



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 Conny Mitterhofer, Supervising Water Resource Control  
11 Engineer (a.m.)  
12 Jean McCue (p.m.)

13

14 PART 2 REBUTTAL

15 For Petitioners:

16 California Department of Water Resources:

17 James (Tripp) Mizell  
18 Jolie-Ann Ansley  
19 Thomas Berliner

20 The U.S. Department of the Interior:

21 Amy L. Aufdenberge, Esq.

22 For State Water Contractors:

23 Stefanie Morris  
24 Rebecca Sheehan

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1 APPEARANCES (Continued)

2 FOR PROTESTANTS AND INTERESTED PARTIES:

3 For Save the California Delta Alliance:

4 Michael Brodsky

5 For California Water Research:

6 Deirdre Des Jardins

7 For Local Agencies of the North Delta, et al.:

8 Osha Meserve

9 For Snug Harbor Resorts, LLC:

10 Nicole S. Suard, Esq.

11 For Westlands Water District and San Luis &  
Delta-Mendota Water Authority:

12 Daniel J. O'Hanlon

13 For California Sportfishing Protection Alliance (CSPA),  
14 California Water Impact Network (C-WIN), and  
AquAlliance:

15 Chris Shutes

16 For Pacific Coast Federation of Fishermen's  
17 Associations, et al.:

18 Alexis Krieg

19 For Barbara Daly / North Delta C.A.R.E.S.:

20 Barbara Daly

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1 Monday, August 27, 2018 9:30 a.m.

2 PROCEEDINGS

3 ---000---

4 CO-HEARING OFFICER DODUC: All right. Good  
5 morning, everyone. Happy Monday. Welcome back to this  
6 Water Right Change Petition hearing for the California  
7 WaterFix Project.

8 I am Tam Doduc. To my right is Board Chair  
9 and Co-Hearing Officer Felicia Marcus. I don't know if  
10 we'll be joined by Board Member Dee Dee D'Adamo or not,  
11 but if she's not here, I'm sure she'll be watching on  
12 the Webcast. To my left are Andrew Deeringer and Conny  
13 Mitterhofer. We're also being assisted by Mr. Hunt  
14 today.

15 I see all familiar -- Oh, I do see one new  
16 face, at least one I don't recognize, so we'll go  
17 through the three announcements.

18 Please take a moment and identify the exit  
19 closest to you. In the event of an emergency, we will  
20 evacuate this room, taking the stairs not the  
21 elevators, down to the first floor and meet in the park  
22 across the street.

23 If you're not able to use the stairs, please  
24 flag down one of the security safety monitors and they  
25 will direct you into a protected area.

1           Second announcement: This is being Webcasted  
2 and recorded, so speak into the microphone and make  
3 sure that it is turned on by pushing the little button  
4 that says "push" and that the green light is lit.

5           Our court reporter is with us. Thank you.

6           And if you need to have a copy of the  
7 transcript sooner than the conclusion of Part 2, please  
8 make your arrangements directly with her.

9           And, finally and more importantly, please take  
10 a moment and put all your noise-making devices on  
11 silent, vibrate, do not disturb, off. Even if you  
12 think they are, please take a moment and check.

13           All right. A couple housekeeping matters  
14 before we turn to Mr. Brodsky.

15           We will be taking a slightly longer lunch  
16 break today in order to go into closed session. And,  
17 so, depending on how things play out, I would like to  
18 take our lunch break sometime before 12:30 and we will  
19 resume at 2 o'clock.

20           Any other housekeeping matters?

21           MR. BRODSKY: Yes, if I may.

22           A couple of things:

23           Captain Morgan does have a cruise booked on  
24 his cruise ship this afternoon that he has to Captain  
25 and --

1 CO-HEARING OFFICER DODUC: Oh, we should move  
2 the hearing there, then.

3 (Laughter.)

4 MR. BRODSKY: Okay. I'm sure there's an open  
5 invitation.

6 So we're hoping he gets out of here before  
7 noon, which I thought would be the case, in any event.

8 CO-HEARING OFFICER DODUC: I believe so.  
9 Unless something has changed, I had only DWR for 30  
10 minutes, Miss Meserve for 25, Miss Des Jardins for 20,  
11 as far as cross-examination for this group.

12 MR. BRODSKY: Okay. And then, also, maybe to  
13 facilitate that and also generally to facilitate smooth  
14 sailing, to continue the metaphor, I'm acting as a  
15 witness and an attorney both today, which isn't  
16 unprecedented in these hearings but is a bit unusual.

17 So I'm wondering if it might facilitate --  
18 perhaps even Mr. Mizell might even agree -- to let  
19 Mr. Wells and Morgan be sworn, give their testimony and  
20 be done, and then let me give my testimony separately.

21 My testimony is very brief. It essentially --

22 CO-HEARING OFFICER DODUC: Certainly.

23 MR. BRODSKY: -- is to authenticate a  
24 document.

25 CO-HEARING OFFICER DODUC: Okay. All right.



1 MR. BRODSKY: Does Mr. Mizell have any opinion  
2 on that?

3 CO-HEARING OFFICER DODUC: I don't think -- I  
4 don't see any objections.

5 And I believe both Mr. Wells and Mr. Morgan  
6 appeared before us before and have already taken the  
7 oath.

8 WITNESS MORGAN: Yes.

9 CO-HEARING OFFICER DODUC: Yes.

10 Any other housekeeping matters?

11 Mr. Mizell.

12 MR. MIZELL: Yes. Good morning.

13 So, before the testimony begins, I have a  
14 motion to strike a small portion of --

15 CO-HEARING OFFICER DODUC: Okay. I'm sorry.  
16 Before we get to that --

17 MR. MIZELL: Okay.

18 CO-HEARING OFFICER DODUC: -- no other  
19 housekeeping matter?

20 All right. Let's turn our attention to this  
21 particular panel of witnesses.

22 And -- I'm sorry -- let the record show we've  
23 now been joined by Board Member Dee Dee D'Adamo.

24 MR. MIZELL: So --

25 CO-HEARING OFFICER DODUC: Mr. Mizell.

1 MR. MIZELL: Yes. There's a limited portion  
2 of -- of Mr. Morgan's testimony from Page 19, Line 23  
3 through Page 22, Line 6, which deals exclusively with  
4 Aquatic Weeds, provides no citation to which -- which  
5 testimony in the case in chief it's responding to.

6 I believe it's out of scope. There has not  
7 been extensive testimony on Aquatic Weeds and I  
8 certainly don't think that it provides a basis on which  
9 it's being submitted as rebuttal testimony.

10 CO-HEARING OFFICER DODUC: Mr. Brodsky.

11 MR. BRODSKY: The basis on which it is  
12 submitted is that both -- and I believe it's explained  
13 in here -- both Mr. Rischbieter and Mr. Bednarski  
14 testified that WaterFix contained extensive Mitigation  
15 Measures that would mitigate or offset impacts on  
16 recreational navigation. And one of those major  
17 Mitigation Measures was AMM 7, which was Aquatic Weed  
18 control.

19 And Mr. Morgan's testimony about that Aquatic  
20 Weed control measure, as well as his testimony in here  
21 about Mitigation Measure TRANS-1a, and his testimony  
22 about the Barge Operations Plan is intended to sh -- to  
23 rebut DWR's witnesses' testimony that -- that those  
24 Mitigation Measures do not actually work very well.

25 CO-HEARING OFFICER DODUC: All right.

1 Mr. Mizell, anything to add?

2 MR. MIZELL: The generalized statements cited  
3 to in the testimony about minimizing potential impacts  
4 to navigation, they were made by Mr. Bednarski and  
5 Mr. Rischbieter, did not go specifically to Aquatic  
6 Weed control.

7 I don't believe that a generalized statement  
8 like that then opens the door to any and all impacts  
9 being within the scope of -- of rebuttal testimony.

10 So I would, again, state that not only is  
11 there no citation to case in chief testimony but AMM 7  
12 is not specifically mentioned anywhere within that  
13 section of testimony.

14 CO-HEARING OFFICER DODUC: My understanding,  
15 or it is my recollection from reading these witnesses'  
16 testimony, is that they're not only rebutting  
17 Petitioners' witnesses in case in chief but also  
18 responding to the Administrative Draft Supplemental  
19 EIR/EIS, in which case this certainly would be covered.

20 MR. MIZELL: If it were listed as a change  
21 within the Supplemental EIR/EIS, I believe that would  
22 be entirely consistent with how we treated that  
23 additional document.

24 However, these AMMs are not changed from the  
25 Final EIR to the Supplemental document.

1 CO-HEARING OFFICER DODUC: Response,  
2 Mr. Brodsky.

3 MR. BRODSKY: Well, I think the change would  
4 be that CM 13, which was the extensive Aquatic Weed  
5 Control Program that is -- was a part of the BDCP, has  
6 gone away. And so that would be different from the  
7 FEIR of December 2016 to the ABSEIR of a few months  
8 ago.

9 And part of Mr. Morgan's testimony does point  
10 out that -- in the FEIR, it points to CM 13 but, if you  
11 track through carefully, CM 13 is actually gone.

12 The other thing is that DWR's witnesses have  
13 repeatedly referred to Mitigation Measures in general;  
14 that "We've got a lot of Mitigation Measures, these  
15 things really going to work," and they go on and give  
16 specific examples.

17 They may not have in the most recent testimony  
18 given AMM as a specific example, but their testimony  
19 about Mitigation Measures in general being affected,  
20 and then their subsequent list of Mitigation Measures,  
21 I believe, were intended as examples, not as an  
22 exhaustive list of what they are talking about.

23 CO-HEARING OFFICER DODUC: That is how I read  
24 it.

25 Your motion is denied, Mr. Mizell.

1 All right. At this time, I'll turn it over to  
2 you, Mr. Brodsky.

3 As I understand it, Mr. Wells and Captain  
4 Morgan will present their testimony, and  
5 cross-examination of their testimony will be conducted  
6 first so that they might leave and go on a cruise, and  
7 then we'll turn to you, Mr. Brodsky.

8 MR. BRODSKY: Okay. Very good. Thank you.

9

10 Frank Morgan

11 and

12 Bill Wells,

13 called as witnesses by the Save the  
14 California Delta Alliance, et al., having  
15 previously been duly sworn, were examined  
16 and testified further as follows:

17 DIRECT EXAMINATION BY

18 MR. BRODSKY: Why don't we start with  
19 Mr. Wells giving a brief overview or -- of his written  
20 testimony.

21 And we will be very brief in our direct  
22 presentations.

23 WITNESS WELLS: Is the mic -- Is it on? Is  
24 the mic on? I guess so.

25 MR. BRODSKY: Yes.

1           WITNESS WELLS: Could we have SCDA-326 on the  
2 screen, please.

3           (Exhibit displayed on screen.)

4           WITNESS WELLS: Okay. This is the location of  
5 the Bouldin Island Barge Dock. The waterway through  
6 there is Potato Slough.

7           This location on the Bouldin Island Barge  
8 Dock -- In my opinion, locating the barge dock here is  
9 not reasonably protective of Delta recreation.

10           It's my opinion that the changes in this  
11 Project eliminating the Clifton Court Barge Dock will  
12 redirect additional barge traffic to this location,  
13 increasing impacts on Delta recreation at this  
14 location.

15           The Bedrooms --

16           MR. BRODSKY: Mr. Wells, if I could suggest  
17 you slow down a little bit. We're -- We have enough  
18 time.

19           WITNESS WELLS: Oh, okay.

20           The Bedrooms Anchorages shown here on SCDA-326  
21 are all heavily used by Delta boaters throughout the  
22 summer months.

23           Could you put the following on the screen,  
24 please: SCDA-311.

25           (Exhibit displayed on screen.)

1 WITNESS WELLS: I tend to talk fast so please  
2 stop me if needed.

3 And this is the Bedroom Anchorages.

4 Could we see SCDA-312, please.

5 (Exhibit displayed on screen.)

6 MR. BRODSKY: Can I just ask: Are those boats  
7 there located at the points near the barge dock that  
8 were shown on -- on the Google Earth shot that we saw  
9 earlier?

10 WITNESS WELLS: Yes, very close to the barge  
11 dock, these on the southern side of the waterway.

12 313. Could we see number SCDA-313, please.

13 (Exhibit displayed on screen.)

14 WITNESS WELLS: Likewise, these are all  
15 photographs of the Bedrooms. It's been a popular  
16 recreation area for probably 50 or 60 years.

17 SCDA-314, please.

18 (Exhibit displayed on screen.)

19 WITNESS WELLS: And SCDA-315.

20 (Exhibit displayed on screen.)

21 WITNESS WELLS: Okay. These photographs show  
22 typical summer scenes at the Bedrooms Anchorages. This  
23 is a very peaceful and precious anchorage to Delta  
24 boaters. These photographs were taken a few hundred  
25 yards from the proposed Bouldin Island Barge Dock.

1           Could we put up SCDA-309, please.

2           (Exhibit displayed on screen.)

3           WITNESS WELLS: Okay. I'd like to read a  
4 passage from Hal Schell's book "Dawdling on the Delta."  
5 It's already been introduced as a -- as an exhibit.

6           (Reading):

7                     "Potato Slough is a beautiful" --

8           MR. BRODSKY: Let me just ask you.

9           WITNESS WELLS: Yes, sir.

10          MR. BRODSKY: Dawdling on the Delta, can you  
11 tell us a little something about that book.

12          WITNESS WELLS: Okay. Well, the book is  
13 written by Hal Schell approximately 40 years ago.

14                 Hal was called The Delta Dawdlers, an  
15 extremely famous person throughout the Delta. He  
16 passed on in 2006 but his legend lives on. Some  
17 magazine gives a Hal Schell award every year. So Hal  
18 was a famous person, spent his -- last part of his life  
19 cruising and exploring the Delta.

20          MR. BRODSKY: Thank you.

21          WITNESS WELLS: That's Exhibit Number 152, by  
22 the way, SCDA.

23                 But, anyway, I'd just like to read this one  
24 passage (reading):

25                     "Potato Slough is beautiful broad



1 stretch of water with a string of lovely  
2 islands along much of its center. It  
3 thus provides two distinct cruising  
4 routes for the skipper on the move, as  
5 well as some nice exploring waters for  
6 one who wishes to poke around the  
7 islands. Toward the western end of the  
8 slough is a good-sized island called Fig  
9 Island, although it is not so marked on  
10 the charts. Fig has a gentle curl to its  
11 eastern side and all summer long there is  
12 a good-sized fleet at anchor here.

13 "Groups get together in little  
14 raftups. Dinghies are constantly on the  
15 move and there is a lot of swimming and  
16 lazing around on air mattresses. When  
17 the wind comes in strong, it is here that  
18 you see daring youngsters dangling from  
19 lines off flapping spinnakers. They put  
20 on a pretty good show for all the  
21 anchorage.

22 "Farther in on the slough there are  
23 other clusters of islands that see  
24 near-equal anchorage activity." This is  
25 where "skippers . . . leave their boats

1           here all summer."

2           Placing the barge dock at this location and  
3 redirecting increasing barge traffic to this location,  
4 estimated to be approximately nine barge round-trips  
5 per day, is not reasonably protective of the Delta  
6 recreation and will ruin this beautiful place.

7           In my opinion, for the reasons stated in my  
8 testimony, the entire Bouldin Island facility needs to  
9 be moved elsewhere.

10           MR. BRODSKY: Thank you, Mr. Wells. Very  
11 concise.

12           WITNESS WELLS: Thank you.

13           MR. BRODSKY: And let's turn to Mr. Morgan.

14           WITNESS MORGAN: Good morning. Thank you for  
15 the opportunity to provide some opening remarks.

16           My name is Frank Morgan. I'm the owner of  
17 Captain Morgan's Delta Adventures LLC, which has been  
18 doing charter cruises on the Delta for about seven  
19 years now. And last year, we did 185 cruises for the  
20 year.

21           As both a waterfront homeowner in Discovery  
22 Bay for the past 18 years and a business owner  
23 utilizing Delta waterways to conduct charter  
24 operations, I am thankful for the opportunity to submit  
25 my written testimony into the record and summarize two

1 main points of my written testimony in my opening  
2 comments today.

3           First, I'm opposed to any water conveyance  
4 that diverts water underneath of the Delta and does not  
5 first flow through the Delta system.

6           With that said, if the Board decides to issue  
7 a permit to DWR to -- to move forward with the WaterFix  
8 Project, I respectfully request the Board require as  
9 Condition of Approval that the tunnel alignment be  
10 further east, near Highway 5, as shown on FEIR Figure  
11 3-4, thereby eliminating the need for any barge  
12 traffic --

13           MR. BRODSKY: Can I just -- Can we put that  
14 up? I believe that's SCDA . . .

15           WITNESS MORGAN: 305.

16           MR. BRODSKY: 305.

17           (Exhibit displayed on screen.)

18           MR. BRODSKY: Good. Thank you.

19           WITNESS MORGAN: As you can see, the easterly  
20 alignment would allow truck traffic to utilize  
21 Highway 5, which was designated -- designed for truck  
22 traffic, as opposed to two-lane highway -- or roads on  
23 the Delta and bridges throughout the region.

24           We have shown only a few of the impacts on  
25 SCDA-305 that results from running the tunnels through

1 the center of the Delta.

2           This Board has heard extensive testimony about  
3 the impacts on recreation and boating and the impacts  
4 on narrow two-lane Delta roadways and rickety bridges.  
5 I will not repeat all of that that you've heard.

6           However, the majority of impacts on recreation  
7 and on the Delta roadways would be eliminated by moving  
8 the tunnel alignment to a feasible eastern route as  
9 shown here.

10           According to Mr. Rischbieter -- I'm sorry if I  
11 pronounced the name wrong -- impacts from barge  
12 operations will be significant and unavoidable during  
13 the construction phase.

14           I completely disagree with Mr. Rischbieter  
15 that the impacts are unavoidable. Simply require the  
16 DWR to construct an easterly alignment and that  
17 eliminates barge traffic in the heart of the Delta and  
18 eliminates many impacts on recreation.

19           Secondly, there has been significant testimony  
20 with regards to barge traffic, barge landings,  
21 construction zones on the water, et cetera. All of  
22 these proposed water activities mean many more, quote,  
23 "no-wake zones," unquote, throughout the Delta.

24           Mr. Bednarski testified that Mitigation  
25 Measure TRANS-1a would, quote, "minimize potential

1 impacts to navigation," unquote.

2 Mitigation Measure TRANS-1a includes posting  
3 of numerous no-wake signs -- zones throughout the  
4 Delta.

5 I disagree with Mr. Bednarski that no-wake  
6 zones minimize impacts to navigation, particularly  
7 recreation navigation.

8 Numerous new wake -- no-wake zones will cause  
9 boaters to avoid the Delta and boat elsewhere.

10 Mitigation Measures TRANS-1a also includes  
11 posting of signs all over the Delta advising boaters of  
12 barge operations in the water -- in water and in water  
13 construction.

14 This amounts to posting Delta "Closed" signs  
15 for construction and will further discourage boating in  
16 the Delta.

17 The way to avoid impacts on the Delta is not  
18 to close the Delta for prolonged construction but is to  
19 move the construction out of the Delta to an eastern  
20 alignment as we have suggested.

21 Thank you very much for the opportunity and,  
22 with that, I'm open to questions.

23 MR. BRODSKY: Can I ask one clarification  
24 question.

25 When you speak about multiple no-wake zones as

1 a result of construction, does that mean that boaters  
2 have to slow to 5 miles per hour in each of those  
3 zones?

4 WITNESS MORGAN: It's actually -- It's -- It's  
5 not necessarily 5 miles an hour. No-wake zone means  
6 that your vessel cannot create a wake that would  
7 cause -- that actually breaks onshore as a wave.

8 So, some boaters, it's less than 5 miles an  
9 hour to create a no-wake zone which is technically the  
10 term.

11 MR. BRODSKY: And do boaters perceive that as  
12 interfering with water boards, such as water-skiing,  
13 wakeboarding, surfing, et cetera?

14 WITNESS MORGAN: Absolutely. Wakeboarders,  
15 water-skiers, or boaters in general always look for  
16 areas without any impediment to their unrestricted  
17 speed while conducting those recreation activities.

18 MR. BRODSKY: Thank you, Mr. Morgan.

19 CO-HEARING OFFICER DODUC: All right. Thank  
20 you.

21 Let me turn first to the Department.

22 MR. MIZELL: (Shaking head.)

23 CO-HEARING OFFICER DODUC: No cross.

24 Miss Des Jardins, any cross?

25 I'm sorry. I think Miss Meserve, depending on

1 which party you represent, you could go before or after  
2 Miss Des Jardins.

3 Any questions for just Mr. Wells and  
4 Mr. Morgan?

5 MS. DES JARDINS: (Waving hand.)

6 CO-HEARING OFFICER DODUC: All right. And,  
7 Miss Meserve, is that a no from you?

8 MS. MESERVE: I just have, like, five minutes.  
9 I'll go after Miss Des Jardins.

10 Thank you.

11 MS. DES JARDINS: I'd like to bring up  
12 DWR-1309, please.

13 CO-HEARING OFFICER DODUC: And your estimate  
14 of time for cross of Mr. Wells and Mr. Morgan?

15 MS. DES JARDINS: I had estimated up to 20  
16 minutes, but it should take less.

17 (Pause in proceedings.)

18 MS. DES JARDINS: 1039 (sic), please.

19 (Exhibit displayed on screen.)

20 MS. DES JARDINS: So let's scroll out, please.

21 (Scrolling out in document.)

22 MS. DES JARDINS: And scroll down to Page 2,  
23 please.

24 (Scrolling through document.)

25

1 CROSS-EXAMINATION BY

2 MS. DES JARDINS: Mr. Wells and Mr. Morgan,  
3 the Department of Water Resources has provided a draft  
4 contract for -- to start work on Bouldin island.

5 Are you aware that the Department of Water  
6 Resources has plans to start work on Bouldin Island in  
7 December of 2018?

8 WITNESS WELLS: Yes, I'm aware of that.

9 MS. DES JARDINS: And --

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

11 Mr. Mizell.

12 MR. MIZELL: I'm going to object to the last  
13 question; move to strike the answer as well.

14 We went over this when Miss Des Jardins  
15 brought this up before. It is misrepresenting the  
16 evidence to state that the Department has plans to  
17 start December 2018.

18 MS. DES JARDINS: Can we go to Page---

19 CO-HEARING OFFICER DODUC: So noted.

20 MS. DES JARDINS: -- 3, please.

21 (Exhibit displayed on screen.)

22 CO-HEARING OFFICER DODUC: Let's get straight  
23 to the point, Miss Des Jardins.

24 MS. DES JARDINS: So, Mr. Wells, does this  
25 state (reading):



1           "The contractor shall mobilize  
2           necessary equipment to the site and begin  
3           construction . . . before the expiration  
4           of December 12th, 2018."

5           WITNESS WELLS: Yeah, it appears to say the  
6 Contractor will complete the balance of work before the  
7 expiration of . . .

8           Oh, I'm -- Okay. Excuse me.

9           MS. DES JARDINS: Yeah.

10          WITNESS WELLS: (Reading):

11          ". . . Shall mobilize necessary equipment  
12          to the site . . . begin construction  
13          before the expiration of December 12."

14          Yes.

15          MS. DES JARDINS: And then (reading):

16          ". . . Shall complete the balance of work  
17          before the expiration of  
18          October 30 . . ."

19          WITNESS WELLS: Yes.

20          MS. DES JARDINS: 2009.

21          WITNESS WELLS: 19, yes.

22          CO-HEARING OFFICER DODUC: What is your  
23 question?

24          MS. DES JARDINS: I was just wanting --

25          CO-HEARING OFFICER DODUC: Hold on.

1 MS. DES JARDINS: -- to address that the --

2 CO-HEARING OFFICER DODUC: Hold on. Because  
3 as Mr. Mizell noted, we've been through this document,  
4 which is a draft, and so far, based on your two  
5 questions, there's nothing new that you're adding to  
6 the record by bringing this up.

7 So is there a specific question you're asking  
8 these witnesses?

9 MS. DES JARDINS: Yes. I just -- I was laying  
10 foundation, if you'll allow me, because of the  
11 objection that was raised and . . .

12 Mr. Wells, in your opinion, does this  
13 construction date of December 2018 allow the Department  
14 to take into account the concerns that you've raised  
15 about the barge landing at Potato Slough?

16 WITNESS WELLS: Maybe I'm not understanding.

17 I think it's a separate issue. I don't see  
18 how that affects the barge landing.

19 MS. DES JARDINS: Does it allow the Department  
20 to potentially -- If they have plans to start  
21 construction, does it allow the Department to consider  
22 the eastern alignment that you have proposed?

