterizing it  
7 for the benefit of the Hearing Officers as well as at  
8 the request of the other parties.

9           I'll leave it at that.

10           CO-HEARING OFFICER DODUC: All right. We'll  
11 look forward to seeing your written objection.

12           MS. DES JARDINS: I -- This is Dierdre  
13 Des Jardins for California Water Research.

14           And at this time, I would like to lodge an  
15 exhibit -- an objection to DWR-104, the testimony of  
16 Dr. Earle, based on Shiffer vs. CBS Corp. (2015), 240  
17 C.A. 4th 246, 254.

18           And that case cited an instance where the  
19 experts did not analyze a complete set of facts and so  
20 their opinions lacked foundation.

21           And to the extent that Dr. Earle was  
22 unfamiliar with efforts over the past decade to manage  
23 the pelagic organism decline under adaptive management,  
24 I would argue that there's a huge set of facts that he  
25 didn't analyze.

1 And --

2 CO-HEARING OFFICER DODUC: I'm sorry.

3 How is this different from the objection you  
4 voiced earlier?

5 MS. DES JARDINS: This -- I'm making it  
6 properly as Dierdre Des Jardins.

7 So I am making it. You can overrule it again.  
8 But I withdrew the other objection.

9 CO-HEARING OFFICER DODUC: I'm sorry. Are you  
10 done?

11 MS. DES JARDINS: I have one more, which is  
12 Exhibit SWR -- Do you -- Would -- Would you like to  
13 rule on it or should I do the second objection?

14 CO-HEARING OFFICER DODUC: I'm sorry. What  
15 was that?

16 MS. DES JARDINS: Should I make the second  
17 objection?

18 CO-HEARING OFFICER DODUC: Go ahead.

19 MS. DES JARDINS: Just, Miss Morris was  
20 correct: I was cross-examining for Patrick Porgans as  
21 a pro per --

22 CO-HEARING OFFICER DODUC: And so you're  
23 just --

24 MS. DES JARDINS: -- raising an objection.

25 CO-HEARING OFFICER DODUC: -- repeating the

1 objection as Dierdre Des Jardins.

2 MS. DES JARDINS: Yes.

3 CO-HEARING OFFICER DODUC: And it is an  
4 objection that I overruled previously and, therefore, I  
5 am overruling it again.

6 MS. DES JARDINS: Thank you.

7 Exhibit SWRCB-102, Appendix 3I, 3I.7 at 15 to  
8 3I.9 at 38, has an extensive discussion of an analysis  
9 done by -- with the State Water Board outside of this  
10 proceeding, and conclusions that were reached.

11 And I am lodging an objection to using those  
12 conclusions as -- Putting a description in the record  
13 of the conclusions that were reached does not satisfy  
14 the spirit of -- outside of the hearing in -- it does  
15 not satisfy the spirit of actually making a decision in  
16 the hearing.

17 And to the extent the Board relies on those  
18 conclusions in any way without them being fully  
19 analyzed and looked at carefully in this proceeding,  
20 I'm lodging an objection under English vs. City of  
21 Long Beach (1950), 35 Cal. 2d 155, 158.

22 Nothing can be considered which was not  
23 introduced at a hearing of which all parties had notice  
24 and were present.

25 None of the parties to this hearing had notice



1 or were present when those discussions were taking  
2 place with DWR.

3 And none of us had a chance to analyze or look  
4 at the -- the analysis that it's referring to.

5 CO-HEARING OFFICER DODUC: And you're done?

6 MS. DES JARDINS: Yes.

7 CO-HEARING OFFICER DODUC: Any response,  
8 Mr. Mizell?

9 MR. MIZELL: Well, I can certainly look into  
10 the case cited by Miss Des Jardins and see if it stands  
11 for the principles she just cited.

12 But assuming that her quotations from the case  
13 are correct, that evidence needs to be provided to the  
14 other parties with notice and opportunity to question  
15 it, she's challenging an exhibit that has been public  
16 for quite some time, was cited in the testimony of our  
17 witnesses as it is the Final EIR/EIS.

18 And we just spent the last several hours  
19 giving Miss Des Jardins an opportunity to examine and  
20 cross the witnesses on that document, as well as the  
21 other panels in days earlier.

22 So she had notice, and she had an opportunity  
23 to examine and then question the witnesses on SWRCB-102  
24 and the appendices attached to -- thereto.

25 So I would say, assuming Miss Des Jar --

1 Des Jardins is correct about the case law, we have  
2 satisfied those burdens already.

3 But I want to reserve the right to also look  
4 at the case and see if anything else is necessary  
5 should the Hearing Officers desire that.

6 CO-HEARING OFFICER DODUC: We will take that  
7 under consideration.

8 If you would like to look into it and,  
9 whatever, you may have till 5 p.m. Tuesday to do so in  
10 addition to any response to Miss Nikkel's written  
11 objection.

12 All right. Before we break for a much-needed  
13 lunch respite, let me do a bit of housekeeping.

14 How -- Thank you for your patience, by the  
15 way.

16 How long do you expect Panel 1 for Group 4 and  
17 5 to take for direct, please?

18 MR. O'HANLON: Thank you.

19 Daniel O'Hanlon on behalf of the San Luis  
20 Delta-Mendota Water Authority and Westlands Water  
21 District.

22 We estimate about 40 minutes for the direct.

23 CO-HEARING OFFICER DODUC: And Grassland had  
24 an Opening Statement but not San Luis or Westlands, so  
25 I don't expect an Opening Statement from you today.

1 MR. O'HANLON: That's correct.

2 CO-HEARING OFFICER DODUC: Let me see any  
3 cross estimate.

4 Please come up. I'm trying to ascertain when  
5 will be our breaking point -- our breaking point -- our  
6 adjournment time for today possibly.

7 Miss Nikkel.

8 MS. NIKKEL: Meredith Nikkel.

9 I understand from Mr. Bezerra on behalf of  
10 Group 7 that he has approximately an hour of  
11 cross-examination for this panel.

12 CO-HEARING OFFICER DODUC: Okay.

13 MS. NIKKEL: On behalf of Group 9 and 10, I  
14 have approximately 20 minutes of cross-examination.

15 CO-HEARING OFFICER DODUC: Okay.

16 MR. JACKSON: Michael Jackson on behalf of  
17 CSPA, C-WIN and AquAlliance.

18 I expect to have about an hour.

19 CO-HEARING OFFICER DODUC: And your group is?

20 MR. JACKSON: 31.

21 CO-HEARING OFFICER DODUC: Okay.

22 MR. STROSHANE: Tim Stroshane, Restore the  
23 Delta, Group 32.

24 Expect between 45 minutes and 60 minutes.

25 CO-HEARING OFFICER DODUC: Mr. Ruiz.

1 MR. RUIZ: Thank you.

2 CO-HEARING OFFICER DODUC: I'll never forget  
3 your name again.

4 MR. RUIZ: Okay. Group 21.

5 About 20 to 30 minutes.

6 CO-HEARING OFFICER DODUC: All right.

7 MR. RUIZ: And I've made a request to  
8 Miss Meserve to switch orders with her, so I would go  
9 before her, if that's agreeable or okay with the --  
10 with you.

11 CO-HEARING OFFICER DODUC: And that would be  
12 in Group 19-20s.

13 MR. RUIZ: Right. Correct.

14 CO-HEARING OFFICER DODUC: Okay.

15 MS. MESERVE: Osha Meserve for Group 19.

16 I have about 45 minutes to an hour of cross.

17 I've been contacted by Group 24, Mr. Keeling.  
18 He says he has 20 minutes of cross.

19 CO-HEARING OFFICER DODUC: Okay.

20 MR. MIZELL: Tripp Mizell, DWR.

21 DWR does not have any cross for the upcoming  
22 panel.

23 I did want to note, however, that we'll be  
24 doing our best to coordinate our cross-examination with  
25 State Water Contractors, so it may be at points in the

1 future we can consolidate that, but for now, we have no  
2 questions.

3 CO-HEARING OFFICER DODUC: All right.

4 So . . .

5 Oh, Miss Des Jardins.

6 MS. DES JARDINS: Yeah.

7 Dierdre Des Jardins, Group 37.

8 I believe I have 45 minutes to an hour.

9 CO-HEARING OFFICER DODUC: Okay. Let's go  
10 ahead and take our lunch break.

11 We will return at 2:15.

12 (Lunch recess at 1:13 p.m.)

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1 Friday, March 9, 2018 2:15 p.m.

2 PROCEEDINGS

3 ---000---

4 (Proceedings resumed:)

5 CO-HEARING OFFICE DODUC: All right. It is

6 2:15. We are back in session.

7 Welcome to our new panel representing Groups 4

8 and 5.

9 A couple of housekeeping matters before we  
10 begin.

11 After completion of direct testimony of this  
12 panel, we will have: Cross-examination by Mr. Bezerra  
13 representing Group 7 for roughly an hour; and then  
14 cross-examination by Miss Nikkel representing Groups 9  
15 and 10, roughly 20 minutes. Then we will call it a  
16 week and we will reconvene on Monday at 9:30.

17 Keep in mind that this is a spring-ahead  
18 weekend, so be here at 9:30, not 10:30. And we  
19 actually will meet in this room.

20 And at that time, I believe we switch back.  
21 So at that time, we will begin with cross-examination  
22 by Miss Meserve; right?

23 MS. MESERVE: (Nodding head.)

24 CO-HEARING OFFICER DODUC: All right. Any  
25 other housekeeping matter?

1 Miss Meserve.

2 MS. MESERVE: Thank you.

3 Just to clarify: Did you have an estimate  
4 of -- Should I tell my LAND panel from Group 3 to be  
5 here by 12:00, do you think would be a good estimate,  
6 or should I check at the end? I just wanted to . . .

7 CO-HEARING OFFICE DODUC: Let's -- Okay.  
8 Since you brought up this, let's see if we can try  
9 to --

10 MS. MESERVE: If you -- It sounded like maybe  
11 you had done some math of the numbers.

12 CO-HEARING OFFICE DODUC: Actually, I haven't  
13 done any math. Have you done any math?

14 MS. MESERVE: I did not.

15 CO-HEARING OFFICE DODUC: Oh, Miss Meserve!

16 And did you do any sort of unofficial --

17 MS. MESERVE: I did not. I've been very  
18 remiss. I'm very sorry.

19 CO-HEARING OFFICER DODUC: Yes.

20 How about unofficial reconnaissance of  
21 cross-examination of the Westlands Water District  
22 panel?

23 MS. MESERVE: My . . . I think I was at  
24 around four to five hours but I didn't add it up.  
25 That's why I was asking you.

1 CO-HEARING OFFICER DODUC: Okay. And we have  
2 one -- one -- one hour, two hour, three hour, four --  
3 roughly four to five hours beyond today of  
4 cross-examination of this panel.

5 And we have Westlands -- I mean, sorry. Is it  
6 Westlands? Grassland Water Districts. So we will not  
7 get to you Monday.

8 MS. MESERVE: Okay. So I should tell my  
9 witnesses Tuesday morning would be the next --

10 CO-HEARING OFFICE DODUC: The earliest, yes.

11 MS. MESERVE: Thank you very much.

12 CO-HEARING OFFICER DODUC: Um-hmm.

13 All right. Mr. O'Hanlon.

14 MR. O'HANLON: Thank you.

15 CO-HEARING OFFICE DODUC: Third -- Third  
16 time's a charm in terms of getting your panel before  
17 us.

18 MR. O'HANLON: Thank you. Appreciate that.

19 This afternoon, we have Frances Mizuno, Jose  
20 Gutierrez and Dr. Michael Shires.

21 I believe the witnesses need to be sworn  
22 before we begin.

23 CO-HEARING OFFICE DODUC: Yes.

24 Please stand and raise your right hands.

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FRANCES MIZUNO,

JOSE GUTIERREZ,

and

MICHAEL SHIRES,

called as witnesses by the San Luis Delta-Mendota Water  
Authority and Westlands Water District, having been  
duly sworn, were examined and testified as follows:

CO-HEARING OFFICE DODUC: Thank you. Be

seated.

I always wondered what if someone says no?

Has anyone ever said no?

MR. O'HANLON: Not that I'm aware of.

CO-HEARING OFFICE DODUC: Good.

MR. O'HANLON: I'll be going in order:

Ms. Mizuno first, Mr. Gutierrez and Dr. Shires.

DIRECT EXAMINATION

MR. O'HANLON: Beginning with you, Ms. Mizuno.

First, please state your name for the record.

WITNESS MIZUNO: My name is Frances Mizuno.

MR. O'HANLON: And could you please summarize  
your position at the San Luis & Delta-Mendota Water  
Authority, your work experience and your educational  
background.

