



1 APPEARANCES

2 CALIFORNIA WATER RESOURCES BOARD

3 Division of Water Rights

4 Board Members Present:

5 Tam Doduc, Co-Hearing Officer  
6 Felicia Marcus, Chair & Co-Hearing Officer (\*)  
7 Dorene D'Adamo, Board Member

8 Staff Present:

9 Andrew Deeringer, Senior Staff Attorney  
10 Jean McCue, Water Resource Control Engineer

11 PART 2

12 For Petitioners:

13 California Department of Water Resources:

14 James (Tripp) Mizell  
15 Jolie-Anne Ansley

16 INTERESTED PARTIES:

17 For California Sportfishing Protection Alliance (CSPA),  
18 California Water Impact Network (C-WIN), and  
19 AquAlliance:

20 Michael Jackson

21 For The Environmental Justice Coalition for Water,  
22 Islands, Inc., Local Agencies of the North Delta, Bogle  
23 Vineyards/Delta Watershed Landowner Coalition, Diablo  
24 Vineyards and Brad Lange/Delta Watershed Landowner  
25 Coalition, Stillwater Orchards/Delta Watershed  
Landowner Coalition, Brett G. Baker and Daniel Wilson:

Osha Meserve

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APPEARANCES (Continued)

INTERESTED PARTIES (Continued):

For County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority:

Thomas H. Keeling

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

Dean Ruiz, Esq.

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## I N D E X

CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER  
IMPACT NETWORK AND AQUALLINCE, SAN JOAQUIN COUNTY &  
LOCAL AGENCIES OF THE NORTH DELTA

WITNESSES: PAGE VOL.

DEL PIERO, MARC SMITH, FELIX (Witnesses Sworn)	5	34
Direct examination by Mr. Jackson	5	34
Direct examination by Mr. Keeling	11	34
Cross-examination by Mr. Ruiz	31	34

CENTRAL DELTA WATER AGENCY, SOUTH DELTA WATER AGENCY  
(DELTA AGENCIES), LAFAYETTE RANCH, HERITAGE LANDS INC.,  
MARK BACHETTI FARMS AND RUDY MUSSI INVESTMENTS L.P.:

EXHIBITS	IDEN	EVID	VOL.
SDWA-154		63	34
SDWA-155		63	34
SDWA-156		63	34
SDWA-157		63	34
SDWA-158		63	34
SDWA-159		63	34
SDWA-160		63	34
SDWA-161		63	34
SDWA-162		63	34
SDWA-163		63	34
SDWA-164		63	34
SDWA-165		63	34
SDWA-166		63	34

1 I N D E X (Continued)

2 CENTRAL DELTA WATER AGENCY, SOUTH DELTA WATER AGENCY  
 (DELTA AGENCIES), LAFAYETTE RANCH, HERITAGE LANDS INC.,  
 3 MARK BACHETTI FARMS AND RUDY MUSSI INVESTMENTS L.P.:

4 EXHIBITS (Continued)	IDEN	EVID	VOL.
5 SDWA-178		63	34
6 SDWA-179		63	34
7 SDWA-180		63	34
8 SDWA-181		63	34
9 SDWA-182		63	34

10 THE ENVIRONMENTAL JUSTICE COALITION FOR WATER, ISLANDS,  
 INC., LOCAL AGENCIES OF THE NORTH DELTA, BOGLE  
 11 VINEYARDS/DELTA WATERSHED LANDOWNER COALITION, DIABLO  
 VINEYARDS AND BRAD LANGE/DELTA WATERSHED LANDOWNER  
 12 COALITION, STILLWATER ORCHARDS/DELTA WATERSHED  
 LANDOWNER COALITION, BRETT G. BAKER AND DANIEL WILSON:

13 EXHIBITS	IDEN	EVID	VOL.
14 LAND-120		65	34
15 LAND-121		65	34
16 LAND-122		65	34
17 LAND-122-Errata		65	34
18 LAND-123		65	34
19 LAND-124		65	34
20 LAND-125		65	34
21 LAND-130		65	34
22 LAND-132		65	34
23 LAND-132-Errata		65	34

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I N D E X (Continued)

THE ENVIRONMENTAL JUSTICE COALITION FOR WATER, 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:

EXHIBITS (Continued)	IDEN	EVID	VOL.
LAND-135		65	34
LAND-136		65	34
LAND-137		65	34
LAND-138		65	34
LAND-139		65	34
LAND-140		65	34
LAND-141		65	34
LAND-142		65	34
LAND-143		65	34
LAND-144		65	34
LAND-145		65	34
LAND-148		65	34
LAND-149		65	34
LAND-150		65	34
LAND-151		65	34
LAND-152		65	34
LAND-153		65	34
LAND-154		65	34

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I N D E X (Continued)

THE ENVIRONMENTAL JUSTICE COALITION FOR WATER, 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:

EXHIBITS (Continued)	IDEN	EVID	VOL.
LAND-155		65	34
LAND-157		65	34
LAND-159		65	34
LAND-160		65	34
LAND-161		65	34
LAND-162		65	34
LAND-163		65	34
LAND-164		65	34
LAND-165		65	34
LAND-166		65	34
LAND-167		65	34
LAND-168		65	34
LAND-169		65	34
LAND-170		65	34
LAND-171		65	34
LAND-172		65	34
LAND-174		65	34
LAND-175		65	34

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I N D E X (Continued)

THE ENVIRONMENTAL JUSTICE COALITION FOR WATER, 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:

EXHIBITS (Continued)	IDEN	EVID	VOL.
LAND-176		65	34
LAND-177		65	34
LAND-178		65	34
LAND-179		65	34
LAND-180		65	34
LAND-181		65	34
LAND-182		65	34
LAND-184		65	34
LAND-186		65	34
LAND-187		65	34
LAND-188		65	34
LAND-188-Errata		65	34
LAND-190		65	34
LAND-198		65	34
LAND-199		65	34
LAND-205		65	34
LAND-205-Errata		65	34
LAND-206		65	34



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## I N D E X (Continued)

THE ENVIRONMENTAL JUSTICE COALITION FOR WATER, 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:

EXHIBITS (Continued)	IDEN	EVID	VOL.
LAND-207		65	34
LAND-208		65	34
LAND-209		65	34
LAND-210		65	34
LAND-216		65	34
LAND-217		65	34
LAND-218		65	34
LAND-219		65	34
LAND-220		65	34
LAND-221		65	34
LAND-222		65	34
LAND-223		65	34
LAND-224		65	34
LAND-225		65	34
LAND-226		65	34

	I N D E X (Continued)		
	CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE:		
	EXHIBITS	IDEN	EVID VOL.
1			
2			
3			
4	CSPA-200		67 34
5	CSPA-202		67 34
6	CSPA-204		67 34
7	CSPA-206		67 34
8	CSPA-209		67 34
9	CSPA-210		67 34
10	CSPA-211		67 34
11	CSPA-212		67 34
12	CSPA-213		67 34
13	CSPA-214		67 34
14	CSPA-215		67 34
15	CSPA-216		67 34
16	CSPA-217		67 34
17	CSPA-218		67 34
18	CSPA-219		67 34
19	CSPA-220		67 34
20	CSPA-221		67 34
21	CSPA-230		67 34
22	CSPA-231		67 34
23	CSPA-232		67 34
24	CSPA-233		67 34
25			

	I N D E X (Continued)		
	CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE:		
	EXHIBITS	IDEN	EVID VOL.
1			
2			
3			
4	CSPA-234		67 34
5	CSPA-235		67 34
6	CSPA-236		67 34
7	CSPA-237		67 34
8	CSPA-239		67 34
9	CSPA-240		67 34
10	CSPA-241		67 34
11	CSPA-242		67 34
12	CSPA-243		67 34
13	CSPA-244		67 34
14	CSPA-245		67 34
15	CSPA-246		67 34
16	CSPA-247		67 34
17	CSPA-248		67 34
18	CSPA-249		67 34
19	CSPA-250		67 34
20	CSPA-251		67 34
21	CSPA-252		67 34
22	CSPA-253		67 34
23	CSPA-254		67 34
24	CSPA-256		67 34
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	I N D E X (Continued)		
1			
2	CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE:		
3	EXHIBITS	IDEN	EVID VOL.
4	CSPA-257		67 34
5	CSPA-258		67 34
6	CSPA-259		67 34
7	CSPA-260		67 34
8	CSPA-261		67 34
9	CSPA-262		67 34
10	CSPA-263		67 34
11	CSPA-264		67 34
12	CSPA-265		67 34
13	CSPA-266		67 34
14	CSPA-267		67 34
15	CSPA-268		67 34
16	CSPA-269		67 34
17	CSPA-270		67 34
18	CSPA-271		67 34
19	CSPA-272		67 34
20	CSPA-273		67 34
21	CSPA-274		67 34
22	CSPA-275		67 34
23	CSPA-276		67 34
24	CSPA-277		67 34
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	I N D E X (Continued)		
	CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE:		
	EXHIBITS	IDEN	EVID VOL.
1			
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4	CSPA-278		67 34
5	CSPA-279		67 34
6	CSPA-280		67 34
7	CSPA-281		67 34
8	CSPA-282		67 34
9	CSPA-283		67 34
10	CSPA-284		67 34
11	CSPA-285		67 34
12	CSPA-286		67 34
13	CSPA-287		67 34
14	CSPA-288		67 34
15	CSPA-289		67 34
16	CSPA-290		67 34
17	CSPA-291		67 34
18	CSPA-292		67 34
19	CSPA-293		67 34
20	CSPA-294		67 34
21	CSPA-295		67 34
22	CSPA-296		67 34
23	CSPA-297		67 34
24	CSPA-298		67 34
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	I N D E X (Continued)		
	CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE:		
	EXHIBITS	IDEN	EVID VOL.
1			
2			
3			
4	CSPA-299		67 34
5	CSPA-300		67 34
6	CSPA-301		67 34
7	CSPA-302		67 34
8	CSPA-303		67 34
9	CSPA-304		67 34
10	CSPA-305		67 34
11	CSPA-306		67 34
12	CSPA-307		67 34
13	CSPA-308		67 34
14	CSPA-310		67 34
15	CSPA-311		67 34
16	CSPA-312		67 34
17	CSPA-313		67 34
18	CSPA-314		67 34
19	CSPA-315		67 34
20	CSPA-317		67 34
21	CSPA-340		67 34
22	CSPA-341		67 34
23	CSPA-342		67 34
24	CSPA-343		67 34
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	I N D E X (Continued)		
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2	CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER		
	IMPACT NETWORK AND AQUALLIANCE:		
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4	EXHIBITS	IDEN	EVID VOL.
5	CSPA-344		67 34
6	CSPA-350		67 34
7	CSPA-351		67 34
8	CSPA-352		67 34
9	CSPA-353		67 34
10	CSPA-354		67 34
11	CSPA-355		67 34
12	CSPA-356		67 34
13	CSPA-357		67 34
14	CSPA-358		67 34
15	CSPA-400		67 34
16	CSPA-401		67 34
17	CSPA-402		67 34
18	CSPA-403		67 34
19	CSPA-404		67 34
20	CSPA-405		67 34
21	CSPA-406		67 34
22	CSPA-406		67 34
23	CSPA-407		67 34
24	CSPA-408		67 34
25	CSPA-409		67 34