23 WITNESS WELLS: I don't think that considers  
24 the eastern alignment.

25 MS. DES JARDINS: Does it allow to consider

1 any other mitigations for impacts of location of the  
2 barge landing on Potato Slough in the -- in the Project  
3 design?

4 WITNESS WELLS: In my opinion, I don't see how  
5 it allows any other mitigation.

6 MS. DES JARDINS: Thank you.

7 And, Captain Morgan, I'd like to ask you the  
8 same question.

9 WITNESS MORGAN: I agree with Mr. Wells.

10 MS. DES JARDINS: And -- And so is Bouldin  
11 island important to your business, Captain Morgan?

12 WITNESS MORGAN: Very important.

13 MS. DES JARDINS: And it's an important  
14 anchorage for -- for your -- or place for your tours?

15 WITNESS MORGAN: Yes. In fact, one of the  
16 reasons why Bouldin island is important to our tours  
17 is, we do a lot of tours out of Tower Park Marina,  
18 which is now Jellystone Park.

19 And they have just spent over \$8 million  
20 upgrading the park with a nice beach for kids and nice  
21 docks and landings.

22 And we operate out of there in November. In  
23 fact, we're under contract with them to do Sandhill  
24 Crane Festival bird-watching cruises.

25 And many of the Sandhill Cranes that we see

1 from the top deck of our boat, the Rosemarie, is right  
2 on Bouldin Island, where they intend to put the muck  
3 dump. So that would be a huge impact.

4           And it's actually -- You know, we've been  
5 doing the bird-watching cruises for the Sandhill Crane  
6 Festival for four years now, and that's a flight path  
7 for the Sandhill Cranes.

8           And I'm just shocked to see that island be  
9 covered with muck when it's such a precious resource  
10 for -- for the whole region.

11           MS. DES JARDINS: And, Captain Morgan, what  
12 season is the Sandhill Cranes and -- and your tours for  
13 the Sandhill Cranes? What months?

14           WITNESS MORGAN: Well, they begin coming in in  
15 late October. Our cruises are early November, and they  
16 are usually around until -- around February.

17           MS. DES JARDINS: Would you be concerned that  
18 there wouldn't be enough time to consider impacts of  
19 the Sup -- Proposed Supplemental EIR design on the muck  
20 piles on the Sandhill Cranes if -- if this construction  
21 started on the date on this contract?

22           WITNESS MORGAN: Yes.

23           MS. DES JARDINS: Thank you.

24           That concludes my questions.

25           CO-HEARING OFFICER DODUC: Yes, even though

1 Mr. Morgan did not mention Sandhill Crane in his  
2 testimony.

3 Miss Meserve.

4 MS. MESERVE: Miss Des Jardins covered the  
5 questions I had. Thank you.

6 CO-HEARING OFFICER DODUC: All right. In that  
7 case, any redirect, Mr. Brodsky?

8 MR. BRODSKY: No redirect.

9 CO-HEARING OFFICER DODUC: Miss Suard.

10 MS. SUARD: I'm sorry. I wasn't fast enough.  
11 Could I just ask one question?

12 CO-HEARING OFFICER DODUC: All right.

13 MR. BRODSKY: Is the mic on?

14 CO-HEARING OFFICER DODUC: She has one  
15 question.

16 MS. SUARD: I just have -- Nicki Suard for  
17 Snug Harbor.

18 Okay. It's just regarding an alternate barge  
19 landing.

20 CO-HEARING OFFICER DODUC: Is it -- Well, ask  
21 the question.

22 You can ask from there, since you're there.

23 CROSS-EXAMINATION BY

24 MS. SUARD: It may be helpful to pull up that  
25 Hal Schell -- your Hal Schell book, SC . . .

1           What number was that?

2           MR. BRODSKY:   Two -- 152?

3           MS. SUARD:   And go to Page 32.  It just makes  
4 it easier to ask the question.

5           (Exhibit displayed on screen.)

6           MS. SUARD:   And could you go down -- slide  
7 down a little bit and zoom in on Bouldin Island?

8           (Exhibit displayed on screen.)

9           MS. SUARD:   Bouldin Island's lower right.  If  
10 you can . . .

11          (Exhibit displayed on screen.)

12          MS. SUARD:   So, if either of you guys would  
13 like to -- I know Bill especially might have an opinion  
14 on this.

15          If the WaterFix were to continue using this  
16 island, would you feel that a better location for the  
17 barge might be . . .

18          Could you note a place, like, between Venice  
19 Island and Bouldin, somewhere along there?

20          Bill, do you -- can you note a place?  You  
21 have to sort of describe it.

22          Like, for example, you see the word "Korth's  
23 Pirate's Lair."  And where the word "lair" is, wouldn't  
24 that be a better location for a barge landing?

25          WITNESS WELLS:  I don't -- I don't think so.

1 I don't think anywhere along Potato Slough would be a  
2 good barge landing. That's a -- Besides the Bedrooms,  
3 that's a lot of cruising grounds for other boats.

4 MS. SUARD: Okay. I'm just trying to look  
5 at -- So anywhere on Potato Slough you'd say would be  
6 out.

7 Okay. Do you see the word "Moore's  
8 Riverboat"?

9 Of course, I'm not saying the -- anywhere near  
10 those actual locations. Those words don't represent  
11 where those marinas are.

12 WITNESS WELLS: Right.

13 MS. SUARD: But you see where the word  
14 "Moore's" is or "Bouldin."

15 WITNESS WELLS: Yes.

16 MS. SUARD: There's that big curve in the  
17 Mokelumne River there. What about that as a location?

18 WITNESS WELLS: I don't think that would be a  
19 good location, either. There's probably more traffic  
20 going up and down the Mokelumne River right there. I  
21 think that would be -- Yeah, I don't think that'd be  
22 good at all.

23 And besides that, there's a kayak rental place  
24 near there and I don't think they'd do good coming in  
25 contact with the barges.

1 MS. SUARD: Okay. So I'm -- I'm just --

2 MR. BRODSKY: Can I just ask for clarif --  
3 what we're -- We're talking about the south fork of the  
4 Mokelumne, which is at the north edge of Bouldin Island  
5 now; is that right?

6 WITNESS WELLS: Where the Mokelumne River goes  
7 into the San Joaquin River, whatever, I think that's  
8 called --

9 MS. SUARD: I'm looking at the north fork --  
10 sorry -- north fork of the Mokelumne River. Go down  
11 past --

12 WITNESS WELLS: Oh, I see.

13 MS. SUARD: -- Moore's and Korth's and all  
14 that.

15 But across from Moore's and Korth's, you'll  
16 see on Bouldin Island, there is an area that's pretty  
17 much out in the San Joaquin River that's kind of pretty  
18 open and exposed to a lot of wind.

19 Would that be a good location?

20 WITNESS WELLS: In my opinion, no.

21 MS. SUARD: Okay. I just thought --

22 WITNESS MORGAN: I -- I would say, in my  
23 opinion, I agree with Mr. Wells that nowhere on Potato  
24 Slough is a good place to -- to put a barge landing  
25 in -- put that much barge traffic in such a pristine



1 area.

2           If it had to be on Bouldin island, I would  
3 recommend, if you look where the San Joaquin River is,  
4 and you see the words "North, the Cay North," so if you  
5 went to the left and down a little, just under that,  
6 looks like a 49 there, but you're out on the  
7 San Joaquin River.

8           If they were going to do a barge landing, it  
9 seems to me that would be the best spot in that that's  
10 the largest part of the river, it's on the main  
11 shipping channel, it's not where people anchor or  
12 anything like that.

13           And you could actually go by that landing  
14 without having to go through five-mile-an-hour zone  
15 because you could be over 200 feet from the barge when  
16 you're passing it.

17           MS. SUARD: Thank you.

18           CO-HEARING OFFICER DODUC: Never trust an  
19 attorney when they say they have one question.

20           Mr. Brodsky, any redirect?

21           MR. BRODSKY: No redirect.

22           CO-HEARING OFFICER DODUC: Thank you very  
23 much, Mr. Wells and Captain Morgan. And we especially  
24 wish we could all be with you this afternoon.

25           WITNESS MORGAN: You're welcome anytime.

1 CO-HEARING OFFICER DODUC: All right.

2 Mr. Brodsky, your turn.

3 WITNESS WELLS: Thank you very much.

4 CO-HEARING OFFICER DODUC: Thank you.

5 MR. BRODSKY: Thank you.

6 I'll be very brief and --

7 CO-HEARING OFFICER MARCUS: Are you going to  
8 ask yourself questions like John Herrick did?

9 MR. BRODSKY: I'm sorry?

10 CO-HEARING OFFICER MARCUS: Are you going to  
11 ask yourself questions like Mr. Herrick did?

12 MR. BRODSKY: I'll try not to. Maybe  
13 Mr. Herrick --

14 CO-HEARING OFFICER DODUC: You may object to  
15 yourself, too.

16 MR. BRODSKY: That I do every day.

17

18 Michael Brodsky,  
19 called as a witness by the Save the  
20 California Delta Alliance, et al., having  
21 been duly sworn, was examined and  
22 testified as follows:

23 DIRECT EXAMINATION BY

24 MR. BRODSKY: So, in his direct testimony,  
25 Mr. Rischbieter said that -- and, actually, it's on

1 cross-examination -- that he did not believe boaters  
2 would abandon the Delta in large number due to the  
3 construction impacts of CWF.

4           And Save the California Delta Alliance  
5 conducted a survey of boaters at the Rio Vista Bass  
6 Festival in 2017. There were approximately 220  
7 respondents to the survey.

8           And the survey presented to each person at the  
9 festival who took the survey, our Exhibit SCDA-72,  
10 which is the map you've seen many times with the barge  
11 routes, and also read to the people who were taking the  
12 survey portions of the EIR.

13           So the description of the Project that the  
14 survey takers were respondent -- responding to was  
15 DWR's description of the Project, not something that we  
16 made up maligning it.

17           The survey takers did not identify that they  
18 were with Save the California Delta Alliance, did not  
19 identify whether they were for or against the tunnels,  
20 so as to try not to unduly what survey takers call  
21 implicitly or impliedly influence the responses.

22           And the responses to the surveys were  
23 overwhelmingly that boaters would abandon the Delta to  
24 a large extent in large numbers in response to the  
25 construction impacts of CWF.

1           So, on Page 3 of my written testimony --  
2           Perhaps we could pull that up. That's  
3 SCDA-351.

4           (Exhibit displayed on screen.)

5           MR. BRODSKY: Let's actually start with  
6 Page 2.

7           (Exhibit displayed on screen.)

8           MR. BRODSKY: So, there at the top of the  
9 page, we have reproduced what was Question 14 on the  
10 survey. Perhaps we can -- I won't read that aloud. We  
11 can all read it silently.

12                         (Pause in proceedings.)

13           CO-HEARING OFFICER DODUC: And have, so you  
14 may move on.

15           MR. BRODSKY: And so 44 percent of the  
16 Respondents answered C, that there would be a  
17 significant reduction in their use of the Delta;  
18 21 percent B, some reduction in use of the Delta; and  
19 22 percent E, that they would stop boating altogether  
20 in the Delta, for a total of 87 percent of respondents  
21 who said they would reduce or stop altogether their use  
22 of the Delta.

23           Then as to . . . I'll skip Question 15 -- you  
24 can review that at your leisure since it's in my  
25 written testimony -- and go to Page 3 and just

1 summarize Question 18 at the bottom of the page --

2 (Exhibit displayed on screen.)

3 MR. BRODSKY: -- which is directed to the  
4 impacts on Delta boaters and Delta recreation users of  
5 road construction rather than how they're reacting to  
6 barges or no-wake zones. How are they reacting to the  
7 increased truck traffic, et cetera, on the roadways?

8 And, again, this -- the survey respondents'  
9 knowledge of what was going to happen was taken  
10 directly from the EIR. This is what the EIR says  
11 traffic impacts are going to be, for example, on the  
12 Rio Vista Bridge.

13 And I'll just allow everyone to read  
14 Question 18 and the answers there to themselves  
15 silently.

16 (Pause in proceedings.)

17 CO-HEARING OFFICER DODUC: I did read your  
18 testimony.

19 MR. BRODSKY: Okay. Maybe the audience at  
20 home wants to read it.

21 You'd be surprised. You probably have Nielsen  
22 ratings, you know, higher than Fox News.

23 CO-HEARING OFFICER DODUC: I don't know,  
24 Mr. Brodsky. It would have been helpful with nice bar  
25 or pie charts. As an Engineer; right?

1 MR. BRODSKY: Okay. Next time.

2 CO-HEARING OFFICER DODUC: Graphics.

3 MR. BRODSKY: So, 47 percent answered E, that  
4 construction vehicles and bridge openings would cause  
5 them to use the Delta for recreation much less often.

6 29 percent answered F, that construction  
7 vehicles and bridge openings would cause them to stop  
8 using the Delta for recreation together.

9 For a total of 76 percent who would use the  
10 Delta much less often or stop using the Delta in  
11 response to the CWF road traffic in the Delta.

12 And, so, to the extent the Hearing Officers  
13 believe that rebuts DWR's statements that boaters will  
14 not abandon the Delta in response to CWF construction  
15 activities, it's submitted into the record.

16 That concludes my testimony.

17 CO-HEARING OFFICER DODUC: All right. I  
18 believe DWR will have 30 minutes of cross for  
19 Mr. Brodsky.

20 MR. MIZELL: (Shaking head.)

21 CO-HEARING OFFICER DODUC: You've changed your  
22 mind.

23 MR. MIZELL: Yeah.

24 CO-HEARING OFFICER DODUC: Okay.  
25 Miss Des Jardins, followed by Miss Meserve.

1 (Pause in proceedings.)

2 CO-HEARING OFFICER DODUC: And since it's just  
3 Mr. Brodsky, how much time do you anticipate needing?

4 MS. DES JARDINS: Less than five minutes.

5 CO-HEARING OFFICER DODUC: All right.

6 Mr. Brodsky will have an early lunch.

7 CROSS-EXAMINATION BY

8 MS. DES JARDINS: Mr. Brodsky, you mentioned  
9 bridge impacts, and I just wanted to ask if you're  
10 aware that the Rio Vista Bridge was stuck open this  
11 past month?

12 CO-HEARING OFFICER DODUC: I think we all  
13 were, but what does that have to do with --

14 MS. DES JARDINS: Is this --

15 CO-HEARING OFFICER DODUC: -- Mr. Brodsky?

16 MS. DES JARDINS: -- kind of concerns you  
17 would have with aging bridges in the Delta?

18 CO-HEARING OFFICER DODUC: That is outside the  
19 scope of Mr. Brodsky's rebuttal testimony.

20 MS. DES JARDINS: Is -- Is -- Would backups of  
21 two hours, as happened with --

22 CO-HEARING OFFICER DODUC: Outside the scope  
23 of his testimony.

24 MS. DES JARDINS: Okay.

25 CO-HEARING OFFICER DODUC: Miss Meserve.

1 MS. MESERVE: No questions.

2 CO-HEARING OFFICER DODUC: Would you like to  
3 redirect yourself, Mr. Brodsky?

4 MR. BRODSKY: No redirect.

5 I would just like to thank Miss Suard for  
6 hosting our survey takers at the Snug Harbor Resort  
7 when we -- She put up 10 or 12 people overnight so they  
8 could conduct the survey.

9 Thank you, Nicki.

10 CO-HEARING OFFICER DODUC: Ah.

11 At this time, does that conclude your rebuttal  
12 testimony?

13 MR. BRODSKY: Yes, it does.

14 CO-HEARING OFFICER DODUC: Would you like to  
15 move your exhibits into the record?

16 MR. BRODSKY: Yes, I would like to move Save  
17 the California Delta Alliance rebuttal evidence into  
18 the record, exhibits and testimony.

19 CO-HEARING OFFICER DODUC: Are there any  
20 objections?

21 All right. They are now in the record.

22 (Save the California Delta Alliance, et al.'s Exhibits  
23 received in evidence)

24 CO-HEARING OFFICER DODUC: Thank you,  
25 Mr. Brodsky.



1 MR. BRODSKY: Thank you.

2 CO-HEARING OFFICER DODUC: I think we're okay  
3 without taking a break.

4 THE REPORTER: (Nodding head.)

5 CO-HEARING OFFICER DODUC: All right. Let's  
6 move on to PCFFA and LAND, Mr. Oppenheim,  
7 Miss Des Jardins and Mr. Stokely.

8 (Pause in proceedings.)

9 CO-HEARING OFFICER DODUC: I'm sorry. As you  
10 are setting up, last week I received cross-examination  
11 requests from only two parties, DWR for 60 to 75  
12 minutes, and Group 4.

13 I see Mr. O'Hanlon there for 30 minutes. Is  
14 that still the case?

15 MR. O'HANLON: Yes.

16 CO-HEARING OFFICER DODUC: Okay. Mr. Shutes.

17 MR. SHUTES: Good morning. Chris Shutes for  
18 California Sportfishing Protection Alliance.

19 I may have a few questions for this panel. I  
20 haven't decided yet. It would be less than half an  
21 hour, probably less than 15 minutes.

22 CO-HEARING OFFICER DODUC: All right. I see  
23 Miss Suard coming up, too.

24 MS. SUARD: Nicki Suard, Snug Harbor.

25 I'm going to listen to the testimony but I'd

1 like to reserve 15 minutes at most.

2 CO-HEARING OFFICER DODUC: All right.

3 Mr. O'Hanlon, did you have anything to add?

4 MR. O'HANLON: Yes. Thank you.

5 Daniel O'Hanlon on behalf of the San Luis &  
6 Delta-Mendota Water Authority, Westlands.

7 CO-HEARING OFFICER DODUC: I don't think your  
8 microphone is on.

9 MR. O'HANLON: Sorry.

10 Daniel O'Hanlon on behalf of San Luis  
11 Delta-Mendota Water Authority and Westlands.

12 I have a Motion to Strike with respect to  
13 Mr. Stokely's testimony.

14 CO-HEARING OFFICER DODUC: All right.

15 MR. O'HANLON: And the Motion to Strike is  
16 based on your ruling related to the written testimony.

17 Three of the slides in his PowerPoint  
18 presentation repeat material that was stricken from his  
19 written testimony. So I'm looking at Slides 3, 11 and  
20 14 all just quote material that was stricken from his  
21 written testimony.

22 CO-HEARING OFFICER DODUC: And were there any  
23 other exhibits associated with the stricken testimony  
24 or am I thinking of a different witness, different  
25 party?

1 MR. O'HANLON: No. The only -- The motion's  
2 limited to the PowerPoint presentation.

3 CO-HEARING OFFICER DODUC: Any response,  
4 Miss Meserve?

5 We will need some time to take a look at those  
6 three slides to make sure.

7 MS. MESERVE: Yeah. I mean, I think they're  
8 basically just quoting the authorities, which we had  
9 hoped to retain as part of the testimony but which were  
10 stricken.

11 So, you know, we thought it made it more  
12 complete to include those things.

13 CO-HEARING OFFICER DODUC: Let's do this,  
14 Mr. O'Hanlon:

15 We will review that -- those slides during  
16 the -- the break. But if it does indeed just reflect  
17 verbatim the language that has been struck from  
18 Mr. Stokely's testimony, then that would be  
19 appropriately also struck from the PowerPoint.

20 MR. O'HANLON: Thank you.

21 CO-HEARING OFFICER DODUC: All right. And  
22 before we get through . . .

23 With the initial cross-examination estimate, I  
24 thought we would be done with this group before we take  
25 our lunch break.

1           But depending on how it goes, you may have to  
2 return at 2 o'clock. So we will see how the rest of  
3 the cross-examination goes out.

4           With that, I will turn it to you.

5           And I believe you all have been here before  
6 and have taken the oath.

7

8                                 NOAH OPPENHEIM,

9                                 THOMAS STOKELY

10                                and

11                               DEIRDRE DES JARDINS,

12           called as witnesses by the Pacific Coast  
13 Federation of Fishermen's Associations,  
14 et al. and Local Agencies of the North  
15 Delta, et al., having previously been  
16 duly sworn, were examined and testified  
17 further as follows:

18           CO-HEARING OFFICER DODUC: All right. I'll  
19 turn to you for presentation of your direct.

20           MS. KRIEG: Good morning. Thank you.

21           This is Alexis Krieg for PCFFA.

22           And I will start with --

23           CO-HEARING OFFICER DODUC: If you could please  
24 move the microphone closer.

25           MS. KRIEG: Thank you. Sorry.

1 I'm going to start with Mr. Oppenheim.

2 DIRECT EXAMINATION BY

3 MS. KRIEG: Is PCFA -- Sorry.

4 Is PCFFA-202 a true and correct copy of your  
5 testimony?

6 WITNESS OPPENHEIM: Yes.

7 MS. KRIEG: And do you have any corrections to  
8 make to it?

9 WITNESS OPPENHEIM: One small correction, a  
10 typographical error.

11 On Page 7 of my testimony, there is a hyphen  
12 on Line 10 where there should not be one. The correct  
13 wording for language should be DWR-1143.

14 MS. KRIEG: Thank you.

15 And --

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

17 Miss Ansley.

18 MS. ANSLEY: Yes. And just for the record,

19 I'd like to note that there's actually --

20 Mr. Oppenheim's testimony was revised and the correct  
21 number is now 202 -- PCFFA-202-Revised or R.

22 CO-HEARING OFFICER DODUC: Correct.

23 MS. KRIEG: Thank you.

24 And -- And -- And do you have any other  
25 corrections?

1 WITNESS OPPENHEIM: (Shaking head.)

2 MS. KRIEG: Then can you summarize your  
3 testimony for us, please.

4 WITNESS OPPENHEIM: Certainly.

5 Good morning, Hearing Officer Doduc, Hearing  
6 Officer Marcus and Member D'Adamo. Good to be with  
7 you.

8 I'll briefly summarize my testimony.

9 I'm going to be covering: The Water Quality  
10 Control Plan; I'll be discussing the status of  
11 winter-run Chinook Salmon; moving into survival  
12 targets; the North Delta Diversion Bypass flow criteria  
13 with regards to Salmon; protection of unlisted  
14 Salmonids and Pacific Salmon Central fish habitat;  
15 discussing other Bay species; discussing a modified  
16 bypass recommendation for Salmon; and then briefly  
17 discussing adaptive management with respect to CSAMP.

18 Starting with the protection of migration in  
19 commercial and beneficial uses in the Water Quality  
20 Control Plan.

21 Mr. Rischbieter testified that the 2006 Delta  
22 Water Quality Standards provide reasonable protection  
23 of the beneficial uses; namely, migration and  
24 commercial beneficial uses.

25 The experience of commercial fishermen,

1 coastal communities, organizations that I represent in  
2 California makes it abundantly clear that the 1995 and  
3 the 2006 Bay-Delta Water Quality Control Plans have  
4 completely failed to protect Delta fisheries'  
5 beneficial uses, certainly inadequately.

6           After the 2006 plan was issued, the Salmon  
7 fishery continued its precipitous decline reflected  
8 most prominently by complete closures of the commercial  
9 seasons in 2008 and 2009.

10           Mr. Greenwood testified that the fall-run  
11 Sacramento River Chinook abundance demonstrated, quote,  
12 "peaks and troughs over the past several decades."

13           Such a sentiment represents at best the  
14 opacity of a -- of a dispassionate and dismissive  
15 analysis rather than the clarity of hindsight.

16           Mr. Greenwood's testimony does not address the  
17 disastrous input -- impacts of the 2013 and 2016  
18 drought and water operations management on fall-run  
19 Chinook Salmon, leading to sharply reduced seasons in  
20 2016, 2017, and now the current 2018 commercial  
21 fishery, which is severely curtailed.

22           Thus, evidence in the 2006 data of the Water  
23 Quality Control Plan was issued, shows that Water  
24 Quality Standards have failed to protect both migration  
25 beneficial use as well as the commercial fishing

1 beneficial use, designated COMM and MIGR in the plan.

2           Now to winter-run, Pages 4 and 5 of my  
3 testimony.

4           Mr. Greenwood refers to Figure B-2 from  
5 DWR-1012 which is itself from the National Marine  
6 Fisheries Service in his discussion of the status of  
7 winter-run Chinook Salmon and later states that  
8 (reading):

9           ". . . Winter-run are reasonably  
10           protected by existing regulatory  
11           requirements."

12           If you could please bring up Figure B-2, which  
13 you can find on Page 4 of PCFFA-202.

14           (Exhibit displayed on screen.)

15           WITNESS OPPENHEIM: Thank you.

16           Figure B-2 shows that the winter-run Chinook  
17 Salmon populations present in the Sacramento system  
18 have collapsed. As you'll recall, this is an  
19 ESA-listed stock.