WITNESS MIZUNO: I'm the Assistant Executive

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www.CaliforniaReporting.com

1 Director for the San Luis & Delta-Mendota Water --

2 CO-HEARING OFFICE DODUC: I don't believe your  
3 microphone is on.

4 WITNESS MIZUNO: How's that? Great.

5 I'm the Assistant Executive Assistant for the  
6 San Luis & Delta-Mendota Water Authority.

7 My responsibilities include the operation and  
8 maintenance of certain South-of-the-Delta CVP  
9 facilities.

10 I also represent the Authority in various  
11 forms and take lead roles in activities at our sister  
12 member agencies. I'm including the coordination of  
13 water transfers for supplemental water supply.

14 I've been employed by the Authority since  
15 1992. Prior to the Authority, I worked for the Bureau  
16 of Reclamation from 1980 to 1986, and then East Bay  
17 Municipal Utility District from 1986 to 1992.

18 I am -- I hold a Bachelor of Science degree in  
19 Civil Engineering from the University of California at  
20 Davis.

21 MR. O'HANLON: Thank you.

22 Is SLDMWA-19 a true and correct copy of your  
23 written testimony?

24 WITNESS MIZUNO: Yes, it is.

25 MR. O'HANLON: And is SLDMWA-13 a list of the

1 member agencies of the San Luis & Delta-Mendota Water  
2 Authority?

3 WITNESS MIZUNO: Yes, it is.

4 MR. O'HANLON: And is SLDW -- I'm sorry --  
5 MWA-14 a table prepared by the Bureau of Reclamation  
6 that shows annual CVP contract allocations for the  
7 years 1997 through 2017?

8 WITNESS MIZUNO: Yes, it is.

9 MR. O'HANLON: Will you be using a PowerPoint  
10 slide in SLDMWA-12 to summarize your written testimony  
11 this afternoon?

12 WITNESS MIZUNO: Yes, I will be.

13 MR. O'HANLON: Could we please have SLDMWA-12  
14 put up on the screen.

15 (Exhibit displayed on screen.)

16 MR. O'HANLON: Miss Mizuno, using your  
17 PowerPoint presentation, would you please summarize  
18 your testimony.

19 WITNESS MIZUNO: Okay. Why don't we go ahead  
20 and go to the next page.

21 (Exhibit displayed on screen.)

22 WITNESS MIZUNO: Yes. Thank you.

23 This is a map of California. And California  
24 consists of 100 million acres, and 9 million acres of  
25 that is irrigated farmland. And of those

1 9 million acres, 3 million acres receive some portion  
2 of their water through the Delta.

3           The Water Authority delivers water to  
4 districts serving 1.2 million acres, which is  
5 13 percent of the State's irrigated farmlands. And it  
6 serves water to 2 million people and 180,000 acres of  
7 wetlands.

8           We can go to the next slide.

9           (Exhibit displayed on screen.)

10           WITNESS MIZUNO: The Water Authority was  
11 formed in 1992 as a joint powers authority. We have a  
12 total of 28 member agencies. 26 of those actually have  
13 contracts with the Bureau of Reclamation for their  
14 water supply.

15           Among other purposes, the Authority was formed  
16 to preserve and protect the rights and benefits of the  
17 members in their contract of water supply for the CVP  
18 water. And also, we do assume the operation and  
19 maintenance of certain South-of-the-Delta CVP  
20 facilities.

21           The Authority area encompasses, as I mentioned  
22 earlier, 1.2 million acres. It starts from the -- just  
23 north of the City of Tracy and it goes along the west  
24 side of San Joaquin Valley all the way down to  
25 Kettleman City to the south, and then to the west, it

1 includes San Benito and Contra -- and Santa Clara  
2 Counties.

3           We have a total -- Our member agencies have a  
4 total of 3.3 million acre-feet of contracted water with  
5 Reclamation. Of that, two-point -- 2.8 million is for  
6 agricultural purposes. 900,000 of that is with the  
7 Exchange and Settlement Contractors.

8           We have 150 to 200,000 acre-feet for M&I  
9 supplies and up to 350,000 acre-feet for Wildlife  
10 Refuges and wetlands.

11           You can go to the next page.

12           (Exhibit displayed on screen.)

13           WITNESS MIZUNO: This chart here represents  
14 the long-term average of South-of-the-Delta CVP Ag  
15 Service Contractors.

16           The CVP's South-of-Delta Ag Service  
17 Contractors have been most signiftic (sic) --  
18 significantly disproportionately impacted by water  
19 supply shortages as a result of various regulations.

20           This graph shows -- illustrates the CVP  
21 South-of-the-Delta allocation over time.

22           You can see, from 1952 to 1990, they received  
23 over 90 percent -- long-term average of 90 -- over  
24 90 percent of their contract allocation. Essentially,  
25 they received 100 percent of their allocation with the

1 exception of 1977 during extreme drought.

2           Since that time, with the onset of various  
3 regulations -- in particular the Endangered Species  
4 Act, the CVPIA and Clean Water Act -- their -- their  
5 water supply allocation long-term average has steadily  
6 declined to -- whereas now the long-term average  
7 expected with the current regulations in place is only  
8 about 40 percent.

9           So the impacts of these shortages have  
10 resulted in the need to purchase a supplemental water  
11 supply at a very high cost. In addition, there's been  
12 substantially increased groundwater pumping and  
13 throughout the valley.

14           The harms that result from the reduced CVP  
15 water allocation include, but not limited to, increased  
16 overdraft, subsidence, lower crop yields, poor water  
17 quality, land fallowing, public health and safety,  
18 increased costs to member agencies, reduced ag  
19 production and economic losses, impacts to the local  
20 wildlife and waterfowl, and employment, and resulting  
21 social economic harms.

22           Next slide.

23           (Exhibit displayed on screen.)

24           WITNESS MIZUNO: This chart shows the -- It's  
25 a little -- I know it's a little busy. But it -- what

1 this shows is the CVP storage at the end of February  
2 relative to the CVP South-of-the-Delta ag service  
3 allocation from 1951 to 2017.

4           So the blue bars is the -- the total CVP  
5 storage at the end of February for any given year.

6           And the -- the green -- Let's see.

7           The red squares shows the initial allocation  
8 and the Green triangles shows the final allocation.

9           So up until the early 1990s, the  
10 South-of-the-Delta Ag Service Contractor received their  
11 allocation in February. They got their initial and  
12 final allocation in February. And that's primarily  
13 because Reclamation didn't take a look at hydrology,  
14 what they have in storage, and be able to make an  
15 allocation.

16           However, since 1991, with the onset of CVPIA,  
17 they no longer can just look at the storage in place.  
18 And because of the various restrictions and reduction  
19 in pumping, that they come out with an allocation --  
20 initial allocation in February and then, on a monthly  
21 basis, provide an update, and sometimes they don't  
22 provide a final allocation until as late as June or  
23 July.

24           But over time, as you can see, with the  
25 general water storage over time, the -- the

1 allocations, both initial and final allocations, have  
2 dramatically increased.

3           So what that tells you is, it's not a shortage  
4 of water that is the problem. It's the restrictions  
5 and regulations that have been placed that have  
6 prevented Reclamation from providing the additional  
7 water supply to -- to its Contractors.

8           The impacts of the late allocations is that  
9 the businesses -- and these businesses are farm --  
10 farming businesses -- they need to have planting  
11 decisions early in the year. Without a firm water  
12 supply, it's very difficult for them to make those  
13 planting decisions and, further, it's very difficult  
14 for them to secure financing.

15           So this makes a very -- constrains on the  
16 ability to utilize the water supply that they may get  
17 and throughout the year for that particular year's  
18 purpose.

19           Okay. What . . . In the -- Let's see. My  
20 Exhibits SLDMW-14 is a table that is provided the  
21 Reclamation that shows the allocation -- historical CVP  
22 allocation.

23           As I mentioned earlier, the CVP  
24 South-of-the-Delta Contractors has been  
25 disproportionately impacted. All these regula --



1 regulations have been put in place have hit mostly the  
2 CVP South Delta Contractors.

3           Looking at those -- the allocations over time,  
4 the Water Rights Settlement Contractors have remained  
5 at 100 percent, with the exception of drought years.

6           Along light classes of CVP Contractors, those  
7 located North of the Delta have received higher  
8 allocations than those south of the Delta.

9           For example, in 2013, the Ag Service  
10 Contractors north of the Delta received a 75 percent  
11 allocation, whereas those south of the Delta received  
12 only a 20 percent allocation.

13           Also in 2013, urban contractors north of the  
14 Delta received 100 percent of their allocation while  
15 the urban contractors south of the Delta received only  
16 a 70 percent allocation.

17           The same pattern appears in multiple years.

18           Prior to 1993, Contractors north of the Delta,  
19 south of the Delta essentially received the same  
20 allocation.

21           Again, because of the inability to convey  
22 water through the Delta, it has prevented Reclamation  
23 from providing the similar allocations to  
24 South-of-the-Delta Contractors.

25           So, in summary, the past 25 years' reliability

1 and the quantity of CVP water to Authority members has  
2 steadily declined due to regulations for fish  
3 protection.

4           However, these fish pop -- The fish population  
5 that were intended to benefit from these regulations  
6 have not only shown any improvement, it's actually have  
7 declined along with the water supply.

8           These 25 years demonstrate the need to find  
9 new solutions or new approaches that will allow the  
10 conveyance of water through the Delta for the  
11 beneficial uses and also to protect fishery population.

12           The WaterFix is intended to move water in a  
13 way that have much reduced environmental impacts.  
14 Whether the WaterFix will actually improve the water  
15 supply for the Authority members remains to be seen.

16           At this time, Reclamation has not defined a  
17 role for the CVP for the WaterFix and, therefore, it  
18 results in -- in -- unclear as to how our Authority  
19 members will actually participate and benefit from the  
20 water -- from the WaterFix.

21           However, through these proceedings, we wanted  
22 to assure that the Board, when it considers this Change  
23 Petition, it does not issue any terms and conditions  
24 that will further impact Reclamation's operations of  
25 the CVP and further reduce the water supply to

1 South-of-the-Delta CVP Contractors.

2 We want to ensure that the public interests of  
3 our members at South of the Delta is protected and  
4 preserved.

5 Thank you.

6 MR. O'HANLON: Thank you, Ms. Mizuno.

7 Turning to Mr. Gutierrez.

8 Could you please state your name for the  
9 record.

10 WITNESS GUTIERREZ: Jose Gutierrez.

11 MR. O'HANLON: Could you please summarize your  
12 position at Westlands, your work experience and your  
13 educational background.

14 WITNESS GUTIERREZ: I am the Assistant Chief  
15 Operation Officer at Westlands Water District. I've  
16 held that position for approximately five and a half  
17 years.

18 I earned my Bachelors of Science and Master's  
19 of Science degree from the University of California at  
20 Berkeley.

21 Go bears!

22 CO-HEARING OFFICER MARCUS: You just made the  
23 Chair so happy.

24 WITNESS GUTIERREZ: Prior to joining  
25 Westlands, I worked in the private sector as a

1 Consulting Engineer working primarily on projects --  
2 water-related projects, with winter storm drain and  
3 flood protection projects throughout California.

4 Prior to being a consultant, I also worked for  
5 the Environmental Protection Agency straight out of  
6 college as an Environmental Engineer.

7 MR. O'HANLON: Is WWD-22 a true and correct of  
8 your updated Statement of Qualifications?

9 WITNESS GUTIERREZ: Yes.

10 MR. O'HANLON: Is WWD-15 a true and correct  
11 copy of your updated written testimony?

12 WITNESS GUTIERREZ: Yes.

13 MR. O'HANLON: Is WWD-3 a copy of the 1963  
14 Water Service Contract between the United States and  
15 Westlands?

16 WITNESS GUTIERREZ: Yes.

17 MR. O'HANLON: Is WWD-4 a copy of the 2016  
18 Interim Renewal Contract for water service between the  
19 United States and Westlands?

20 WITNESS GUTIERREZ: What -- What year was that  
21 again, the . . .

22 MR. O'HANLON: WWD-4.

23 WITNESS GUTIERREZ: The 2016?

24 MR. O'HANLON: Yes.

25 WITNESS GUTIERREZ: Yes.

1 MR. O'HANLON: And that contract expired on  
2 February 28th of this year; correct?

3 WITNESS GUTIERREZ: Yes.

4 MR. O'HANLON: And has Westlands renewed that  
5 contract and another renewal contract that runs through  
6 2020?

7 WITNESS GUTIERREZ: Yes.

8 MR. O'HANLON: Thank you.

9 Is WWD-5 a map of Westlands Water District?

10 WITNESS GUTIERREZ: It's actually a map of the  
11 Authority's member agencies, but Westlands is part of  
12 that.

13 MR. O'HANLON: All right. And is WWD-6 a copy  
14 of the BDCP Planning Agreement signed in October of  
15 2006?

16 WITNESS GUTIERREZ: Yes.

17 MR. O'HANLON: Will you be using a PowerPoint  
18 presentation to aid in your summary of written  
19 testimony this afternoon?