	I N D E X (Continued)		
	CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE:		
	EXHIBITS	IDEN	EVID VOL.
1			
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3			
4	CSPA-412		67 34
5	CSPA-413		67 34
6	CSPA-414		67 34
7	CSPA-415		67 34
8	CSPA-416		67 34
9	CSPA-417		67 34
10	CSPA-419		67 34
11	CSPA-420		67 34
12	CSPA-421		67 34
13	CSPA-423		67 34
14	CSPA-425		67 34
15	CSPA-426		67 34
16	CSPA-427		67 34
17	CSPA-428		67 34
18	CSPA-429		67 34
19	CSPA-430		67 34
20	CSPA-431		67 34
21	CSPA-432		67 34
22	CSPA-433		67 34
23	CSPA-434		67 34
24	CSPA-435		67 34
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	I N D E X (Continued)		
	CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE:		
	EXHIBITS	IDEN	EVID VOL.
1			
2			
3			
4	CSPA-436		67 34
5	CSPA-437		67 34
6	CSPA-438		67 34
7	CSPA-439		67 34
8	CSPA-440		67 34
9	CSPA-441		67 34
10	CSPA-442		67 34
11	CSPA-443		67 34
12	CSPA-444		67 34
13	CSPA-445		67 34
14	CSPA-446		67 34
15	CSPA-447		67 34
16	CSPA-449		67 34
17	CSPA-450		67 34
18	CSPA-451		67 34
19	CSPA-453		67 34
20	CSPA-454		67 34
21	CSPA-455		67 34
22	CSPA-456		67 34
23	CSPA-457		67 34
24	CSPA-458		67 34
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I N D E X (Continued)

CALIFORNIA SPORTFISHING ALLIANCE, CALIFORNIA WATER  
IMPACT NETWORK AND AQUALLIANCE:

EXHIBITS	IDEN	EVID	VOL.
CSPA-459		67	34
CSPA-460		67	34
CSPA-461		67	34
CSPA-462		67	34
CSPA-463		67	34
CSPA-464		67	34
CSPA-465		67	34
CSPA-466		67	34

1 Wednesday, April 25, 2018 9:30 a.m.

2 PROCEEDINGS

3 ---000---

4 CO-HEARING OFFICER DODUC: Good morning  
5 everyone. It is 9:30.

6 Welcome back to this Water Right Change  
7 Petition hearing for the California WaterFix Project.

8 I am Tam Doduc, Board Member and Co-Hearing  
9 Officer. Chair Marcus and also Co-Hearing Officer is  
10 on a plane at the moment, but she definitely will be  
11 viewing the videos for today. And on my right is Board  
12 Member Dee Dee D'Adamo. To my left, Andrew Deeringer  
13 and Jean McCue. We're being assisted today by  
14 Miss Gaylon.

15 Since I do see some new faces, please take a  
16 moment and identify the exit closest to you. In the  
17 event of an emergency, an alarm will sound, lights will  
18 flash. We will evacuate preferably using that door  
19 (indicating) because that door will lead you to the  
20 stairway which we will take down to the first floor and  
21 meet up in the park across the street.

22 If you're not able to use the stairs, there  
23 will be security and safety monitors wearing  
24 fluorescent-colored vests and caps. And flag down one  
25 of them, and they will direct you to a protective area.

1           Secondly, this hearing is being recorded and  
2 Webcast, so please speak into the microphone after  
3 pushing the push-button and making sure that the green  
4 light is lit. And begin by stating your name and  
5 affiliation, if necessary, for the court reporter, who  
6 is back with us for the third day in a row.

7           Thank you, Candace.

8           And, third, and most importantly, please take  
9 a moment and put all your noise-making devices to  
10 silent, vibrate, do not disturb, airplane mode.

11           All right. Are there any housekeeping matters  
12 that we need to address at this time?

13           I believe the only one that I will ask  
14 Mr. Jackson to respond to before we get to his  
15 witnesses is:

16           Mr. Mizell had a question with respect to  
17 Dr. Budgor's testimony yesterday. Are you able to  
18 provide an answer?

19           MR. JACKSON: I'm actually not sure which  
20 question.

21           CO-HEARING OFFICER DODUC: Mr. Mizell, during  
22 cross-examination of Dr. Budgor, you asked for, I  
23 believe it was, a reference or citation to something in  
24 his testimony.

25           MR. MIZELL: Yes, that's correct.

1           It would be a citation for the underlying  
2 source of data on the conclusion about the . . . the  
3 economics of water in Santa Barbara region.

4           Mr. -- Dr. -- Sorry.

5           Dr. Budgor described how, as costs go up, the  
6 demand for water decreases, and yet we had not been  
7 able to find data in the record that was supportive of  
8 that -- of that assertion.

9           So that's the citation that I was requesting  
10 yesterday.

11           MR. JACKSON: I believe it's in Appendix 5 to  
12 the Santa Barbara Report.

13           CO-HEARING OFFICER DODUC: And is there a  
14 particular section are you aware of?

15           MR. JACKSON: No. I didn't find -- I didn't  
16 find the section. That's just what he told me.

17           MS. MESERVE: In addition, I think Dr. Budgor  
18 would probably be relying on his experience in these  
19 matters as well as whatever citations he had.

20           MR. JACKSON: And I think that's what General  
21 Managers of each of the -- each of the districts that  
22 he talked to told him.

23           CO-HEARING OFFICER DODUC: Mr. Mizell, it  
24 seems like that's the only response you're going to  
25 get.

1 MR. MIZELL: Very well.

2 Then I'll lodge an objection for the record on  
3 hearsay to the extent that he relied on the statements  
4 of the District Managers from that region.

5 CO-HEARING OFFICER DODUC: We will so note the  
6 objection on hearsay grounds.

7 MR. MIZELL: Thank you.

8 I have -- Before proceeding, I have one  
9 housekeeping question.

10 CO-HEARING OFFICER DODUC: Go ahead.

11 MR. MIZELL: Have you determined whether or  
12 not there will be a date for filing objections to  
13 cross-examination exhibits?

14 CO-HEARING OFFICER DODUC: Yes. We will get  
15 to that at the conclusion of today.

16 MR. MIZELL: Thank you.

17 CO-HEARING OFFICER DODUC: All right. At this  
18 time, I welcome Mr. Smith back -- thank you for coming  
19 back -- and welcome Former Vice-Chair Del Piero.

20 If you would both please stand and raise your  
21 right hands.

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Marc Del Piero

and

Felix Smith

called as witnesses by the California Sportfishing Protection Alliance (CSPA), California Water Impact Network (C-WIN), and AquAlliance, San Joaquin County & Local Agencies of the North Delta, having been duly sworn, were examined and testified as follows:

CO-HEARING OFFICER DODUC: Thank you. Please be seated.

And I will ask your attorneys to proceed with direct testimony.

DIRECT EXAMINATION BY

MR. JACKSON: Mr. Smith, is CSPA-210 a true and correct copy of your testimony in this matter?

WITNESS SMITH: Yes.

MR. JACKSON: Is CSPA-211 a true and correct copy of your Statement of Qualifications --

WITNESS SMITH: Yes.

MR. JACKSON: -- in this matter?

Could you please summarize your testimony, sir.

1           WITNESS SMITH: I'd like to make a few points.

2           Starting out, I see the Public Trust Doctrine  
3 as a background principle extending back, back to the  
4 days of the Roman Empire.

5           In 1853, the California Court said that the  
6 use of water is a user right. That means, in simple  
7 terms, you can use it, but don't abuse it.

8           In 1897, the Truckee Court said -- That's when  
9 we learned that fish were a very interesting piece of  
10 property owned by the people, managed by the State.

11           Let's jump ahead now to 1971 and look at Marks  
12 vs. Whitney. The location is Tomales Bay. It's a  
13 small estuarian area on the California coast. It is a  
14 tide land. It's tidal water. It has a small stream,  
15 Lagunitas Creek, which has a run -- a small run of Coho  
16 Salmon and Steelhead Trout.

17           The Court said that the public trust is more  
18 than traditional uses of navigation, fishery and  
19 commerce. It includes the preservation of those lands  
20 in their natural state so they may serve as ecological  
21 units for scientific study, as open space, as  
22 environments which provide food and habitat for fish  
23 and -- for birds, fish and marine life. If favorably  
24 influenced the scenery and climate of the area.

25           The ecological components of the Tomales Bay



1 Estuary are not much different from the very large  
2 San Francisco Bay-Delta.

3           To this Biologist, the broadening  
4 understanding of tidal waters and marshland would  
5 encompass all the aquatic and invasive ecosystem. This  
6 would easily fit the Bay-Delta and its tributary  
7 systems. It easily fits rivers and streams and their  
8 beds and associated riverine systems, habitats and  
9 riparian quarters. This broad definition easily fits  
10 lakes and similar water bodies like Mono Lake.

11           In 1980, I was with the Fish and Wildlife  
12 Service. I stated in a paper that if the public trust  
13 is forcibly applied to the allocation of water and  
14 water rights, it could result in a Board placing  
15 restrictions on water rights.

16           For example, the State Board will not be able  
17 to approve such which -- appropriation which harm or  
18 degrade the public rights in fish and instream flows.  
19 The State Board could just say no to that water  
20 applicant based on protecting the public trust.

21           At the Mono Lake Basin, the State Board did a  
22 very good job in protecting Mono Lake and its  
23 tributaries. But it's going to take vigilance on the  
24 behalf of the people -- in this particular case, Mono  
25 Lake Committee and others -- to make sure followup

1 studies are done and corrective actions taken and  
2 monitored.

3           The -- Adolph Moskovitz was the lead attorney  
4 for L.A. Water and Power. In 1994, he made a  
5 presentation to the Water Forum. He said simply any  
6 trier of fact is required to balance and accommodate  
7 all legitimate competing uses of a water body.

8           But he also stated the importance of the  
9 Public Trust Doctrine cannot be diluted by treating it  
10 as another beneficial use under Article X, Section 2,  
11 coequal with irrigation, power production and municipal  
12 water supply.

13           He goes on to say the Public Trust Doctrine  
14 applies a -- occupies an exalted position in any  
15 judicial or administrative determination of water use.  
16 If -- If harm to public assets, uses and values is  
17 projected to be significant -- and, in my opinion, it  
18 doesn't take much -- then the beneficial use may have  
19 to cut back or eliminated.

20           Again, the State Board could just say no or  
21 can restrict or limit the use of water to protect the  
22 public trust. Recent courts have already said as much.

23           The allocation of rivers in the Central Valley  
24 is greatly -- are greatly oversubscribed. The Board's  
25 priority is to protect public trust whenever possible.

1           Audubon Court said the public trust protection  
2 is an obligation, an affirmative duty of this Board.  
3 Physical solutions may have to be adopted to mitigate  
4 measures and install measures before the Project can  
5 move forward.

6           In other words, build them first.

7           This may result in retrofits to existing  
8 projects before others can move forward or mitigation  
9 be taken now to protect damage in the future. For  
10 example, there are about 379,000 acres of  
11 drainage-impaired lands in the San Luis Unit of the  
12 CVP.

13           The application of such water -- of water to  
14 such drainage-impaired lands with its attendant  
15 incidental losses and degradation to water quality  
16 could easily constitute an unreasonable use of water.

17           The selenium-deformed bird, drainage issue at  
18 Kesterson in 1983 is still fresh in my mind. And that  
19 1983 date, when we found those birds, was only about  
20 three months after the Mono Lake decision came down by  
21 the California Court. This really drove home the need  
22 of protecting the public trust.

23           Today, the spring-run in the Central Valley is  
24 extinct in the San Joaquin and a remnant run in the  
25 Sacramento Valley. The winter-run is a shadow of its

1 former self. And based on my information from the  
2 Pacific Green Fishery Council, there were 490 adults,  
3 Jack -- adult winter-run and 485 Jacks in the 217  
4 run -- 2017 run. Not a good showing for a fish that is  
5 supposed to be protected under the public trust.