20           I wouldn't consider this to be a reasonable  
21 protective -- a set of reasonably protective measures.

22           As David Bitts testified in PCFFA-86 in our  
23 case in chief, commercial Salmon seasons may be  
24 constrained based on the abundance of this stock and,  
25 on some occasions, are significantly constrained by it,



1 costing millions of dollars in lost revenue.

2           Mr. Greenwood also refers to Figure B-4 of the  
3 National Marine Fisheries BiOp showing winter-run  
4 Juvenile Salmonids entering the Delta. That's on  
5 Page 5 of my testimony.

6           (Exhibit displayed on screen.)

7           WITNESS OPPENHEIM: This figure clearly shows  
8 that the number of winter-run juveniles entering the  
9 Delta have declined from a peak abundance of nearly  
10 4 million individuals to less than 200,000 fish, which  
11 is a 95 percent decline since 2006.

12           For the same reasons as described earlier,  
13 existing upstream requirements are not reasonably  
14 protective of winter-run Chinook Salmon, do not protect  
15 the spawning beneficial use.

16           I will discuss survival target -- targets  
17 generally described in my testimony, Pages 5 and 6.

18           Mr. Greenwood's testimony states that the  
19 WaterFix Incidental Take Permit requires that  
20 through-Delta survival must be equal to or greater than  
21 baseline, ensuring that the WaterFix H3+ must be  
22 operated to provide reasonable protection of  
23 juvenile-listed Salmonids, winter-run namely.

24           Both upstream and through-Delta survival of  
25 winter-run Chinook under current conditions are

1 insufficient. In my professional judgment, and in my  
2 opinion, the proposed baseline study and adaptive  
3 management targets will not remedy these hostile  
4 conditions, for three reasons in particular:

5           One, they only consider survival of winter-run  
6 in the vicinity of the North Delta Intakes and not the  
7 upstream or the total through-Delta survival, which is,  
8 of course, critical to their overall abundance  
9 demographically at a population scale.

10           Second, they apply only to listed runs, not to  
11 the unlisted commercially-harvested fall-run.

12           And, three, they do not address and will not  
13 achieve the Salmon dub -- Salmon doubling requirement  
14 for all runs, which is part of State and Federal law.

15           Briefly on North Delta diversion bypass flows  
16 and Salmon:

17           By definition, the North Delta diversion  
18 bypass flows would be subject to reduction in both  
19 duration and in timing under any adaptive management  
20 scheme envisioned for this Project, which would  
21 increase the adverse effects of Project operations on  
22 Salmon.

23           Because fall-run and late fall-run Chinook  
24 Salmon may up-migrate at different times than  
25 winter-run and spring-run Chinook, they may experience

1 worse, more deleterious impacts for these reductions  
2 than the ESA protected runs.

3           For these and other reasons described in more  
4 detail in my testimony, PCFFA and IFR do not support  
5 the bypass flows triggered only by real-time catches of  
6 certain stocks of Juvenile Salmonids.

7           To protect the migration and the estuarine  
8 habitat beneficial use of the Delta, as well as the  
9 commercial fishing beneficial use, the Board must  
10 require minimum bypass flows in the diversion permit  
11 that are protective of the entire suite of Salmon  
12 species present.

13           On to protection of unlisted Salmon and  
14 essential fish habitat:

15           The minimum bypass flows of 5,000 cfs from  
16 July to September leaves so little water in the river  
17 that flows would be tidal in the vicinity -- vicinity  
18 of the intakes -- that's from Miss Des Jardins'  
19 testimony in our case in chief -- which could  
20 contribute to stress on migrating adults, impair their  
21 successful migration and certainly their survival.

22           Temperature effects of these reduced flows are  
23 also unclear, but up-migrating adults are known to  
24 require temperatures of 70 degrees Fahrenheit or below.  
25 Ideally, they would need 65 degrees Fahrenheit or

1 below.

2           The State Water Board must, therefore, mandate  
3 sufficient flows to sustain low temperatures,  
4 zooplankton abundance, and avoid large Microcystis  
5 blooms, protecting the food web in the Delta on which  
6 all these Salmon runs depend, while rearing and  
7 out-migrating.

8           The only way for the Board to protect those  
9 unlisted runs is to -- and to protect the essential  
10 fish habitat on which they depend, is to deny the  
11 Petition or to include fully protective Bypass Flow  
12 Criteria.

13           Very briefly with regard to other Bay species  
14 present which are components of the food web on which  
15 these Salmon depend; namely, Bay Shrimp and Starry  
16 Flounder.

17           CFW Biologist Randall Baxter testified in  
18 Part 2 that increases in Starry Flounder and Shrimp --  
19 Bay Shrimp abundance are correlated with very high  
20 outflows, and these require brackish water habitats  
21 that are expanded in high years.

22           Based on my professional judgment and  
23 experience, we recommend that enhanced Delta outflow of  
24 75 percent of unimpaired flow from December to June in  
25 order to protect these Bay species, as well as Salmonid

1 essential fish habitat.

2 I'm going to discuss briefly a modified bypass  
3 flow and outflow recommendation; namely, increasing  
4 from 25,000 to 35,000 cfs.

5 Since my case in chief testimony for Part 2, a  
6 study of the North Delta diversions by Perry, et al.,  
7 which was published in February of 2018, shows that  
8 likely my own prior recommendations of 20,000 and  
9 25,000 cfs are insufficiently protective of these  
10 beneficial uses. They're insufficient.

11 And the Board must mandate minimum bypass  
12 flows of 35,000 cfs as inflow at Freeport and outflow  
13 at Rio Vista. These bypass flows need to be present  
14 all months of the year.

15 Based on our experience, we believe that  
16 reductions triggered by the presence of fish are  
17 unlikely to be implemented. These are the -- the  
18 triggers that are currently proposed.

19 Fall-run Chinook Salmon regularly migrate in  
20 June and, for this reason, we believe that the season  
21 for protective bypass flows should certainly run  
22 through June.

23 In addition, fall-run Salmon out-migrate as  
24 early as August so, for this reason, we'd like to see  
25 the season of protective bypass flows extend to August.

1           And . . . Let's see.

2                       (Pause in proceedings.)

3           WITNESS OPPENHEIM: There is a section in my  
4 testimony dealing with OMR flow criteria.

5           Mr. Greenwood testified that entrainment for  
6 listed Salmonids would be reduced from or at least  
7 maintained no more than the existing levels.  
8 Greenwood's opinion is based on OMR flow criteria in  
9 the NMFS Biological Opinion and the Incidental Take  
10 Permit. These criteria are subject to change under  
11 adaptive management as noted in various places.

12           The criteria in Exhibit DWR-1143 also failed  
13 to comply with the negative 2500 cfs protective  
14 criteria adopted by Board staff in the 2010 Delta Flow  
15 Criteria Report.

16           PCFFA and IFR, therefore, oppose the change  
17 petition approval. But if the Board does approve the  
18 petition, we'd request that the Board adopt a Permit  
19 term requiring that net Old, Middle River flows be no  
20 more negative than -2500 cfs at the South Delta  
21 diversions from November through June.

22           To conclude my summary: With respect to  
23 adaptive management, DWR witness Gwendolyn Buchholz  
24 testified that DWR and other agencies, quote (reading):

25           ". . . Will coordinate with collaborative

1 science workshop -- workgroups to  
2 identify and prioritize potential changes  
3 to address uncertainties related to the  
4 effects of the State Water Project and  
5 CVP operations through adaptive  
6 management."

7 One of the examples of such collaborative  
8 frame works -- collaborative organizations in the  
9 framework is the Collaborative Science and Adaptive  
10 Management Program, or CSAMP.

11 I've been a member of the CSAMP Policy Group,  
12 which is the top level component of the hierarchical  
13 organization of CSAMP, since March 13, 2017.

14 And, therefore, based on my experience at  
15 CSAMP, I do not believe that this organization is  
16 capable of participating in an adaptive management  
17 framework that DWR proposes based on my understanding  
18 of CSAMP's current limitations, its inability to make  
19 any decisions based on its lack of any voting criteria,  
20 or any capacity to adjudicate the proposed changes that  
21 would certainly be present in any Adaptive Management  
22 Program.

23 I'll leave it at that.

24 Thank you very much for the time.

25 WITNESS DES JARDINS: Thank you.

1           Before we start, I do have a correction to my  
2 testimony, which is Exhibit PCFFA-203.

3           (Exhibit displayed on screen.)

4           WITNESS DES JARDINS: And at the top of  
5 Page 13, Line 2, it says (reading):

6                     "As explained in my technical memo,  
7 Exhibit PCFFA-205, as of the date of this  
8 testimony, the Department of Water  
9 Resources has stopped publishing  
10 tidally . . . flow data for monitoring  
11 locations in the Delta on the California  
12 Data Exchange Center website."

13           And I wanted to correct that to (reading):

14                     ". . . For multiple monitoring locations  
15 in the Delta . . ."

16           And then --

17           CO-HEARING OFFICER DODUC: Hold on,  
18 Miss Des Jardins.

19           So, on Line 2, you would like to insert the  
20 word "multiple" --

21           WITNESS DES JARDINS: "Multiple."

22           CO-HEARING OFFICER DODUC: -- before the word  
23 "monitoring."

24           WITNESS DES JARDINS: Yes. I would like to  
25 qualify it in that way.



1 And then . . .

2 (Pause in proceedings.)

3 MS. KRIEG: Is that your only correction?

4 WITNESS DES JARDINS: There's one more, and  
5 that's on Page 14 at Line 5.

6 (Exhibit displayed on screen.)

7 WITNESS DES JARDINS: I should have qualified  
8 this.

9 It said (reading):

10 "There has also been no analysis of  
11 any diversion permit terms that would  
12 limit long-term operations."

13 That should be qualified to say (reading):

14 "There has also been no analysis of  
15 any new diversion permit terms that would  
16 limit long-term operations."

17 CO-HEARING OFFICER DODUC: All right. So  
18 insert the word "new" --

19 WITNESS DES JARDINS: Yes.

20 CO-HEARING OFFICER DODUC: -- before  
21 "diversion" on Line 6.

22 WITNESS DES JARDINS: So, next --

23 MS. KRIEG: And --

24 WITNESS DES JARDINS: Yeah.

25 MS. KRIEG: Do you have any other corrections?

1 WITNESS DES JARDINS: That's all.

2 MS. KRIEG: And, then, so with these  
3 corrections, PCFFA-203 is a true and complete copy of  
4 your testimony?

5 WITNESS DES JARDINS: That is correct.

6 MS. KRIEG: Thank you.

7 WITNESS DES JARDINS: Okay. So, in the  
8 interest of time, I'd like to jump first to Page 25 of  
9 my testimony.

10 (Exhibit displayed on screen.)

11 WITNESS DES JARDINS: No. Sorry. Page 24.

12 (Exhibit displayed on screen.)

13 WITNESS DES JARDINS: And . . . I'm going to  
14 discuss -- I discuss the modeling and some of the  
15 uncertainties about the actual Operational Criteria in  
16 my testimony.

17 And one of the key things I'm rebutting is:  
18 Aaron Miller's testimony states that he believes it's  
19 possible to operationalize the modeling assumptions for  
20 CWF H3+.

21 And while it's possible, it's my opinion that  
22 the obligations in the current Coordinated Operating  
23 Agreement which Kristin White did verify are -- are  
24 absolutely essential -- a fundamental basis of meeting  
25 those obligations.

1           And under the current COA, storage withdrawals  
2 for in-basin use, the CVP provides 75 percent when --  
3 when they need to do -- protect in-basin uses under the  
4 Water Quality Control Plan. 75 percent CVP, 25 percent  
5 SWP, and exports of unstored flows are 55 percent CVP,  
6 45 percent CVP (sic).

7           And if we can go to the table on Page 25 of my  
8 testimony: It's at Line 11.

9           (Exhibit displayed on screen.)

10          WITNESS DES JARDINS: Let's zoom in and look  
11 at that.

12          (Exhibit displayed on screen.)

13          WITNESS DES JARDINS: So, this is a rough  
14 calculation based on the reservoir capacities on the  
15 California Data Exchange Center.

16          And I looked at the total Project storage --  
17 total joint CVP and SWP storage capacity on the  
18 Sacramento River and including imports from Trinity.

19          And Or -- According to this table, Oroville  
20 Reservoir has about 31 percent of the joint Project  
21 storage and Shasta, Folsom and Trinity have about  
22 69 percent.

23          And bec -- because Oroville represents a  
24 relatively small share of the Project storage -- joint  
25 Project storage, if the State Water Project's share of

1 required Project storage releases to meet in-basin  
2 needs increased because of changes in the COA, under  
3 my -- my belief --

4 CO-HEARING OFFICER DODUC: Hold on, please,  
5 Miss Des Jardins.

6 Miss Ansley.

7 WITNESS DES JARDINS: Yes.

8 MS. ANSLEY: Jolie-Anne Ansley for the  
9 Department of Water Resources.

10 Mr. Miller did indeed testify that -- that he  
11 felt the CWF H3+ could be operationalized. However, I  
12 believe nowhere did any of the witnesses testify as to  
13 a change in the COA, which is a current agreement.

14 So, what Miss Des Jardins is doing now is  
15 taking the rebuttal of the operational conditions that  
16 Mr. -- and none of these witnesses. Kristin White  
17 actually testified as to changed conditions in the COA.

18 So now what she's doing is using the hook of  
19 him saying "operationalize" and the fact that witnesses  
20 mentioned the word "COA" to provide speculative  
21 testimony concerning what might happen in a future  
22 scenario that is not actually a scenario that anyone  
23 testified to.

24 So I think this is beyond the scope of the  
25 witness' case in chief.

1 CO-HEARING OFFICER DODUC: Miss Krieg?

2 Miss Meserve?

3 MS. KRIEG: My understanding of the witness'  
4 testimony is that she's merely pointing out that the  
5 assumptions are based on the current COA.

6 And maybe I'm reading it differently than  
7 Miss Ansley, but her oral testimony is consistent with  
8 the written testimony on Page 25 through 26.

9 MS. ANSLEY: Looking at Page 25, she has gone  
10 beyond acknowledging what the witnesses testified, that  
11 they assumed the current operating COA, and now she  
12 is -- On, for example, Lines 18 to 21, what she's doing  
13 is providing testimony about a hypothetical scenario  
14 that no witness testified to indeed if the COA was not  
15 in effect. But the COA is in effect. It's an  
16 agreement.

17 And now what we're doing is using that as a  
18 hook to speculate on operating conditions, which could  
19 have certainly been done at any time in a any case in  
20 chief, but it is not rebuttal to something specific  
21 that Mr. Miller nor Miss White testified to.

22 CO-HEARING OFFICER DODUC: It is rebutting, I  
23 guess, the assumption that the existing COA as modeled  
24 would be continue.

25 WITNESS DES JARDINS: If -- If I could,

1 Mr. Miller also did say on DWR-1011, Page 4 at 17, that  
2 the two primary SWP management tools the Operators have  
3 are releases from the upstream reservoirs and  
4 adjustments to diversions in the Delta. So that's what  
5 he testified were the management tools.

6 And Kristin White did testify that the COA was  
7 being renegotiated.

8 CO-HEARING OFFICER DODUC: Hold on.

9 MS. MESERVE: And that references the bottom  
10 of Page 24 of Miss Des Jardins' testimony.

11 So this is direct rebuttal to a statement made  
12 by a DWR witness during the rebuttal portion of this  
13 Part 2.

14 CO-HEARING OFFICER DODUC: Miss Ansley.

15 MS. ANSLEY: As noted on Page 24, Line 23, of  
16 Miss Des Jardins' testimony, what Miss White testified  
17 to, that the COA could be subject to negotiation.

18 You might as well say, you know, also future  
19 laws could be changed, such as in the CVPIA. But what  
20 these witnesses did not do was speculate or provide  
21 information regarding some other scenario of COA.

22 And so --

23 CO-HEARING OFFICER DODUC: Understood.

24 MS. ANSLEY: -- she's -- she's noted here that  
25 they -- that the modeling assumed the current COA at

1 that time.

2 CO-HEARING OFFICER DODUC: Understood.

3 But because no terms and conditions have been  
4 proposed, and because that door was left wide open for  
5 these witnesses to speculate, I will overrule your  
6 objection but will say that it goes to weight.

7 Please continue, Miss Des Jardins.

8 WITNESS DES JARDINS: So, I did want to say  
9 that operationally -- operationalizing the CWF H3+  
10 scenario without adverse consequences to Oroville  
11 storage and Oroville carryover storage is largely  
12 dependent on the current COA.

13 And . . . I'd like to say also that, in my  
14 professional judgment as a physicist who has looked at  
15 climate change, that the significance --

16 CO-HEARING OFFICER DODUC: Hold on,  
17 Miss Des Jardins.

18 Are you still arguing the point --

19 WITNESS DES JARDINS: No.

20 CO-HEARING OFFICER DODUC: -- which I ruled in  
21 your favor, or are you now --

22 WITNESS DES JARDINS: Okay.

23 CO-HEARING OFFICER DODUC: -- about to --

24 WITNESS DES JARDINS: Okay.

25 CO-HEARING OFFICER DODUC: -- summarize your

1 testimony.

2           WITNESS DES JARDINS: I did have some further  
3 testimony about the risk to in-basin needs and that  
4 there was an operation of.

5           I believe that the Board should not issue a  
6 permit for the requested 9,000 cfs in diversions if the  
7 COA is being renegotiated and subject to changing  
8 unspecified ways.

9           If the Board nonetheless issues a permit, the  
10 Board should require the Petitioners to enter into a  
11 binding Coordinated Operating Agreement for the State  
12 Water Project and the Central Valley Project with the  
13 new 9,000 cfs Water -- North Del -- WaterFix facility  
14 that includes modeling that can confirm that  
15 implementation of the Project is feasible.

16           If the Board instead chooses to approve the  
17 WaterFix Project based on the WaterFix Final EIR/EIS  
18 and the modeling presented in Part 1 and Part 2, all of  
19 which assumes the current COA, the Board should put the  
20 current COA in the CVP and SWP Permits as -- as . . .  
21 as documenting the current promises by the CVP and SWP  
22 until further order of the Board.

23           You know, this would require the Petitioners  
24 to come back to the Board if they did get --  
25 renegotiate the COA with a new Coordinated Operating



1 Agreement for the Bay-Delta Water Quality Plans.

2           So, I have the Permit terms on -- suggested  
3 Permit terms on Page 27 of my testimony, which were  
4 drawn from --

5           (Exhibit displayed on screen.)

6           WITNESS DES JARDINS: -- Line 6 (reading):

7           "Until further order of the Board,  
8           Permittee" -- for CVP -- "shall provide  
9           75 percent of the storage releases to  
10          maintain Water Quality Standards during  
11          balanced conditions.

12          "SWP Permits:

13          "Until further order of the Board,  
14          Permittee shall provide 25 percent of the  
15          storage releases to maintain water  
16          quality standards during balanced  
17          conditions."

18          And this is just . . . providing the . . . the  
19          current obligations and the assumption in all the  
20          modeling that these obligations would continue into the  
21          Permit.

22          If these Permit terms are not acceptable to  
23          Petitioners, I suggest that the Board instead write,  
24          "Until further order of the Board, Permittee may not  
25          divert from the North Delta diversions during balanced

1 conditions."

2           Balanced conditions are when either Project is  
3 having to release water from storage during -- due to a  
4 requirement to meet Water Quality Plans.

5           So this -- this other Permit term would allow  
6 Petitioners to divert unstored flows with the North  
7 Delta diversions but require them to come back to the  
8 Board with a proposal for providing storage releases  
9 for the North Delta diversions.

10           And I think this -- this is just critically  
11 important.

12           I also . . . As I previously testified -- And  
13 if we could pull up Page 13 of my testimony --

14           (Exhibit displayed on screen.)

15           WITNESS DES JARDINS: -- on Line 16.

16           Is that -- Is this Page 13?

17           Yeah, Page 13 at Line 16.

18           (Exhibit displayed on screen.)

19           WITNESS DES JARDINS: Thank you.

20           Actually, scroll up to Line 11, please.

21           (Scrolling through document.)

22           WITNESS DES JARDINS: So, another issue is the  
23 Joint Point of Diversion.

24           And my professional judgment is also that,  
25 without -- The Water Board did a complete analysis of

1 the Joint Point of Diversion for Decision 1641, relied  
2 partly on sources of water for Old River.

3           Without an updated analysis, I believe it's  
4 really impossible for the Board to determine what the  
5 permit term in the -- enacted in Decision 1641 allowing  
6 diversions up to the full physical capacity of the  
7 facilities would mean, and what potential impacts would  
8 be on tidal levels.

9           For this reason, I recommend the Board include  
10 a Permit term that Joint Point of Diversion only  
11 applies to diversions in the South Delta.

12           And I'm recommending that the Board require  
13 DWR and Reclamation to submit their maximum proposed  
14 diversions of the North Delta diversions and maximum  
15 proposed simultaneous diversions in the North Delta and  
16 South Delta, which I don't think is clear. There's a  
17 lot of modeling assumptions, but they're not proposed  
18 as permit terms.

19           And without -- without this, I don't see how  
20 the Board can fully assess water rights compliance  
21 or -- or what permit terms are appropriate.

22           And then I'd like to get down to Number V  
23 point.

24           So there's been a lot of issues about  
25 uncertainty. And one of the key issues since before

1 this hearing started was whether Petitioners would  
2 develop a final initial Operating Plan for the Project.

3 Please go to Page 14.

4 (Exhibit displayed on screen.)

5 WITNESS DES JARDINS: And I go into some  
6 length. I'm not going to go into all of it.

7 But eight of DWR's witnesses testified that an  
8 initial Operations Plan had been adopted for the  
9 WaterFix Project, but the underlying documents are  
10 clear that initial operations have not been finally  
11 determined and are subject to change. And there's  
12 no -- been no analysis of any new diversion permits  
13 that would limit long-term operations.

14 In my opinion, the basic principles -- It's  
15 against the basic principles of computer simulation to  
16 rely on modeling scenarios which do not fully represent  
17 the boundaries of potential future operations for  
18 determination of impacts.

19 And to comply with requirements to set  
20 appropriate Delta Flow Criteria, in my opinion, the  
21 Water Board should define initial operations to protect  
22 fisheries as part of any order approving the change in  
23 point of diversion.

24 And I would assert that I believe changes to  
25 appropriate Delta Flow Criteria can be addressed -- and

1 new science could be addressed as part of the review of  
2 the Bay-Delta Water Quality Control Plan.

3           So . . . One of the -- One of the key issues  
4 I'd like to go is the -- Another issue is uncertainty  
5 in the fish screens. And I wanted to go into that in  
6 some detail because I'm also recommending some permit  
7 terms.

8           So . . . At the lower end of the proposed  
9 bypass flows for the Sac River in the Permit, which is  
10 5,000 cfs, I found that the closest downstream gage  
11 maintained by the U.S. Geological Survey showed  
12 significant tidal impacts in reach of the Sacramento  
13 River above the Delta Cross Channel.

14           If we could bring up Exhibit PCFFA-205,  
15 please.

16           (Exhibit displayed on screen.)

17           WITNESS DES JARDINS: So if you scroll out.

18           (Scrolling out.)

19           WITNESS DES JARDINS: So I just -- There's a  
20 summary of results here, and I went into the data that  
21 I pulled from there.

22           But I found that the analysis showed that flow  
23 velocities could be tidal -- could be negative at low  
24 flows, which would carry whatever's in the water  
25 upstream.

1           Marin Greenwood's testimony assumes that  
2 sweeping velocities will be above four-tenths of a foot  
3 per second in the North Delta diversions.

4           And just a simple analysis of available data  
5 shows that the assumption's clearly not met at the  
6 lower end of proposed by -- bypass flows, which I  
7 assume are planned to be implemented as a tidal  
8 average, a daily tidal average.

9           And I -- There's a concern that the  
10 field-based study just wasn't done. We submitted for  
11 the record the NMFS 2013 Work Plan for intake design  
12 criteria.

13           And if we could go to Page 11 of my testimony,  
14 DWR-203.

15           (Exhibit displayed on screen.)

16           WITNESS DES JARDINS: Sorry. PCFFA-203.

17           There's a whole list here. And the Flow  
18 Profiling Field Study and the Site Locations Lab Study  
19 and the Numeric Study were just essential to verify  
20 that the screens would have adequate sweeping  
21 velocities at the proposed lower bypass flows of 5,000  
22 cfs.

23           And without the studies, the assertions that  
24 the fish screens will be effective at the proposed  
25 locations and for the proposed minimum bypass flows is

1 just speculative.