20 WITNESS GUTIERREZ: Yes.

21 MR. O'HANLON: And is that power (sic)  
22 presentation contained in WWD-17?

23 WITNESS GUTIERREZ: Yes.

24 (Exhibit displayed on screen.)

25 MR. O'HANLON: Can we please have WWD-17 --

1 And I see it's already on the screen. Thank you.

2 Mr. Gutierrez, could you please summarize your  
3 testimony using the PowerPoint presentation.

4 WITNESS GUTIERREZ: Okay. The next slide,  
5 please.

6 (Exhibit displayed on screen.)

7 WITNESS GUTIERREZ: This is a brief agenda of  
8 what I'm going to discuss in my PowerPoint  
9 presentation.

10 Next slide, please.

11 (Exhibit displayed on screen.)

12 WITNESS GUTIERREZ: This is a map of Westlands  
13 Water District. The District is primarily in western  
14 Fresno County and portions of Kings County. It's about  
15 70 miles long by about 15 miles wide on average.

16 Next slide, please.

17 (Exhibit displayed on screen.)

18 WITNESS GUTIERREZ: Historically, when water  
19 supply is sufficient, Westlands could irrigate up to  
20 about 1.4 -- or use about 1.4 million acre-feet per  
21 year. Again provided water supply's sufficient.

22 Next slide, please.

23 (Exhibit displayed on screen.)

24 WITNESS GUTIERREZ: Frances already discussed  
25 this slide so I'm going to go to the next one.

1 Westlands' water supply primarily comes from  
2 its contract with the Bureau of Reclamation. Also,  
3 there are supplemental water transfers that staff  
4 purchases on an annual basis if there is supply  
5 available, and groundwater.

6 Next slide, please.

7 (Exhibit displayed on screen.)

8 WITNESS GUTIERREZ: Westlands promotes water  
9 conservation in our district. And I'd like to say that  
10 over 90 percent of Westlands' water users employ drip  
11 irrigation or sprinkler irrigation on their farms.

12 Next slide.

13 (Exhibit displayed on screen.)

14 WITNESS GUTIERREZ: One of the benefits of  
15 drip irrigation is that it helps reduce the amount of  
16 shallow groundwater that persists within our service  
17 area.

18 Next slide, please.

19 (Exhibit displayed on screen.)

20 WITNESS GUTIERREZ: As Frances pointed out in  
21 her slide, due to increased regulations, we anti --  
22 Westlands anticipates an average CVP allocation between  
23 30 and 40 percent going forward.

24 And, in fact, in 2014 and 2015, we received a  
25 0 percent allocation followed by a 5 percent allocation

1 in 2016.

2 Next slide.

3 (Exhibit displayed on screen.)

4 WITNESS GUTIERREZ: This graphic illustrates  
5 the mix of surface water and groundwater supplies used  
6 in Westlands Water District. And in years when our  
7 allocations were very low, we pumped more groundwater.  
8 But when our service water allocations were high, we  
9 pumped less groundwater and used that surface water.

10 Next slide, please.

11 (Exhibit displayed on screen.)

12 WITNESS GUTIERREZ: This graphic illustrates  
13 the average groundwater elevation in Westlands Water  
14 District's service area and the total groundwater  
15 pumped by year.

16 And, again, as illustrated, as pumping goes  
17 up, groundwater levels decline, and the reverse happens  
18 when surface war is abundant or sufficient.

19 Next slide, please.

20 (Exhibit displayed on screen.)

21 WITNESS GUTIERREZ: This table summarizes the  
22 District-wide groundwater pumping from contract years  
23 2007 and 2008 through contract year 2017-18 that we  
24 just completed.

25 If I could draw your attention to row 2011-12.



1 We received an 80 percent allocation that year and  
2 pumped about 45,000 acre-feet. And in comparison, in  
3 2015-16, contrary here, our allocation was there and we  
4 pumped 660,000 acre-feet.

5 And for the year that we just completed, we  
6 received 100 percent allocation, I think the data just  
7 came in. We pumped about 40 -- I'm sorry -- 54,000  
8 acre-feet.

9 So, again, when our allocations are high, we  
10 rely less on groundwater.

11 Next slide, please.

12 (Exhibit displayed on screen.)

13 WITNESS GUTIERREZ: This is -- This is slide  
14 that Frances discussed already so I'm going to skip it.

15 (Exhibit displayed on screen.)

16 WITNESS GUTIERREZ: Here's a summary of our  
17 South -- CVP South-of-Delta allocations dating from  
18 1990 through the 2017-18 contract year.

19 I'd like to point out that, from 2009 and '10  
20 through 2017-18, our average allocation was 33 percent,  
21 so we're within that 30 to 40 percent band that we're  
22 anticipating going forward.

23 Next slide, please.

24 (Exhibit displayed on screen.)

25 WITNESS GUTIERREZ: The purpose behind this

1 illustration is to demonstrate, in similar hydrologic  
2 years in 2004-05 versus 2015-16, the precipitation  
3 totals were similar. However, in 2004-2005, our  
4 allocation was 85 percent and, in 2016, our allocation  
5 was 5 percent.

6 Next slide.

7 (Exhibit displayed on screen.)

8 WITNESS GUTIERREZ: Similarly, the reservoir  
9 levels were about the same in those two years, just  
10 demonstrating that precipitation and reservoir levels  
11 are nev -- no longer a good indication whether we're  
12 going to receive a -- a high allocation or not.

13 Next slide.

14 (Exhibit displayed on screen.)

15 WITNESS GUTIERREZ: I wanted to share: Goals  
16 amongst the signatories to the BDCP was to restore and  
17 protect water supply.

18 Next slide.

19 (Exhibit displayed on screen.)

20 WITNESS GUTIERREZ: Now, one of the concerns  
21 that we have, potential impacts to Westlands, is that  
22 reliability going forward could drop below 30 percent  
23 and further impact operations in Westlands.

24 Next slide.

25 (Exhibit displayed on screen.)

1           WITNESS GUTIERREZ: Now, if -- if there was a  
2 way that we could restore our CVP allocation to  
3 70 percent, and if Westlands staff could procure  
4 supplemental water, and if our water users could also  
5 complete their own individual transfers like they do  
6 currently, and we could manage -- sustainably managing  
7 our groundwater subbasin, we -- we expect that we could  
8 achieve an increase in our harvesting of our irrigable  
9 acres. We could also lower employment rates in Fresno  
10 County and Kings County. And we could limit the -- the  
11 amount of groundwater pumping and manage our basin  
12 within its sustainable yield.

13           Next slide, please.

14           (Exhibit displayed on screen.)

15           WITNESS GUTIERREZ: So it's our hopes that,  
16 whatever the outcome is in these proceedings, is that  
17 the -- the water supply for Westlands not be reduced  
18 any further. That is our -- our hope.

19           Next slide.

20           (Exhibit displayed on screen.)

21           WITNESS GUTIERREZ: And, like -- I guess to  
22 that point, it's -- it would be important that this  
23 Project and process not reduce water supply to  
24 Westlands.

25           That's the conclusion of my presentation.

1 MR. O'HANLON: Thank you, Mr. Gutierrez.

2 Turning to you, Dr. Shires.

3 Could you please state your name for the  
4 record.

5 WITNESS SHIRES: Michael Allen Shires.

6 MR. O'HANLON: Dr. Shires, would you please  
7 summarize your qualifications, your experience and  
8 educational background.

9 WITNESS SHIRES: I'm an Associate Professor of  
10 Public Policy and Associate Dean for Strategy and  
11 Special Projects at the Pepperdine School of Public  
12 Policy.

13 In my capacity as a scholar and professor, I  
14 have executed many policy analyses and research  
15 projects examining the fiscal, economic, budgetary, and  
16 human aspects of public policy choices, both those made  
17 by public and private actors.

18 I offer my testimony today in my capacity as a  
19 scholar in the areas of economic environmental, fiscal  
20 analysis, and public policy analysis.

21 I have a Bachelor's in Economics from the  
22 Southern Branch of the University of California, more  
23 affectionately know as UCLA, as well as an MBA from the  
24 UCLA School of Management, a Master's in Philosophy  
25 from the Pardee RAND Graduate School, and a Ph.D. in

1 the same area, public policy analysis.

2 MR. O'HANLON: Dr. Shires, is WWD-20 a true  
3 and correct copy of your Statement of Qualifications?

4 WITNESS SHIRES: Yes, it is.

5 MR. O'HANLON: And is WWD-18 a true and  
6 correct copy of your written testimony?

7 WITNESS SHIRES: Yes, it is.

8 MR. O'HANLON: Have you prepared a PowerPoint  
9 presentation to aid in your summary of your testimony  
10 this afternoon?

11 WITNESS SHIRES: I have.

12 MR. O'HANLON: Is that PowerPoint presentation  
13 in WWD-19?

14 WITNESS SHIRES: Yes, it is.

15 MR. O'HANLON: Using the PowerPoint  
16 presentation, would you please summarize your  
17 testimony.

18 WITNESS SHIRES: Thank you for the opportunity  
19 to present this information.

20 Next slide, please.

21 (Exhibit displayed on screen.)

22 WITNESS SHIRES: We've already seen the map of  
23 the Westlands Water District. I just think it's -- I  
24 wanted to put it in the context of Fresno because a lot  
25 of this is going to look at the regional economy and

1 the impacts.

2 Next slide, please.

3 (Exhibit displayed on screen.)

4 WITNESS SHIRES: My testimony today will focus  
5 on three questions.

6 The first is the economic and demographic  
7 context of the Westlands Water District and its  
8 economic activities.

9 The second is the economic impact of Westlands  
10 growers.

11 And then, finally, the implications of those  
12 impacts on regional, state and national policy.

13 Next slide, please.

14 (Exhibit displayed on screen.)

15 WITNESS SHIRES: So the region of the Central  
16 Valley in which Westlands is located is an area that's  
17 slated for high growth, something around the order of  
18 11 percent per decade for the next four decades, see a  
19 population increase of about 700,000 in the region.

20 Next slide, please.

21 (Exhibit displayed on screen.)

22 WITNESS SHIRES: Of that total, it's  
23 dramatically Latino in nature. The Hispanic share of  
24 the population is about 50 percent today if we look at  
25 Fresno and Kings Counties combined.

1           In 50 years, the State Department of Finance  
2 projects that will be more than 60 percent in both  
3 counties. With that population, the county also  
4 exhibits a high level of poverty.

5           If we could have the next slide, please.

6           (Exhibit displayed on screen.)

7           WITNESS SHIRES: You can see here the share of  
8 families that are under the Federal designated poverty  
9 level. Statewide, it's somewhere around -- it's  
10 somewhere around about 15 to 20 -- 12 to 15 percent.

11           But if you look at Fresno and Kings Counties,  
12 those numbers are much higher, in the case of Fresno  
13 County, above 20 percent.

14           The next slide.

15           (Exhibit displayed on screen.)

16           WITNESS SHIRES: If you look at median  
17 household incomes in this region, you see a trend  
18 that -- From 2011 to 2014, you see median household  
19 income. If you look at the middle line, where it says,  
20 "Fresno County," you can see that line going down  
21 essentially every year since the great recession at a  
22 time when the state was level to flat.

23           If you think of that, those are nominal  
24 dollars in the top. If you think of that in terms of  
25 buying power and inflation, you can see the bottom

1 line, you can see the changes are much more dramatic  
2 with Fresno and Kings Counties both showing median  
3 household incomes declining by more than 8 percent,  
4 which is significant.

5 Next slide.

6 (Exhibit displayed on screen.)

7 WITNESS SHIRES: Within the region,  
8 agriculture is a major driver of economic activity.  
9 One in eight jobs in Fresno County and one in six jobs  
10 in Kings County are located on a farm.

11 Beyond that -- and most people don't always  
12 think of this -- in areas that are so heavily  
13 influenced by agricultural, significant parts of the  
14 other businesses that you see, the car dealers, the  
15 truck -- the truck companies, the -- the seed sales,  
16 all of those are related to agriculture in some way.

17 So when we did the estimate of the economic  
18 impact at Westlands --

19 Go ahead and go to the next slide.

20 (Exhibit displayed on screen.)

21 WITNESS SHIRES: -- we had to take on the  
22 question in many ways.

23 Next slide please.

24 WITNESS SHIRES: -- of the complexity of the  
25 agricultural process.



1 Westlands provides waters to growers, amongst  
2 others, and in that process, they plant crops and they  
3 produce -- they produce goods that are then used by  
4 packers and processors, which are a whole separate  
5 sector, but, again, who are completely driven by the  
6 presence of the agriculture in the first place.