6 Late-fall Chinook is not doing well, either,  
7 but it has about 4400 adults in the -- in the run and  
8 is a specie of concern.

9 The fall-run, this year's run, last year's run  
10 that come in, was 44,547 based on information from the  
11 Pacific Range Fisheries Commission. The expected  
12 escapement for sustainable fishery is 122,000.

13 We kind of blew it there; didn't we?  
14 Something's wrong.

15 The Longfin Smelt is listed as  
16 State-threatened. The Delta Smelt may even be a  
17 possible extinction. A footnote to a water use and  
18 development history. Extinction of an aquatic specie  
19 should not be a management option.

20 Under the Public Trust Doctrine, members of  
21 the public, present and future generations, have a  
22 clear property right to clean water, clean air, healthy  
23 and uncontaminated fish and wildlife species and  
24 resources having many public trust values.

25 The Public Trust Doctrine as a background

1 principle is supreme to and supersedes the private use  
2 rights of an individual or corporation that may have  
3 the same property right -- use.

4           Until regulatory agencies believe that the  
5 people's property and trust rights exist and act  
6 accordingly, there will be little meaningful action  
7 taken to protect the public trust, associated resources  
8 and value.

9           The public trust may still end up being the  
10 courts, and the courts being the final adjudicate.

11           Thank you.

12           CO-HEARING OFFICER DODUC: Thank you,  
13 Mr. Smith.

14           MR. KEELING: Good morning. Tom Keeling for  
15 the San Joaquin County Protestants.

16           And for the record, Mr. Marc Del Piero will be  
17 appearing today and testifying on behalf of San Joaquin  
18 County Protestants, the CSPA, C-WIN, AquAlliance  
19 parties and LAND, Local Agencies of the North Delta.

20           So that's why Mr. Jackson, Miss Meserve and I  
21 are all here today.

22                           DIRECT EXAMINATION BY

23           MR. KEELING: Good morning, Mr. Del Piero.

24           WITNESS DEL PIERO: Good morning, Mr. Keeling.

25           (Fire alarm sounds.)

1 CO-HEARING OFFICER DODUC: Wait.

2 I'm sorry, Mr. Keeling.

3 Before you continue, I just want to make  
4 everyone aware that an alarm has sounded on another  
5 floor. We are in the midst of evacuation drills.

6 So we are going to wait for an announcement to  
7 come overhead. Chances are very good that other  
8 floors, not ours, could be evacuated, so don't be  
9 alarmed.

10 It is going to be somewhat annoying because it  
11 will keep going off in the background.

12 MR. KEELING: Yes.

13 WITNESS DEL PIERO: I will try to speak  
14 loudly.

15 FROM THE SPEAKERS: Attention, all building  
16 occupants. Attention, all building occupants. An  
17 alarm has sounded on Floors 20, 21, 22. We are in the  
18 process of investigating the alarm.

19 Floors 20, 21, 22, please continue with your  
20 relocation procedures. All other floors, please wait  
21 for an upcoming announcement.

22 I repeat: Attention, all building occupants.

23 An alarm has sounded on Floors 20, 21, 22. We  
24 are in the process of investigating the alarm.

25 Floors 20, 21 and 22, please continue with the

1 relocation procedures. All other floors, wait for a  
2 pending announcement.

3 CO-HEARING OFFICER DODUC: All right. I think  
4 it is safe to proceed, Mr. Keeling.

5 MR. KEELING: Thank you very much.

6 Mr. Del Piero, is Exhibit CSPA-208-Corrected a  
7 true and correct copy of your Part 2 written testimony?

8 WITNESS DEL PIERO: It is.

9 MR. KEELING: Did you write that testimony?

10 WITNESS DEL PIERO: I did.

11 MR. KEELING: Is Exhibit CSPA-209 a true and  
12 correct copy of your Statement of Qualifications?

13 WITNESS DEL PIERO: It is.

14 MR. KEELING: Mr. Del Piero, could you please  
15 summarize for the Hearing Officers your written  
16 testimony.

17 WITNESS DEL PIERO: Thank you very much.

18 Hearing Officer Doduc, Board Member D'Adamo,  
19 and Hearing Officer Marcus -- who I understand is  
20 listening to us from the other end of the electronic  
21 spectrum -- it's a pleasure to be here today.

22 I want to apologize because, as the Hearing  
23 Officer knows, today's the first day that anybody's  
24 seen me outside of a hospital bed, and so my voice is a  
25 little -- a little rough because of the surgery. I

1 will apologize. It might take me a little longer than  
2 normal, but I will do the best to muddle through.

3 My written testimony has been presented -- has  
4 been previously submitted to the Board, and I hereby  
5 affirm that it is my own, written by me without the  
6 assistance of any third parties.

7 The core of the Public Trust Doctrine is the  
8 State's authority as sovereign to exercise the  
9 continuous supervision and control over the navigable  
10 waters of the State and the lands underlying those  
11 waters.

12 This authority applies to the waters tributary  
13 to the Delta and bars Petitioners or, for that matter,  
14 any other party from claiming a vested right to divert  
15 waters once it becomes clear that such diversions harm  
16 the interests protected by the public trust.

17 I will go on to say later that I believe the  
18 public trust is the preeminent beneficial use under  
19 both the Constitution and the laws of the State of  
20 California.

21 The fact that these diversions of Delta water  
22 by Petitioners to points south of the Delta over the  
23 past 50 years, the fact is that those diversions have  
24 not just harmed but decimated public trust resources  
25 currently in the Delta.



1           Finally, the massive loss of public trust  
2 resources in the Delta during this time cannot in any  
3 way be construed as being in the public's interest.

4           And the continuation of this devastation to  
5 the public trust and the public trust resources within  
6 the Delta by the Petitioners will not benefit the  
7 public in any manner in the future.

8           The water rights enjoyed by the Petitioners  
9 were granted, the diversions were commenced, and the  
10 diversions have continued to the present without any  
11 consideration of the impact upon public trust.

12           The State, specifically the State Water  
13 Resources Control Board, and other state agencies,  
14 including Petitioner DWR, have not at this point  
15 attempted, let alone met, mandates articulated in the  
16 Audubon decision that I quote (reading):

17                     "Before State agencies approve water  
18                     diversions" --

19           And parenthetically I would include changes in  
20 points of diversion, in my opinion, are encompassed in  
21 water diversions as defined by Audubon.

22                     -- "they should consider the effect of  
23                     such diversions upon interests protected  
24                     by the public trust and attempt, so far  
25                     as feasible, to avoid and minimize any

1           harm to those interests."

2           I believe that this failure is evidence of the  
3 Petitioners' acknowledgment of the lack of any  
4 additional available wet water in the Delta system.

5           The only so-called water that remains is on  
6 paper and does not exist, except in the wettest of  
7 years where, in a lack of both storage and demand,  
8 renders it of little consequence for domestic  
9 consumption.

10           This is inherently the problem with the  
11 California WaterFix as it's been characterized. And it  
12 is a problem with this process since the watered-down  
13 versions of D-1641 were adopted nearly two decades ago.

14           Absent the State Water Resources Control  
15 Board, prior quantification of the constitutionally  
16 mandated and required public trust flows necessary to  
17 protect and preserve public trust resources in the  
18 Delta, and the prior allocation of those flows to  
19 public trust purposes by the State Water Resources  
20 Control Board, the Petitioners CWF will result in an  
21 unreasonable and, in my opinion, hence,  
22 unconstitutional use of the State's waters.

23           The failure by the State Water Resources  
24 Control Board to take action over the past 18 years to  
25 prepare and forcefully implement with measurable

1 significant and enforceable penalties for  
2 non-compliance, a comprehensive analysis of the  
3 required water and flows to protect the public trust  
4 resources cannot be construed as having satisfied the  
5 State Board's standards, nor can it be construed as  
6 having satisfied the Constitutional duties of the State  
7 Board as articulated in Audubon and in the Racanelli  
8 decision.

9 The absence of even an effort as the  
10 preparation of a detailed evidentiary-based water  
11 availability analysis underscores why current  
12 air-ridden problems in the CWF process of piecemealing  
13 its environmental reviews of their ever-changing  
14 Project is as massively broken as the public trust  
15 resources in the Sacramento-San Joaquin Delta

16 Failure to cause the preparation of a WAA in  
17 light of the unrefuted evidence of massive species loss  
18 and decline due to the lack of water availability  
19 constitutes an admission that the State has erroneously  
20 overcommitted, on paper at least, the available water  
21 resources of the Delta.

22 I participated in most of the evidentiary  
23 hearings leading up to the adoption of the State Water  
24 Resources Control Board Decision 1641 back in 2000,  
25 prior to all of the hearings that took place prior to

1 the end of my tenure on April 1st, 1999.

2 D-1641 was intended to effectively implement  
3 the Water Quality Plan objectives of 1995.

4 Unfortunately, it has been a failure.

5 The teeth in D-1641 were effectively knocked  
6 out when it was subsequently adopted in the year 2000.  
7 And those objectives that we anticipated would  
8 ultimately be implemented as part of a subsequent  
9 decision when we adopted the Water Quality Plan in 1995  
10 have not been realized or achieved.

11 That failure has -- Pardon me.

12 That decision has failed to provide adequate  
13 Delta outflow to the San Francisco Bay. It has failed  
14 to protect and preserve or even quantify the Delta  
15 public trust resources and Delta public trust-protected  
16 fisheries.

17 That decision has failed to obligate major  
18 water rights holders to actually meet or exceed all of  
19 the water quality standards that the Board adopted to  
20 guarantee the sustained health of the estuary and its  
21 public trust resources.

22 It has failed to elevate the protection of the  
23 State's public trust resources to a higher level than  
24 other common beneficial uses, thereby ignoring the  
25 Constitutional imperatives to do so that have been

1 articulated in both the Audubon and the Racanelli  
2 decisions.

3           It has failed to guarantee equivalency for the  
4 protection of environmental resources as against the  
5 needs and continuing ever-increasing demands of Export  
6 Contractors.

7           Moreover, the Petitioners have effectively  
8 ignored D-1641 when strict compliance with its mandates  
9 became inconvenient due to the export demands on the  
10 Projects.

11           Petitioners' assurances to the State Board  
12 that they will comply with the water quality standards  
13 in the revised 2006 Water Quality Plan update if their  
14 Projects are only approved lacks sincerity,  
15 intellectual honesty, and a successful track record  
16 upon which they can rely and point to to satisfy the  
17 requirements, demands and the State Board for  
18 enforcement.

19           It is clear now that precise, detailed and  
20 measurably enforceable terms amended into the  
21 Petitioners' Permits with financially and significantly  
22 punitive penalties for violations by the Petitioners  
23 and their customers are the only way to stop the  
24 Petitioners' periodic inherent violations of water  
25 quality standards and of the senior water rights of

1 other innocent parties in the Delta and that serve  
2 Delta communities generally.

3           And, just parenthetically, I would -- I would  
4 ask that the Board seriously consider, in regards to  
5 those comments, the Board's adopted findings that I  
6 know the Chair and -- and the Board Members worked so  
7 hard on during 2010 on the Water Quality Plan policies.

8           If you want to find the conditions, the  
9 measurable, enforceable conditions, to incorporate into  
10 the Permits that the Petitioners are asking for, look  
11 to your own Plan that you adopted in 2010. But make  
12 sure they've got teeth so that you don't have to  
13 continue to come back repeatedly for -- for innumerable  
14 hearings to try to enforce what we all know should be  
15 enforced by the Petitioners themselves.