2           In my professional judgment, the Board should  
3 not approve the Change Petition without studies  
4 validating the Proposed Intake design, including  
5 locations and minimum bypass flows.

6           If the Board does approve the Petition without  
7 these studies requiring higher minimum bypass flows in  
8 the Permit, which D -- PCFFA-205 shows to be greater  
9 than 7,000 cfs, would help reduce the risk of severe  
10 adverse consequences.

11           And I also suggest that operating the North  
12 Delta diversions only with a positive sweeping velocity  
13 of at least four-tenths of a foot per second, as  
14 assumed in Mr. Greenwood's testimony, would also reduce  
15 the level of uncertainty about the effects of the  
16 screen.

17           And I'm suggesting that if the Board does  
18 approve this Permit for the North Delta diversions  
19 based on Mr. Greenwood's testimony, and without the  
20 needed field studies of the intakes, the Board should  
21 make the sweeping velocity a con -- a requirement in  
22 the Permits. And there's a precedent in the standards  
23 for Delta fish-protected facilities in Table 2 of  
24 Decision 1485.

25           Another thing that I noticed was, when I went

1 to get data, is that . . . the -- that the California  
2 Data Exchange Center in multiple monitoring locations  
3 is now no longer reporting tidally filtered flow data.

4           And this is -- It's critically important to  
5 have both 15-minute data for flow, stage and velocity,  
6 and also tidally filtered flow data, and just to assess  
7 what's going on -- what's happening with the river and  
8 for Biologists and independent researchers to be able  
9 to look at correlations with any trends in species  
10 populations.

11           So, I'm recommending as a condition of the  
12 Permit, the Board needs to add the locations of the  
13 three intakes as required monitoring locations, require  
14 15-minute data for flow, stage and velocity be reported  
15 at these new monitoring locations and, in fact, at all  
16 monitoring locations, as well as tidally filtered flow  
17 data.

18           Then the other thing is, the California Data  
19 Exchange Center -- and I did check this -- only reports  
20 daily average diversions at the Banks Pumping Plant.

21           And because there are proposed simultaneous  
22 diversions possibly in the North Delta and South Delta,  
23 it's really unclear how this is going to affect water  
24 levels tidally and, for this reason, I'm also  
25 recommending that the Board require reporting of



1 15-minute average diversions at Clifton Court Forebay  
2 as well as hourly average diversions at Banks and  
3 Pumping Plant -- Tracy Pumping Plants so that the full  
4 effects of the combined diversions at these new  
5 structures can be assessed.

6 Finally, I'd like to go to --

7 CO-HEARING OFFICER DODUC: Let's do a time  
8 check here. I know Mr. Stokely still needs to  
9 present --

10 WITNESS DES JARDINS: Yeah.

11 CO-HEARING OFFICER DODUC: -- his testimony  
12 and there's only seven minutes.

13 WITNESS DES JARDINS: Okay.

14 MS. MESERVE: He can -- He only needs about  
15 four or five minutes so, if she can briefly conclude,  
16 that should be fine.

17 WITNESS DES JARDINS: There are so much --

18 CO-HEARING OFFICER DODUC: Thank you so much,  
19 Miss Meserve.

20 WITNESS DES JARDINS: Okay. So Page 5 of my  
21 testimony -- I also do have a background -- Let's go to  
22 Page 6 real quick.

23 (Exhibit displayed on screen.)

24 WITNESS DES JARDINS: But I do have a  
25 background in dynamic systems theory. And, in fact,

1 that was the area of my dissertation research.

2           And I would note that, to the extent --  
3 Mr. Baxter testified to this in Part 1.

4           To the extent that there's actually been a  
5 regime shift to a new basin of attraction for the Delta  
6 ecosystem, it's my opinion based on that background  
7 that it will require prolonged, sustained changes in  
8 these abiotic drivers to allow the system to return to  
9 a regime that's more -- that's more conducive to stable  
10 flourishing populations of endangered fishes.

11           And I think that . . . there is a danger with  
12 adaptive management that small perturbations around the  
13 existing equilibrium state, which is well into the  
14 invasives, according to this hypothesis, would be  
15 unlikely to shift species populations. It could give a  
16 false conclusion that changes to major abiotic drivers  
17 such as flow will not affect the ecosystem.

18           And, also, analyses of perturbations of the  
19 system in the existing regime may not show the system  
20 response to major changes in abiotic drivers because  
21 it's in this regime where there's been a major shift.

22           You have a change in the bathmic population,  
23 you have a change in the species composition, you have  
24 a change in the zooplankton and the phytoplankton. All  
25 those take time to change.

1           So, based on this, I think it's a huge  
2 experiment and it's a bad idea without these flows --  
3 this system being restored to try to do an experiment  
4 in this strata with a major new diversion.

5           But if the Board does enact this, I believe  
6 that appropriate Delta Flow Criteria should begin long  
7 before the new diversions to try to -- with clearly  
8 defined numeric targets for species populations and  
9 survival of migrating Salmonids.

10           Thank you.

11           MS. MESERVE: Thank you, Miss Des Jardins.

12           And now let's turn to Mr. Stokely.

13           Is LAND-290-Revised a true and correct copy of  
14 your testimony?

15           WITNESS STOKELY: Yes.

16           MS. MESERVE: And is -- And I have reviewed  
17 LAND-291, and it does look like those Slides 3, 11 and  
18 14 are the same as what was stricken from -- by the  
19 Board's ruling from LAND-290. So I would advise to  
20 perhaps skip over those 3, 11 and 14 as pointed out by  
21 Mr. O'Hanlon.

22           But, otherwise, that's a true and correct copy  
23 of your PowerPoint at 291?

24           WITNESS STOKELY: It is.

25           MS. MESERVE: And then are Exhibits LAND-292

1 to -304 and other exhibits cited in the record copies  
2 of what you relied upon in preparing your testimony?

3 WITNESS STOKELY: Yes.

4 MS. MESERVE: Okay. If you could go ahead and  
5 just briefly summarize your testimony for the Hearing  
6 Officers today.

7 WITNESS STOKELY: Sure. I'm Tom Stokely.

8 Could we bring up LAND-291, please. Let's go  
9 to Slide 4.

10 (Exhibit displayed on screen.)

11 WITNESS STOKELY: This is a Feasibility Report  
12 for the San Luis Unit Service Area, prepared in the  
13 '50s. It shows the existing -- or the feasibility area  
14 for Westlands.

15 Let's go to Slide 5.

16 (Exhibit displayed on screen.)

17 WITNESS STOKELY: This is from the Report of  
18 the San Luis Unit Task Force. It talks about Westlands  
19 Service Area as 496,000 areas -- excuse me -- San Luis  
20 Unit at 496,000 acres, Westlands at 400,000 acres. And  
21 so the 600,000-acre figure cited by Mr. Gutierrez in  
22 his testimony is not consistent with Congressional  
23 authorization for the San Luis Unit.

24 Slide 8, please -- Or -- excuse me -- Slide 6.

25 (Exhibit displayed on screen.)

1           WITNESS STOKELY: Westlands' current acreage  
2 is shown in blue on the right there. This is all of  
3 the San Luis/Delta-Mendota Water Authority Districts.

4           Next slide, please.

5           (Exhibit displayed on screen.)

6           WITNESS STOKELY: What we did is, we took a  
7 map of Westlands' current acreage and overlaid it with  
8 the San Luis Task -- Feasibility Report map. And you  
9 can see the areas in blue are expanded beyond the  
10 Congressional authority.

11          Line -- Next slide, please.

12          MS. MESERVE: Mr. Stokely, just to clarify:

13          When you say the areas in blue, are you  
14 talking about that light blue color above the green?

15          WITNESS STOKELY: Yes. Above and below the  
16 green. Thank you.

17          Slide 8, please.

18          (Exhibit displayed on screen.)

19          WITNESS STOKELY: This is from the House and  
20 Senate Committee Reports for the Trinity River Act of  
21 1955. And it's stated in there that, of the 1.19  
22 million acre-feet available from the Trinity River,  
23 that 525,000 acre-feet would be available for lands on  
24 the westside of the San Joaquin Valley, which I  
25 understand to be the San Luis Unit.

1 Next slide, please.

2 (Exhibit displayed on screen.)

3 WITNESS STOKELY: Mr. Gutierrez talked about  
4 600,000 acres in Westlands. But in 2017, there were  
5 146,275 acres fallowed. And, according to the U.S.  
6 Fish and Wildlife Service, they can't determine what  
7 the permanent fallowing of acreage is within Westlands  
8 but certainly that was a very high year.

9 Slide 10, please.

10 (Exhibit displayed on screen.)

11 WITNESS STOKELY: This is a map of Westlands  
12 solar developments.

13 As you can see, there's quite a bit of land  
14 within the District that is either -- thank you for  
15 blowing it up -- that's either under solar development  
16 or planned for solar development.

17 I can't quite tell which ones are the -- the  
18 lands that are currently developed, but you can see  
19 significant acreage within Westlands is either  
20 currently under solar development or is planned for in  
21 the future, again, showing that a significant portion  
22 of their land is not under irrigation.

23 Next slide, please.

24 (Exhibit displayed on screen.)

25 WITNESS STOKELY: We were going to skip this

1 one.

2 (Exhibit displayed on screen.)

3 WITNESS STOKELY: I wanted to point out in --  
4 that Westlands also -- Mr. Gutierrez talked about the  
5 Barcellos judgment and the additional water they get  
6 from the Barcellos judgment, but the -- the judgment  
7 expired in 2007.

8 Next slide, please.

9 (Exhibit displayed on screen.)

10 WITNESS STOKELY: Also, the Barcellos judgment  
11 does not alter Federal law, according to the judgment  
12 itself.

13 Skip the next slide, please.

14 (Exhibit displayed on screen.)

15 WITNESS STOKELY: Mr. Gutierrez also, in my  
16 opinion, incorrectly asserts that area-of-origin  
17 principles have not been applied to by Reclamation,  
18 State Water Board, the courts and CVP contracts. But I  
19 will note that this State Water Board 15, a permit for  
20 the Trinity River, contains specific condition for  
21 instream flows, 50,000 acre-feet for Humboldt County  
22 which is also a contract that Reclamation has, which we  
23 introduced as an exhibit, and it's also subject to  
24 Section 10505 of the Water Code, which is the  
25 area-of-origin statutes.

1 Next slide, please.

2 (Exhibit displayed on screen.)

3 WITNESS STOKELY: This is an excerpt from the  
4 1954 Trinity Journal where the Manager of Westlands  
5 Water District specifically said (reading):

6 "As desperate as our needs are in  
7 the West San Joaquin Valley, we do not  
8 want to take a drop of water from the  
9 Trinity River until all the water that  
10 can be beneficially used in the Trinity  
11 and Sacramento areas is definitely  
12 reserved for them."

13 And then, finally, Slide 17.

14 (Exhibit displayed on screen.)

15 WITNESS STOKELY: As an example of how  
16 Reclamation does favor the area of origin, this is an  
17 excerpt from the Lower Klamath Record of Decision,  
18 which was PCFFA-106. And it specifically says that  
19 Reclamation will release 50,000 acre-feet for these  
20 supplemental flows to prevent a fish kill on the Lower  
21 Klamath River.

22 That concludes my testimony.

23 Thank you.

24 CO-HEARING OFFICER DODUC: Thank you.

25 With that, we'll take a -- with apologies to



1 the court reporter -- a late-morning break. We will  
2 return at 11:20.

3 I'll ask DWR to go ahead and set up for your  
4 cross-examination.

5 And, again, a reminder: We'll take our lunch  
6 break around 12:30 and we'll resume at 2 o'clock.

7 (Recess taken at 11:05 a.m.)

8 (Proceedings resumed at 11:20 a.m.):

9 CO-HEARING OFFICER DODUC: It is 11:20.

10 Miss Ansley.

11 MS. ANSLEY: Yes.

12 Mr. O'Hanlon and I have spoken, and I've  
13 spoken with the attorneys here, and he has questions  
14 for Mr. Stokely only, which are, you know, succinct and  
15 discrete, and we do not have questions for Mr. Stokely.

16 So, with your permission, we would like to let  
17 Mr. O'Hanlon go first. And we do not know if other  
18 parties have questions for Mr. Stokely, but certainly  
19 we don't.

20 CO-HEARING OFFICER DODUC: All right. Why  
21 don't we go, as you suggested, to Mr. O'Hanlon for his  
22 cross, after which I will ask the other parties if they  
23 has -- if they have cross for Mr. Stokely. And if not,  
24 and there's no redirect, recross, then we will all envy  
25 you, Mr. Stokely.

1 WITNESS STOKELY: Thank you.

2 CO-HEARING OFFICER DODUC: Mr. O'Hanlon.

3 MR. O'HANLON: Thank you.

4 CO-HEARING OFFICER DODUC: I believe you  
5 requested 30 minutes?

6 MR. O'HANLON: Yes.

7 And my questions will be only for Mr. Stokely,  
8 and they'll relate to his opinion that not all of the  
9 area within Westlands is authorized under Federal law  
10 to receive CVP water.

11 CROSS-EXAMINATION BY

12 MR. O'HANLON: Good after -- Or good morning,  
13 Mr. Stokely.

14 WITNESS STOKELY: Good morning, Mr. O'Hanlon.

15 MR. O'HANLON: Have you ever worked for the  
16 Bureau of Reclamation?

17 WITNESS STOKELY: No, but I have received  
18 grants and Cooperative Agreements through them in the  
19 past.

20 MR. O'HANLON: Okay. Have you ever worked for  
21 a Central Valley Project Contractor?

22 WITNESS STOKELY: No.

23 MR. O'HANLON: And you're not an attorney;  
24 correct?

25 WITNESS STOKELY: Correct.

1 MR. O'HANLON: All right. You've testified  
2 that, in your opinion, under Federal law, not all of  
3 the lands within Westlands are eligible to receive CVP  
4 water; correct?

5 WITNESS STOKELY: I testified that not all the  
6 lands that are being irrigated within Westlands are  
7 covered by the Federal authorization for the San Luis  
8 Unit.

9 MR. O'HANLON: Well, does that mean your --  
10 is -- mean that your opinion's they're not authorized  
11 to receive CVP water?

12 WITNESS STOKELY: No. They're just not  
13 authorized by Federal law.

14 MR. O'HANLON: Okay. Now, Mr. Gutierrez  
15 testified that Westlands encompasses a total of some  
16 600,000 acres; correct?

17 WITNESS STOKELY: Yes.

18 MR. O'HANLON: But, in your opinion, of that  
19 total of 600,000, approximately 400,000 acres is  
20 authorized under Federal law to receive CVP water;  
21 correct?

22 WITNESS STOKELY: Yes.

23 MR. O'HANLON: And do you agree that the  
24 availability of water supply for irrigation of  
25 400,000 acres of land is a matter affecting the public

1 interest?

2 WITNESS STOKELY: Yes.

3 MR. O'HANLON: Mr. Hunt, could I have  
4 Mr. Stokely's written testimony, which is  
5 LAND-290-Revised.

6 (Exhibit displayed on screen.)

7 MR. O'HANLON: And I would like to refer to  
8 Page 4 of his testimony.

9 (Exhibit displayed on screen.)

10 MR. O'HANLON: Thank you.

11 So, Mr. Stokely, I want to ask you some  
12 questions about your testimony on Page 4, beginning at  
13 Line 8 through Line 18.

14 Now, in the sentence beginning at Line 8, you  
15 reference a Feasibility Report prepared by Reclamation;  
16 correct?

17 WITNESS STOKELY: Yes.

18 MR. O'HANLON: All right. And the Feasibility  
19 Report was prepared in 1955 and sent to Congress in  
20 1956; correct?

21 WITNESS STOKELY: Yes.

22 MR. O'HANLON: And the Federal legislation  
23 authorizing the San Luis Unit was passed by Congress a  
24 few years later, in 1960; correct?

25 WITNESS STOKELY: Yes.

1 MR. O'HANLON: And you have hadmarked the  
2 entire -- The entire Feasibility Report has been marked  
3 as LAND Exhibit 302; correct?

4 WITNESS STOKELY: Let me double-check.

5 (Pause in proceedings.)

6 CO-HEARING OFFICER DODUC: If it helps, that's  
7 what it says on Line 8 of your testimony.

8 WITNESS STOKELY: Okay. Sure. Thank you.

9 MR. O'HANLON: All right. And as you  
10 described in your summary of your direct testimony, you  
11 took a map from that report.

12 WITNESS STOKELY: Yes.

13 MR. O'HANLON: And by laying that map from the  
14 Feasibility Report over a map of the current boundaries  
15 of Westlands, you identify some areas of Westlands that  
16 are outside the boundaries of the service area  
17 originally identified in the Feasibility Report;  
18 correct?

19 WITNESS STOKELY: Yes.

20 MR. O'HANLON: And it's your contention that  
21 the Feasibility Report boundaries define the area that  
22 Congress has authorized to receive CVP water; is that  
23 right?

24 WITNESS STOKELY: Yes.

25 MR. O'HANLON: In preparing your testimony,

1 did you research any of the case law that addresses  
2 whether a Feasibility Report defines or limits the  
3 scope of Federal authorization for a Project?

4 WITNESS STOKELY: No.

5 MR. O'HANLON: In preparing your testimony,  
6 did you research the purpose of a Feasibility Report  
7 for a water Project?

8 WITNESS STOKELY: No.

9 MR. O'HANLON: When the Secretary of the  
10 Interior transmitted the Feasibility Report to Congress  
11 in 1956, he described it as an interim report; correct?

12 WITNESS STOKELY: I'm not sure.

13 MR. O'HANLON: I -- We don't need to pull up  
14 the exhibit but, for the record, that's at .pdf Page 19  
15 of LAND-302.

16 You don't need to refer to it.

17 WITNESS STOKELY: Thank you.

18 MR. O'HANLON: Let's look back at your written  
19 testimony.

20 At Lines 10 to 13, you refer to -- to another  
21 exhibit, LAND-296; correct?

22 WITNESS STOKELY: Yes.

23 MR. O'HANLON: And that's a page taken from  
24 a -- from the San Luis Drainage Task Force Report;  
25 correct?

1 WITNESS STOKELY: Yes, Page 51.

2 MR. O'HANLON: And that was a report prepared  
3 at the direction of Congress?

4 WITNESS STOKELY: I don't recall what the --  
5 what the driving force was behind the San Luis Task  
6 Force Report.

7 MR. O'HANLON: All right. But, in any event,  
8 you reviewed that Task Force Report and you've  
9 identified some of the history related to the San Luis  
10 Unit and Westlands that is recorded in that report;  
11 correct?

12 WITNESS STOKELY: Yes.

13 MR. O'HANLON: And, as you indicated, the  
14 testimony at Lines 10 to 13 is based on an excerpt from  
15 Page 51 of the Task Force Report; correct?

16 WITNESS STOKELY: Yes.

17 MR. O'HANLON: All right. Before we take a  
18 look at that page from the Task Force Report, I'd like  
19 you to look at another page from the same report. It's  
20 actually the preceding page, Page 50, which I have  
21 identified as Westlands Exhibit Number 23.

22 Mr. Hunt, could you please pull up Exhibit 23?

23 (Exhibit displayed on screen.)

24 MR. O'HANLON: All right. This has been  
25 identified for the purpose of this hearing as WWD-23.

1           And you'll see the first page is the same  
2 cover page of the same report that you've identified in  
3 your exhibit.

4           WITNESS STOKELY: Yes.

5           MR. O'HANLON: All right. Mr. Hunt, could you  
6 for -- please scroll to the next page?

7           (Scrolling through document.)

8           MR. O'HANLON: All right. Mr. Stokely, I'd  
9 like to refer you to the right-hand column of this page  
10 from the Task Force Report that begins (reading):

11                   "When Congress was in the final  
12 stages of authorizing the San Luis Unit  
13 in 1960 . . ."

14           Do you see that.

15           WITNESS STOKELY: Yes.

16           MR. O'HANLON: And I'd like you to read  
17 silently to yourself from there through to the bottom  
18 of the page.

19           And just for background, this -- this -- this  
20 is describing a memorandum from 1960 prepared by the  
21 Bureau of Reclamation.

22                   (Pause in proceedings.)

23           MS. MESERVE: I think we're going to need to  
24 scroll down a little bit in order for the witness to  
25 see the entire . . .



1 (Scrolling through document.)

2 WITNESS STOKELY: Okay. I've read it.

3 MR. O'HANLON: Did you read this passage from  
4 Page 50 of the Task Force Report when you were  
5 preparing your rebuttal testimony?

6 WITNESS STOKELY: I may have.

7 MR. O'HANLON: You don't recall whether you  
8 did or not?

9 WITNESS STOKELY: No.

10 MR. O'HANLON: When you prepared your rebuttal  
11 testimony, did you understand that, at the time the  
12 San Luis act was adopted in 1960, Reclamation did not  
13 believe that the map in the Feasibility Report defined  
14 the lands on which CVP water may be used?

15 MS. MESERVE: Objection: Assumes facts not in  
16 evidence.

17 CO-HEARING OFFICER DODUC: Mr. O'Hanlon.

18 MR. O'HANLON: I'm just asking for his  
19 understanding when he prepared his -- his testimony.

20 CO-HEARING OFFICER DODUC: It goes to the  
21 basis of his testimony.

22 Overruled, Miss Meserve.

23 WITNESS STOKELY: Could you repeat the  
24 question?

25 MR. O'HANLON: Sure.

1           When you prepared your rebuttal testimony, did  
2 you understand that at the time the San Luis Act was  
3 adopted in 1960, Reclamation did not believe the map in  
4 the Feasibility Report defined the lands under which  
5 CVP water may be used?

6           WITNESS STOKELY: I did not fully understand  
7 this section when I prepared my testimony.

8           MR. O'HANLON: All right. Do you understand  
9 Reclamation's position today to be that the map in the  
10 1956 Feasibility Report does not define the boundaries  
11 of the areas eligible for use of CVP water within  
12 Westlands?

13           MS. MESERVE: Objection: Assumes facts not in  
14 evidence.

15           The questioner is characterizing this report,  
16 and then putting his own spin on what -- what it means,  
17 and then asking the witness to agree to it.

18           CO-HEARING OFFICER DODUC: Sustained.

19           It's one thing to ask based on the document  
20 you just showed him, but now you've made an assertion  
21 about present understanding, so I'm sustaining the  
22 objection.

23           MR. O'HANLON: My intent -- I'll rephrase my  
24 question.

25           My -- My intent is this: Do you know what

1 Reclamation's position is today regarding whether the  
2 Feasibility Report defines the area that water could be  
3 used within Westlands?

4 WITNESS STOKELY: It's my understanding that  
5 Reclamation delivers water within the entire boundary  
6 of Westlands Water District.

7 MR. O'HANLON: Okay. So, we were just looking  
8 at Page 50 from the Task Force Report. I would like to  
9 now look at Page 51, which is LAND-296.

10 Mr. Hunt, could I have LAND-296, please.

11 (Exhibit displayed on screen.)

12 MR. O'HANLON: And could I have the second  
13 page, please.

14 (Scrolling through document.)

15 MR. O'HANLON: Thank you.

16 So, Mr. Stokely, in -- in your written  
17 testimony and your PowerPoint presentation, you refer  
18 to the text that's up -- in the upper left-hand part of  
19 the page in the first column -- correct? -- that lists  
20 some numbers?

21 WITNESS STOKELY: Yes.

22 MR. O'HANLON: And these numbers give a --  
23 quotes from other memoranda prepared by Reclamation in  
24 1960 and 1959 describing a breakdown of areas within  
25 and outside of the San Luis service area as described

1 in the Feasibility Report; correct?

2 WITNESS STOKELY: Yes.

3 MR. O'HANLON: Did you review the rest of the  
4 text on this page?

5 WITNESS STOKELY: Yes.

6 MR. O'HANLON: And doesn't some of the other  
7 text on this page describe how the area that was to be  
8 served by the San Luis Unit later grew in size?

9 WITNESS STOKELY: Yes.

10 MS. MESERVE: Objection: Vague.

11 Which text are you referring to?

12 CO-HEARING OFFICER DODUC: Mr. O'Hanlon.

13 MR. O'HANLON: I'm sorry. I didn't -- I  
14 didn't hear the objection.

15 MS. MESERVE: Vague.

16 CO-HEARING OFFICER DODUC: She'd like to be  
17 referred to a specific text on this page.

18 MR. O'HANLON: Sure.

19 Why don't we look at the very next paragraph.

20 Mr. Stokely, can you read that paragraph to  
21 yourself, please.

22 WITNESS STOKELY: Which one? The one that  
23 starts with "The 116,000 acres"?

24 MR. O'HANLON: Yes.

25 WITNESS STOKELY: Okay.

1 (Pause in proceedings.)