7 And then, finally, those packaged products are  
8 often sent off to food processors to make things like  
9 ketchup and other resources that we see, other  
10 products. And in all these sectors, there are workers,  
11 there are purchases, and there are other inputs into  
12 the sector.

13 So we did an economic model of the region, and  
14 we estimated the impacts just of the agriculture  
15 production of the growers and the economic activity,  
16 nonagricultural water provision for Westlands Water  
17 District.

18 If I could have the next slide.

19 (Exhibit displayed on screen.)

20 WITNESS SHIRES: In that analysis, we  
21 identified just under 29,000 jobs in the 2015 year  
22 which were related to agriculture, which were related  
23 to the agricultural activity from Westlands, as well as  
24 some of the other activities, transporting water to  
25 surrounding cities and communities.

1           That accounted for a total of about  
2 \$3.6 billion in economic activity across the region.

3           It's important to kind of put a footnote in  
4 this. This was a drought year. This is 2015.

5           If we look at the next slide --

6           (Exhibit displayed on screen.)

7           WITNESS SHIRES: -- and we see the chart that  
8 you've seen before which shows the percentage of  
9 allo -- of Westlands contractual allocation that they  
10 received, you can see 2015 down there in the bottom  
11 right-hand corner as a little wedge. That has some  
12 obvious implications. If there's not water, it's hard  
13 to plant crops.

14          If we go to the next slide --

15          (Exhibit displayed on screen.)

16          WITNESS SHIRES: -- you can see that same  
17 chart plotted next to the number of acres that were  
18 fallowed, of agricultural productive land in Westlands  
19 that were fallowed, in each year.

20          And you see this wonderful kind of mirror  
21 effect -- I mean, it's not wonderful to the growers.

22          But you see this mirror effect of years in  
23 which they receive very little water, there's a lot of  
24 land fallowed. And so the year that we looked at in  
25 our economic analysis is in the bottom right side of

1 that.

2           There's another implication of water  
3 availability in times when water is not available.

4           If we go to the next chart.

5           (Exhibit displayed on screen.)

6           WITNESS SHIRES: And this is not the only  
7 thing that drives this, but the drought was clearly  
8 part of this.

9           You can see the share of crop production in  
10 different categories. So the very top, you see fruit  
11 tree production, you see other crops, you see grains in  
12 the middle there. That gray kind of wedge in the  
13 middle is tree nuts. You can see that growing  
14 dramatically as a share. And then, finally, vegetables  
15 and melons on the bottom.

16           And so you can see this kind of change in the  
17 size of these colors and the wedges across this. You  
18 see that they're pervasive and they're consistent.  
19 There's trend lines over time.

20           This has some interesting implications on  
21 employment in the region. We actually looked at what  
22 would happen if you had kept the allocation of crops  
23 differently.

24           If you think about it, tree nuts have --  
25 Things like almond trees have a lot of ag -- have a lot

1 of work at the beginning when you plant the trees. And  
2 then they sit there and they grow and the maintenance  
3 is much lower, whereas other crops, like fruit and  
4 produce, have consistent hands-on labor needs all -- at  
5 all times. And so we looked at the labor impacts of  
6 this.

7 If we pull up the next slide.

8 (Exhibit displayed on screen.)

9 WITNESS SHIRES: What you'll see here is a  
10 chart that used crop profiles from three different  
11 periods.

12 The right-hand one is the one we see in 2015.  
13 The others are from 1993 and 2008, years when the  
14 allocation at least in 2008 was much higher.

15 And you can see here that there would have  
16 been significantly more employment impact related to  
17 Westlands activity if the crop profiles matched those  
18 years.

19 And here we corrected for acreage, and we  
20 corrected for value crops just to give us kind of this  
21 comparison.

22 And we see that, today, it's about  
23 30 percent -- 34 percent lower than it would have been,  
24 for example, if we were using the 1993 crop profile.

25 So next slide.

1 (Exhibit displayed on screen.)

2 WITNESS SHIRES: What does all this mean to  
3 regional, state and national policy?

4 Next slide.

5 (Exhibit displayed on screen.)

6 WITNESS SHIRES: The first thing is that  
7 Westlands' crop-related production is a significant  
8 share of state and national production.

9 Just to give you kind of a -- the number that  
10 wowed me when I did this the first time, if you look at  
11 the bottom table where it shows the share of overall  
12 output, and you look at the second from the right  
13 column, Westlands produces 5 percent of the  
14 agricultural output -- almost 5 percent of the  
15 agricultural output in the State of California.

16 Even to me, the 1 percent is particularly  
17 impressive because you think of all the acres of corn  
18 and soy across the country and the fact that the  
19 agricultural production here can be such a significant  
20 part.

21 Next slide, please.

22 (Exhibit displayed on screen.)

23 WITNESS SHIRES: Not only that, but when you  
24 think of fresh fruit and produce, California -- and  
25 Westlands is a significant part of this -- dominates

1 the production nationally.

2 I think as this Board thinks about policy  
3 issues that are going to affect availability possibly  
4 of water for agriculture purposes, this is something to  
5 keep in mind.

6 The Central Valley is unique in its location  
7 and in its growing season and the quality of the soil  
8 and the resources available to grow crops. We don't  
9 have places like this all over the country. And so  
10 this is a unique place.

11 And because of that, you can see here there  
12 are many, many crops where California produces all,  
13 almost all, well over 50 percent of the crops that  
14 are -- are being grown in the United States.

15 If decisions were made here that reduce that  
16 production, for whatever reasons, that can have a  
17 series of implications that I just kind of want to  
18 mention as part of the -- the end of the analysis we  
19 did.

20 If we could have the next slide.

21 (Exhibit displayed on screen.)

22 WITNESS SHIRES: There's really two sets of  
23 issues that I want to highlight: The first is the  
24 public health issue; and the second is that if we don't  
25 grow the fruit and produce in California, there are no

1 other places in the United States that we could easily  
2 grow them. That means that we become increasingly  
3 dependent on imports from other countries, and that has  
4 some significant implications for -- for California.

5 The next chart.

6 (Exhibit displayed on screen.)

7 WITNESS SHIRES: This is a chart that I think  
8 people have seen many times but it's still kind of  
9 slaps you on the face. This is the obesity rate across  
10 the country for children. And as you can see here,  
11 these numbers are dramatic, especially in the south.

12 One of the things that all nutritionists agree  
13 on is the availability of fresh fruit and produce in  
14 people's diets as one of the keys to this.

15 If we reduce production in California, we will  
16 see a situation where those things certainly become  
17 more expensive and less available.

18 The next chart, please.

19 (Exhibit displayed on screen.)

20 WITNESS SHIRES: Finally, there's the question  
21 of what the impact will be of Westlands -- of reducing  
22 water supply to agriculture in terms of increasing our  
23 reliance on imports. And this is a -- this is an  
24 important point.

25 First, there's always the national security

1 issue. If you're in a situation where you might have  
2 difficult trade relationships, as we've increasingly  
3 seen between the United States and its neighbors, being  
4 dependent on them for your food supply has some  
5 national security implications.

6 But I think, more important than that, is the  
7 food safety implications. The U.S. has a very  
8 developed food safety sector and we are very good at  
9 tracking illness and tracking the quality of our  
10 vegetables and produce and inspecting them.

11 If we become dependent on other countries --  
12 There was the case in 2011 where there was a major  
13 salmonella outbreak that affected over 1100 people. It  
14 was from farms in Mexico. It took the USFDA to find  
15 out where that infection came from and to identify it.  
16 Other countries just don't have that infrastructure.

17 There's also the question of environmental  
18 protection. California and the United States are very  
19 good at regulating environmental impacts and making  
20 sure that pesticide use and that the climate is  
21 protected, the ground is protected, the water supply is  
22 protected. Other countries are not so good at that and  
23 don't have the regulatory enforcement.

24 So, in some ways, as we shift our consumption  
25 away -- If we were to shift our consumption away from



1 U.S. production to other places, that will in some ways  
2 require our consumers to subsidize that dangerous  
3 production other places.

4           If you think of things -- places like India  
5 and Brazil, clearcutting forests, rain forests, in  
6 order to make farmlands, it can even have broader  
7 impacts on the climate overall.

8           And then, finally, labor standards. This is  
9 one that being in Southern California is near and dear  
10 to my heart.

11           U.S. farm production has to meet very  
12 stringent safety and wage standards.

13           There was a -- a -- a strike in Mexico in  
14 2015, in May. It was a very violent confrontation.  
15 And the result of that strike was to get farmers a  
16 raise from 12 to \$13 a day in wages for farm workers.

17           And so we have a -- I think a very much  
18 stronger quality of life for our agricultural workers  
19 in the United States.

20           And so as -- If we shift production away from  
21 U.S. production of crops, and we focus on these  
22 imports, those are all the kinds of issues this we'll  
23 be subsidizing.

24           In conclusion of my remarks today, any  
25 findings that this Board makes related to putting

1 limitations on water availability for our agricultural  
2 sector is going to have impacts not just on the  
3 availability of food supply and these kind of issues  
4 here, but it's going to directly affect the lives of  
5 those farm workers in those communities, as well as the  
6 communities in which they live.

7 I mean, if you -- if you either force them out  
8 of the labor force, they will either emigrate to other  
9 places, in which case the local School District, for  
10 example, will have to lay off teachers, or they will --  
11 or they will go on to the public safety support net.

12 So thank you for this -- Thank you.

13 MR. O'HANLON: Thank you, Dr. Shires.

14 And that concludes the summary of the direct  
15 testimony.

16 CO-HEARING OFFICE DODUC: Thank you very much.

17 Mr. Bezerra.

18 I'm wondering: Do the witnesses want to move  
19 down for easier viewing of this screen?

20 MR. O'HANLON: That's really fine with me. Do  
21 you guys want to move down?

22 WITNESS SHIRES: Should we take our name tags?

23 MR. BEZERRA: Good afternoon.

24 My name's Ryan Bezerra. I'm counsel for the  
25 Cities of Folsom and Roseville, Sacramento Suburban

1 Water District, and San Juan Water District in this  
2 hearing.

3 So, welcome.

4 I have about an hour worth of cross.

5 I've got four subjects I'd like to discuss:

6 One is the issues that Cal WaterFix would  
7 address for these agencies.

8 The second is what the restoration of CVP  
9 supplies would mean.

10 The third is the possible adaptive management  
11 that may affect deliveries to these agencies.

12 And the third (sic) is the Central Valley  
13 Project as an integrated product.

14 So if we could please pull up Ms. Mizuno's  
15 testimony which is Exhibit SLDMWA-19. That's a lot of  
16 letters.

17 (Exhibit displayed on screen.)

18 MR. BEZERRA: And please go to Page 5 and  
19 Lines 12 through 14.

20 (Exhibit displayed on screen.)

21 CROSS-EXAMINATION BY

22 MR. BEZERRA: Ms. Mizuno, do you see on that  
23 page, there's a sentence (reading):

24 "There is an urgent need to restore  
25 these surface water supplies to improve

1           the condition of the communities that  
2           that exist within the areas served by the  
3           member agencies."

4           Do you see that?

5           WITNESS MIZUNO: Yes.

6           MR. BEZERRA: And, by that sentence, "the  
7           urgent need to restore supplies -- surface water  
8           supplies" from the CVP; correct?

9           WITNESS MIZUNO: That's correct.

10          MR. BEZERRA: And if we could just have you  
11         speak into the mic so we have a clear record.

12         WITNESS MIZUNO: That is correct.

13         MR. BEZERRA: Thank you.

14         All of the Authority's members are Central  
15         Valley Project Contractors; correct?

16         WITNESS MIZUNO: 26 out of the 28.

17         MR. BEZERRA: 26 out of the 28.

18         WITNESS MIZUNO: 28 members, yes.

19         MR. BEZERRA: And which two are not CVP  
20         Contractors?

21         WITNESS MIZUNO: Pajaro Valley and Pleasant --  
22         Pleasant Valley.

23         MR. BEZERRA: So when you -- Perhaps I asked  
24         this already.

25         When you say there's an urgent need to restore

1 the supplies, you mean CVP contract supplies; correct?

2 WITNESS MIZUNO: That's correct.

3 MR. BEZERRA: Could we please go to the next  
4 page of Ms. Mizuno's testimony, and specifically  
5 Lines 12 through 25.

6 (Exhibit displayed on screen.)

7 MR. BEZERRA: And on these lines, Ms. Mizuno,  
8 you discuss reductions of CVP allocations in similar  
9 hydrologic circumstances as being a problem for the  
10 Authority's members; correct?

11 WITNESS MIZUNO: That's correct.

12 MR. BEZERRA: So addressing this reduction  
13 would be part of restoring the members' CVP supplies;  
14 correct?

15 WITNESS MIZUNO: That's correct.

16 MR. BEZERRA: Could we please go to the next  
17 page of Ms. Mizuno's testimony and Paragraph 17.

18 (Exhibit displayed on screen.)