16           CO-HEARING OFFICER DODUC: Mr. Del Piero,  
17 perhaps a clarification.

18           WITNESS DEL PIERO: Yes, ma'am.

19           CO-HEARING OFFICER DODUC: It was not a Water  
20 Quality Control Plan we adopted in 2010.

21           WITNESS DEL PIERO: No. It's the policies  
22 that you adopted in 2010.

23           CO-HEARING OFFICER DODUC: It was the flow  
24 criteria that --

25           WITNESS DEL PIERO: Flow criteria, yes, ma'am.

1 That's what I'm referring to.

2 CO-HEARING OFFICER DODUC: Thank you.

3 WITNESS DEL PIERO: The WaterFix and its  
4 tunnels are proposed by Petitioners as new enhanced  
5 conveyance mechanisms to take water across the Delta  
6 for increased reliability.

7 As has been disclosed previously, these new  
8 pipes do not impound or store any more water than is  
9 already present in the collapsing ecosystem of the  
10 Sacramento-San Joaquin Delta.

11 The dual tunnels do not create any new water  
12 resources and are completely reliant upon the fiction  
13 of paper water entitlements. Neither new pipes nor old  
14 paper has ever produced an additional water resource  
15 for the State of California.

16 Common sense, however, and the law of  
17 political expediency, would indicate that a  
18 multibillion-dollar capital facilities pipeline will  
19 not be built to remain empty.

20 Sooner or later, water from the Delta to fill  
21 those tunnels will be taken from the least politically  
22 powerful sources with the least power to resist: The  
23 water-dependent public trust resources of the Delta and  
24 the fisheries and in-Delta water rights holders and  
25 communities that depend upon those resources.

1           They will be deemed expendable in the face of  
2 the massive demand of water from users south of the  
3 Delta who are obligated to pay for the otherwise empty  
4 pipes.

5           This is the unstated ultimate consequence of  
6 the failure to establish specific, dedicated, in-Delta  
7 water flows and designated water supplies identified  
8 expressly to preserve and protect public trust  
9 resources and Delta water quality before billions of  
10 California taxpayer dollars are spent on pipes with no  
11 water to fill them.

12           One would be challenged to identify a Project  
13 that is less consistent with the public interest than  
14 the WaterFix.

15           Finally, Petitioners' proposal to use the  
16 legislatively undefined concept of adaptive management  
17 to describe or simply wish away significant  
18 deficiencies in the WaterFix proposal renders the  
19 Project as proposed untenable.

20           My experience -- My personal experience with  
21 adaptive management in a variety of venues is that the  
22 lack of consistent decision-making by staff because of  
23 consistent turnovers of staff and the consistent  
24 oftentimes reinterpretation of mandates and policies by  
25 ever changing bureaucrats and the lack of sustained



1 funding, which is often forgotten after a decision is  
2 made, and the lack of enforceable penalties virtually  
3 guarantee failure.

4 I reference the National Resource Council  
5 review of the Bay-Delta Conservation Plan in my  
6 testimony as the predecessor to the WaterFix and -- and  
7 prepared a report titled -- They prepared a report  
8 titled "Review of Use of Science and Adaptive  
9 Management in the California Draft Bay-Delta  
10 Conservation Plan."

11 They observed -- and I personally agree based  
12 on my personal experience -- that --

13 CO-HEARING OFFICER DODUC: Hold on, please.

14 WITNESS DEL PIERO: Yes, ma'am.

15 FROM THE SPEAKERS: Attention, all building  
16 occupants. Attention, all building occupants.

17 A fire alarm sounded on Floors 20, 21, 22.

18 The floors that were in the alarm are all clear.

19 Please return to your designated work areas.

20 Repeat: Attention, all building occupants.

21 Attention, all building occupants.

22 A fire alarm has sounded on 20, 21, 22. The  
23 floors that were in the alarm are all clear.

24 Please continue to your designated work areas.

25 Thank you.

1 CO-HEARING OFFICER DODUC: Let's enjoy this  
2 moment of silence. No alarms.

3 Mr. Del Piero, please continue.

4 WITNESS DEL PIERO: Thank you.

5 Despite the numerous attempts to silence me --

6 (Laughter.)

7 WITNESS DEL PIERO: Pardon me, Madam Chair. I  
8 apologize.

9 Despite the numerous attempts to develop and  
10 implement the adaptive environmental management  
11 strategies, many of them have not been successful. And  
12 I've referenced in -- Rather than go on in regards to  
13 that, I referenced that specifically in my written  
14 testimony submitted to the Board.

15 I think it's appropriate for the -- for me at  
16 this point to leave the Board Members with certain  
17 thoughts in conclusion.

18 The reasonableness doctrine and the public  
19 trust are not going away. They just haven't been  
20 satisfied or -- or -- nor have the demands upon the  
21 State Board been met when you compare those to other  
22 uses and -- and to the need for the State Board to  
23 recognizes -- recognize changes in conditions.

24 There have been massive changes in conditions  
25 since the original Permits for the State Project and

1 Central Valley Project were issued.

2           And the Board needs to understand and take  
3 those into consideration when it proceeds to set public  
4 trust flow requirements during the process that you're  
5 now involved in.

6           Racanelli -- Judge -- Justice Racanelli said  
7 that (reading):

8                     "The State has a duty to take public  
9                     trust into account wherever feasible."

10           That's an exact quote out of the -- out of the  
11 decision.

12           Madam Chair and Members of the Board, it's  
13 feasible now.

14           Contrary to the Petitioners'  
15 characterizations, the proposed Petition is not a minor  
16 change. It's a massive project, as defined by CEQA,  
17 that will have huge and numerous significant adverse  
18 environmental impacts upon protected public trust  
19 resources and upon environmental resources in general.

20           The Petitioners would have this Board believe  
21 that adding 9,000 cubic feet per second of diversion  
22 capacity to the Northern Delta some 35 to 40 miles away  
23 from the Petitioners' existing diversions is somehow a  
24 minor change.

25           As presented in the cases in chief of various

1 Protestants, this change would have an existential  
2 effect of water users and the beneficial uses in the  
3 Delta and devastate what's left of the public trust.

4 The right . . .

5 The -- One last thought, Madam Chair, and then  
6 I'll subject myself to whatever questions anyone might  
7 have.

8 ~~The State Water Resources Control Board's the~~  
9 ~~responsible agency in the CEQA process. I've indicated~~  
10 ~~in my testimony that in water rights -- that a Water~~  
11 ~~Availability Analysis, I believe, is necessary for you~~  
12 ~~to satisfy your public trust duties.~~

13 ~~It is also, under my reading of the law,~~  
14 ~~appropriate, if not necessary, but appropriate for the~~  
15 ~~State Board to demand of lead agencies preparing~~  
16 ~~environmental documents to incorporate into those~~  
17 ~~environmental documents those -- an evaluation of those~~  
18 ~~environmental issues that the State Board believes it's~~  
19 ~~necessary to have so that the Board can render an~~  
20 ~~intelligent, thoughtful, and legally sustainable~~  
21 ~~decision in its capacity as a responsible agency.~~

22 ~~So asking for Water Availability Analysis in~~  
23 ~~order to meet the requirements as the responsible~~  
24 ~~agency is not inappropriate and is fully within your~~  
25 ~~authority.~~

1 Madam Chair, that concludes by comments.

2 Thank you very much.

3 CO-HEARING OFFICER DODUC: Thank you,

4 Mr. Del Piero.

5 Mr. Mizell.

6 MR. MIZELL: Yes.

7 I'd like to object to the last statement  
8 insofar as it goes to addressing a CEQA concern.

9 He is indicating that he doesn't believe that  
10 the CEQA documents sufficient to include additional  
11 analyses under a legal theory that he has, so I would  
12 move to strike that as being already ruled upon by --  
13 by you as being outside the scope of this hearing as it  
14 challenges the CEQA document.

15 CO-HEARING OFFICER DODUC: I believe he framed  
16 his comment -- his testimony in terms of our  
17 responsibility as -- as a responsible agency in  
18 considering the CEQA document for our purposes in this  
19 hearing.

20 That was my understanding, Mr. Del Piero;  
21 correct?

22 WITNESS DEL PIERO: That is correct, Madam  
23 Chair.

24 CO-HEARING OFFICER DODUC: Does anyone else  
25 want to respond to that objection?

1 MR. KEELING: You have it.

2 CO-HEARING OFFICER DODUC: Overruled,  
3 Mr. Mizell.

4 Anything else?

5 MR. KEELING: Thank you, Mr. Del Piero.

6 No. I -- Our witnesses are available for  
7 cross-examination.

8 CO-HEARING OFFICER DODUC: Any cross?

9 Mr. Ruiz.

10 MR. RUIZ: Yes.

11 I have some cross for Mr. Del Piero. I think  
12 it's probably 20 to 30 minutes at the outside.

13 CO-HEARING OFFICER DODUC: All right.

14 Mr. Mizell, the Department had indicated  
15 yesterday that you did not have any cross but you do  
16 have objections to lodge. Why don't you go ahead and  
17 lodge those objections now, at least a summary of them.

18 MR. MIZELL: Yes.

19 I can either address them all or, if you'd  
20 like, I can go over the topics that we filed in the  
21 writing.

22 CO-HEARING OFFICER DODUC: Why don't we go  
23 over the topic first.

24 MR. MIZELL: Certainly.

25 We have additional objections to testimony we

1 believe still falls within the challenging of the CEQA  
2 process, which has previously been ruled beyond the  
3 scope of this hearing.

4 We also have objections relating to testimony  
5 we believe addresses key hearing issues of Part 1 and  
6 not Part 2 and, therefore, should be stricken.

7 We have hearsay objections.

8 We also have objections as to the value of  
9 certain aspects of the testimony as not being that  
10 which are reliable -- a reasonable person would rely  
11 upon in this -- in this context.

12 We also have objections to -- Well, this one's  
13 when they go to admit their evidence in the record.

14 Those are the -- Those are the main tag words.

15 CO-HEARING OFFICER DODUC: And how extensive  
16 and detailed are those objections?

17 Miss Ansley had indicated yesterday that they  
18 were detailed enough that she requested that they be  
19 submitted in writing.

20 MR. MIZELL: Yes.

21 I have four pages of rather detailed notes. I  
22 can either go through the passages and explain the  
23 objections now or we can file it in writing. Your  
24 preference.

25 CO-HEARING OFFICER DODUC: Miss Meserve.

1 MS. MESERVE: I guess one thing I would note  
2 is that the witness is available here today, and if  
3 there are any issues with the -- for instance, on the  
4 reasonable reliance or the basis of his testimony, I  
5 think it would be most appropriate for DWR to simply  
6 ask the witness those questions while he's here to test  
7 their theories.

8 But with respect to whatever other objections  
9 there are, we have no problem with responding in  
10 writing and that may be more efficient for everyone's  
11 time.

12 CO-HEARING OFFICER DODUC: Response,  
13 Mr. Mizell?

14 MR. MIZELL: Yeah.

15 These question -- These objections are not  
16 something that could be cured by a questioning of the  
17 witness.

18 CO-HEARING OFFICER DODUC: All right.  
19 Mr. Mizell, you may have until noon tomorrow to file  
20 your written objections.

21 And, Miss Meserve, Mr. Keeling, Mr. Jackson,  
22 you may have until noon Friday.

23 Is tomorrow Thursday? Yes. Noon Friday to  
24 respond.

25 MS. ANSLEY: Thank you.



1 MS. MESERVE: But to say they're --  
2 Apparently, DWR's been working on this for a while, so  
3 I guess I would request until Monday noon if they're as  
4 voluminous as Mr. Mizell seems to be indicating.