2 WITNESS STOKELY: Okay. I've read it.

3 MR. O'HANLON: All right. And doesn't that  
4 paragraph indicate that an additional 116,000 acres  
5 within Westlands was later found by Reclamation to be  
6 irrigable and, hence, eligible for use of CVP water?

7 WITNESS STOKELY: Yes, that's what the  
8 document says.

9 MR. O'HANLON: All right. I'd like to refer  
10 you to the column on the right-hand side of the page,  
11 the paragraph that begins (reading):

12 "The merger of Westlands Water  
13 District and Westplains Water Service  
14 District in June 1965 . . ."

15 Do you see that?

16 WITNESS STOKELY: Yes.

17 MR. O'HANLON: And were you aware that, in  
18 1965, there was a merger of two Water Districts,  
19 Westlands and Westplains?

20 WITNESS STOKELY: Yes.

21 MR. O'HANLON: And the text goes on to  
22 explain, doesn't it, that the total acreage within  
23 Westlands then went from approximately 400,000 acres to  
24 about 600,000 acres; correct?

25 WITNESS STOKELY: That's correct, with 549,443

1 irrigable acres.

2 MR. O'HANLON: Thank you.

3 All right. Now, that merger occurred as a  
4 result of a statute; correct?

5 WITNESS STOKELY: Yes.

6 MR. O'HANLON: And in that statute, the  
7 California legislature declared that maximizing the  
8 area that can be served by the San Luis Unit is in the  
9 public interest; correct?

10 MS. MESERVE: Objection: Calls for a legal  
11 conclusion; in addition, it's vague what he's referring  
12 to.

13 CO-HEARING OFFICER DODUC: Mr. O'Hanlon.

14 MR. O'HANLON: I think maybe we could address  
15 this by looking at Exhibit Westlands 24.

16 (Exhibit displayed on screen.)

17 MR. O'HANLON: And Westlands Exhibit 24 is the  
18 text of Water Code Section 37801.

19 Mr. Stokely, please read that to yourself.

20 (Pause in proceedings.)

21 WITNESS STOKELY: I've read it.

22 MR. O'HANLON: All right. And in Water Code  
23 Section 37801, doesn't the California legislature  
24 declare that maximizing the area that can be served by  
25 the San Luis Unit is in the public interest?

1 WITNESS STOKELY: Yes.

2 MR. O'HANLON: And did you read this section  
3 prior to submitting your written rebuttal testimony?

4 WITNESS STOKELY: I'm not sure. I was aware  
5 of the Act.

6 MR. O'HANLON: All right. Let's -- Let's move  
7 forward a bit in time to 1986 and the Barcellos  
8 judgment.

9 Mr. Hunt, could you please bring up Exhibit  
10 LAND-300.

11 (Exhibit displayed on screen.)

12 MR. O'HANLON: And, Mr. Stokely, what's been  
13 marked as Exhibit LAND-300 is a copy of the judgment  
14 entered in the Barcellos case; correct?

15 WITNESS STOKELY: Portions of the Barcellos  
16 judgment. I have in my file just portions. I don't  
17 know if the whole thing was . . . was an exhibit.

18 MR. O'HANLON: Okay. The Barcellos judgment  
19 addressed -- Among other issues, the Barcellos judgment  
20 addressed the issue of whether all the lands within  
21 Westlands are eligible to receive CVP water; correct?

22 WITNESS STOKELY: Yes.

23 MR. O'HANLON: And -- And it provides in  
24 Section 10 that all of the lands within Westlands are  
25 within the authorized service area of the Central

1 Valley Project; correct?

2 MS. MESERVE: Objection: Vague.

3 Can you please show the witness where you're  
4 talking about?

5 WITNESS STOKELY: Could I see Section 10,  
6 please.

7 MR. O'HANLON: Sure. Mr. Hunt, could we  
8 please have .pdf Page 36 in this document.

9 (Exhibit displayed on screen.)

10 MR. O'HANLON: All right. Mr. Stokely, on the  
11 screen, you can see -- It's Paragraph 10, 10.1, 10.2  
12 and the beginning of 10.3 in the Barcellos judgment.  
13 And, if necessary, to look at the definitions of  
14 Area 1B and 1A, we can do that.

15 But as recited here, doesn't this indicate  
16 that Area 1B, 1A, and 2B and 2A are within the  
17 authorized service area of the Central Valley Project?

18 WITNESS STOKELY: Well, it says they're  
19 entitled to the same water supply and the same rights  
20 pertaining to area 2A or 1A.

21 It doesn't say they're authorized. It just  
22 says that they're entitled to the same water supply.

23 MR. O'HANLON: Well, looking at  
24 Paragraph 10.1, it says (reading):

25 "Area 1B, in addition to Area 1A, is



1 within the authorized service area of the  
2 Central Valley Project . . ."

3 Correct?

4 WITNESS STOKELY: Okay. Yes, you're correct.

5 MR. O'HANLON: And just to be complete on  
6 this, perhaps we can refer, Mr. Hunt, back to .pdf  
7 Pages 6.

8 (Exhibit displayed on screen.)

9 MR. O'HANLON: And we can look at the  
10 definitions of those areas.

11 All right. So, if you could scroll up a  
12 little bit, Mr. Hunt, please.

13 (Scrolling through document.)

14 MR. O'HANLON: Thank you.

15 So, this defines Paragraph 1.10 on this page.  
16 Page 6 of the judgment defines Area 1A; correct?

17 WITNESS STOKELY: Yes.

18 MR. O'HANLON: And it refers to Area A1 as the  
19 area identified in the Feasibility Report; correct?

20 WITNESS STOKELY: Yes.

21 MR. O'HANLON: And then Area 1B is the area of  
22 the original Westlands District that was outside of the  
23 proposed initial service area; correct?

24 WITNESS STOKELY: Yes.

25 MR. O'HANLON: All right. And let's look

1 at --

2 If you could scroll up a little bit more,  
3 Mr. Hunt, please.

4 (Scrolling through document.)

5 MR. O'HANLON: Thank you.

6 Paragraph 1.12, Area 2A is the area of the  
7 former Westplains District within the proposed initial  
8 service area; correct?

9 WITNESS STOKELY: Correct.

10 MR. O'HANLON: And looking at  
11 Paragraph 1.13 -- I'm sorry, Paragraph -- That's the  
12 definition of Area 2B. That's the area of the former  
13 Westplains District that was outside of the proposed  
14 initial service area; correct?

15 WITNESS STOKELY: Yes.

16 MR. O'HANLON: All right. Now, as you have  
17 stated in your written testimony, and as you repeated  
18 in your summary today, Paragraph 2 of the Barcellos  
19 judgment says the term of the judgment ended  
20 December 31, 2007; correct?

21 WITNESS STOKELY: Yes.

22 MR. O'HANLON: Can you identify any change in  
23 the law since the Court entered this judgment in 1986  
24 that would make the legal conclusions in Paragraph 10  
25 incorrect today?

1 MS. MESERVE: Objection: Calls for a legal  
2 conclusion.

3 CO-HEARING OFFICER DODUC: Mr. Stokely  
4 testified extensively on this document, so I want to  
5 understand what his understanding is with respect to  
6 Mr. O'Hanlon's question.

7 So overruled.

8 WITNESS STOKELY: Could you repeat the  
9 question, please.

10 MR. O'HANLON: Certainly.

11 Can you identify any change in the law since  
12 the Court entered the judgment in 1986 that would make  
13 the legal conclusions in Paragraph 10 incorrect today?

14 WITNESS STOKELY: No changes in the law since  
15 then, but Paragraph 23 says it is (reading):

16 "Neither this Judgment nor the  
17 Stipulation for Compromised Settlement is  
18 a contract or an amendment to a contract  
19 with the United States as described in  
20 Section 203(a) of the 1982 Act."

21 So the judgment itself says it's not -- it's  
22 not changing Federal law.

23 MR. O'HANLON: That's how you interpret  
24 Paragraph 23?

25 WITNESS STOKELY: Yes.

1 MR. O'HANLON: All right. I'd like to switch  
2 topics now away from the Barcellos judgment and ask you  
3 a little bit about place of use.

4 You participated in the hearings before the  
5 State Water Board that resulted in Water Rights  
6 Decision 1641; correct?

7 WITNESS STOKELY: Yes.

8 MR. O'HANLON: And one of the issues in that  
9 hearing was a change to the authorized place of use in  
10 the Water Permits -- Water Right Permits for the CVP;  
11 correct?

12 WITNESS STOKELY: Yes.

13 MS. MESERVE: Objection: Outside the scope of  
14 his rebuttal testimony.

15 CO-HEARING OFFICER DODUC: Mr. O'Hanlon, make  
16 the connection, please.

17 MR. O'HANLON: I'm -- I'm asking these  
18 questions because the gist of the testimony is that  
19 it's not within the authorized -- that the water's  
20 being used in areas it shouldn't be.

21 And I'm going to ask him just a few questions,  
22 but whether this issue came up in the D-1641 hearings,  
23 which presumably the same issue would have been raised  
24 there.

25 MS. MESERVE: There's no reference to D-1641

1 after the Hearing Officers strike -- struck out the one  
2 reference to it that referred to the Water Board cases  
3 from 2005.

4 CO-HEARING OFFICER DODUC: Correct.

5 So, Mr. O'Hanlon, again, what is the  
6 connection to his remaining rebuttal testimony?

7 MR. O'HANLON: You know, it -- We don't need  
8 to go into this. That's fine.

9 CO-HEARING OFFICER DODUC: Then we will not go  
10 there.

11 MR. O'HANLON: D-1641 speaks for itself, but  
12 we can refer to it in our briefing.

13 Mr. Stokely, I'd like to ask you a bit about  
14 the Westlands contract.

15 WITNESS STOKELY: Sure.

16 MR. O'HANLON: Mr. Hunt, could I have Exhibit  
17 LAND-295, please.

18 (Exhibit displayed on screen.)

19 MR. O'HANLON: Mr. Stokely, LAND-295 is a  
20 contract between Westlands and the United States for  
21 delivery of CVP water; correct?

22 WITNESS STOKELY: Yes.

23 MR. O'HANLON: And Mr. Hunt, could you please  
24 scroll to the third .pdf page.

25 (Exhibit displayed on screen.)

1 MR. O'HANLON: Okay. And the handwriting on  
2 this page indicates this contract was entered on the  
3 27th day of December in 2007; correct?

4 WITNESS STOKELY: Yes.

5 MR. O'HANLON: And this was the first contract  
6 between -- that Westlands entered with the United  
7 States after the Barcellos judgment expired; correct?

8 WITNESS STOKELY: Yes. This was the first  
9 Interim Contract Renewal pursuant to CVPIA.

10 MR. O'HANLON: And, as you indicated, this is  
11 an Interim Contract for the term that ends -- ended --  
12 excuse me -- February 28th, 2010; correct?

13 WITNESS STOKELY: I don't see the date, but  
14 I'll take your word for it.

15 MR. O'HANLON: All right. That's fine. It's  
16 not critical.

17 As you -- And as you've already testified,  
18 Westlands has entered a series of Interim Contracts  
19 since this initial contract ended; correct?

20 WITNESS STOKELY: Yes.

21 MR. O'HANLON: And each of those Interim  
22 Contracts has extended the terms of the contracts shown  
23 here for another two years; correct?

24 WITNESS STOKELY: Yes.

25 MR. O'HANLON: Mr. Hunt, could you please turn

1 to .pdf Page 9.

2 (Exhibit displayed on screen.)

3 MR. O'HANLON: And scroll down a little bit  
4 more, please.

5 (Scrolling through document.)

6 MR. O'HANLON: Thank you.

7 Mr. Stokely, I want to refer you to  
8 Paragraph 1(f) which is the definition of Contractor's  
9 Service Area.

10 Do you see that?

11 WITNESS STOKELY: Yes.

12 MR. O'HANLON: And in this contract,  
13 Contractor's Service Area is defined as the area to  
14 which Westlands may deliver Project water; correct?

15 WITNESS STOKELY: Yes.

16 MR. O'HANLON: And it refers to Exhibit A as  
17 identifying that area; correct?

18 WITNESS STOKELY: Yes.

19 MR. O'HANLON: Mr. Hunt, could we -- could we  
20 please have .pdf Page 68.

21 (Exhibit displayed on screen.)

22 MR. O'HANLON: Okay. And this is Exhibit A to  
23 the contract.

24 And this is a map showing the service area  
25 that includes essentially all the lands within the

1 boundaries of Westlands; correct?

2 WITNESS STOKELY: As I understand it, yes.

3 (Pause in proceedings.)

4 MR. O'HANLON: Mr. Stokely, it's -- Based on  
5 what we've been discussing, it's apparent that  
6 Reclamation does not agree with your opinion that only  
7 400,000 acres within Westlands are eligible to receive  
8 CVP water; correct?

9 MS. MESERVE: Objection: Argumentative.

10 CO-HEARING OFFICER DODUC: Sustained.

11 Rephrase, Mr. O'Hanlon.

12 MR. O'HANLON: Are you aware of any  
13 announcement or notice by Reclamation that it's  
14 reconsidering what lands within Westlands may receive  
15 CVP water?

16 WITNESS STOKELY: Not at this time.

17 But when they were looking at alternatives for  
18 drainage, they were looking at retiring 1 to  
19 300,000 acres within Westlands.

20 MR. O'HANLON: All right. Are you -- Are you  
21 aware of any pending legal proceedings brought by  
22 anyone that -- to challenge Reclamation's position that  
23 it's authorized to deliver CVP water in areas outside  
24 the areas identified in the Feasibility Report?

25 WITNESS STOKELY: I'm not aware of that.



1 MR. O'HANLON: Would you agree that, for the  
2 foreseeable future, at least, deliveries of CVP water  
3 within Westlands won't be limited to the lands  
4 identified in the Feasibility Report?

5 WITNESS STOKELY: Yes.

6 MS. MESERVE: Objection: Assumes facts not in  
7 evidence.

8 CO-HEARING OFFICER DODUC: Overruled.

9 He's asking for Mr. Stokely's opinion based on  
10 his testimony.

11 MR. O'HANLON: And your answer was "yes"?

12 WITNESS STOKELY: Yes.

13 MR. O'HANLON: And do you agree that the Water  
14 Board should consider the likely practical consequences  
15 of its order when weighing the public incident?

16 MS. MESERVE: Objection: Vague.

17 CO-HEARING OFFICER DODUC: I agree.

18 Mr. O'Hanlon.

19 MR. O'HANLON: The -- The suggestion in the  
20 testimony has been that the Water Board should look to  
21 the area originally identified as the authorized  
22 service area in weighing the public interest.

23 And I think the testimony has indicated that,  
24 in fact, the area that's receiving CVP water is much  
25 larger than the original service area and doesn't agree

1 that, in terms of considering the public interest, the  
2 Board should consider what's actually receiving CVP  
3 water as opposed to a legal theory about what area is  
4 authorized to receive CVP water.

5 CO-HEARING OFFICER DODUC: Considering in what  
6 way?

7 MR. O'HANLON: I'm sorry?

8 CO-HEARING OFFICER DODUC: Considering in what  
9 way?

10 MR. O'HANLON: In terms of weighing the public  
11 interest and the impact of any order that the Board  
12 enters on deliveries of CVP water.

13 CO-HEARING OFFICER DODUC: Does your question,  
14 then, focus on the impact to the portion of Westlands  
15 that's now receiving that water?

16 MR. O'HANLON: Yes.

17 CO-HEARING OFFICER DODUC: Are you able to  
18 answer based on that clarification, Mr. Stokely?

19 MS. MESERVE: Mr. --

20 WITNESS STOKELY: Sure.

21 MS. MESERVE: -- Stokely's testimony doesn't  
22 discuss the public interest.

23 CO-HEARING OFFICER DODUC: I think it's  
24 implied.

25 MS. MESERVE: I'm not sure it's within the

1 scope is what I'm saying.

2 CO-HEARING OFFICER DODUC: In any case,  
3 Mr. Stokely, do you want to answer?

4 WITNESS STOKELY: Sure. If you could rephrase  
5 the question, please.

6 MR. O'HANLON: You know what? I -- I think we  
7 can make the point another way. We'll just move on.

8 Thank you.

9 And I will try to keep to my 30-minute  
10 promise.

11 (Pause in proceedings.)

12 MR. O'HANLON: Just a couple more questions,  
13 Mr. Stokely.

14 And this is back to Page 4 of your testimony.

15 Mr. Hunt, could I please have

16 LAND-290-Revised.

17 (Exhibit displayed on screen.)

18 MR. O'HANLON: Page 4.

19 (Exhibit displayed on screen.)

20 MR. O'HANLON: Could you scroll up a little  
21 bit.

22 (Scrolling through document.)

23 MR. O'HANLON: I want to ask you some  
24 questions about this passage that begins on Page --  
25 Line 19 and the quote there.

1           So, in Line -- Lines 19 to 21, you indicate  
2 that Congress found that 525,000 acre-feet of water per  
3 year was the, quote-unquote, "ultimate need" of the  
4 San Luis Unit for CVP water; correct?

5           WITNESS STOKELY: Yes.

6           MR. O'HANLON: And you base that on the  
7 passage of legislative history from a . . . related to  
8 the Trinity River Act of 1955; correct?

9           WITNESS STOKELY: Yes.

10          MR. O'HANLON: And the word -- words "ultimate  
11 needs" appear in the final sentence of this quoted  
12 passage, beginning at about Line 26, where it begins,  
13 of the 1.19, et cetera, million acre-feet; correct?

14          WITNESS STOKELY: Yes.

15          MR. O'HANLON: And in that sentence, doesn't  
16 "ultimate needs" refer to the needs of the Sacramento  
17 Canal Service Area as opposed to the lands on the west  
18 side of the San Joaquin Valley?

19          WITNESS STOKELY: No. It says (reading):

20           ". . . to meet the ultimate needs of the  
21           Sacramento Canals Service Area,  
22           comprising about 200,000 acres, and about  
23           525,000 acre-feet annually would be  
24           available for use on the lands on the  
25           west side . . ."

1 I see it as the ultimate need for the west  
2 side of the San Joaquin Valley and the Sacramento  
3 canals area because it talks about ultimate needs and  
4 525,000 acre-feet.

5 Maybe we have a different interpretation of  
6 English.

7 MR. O'HANLON: Yes, a different  
8 interpretation.

9 As we discussed a few minutes ago, in your  
10 view, Congress expected the total area to be served by  
11 the San Luis Unit was about 500,000 acres; correct?

12 WITNESS STOKELY: Yes.

13 MR. O'HANLON: And so if the service water  
14 supply for the San Luis Unit were 525,000 acre-feet  
15 annually, wouldn't that mean just over one acre-foot  
16 per acre?

17 WITNESS STOKELY: Yes, it would.

18 (Pause in proceedings.)

19 MR. O'HANLON: My last questions relate to a  
20 statement on Page 3 of your testimony,  
21 LAND-290-Revised.

22 And it's the statement that begins at Line 16  
23 and then carries through Line 22.

24 (Exhibit displayed on screen.)

25 WITNESS STOKELY: Yes.

1 MR. O'HANLON: Do you see that?

2 WITNESS STOKELY: I do.

3 MR. O'HANLON: All right. And here, you  
4 assert that Westlands' demand for water has various  
5 effects on upstream users, water quality and  
6 ecosystems; correct?

7 WITNESS STOKELY: Yes.

8 MR. O'HANLON: All right. And just to  
9 confirm: You're not an Engineer; correct?

10 WITNESS STOKELY: Correct.

11 MR. O'HANLON: And you're not a Modeler;  
12 correct?

13 WITNESS STOKELY: Correct, although I have  
14 supervised a number of modeling exercises --

15 MR. O'HANLON: Yes.

16 WITNESS STOKELY: -- in my previous  
17 employment.

18 MR. O'HANLON: And you're not a biologist;  
19 correct?

20 WITNESS STOKELY: I have a degree in biology  
21 and environmental studies from U.C. Santa Cruz and I  
22 graduated with honors in biology.

23 MR. O'HANLON: In -- In this statement -- Is  
24 this statement here in your testimony, is this based on  
25 any modeling of how CVP operations would change if

1 deliveries were limited to the areas of Westlands you  
2 say are eligible to receive CVP water?

3 WITNESS STOKELY: I have not done any modeling  
4 on it, but I have looked at the water savings from  
5 retiring drainage problem lands, and it is a  
6 significant amount of water that could be saved if some  
7 of those drainage problem lands were not delivered  
8 water and the water went back to the larger CVP.

9 MR. O'HANLON: Okay. My -- my question's more  
10 specific than that. It relates to the statement in  
11 your rebuttal testimony.

12 And -- And it was whether you had any  
13 modeling, or had someone else do any modeling, done of  
14 how CVP operations would change if there were no  
15 deliveries to the areas that you say are not eligible  
16 to receive CVP water.

17 WITNESS STOKELY: I have not done any modeling  
18 on that.

19 MR. O'HANLON: And you haven't had anyone else  
20 do any modeling on your behalf, either; correct?

21 WITNESS STOKELY: Correct.

22 MR. O'HANLON: All right. I have no further  
23 questions.

24 Thank you.

25 Thank you, Mr. Stokely.

1 CO-HEARING OFFICER DODUC: Thank you,  
2 Mr. O'Hanlon.

3 And before I forget, let me now confirm for  
4 the record that we will strike Slides 3, 11 and 14 from  
5 the evidentiary record -- or from Mr. Stokely's  
6 PowerPoint presentation.

7 Any other cross for Mr. Stokely?

8 Do you propose or are you requesting any  
9 redirect, Miss Meserve?

10 MS. MESERVE: Not at this time.

11 CO-HEARING OFFICER DODUC: All right. Then  
12 thank you, Mr. Stokely.

13 WITNESS STOKELY: Thank you very much.

14 CO-HEARING OFFICER DODUC: All right.  
15 Miss Ansley, I'm assuming you're doing the honors for  
16 DWR.

17 Please, again, keep in mind, we're going to  
18 take our lunch break at 12:30, so as we get close to  
19 that and there's a good time to take a break in your  
20 line of questioning, we will do so.

21 MS. ANSLEY: Thank you.

22 (Pause in proceedings.)

23 CO-HEARING OFFICER DODUC: Perhaps,  
24 Miss Ansley, Mr. Berliner, you might give us a sort of  
25 preview of what we might expect from you in the next



1 half an hour or so.

2 MS. ANSLEY: I'm going to direct my questions  
3 to Mr. Oppenheim. I would like to do his  
4 cross-examination first and then Miss Des Jardins.

5 Sort of per my usual practice, my -- my  
6 questions follow the -- pretty much the headings of his  
7 testimony and pretty much in order.

8 So we're going to have a couple questions  
9 possibly on fall-run, which is the first part of his  
10 testimony. Then he has questions on status of  
11 winter-run. He has some testimony on survival  
12 targets -- and, again, I believe this is actually in  
13 order -- North Delta diversion bypass flows and,  
14 obviously, protection of Salmonids.

15 Protection of unlisted Salmonids in another  
16 topic in his testimony. And, of course, I do -- I have  
17 questions on the fish screen design that is a subject  
18 of his testimony.

19 And then he has, I think, sort of a catch-all,  
20 other recommendations, which would be his modified  
21 bypass and outflow recommendation.

22 Let me see if there's anything else.

23 (Pause in proceedings.)

24 MS. ANSLEY: That -- Those are the topics  
25 which are pulled from the topics of his headings.

1 CO-HEARING OFFICER DODUC: All right. Thank  
2 you, Miss Ansley.

3 MS. ANSLEY: And I'm going to perhaps seem a  
4 little slow, but what I'm actually doing is trying to  
5 cut the questions down to see how we can progress and  
6 maybe not ask detailed questions first to what answers  
7 I get back.

8 CROSS-EXAMINATION BY

9 MS. ANSLEY: Mr. Oppenheim, can we look at  
10 Page 3 of your testimony, which is PCFFA-203-Revised  
11 (sic).

12 And just quickly directing your attention to  
13 Line -- Oh, excuse me, Mr. Hunt.

14 Two oh . . .

15 CO-HEARING OFFICER DODUC: Two.

16 MS. ANSLEY: 202-Revised. Well, I might be  
17 looking at the wrong . . .

18 I apologize. I was looking at  
19 Miss Des Jardins'.

20 So, yes, 202-Revised.

21 (Exhibit displayed on screen.)

22 MS. ANSLEY: Page 3, Lines 6 through 9.

23 (Exhibit displayed on screen.)

24 MS. ANSLEY: This is just a small point of  
25 clarification.

1           Looking at your testimony on Lines 6 through  
2 9, you imply that Dr. Greenwood did not acknowledge  
3 declines in fall-run Chinook Salmon.