19 MR. BEZERRA: Okay. Ms. Mizuno, in this  
20 paragraph, you generally discuss a disparity in CVP  
21 allocations between north and -- North-of-Delta and  
22 South-of-Delta CVP Contractors; correct?

23 WITNESS MIZUNO: That's correct.

24 MR. BEZERRA: And that's occurred after 1993.

25 WITNESS MIZUNO: That's correct.

1 MR. BEZERRA: And is reducing this disparity  
2 part of restoring the water supplies of the Authority's  
3 members?

4 WITNESS MIZUNO: By restoring the -- the  
5 contract allocations, I think it would im -- The -- The  
6 goal is not to reduce the disparity. The goal is to  
7 increase contract quantity to South-of-Delta  
8 Contractors.

9 MR. BEZERRA: Okay. So a reduction in  
10 North-of-Delta allocations is not something you  
11 consider to be part of restoring water supplies to the  
12 Authority's members?

13 WITNESS MIZUNO: I think Reclamation has their  
14 process in which they allocate water. I would expect  
15 Reclamation to continue to utilize the same processes  
16 that they do with -- currently as they make their  
17 determination on allocations.

18 MR. BEZERRA: Okay. So based on that  
19 Reclamation process, if allocations to the Authority's  
20 members went up as a result of the California WaterFix  
21 Project, is it possible that allocations to  
22 North-of-Delta CVP Contractors would go down?

23 MR. O'HANLON: Objection: Calls for  
24 speculation.

25 CO-HEARING OFFICE DODUC: Mr. Bezerra.

1 MR. BEZERRA: I don't believe it calls for  
2 speculation. Ms. Mizuno just stated knowledge of  
3 Reclamation's allocation process.

4 CO-HEARING OFFICE DODUC: To an extent, are  
5 you able to answer that?

6 WITNESS MIZUNO: I don't have the details on  
7 the Reclamation's allocation process.

8 What I've stated is that the current process  
9 that they use, I would expect that they will continue  
10 to do so.

11 MR. BEZERRA: Mr. Gutierrez, could you please  
12 go to -- Could we please pull Mr. Gutierrez's  
13 testimony, Exhibit WWD-15.

14 (Exhibit displayed on screen.)

15 MR. BEZERRA: And if we could please go to  
16 Page 2, Lines 9 through 13.

17 (Exhibit displayed on screen.)

18 MR. BEZERRA: And do you see that sentence  
19 beginning on Line 9 and continuing through Line 13,  
20 Mr. Gutierrez?

21 WITNESS GUTIERREZ: Starting with "In  
22 addition"?

23 MR. BEZERRA: Starting with "In addition,"  
24 correct.

25 WITNESS GUTIERREZ: Yes, I see that.

1 MR. BEZERRA: And, in a sense, you discuss  
2 restoring CVP water supplies to Reclama -- excuse me --  
3 to Westlands; correct?

4 WITNESS GUTIERREZ: Yes.

5 MR. BEZERRA: And Westlands is a member of the  
6 Authority; correct?

7 WITNESS GUTIERREZ: Yes.

8 MR. BEZERRA: So is Miss Mizuno's testimony  
9 about restoring CVP supplies to the Authority's  
10 members, does that also apply to Westlands' CVP  
11 supplies?

12 WITNESS GUTIERREZ: Can you restate the  
13 question, please.

14 MR. BEZERRA: Sure.

15 Westlands is a member of the Authority;  
16 correct?

17 WITNESS GUTIERREZ: Um-hmm, yes.

18 MR. BEZERRA: And Ms. Mizuno just testified  
19 about restoring CVP supplies to the Authority's  
20 members; correct?

21 WITNESS GUTIERREZ: Yes.

22 MR. BEZERRA: So does Ms. Mizuno's testimony  
23 about that also apply to Westlands' supplies?

24 WITNESS GUTIERREZ: Yes. As -- As it pertains  
25 to the CVP portion, yes.



1 MR. BEZERRA: Okay. Thank you very much.

2 And you -- You dis -- You discuss the need to,  
3 quote, "restore Westlands' CVP supplies" throughout  
4 your written testimony; correct?

5 WITNESS GUTIERREZ: Is that a question to me  
6 or Ms. Mizuno?

7 MR. BEZERRA: I'm sorry. To you.

8 WITNESS GUTIERREZ: Can you repeat the  
9 question.

10 MR. BEZERRA: Sure.

11 In your written testimony, you discuss the  
12 need to "restore Westlands' CVP supplies" in multiple  
13 places; correct?

14 WITNESS GUTIERREZ: Yes.

15 MR. BEZERRA: And do you mean the same thing  
16 throughout your testimony when you say "restoring  
17 Westlands' CVP supplies?"

18 WITNESS GUTIERREZ: Can you be more specific?  
19 What do you mean by --

20 MR. BEZERRA: Sure. I can --

21 WITNESS GUTIERREZ: Am I using the same  
22 definition for "restoring"?

23 MR. BEZERRA: Yeah. I can go through the  
24 same -- your testimony in each instance if you want,  
25 but I was trying to cut through it a little more

1 rapidly.

2           You use the term "restore water to Westlands"  
3 several times in your testimony; correct?

4           WITNESS GUTIERREZ: Yes.

5           MR. BEZERRA: And in each instance, do you  
6 mean the same thing?

7           WITNESS GUTIERREZ: Probably in general, yes.

8           MR. BEZERRA: Okay. Thank you.

9           So if we could please go to this exhibit,  
10 Page 18, Lines 11 through 15.

11           (Exhibit displayed on screen.)

12           MR. BEZERRA: And in this portion of your  
13 testimony, you discuss how Westlands has re -- that --  
14 excuse me -- CVP South-of-Delta Ag Service Allocations  
15 were different in 2005 versus 2010-11; correct?

16           WITNESS GUTIERREZ: Yes.

17           MR. BEZERRA: And is addressing this disparity  
18 part of restoring Westlands' CVP water supplies?

19           WITNESS GUTIERREZ: I don't think I would  
20 agree with that statement.

21           MR. BEZERRA: Okay. In your testimony, you  
22 state, for -- the 2005-2006 allocation was 85 percent;  
23 correct?

24           WITNESS GUTIERREZ: Correct.

25           MR. BEZERRA: And in 2010-2011, the allocation

1 was 45 percent; correct?

2 WITNESS GUTIERREZ: Correct.

3 MR. BEZERRA: And I be -- Do you view those  
4 two years as being similar hy -- hydrologically?

5 WITNESS GUTIERREZ: I -- Without having the  
6 precipitation data in front of me, I can't answer the  
7 question.

8 MR. BEZERRA: Okay. Well, in the next  
9 sentence of your testimony, beginning on Line 12, it  
10 discusses precipitation data.

11 WITNESS GUTIERREZ: I -- I'm sorry. I'm  
12 getting lost here. Where --

13 MR. BEZERRA: Page 18.

14 WITNESS GUTIERREZ: Page 18.

15 Okay. Go ahead.

16 MR. BEZERRA: Line 12, you discuss the  
17 precipitation data for Water Year 2005 and Water  
18 Year 2010; correct?

19 WITNESS GUTIERREZ: Yes.

20 MR. BEZERRA: And in those two years, do you  
21 view that precipitation as being similar?

22 WITNESS GUTIERREZ: In terms of total  
23 precipitation as reported in the 8-Station Index? Yes.

24 MR. BEZERRA: And Westlands received  
25 substantially different water supply allocations in

1 those two years; correct?

2 WITNESS GUTIERREZ: Yes.

3 MR. BEZERRA: Do you view bringing the lower  
4 allocation up closer to the higher allocation as being  
5 an example of restoring Westlands' CVP supplies?

6 WITNESS GUTIERREZ: Yes, I guess you could  
7 probably interpret it to be that way.

8 MR. BEZERRA: Okay. Thank you.

9 Okay. Now, going to Page 15, Lines 17 through  
10 20.

11 (Exhibit displayed on screen.)

12 MR. BEZERRA: In these lines, you're -- you  
13 state that -- Well, you state that since the  
14 implementation of the two Biological Opinions,  
15 Westlands' anticipated allocation going forward as  
16 40 percent; correct?

17 WITNESS GUTIERREZ: Yes.

18 MR. BEZERRA: And that's 40 percent of your  
19 CVP contract total?

20 WITNESS GUTIERREZ: It's 40 percent of our  
21 contract amount, correct.

22 MR. BEZERRA: And -- And you anticipate that  
23 this would be the long-term annual average allocation  
24 to Westlands going forward without California WaterFix;  
25 correct?

1           WITNESS GUTIERREZ: Under the current  
2 regulatory regime, yes.

3           MR. BEZERRA: And that allocation would be  
4 worse in dryer years, presumably; correct?

5           WITNESS GUTIERREZ: Yes.

6           MR. BEZERRA: Ms. Mizuno, do you anticipate  
7 similar future CVP allocations to the rest of the  
8 Authority's members?

9           WITNESS MIZUNO: Given the current regulations  
10 that are in place, assuming those continue, and there  
11 is no resolution on any ability to move water south of  
12 the Delta, I would expect our allocations to be in the  
13 long-term average of 35, 40 percent.

14           MR. BEZERRA: Okay. As to the dis -- As to  
15 the disparities before the Biological Opinions and  
16 after the Biological Opinions, in years of similar  
17 hydrology, why do you believe the California WaterFix  
18 would address that issue, Ms. Mizuno?

19           WITNESS MIZUNO: California WaterFix has the  
20 potential of being able to facilitate additional water  
21 that can be conveyed south of the Delta.

22           So with additional water south of the Delta,  
23 that could increase allocations to our member agencies.

24           MR. BEZERRA: Okay. And, Mr. Gutierrez, do  
25 you agree with that characterization of how California

1 WaterFix could address this disparity?

2 WITNESS GUTIERREZ: My -- I guess I would  
3 answer that question a little different.

4 I think that California WaterFix could  
5 potentially avoid a lot of the conveyance restrictions  
6 that are currently experienced at the Jones Pumping  
7 Plant.

8 MR. BEZERRA: And do you believe that would  
9 result in higher CVP allocations to Westlands?

10 WITNESS GUTIERREZ: If Jones could operate at  
11 higher pumping rates, yes, I think that would translate  
12 into higher allocations for Westlands.

13 MR. BEZERRA: And if you re -- If Westlands  
14 received higher allocations, do you believe you'd  
15 receive ultimately higher deliveries from CVP?

16 WITNESS GUTIERREZ: Yes.

17 MR. BEZERRA: And Ms. Mizuno, do you agree  
18 with that for the Authority?

19 WITNESS MIZUNO: Yes.

20 MR. BEZERRA: Okay. Referring to  
21 Mr. Gutierrez's testimony, Page 22, Lines 13 through  
22 15.

23 (Exhibit displayed on screen.)

24 MR. BEZERRA: Okay. Mr. Gutierrez, do you see  
25 that sentence that begins, "If the California WaterFix

1 can be"?

2 WITNESS GUTIERREZ: Yes.

3 MR. BEZERRA: And in that sentence, you refer  
4 to restoring Westlands' CVP allocation to an average of  
5 70 percent.

6 Is that what you would view as restoration of  
7 Westlands' CVP water supplies?

8 WITNESS GUTIERREZ: I think it's an  
9 improvement over what we're experiencing today. So  
10 anything above 40 percent would be partial restoration  
11 of our contract amount.

12 MR. BEZERRA: And that would be as a long-term  
13 average; correct?

14 WITNESS GUTIERREZ: The 70 percent? I guess  
15 this was just a hypothetical that, if we could, if  
16 water -- if WaterFix was part of the comprehensive  
17 solution, and if the CVP allocation to Westlands could  
18 increase to 70 percent, then combined with other  
19 efforts, with using groundwater and buying supplemental  
20 water, that's all part of the restoration of our  
21 supply.

22 MR. BEZERRA: Is there some other long-term  
23 average contract allocation that Westlands would view  
24 as restoration of its CVP water supplies?

25 WITNESS GUTIERREZ: I guess without -- without

1 analyzing what our long-term water demands would be  
2 with crop -- changes in cropping patterns, it's hard to  
3 answer that question.

4 MR. BEZERRA: Ms. Mizuno, do you view  
5 increasing long-term average CVP allocations to the  
6 Authority's members to 70 percent of contract totals as  
7 restoration of those members' CVP supplies?

8 WITNESS MIZUNO: I don't -- I do not have  
9 information for each of our member agency as to whether  
10 that would be considered a restoration of -- of their  
11 contract supply. 70 percent is not something that I  
12 have knowledge on or be able to confirm or deny.

13 MR. BEZERRA: Okay. So if we could please go  
14 back to your testimony, Exhibit SLDMWA-19, and Page 5.

15 (Exhibit displayed on screen.)