5 CO-HEARING OFFICER DODUC: Monday noon.

6 With that, Mr. Ruiz, please come up and  
7 conduct your cross.

8 MR. RUIZ: Good morning, Mr. Del Piero.

9 WITNESS DEL PIERO: Good morning.

10 MR. RUIZ: I'm Dean Ruiz. I'm here on behalf  
11 of the South Delta Water Agency parties, and I have  
12 some questions for you that fall into three basic  
13 categories:

14 Your testimony with regard to lack of a Water  
15 Availability Analysis; the balancing of the public  
16 trust; and adaptive management generally.

17 CROSS-EXAMINATION BY

18 MR. RUIZ: Your testimony squarely focuses on  
19 the lack of Water Availability Analysis.

20 And on Page 8 of your testimony, you write  
21 that there's not currently enough water available in  
22 the Delta to sustain the public trust resources of the  
23 Delta.

24 And I've heard you testify just a moment ago  
25 about, you feel that the Board has the discretion, the

1 authority, to require Water Availability Analysis.

2 But I want to understand as clearly as  
3 possible why you think a Water Availability Analysis is  
4 essential before Petitioners' request for point of  
5 change in diversion can be decided upon.

6 WITNESS DEL PIERO: Well . . .

7 A Water Availability Analysis is required  
8 because the State Legislature has embodied that  
9 requirement in the statutes.

10 A Water Availability Analysis is required  
11 because the Audubon court and Judge Racanelli told us  
12 we needed to do it.

13 A Water Availability Analysis is required  
14 because of the Board's ongoing obligations to continue  
15 to monitor and adjust and -- protections for the public  
16 trust resources in the Delta. And absent a Water  
17 Availability Analysis, the Board can't exercise its  
18 Constitutional as well as its statutory duties.

19 MR. RUIZ: Thank you.

20 And turning your attention to Page 8 of your  
21 testimony.

22 You state that (reading):

23 ". . . Petitioners are wrongfully relying  
24 on their -- on ancient water rights that  
25 are nothing more than worthless 'paper

1 water rights.'" "

2 What do you mean by that, specifically?

3 WITNESS DEL PIERO: If -- If one reviews the  
4 water rights that the Petitioners have introduced into  
5 the record as part of the California WaterFix  
6 proposals -- And when I say proposals, it's because it  
7 changes a lot so it's sort of hard to keep track of --  
8 of exactly what it is they're proposing due to a lack  
9 of specificity.

10 The one thing I can tell you is, the magnitude  
11 of the water that was allowed as part of those  
12 reasonable Permits issued before by the State Water  
13 Rights Board and by the State Engineer far exceed what  
14 the last 70 years of hydrology are able to demonstrate.

15 Except in the very wettest of years, when this  
16 lack of storage capacity and, frankly, a lack of  
17 demand, the hydrologic records demonstrate that the  
18 water that was granted as part of those Permits just  
19 doesn't -- doesn't exist, probably never has.

20 And so a multibillion dollar pipeline project  
21 that, by their own admission, doesn't generate any new  
22 water, it only supposedly improves reliability, has to  
23 be predicated on something.

24 And if it's only 9,000 cubic feet per second,  
25 there's no -- there's no cost benefit analysis that I'm

1 aware of that anyone could produce that could  
2 demonstrate that -- that there's any water left in that  
3 system.

4           Moreover, everyone needs to just face up to  
5 the reality that -- that -- that the public trust  
6 resources and the ecological health of the Delta is, in  
7 effective, in free-fall if not collapsed.

8           You can't a look at the -- at the trawl  
9 studies done by the California Department of Fish and  
10 Wildlife for the better part of the last 40 years  
11 and -- and recognize continuing declines in both  
12 endangered as well as threatened species, both pelagic  
13 as well as anadromous fisheries in the Delta, without  
14 recognizing that there's a problem.

15           And the problem is real simple. You can do --  
16 You can throw as much money at the Delta as you want.  
17 Until there is water available for the protection of  
18 public trust resources, until more water is committed  
19 by the State Board and the State to the protection and  
20 preservation of public trust resources, then continuing  
21 to rely on old paper and new pipes isn't going to fix  
22 the problem.

23           CO-HEARING OFFICER DODUC: Before you  
24 continue, Mr. Ruiz.

25           Mr. Mizell, did you have an objection to

1 lodge? I saw you standing earlier by the microphone.

2 MR. MIZELL: Yes.

3 It's a bit past at this point, but the  
4 Department objects to going over Part 1 issues again.

5 Whether or not this Petition requires a new  
6 water right was a key hearing issue in Part 1 and not  
7 in Part 2.

8 I understand that Mr. Del Piero is trying to  
9 tie it to the public trust and the public interest.  
10 However, I don't believe that the public trust and  
11 public interest should be used as a panacea for all  
12 complaints that were encompassed within Part 1.

13 There's an effective avenue for that, which is  
14 rebuttal, and he can address those issues on -- on  
15 CSPA's or San Joaquin Counties' rebuttal testimony.

16 But challenging the need for a new water right  
17 in its case in chief is inappropriate, and I'd object  
18 to the question as -- as bringing out points that are  
19 more appropriate for then.

20 CO-HEARING OFFICER DODUC: Mr. Ruiz?

21 MR. KEELING: I would point out that the  
22 question of a Water Availability Analysis and paper  
23 water was struck from his Part 1 testimony. That's why  
24 it's in Part 2.

25 It's a public trust issue. So which part are

1 we talking about?

2 CO-HEARING OFFICER DODUC: All right. All  
3 right.

4 Overruled, Mr. Mizell.

5 MR. RUIZ: Mr. Del Piero, you testified that  
6 the Project Proponents have failed to balance the  
7 public trust.

8 What, in your opinion, are the essential steps  
9 required for a balancing of the public trust?

10 WITNESS DEL PIERO: Well, an acknowledgment  
11 that you've got a duty to something called the public  
12 trust in the first place wouldn't hurt.

13 The fact that -- that the operations of the  
14 Projects over the better part of the last five decades  
15 have -- have been conducted in such a fashion as to  
16 continue to watch the -- the decline in environmental  
17 resources without the Operators taking it upon  
18 themselves to do the right thing, is -- is probably  
19 indicative of the fact that they have lack -- they lack  
20 any appreciation, or obligation, or sense of  
21 obligation, if you will, that the protection of the  
22 public trust is any -- is the responsibility of any  
23 other public agency other than State Water Resources  
24 Control Board.

25 I don't believe that to be the case. I

1 believe the State Department of Water Resources bears a  
2 huge burden in its -- in its responsibilities to  
3 operate those Projects in order to protect the public  
4 trust resources in the State if not -- if not the  
5 preeminent responsibility that they have in the  
6 operation of those Projects is to protect the public  
7 trust resources of the State before they guarantee  
8 water to their customers.

9           And, so, in order to -- to -- to -- to . . .  
10 initiate a -- a program of -- of dealing with that, not  
11 only do you need to have an acknowledgment that there's  
12 been a problem, you also need to lay out a systematic  
13 method by which you want to quantify the water  
14 availability that exists, wet water, not paper. Wet  
15 water.

16           And then you identify the water requirements  
17 for public trust resources that haven't been required  
18 since long before the water -- Well, they weren't  
19 required at the time the Permits were issued in the  
20 first place, so they've never been required.

21           So you -- You quantify the amount of water  
22 that's necessary in order to protect and preserve  
23 whatever the baseline is that you've decided to  
24 establish for your public trust resources.

25           And then you go to riparian users and senior

1 water rights holders, and then you go to the Central  
2 Valley Project and the State Water Project.

3           And if, after you've made all of those  
4 incremental decisions predicated upon actual evidence,  
5 not trust me, then you might get to the point of  
6 discovering exactly how much water, if any, would ever  
7 be generated or allowed to pass through the proposed  
8 California WaterFix.

9           But this -- this is not rocket science. There  
10 are massive numbers of Engineers that have been  
11 employed by the State of California for the better part  
12 of five decades. I'm not aware that any of them have  
13 ever initiated this process.

14           And, so, continuing to point the finger at the  
15 State Board and say, "Well, you know, this is a State  
16 Board problem," when the duty for the protection of the  
17 public trust resources of this state fall on the  
18 shoulders of every bureaucrat, every Senior Executive  
19 of every major institution that -- that is -- provides  
20 services to the residents of the State of California.

21           That's what we're here talking about. It's  
22 not whether or not the State Board has satisfied its  
23 obligations. There's -- We know the State Board hasn't  
24 satisfied its obligation. That doesn't mean the  
25 obligation is unique.



1           The Department of Water Resources is a  
2 failure. So's the Central Valley Project. And I say  
3 that recognizing that, if the Delta ecosystem and the  
4 public trust resources upon which all of us rely and  
5 benefit had not collapsed, then I wouldn't make a mean  
6 state -- mean-sounding statement like that. But that's  
7 not the case.

8           They watched it collapse and let it go.

9           MR. RUIZ: Thank you.

10           Mr. Del Piero, do you believe there is any way  
11 possible to achieve a balancing of the public trust in  
12 the context of this Petition without first conducting  
13 an actual Water Availability Analysis?

14           WITNESS DEL PIERO: No.

15           MR. RUIZ: Mr. Del Piero, you are aware of the  
16 fact that Petitioners have assured the Board -- this  
17 Board that California WaterFix will comply with  
18 decision D-1641, any -- and any other legal  
19 requirements governing the Project's operations in the  
20 Delta?

21           WITNESS DEL PIERO: I'm aware they made that  
22 promise. At least, I've read it in the newspapers.

23           MR. RUIZ: What, in your opinion, is  
24 problematic or insufficient about that assurance of  
25 protecting the resources of the Delta?

1           WITNESS DEL PIERO:  It's -- It's  
2 probably . . .

3           In all sincerity, there either used to be --  
4 there used to be a President of the United States that  
5 had a -- that had a fondness for saying, You trust but  
6 verify."

7           I served on this Board for eight years, and I  
8 heard the same representations from the Department on  
9 the Central Valley Project.  "Trust me" isn't working,  
10 hasn't worked in the last 30 years.

11           I think the current Board Members have a duty  
12 and an obligation to incorporate measurable standards  
13 with really, really tough financial penalties for  
14 failure.

15           Because at this point in time, given the  
16 decimated condition of the public trust resources in  
17 the Delta, unless you are just hard-nosed, there will  
18 be a continuing . . . ignoring, if you will, of the  
19 duties of the protection of the public trust to the  
20 point where, sooner or later, the Delta will just  
21 become a -- a freshwater estuary that's used as part of  
22 the plumbing for the delivery of water someplace else.

23           MR. RUIZ:  At Pages 3 and 4 of your written  
24 testimony, you write that (reading):

25                    "In 1992 and 1993, while I was

1 serving on the State Water Resources  
2 Control Board, we came very close to  
3 adopting a Water Rights Decision -- it  
4 was Draft Decision 1630 -- that would  
5 have addressed many if not all of those  
6 desired outcomes for the Delta today.

7 How would Draft Decision 1630, if implemented,  
8 how would that have occurred? How would that have  
9 accomplished those -- those goals?

10 WITNESS DEL PIERO: It -- D-1630 -- A little  
11 background, if you will.

12 D-1630 was drafted my first year that I was on  
13 the State Water Resources Control Board.

14 Members of the State Water Board at that time  
15 were Chairman Don Juan, Eliseo San Diego, John Caffrey  
16 and me. Ted Finster rotated off within the first  
17 couple of months, and it was -- He was subsequently  
18 replaced with a representative from Santa Barbara  
19 County.