4           Isn't it true that Dr. Greenwood's testimony  
5 stated that the abundance of the overall ESU just  
6 demonstrated peaks and troughs over the last several  
7 decades, including a substantial decline in 2007 to  
8 2009?

9           WITNESS OPPENHEIM: That text appears in  
10 Mr. Greenwood's testimony and mine.

11           MS. ANSLEY: And before the word "abundance"  
12 in your -- on your Line 7, there is "the" abundance; is  
13 that correct? Dr. Greenwood was not implying that the  
14 overall abundant -- ESU is in abundance?

15                           (Pause in proceedings.)

16           WITNESS OPPENHEIM: You appear to be correct.

17           MS. ANSLEY: I'm sorry. Could you repeat what  
18 you said.

19           WITNESS OPPENHEIM: I said you appear to be  
20 correct.

21           MS. ANSLEY: Okay. Looking at Lines 11  
22 through 14 in this section of your testimony, you're  
23 discussing the Bay-Delta Water Quality Control Plan.

24           And it is your opinion that the Water Quality  
25 Control Plan has -- the current Water Quality Control

1 Plan has failed to protect the Delta fisheries  
2 beneficial uses; is that correct?

3 WITNESS OPPENHEIM: Yes.

4 MS. ANSLEY: Have you yourself, or any  
5 consultant at your direction, conducted quantitative  
6 analysis of the factors that may have contributed to  
7 trends in ocean Salmon abundance?

8 WITNESS OPPENHEIM: Not at my direction and  
9 not personally, no.

10 MS. ANSLEY: On Page 3, still continuing down  
11 this page, on Lines 2 to -- 20 to 24, you cite  
12 Mr. Bitts' written testimony which you did refer to  
13 today as well in your oral testimony.

14 And you refer to the NMFS Technical Memo on  
15 contributors to the 2009 -- 2008 to 2009 Salmon Fishery  
16 closure; is that correct?

17 WITNESS OPPENHEIM: Yes, that's correct.

18 MS. ANSLEY: That would be the Exhibit  
19 PCFFA-86; correct?

20 WITNESS OPPENHEIM: That's Mr. Bitts'  
21 testimony, that's correct.

22 MS. ANSLEY: And we confirmed in the case in  
23 chief that this Technical Memo by NMFS, the National  
24 Marine Fisheries Service, concluded that ocean  
25 conditions were the proximate cause of that collapse?

1 MS. MESERVE: Objection: States facts not in  
2 evidence.

3 CO-HEARING OFFICER DODUC: Perhaps you could  
4 rephrase, Miss Ansley.

5 MS. ANSLEY: Okay. Isn't it correct that the  
6 NMFS Technical Memo . . . cited by Mr. Bitts actually  
7 concluded that ocean conditions were the proximate  
8 cause for the collapse?

9 WITNESS OPPENHEIM: If I can recall correctly,  
10 Mr. Bitts strongly challenged that assertion by the  
11 National Marine Fisheries Service during his case in  
12 chief, and I stand by his assertion.

13 MS. ANSLEY: I understand what you're saying  
14 that you would stand by Mr. Bitts' opinion.

15 But is it correct that is what the National  
16 Marine Fisheries Service concluded in that report? I  
17 see you're familiar with that report.

18 WITNESS OPPENHEIM: I'm familiar with that  
19 report, and that is the conclusion of the Service.

20 MS. ANSLEY: Are you familiar with the Pacific  
21 Fishery Management Council's Annual Reports on the  
22 previous year's Salmon Fishery?

23 MS. MESERVE: Objection: Vague.

24 What -- What year are you speaking of?

25 MS. ANSLEY: I'm just asking if he's generally

1 familiar with those Annual Reports.

2 CO-HEARING OFFICER DODUC: In general, not any  
3 specific year.

4 MS. ANSLEY: Nope. Just if he's familiar with  
5 those reports.

6 And I believe he said --

7 WITNESS OPPENHEIM: Yes.

8 MS. ANSLEY: -- yes.

9 Isn't it true that, in 12 of the last 15  
10 years, that the Pacific Fishery Management Council's  
11 predictions have overestimated the size of the  
12 available Salmon population to be harvested in the  
13 ocean?

14 MS. MESERVE: Objection: Assumes facts not in  
15 evidence.

16 MS. ANSLEY: I'm just asking if he's aware.  
17 He said he was aware of these reports.

18 MS. MESERVE: And the --

19 MS. ANSLEY: And I'm --

20 CO-HEARING OFFICER DODUC: Hold on.

21 MS. ANSLEY: I'm just asking --

22 CO-HEARING OFFICER DODUC: Just --

23 MS. ANSLEY: -- for his understanding.

24 CO-HEARING OFFICER DODUC: -- making sure.

25 And you are doing so to determine the basis

1 for his testimony?

2 MS. ANSLEY: Well --

3 CO-HEARING OFFICER DODUC: He is just  
4 referring to Dave Bitts' testimony.

5 MS. ANSLEY: In his testimony, he's -- Of  
6 course, he's relying on Mr. Bitts for Lines 20 through  
7 24.

8 But the gist of this section is that the  
9 declines -- that the Bay-Delta Water Quality Control  
10 Plan -- and we presume the factors in the Bay-Delta  
11 Water Quality Control Plan -- are responsible for  
12 declines is what he's implying in the Salmon Fishery in  
13 the ocean. His clients are the commercial Salmon  
14 fishermen of the ocean.

15 And so my question leading from there is  
16 whether --

17 CO-HEARING OFFICER DODUC: Did he say that  
18 that plan was responsible or the Plan was not  
19 protective?

20 MS. ANSLEY: He said the Plan has completely  
21 failed to protect the Delta fisheries.

22 CO-HEARING OFFICER DODUC: All right. And so  
23 your line of questioning refers to . . .

24 MS. ANSLEY: I'm just wondering if he was  
25 aware of the PFMC predictions that have overestimated

1 the available harvest. And those predictions were used  
2 to set Salmon harvesting, which has led to  
3 overharvesting the last 12 to 15 years.

4 CO-HEARING OFFICER DODUC: I see the  
5 connection now.

6 All right. Overruled, Miss Meserve.

7 MS. ANSLEY: And so -- Would you like me to  
8 repeat the question?

9 WITNESS OPPENHEIM: I'd be delighted if you'd  
10 repeat the question.

11 MS. ANSLEY: I'll do my best.

12 Is it your understanding, based on your review  
13 of those reports, that, in 12 of the last 15 years, the  
14 predictions have overestimated the size of the  
15 available Salmon population to be harvested in the  
16 ocean, leading to higher-than-expected harvest rates?

17 WITNESS OPPENHEIM: I've reviewed the reports,  
18 and I believe you're characterizing their  
19 overestimation for abundance, but I would not agree  
20 that those are the only factors that lead to what you  
21 characterize as overharvest.

22 MS. ANSLEY: And just one clarifying question,  
23 because perhaps my question was in too many parts.

24 But we -- We are in agreement that the annual  
25 PMFC predictions have, in 12 of the last 15 years,



1 overestimated the size of the available Salmon  
2 population.

3 WITNESS OPPENHEIM: That's correct.

4 MS. ANSLEY: Okay. I'd like to move on to  
5 your testimony regarding winter-run, which begins on  
6 Page 4 of your testimony, Line 3.

7 (Exhibit displayed on screen.)

8 MS. ANSLEY: On Page 4, Lines 7 through 8, you  
9 state that Dr. Greenwood testified (reading):

10 ". . . that winter-run are reasonably  
11 protected by existing regulatory  
12 requirements."

13 Do you see that testimony?

14 WITNESS OPPENHEIM: I do.

15 MS. ANSLEY: Isn't it true that the reference  
16 you cite by Dr. Greenwood is referring specifically to  
17 protection from South Delta entrainment?

18 MS. MESERVE: Objection: Vague.

19 I think you need to show the witness.

20 MS. ANSLEY: I'd be happy to if the witness  
21 feels he can't answer, but I think that . . .

22 CO-HEARING OFFICER DODUC: Let's just go ahead  
23 and pull it up for my benefit as well, Miss Ansley.

24 MS. ANSLEY: Okay. Well, let's look at  
25 DWR-1012, Page 34, 14, which I believe is the section

1 that Mr. Oppenheim is stating or is citing.

2 (Exhibit displayed on screen.)

3 MS. ANSLEY: Isn't it true, Mr. Oppenheim,  
4 that -- that this section . . . is talking about the  
5 potential for entrainment?

6 (Pause in proceedings.)

7 MS. ANSLEY: In fact, you are citing the  
8 heading of this section in your testimony; is that  
9 correct?

10 WITNESS OPPENHEIM: Yes, that's correct.

11 MS. ANSLEY: But then the section is  
12 specifically re -- talking about the risk from  
13 entrainment; is that correct?

14 WITNESS OPPENHEIM: That's correct.

15 MS. ANSLEY: Are you familiar with the  
16 existing regulatory requirements for winter-run Chinook  
17 Salmon entrainment protection in the South Delta?

18 WITNESS OPPENHEIM: I am modestly familiar  
19 with those requirements.

20 MS. ANSLEY: And are you aware that the  
21 National Marine Fisheries Service 2009 Biological  
22 Opinion requires that the South Delta entrainment loss  
23 be limited to no more than 1 percent of juvenile  
24 winter-run entering the Delta?

25 WITNESS OPPENHEIM: Yes.

1 MS. ANSLEY: And this is indicated by the  
2 juvenile production estimate; is that correct?

3 WITNESS OPPENHEIM: Yes.

4 (Pause in proceedings.)

5 MS. ANSLEY: I'm going to move on to my next  
6 topic in the interest of time, which would be on  
7 Survival Targets which starts on Page 5, Line 20 of his  
8 testimony.

9 (Exhibit displayed on screen.)

10 MS. ANSLEY: On Page 5, Line 20 through  
11 Page 6, Line 5.

12 So if you could orient yourself to that  
13 section of testimony.

14 You generally cite Figures B-2 and B-4 as  
15 evidence that the upstream and through-Delta survival  
16 conditions are inefficient; is that correct?

17 WITNESS OPPENHEIM: Yes.

18 MS. ANSLEY: You yourself haven't done any  
19 analysis assessing the extent to which different  
20 factors upstream or in the Delta have resulted in the  
21 current status of winter-run Chinook Salmon; have you?

22 WITNESS OPPENHEIM: No, I have not.

23 MS. ANSLEY: Moving to your Section D, which  
24 starts on Page 6 at Line 6, on North Delta Diversion  
25 Bypass Flows.

1 (Exhibit displayed on screen.)

2 MS. ANSLEY: Looking at Page 6, Line 26  
3 through Page 7, Line 5.

4 Do you see your testimony where you state that  
5 real-time operations may not be implemented?

6 I believe it's on the next page. It's on  
7 Page 7 at Lines 2 through 5.

8 (Exhibit displayed on screen.)

9 WITNESS OPPENHEIM: I see that.

10 MS. ANSLEY: Are you aware that the -- And do  
11 you know what I mean by the "ITP" when I say "ITP  
12 permit" --

13 WITNESS OPPENHEIM: The Incidental Take Permit  
14 permit.

15 MS. ANSLEY: -- provided by the CFW?

16 Okay. Just so we can shorthand it.

17 Are you aware that the ITP Condition of  
18 Approval 9.9.5.1 requires real-time operations of the  
19 North Delta diversion intakes to occur?

20 MS. MESERVE: Objection: Vague.

21 MS. ANSLEY: I'm not sure it's vague.

22 Are you -- My question is, is he aware that  
23 the permit condition requires real-time operations?

24 CO-HEARING OFFICER DODUC: Overruled.

25 WITNESS OPPENHEIM: No, I'm not aware of that

1 specific permit term.

2 MS. ANSLEY: Looking at Page 7, 6 -- Lines 6  
3 through 8.

4 (Exhibit displayed on screen.)

5 MS. ANSLEY: And you have testimony here that  
6 the bypass flows are the only potential protection for  
7 upmigrating adults -- do you see that testimony? -- and  
8 other flow-dependent organisms?

9 WITNESS OPPENHEIM: I see that.

10 MS. ANSLEY: Isn't it also true there are  
11 constraints on operations, such as the need to avoid  
12 increasing river flows in Sacramento at Georgiana  
13 Slough?

14 (Pause in proceedings.)

15 WITNESS OPPENHEIM: I'm aware of those  
16 additional protections and requirements.

17 MS. ANSLEY: And there are Delta outflow  
18 constraints as well?

19 WITNESS OPPENHEIM: With respect to what?

20 MS. ANSLEY: Just generally, that there are  
21 constraints on the operations that control Delta  
22 outflow in the California WaterFix Project.

23 WITNESS OPPENHEIM: I'm aware of those, yes.

24 MS. ANSLEY: Okay. Moving on to Page 8.

25 (Exhibit displayed on screen.)

1 MS. ANSLEY: And now we're in your Section E,  
2 which is on (reading):

3 "Protection of unlisted Salmonids  
4 and . . . Salmon essential fish habitat."

5 (Pause in proceedings.)

6 MS. ANSLEY: On Lines 23 to 28 of Line (sic) 8  
7 if you're there.

8 (Exhibit displayed on screen.)

9 WITNESS OPPENHEIM: Page 8, Lines 23 to 28?

10 MS. ANSLEY: Yes.

11 WITNESS OPPENHEIM: Yes.

12 MS. ANSLEY: Looks like we're there on the  
13 screen as well.

14 You state that reduced flows in the Sacramento  
15 River (reading):

16 ". . . of 5,000 cfs . . . contribute to  
17 stress on upmigrating adults . . ."

18 Do you see that testimony specifically?

19 WITNESS OPPENHEIM: Yes.

20 MS. ANSLEY: Have you done an assessment of  
21 changes and flows that could affect migration?

22 WITNESS OPPENHEIM: As in a technical  
23 assessment?

24 MS. ANSLEY: Yes.

25 WITNESS OPPENHEIM: No, I have not.

1 MS. ANSLEY: Are you aware that an analysis  
2 was done in the Biological Assessment for this Project  
3 of changes in olfactory cues for Adult-listed Salmon --  
4 Salmonids? Excuse me.

5 WITNESS OPPENHEIM: I'm unaware of any  
6 analyses with respect to olfactory cues for  
7 outmigrating Salmonids.

8 MS. ANSLEY: And then you also provide  
9 testimony, continuing on Lines 25, regarding  
10 temperature; is that correct?

11 WITNESS OPPENHEIM: That's correct.

12 MS. ANSLEY: Are you aware that the Biological  
13 Assessment for the California WaterFix also undertook  
14 an analysis of potential water temperature effects on  
15 Adult Salmonids?

16 WITNESS OPPENHEIM: I think my testimony makes  
17 it clear that I am unaware, as it says (reading):

18 "Temperature effects of the reduced  
19 flows are also not known . . ."

20 MS. ANSLEY: So you had not reviewed that --  
21 that analysis in the Biological Assessment on  
22 temperature effects on Adult Salmonids.

23 WITNESS OPPENHEIM: My testimony doesn't  
24 reflect analysis of that particular section.

25 MS. ANSLEY: Okay. And did you review that

1 study?

2 WITNESS OPPENHEIM: No, not that particular  
3 component of the study with respect to temperature.

4 MS. ANSLEY: I'd like to ask you a few  
5 questions on your testimony on fish screens now.

6 This would be starting on -- The section  
7 starts on Page 9, Line 9 and carries through to  
8 Page 10, Line 16. Specifically, I'd like to ask you  
9 about Page 10, Lines 11 through 15.

10 (Exhibit displayed on screen.)

11 MS. ANSLEY: Do you see that testimony?

12 WITNESS OPPENHEIM: I do.

13 MS. ANSLEY: And in this testimony, you ask  
14 the Board to (reading):

15 ". . . require sweeping flows of at least  
16 .4 feet per second at the intakes . . ."

17 Do you see that?

18 WITNESS OPPENHEIM: I do.

19 MS. ANSLEY: Is it true that sweeping flows of  
20 two times the approach velocity is required by the  
21 National Marine Fisheries Service Biological Opinion  
22 for this California WaterFix?

23 (Pause in proceedings.)

24 WITNESS OPPENHEIM: Can you point to the  
25 specific text in the Biological Opinion --



1 MS. ANSLEY: Yes.

2 WITNESS OPPENHEIM: -- in the record?

3 MS. ANSLEY: Yes.

4 Can we go to SWRCB-106 -- sorry, I was trying  
5 not to get confused by Biological Opinions --  
6 Page 1159.

7 (Exhibit displayed on screen.)

8 MS. ANSLEY: Thank you.

9 I think we need to go five more pages to  
10 Table 2-290.

11 (Exhibit displayed on screen.)

12 MS. ANSLEY: Are you familiar with this table  
13 in the Biological Opinion?

14 WITNESS OPPENHEIM: Yes, in the sense that I  
15 reviewed the Biological Opinion.

16 MS. ANSLEY: And do you see that this -- the  
17 criterion for sweeping velocity is twice the approach  
18 velocity set by the CDFW criteria?

19 WITNESS OPPENHEIM: I see that.

20 MS. ANSLEY: And are you familiar with what  
21 the CDFW criteria is?

22 WITNESS OPPENHEIM: At this time, I can't  
23 specifically list those criteria for you.

24 MS. ANSLEY: Is it your understanding the  
25 criteria is less than or equal to .2 feet per second?

1 If that refreshes your recollection. If you don't  
2 recall, you don't recall.

3 WITNESS OPPENHEIM: I don't recall at this  
4 time.

5 (Pause in proceedings.)

6 MS. ANSLEY: Looking at Page 10, Line 14,  
7 speaking to the same topic of asking the Board to  
8 require sweeping flows.

9 (Exhibit displayed on screen.)

10 MS. ANSLEY: There you say, "as assumed in the  
11 Biological Opinions."

12 But we're in agreement -- right? -- that it is  
13 a requirement of the Biological Opinion; is that  
14 correct?

15 WITNESS OPPENHEIM: Yes.

16 MS. ANSLEY: And moving, then, on to your  
17 testimony regarding other recommendation, which begins  
18 on Page 11 and goes through Page 14.

19 (Exhibit displayed on screen.)

20 MS. ANSLEY: Pardon me for just a second. I'm  
21 trying to streamline this so we maybe complete  
22 Mr. Oppenheim.

23 (Pause in proceedings.)

24 MS. ANSLEY: Oh, yes, I'm sorry.

25 On Page 11, Line 14 -- beginning on Line 14,

1 you describe what you now term a "modified . . . bypass  
2 recommendation."

3           This is a change from your recommendation from  
4 the case in chief --

5           WITNESS OPPENHEIM: That's correct.

6           MS. ANSLEY: -- is that correct?

7           WITNESS OPPENHEIM: That's correct, based on  
8 additional information cited in my rebuttal testimony.

9           MS. ANSLEY: And you cite here four additional  
10 studies; is that correct? On Lines 22, 23 -- or 24.

11 Excuse me.

12           WITNESS OPPENHEIM: Correct.

13           MS. ANSLEY: And the studies that were from  
14 2015 to 2017 were studies you were not aware of when  
15 you submitted your case in chief?

16                       (Pause in proceedings.)

17           WITNESS OPPENHEIM: That's correct.

18           MS. ANSLEY: So this is new evidence in  
19 support of a permit condition submitted for the first  
20 time in rebuttal?

21           MS. MESERVE: Objection: Argumentative.

22           MS. ANSLEY: I'm just asking is it new  
23 evidence?

24           CO-HEARING OFFICER DODUC: Mr. Oppenheim.

25           Overruled, Miss Meserve.

1 WITNESS OPPENHEIM: Can you repeat the  
2 question?

3 CO-HEARING OFFICER DODUC: It's apparently  
4 submitted but it's not new.

5 MS. ANSLEY: It is --

6 CO-HEARING OFFICER DODUC: Do you want to  
7 clarify?

8 MS. ANSLEY: It is not new. It is new to  
9 Mr. Oppenheim that he is submitting in support of his  
10 now-modified bypass flow recommendation that was not  
11 submitted as part of his case in chief's  
12 recommendation.

13 So it is new evidence on rebuttal in support  
14 of a permit condition; is that correct?

15 WITNESS OPPENHEIM: I'd say that's an accurate  
16 characterization of the analysis of this material.

17 (Pause in proceedings.)

18 MS. ANSLEY: And this evidence is not being  
19 used to rebut any particular witness' testimony. It is  
20 merely to support your now-changed modified bypass  
21 flow; is that correct?

22 (Pause in proceedings.)

23 WITNESS OPPENHEIM: On Page 12 of my  
24 testimony, I refer specifically to NRDC-58.

25 (Exhibit displayed on screen.)

1 WITNESS OPPENHEIM: And I'm specifically  
2 rebutting the proposed minimum bypass flow contained  
3 there, in addition to proposing this modified  
4 recommendation.

5 MS. ANSLEY: You're presenting this data to  
6 rebut Dr. Rosenfield's testimony?

7 WITNESS OPPENHEIM: I am specifically speaking  
8 to his testimony.

9 MS. ANSLEY: But -- But not rebutting it.

10 WITNESS OPPENHEIM: No, correct.

11 MS. ANSLEY: You're using his testimony in  
12 support your now-changed modified bypass flow; is that  
13 correct?

14 MS. MESERVE: Objection.

15 CO-HEARING OFFICER DODUC: I'm sorry.

16 MS. MESERVE: I'm wondering if this is  
17 relevant.

18 CO-HEARING OFFICER DODUC: Hold on.

19 MS. MESERVE: We're allowed to submit proposed  
20 criteria at any time, so the questions seem to be  
21 trying to trap the witness into feeling it's not --

22 CO-HEARING OFFICER DODUC: Overruled. We  
23 won't assign any sort of motive.

24 But can we scroll up -- I mean, down?

25 (Scrolling through document.)

1 CO-HEARING OFFICER DODUC: So -- If you  
2 scrolled up a little bit mome, please.

3 (Scrolling through document.)

4 CO-HEARING OFFICER DODUC: Oop. A little bit  
5 more.

6 (Scrolling through document.)

7 CO-HEARING OFFICER DODUC: A little bit more.

8 (Scrolling through document.)

9 CO-HEARING OFFICER DODUC: If I were to read  
10 starting on Line 27 of Page 11 continuing to Line 2 of  
11 Page 12, it seems that you are rebutting  
12 Dr. Rosenfield's testimony.

13 WITNESS OPPENHEIM: That's -- That's correct.

14 CO-HEARING OFFICER DODUC: That is  
15 insufficient, so -- so there.

16 MS. ANSLEY: I'm sorry. Was there a direction  
17 to me for that?

18 CO-HEARING OFFICER DODUC: I think he answered  
19 your question.

20 Yes, aside from the fact that Miss Meserve is  
21 correct. We welcome proposed terms and conditions and  
22 evidence to support them throughout the course of this  
23 hearing.

24 It seems from this testimony that  
25 Mr. Oppenheim is rebutting Dr. Rosenfield's testimony.

1 MS. ANSLEY: The studies you cite on Lines 20  
2 through 24 are additional studies that you provide as  
3 evidence of the strong correlation between fish  
4 survival and flow -- correct? -- as you characterize  
5 it?

6 WITNESS OPPENHEIM: That's correct.

7 MS. ANSLEY: And starting first with the Perry  
8 and Pope 2018 study that you cite on Lines 20 to 23,  
9 which you have submitted as PCFFA-207.

10 Isn't it true that the Perry and Pope study  
11 didn't analyze whether any other environmental  
12 variables, other than river flow and Delta Cross  
13 Channel Gate position, affected survival through the  
14 Delta?

15 (Pause in proceedings.)

16 WITNESS OPPENHEIM: Yeah, that's correct.

17 MS. ANSLEY: And the Perry and Pope 2018 model  
18 relations between flow at Freeport and survival through  
19 each of the eight reaches in the Delta; is that  
20 correct?

21 WITNESS OPPENHEIM: Yes.

22 (Pause in proceedings.)

23 MS. ANSLEY: Can we look at PCFFA-207, please.

24 (Exhibit displayed on screen.)

25 MS. ANSLEY: Can we look at Page 11 of this

1 study. And I hope it's . . .

2 (Exhibit displayed on screen.)

3 MS. ANSLEY: I think it's the actual Page 11,  
4 not PCFFA's -- I apologize.

5 (Exhibit displayed on screen.)

6 MS. ANSLEY: There we go.

7 And this is the modeled relationship between  
8 flow at Freeport on the horizontal axis and survival  
9 through each of the eight reaches in the Delta; is that  
10 correct?