16 MR. BEZERRA: Lines 12 through 14.

17 (Exhibit displayed on screen.)

18 MR. BEZERRA: Now, when -- when you refer to  
19 the "urgent need to restore these water supplies,"  
20 what -- what does that mean to you relative to a  
21 long-term average of CVP allocations?

22 WITNESS MIZUNO: I don't have a specific  
23 allocation percentage, per se, but it is to maximize  
24 their contract quantities.

25 MR. BEZERRA: And -- Okay. And to increase



1 them above the current allocations --

2 WITNESS MIZUNO: That's correct.

3 MR. BEZERRA: -- they receive.

4 I'm sorry?

5 WITNESS MIZUNO: That's correct.

6 MR. O'HANLON: Okay. Thank you.

7 Back to Mr. Gutierrez.

8 You -- You previously identified your --  
9 Westlands' current anticipated long-term average  
10 allocation as 40 percent of the contract total;  
11 correct?

12 WITNESS GUTIERREZ: Yes.

13 MR. BEZERRA: And 70 percent of the contract  
14 total you just test -- testified would be something  
15 like a restoration of Westlands' CVP water supplies;  
16 correct?

17 MR. O'HANLON: Objection: Mischaracterizes  
18 the witness' testimony.

19 CO-HEARING OFFICE DODUC: Sustained.

20 He did say it was a hypothetical.

21 MR. BEZERRA: I'll withdraw.

22 What is the total volumetric difference in  
23 acre-feet per year of the differential between a  
24 40 percent contract allocation and a 70 percent  
25 contract allocation for Westlands?

1 WITNESS GUTIERREZ: Let me get my calculator.

2 MR. BEZERRA: Sure.

3 CO-HEARING OFFICE DODUC: Yes!

4 WITNESS GUTIERREZ: I'm sorry, but I turned it  
5 off, so it's going to have to fire up.

6 CO-HEARING OFFICER MARCUS: Does it make a  
7 noise?

8 WITNESS GUTIERREZ: I've got it on mute also,  
9 actually.

10 CO-HEARING OFFICE DODUC: You see? Cal  
11 engineers, we know how to . . .

12 WITNESS GUTIERREZ: So you said between  
13 40 percent and 70 percent, what's the difference in the  
14 contract volume?

15 MR. BEZERRA: Yes.

16 WITNESS GUTIERREZ: Hold on here.

17 It's about 358,000 acre-feet is the  
18 difference.

19 MR. BEZERRA: Okay. So approximately 358,000  
20 acre-feet as an increase in Westlands' long-term  
21 average CVP deliveries is approximately the sort of  
22 restoration Westlands is seeking in its CVP water  
23 supplies?

24 MR. O'HANLON: Objection: Mischaracterizes  
25 the witness' testimony.

1 CO-HEARING OFFICE DODUC: Sorry. What was  
2 your question again, Mr. Bezerra?

3 MR. BEZERRA: 358,000 acre-feet as an annual  
4 average long-term is approximately the increase in  
5 Westlands' CVP supplies it's seeking to restore those  
6 water supplies.

7 CO-HEARING OFFICE DODUC: Well, going back to  
8 when you asked him the question about 70 percent, if my  
9 recollection is correct, Mr. Gutierrez, you said it was  
10 a hypothetical. You didn't have a specific percentage  
11 in mind when you say "restoration," or am I  
12 misunderstanding that.

13 WITNESS GUTIERREZ: No, you're correct. I was  
14 using that as an example.

15 If we were to increase our CVP allocation by a  
16 certain amount, let's say 70 percent, and if we're able  
17 to procure supplemental water and use groundwater  
18 sustainably.

19 You know, a combination of supplies, we might  
20 be able to irrigate, you know, 465,000 acres in  
21 Westlands.

22 CO-HEARING OFFICE DODUC: But you don't have a  
23 specific percentage in mind when you say "restore."

24 WITNESS GUTIERREZ: No.

25 CO-HEARING OFFICE DODUC: And I think that's

1 why he keeps -- Mr. O'Hanlon keeps objecting.

2 MR. BEZERRA: Yeah. I -- I think the way  
3 Mr. Gutierrez explained it is just fine. Thank you  
4 very much.

5 Okay. I'd like to pull up Exhibit BKS-253,  
6 please.

7 For the record, this is excerpts of Exhibit  
8 SWRCB-108, which is a Staff Exhibit that is the  
9 July 17th Developments after (sic) Proposed Final  
10 Environmental Impact Report document on which the DWR  
11 relied.

12 (Exhibit displayed on screen.)

13 MR. BEZERRA: Could we please turn to Page 141  
14 of this document --

15 (Exhibit displayed on screen.)

16 MR. BEZERRA: -- and Figure 14.

17 (Exhibit displayed on screen.)

18 MR. BEZERRA: If we could go up one more, it's  
19 Figure 14.

20 (Exhibit displayed on screen.)

21 MR. BEZERRA: And I'll represent for the  
22 record that DWR's witness Erik Reyes testified that the  
23 Revised Alt 4A results here are the CWF -- are the same  
24 as CWF H3+ results.

25 Mr. Gutierrez, do you see that these modeling

1 results indicate that, with California WaterFix, CVP  
2 South-of-Delta deliveries actually would be lower than  
3 in the No-Action Alternative?

4 WITNESS GUTIERREZ: I'm sorry, Mr. Bezerra.  
5 Which -- Which set of columns are you referring to?

6 MR. BEZERRA: Sure. It's the LT Avg,  
7 long-term average.

8 WITNESS GUTIERREZ: Okay.

9 MR. BEZERRA: And those results indicate that  
10 the blue bar for the No-Action Alternative actually is  
11 lower than the red bar for the Revised Alt 4A.

12 WITNESS GUTIERREZ: Oh, for the long-term  
13 average?

14 MR. BEZERRA: Correct.

15 CO-HEARING OFFICE DODUC: You mean the blue is  
16 higher than the red.

17 WITNESS GUTIERREZ: Right.

18 MR. BEZERRA: I'm sorry, yes. My mistake.

19 WITNESS GUTIERREZ: Okay.

20 MR. BEZERRA: The No-Action Alternative blue  
21 bar is actually a little higher than the With-Action  
22 red bar; correct?

23 WITNESS GUTIERREZ: Yeah. According to this  
24 graph, it looks like 6,000 acre-feet difference.

25 MR. BEZERRA: Correct.

1           Ms. Mizuno, do you see that modeling result as  
2 well?

3           WITNESS MIZUNO: Yes, I do.

4           MR. BEZERRA: Okay. These modeling results  
5 indicate that the California WaterFix actually probably  
6 would not increase CVP South-of-Delta deliveries as a  
7 long-term average; correct?

8           WITNESS MIZUNO: Based on the modeling  
9 results, correct.

10          MR. BEZERRA: Mr. Gutierrez, do you agree with  
11 that?

12          WITNESS GUTIERREZ: That's what the chart  
13 shows.

14          I -- I'm not sure if I've ever looked at this  
15 exact chart before, but that's what it's showing.

16          MR. BEZERRA: Okay. Have you ever seen any  
17 CalSim modeling results for California WaterFix that  
18 indicate that the Project would increase CVP  
19 South-of-Delta deliveries?

20          WITNESS GUTIERREZ: I don't know if -- if  
21 there are CalSim results. I -- I couldn't answer that  
22 for sure.

23          MR. BEZERRA: Have you seen any modeling  
24 results that indicate that the California WaterFix  
25 Project would increase long-term average CVP

1 South-of-Delta deliveries?

2 WITNESS GUTIERREZ: Yes.

3 MR. BEZERRA: And what were those?

4 WITNESS GUTIERREZ: They were results that  
5 were presented to our Board in September.

6 MR. BEZERRA: September . . .

7 WITNESS GUTIERREZ: 2017.

8 MR. BEZERRA: 2017.

9 And by whom were they presented?

10 WITNESS GUTIERREZ: I think they were  
11 presented by our General Manager and our Assistant  
12 General Manager.

13 MR. BEZERRA: And by how much did those  
14 modeling results indicate that California WaterFix  
15 would increase CVP South-of-Delta deliveries?

16 WITNESS GUTIERREZ: You know, I want to say --  
17 I -- I can't answer -- I don't know. I don't remember  
18 how much exactly the modeling results show that it  
19 would increase.

20 MR. BEZERRA: Was it more than 100,000  
21 acre-feet?

22 WITNESS GUTIERREZ: I think it was 200,000, at  
23 least for the scenario that was presented, and -- but  
24 I'm not 100 percent certain on this.

25 MR. BEZERRA: Was that just for Westlands or

1 for some larger group of agencies?

2 WITNESS GUTIERREZ: I believe it was total  
3 exports.

4 MR. BEZERRA: Total exports.

5 So does that incre -- does that include both  
6 Central Valley Project deliveries and State Water  
7 Project deliveries?

8 WITNESS GUTIERREZ: I think, to the best of my  
9 memory, it's combined exports for the state and CVP  
10 but, again, I'm not 100 percent certain.

11 MR. BEZERRA: Okay. Do you know what the  
12 source of those modeling results was?

13 WITNESS GUTIERREZ: No.

14 MR. BEZERRA: Ms. Mizuno, have you ever seen  
15 any modeling results that indicate that the California  
16 WaterFix Project actually would increase CVP  
17 South-of-Delta deliveries.

18 WITNESS MIZUNO: Unfortunately, my  
19 responsibility doesn't allow me much time -- or any  
20 time to work on the WaterFix Project. And so I have  
21 not seen any modeling results that would show either  
22 more or less.

23 MR. BEZERRA: Okay. Thank you.

24 Do you have any other basis besides modeling  
25 results that would indicate that the California



1 WaterFix Project would increase CVP South-of-Delta  
2 deliveries?

3 CO-HEARING OFFICE DODUC: That is directed at?

4 MR. BEZERRA: Ms. Mizuno.

5 WITNESS MIZUNO: I have not.

6 MR. BEZERRA: Okay. Thank you.

7 Mr. Gutierrez, in your testimony, you state  
8 that -- And let me find it. It's on Page 22, beginning  
9 at Line 20.

10 You state . . .

11 (Exhibit displayed on screen.)

12 MR. BEZERRA: You state that (reading):

13 ". . . If the change petition is approved  
14 but imposes significant operational  
15 limitations . . ."

16 And then you go on to say (reading):

17 ". . . There is a significant risk of  
18 adverse impacts to Westlands' water  
19 supply . . ."

20 What would you consider conditions that would  
21 impose significant operational limitations that would  
22 adversely impact Westlands?

23 WITNESS GUTIERREZ: I think -- I mean, for  
24 example, imposition of increased outflow. If -- If it  
25 was more outflow that was required as a result of the

1 approval of this Project, that could impact our -- our  
2 exports and our allocation.

3 MR. BEZERRA: Okay. Are there any other  
4 examples of operational limits you would view as  
5 adversely impacting Westlands?

6 WITNESS GUTIERREZ: I mean, that's the first  
7 one that comes to mind. I'd have to give it a little  
8 more thought in order to give you another example.

9 MR. BEZERRA: Okay. Thank you.

10 Are you aware that Reclamation and DWR have  
11 not proposed in this proceeding any new conditions that  
12 would govern how they operate the CVP and SWP with  
13 California WaterFix?

14 WITNESS GUTIERREZ: No, I'm not aware of that.

15 MR. BEZERRA: Okay. Thank you.

16 Okay. I'd like to pull up Exhibit SWRCB-107,  
17 and Attachment 5.

18 For the record, this is the Adaptive  
19 Management Program that applies to California WaterFix  
20 or -- I'm sorry.

21 (Exhibit displayed on screen.)

22 MR. BEZERRA: And could please go to .pdf  
23 Page 72 in this document.

24 (Exhibit displayed on screen.)

25 MR. BEZERRA: And beginning on this page is an

1 agreement for implementation of an Adaptive Management  
2 Program for Project operations.

3 Ms. Mizuno, the Authority is a signatory to  
4 this agreement; correct?

5 MR. O'HANLON: Objection: Misstates the  
6 document.

7 This is not a signed document.

8 CO-HEARING OFFICE DODUC: Mr. Bezerra.

9 MR. BEZERRA: Is -- Well, Ms. Mizuno; is that  
10 correct? This document has not been signed?

11 WITNESS MIZUNO: I'm not familiar with this  
12 document.

13 MR. BEZERRA: Okay. Mr. Gutierrez, are you  
14 familiar with this document?

15 WITNESS GUTIERREZ: No.

16 MR. BEZERRA: Thank you.

17 Okay. Mr. Gutierrez, I'd like to refer you  
18 to . . .

19 Well, let's pull up his testimony, Exhibit  
20 WWD-15, Page 3, please.

21 (Exhibit displayed on screen.)