20 The preparation of 1630 was the ultimate  
21 culmination of the Court's efforts to try and implement  
22 the Racanelli decision six or seven years earlier.

23 And Judge -- Justice Racanelli was very clear,  
24 because Justice Racanelli's decision was predicated on  
25 the Audubon decision from 1983.

1           So, 1630 did its very best to have as specific  
2 measurable standards, flow standards, water quality  
3 standards, locations for water quality goals to -- to  
4 be met, a whole variety of measurable, enforceable  
5 requirements.

6           Unfortunately . . .

7           Now I'm going to tell you a story. I  
8 apologize, Madam Chair.

9           When the draft was completed, Don Juan, the  
10 Chair, was very ill, and he knew he was not going to  
11 make it through the hearing process. And so that --  
12 And that brought the Board down to only four members.

13           And . . . we set the hearing -- we set the  
14 matter for hearing and a copy of the draft was  
15 circulated.

16           At the time, part of being a Board Member, as  
17 the Chair and Board Member D'Adamo knows, is counting  
18 to three. It's -- It's a skill you need to have when  
19 you sit on a five-member Board.

20           And so when -- There were three votes at the  
21 time to approve 1630. Sam San Diego, Don Juan and Marc  
22 Del Piero.

23           When Don's health effectively collapsed, and  
24 he passed away not long after that, he left the Board  
25 and left us with four members.

1           And I was sitting in my office one day -- and  
2 I'm sure someone's going to object to this as  
3 hearsay -- but I will tell you the story, anyway, so  
4 you understand the background.

5           Sam San Diego came into my office --

6           CO-HEARING OFFICER DODUC: Mr. Del Piero, I'm  
7 sorry.

8           I appreciate the background, having actually  
9 been --

10          WITNESS DEL PIERO: I know.

11          CO-HEARING OFFICER DODUC: -- on the Board  
12 staff during that time, but I'm curious.

13          Mr. Ruiz's question was more specific to not  
14 the background of what happened with the Draft  
15 Decision 1630 but -- and I understand it, Mr. Ruiz --  
16 how the proposal in that draft decision would have  
17 provided the protection that Mr. Del Piero mentioned in  
18 his testimony.

19          MR. RUIZ: That's correct. That was my  
20 deci -- my question.

21          However, my next question was going to be what  
22 was the fate of that draft decision.

23          CO-HEARING OFFICER DODUC: Ah. You  
24 anticipated Mr. Ruiz.

25          WITNESS DEL PIERO: I did not anticipate it.

1 Mr. Ruiz and I, I don't think we've ever met before, so  
2 I --

3 CO-HEARING OFFICER DODUC: All right. So  
4 please continue, but please do not forget to go back to  
5 the substance of --

6 WITNESS DEL PIERO: Yes, ma'am.

7 CO-HEARING OFFICER DODUC: -- Draft  
8 Decision 1630 to address Mr. Ruiz's initial request.

9 WITNESS DEL PIERO: Yes, ma'am.

10 Don had to retire because of his health, left  
11 four members on the Board.

12 I was sitting in my office about two weeks,  
13 maybe three weeks before the next hearing was  
14 scheduled.

15 And Sam came in, walked in, shut my -- this is  
16 in the Old Bonderson Building -- shut the door, sat  
17 down in front of me and said, "I got a phonecall." And  
18 I said, "Really?" And he was looking very grim. And  
19 he said, "Yeah." He said, "I can get reappointed to  
20 the Board so long as I vote against 1630."

21 And I asked him who the phonecall was from,  
22 and he told me, and it was . . . it was clear that that  
23 phonecall was -- was direction. It was either --  
24 Because he was up for reappointment.

25 And I said, "Well, what are you going to do --

1 What did you tell them?" And he said, "I'm going to  
2 vote for 1630." And he was promptly not reappointed to  
3 the State Board, which left three Board Members.

4 And if you can't count to three, when you only  
5 have three Board Members, you don't get a -- you don't  
6 get a decision that was approved.

7 And so D-1630, the draft, still shows up on  
8 the website for the State Water Resources Control  
9 Board, but . . . it -- it did not get adopted.

10 MR. RUIZ: Thank you.

11 WITNESS DEL PIERO: Now, the reason it didn't  
12 get adopted is because it implemented -- succinctly,  
13 Madam Chair -- it implemented Racanelli. It  
14 implemented Audubon.

15 It implemented all of those things that  
16 individuals who are -- who -- some of whom are --  
17 are -- have been part of the Petitioners' group here  
18 object to.

19 And I think you heard it again today when you  
20 heard objections to whether or not the public trust and  
21 the application of protection policies and provisions  
22 for the public trust is appropriate for this Board to  
23 consider as part of this hearing process.

24 MR. RUIZ: Thank you.

25 CO-HEARING OFFICER DODUC: Before you

1 continue, Mr. Ruiz.

2 Mr. Mizell.

3 MR. MIZELL: Yes.

4 As Mr. Del Piero anticipated, I'm lodging a  
5 hearsay objection on that answer.

6 CO-HEARING OFFICER DODUC: So noted.

7 MR. RUIZ: Mr. Del Piero, on Page 5 of your  
8 testimony, you write that (reading):

9 "The August 3rd, 2010, SWRCB Final  
10 Report on Delta flow criteria calls out  
11 the necessity of increasing real wet  
12 water flows into the Delta to save its  
13 constitutionally protected public trust  
14 fisheries."

15 My question is: Is it your opinion that if  
16 the CWF Project is approved, should it at a minimum be  
17 conditioned upon compliance with the increased real wet  
18 water flows into the Delta as set forth in the 2010  
19 Final Report on the Delta Flow Criteria?

20 WITNESS DEL PIERO: Yes. And -- And I might  
21 add -- I actually thought the Delta Flow Criteria  
22 Report from 2010 was pretty -- pretty good project --  
23 or pretty good document, given -- given what the Board  
24 had to work with, given that -- that previous decisions  
25 of the Board were not as strong in terms of protection



1 of the public -- of the public trust resources as I  
2 would have -- would have expected. I thought 2010 was,  
3 frankly, pretty good work.

4 But it's really pretty good work that is going  
5 to be for nought because it's eight years after the  
6 fact, and unless those findings and recommendations are  
7 reduced to enforceable mandates to be incorporated into  
8 the obligations of the Petitioners as part of this  
9 Project, it's -- it's just going to be one more thing  
10 that -- that was reduced to writing that didn't -- with  
11 all good intentions, didn't save the Delta.

12 MR. RUIZ: Thank you.

13 At Page 7 of your testimony, you observe that  
14 fishery agencies are not participating in this  
15 proceeding.

16 Does that concern you?

17 WITNESS DEL PIERO: Well, I -- I could give  
18 you a cheeky answer and say, you know, since there are  
19 virtually no fish left in the Delta, there's no  
20 surprise they aren't here, but that's not -- that's,  
21 again, a cheeky answer.

22 The fact of the matter is, the absence of the  
23 fishery agencies, I think, significantly undercuts the  
24 ability of the State Board to do its job in terms of  
25 balancing obligations and protections of public trust

1 resources.

2           And I'm not sure why they aren't here, but I  
3 don't think they're doing anybody any favors, because,  
4 sooner or later -- sooner or later, either you're going  
5 to accept the -- the -- the extinction of all those  
6 species that are currently listed as either --

7           (Timer rings.)

8           WITNESS DEL PIERO: Again?

9           -- as listed as threatened or endangered, or  
10 you're going to have to deal with the fact that  
11 increased flows into the Delta are the only way to  
12 address, protect and maybe even just save what  
13 remaining public trust resources there are.

14           MR. RUIZ: Mr. Del Piero, on Page 26 and 27 of  
15 your testimony, you discuss Petitioners' reliance on  
16 the concept of adaptive management.

17           At Page 26, at Lines 16, you say that adaptive  
18 management is a legislatively undefined concept.

19           I have two questions related to that.

20           What specifically do you mean by that and why  
21 is that significant?

22           WITNESS DEL PIERO: I've looked everywhere. I  
23 can't find anywhere where adaptive management has been  
24 defined by the State Legislature. I -- I -- I can't  
25 find it.

1           So when a judge goes to try and figure out  
2 what this Board means if it adopts something as  
3 speculative if not amorphous as adaptive management, a  
4 judge is going to say, "I can't -- I can't render a  
5 decision as to whether or not this was achieved because  
6 there are no measurable standards by which to judge  
7 it". So adaptive management is meaningless at this  
8 point.

9           If you can't -- If you don't -- If the  
10 Petitioners want adaptive management -- If the  
11 Petitioners want adaptive management, they should have  
12 made a presentation to this Board as to what adaptive  
13 management meant.

14           What meaningful, substantive and enforceable  
15 criteria constitutes adaptive management? So that the  
16 Chair and the other members of this Board can  
17 incorporate those into enforceable terms and conditions  
18 into whatever Permits they decide to issue.

19           MR. RUIZ: Are you aware of a -- an adaptive  
20 management, based on your experience, anywhere near the  
21 scope of this Project has ever been successfully  
22 implemented?

23           WITNESS DEL PIERO: No. And I'm also aware of  
24 a bunch of Adaptive Management Programs around the  
25 state dealing with a variety of issues and a variety of

1 environmental issues that are much smaller than this  
2 that have been abject failures.

3           So, adaptive management is -- is generally  
4 used -- And please keep in mind, during the course of  
5 my career, I've -- I've been responsible for over 150  
6 Environmental Impact Reports, either voting in favor of  
7 them or -- or voting against them. And I've litigated  
8 a number of CEQA cases during the course of my career  
9 and written a lot of land use policies and regulations.

10           The situation you have here is -- is . . .

11           Absent measurable standards, adaptive  
12 management is not only not enforceable, it's impossible  
13 to define.

14           I can -- And if you want an example of  
15 something unrelated to water issues, I'll be happy to  
16 give you an example of the Elkhorn Slough National  
17 Estuarine Research Reserve that was predicated upon  
18 adaptive management. And that reserve, which started  
19 off as a brackish water reserve in 1978, is now a  
20 seawater estuary.

21           There's been loss of probably 80 percent of  
22 the fresh and brackish water habitat, as well as  
23 species in that, all predicated upon the idea that  
24 members of the Coastal Commission who were going to use  
25 adaptive management in terms of restoration of that

1 program. And there was no penalty. There has been no  
2 penalty.

3 I guess that's one last thing I might want to  
4 point out in regards to -- to adaptive management.  
5 Who's the responsible party? Who gets fired if they  
6 fail? Who -- Who loses their job? Who gets a note in  
7 their -- in their personnel file saying this was the  
8 dumbest thing anybody ever came up with and this person  
9 should never be promoted ever again?

10 You have no mechanism by which you're judging  
11 anything with regards to adaptive management, or  
12 attributing fault when it fails.

13 They have to be responsible for enforcing  
14 specific terms and conditions to protect the public  
15 resources of the Delta.

16 MR. RUIZ: Similarly, related to the same  
17 topic, at Page 27, you write that reliance on the  
18 proposed adaptive management (reading):

19 ". . . would constitute a wrongful . . .  
20 delegation of the Board's (sic)  
21 constitutional duties and powers . . ."

22 What specifically do you mean by that?

23 WITNESS DEL PIERO: Audubon said that the  
24 Board had an ongoing duty and responsibility to monitor  
25 and perform its -- its responsibilities to protect,

1 preserve the public trust resources of the State of  
2 California, specifically indicates the Mono Lake, but  
3 it's equally applicable everywhere to all waters of the  
4 state. Racanelli said the same thing in regards to the  
5 Delta water quality.