11 WITNESS OPPENHEIM: I apologize. Are you  
12 looking at --

13 MS. ANSLEY: Figure 4.

14 WITNESS OPPENHEIM: Figure 4. Thank you.

15 MS. ANSLEY: And you may need to scroll down a  
16 tiny bit, Mr. Hunt --

17 (Scrolling through document.)

18 MS. ANSLEY: No, the other way.

19 (Scrolling through document.)

20 MS. ANSLEY: -- so we can see all the graphs.  
21 I apologize. There's a lot of them. There's  
22 eight.

23 Do you have that in front of you or can you  
24 see that on the screen?

25 WITNESS OPPENHEIM: And can you please repeat



1 the question.

2 MS. ANSLEY: I haven't asked a question yet.

3 WITNESS OPPENHEIM: Okay.

4 MS. ANSLEY: Would you agree that the slopes  
5 in Reaches 1, 2, 7 and 8 are relatively flat?

6 WITNESS OPPENHEIM: Relative to what?

7 The other reaches? Yes.

8 MS. ANSLEY: And doesn't the slope of the line  
9 indicate the degree of relationship between flow and  
10 survival in this study?

11 WITNESS OPPENHEIM: Yes, although it's . . . a  
12 weak assumption to characterize the visual  
13 representation of slope on a figure with actual  
14 statistical analyses in a linear or multiple regression  
15 scenario like this analysis.

16 MS. ANSLEY: And is it your understanding that  
17 the smaller degree of slope -- meaning the flatter that  
18 the line is -- is indicative of less strong of a  
19 relationship between flow and survival as these graphs  
20 are read?

21 WITNESS OPPENHEIM: That's not my  
22 understanding of how one would interpret a regression  
23 based on just a visual characterization of a slope on a  
24 figure.

25 MS. ANSLEY: How would you read these graphs?

1 WITNESS OPPENHEIM: I would read those graphs  
2 while also interpreting the summary statistics  
3 appropriately, which aren't shown in these figures.

4 MS. ANSLEY: Do you see the light gray  
5 regions -- labels indicating the 95 percent confidence  
6 interval?

7 WITNESS OPPENHEIM: I do.

8 MS. ANSLEY: And you are obviously aware that  
9 the confidence interval is a measure of statistical  
10 uncertainty?

11 WITNESS OPPENHEIM: Yes.

12 MS. ANSLEY: Okay. I think I'd like to move  
13 on to the next study you cite, which is Michele,  
14 et al., 2015.

15 And Hearing Officers, I believe I'll be very  
16 close, but I may finish the rest of my questions in the  
17 next 10 minutes.

18 CO-HEARING OFFICER DODUC: And would --

19 MS. ANSLEY: For Mr. Oppenheim.

20 CO-HEARING OFFICER DODUC: And would that  
21 conclude your cross of Mr. Oppenheim?

22 MS. ANSLEY: I think it might. I mean, I  
23 might want to take the opportunity to read through  
24 because I was going quickly to make sure I don't have  
25 any cleanup.

1           But, yes, I think it would be the bulk of my  
2 questions for Mr. Oppenheim. If you could --

3           CO-HEARING OFFICER DODUC: Well, I was asking  
4 because, if there's a possibility to thank  
5 Mr. Oppenheim and dismiss him before we take our lunch  
6 break, I think he might appreciate that.

7           MS. ANSLEY: I don't know his schedule but,  
8 yeah, I don't think --

9           CO-HEARING OFFICER DODUC: Okay.

10          MS. ANSLEY: -- I have a problem with that.

11          CO-HEARING OFFICER DODUC: Okay.

12          MS. ANSLEY: So, NRDC-40 is the Michele, et  
13 al., 2015 paper you cite; is that correct?

14          WITNESS OPPENHEIM: Yes.

15          MS. ANSLEY: And isn't it true that this paper  
16 didn't statistically test the correlation between  
17 survival and flow? Just based on your understanding of  
18 the paper.

19          WITNESS OPPENHEIM: That is my understanding,  
20 yes.

21          MS. ANSLEY: And that the authors of that  
22 study looked at reach, length, year and other  
23 characteristics but did not look at flow specifically;  
24 is that correct?

25          WITNESS OPPENHEIM: Correct.

1 MS. ANSLEY: And, if you recall, wasn't the  
2 author's inference regarding high survival correlated  
3 with high flow based on a comparison of a single wet  
4 year, which would be 2011?

5 WITNESS OPPENHEIM: That's my understanding,  
6 yes.

7 (Pause in proceedings.)

8 MS. ANSLEY: On Page 12, Lines 13 to 14, of  
9 your testimony, you state that the Board (reading):

10 ". . . must require at least 35,000 cfs  
11 (sic) bypass flow . . . upstream . . ."

12 Do you see that?

13 (Exhibit displayed on screen.)

14 MS. ANSLEY: You say (reading):

15 ". . . Must acquire at least  
16 35,000 . . ." --

17 I assume you mean cfs.

18 ". . . minimum bypass flows at Freeport,  
19 Rio Vista and upstream . . ."

20 Is that correct?

21 WITNESS OPPENHEIM: Correct.

22 MS. ANSLEY: And this is upstream of the North  
23 Delta diversions?

24 WITNESS OPPENHEIM: Correct.

25 I would say this is referring to an area

1 immediately upstream of the North Delta diversions.

2 MS. ANSLEY: And would more water need to be  
3 released from reservoirs to achieve this upstream flow  
4 requirement?

5 WITNESS OPPENHEIM: I am unsure as to what  
6 upstream operations would be needed to result in the  
7 achievement of this recommendation.

8 MS. ANSLEY: Would upstream diversions need to  
9 divert less in order to meet this upstream flow  
10 requirement?

11 WITNESS OPPENHEIM: I am unsure as to what  
12 changes and diversions would need to be accomplished in  
13 order to achieve this recommendation.

14 MS. ANSLEY: And it's be -- And this is  
15 because you have not modeled whether this proposal  
16 would reasonably protect upstream users of water or  
17 reservoir storage; is that correct?

18 WITNESS OPPENHEIM: That's correct.

19 MS. ANSLEY: Is it your understanding that  
20 Freeport is upstream of the North Delta diversions?

21 WITNESS OPPENHEIM: No.

22 MS. ANSLEY: Looking at Page 12, Line 16 to  
23 19, and you discuss the Fremont Weir notching.

24 Do you see that testimony?

25 (Pause in proceedings.)

1 MS. ANSLEY: It's specifically mentioned on  
2 Line 18 on Page 12.

3 WITNESS OPPENHEIM: Yes, I see that.

4 MS. ANSLEY: Are you aware that one of the  
5 terms and conditions of the National Marine Fisheries  
6 Service Biological Opinion for the California WaterFix  
7 requires that non-operational restoration components of  
8 the RPA, including those in the National Marine  
9 Fisheries Service 2009 BiOp, are implemented and  
10 completed before commencement of operations of the  
11 North Delta diversion?

12 WITNESS OPPENHEIM: That was a mouthful.

13 MS. ANSLEY: Yes, it was.

14 WITNESS OPPENHEIM: One more time, please.

15 MS. ANSLEY: Okay.

16 WITNESS OPPENHEIM: Thank you.

17 MS. ANSLEY: Maybe I'll break it down. That's  
18 my fault for trying to move fast.

19 So, in these lines of your testimony, you  
20 request that the Board mandate notching of the Fremont  
21 Wehr.

22 Do you see that testimony?

23 WITNESS OPPENHEIM: I do.

24 MS. ANSLEY: And are you familiar with the  
25 National Marine Fisheries Service California WaterFix

1 Biological Opinion?

2 WITNESS OPPENHEIM: Yes.

3 MS. ANSLEY: And are you aware that the  
4 Biological Opinion for the California WaterFix requires  
5 that the non-operational restoration components of the  
6 RPA that were in the NMFS 2009 BiOps -- so the current  
7 BiOps -- are -- are required to be implemented or  
8 completed before commencements of the California  
9 WaterFix North Delta diversions?

10 WITNESS OPPENHEIM: I'm unaware of that  
11 specific provision in the Biological Opinion.

12 But we could review it, if you care to, in the  
13 interest of time.

14 MS. ANSLEY: Is it your understanding that  
15 the -- I'm trying to shortcut.

16 Is it your understanding that the National  
17 Marine Fisheries Service 2009 Biological Opinion in --  
18 includes provisions that discuss increasing Juvenile  
19 Salmonid access to the Yolo Bypass?

20 WITNESS OPPENHEIM: Yes.

21 MS. ANSLEY: And increase the duration of  
22 frequency of Yolo Bypass flood inundation?

23 WITNESS OPPENHEIM: Yes.

24 MS. ANSLEY: And this includes the Fremont  
25 Weir.

1 WITNESS OPPENHEIM: Yes.

2 MS. ANSLEY: Okay.

3 (Pause in proceedings.)

4 MS. ANSLEY: On Page 13, Line 24 . . .

5 Hold on.

6 (Exhibit displayed on screen.)

7 MS. ANSLEY: You state that (reading):

8 "The FEIR/S assumed that the  
9 previously proposed Habitat Conservation  
10 Plan -- the BDCP (sic) -- would be in  
11 effect."

12 Do you see that testimony?

13 WITNESS OPPENHEIM: Yes, I see it.

14 MS. ANSLEY: Is it your understanding that --  
15 And perhaps I'm mistaking your testimony.

16 Is it your understanding that Alt 4A assumed  
17 that the Habitat Conservation Plan would be in effect?

18 WITNESS OPPENHEIM: I don't believe that I  
19 refer to Alternative 4A in my testimony.

20 MS. ANSLEY: So that would be my clarifying  
21 question.

22 You are not assuming that Alt 4A is modeled  
23 with the assumptions that the Habitat Conservation  
24 Plan, the BDCP, would be in effect; are you?

25 WITNESS OPPENHEIM: No.



1 MS. ANSLEY: Okay.

2 (Pause in proceedings.)

3 MS. ANSLEY: I think that concludes my  
4 questions for Mr. Oppenheim.

5 I mean, I will look through, make sure I don't  
6 have a cleanup question that I neglected to ask, but I  
7 believe the --

8 CO-HEARING OFFICER DODUC: Please look through  
9 now.

10 MS. ANSLEY: Oh, sure.

11 CO-HEARING OFFICER DODUC: Is there any other  
12 cross for Mr. Oppenheim?

13 (Pause in proceedings.)

14 MS. ANSLEY: I'm good if there's no other  
15 cross for Mr. Oppenheim.

16 CO-HEARING OFFICER DODUC: I believe they are  
17 consulting whether or not they would like to request  
18 redirect.

19 And I will warn you now that, if there is  
20 extensive redirect, Mr. Oppenheim will have to return  
21 at 2 o'clock.

22 MS. MESERVE: I think he's available. So if  
23 we bring him back, that means that we are doing  
24 redirect and, that way, we don't have to take up the  
25 hearing's time.

1 CO-HEARING OFFICER DODUC: We will do so,  
2 then.

3 Thank you. Good timing, everyone.

4 We will return at 2 o'clock.

5 MS. ANSLEY: And I estimate that I have about  
6 20 to 30 minutes for Miss Des Jardins but I, of course,  
7 will over lunch try to --

8 CO-HEARING OFFICER DODUC: All right.

9 MS. ANSLEY: -- cut that down.

10 In that case, then, thank you, Miss Daly and  
11 Miss Suard, for being here. We will definitely get to  
12 you this afternoon.

13 And during the break, if Mr. Meserve and also  
14 Mr. Herrick and Mr. Ruiz, if you're watching, I would  
15 like to discuss after lunch the availability of  
16 Mr. Burke, Mr. Stroshane, and especially Mr. Nakagawa  
17 for tomorrow's session.

18 Thank you. See you at 2:00.

19 (Lunch recess at 12:30 p.m.)

20 \* \* \*

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1 CO-HEARING OFFICER DODUC: Ms. Des Jardins.

2 MS. DES JARDINS: I just wanted to raise a  
3 question as a party, but Mr. Brodsky asked this  
4 question with respect to whether a permit term  
5 condition could be -- had to be raised in testimony or  
6 could be raised in briefing. And I'm just wanting to  
7 clarify with respect to the direction that was given.

8 CO-HEARING OFFICER DODUC: Yes, we welcome  
9 proposed terms and conditions, whether it be in  
10 testimony or I'm sure later on there will be some  
11 proposed in briefings as well.

12 I believe the point Mr. Berliner was trying to  
13 get clarification on is that, while you may propose  
14 terms at any time, the supporting evidence has to come  
15 during the course of this hearing. So it has to be  
16 submitted properly and has to be within the applicable  
17 scope for the proceeding that we're in. I believe that  
18 was the clarification he was seeking.

19 All right. Before we, I guess, turn back to  
20 additional cross of Mr. Oppenheim, I have a ruling to  
21 read.

22 We, as you know, received some motions to  
23 strike testimonies of Dr. Hanson, Dr. Hutton, and  
24 Mr. Sean Acuna from the petitioners' panels. These  
25 motions allege that all three witnesses are responding

1 to arguments that no case-in-chief party made.

2 I will remind parties that the evidence --  
3 I'll remind other parties about prior rulings on the  
4 scope of rebuttal. Evidence is within the scope of  
5 rebuttal if it's responsive to evidence introduced in  
6 connection with another party's case in chief. In  
7 other words, rebuttal testimony does not necessarily  
8 have to be responsive to case-in-chief testimony.

9 We have used the same language defining the  
10 scope of rebuttal since Part 1, and we underscored this  
11 exact point recently in our ruling responding to SJTA's  
12 motion for reconsideration. For example, though the  
13 2010 Delta flow criteria report was admitted into  
14 evidence during Part 1, the CSPA parties also moved it  
15 into evidence during Part 2.

16 That Part 2 exhibit puts the 2010 Delta flow  
17 criteria report within the scope of Part 2 Rebuttal to  
18 the extent it relates to appropriate Delta flow  
19 criteria for this project.

20 Although the substance of these DWR witnesses'  
21 rebuttal testimony is within the scope of the evidence  
22 submitted in Part 2, we do agree that they  
23 mischaracterized the Part 2 case-in-chief testimony of  
24 several witnesses.

25 We will instruct the hearing team to strike

1 those portions of Dr. Hanson's, Dr. Hutton's, and  
2 Mr. Acuna's testimonies that misstate several  
3 protestants' case-in-chief testimony. The remainder of  
4 their testimony and supporting exhibits will remain.

5 We will now move them to the end of the order  
6 of proceeding, and they will present their rebuttal  
7 testimony, I would expect, later this week and be  
8 available for cross-examination.

9 MR. BERLINER: So maybe at the end of the day  
10 today we can go over scheduling?

11 CO-HEARING OFFICER DODUC: Actually, we're  
12 going to do it right now.

13 MR. BERLINER: Oh, great. Thank you.

14 CO-HEARING OFFICER DODUC: I am still fully  
15 expecting that we will complete the panel today and  
16 also hear from North Delta C.A.R.E.S. and Snug Harbor.

17 Tomorrow, my understanding, Ms. Meserve, is we  
18 will begin with Mr. Wirth, Dr. Fries, and Dr. Williams.  
19 That's the first panel. My understanding is that we  
20 have very limited cross-examination, 20 minutes from  
21 the Department?

22 MS. ANSLEY: I would say that's approximately  
23 correct.

24 CO-HEARING OFFICER DODUC: And I did not get  
25 any further request for cross, so that should be fairly

1 quick. Then we will turn next to -- well, we should  
2 discuss. I have next Clifton Court. And again, there  
3 is very little cross from Clifton Court.

4 And I have County of Sacramento. And that's  
5 about, I believe, a total of about an hour of cross for  
6 County of Sacramento, 30 from the Department, and 20  
7 from Ms. Des Jardins was the request I have, which  
8 means that, after that, we would get to Mr. Burke.

9 I'm assuming we have not heard from  
10 Mr. Herrick or Mr. Ruiz?

11 MS. MESERVE: I spoke with Mr. Ruiz, and I  
12 think they are prepared to be available tomorrow  
13 afternoon.

14 CO-HEARING OFFICER DODUC: Excellent. I have  
15 a total of about three hours of cross for Mr. Burke.  
16 Is that still the case? The majority of that, I  
17 believe, is from DWR, who had requested -- a  
18 combination between DWR and the State Water Contractors  
19 initially requested two hours to cross Mr. Burke.

20 MR. BERLINER: I think that estimate still  
21 holds.

22 CO-HEARING OFFICER DODUC: Then I also have  
23 CSPA for 20, Ms. Des Jardins for 20, and Ms. Meserve  
24 for 25. So that's roughly three hours. But, again,  
25 the other -- I think Ms. Womack will be relatively



1 short tomorrow, as will -- as will your panel,  
2 Ms. Meserve.

3 So my question to you is will Mr. Nakagawa be  
4 available tomorrow along with Mr. Stroshane?

5 MS. MESERVE: Mr. Nakagawa is traveling back  
6 tomorrow. So he is first available on Wednesday  
7 morning. So, no, we couldn't put him tomorrow.

8 CO-HEARING OFFICER DODUC: Is it possible for  
9 Mr. Stroshane to come in tomorrow?

10 MS. MESERVE: I can check on that. We were  
11 trying to keep the witnesses together. But if that  
12 would be necessary to keep things moving, I'll -- let  
13 me --

14 CO-HEARING OFFICER DODUC: I would like to  
15 pursue that. Then if that's the case, then on  
16 Wednesday we will get to Mr. Nakagawa. And as soon as  
17 we can, after that, we will then get to your witnesses,  
18 from DWR.

19 MR. BERLINER: Okay. We will contact them  
20 today and confirm their availability. I believe they  
21 are available. But we'll confirm to you that they'll  
22 be here on Wednesday.

23 CO-HEARING OFFICER DODUC: All right. And for  
24 everyone else watching and listening, please e-mail to  
25 the WaterFix e-mail your request for cross-examination

1 of those three DWR witnesses -- your request with a  
2 time estimate, please.

3 MR. BERLINER: And just probably this assists  
4 us as well as everybody else who is planning to cross,  
5 when will we know what testimony has been stricken?

6 CO-HEARING OFFICER DODUC: We will have staff  
7 working on that. But as I noted in my ruling, the only  
8 testimony struck -- that will be struck is the one that  
9 I believe has been cited to in the various motions  
10 alleging mischaracterization of the testimony to which  
11 they are rebutting.

12 MR. BERLINER: Well, mischaracterization to  
13 one person might be dead-on in the eyes of another. So  
14 I don't want to presuppose anything. I mean, we'll  
15 obviously try to review it in light of what you've  
16 indicated and try to make our own, but we might be a  
17 little -- everybody might be a little on the fly on  
18 Wednesday, so. . .

19 CO-HEARING OFFICER DODUC: All right. Well,  
20 we'll do our best to direct staff to get them out. I'm  
21 trying to remember those testimony. I can't be very  
22 specific, but there are sentences, language, referring  
23 back to case-in-chief testimony of protestants to which  
24 the three witnesses are responding. And there was some  
25 arguments made about how those statements

1 mischaracterized the case-in-chief testimony of  
2 protestants. That's what I was referring to.

3 MR. BERLINER: I think that's helpful. Thank  
4 you.

5 CO-HEARING OFFICER DODUC: So we will, of  
6 course, revisit again the schedule tomorrow.

7 Did I give a deadline for submitting  
8 cross-examination requests? Let me give a deadline for  
9 that now: by noon tomorrow, please. Please e-mail or  
10 be prepared to let me know during the hearing tomorrow  
11 your requested time for cross-examination of -- let me  
12 be very specific Dr. Hanson, Dr. Hutton and Mr. Acuna.

13 Mr. Shutes.

14 MR. SHUTES: Not knowing whether Mr. Jackson  
15 is going to be available to answer that on time, I  
16 would imagine that CSPA would have between an hour and  
17 an hour and a half for the three witnesses.

18 THE COURT: You know what? E-mail it in,  
19 please. I'm not taking notes right now.

20 MR. SHUTES: Thank you.

21 CO-HEARING OFFICER DODUC: All right. Thank  
22 you, Mr. Shutes.

23 All right. So by tomorrow we should have --  
24 tomorrow noon, we should have those estimates. And by  
25 the end of the day tomorrow, we will discuss scheduling

1 for Wednesday, Thursday, and Friday. Depending on  
2 those requests for cross, we may be looking at  
3 potentially very long days those three days.

4 All right. Yes, we might be staying as late  
5 as 6:30 those nights.

6 And now, I believe -- is there additional  
7 cross for Mr. Oppenheim, or is there redirect?

8 MS. MESERVE: Were we going to wait and do  
9 redirect at the end of the -- it's up to their  
10 scheduling.

11 CO-HEARING OFFICER DODUC: Oh, okay. Got it.

12 MS. MESERVE: Go ahead.

13 MS. KRIEG: No --

14 MS. MESERVE: No? Okay. Let's just wait till  
15 the end.

16 CO-HEARING OFFICER DODUC: Did you not work  
17 this out during the lunch break?

18 MS. MESERVE: I thought I knew what the plan  
19 was.

20 CO-HEARING OFFICER DODUC: All right. We will  
21 proceed then with cross-examination of Ms. Des Jardins.

22 MS. ANSLEY: And I revised my estimate. I  
23 worked over the lunch hour, and I think I'm down to  
24 about ten questions or a little bit less. So let's see  
25 what we can do quickly.

1 DEIRDRE DES JARDINS and NOAH OPPENHEIM,  
2 called as Part 2 Rebuttal witnesses  
3 for Protestant Groups 19 and 38, having  
4 been previously duly sworn, were  
5 examined and testified further as  
6 hereinafter set forth:

7 CROSS-EXAMINATION BY MS. ANSELY

8 MS. ANSELY: Ms. Des Jardins -- Jolie-Ann  
9 Ansley for the Department of Water Resources.

10 If we could look at your testimony at  
11 PCFFA-203, Page 10, Lines 10 through 13, I think,  
12 first.

13 We'll wait until Mr. Hunt gets a chance.

14 And here on this page, you reference your  
15 technical memo, which is PCFFA-205, in which -- in  
16 which you assess flow and velocity in the Sacramento  
17 River. Do you see that testimony?

18 WITNESS DES JARDINS: Yeah, I assess flow and  
19 velocity in the reach of the Sacramento River above the  
20 Delta Cross Channel, as indicated there, at the closest  
21 downstream gauge since the Department doesn't report  
22 any flows at their monitoring station at the --

23 MS. ANSELY: I think the answer was yes.

24 And you see that testimony? And is it your  
25 understanding that the point on the Sacramento River

1 above the Delta Cross Channel that you used is  
2 approximately 10 miles from the North Delta Diversion?

3 WITNESS DES JARDINS: I'm not sure how far  
4 downstream it is. I know it's significantly  
5 downstream. And I used the closest available  
6 downstream location. And I think that the results show  
7 that there really needs -- to be more study.

8 MS. ANSLEY: I think that's --

9 MS. DES JARDINS: -- to be more study.

10 MS. ANSLEY: That wasn't part of my question.  
11 I would appreciate you do that on a redirect.

12 CO-HEARING OFFICER DODUC: Hold on. Hold on.

13 I need to remind you, Ms. Des Jardins, again,  
14 to not speak --

15 WITNESS DES JARDINS: Sorry.

16 CO-HEARING OFFICER DODUC: -- above others  
17 because the court reporter has to capture what you say.

18 All right. Ms. Ansley, continue, please.

19 MS. ANSLEY: Yes. And then on Page 10,  
20 Line 24, continuing over to Page 11, Line 22, you list  
21 several studies, including studies numbers, as you  
22 number them, 1, 2, and 7, that you suggest are  
23 essential to verify that the fish screens would have  
24 adequate sweeping velocities. Do you see that  
25 testimony?

1 I just want to make sure you're looking at the  
2 right place and you're with me. Do you see the  
3 testimony I'm referencing, Page -- Page 10 to Page 11?

4 WITNESS DES JARDINS: I just wanted to -- it  
5 was to have adequate sweeping velocity at the proposed  
6 bypass flows, which I understood to be tidally averaged  
7 flows.

8 MS. ANSLEY: Okay. My question was just do  
9 you see that testimony?

10 WITNESS DES JARDINS: Yes, I do.

11 MS. ANSLEY: Okay. And are you aware that  
12 these studies are required as part of the Incidental  
13 Take Permit?

14 WITNESS DES JARDINS: Yes, I am aware of that.

15 MS. ANSLEY: Okay. And then -- bear with me.  
16 Like I said, I've erased a lot of questions.

17 And then on Page 12 of your testimony, Lines 4  
18 to 7, here you request that the Board should require a  
19 real-time monitoring and reporting of velocities at the  
20 fish screens. Do you see that testimony there? Make  
21 sure we're on the right page.