22 MR. BEZERRA: And Line 15 through 20, please.

23 (Exhibit displayed on screen.)

24 MR. BEZERRA: And, Mr. Gutierrez, do you see  
25 this where it begins, "Reclamation operates the CVP as

1 an integrated project"?

2 WITNESS GUTIERREZ: Yes.

3 MR. BEZERRA: And then going down to Line 18,  
4 there's the sentence (reading):

5 "It is my understanding that  
6 Reclamation, the Water Board, and courts  
7 have consistently declined to give  
8 priority to contractors based on 'area of  
9 origin' principles."

10 Correct?

11 WITNESS GUTIERREZ: Right.

12 MR. BEZERRA: Is that your -- That is your  
13 understanding?

14 WITNESS GUTIERREZ: That's my understanding,  
15 yes.

16 MR. BEZERRA: What is the basis of your  
17 understanding that the Water Board has consistently  
18 declined to give priority to Contractors based on area  
19 of origin principles?

20 WITNESS GUTIERREZ: Oh, I . . . That's what  
21 our -- When I was preparing this, that was my  
22 understanding after discussing this item with -- with  
23 Westlands staff, our General Counsel.

24 MR. BEZERRA: Thank you.

25 I'd like to pull up Exhibit SWRCB-10, which is

1 a copy of Water Right Permit 11315, which is one of  
2 Reclamation's Permits for Folsom Dam and Reservoir.

3 (Exhibit displayed on screen.)

4 MR. BEZERRA: Mr. Gutierrez, this Permit is  
5 one of Reclamation's Water Right Permits that's subject  
6 to this proceeding; correct?

7 WITNESS GUTIERREZ: I don't know.

8 MR. BEZERRA: Have you ever reviewed this  
9 Permit?

10 WITNESS GUTIERREZ: No.

11 MR. BEZERRA: Okay. If we could please go to  
12 Page -- .pdf Page 98 of this document.

13 (Exhibit displayed on screen.)

14 MR. BEZERRA: And scroll down to  
15 Paragraph 11 --

16 (Exhibit displayed on screen.)

17 MR. BEZERRA: -- which reads, for the record  
18 (reading):

19 "Deliveries of water under this  
20 Permit shall be limited to deliveries for  
21 beneficial use within Placer, Sacramento  
22 and San Joaquin Counties and shall not be  
23 made beyond the westerly or southerly  
24 border -- boundaries thereof, except on a  
25 temporary basis, until the needs of those

1 counties, presented or prospective, are  
2 fully met and provided, however, that  
3 agreements in accordance with Federal  
4 Reclamation laws between permittee and  
5 parties desiring such service within said  
6 counties are executed by July 1st, 1968."

7 Mr. Gutierrez, did you consider this Permit  
8 term in reaching your understanding that the Water  
9 Board has consistently declined to give priority based  
10 on area of origin principles?

11 WITNESS GUTIERREZ: No.

12 MR. BEZERRA: Thank you.

13 I'd like to pull up Exhibit BKS-265, which is  
14 a highlighted copy of the State Water Rights Board  
15 Decision 893.

16 And I have copies for you to refer to.

17 (Exhibit displayed on screen.)

18 CO-HEARING OFFICE DODUC: Mr. Bezerra, just a  
19 time check. I'd like to give the court reporter a  
20 break sometime around 3:45.

21 MR. BEZERRA: I anticipate being done well  
22 before that.

23 CO-HEARING OFFICE DODUC: Excellent.

24 MR. BEZERRA: Could we please go to .pdf  
25 Page 70 which is Numbered 69.

1 (Exhibit displayed on screen.)

2 MR. BEZERRA: Mr. Gutierrez, do you see that  
3 this decision approved application 13370?

4 MR. O'HANLON: I'm sorry, Mr. Bezerra. What  
5 page are you on? I don't seem to have that page in the  
6 paper copy you gave me.

7 MR. BEZERRA: Oh. It's Page 69.

8 WITNESS MIZUNO: We don't have it.

9 MR. BEZERRA: You don't have it? I apologize.  
10 Well, if we could please expand the text.

11 (Exhibit displayed on screen.)

12 MR. BEZERRA: I apologize for the error.

13 Mr. Gutierrez, do you see that this decision  
14 approved Application 13370?

15 WITNESS GUTIERREZ: Yes.

16 MR. BEZERRA: Okay. Thank you.

17 Okay. If we could please scroll down to .pdf  
18 Page 53, which is numbered Page 52.

19 (Exhibit displayed on screen.)

20 MR. BEZERRA: Hopefully, this one's in the  
21 document.

22 Do you see the paragraph that begins, "While  
23 not attempting to define"?

24 WITNESS GUTIERREZ: Yes.

25 MR. BEZERRA: Do you see it refers to Water

1 Code Section 11460?

2 WITNESS GUTIERREZ: Yes.

3 MR. BEZERRA: Do you understand that that  
4 Water Code section is considered to be one of the area  
5 of origin laws?

6 WITNESS GUTIERREZ: I did not know that, no.

7 MR. BEZERRA: Okay. Thank you.

8 Do you see that, in this discussion, that  
9 (reading):

10 ". . . The demonstrated needs of (sic)  
11 additional water in Sacramento,  
12 San Joaquin, and Placer counties" -- and  
13 in view of those -- "the three counties  
14 mentioned should be allowed a reasonable  
15 period, say 10 years, within which to  
16 negotiate with the United States for  
17 water from the American River, before the  
18 supply . . . from that source is  
19 permanently committed to use in a more  
20 remote area."

21 Do you see that discussion?

22 WITNESS GUTIERREZ: Yes.

23 MR. BEZERRA: Did you consider this discussion  
24 in reaching your understanding that the Water Board has  
25 consistently declined to give priority based on area of



1 origin principles?

2 WITNESS GUTIERREZ: No.

3 MR. BEZERRA: Okay. Thank you.

4 Okay. If we could please scroll down to .pdf

5 Page 54, which is numbered Page 53.

6 (Exhibit displayed on screen.)

7 MR. BEZERRA: Do you see that this . . .

8 Do you see that this decision considered a

9 Water Right Application by the City of Roseville?

10 WITNESS GUTIERREZ: Yes.

11 MR. BEZERRA: Are you aware that this water

12 right decision denied that application by the City of

13 Roseville?

14 WITNESS GUTIERREZ: No.

15 MR. BEZERRA: Okay. Okay. If we can please

16 scroll down to .pdf Page 55, which is numbered Page 54.

17 (Exhibit displayed on screen.)

18 MR. BEZERRA: Do you see the highlighted

19 paragraph there?

20 WITNESS GUTIERREZ: Yes.

21 MR. BEZERRA: And that states, for the record

22 (reading):

23 "Permits are being issued to the

24 United States to appropriate enough

25 American River water to adequately supply

1           the applicants naturally dependent on  
2           that source and availability of water to  
3           such applicants is reasonably assured by  
4           the terms to be contained in the permits  
5           to be issued to the United States  
6           restricting exportation of water under  
7           those Permits insofar as exportation  
8           interferes with fulfillment of needs  
9           within Placer, Sacramento, and  
10          San Joaquin Counties."

11          Mr. Gutierrez, did you consider this  
12 discussion in reaching your understanding that the  
13 Water Board has consistently declined to give priority  
14 based on area of origin principles?

15          WITNESS GUTIERREZ: No.

16          MR. BEZERRA: Okay. Thank you very much.  
17 That completes my cross-examination.

18          CO-HEARING OFFICE DODUC: Thank you,  
19 Mr. Bezerra.

20          If the court reporter does not mind, we will  
21 go ahead and move to Ms. Nikkel and we might actually  
22 be done by 4:00.

23          Consider that a gift from Mr. Bezerra.

24          MR. BEZERRA: Thank you.

25          CO-HEARING OFFICE DODUC: And Mr. Herrick and

1 Ruiz.

2 MR. BEZERRA: Making up for last Friday.

3 CO-HEARING OFFICE DODUC: You're standing  
4 between us and the weekend, Miss Nikkel.

5 MS. NIKKEL: Yet again. I get the distinct  
6 pleasure of sending everyone off to their weekends,  
7 hopefully not after 5:00 this time.

8 Meredith Nikkel and I'm here representing  
9 Groups 9 and 10.

10 I have questions for Mr. Gutierrez and I'm  
11 going to start there. And then I also have questions  
12 for Dr. Shires and Ms. Mizuno.

13 For Mr. Gutierrez, I have just a few  
14 categories.

15 First, a couple of followup questions on  
16 the -- his opinion regarding area of origin;

17 A couple of questions about his  
18 qualifications;

19 And then, finally, adverse impacts of reduced  
20 water supplies.

21 If we could pull up Mr. Gutierrez's written  
22 testimony in the same location that Mr. Bezerra was  
23 just asking a few questions about, at Page 3, Line 18  
24 to 20.

25 (Exhibit displayed on screen.)

1 MS. NIKKEL: Thank you.

2 CROSS-EXAMINATION BY

3 MS. NIKKEL: Mr. Gutierrez, are you aware  
4 that, in 2006, the Third District Court of Appeal  
5 pronounced that Reclamation cannot reduce a  
6 contractor's allotment of water to supply of water for  
7 uses outside the area of origin?

8 WITNESS GUTIERREZ: No.

9 MS. NIKKEL: So you did not consider that  
10 court opinion in your opinion in your written  
11 testimony?

12 WITNESS GUTIERREZ: I did not consider it.

13 MS. NIKKEL: And are you aware that, in 1998,  
14 in State Water Resources Control Board Order Water  
15 right -- excuse me -- WR 98-09, the State Water Board  
16 found that a water user could obtain the benefit of  
17 area of origin protection by contracting for water  
18 supplies from Reclamation?

19 WITNESS GUTIERREZ: No.

20 MS. NIKKEL: And so you did not consider that  
21 in your opinion, either; correct?

22 WITNESS GUTIERREZ: Correct.

23 MS. NIKKEL: Okay. If we could go to Page 1  
24 of Mr. Gutierrez's testimony at Lines 25 through 28.

25 (Exhibit displayed on screen.)

1 MS. NIKKEL: And here, Mr. Gutierrez, you  
2 describe your -- your background, experience, including  
3 working for Westlands since 2012. And before that, you  
4 worked for the United States Environmental Protection  
5 Agency; and 17 years as a Consulting Engineer working  
6 on water-related Projects throughout California;  
7 correct?

8 WITNESS GUTIERREZ: Yes.

9 MS. NIKKEL: So, would it be fair to say that  
10 you have broad experience with the impacts of water  
11 delivery in California?

12 MR. O'HANLON: Objection --

13 WITNESS GUTIERREZ: No. I think my --

14 MR. O'HANLON: -- vague and ambiguous.

15 CO-HEARING OFFICE DODUC: Hold on.

16 MR. O'HANLON: Objection: Vague and  
17 ambiguous.

18 CO-HEARING OFFICE DODUC: Well, yes, the  
19 question is broad, but it was meant to be broad.

20 MS. NIKKEL: Indeed.

21 CO-HEARING OFFICE DODUC: Overruled.

22 WITNESS GUTIERREZ: No. I think my -- most of  
23 my experience with impacts on California were primarily  
24 focused on Westlands Water District.

25 MS. NIKKEL: So your 17 years as a Consulting

1 Engineer working on water-related Projects throughout  
2 California did not give you experience on water supply  
3 impacts in other parts of California?

4 WITNESS GUTIERREZ: In other parts of  
5 California, yes, but probably not as broad as, say,  
6 understanding the impacts in the Sac Valley and  
7 Southern California's Central Coast and in the Monterey  
8 area.

9 MS. NIKKEL: Okay. That -- That helps  
10 clarify.

11 And let's go to Page 22, Lines 25 through 23.

12 (Exhibit displayed on screen.)

13 MS. NIKKEL: I'm sorry. That was backwards.

14 Line 25 through the next Page 23 at Line 1.

15 So if we could go where the page breaks.

16 (Exhibit displayed on screen.)

17 MS. NIKKEL: Thank you.

18 And here you testify that reduced water supply  
19 results and adverse impacts, such as land fallowing,  
20 increased soil salinity, and various other items;  
21 correct?

22 WITNESS GUTIERREZ: Yes.

23 MS. NIKKEL: And based on your experience in  
24 other parts of California, as well as in Westlands, and  
25 I think you mentioned the Sacramento Valley, would you

1 agree that reductions in water supply can have these  
2 same types of adverse impacts in areas such as the  
3 Sacramento Valley or in the Delta?