6           Delegating the Board's responsibility for its  
7 ongoing monitoring, protection and preservation of the  
8 public trust resources to a -- a nameless, faceless  
9 group of bureaucrats, on the premise of something  
10 called adaptive management, which State legislature nor  
11 any court has ever defined, is an abdication of the  
12 State's -- of the State Water Resource Control Board's  
13 constitutional, legal duties to do its job. Real  
14 simple.

15           MR. RUIZ: Thank you.

16           WITNESS DEL PIERO: And one last comment:

17           Delegating it to the Department of Water  
18 Resources in the Central Valley Project, who have had a  
19 history of failing to address the needs of the public  
20 trust resources of the Delta is sort of just . . .  
21 pretty foolish.

22           CO-HEARING OFFICER DODUC: How much more do  
23 you have, Mr. Ruiz?

24           MR. RUIZ: I just have actually three  
25 questions.

1 CO-HEARING OFFICER DODUC: All right.

2 And, Mr. Mizell, you have an objection?

3 MR. MIZELL: It was simply an inquiry and  
4 question more than an objection.

5 As much as I'm sure the attorney -- attorneys  
6 from San Joaquin County, LAND, and Central Delta --  
7 South Delta Water Agency enjoy open-ended friendly  
8 cross, I do have to question the probative value of  
9 asking an open-ended question for him to expand upon  
10 his written testimony and then bring in examples that  
11 are nowhere in that written testimony. It strikes me  
12 as borderline surprise testimony at this point.

13 It would be nice if the questions were concise  
14 and the answers address the question specifically  
15 rather than introducing long narrative answers that go  
16 well beyond the question, as well as well as beyond the  
17 testimony.

18 CO-HEARING OFFICER DODUC: I might look to my  
19 counsel for confirmation, but I don't believe there is  
20 any such thing as surprise testimony during cross.

21 MR. DEERINGER: That is correct.

22 During cross-examination, testimony can -- or  
23 questions can touch on any Part 2 issue.

24 CO-HEARING OFFICER DODUC: Overruled.

25 And, Mr. Ruiz, another five, 10 minutes?

1 MR. RUIZ: Yes.

2 WITNESS DEL PIERO: Madam Chair, could you  
3 hold on one second? The throat's starting to bug me a  
4 little bit.

5 CO-HEARING OFFICER DODUC: Okay. Well, we'll  
6 just try to keep it short.

7 MR. RUIZ: Just two questions, then.

8 WITNESS DEL PIERO: I'm okay. Let's go.

9 MR. RUIZ: You sure?

10 WITNESS DEL PIERO: Yes.

11 MR. RUIZ: Okay.

12 WITNESS DEL PIERO: Let's go.

13 MR. RUIZ: At Page 24 and 25 in your  
14 testimony, you say that in this proceeding, under  
15 Section 1701 and 1702 of the Water Code, Petitioners  
16 cannot meet the public trust obligations to rely on  
17 Mitigation Measures as reported to reduce impacts to  
18 less-than-significant levels.

19 Why is that, in your opinion --

20 WITNESS DEL PIERO: It's because --

21 MR. RUIZ: -- that you can't rely on those?

22 WITNESS DEL PIERO: Because the Code doesn't  
23 allow that standard. That's a standard on CEQA.

24 That you have a no harm obligation under 1702.  
25 No injury is -- is allowed to be perpetrated upon any



1 senior or -- or prior user of -- legal user of water,  
2 and 1702 embodies that.

3           The -- The requirement to -- Or the -- The --  
4 The reference to reducing something to a  
5 less-than-significant adverse effect is a -- is a  
6 reference out of the California Environmental Quality  
7 Act.

8           There's no equivalency between the obligation  
9 of the State Water Resources Control Board vis-`-vis  
10 Section 1702 of the Water Code and the provisions of  
11 CEQA that allow for . . . mitigation of significant  
12 adverse impacts.

13           Moreover, CEQA doesn't even obligate the --  
14 the -- the lead -- lead -- lead agency or the -- the  
15 Petitioners to actually implement any kind of  
16 mitigation. They can just make a finding of overriding  
17 consideration and walk away from it.

18           So it's clear that they're mixing apples and  
19 oranges. Those two standards don't have any  
20 equivalency at all.

21           MR. RUIZ: Thank you.

22           Last question: On Page 19, you refer to the  
23 Racanelli decision with respect to its findings that  
24 the State Board has two primary duties in its role in  
25 issuing appropriate Permits:

1           One, to determine if surplus water is  
2 available;

3           And, two, to protect the public interest.

4           Has anything occurred, in your view, since the  
5 Racanelli decision that changes those two primary  
6 duties?

7           WITNESS DEL PIERO: Nothing.

8           MR. RUIZ: Thank you.

9           I have no further questions.

10          CO-HEARING OFFICER DODUC: Thank you,  
11 Mr. Ruiz.

12          Any redirect?

13          MR. KEELING: No redirect.

14          CO-HEARING OFFICER DODUC: All right. Thank  
15 you.

16          Let me take this opportunity now to make a  
17 correction.

18          Apparently I erred early, my only one error  
19 now in this proceeding.

20          I am advised that -- This is in response to  
21 Mr. Mizell's objection to Mr. Del Piero's testimony  
22 regarding the Water Availability Analysis.

23          Apparently in our April 13th, 2017, ruling, we  
24 did strike Mr. Del Piero's testimony concerning the  
25 requirement of a WAA as being outside the scope of the

1 hearing, not just the scope of Part 1, but the scope of  
2 the hearing.

3           So, on that ground, I will reverse my  
4 overruling of Mr. Mizell's objection, and that portion  
5 of Mr. Del Piero's testimony is struck.

6           MR. KEELING: That portion being what exactly?

7           CO-HEARING OFFICER DODUC: Recommendation of  
8 the WAA and testimony concerning that as part of these  
9 proceedings.

10           MR. KEELING: As part of his analysis of the  
11 public trust obligations.

12           CO-HEARING OFFICER DODUC: Correct.

13           Mr. Mizell.

14           MR. MIZELL: Yes.

15           If it would assist the Board, there were also  
16 cross-examination answers given and questions asked  
17 along those lines.

18           I would like to brief those in the objections  
19 that we file.

20           CO-HEARING OFFICER DODUC: Please do.

21           MR. MIZELL: If I might have until the end of  
22 tomorrow, then, in order to get the transcripts that  
23 will be available tonight and provide you with  
24 citations.

25           CO-HEARING OFFICER DODUC: All right. So you

1 will file your objections by 5 p.m. tomorrow.

2 MR. MIZELL: Correct.

3 CO-HEARING OFFICER DODUC: And Protestants  
4 will still have until noon Monday to file.

5 MS. MESERVE: Yes. I mean, I would just say,  
6 though, Mr. Del Piero's opinions regarding the need for  
7 Water Availability Analysis have come up both in Part 1  
8 and Part 2, and it's a . . .

9 I think, yeah, I would like to deal with that  
10 in briefing rather than just -- It would take out a  
11 tremendous amount of his testimony if -- if you were to  
12 say that that same ruling from over a year ago applies  
13 to everything here today.

14 And I also would note that the Board did  
15 not -- did strike out some portions of Mr. Del Piero's  
16 testimony in January this year and did leave in certain  
17 points regarding the value and need for Water  
18 Availability Analysis.

19 So I just would hope not to prejudge that and  
20 let that lay out in the briefing.

21 MR. KEELING: I would --

22 CO-HEARING OFFICER DODUC: All right. But  
23 it --

24 MR. KEELING: -- add that --

25 CO-HEARING OFFICER DODUC: All right. Go

1 ahead.

2 Mr. Mizell will submit his objections again in  
3 writing.

4 Miss Meserve, you may respond to that in  
5 writing.

6 I would ask you to look at our April 13, 2017,  
7 ruling, reference that and make your arguments based on  
8 that ruling.

9 MR. DEERINGER: And I -- I would just add  
10 that:

11 So the portions of testimony, whether  
12 Mr. Del Piero's or anyone else's, that were struck  
13 during the Hearing Team's review for scope, those were  
14 not definitive statements of, these are the only things  
15 that are beyond the scope. That was the Hearing Team's  
16 first pass.

17 And so other parties are still free to argue  
18 that they -- And this goes not just to Mr. Del Piero's  
19 testimony but it extends to everyone. They're still  
20 free to argue that certain matters are within or not  
21 within the scope.

22 MR. JACKSON: As a point of clarification:

23 Since Racanelli made it very clear that, in a  
24 public trust sense, Water Availability Analysis was one  
25 of the first Board's -- one of the Board's first

1 duties.

2           It's -- It is different, I think, both  
3 factually and legally from the ruling that it didn't  
4 apply to the 1702 kind of requirement.

5           Those are two different things.

6           And it seems that the ruling, which the  
7 Hearing Officer just sort of took as settled, is  
8 probably dicta because it's a completely different set  
9 of factual analysis between 1701 -- or the 1700 section  
10 and the duty under the public trust to determine is  
11 water available.

12           CO-HEARING OFFICER DODUC: All right. I will  
13 look forward to reading all your arguments on that  
14 particular set of objections.

15           All right.

16           MR. KEELING: Now, that -- that is the --  
17 Mr. Del Piero is the last witness for the San Joaquin  
18 County Protestants.

19           And we will -- And we do request that all of  
20 the exhibits submitted in support of our case in chief  
21 be admitted into evidence, and we will have a list and  
22 update the list. I'll send a letter to the -- to the  
23 Hearing Officers.

24           I would like a point of clarification.

25           There have been varying practices, and I know

1 you -- you've said this before.

2           With respect to exhibits used on cross, my  
3 understanding is, we don't need to list exhibits that  
4 have already been admitted by some party --

5           CO-HEARING OFFICER DODUC: That's correct.

6           MR. KEELING: -- that were used in cross.

7           And the only things we need to update on our  
8 Exhibit List are cross-examination exhibits that were  
9 not already admitted by -- in connection with  
10 somebody's testimony.

11           CO-HEARING OFFICER DODUC: And, as I remember  
12 Miss -- How easy I forget her name -- Miss Heinrich's,  
13 I guess, legal opinion from Part 1 was that you don't  
14 even have to submit cross-examination exhibits into the  
15 record.

16           Now that I have a new attorney, maybe that's  
17 changed. I hope not.

18           But, Mr. Keeling, I will address deadlines for  
19 cross-examination exhibits shortly.

20           MR. KEELING: Thank you.

21           CO-HEARING OFFICER DODUC: At this time --

22           MR. JACKSON: I --

23           CO-HEARING OFFICER DODUC: -- before we move  
24 on to other parties, Mr. Keeling has moved exhibits for  
25 San Joaquin County.

1 Are there any objections?

2 MR. MIZELL: Yes.

3 We have one objection to San Joaquin County  
4 Exhibit 286. This is the Tunnel Talk website.

5 It's a website and not a document. Therefore,  
6 it's not static. It's continuing -- continuing to  
7 evolve as new posts are placed.

8 It is, therefore, not what a reasonable person  
9 would rely upon, because it is -- it can't be counted  
10 upon to contain the same information from day to day.

11 In addition, we would object to that as being  
12 hearsay, as it consists entirely of blog posts of its  
13 author and not of documents and facts that can be  
14 verified. It's merely opinion.

15 So, again, under Government Code 11513, we  
16 would object to San Joaquin County 286.

17 CO-HEARING OFFICER DODUC: Your response,  
18 Mr. Keeling.

19 MR. KEELING: SJC-286 submitted as a .pdf is  
20 not changing -- the website may be changing, like --  
21 like this Project -- but it's a snapshot in time as to  
22 what's there. I don't see what the problem is.

23 CO-HEARING OFFICER DODUC: So that leaves you  
24 with a hearsay objection.

25 MR. KEELING: And that goes to weight.



1 MR. MIZELL: Hearsay objection to the static  
2 .pdf version. Oftentimes, in the testimony, they would  
3 reference the exhibit followed by the website.

4 So the website -- Any reliance on the website,  
5 we would object as being not static and continuing to  
6 evolve. The .pdf version is simply a hearsay  
7 objection.

8 Mr. Keeling will use -- what is the legal  
9 terminology? -- agree, stipulate, that any references  
10 to written testimony to the website is actually in  
11 deference to the .pdf version that was submitted.

12 MR. KEELING: So stipulated.

13 CO-HEARING OFFICER DODUC: All right. So that  
14 leaves, then, the hearsay objection to be noted.

15 And, otherwise, your exhibits are received  
16 into the record, Mr. Keeling.

17 (Central Delta Water Agency, South Delta Water Agency  
18 (Delta Agencies), Lafayette Ranch, Heritage Lands  
19 Inc., Mark Bachetti Farms and Rudy Mussi Investments  
20 L.P.: Exhibits SDWA-154 through SDWA-166, SDWA-178  
21 through SDWA-182 received in evidence)

22 CO-HEARING OFFICER DODUC: Next?

23 MS. MESERVE: And, yes, in addition, Local  
24 Agencies of the North Delta is completed with its case  
25 in chief now, and so we would move that all of the

1 exhibits from our various panels and the shared  
2 testimony that you heard here today and previously  
3 would be admitted into the record.

4           And we will update our Exhibit Index, if  
5 necessary, although I'm not sure it's necessary at this  
6 time. We would like to move everything into the  
7 record.

8           CO-HEARING OFFICER DODUC: Objections to  
9 LAND's exhibits?

10           MR. MIZELL: (Shaking head.)

11           CO-HEARING OFFICER DODUC: Seeing none, they  
12 have been so moved into the record. Received. Entered  
13 into the record.

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1 (The Environmental Justice Coalition for Water,  
2 Islands, Inc., Local Agencies of the North Delta,  
3 Bogle Vineyards/Delta Watershed Landowner Coalition,  
4 Diablo Vineyards and Brad Lange/Delta Watershed  
5 Landowner Coalition, Stillwater Orchards/Delta  
6 Watershed Landowner Coalition, Brett G. Baker and  
7 Daniel Wilson Exhibits LAND-120 through LAND-122,  
8 LAND-122-Errata, LAND-123 through LAND-125, LAND-130,  
9 LAND-132, LAND-132-Errata, LAND-135 through LAND-145,  
10 LAND-148 through LAND-155, LAND-157, LAND-159 through  
11 LAND-172, LAND-174 through LAND-182, LAND-184,  
12 LAND-186 through LAND-188, LAND-188-Errata, LAND-190,  
13 LAND-198, LAND-199, LAND-205, LAND-205-Errata,  
14 LAND-206 through LAND-210, LAND-216 through LAND-126  
15 received in evidence)

16 CO-HEARING OFFICER DODUC: Mr. Jackson.

17 MR. JACKSON: Yes.

18 At this point, CSPA, C-WIN and AquAlliance's  
19 case in chief for Part 2 are complete. And I would  
20 like to move all of the exhibits identified on the  
21 exhibit identification list into -- into evidence in  
22 Part 2 of the hearing.

23 It's an extremely long list, and I'd prefer  
24 not to read it.

25 Thank you.

1 CO-HEARING OFFICER DODUC: Any objections?

2 MR. MIZELL: I don't believe I have any  
3 objections.

4 I have one request for clarification based on  
5 our earlier conversation.

6 MR. JACKSON: Excuse me. I -- I . . . made an  
7 error in regard to C-WIN's testimony.

8 We withdrew yesterday, I think it was, two  
9 oh --

10 MR. MIZELL: Seven.

11 CO-HEARING OFFICER DODUC: Seven and 208.

12 MR. JACKSON: -- seven and 208.

13 MR. MIZELL: So those would be -- So the  
14 discussion we had yesterday would still apply to the --

15 MR. JACKSON: Yes. I just wanted to make sure  
16 that it didn't happen inadvertently.

17 MR. MIZELL: Thank you.

18 CO-HEARING OFFICER DODUC: And with that, your  
19 request is granted, and C-WIN, CSPA and AquAlliance  
20 exhibits are moved into the record.

21 MR. JACKSON: Thank you.

22

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25

1 (California Sportfishing Alliance, California Water  
2 Impact Network and AquAlliance Exhibits CSPA-200,  
3 CSPA-202, CSPA-204, CSPA-206, CSPA-209 through  
4 CSPA-221, CSPA-230 through CSPA-237, CSPA-239 through  
5 CSPA-254, CSPA-256 through CSPA-308, CSPA-310 through  
6 CSPA-315, CSPA-317, CSPA-340 through CSPA-344,  
7 CSPA-350 through CSPA-358, CSPA-400 through CSPA-409,  
8 CSPA-412 through CSPA-417, CSPA-419 through CSPA-423,  
9 CSPA-425 through CSPA-477, CSPA-449 through CSPA-451,  
10 CSPA-453 through CSPA-466 received in evidence)

11 CO-HEARING OFFICER DODUC: Thank you,  
12 Mr. Smith and Mr. Del Piero.

13 And thank you, Mr. Keeling, Miss Meserve,  
14 Mr. Jackson, and actually all the attorneys and all the  
15 witnesses who have appeared for case in chief during  
16 Part 2.

17 I appreciate the tremendous effort everyone  
18 has put into this. It's been a challenging task to  
19 organize witnesses and panels and get testimony in  
20 place. And the fact that we have moved so efficiently  
21 and effectively would not have happened without all of  
22 your tremendous effort. I greatly appreciate that. I  
23 just wanted to acknowledge it.

24 Let's give you a few deadlines, and I'm glad  
25 Miss Taber is here for this.

1           You have until noon this Friday, April 27th,  
2 to move cross-examination exhibits into the record.

3           And you have until noon Tuesday, May 1st, to  
4 file any objections to those cross-examination  
5 exhibits.

6           And you have until noon Friday, May 4th, to  
7 respond to those objections.

8           Miss Meserve, there is an outstanding issue  
9 with respect to Snug Harbor and exhibits for Snug  
10 Harbor.

11           I believe you had made a request that you were  
12 trying to work out with Miss Ansley some objections  
13 regarding Miss Suard's exhibits, and you wanted to wait  
14 until cross-examination are completed so that you could  
15 submit all of her exhibits.

16           MS. MESERVE: (Nodding head.)

17           CO-HEARING OFFICER DODUC: Your deadline,  
18 then, is also noon Friday, April 27th, to move Snug  
19 Harbor's exhibits into the record.

20           MS. MESERVE: Yes.

21           And I see actually that Miss Suard has sent an  
22 e-mail this morning with her exhibits, so I believe --

23           CO-HEARING OFFICER DODUC: Oh.

24           MS. MESERVE: -- she should be all done.

25           CO-HEARING OFFICER DODUC: All right. She

1 beat me to it.

2 MR. MIZELL: And would the May 1st deadline  
3 then apply to any further objection that might -- We  
4 don't anticipate there being any --

5 CO-HEARING OFFICER DODUC: Yes --

6 MR. MIZELL: -- but if there are any.

7 CO-HEARING OFFICER DODUC: -- to

8 Miss Suard's -- Miss Suard's exhibits.

9 We will need some time to review all that will  
10 be submitted with respect to cross-examination  
11 exhibits. There might even be a few outstanding  
12 motions that we need to rule on.

13 So we will issue a ruling forthcoming that  
14 will address all those outstanding issues, as well as  
15 directions, guidelines, and a schedule for rebuttal,  
16 and the hearing will resume in accordance with that  
17 forthcoming ruling.

18 MS. MESERVE: I would just like to make a  
19 brief comment with respect to the schedule for rebuttal  
20 and, maybe once we see the ruling, we could respond to  
21 it.

22 But I would just hesitate, given some of the  
23 ambiguities around what all information will be  
24 included in the Supplemental EIR that DWR is working  
25 on, I would be hesitant to try to set a set schedule

1 because we don't know the content of that, and we won't  
2 until at least the time the draft is released.

3           So I suggest it may be appropriate to revisit  
4 schedule at that time when we know what all -- We've  
5 heard certain representations about what will be in  
6 there, and we have a very brief fact sheet that is not  
7 very clear about what the changes are.

8           So I would just suggest it may be something  
9 to -- to check back in on before a schedule would be  
10 set.

11           CO-HEARING OFFICER DODUC: I -- I understand  
12 those concerns. We actually have had a discussion  
13 about that earlier this week. All the hearing dates  
14 run together in my mind.

15           And certainly those are things that we are  
16 still considering, which is why it will take at least a  
17 few weeks before we issue a ruling with any specificity  
18 regarding rebuttal.

19           Mr. Mizell, anything to add?

20           MR. MIZELL: Not on this issue, no.

21           CO-HEARING OFFICER DODUC: All right. If  
22 there isn't anything else, I will once again thank all  
23 of you, all the parties.

24           Oh, Mr. Jackson.

25           MR. JACKSON: Yes.



1 I was just remembering how useful some of your  
2 pre-hearing conferences have been. And it might be  
3 very useful to set a date after -- after you do your  
4 ruling, or in your ruling, for a pre-hearing conference  
5 about rebuttal so that we could get the advice of all  
6 of the parties who are not here today.

7 CO-HEARING OFFICER DODUC: We will take that  
8 under consideration.

9 Mr. Mizell.

10 MR. MIZELL: Yes.

11 Before Mr. Jackson and his group leave the  
12 stand, I do have one objection for the record and then  
13 one request for a clarification.

14 CO-HEARING OFFICER DODUC: And what is your  
15 objection? I thought we had closed the door on  
16 objections, at least to exhibits.

17 MR. MIZELL: I -- This is not an objection to  
18 the exhibit being admitted into the records. This is a  
19 hearsay objection for the record on CSPA-100, -102,  
20 -103. So that was -- That would not have prohibited  
21 them from being admitted into the record. This is just  
22 for purposes of clarity in the record.

23 CO-HEARING OFFICER DODUC: Okay. So noted.

24 MR. MIZELL: And the -- The question is,  
25 earlier, we were talking about Dr. Budgor's citation,

1 and Mr. Jackson provided us with Appendix 5 to the  
2 Santa Barbara Report.

3           The appendices are not numeric; they are  
4 alphabetic. And so we looked at Appendix E, which  
5 would be the fifth appendix, and we were unable to find  
6 any information in that appendix related to the  
7 question at hand.

8           So, I -- My question would be: Either is  
9 there a different appendix, or are we clear at this  
10 time that the only -- the only evidence for the  
11 statement by Dr. Budgor is his personal experience?

12           MR. JACKSON: Yes, supporting the hearsay  
13 statements that . . . that he received from each of the  
14 water agencies that he listed.

15           Hearsay can be admitted when it's supported by  
16 other evidence.

17           CO-HEARING OFFICER DODUC: All right. So  
18 noted.

19           Again, thank you to everyone.

20           Thank you to the court reporters and all the  
21 staff.

22           And, with that, we are adjourned.

23           (Proceedings adjourned at 11:00 a.m.)

24

25

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: April 30, 2018

23

24

25

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Candace L. Yount, CSR No. 2737