4 WITNESS GUTIERREZ: I could, yes.

5 MS. NIKKEL: Thank you.

6 That's all I have for Mr. Gutierrez.

7 Let's do Dr. Shires.

8 Am I saying that correctly?

9 WITNESS SHIRES: Yes.

10 MS. NIKKEL: Thank you.

11 And, for Dr. Shires, I have a few categories.

12 First, the economic impact of Westlands Water  
13 District;

14 Second, the importance of agricultural  
15 production;

16 And, last, the analysis of -- of WaterFix  
17 operational scenarios.

18 If we could pull up Dr. Shires' testimony,  
19 WWD-18, at Page 15, Lines 9 through 10.

20 (Exhibit displayed on screen.)

21 MS. NIKKEL: And here you describe your  
22 opinions regarding the economic impact of the Westlands  
23 Water District; correct?

24 WITNESS SHIRES: The lines that you speak to,  
25 specifically, are about methodology.

1 MS. NIKKEL: And that methodology is based on  
2 Fresno County level data; correct?

3 WITNESS SHIRES: Correct.

4 MS. NIKKEL: And so your opinion in this  
5 section -- Or I'll say your opinion to the extent it  
6 relies on this methodology does not extend to an  
7 analysis of the overall economic impact of Westlands  
8 Water District on a broader statewide level; correct?

9 WITNESS SHIRES: No.

10 MS. NIKKEL: So, for example, your analysis  
11 does not consider the economies of other communities as  
12 a result of increased water deliveries to Westlands  
13 Water District.

14 WITNESS SHIRES: Can you ask the question a  
15 different way?

16 MS. NIKKEL: Let me think about it.

17 Does your analysis consider impacts on the  
18 economies of other communities?

19 WITNESS SHIRES: The data used in this  
20 analysis are based on Fresno County. So if you're  
21 asking whether the data that's used to calibrate within  
22 Fresno County, the answer is, it's -- the model is used  
23 in Fresno County data. Sometimes those input and  
24 output matrixes capture information from other parts of  
25 the study.



1 MS. NIKKEL: Can you explain how they capture  
2 information from other parts of the state if they're  
3 based on Fresno County data?

4 WITNESS SHIRES: It's a series of input/output  
5 models, and sometimes the industrial sectors that the  
6 input/output models use extend over county boundaries  
7 so the coefficients could be more regional.

8 There are some aspects of production which we  
9 explicitly modeled in this analysis, for example, in  
10 the subsequent markets like processing and handling,  
11 where the actual locations for that to happen are  
12 outside the region, so we included a correction for to  
13 that as well.

14 MS. NIKKEL: Okay. So, if your analysis  
15 included an increase in water deliveries to Westlands  
16 Water District, it sounds like, through that mechanism,  
17 the economic impacts on other communities is  
18 considered.

19 WITNESS SHIRES: It's partially considered. I  
20 think it's a conservative estimate.

21 MS. NIKKEL: Okay. Thank you.

22 If we could turn to your opinions in  
23 Section IV, starting at Page 26.

24 (Exhibit displayed on screen.)

25 MS. NIKKEL: And generally in this section,

1 you discuss the importance of Westlands Water  
2 District's contribution of the supply of fresh nuts,  
3 fruit and vegetables.

4 And then moving to Page 27, Lines 20 through  
5 24 --

6 (Exhibit displayed on screen.)

7 MS. NIKKEL: -- here, you describe  
8 California's contributions as a whole to production of  
9 fresh fruit and vegetables in the United States.

10 And, so, this would include other regions of  
11 California, such as the Sacramento Valley and the  
12 Delta; correct?

13 WITNESS SHIRES: Correct.

14 MS. NIKKEL: And, similarly, at Page 31,  
15 Lines 13 to 14.

16 (Exhibit displayed on screen.)

17 WITNESS SHIRES: Yes.

18 MS. NIKKEL: So you would agree that regions  
19 like the Sacramento Valley and the Delta also play a  
20 critical role in turning back the tide of obesity in  
21 the United States and sustaining a critical supply of  
22 fresh fruits and vegetables for consumers?

23 WITNESS SHIRES: Yes.

24 MS. NIKKEL: Thank you.

25 Let's turn to Page 32.

1 (Exhibit displayed on screen.)

2 MS. NIKKEL: And the Section V header.

3 This is the -- your opinions regarding  
4 replacing lost agricultural production.

5 And in this section, you would agree that  
6 these opinions would also be applicable to areas such  
7 as the Sacramento Valley and the Delta; correct?

8 WITNESS SHIRES: Yes.

9 MS. NIKKEL: So if operation of the California  
10 WaterFix resulted in lost agricultural production in  
11 those areas, then the same challenges would arise;  
12 correct?

13 WITNESS SHIRES: Generally? Yes.

14 MS. NIKKEL: Thank you.

15 And, finally, your analysis and opinions are  
16 not based on the California WaterFix operation scenario  
17 CWF H3+; are they?

18 WITNESS SHIRES: No.

19 MS. NIKKEL: And they're not based on any  
20 other WaterFix operational scenario; correct?

21 WITNESS SHIRES: Correct.

22 MS. NIKKEL: Thank you.

23 That's all I have for Dr. Shires.

24 My last set of questions are for Ms. Mizuno.

25 The categories I have for Ms. Mizuno are the

1 use of water in and out of the San Luis Delta-Mendota  
2 service area; and her opinions regarding water service  
3 allocations north and south of the Delta.

4 Miss Mizuno, your background includes work on  
5 water Project operations at Reclamation and East Bay  
6 MUD; correct?

7 WITNESS MIZUNO: That's correct.

8 MS. NIKKEL: And based on that background you  
9 have a general understanding of where the Sacramento  
10 Watershed is located; correct?

11 WITNESS MIZUNO: Yes.

12 MS. NIKKEL: At Page 6 of Miss Mizuno's  
13 testimony, which is.

14 (Exhibit displayed on screen.)

15 MS. NIKKEL: We're at Page 6?

16 Yeah. Lines 21 through 24.

17 (Exhibit displayed on screen.)

18 MS. NIKKEL: Here, you testify that (reading):

19 ". . . Low initial contract allocations  
20 constrain and limit beneficial uses South  
21 of the Delta . . ."

22 Just to clarify: Is it your opinion that  
23 members of the San Luis & Delta-Mendota Water Authority  
24 who use water for agricultural use are among those  
25 beneficial uses south of the Delta?

1 WITNESS MIZUNO: Yes.

2 MS. NIKKEL: And members of the San Luis &  
3 Delta-Mendota Water Authority are not located within  
4 the Sacramento River Watershed; correct?

5 WITNESS MIZUNO: That's correct.

6 MS. NIKKEL: Nor are those members located  
7 immediately adjacent to the Sacramento River Watershed;  
8 correct?

9 WITNESS MIZUNO: That's correct.

10 MS. NIKKEL: Miss Mizuno, are you familiar  
11 with the Tehama-Colusa Canal Authority?

12 WITNESS MIZUNO: I am.

13 MS. NIKKEL: And so you generally understand  
14 that members of the TCCA, the Tehama-Colusa Canal  
15 Authority, use water for agricultural purposes, much  
16 like those of the San Luis Delta-Mendota Water  
17 Authority members?

18 WITNESS MIZUNO: That's correct.

19 MS. NIKKEL: And members of the Tehama-Colusa  
20 Canal Authorities supply to landowners located within  
21 the Sacramento Rivershed -- Watershed; correct?

22 WITNESS MIZUNO: That's correct.

23 MS. NIKKEL: In other words, those members  
24 receive water from the Sacramento River and deliver it  
25 to supply the needs of irrigators within their service

1 area; correct?

2 WITNESS MIZUNO: Correct.

3 MS. NIKKEL: And, finally, Miss Mizuno, at  
4 Page 7 of your testimony, Lines 22 to 23.

5 (Exhibit displayed on screen.)

6 MS. NIKKEL: Here, you testify that, among  
7 white classes of CVP Contractors, those located north  
8 of the Delta have received higher allocations than  
9 those South of Delta?

10 Miss Mizuno, as we sit here today, can you  
11 tell me what allocation has been made to the  
12 South-of-Delta CVP Contractors in the San Luis  
13 Delta-Mendota service area?

14 WITNESS MIZUNO: Current -- In this current  
15 year?

16 MS. NIKKEL: Yes, today as we sit here. I'm  
17 sorry.

18 WITNESS MIZUNO: Current -- In this current  
19 year, 20 percent.

20 MS. NIKKEL: Yes, today as we sit year. I'm  
21 sorry?

22 WITNESS MIZUNO: 20 percent.

23 MS. NIKKEL: Thank you.

24 And isn't it true that North of the Delta CVP  
25 Contractors in a like class, such as the Tehama-Colusa

1 Canal Authority Contractors, have not been allocated  
2 any water as we sit here today?

3 WITNESS MIZUNO: That's correct.

4 MS. NIKKEL: So it is not always true that  
5 Contractors north of the Delta receive higher  
6 allocations than those South of Delta; correct?

7 WITNESS MIZUNO: When this testimony was  
8 prepared, this -- the testimony was correct.

9 MS. NIKKEL: Okay. But as we sit here today,  
10 that's not true; correct?

11 WITNESS MIZUNO: That's correct.

12 MS. NIKKEL: Thank you.

13 I have no further questions.

14 CO-HEARING OFFICE DODUC: Thank you.

15 All right, everyone. By my estimate, we still  
16 have another four to five hours of cross-examination  
17 for this panel, although this afternoon,  
18 cross-examination was extremely efficient and fast. I  
19 would encourage all other parties to follow suit.

20 With that, have a good weekend and we will see  
21 you on Monday.

22 Oh, I'm sorry. Mr. Mizell, that's right.  
23 There was a housekeeping item. We're not done yet.

24 MR. MIZELL: Thank you very much.

25 Tripp Mizell, DWR.

1 I have three, hopefully, very short  
2 housekeeping items.

3 One, Miss Des Jardins submitted about  
4 11 o'clock today a written version of the -- a motion  
5 that has been twice overruled during the course of the  
6 hearing today.

7 I just wanted to confirm that that matter's  
8 considered settled at this point and DWR doesn't have  
9 to respond in writing to --

10 CO-HEARING OFFICE DODUC: That is correct. I  
11 did see that, and I have already ruled on it.

12 MR. MIZELL: Perfect.

13 Second is, Sacramento County . . .

14 Is it Sac County or Sac Regional?

15 Excuse me.

16 Sac Regional Exhibit 16, the testimony of one  
17 of their witnesses, appears to be truncated. It is  
18 about three sentences long. It appears to cut off  
19 mid-sentence. So we think that there might be a file  
20 error going on with the website.

21 Mr. Hitchings and Miss Taber are listed as the  
22 attorneys. If maybe one of them could help resolve  
23 that -- that file problem on the FTP site -- or the  
24 website, that would be greatly appreciated so we could  
25 see the full testimony.



1 MR. DEERINGER: Sorry. One more time: Which  
2 file was that?

3 MR. MIZELL: That would be Sac Regional  
4 Exhibit 16.

5 MR. DEERINGER: Thank you.

6 MR. MIZELL: And, lastly, next week, DWR  
7 attorney Catherine Cavanaugh will be standing in my  
8 place, and I just didn't want that to come as a  
9 surprise to the Hearing Officers.

10 CO-HEARING OFFICE DODUC: Thank you.  
11 Cavanaugh?

12 MR. MIZELL: Yes.

13 CO-HEARING OFFICER DODUC: All right. Thank  
14 you, Mr. Mizell.

15 Wherever it is you're going, hopefully you'll  
16 enjoy yourself.

17 Miss Wehr, have you worked out an arrangement  
18 with respect to your witness?

19 MS. NIKKEL: I wanted to inform you that I am  
20 still trying to work out an arrangement just to move  
21 one of my witnesses -- excuse me -- to move one of my  
22 witness until later next week.

23 So I will be filing a -- a request to that  
24 effect this afternoon to give the parties notice.

25 CO-HEARING OFFICE DODUC: Excellent. You

1 actually have some time.

2 MS. NIKKEL: Thank you.

3 CO-HEARING OFFICE DODUC: All right. With  
4 that, we will adjourn. Have a good weekend.

5 (Proceedings adjourned at 3:47 p.m.)

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1 State of California )  
2 County of Sacramento )

3

4 I, Candace L. Yount, Certified Shorthand Reporter  
5 for the State of California, County of Sacramento, do  
6 hereby certify:

7 That I was present at the time of the above  
8 proceedings;

9 That I took down in machine shorthand notes all  
10 proceedings had and testimony given;

11 That I thereafter transcribed said shorthand notes  
12 with the aid of a computer;

13 That the above and foregoing is a full, true, and  
14 correct transcription of said shorthand notes, and a  
15 full, true and correct transcript of all proceedings  
16 had and testimony taken;

17 That I am not a party to the action or related to  
18 a party or counsel;

19 That I have no financial or other interest in the  
20 outcome of the action.

21

22 Dated: March 16, 2018

23

24

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Candace L. Yount, CSR No. 2737