22 WITNESS DES JARDINS: Yes.

23 MS. ANSLEY: And is it your understanding that  
24 the ITP requires the permittee, which is the DWR, to  
25 provide the North Delta fish screens with monitoring

1 systems capable of verifying the approach and sweeping  
2 velocity standards in real-time?

3 WITNESS DES JARDINS: There's a difference  
4 between monitoring and monitoring and reporting. And  
5 I, as an independent scientist, I feel that reporting  
6 is very important.

7 MS. ANSLEY: So we're in agreement, though? I  
8 mean, I understand your distinction here. We're in  
9 agreement that the ITP does require real-time  
10 monitoring of the approach and sweeping velocities at  
11 the fish screen?

12 WITNESS DES JARDINS: Yes, the ITP does  
13 indicate that that's required. I'm not sure -- I'd  
14 have to go back and double-check if it requires tidal  
15 averaging. But tidal averaging is related to how the  
16 bypass criteria is calculated in all tidally influenced  
17 reaches. There's a lot of sloshing back and forth with  
18 the tides.

19 MS. ANSLEY: I think my question is answered.  
20 Thank you.

21 WITNESS DES JARDINS: Yeah, but --

22 CO-HEARING OFFICER DODUC: Thank you.

23 MS. ANSLEY: And then can we call up  
24 SWRCB-107, Page 168 if we could -- of the main ITP.  
25 Thank you.



1           Okay. And are you familiar with this page of  
2 the -- you're familiar with the ITP, I assume?

3           WITNESS DES JARDINS: Yes, I looked at it  
4 fairly closely.

5           MS. ANSLEY: And looking at Studies 2 and 4 --  
6 maybe we need to zoom out a little so we can see more  
7 of the whole page.

8           These studies are included here -- they're  
9 post-construction studies included to monitor approach  
10 and sweeping velocities of the fish screens. Is that  
11 your understanding of these studies?

12          WITNESS DES JARDINS: This indicates that  
13 there will be a post-construction study. It doesn't  
14 indicate the time period. But yes, it indicates there  
15 will be one.

16          MS. ANSLEY: If you'll just give me one  
17 minute, I'm going to flip through my questions. That  
18 may be all the questions.

19          That's all my questions for Ms. Des Jardins.

20          CO-HEARING OFFICER DODUC: Thank you,  
21 Ms. Ansley. I believe there is a request for redirect.  
22 May I ask what topic you're exploring? And is it only  
23 of Mr. Oppenheim?

24          I'm sorry, did I miss something, Mr. Shutes?

25          MS. KRIEG: Sorry. Uhm --

1 CO-HEARING OFFICER DODUC: Hold on. Hold on.

2 Hold on.

3 MR. SHUTES: I had requested time for cross,

4 but I'm going to pass.

5 CO-HEARING OFFICER DODUC: Oh, okay. Thank

6 you.

7 MS. KRIEG: Yes, I would like to ask just

8 three brief questions.

9 CO-HEARING OFFICER DODUC: About?

10 MS. KRIEG: One just to clarify a misstatement

11 in his prior testimony.

12 One just a clarification of a misstatement.

13 CO-HEARING OFFICER DODUC: In his response to

14 a cross question?

15 MS. KRIEG: In his response to a cross

16 question. I would also like to ask him a little bit

17 about the PFMC overestimates of fish abundance and

18 briefly about real-time operations. In response to

19 Ms. Ansley's questions about his testimony on Line --

20 I'm sorry, Page 7, Lines 2 through 5.

21 CO-HEARING OFFICER DODUC: All right. All

22 that seem to stem from her cross. Go ahead, please.

23 REDIRECT EXAMINATION BY MS. KRIEG

24 MS. KRIEG: First, Mr. Oppenheim, can you

25 please clarify your earlier statement about the

1 location of Freeport in relation to the diversion?

2 WITNESS OPPENHEIM: Freeport is upstream of  
3 the point of diversion. And just to clarify further,  
4 my misstatements stem from my misunderstanding of the  
5 question in regards to the testimony, which was itself  
6 unclear about whether the word "upstream" was in  
7 reference to the point of diversion or Freeport.

8 MS. KRIEG: Thank you. Ms. Ansley asked you  
9 about the PFMC overestimates of fish abundance. Can  
10 you briefly address the regulatory response that  
11 happens and its impact on commercial fish --

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

13 Ms. Ansley.

14 MS. ANSLEY: I asked him if he was aware of  
15 the annual reports, to which he said he was. And then  
16 I asked him if he was aware that, in the last 12 to 15  
17 years, the predictions had overestimated the size of  
18 the available salmon population.

19 CO-HEARING OFFICER DODUC: Yes, and that was  
20 the gist of her question. And now your question is?  
21 Keep in mind you cannot go beyond the scope.

22 MS. KRIEG: It's specific to the results of  
23 that -- what happens in that instance as it relates to  
24 commercial fish. Let me try and phrase this. We were  
25 talking about Dave Bitts' testimony on Page 3 that he

1 was citing.

2 MS. ANSLEY: I'm sorry. Go ahead.

3 MS. KRIEG: My understanding is that her  
4 questions were extracted from Mr. Oppenheim's reliance  
5 on those statements as things that contributed to the  
6 collapse in stock and how things are impacting  
7 commercial fishing.

8 MS. ANSLEY: My question for there was related  
9 to his assertion in this paragraph, Page 3, Lines 10  
10 through 24, where he was saying that the Delta water  
11 quality control plans had completely failed to protect  
12 the Delta fisheries.

13 CO-HEARING OFFICER DODUC: I remember that  
14 exchange.

15 MS. ANSLEY: And it was -- my questions  
16 regarding Mr. Bitts -- reliance on Mr. Bitts was simply  
17 to clarify the conclusion that the National Marine  
18 Fisheries Service made in the technical memo that he  
19 cites on Lines 21 to 22.

20 CO-HEARING OFFICER DODUC: And you did not go  
21 into a discussion of the results.

22 MS. ANSLEY: (Shakes head)

23 MS. MESERVE: Actually, Ms. Ansley did  
24 characterize the results and the content of those  
25 annual surveys or whatever they're called. And so I

1 believe that the question was just meant to further  
2 illuminate his response to that question.

3 MS. ANSLEY: His response was that he  
4 understood what I was asking, which is -- his  
5 understanding was what the PFMC predictions or index  
6 had overestimated the size of the available salmon  
7 populations in 12 of the last 15 years.

8 CO-HEARING OFFICER DODUC: No, Ms. Krieg, that  
9 is outside the scope.

10 MS. KRIEG: Okay. Ms. Ansley also asked you  
11 whether -- or she asked about your opinion on Page 7 as  
12 to real-time operations. And I was wondering if you --  
13 could just perhaps explain why you say that real-time  
14 operations to protect salmon may not be implemented.

15 WITNESS OPPENHEIM: Certainly. I stated that  
16 because it's my understanding and belief that the  
17 explicit terms of real-time operations are yet to be  
18 determined, specifically with regard to protection of  
19 salmon.

20 MS. KRIEG: Thank you.

21 CO-HEARING OFFICER DODUC: Any recross?

22 MS. ANSLEY: No. If that concludes their  
23 redirect, then we're done. Thank you.

24 CO-HEARING OFFICER DODUC: Thank you. Thank  
25 you both. And Ms. Krieg, I believe -- or Ms. Meserve

1 still has other witnesses to present. But does that  
2 conclude PCFFA's rebuttal?

3 MS. KRIEG: Yes, it does. And at this time, I  
4 would like to move all of our testimony and exhibits  
5 into evidence.

6 CO-HEARING OFFICER DODUC: Any objections?

7 MS. McCUE: I just have a clarification.

8 CO-HEARING OFFICER DODUC: Who is that  
9 talking.

10 MS. McCUE: Sorry, Jean McCue.

11 So you had a -- testimony of Noah Oppenheim  
12 was PCFFA-202, and then it was modified by the ruling.  
13 So you would be entering PCFFA-202-R?

14 MS. KRIEG: That is my understanding, yes.

15 MS. McCUE: And then you also had listed State  
16 Water Board exhibits, and I didn't know -- are those  
17 being offered as well, or just the --

18 MS. KRIEG: Please, yes.

19 MS. McCUE: A couple, I think, have already  
20 been offered, so. . .

21 MS. KRIEG: Sorry. I didn't keep track of  
22 which ones were. . .

23 MS. ANSLEY: Could we have her read into the  
24 record which ones she's proposing to admit so I can  
25 assert my objections?

1 MS. KRIEG: I would have to pull that up. It  
2 will just take me a moment.

3 MS. MESERVE: While we're waiting on that, I  
4 had a question regarding the order.

5 Mr. Ruiz has asked me to inquire as to the  
6 status of the motion to strike the testimony of  
7 Mr. Burke. Is that something that is still pending?

8 CO-HEARING OFFICER DODUC: I guess it is. We  
9 will get to that soon. Thank you for the reminder.

10 MS. KRIEG: I actually don't have my list  
11 of --

12 CO-HEARING OFFICER DODUC: So actually, we  
13 have it, and we're pulling it up right now.

14 MS. ANSLEY: And Mr. Hunt, if you could, when  
15 Ms. Krieg is done looking at the top part, I would like  
16 to see the SWRCB exhibits that you're putting on the  
17 screen right now. But she would probably like to look  
18 first.

19 MS. KRIEG: Oh, that looks like what it should  
20 be, so. . .

21 CO-HEARING OFFICER DODUC: Okay. Except that  
22 202 is probably 202-R.

23 MS. KRIEG: Yes.

24 CO-HEARING OFFICER DODUC: Okay. Then moving  
25 down, please.

1 CO-HEARING OFFICER DODUC: Objections?

2 MS. ANSLEY: Oh, we do not have objections to  
3 these SWRCB exhibits.

4 CO-HEARING OFFICER DODUC: All right.

5 MS. KRIEG: Thank you.

6 CO-HEARING OFFICER DODUC: All right. Then  
7 your exhibits are in the record. Thank you very much.

8 Thank you, Mr. Oppenheim.

9 (Exhibits PCFFA-202-R, PCFFA-203 through  
10 PCFFA-208 admitted into evidence)

11 (Exhibits SWRCB - to be determined - admitted  
12 into evidence)

13 MS. MESERVE: Does that mean they're -- well  
14 because some of those exhibits were already entered in  
15 the Part 1, so --

16 CO-HEARING OFFICER DODUC: Yes.

17 MS. MESERVE: -- I guess we'll just use --

18 CO-HEARING OFFICER DODUC: We'll take a look  
19 at them, and those that were already submitted, we  
20 will --

21 MS. ANSLEY: Yeah, we intend no duplication.  
22 I'm just saying there's no objections to any in that  
23 list.

24 CO-HEARING OFFICER DODUC: Exactly.

25 I believe we're now to Ms. Daly.



1 MS. MESERVE: I'm not sure I will be any help,  
2 but Ms. Daly has asked me to sit up here with her in  
3 case I can be. So I'm here for her.

4 CO-HEARING OFFICER DODUC: Moral support is  
5 always good.

6 BARBARA DALY,  
7 called as a Part 2 Rebuttal witness by  
8 protestant North Delta C.A.R.E.S.,  
9 having been previously duly sworn, was  
10 examined and testified further as  
11 hereinafter set forth:

12 CO-HEARING OFFICER DODUC: Welcome back,  
13 Ms. Daly.

14 WITNESS DALY: Thank you very much. Good to  
15 be here.

16 Should I begin, Osha?

17 DIRECT TESTIMONY BY BARBARA DALY

18 WITNESS DALY: Okay. My qualifications are  
19 the same, except that I am now on the Board of the  
20 Clarksburg Youth Soccer Club and also part of the  
21 Clarksburg Rotary, so I guess that makes me more  
22 qualified.

23 CO-HEARING OFFICER DODUC: And, as every party  
24 who was in attendance that day, we know by now, you  
25 also make excellent cookies.

1           WITNESS DALY: I appreciate that, yes, many  
2 talents.

3           I do want to ask if I could strike from my  
4 testimony and my exhibits the words "CEQA" and "NEPA."  
5 I don't think they're appropriate there. And I can  
6 resubmit them. There's only seven times -- seven or  
7 eight times in the testimony, but I do believe that  
8 it's quite a few times in the exhibits.

9           CO-HEARING OFFICER DODUC: Could we see an  
10 example, perhaps?

11          WITNESS DALY: Yes. If you pull up North  
12 Delta C.A.R.E.S. 255.

13          CO-HEARING OFFICER DODUC: Okay.

14          WITNESS DALY: And if we go to Page -- let me  
15 find one here. A lot of notes. Well, for sure on  
16 Page 4.

17          CO-HEARING OFFICER DODUC: We see that, yes.

18          WITNESS DALY: And "CEQA" under "Aesthetics."  
19 No. 4, Line 2, "Unavoidable." Then I have "CEQA."  
20 Yes, there, right.

21          So there's about seven or eight places that it  
22 occurs that I guess it's -- it could be objectionable.  
23 So -- I don't know. But before it is, I'll strike it.

24          CO-HEARING OFFICER DODUC: It's your  
25 testimony. You may make the corrections you deem

1 appropriate to your testimony.

2 If there are objections, I'm sure we'll hear  
3 them.

4 WITNESS DALY: All right. Thank you.

5 So what I would like to do then is to  
6 summarize my testimony as best I can.

7 And in summary, North Delta C.A.R.E.S. Action  
8 Committee is choosing to rebut the Administrative  
9 Supplemental EIR/EIS provided to the public in June  
10 2018.

11 And so what we are providing is a list of the  
12 chapters of that Supplement where it is evident that  
13 DWR has let the Delta down in its planning because,  
14 even after mitigation measures, there are significant  
15 adverse impacts to the Delta's people, its businesses,  
16 its land, and its policies, and it's not acceptable.  
17 And therefore, it's the wrong plan.

18 We've chosen Chapters 13 for land use, 15 for  
19 recreation, 16 socioeconomics, 17 for aesthetics and  
20 visual resources, 18 for cultural resources, and 24 for  
21 hazards and hazardous materials.

22 So I would like to just summarize what we have  
23 written in the testimony under those headings. So  
24 under land use, this project is incompatible with  
25 current land use designations in the Delta. It

1 necessitates removing a substantial number of permitted  
2 structures.

3           Even though there were changes to the  
4 construction in Hood, Intake 3 is still being  
5 constructed one quarter mile north, and Intake 5 is  
6 planned to be constructed one half mile south of Hood.

7           People live there, and there are babies,  
8 children, pregnant women, and the elderly who will be  
9 most susceptible to the adverse effects of the  
10 construction zone there.

11           Temporary power lines will still cross through  
12 portions of Hood. And even though access to and from  
13 the community would be maintained over the long-term,  
14 the nearby construction of the temporary work area  
15 would substantially alter the setting of the community  
16 in the near term. This is considered a significant and  
17 unavoidable impact.

18           And next I'd like to summarize recreation.  
19 Construction of the project would result in the  
20 displacement of existing well-established recreation  
21 facilities and would reduce recreation opportunities at  
22 some sites as a result of the construction.

23           The impacts resulting in long-term reduction  
24 of recreation opportunities and experiences as a result  
25 of constructing the proposed water conveyance

1 facilities and the long-term reduction of recreational  
2 navigation opportunities as a result of the  
3 construction, even after mitigation measures, would  
4 remain significant and unavoidable.

5           Next, I would like to summarize socioeconomic.  
6 Impacts after mitigation would not be reduced to a  
7 less-than-significant level and remain significant and  
8 unavoidable under the Supplemental EIR/EIS.

9           Next, aesthetics and visual resources. The  
10 impacts on scenic highways associated with the proposed  
11 project would be significant and unavoidable, even with  
12 mitigation measures. Changes to light and glare remain  
13 an adverse impact. And the new sources of daytime and  
14 nighttime light and glare associated with the proposed  
15 project would result in significant and unavoidable  
16 impacts on public views in the project vicinity.

17           DWR has found that no additional mitigation is  
18 required related to the compatibility of the proposed  
19 project with relevant plans and policies and all  
20 Supplemental EIR/EIS findings. And they show these to  
21 be no impact and no effect on the plans and policies  
22 after mitigation.

23           Even so, the Final EIR/EIS found that there  
24 was a potential for the approved project and other  
25 projects to have cumulative effect on aesthetics and

1 visual resources in the plan area because they would  
2 result in reduced visual quality and introduce dominant  
3 visual elements that would result in noticeable changes  
4 that do not blend, are not in keeping with or are  
5 incompatible with the existing visual environment and  
6 could be viewed by sensitive receptors and from public  
7 viewing areas.

8           The permanent changes to the landscape would  
9 be noticeable to very noticeable, and one reason is the  
10 conversion of agricultural land to non-agricultural  
11 uses.

12           It states that construction and ongoing  
13 operations associated with the proposed project -- the  
14 EIR/EIS states that construction and ongoing operations  
15 associated with the proposed project would result in  
16 considerable cumulative effects on aesthetics and  
17 visual resources. This will harm the tourism and  
18 recreation economy in the Delta as well as the quality  
19 of life for the residents and the visitors.

20           Next is cultural resources. All impact areas  
21 except one remain significant and unavoidable in the  
22 Supplemental EIR/EIS. DWR identified several  
23 archeological resources in the approved project area  
24 and found that they are likely to qualify as historical  
25 resources. Even so, this impact remains significant

1 because construction could materially alter or destroy  
2 the physical integrity of the resource or their  
3 potential to yield information useful in archeological  
4 research.

5           Also, the impact on identified archeological  
6 sites would also be significant and unavoidable because  
7 construction could damage the remaining portions of the  
8 deposits. Although the majority of the study area  
9 hasn't been surveyed, sensitive resources have been  
10 located within and near the portions of the alignment  
11 that have been surveyed. Additional archeological  
12 resources are likely to be found in the portions of the  
13 study area where surveys have not yet been conducted.

14           Ground-disturbing construction for both the  
15 approved project or the proposed project may materially  
16 alter the significance of these resources. For this  
17 reason, the impact would be adverse, significant, and  
18 unavoidable. Culture and historical significance of  
19 the Delta would be minimalized [sic] and largely  
20 destroyed.

21           North Delta C.A.R.E.S. asserts that the  
22 historical significance of the Delta to the people of  
23 the State of California, the people of the United  
24 States of America, and the people of the world is being  
25 ignored and destroyed by this project.

1 Hazards and hazardous materials is the last  
2 one. The summary of this chapter is that potential  
3 effects include routine use of hazardous materials,  
4 possible natural gas accumulation in tunnels, contact  
5 with or release of existing contaminant, the  
6 constituents of the RTM, effects of electrical  
7 transmission lines, conflicts with utilities containing  
8 hazardous materials, and routine transport of hazardous  
9 materials.

10 With mitigation, the impacts are considered  
11 significant because the potential exists for  
12 substantial hazard to the public or environment to  
13 occur related to conveyance facility construction.  
14 Also, although land use chapter has -- the land use  
15 chapter has not specifically identified sensitive  
16 receptors within one quarter mile of construction  
17 footprint, the town of Hood is, by definition in the  
18 EIR/EIS, one quarter mile south of Intake 3 and one  
19 half mile north of the construction of Intake 5, as  
20 stated earlier.

21 Infants, children, and the elderly are  
22 sensitive receptors in the communities of Hood and  
23 Clarksburg and are too close the construction zones to  
24 be out of harm's way. The water intakes should not be  
25 constructed here.



1           The Supplemental EIR/EIS did identify, under  
2 the proposed project, that there are no sites of  
3 concern within a half a mile of the construction  
4 footprint, which is a decrease from three sites of  
5 concern within a half a mile and identical to the  
6 approved project. There are still no known hazardous  
7 material sites located within the construction  
8 footprint of the water conveyance, and thus they say no  
9 related hazard to the public or the environment.

10           On July 9th, 2018, North Delta C.A.R.E.S.  
11 wrote a letter to the Metropolitan Water District of  
12 Southern California informing their board of directors  
13 of the huge gas well fields and numerous wells, both  
14 active and abandoned, in the Delta region and  
15 specifically in the vicinity of the construction for  
16 the California WaterFix.

17           North Delta C.A.R.E.S. remains extremely  
18 concerned about the potential for gassy tunnel -- a  
19 gassy tunnel accident similar to the one that occurred  
20 in Sylmar 42 years ago, when Metropolitan experienced  
21 an explosion while drilling a tunnel that killed 17  
22 people. At that time, we also included a list of good  
23 potential alternatives for creating a sustainable water  
24 supply for California.

25           North Delta C.A.R.E.S. opposes the granting of

1 the DWR and Bureau of Reclamation change in point of  
2 diversion permits for the three intakes and the  
3 California WaterFix project and requests the State  
4 seeks better alternatives that do not cause further  
5 harm to the Delta region.

6 Thank you for letting me give my summary.

7 CO-HEARING OFFICER DODUC: Thank you,  
8 Ms. Daly. I believe there is no cross from DWR. And  
9 Ms. Des Jardins requested 20 minutes.

10 CROSS-EXAMINATION BY MS. DES JARDINS

11 MS. DES JARDINS: Good afternoon, Ms. Daly.

12 I'm Deirdre --

13 WITNESS DALY: Good afternoon.

14 MS. DES JARDINS: -- Des Jardins with  
15 California Water Research.

16 And the last part of your summary regarding  
17 the Sylmar tunnel accident -- can we bring up Exhibit  
18 NDC-61, please? And I'd like to go to Page 3. Can we  
19 scroll down.

20 Ms. Daly, is it your understanding -- this  
21 appears to be an article from the Daily News; is that  
22 correct?

23 WITNESS DALY: Yes.

24 MS. DES JARDINS: Does it state that this was  
25 the worst tunnel disaster in California history?

1 WITNESS DALY: Yes.

2 MS. DES JARDINS: Leaving one survivor?

3 WITNESS DALY: Yes. I believe he's still  
4 alive.

5 MS. DES JARDINS: And is this part of the  
6 basis for your concern?

7 WITNESS DALY: Yes, and the map that shows so  
8 many tunnels -- or not tunnels -- so many wells in the  
9 area of the California WaterFix alignment.

10 MS. DES JARDINS: The next thing I'd like to  
11 ask is, with respect to -- just a second --- your --  
12 Page 7 of your testimony, can we go to North Delta  
13 C.A.R.E.S. 55, Page 7.

14 And I believe it states that the Supplemental  
15 EIR promises that the precise location of its pipelines  
16 will be identified prior to construction?

17 WITNESS DALY: Yes, I see that down toward the  
18 bottom.

19 MS. DES JARDINS: I'd like to bring up Exhibit  
20 DWR-1309 please.

21 And, Ms. Daly, are you aware that DWR is --  
22 has plans to begin construction on Bouldin Island?

23 CO-HEARING OFFICER DODUC: Hold on.

24 WITNESS DALY: I --

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

1 Ms. Ansley.

2 MS. ANSLEY: Yes, I would lodge an objection.  
3 I would obviously move to strike that.

4 In Ms. Daly's testimony, she is merely  
5 excerpting the admin draft supplemental record, I  
6 believe, here. And in nowhere does she go to any other  
7 documents or talk about work specifically on Bouldin  
8 Island. So, in fact, there are very few sections in  
9 this testimony where there's anything other than an  
10 excerpt from the SEIR.

11 So I think this is well beyond the scope of  
12 rebuttal and just used as a hook to expand.

13 CO-HEARING OFFICER DODUC: On something that  
14 we've already been through.

15 Ms. Des Jardins, make the linkage, if you  
16 could. Point me to --

17 MS. DES JARDINS: There is -- I was going to  
18 do that on the very next question, which is --

19 CO-HEARING OFFICER DODUC: Hold on. Hold on.  
20 Pull up Ms. Daly's testimony.

21 MS. DES JARDINS: Yes.

22 CO-HEARING OFFICER DODUC: And show me the  
23 linkage.

24 MS. DES JARDINS: So Ms. Daly talks about  
25 utilities.

1 CO-HEARING OFFICER DODUC: Where?

2 MS. DES JARDINS: I just was at --

3 CO-HEARING OFFICER DODUC: Page, please?

4 MS. DES JARDINS: So Page 7. I was just on  
5 it. And it states that precise location of pipelines  
6 would be identified prior to construction to provide --  
7 to avoid conflicts with construction.

8 MS. ANSLEY: And I would add that this is  
9 indeed Ms. Daly's testimony. This excerpt is not  
10 Ms. Daly's opinion. This is an excerpt from the SEIR.  
11 It's not a sentence that she is crafting. It's a  
12 sentence that she's alluding to.

13 CO-HEARING OFFICER DODUC: And her response to  
14 it? How does it connect to where you're going,  
15 Ms. Des Jardins?

16 MS. DES JARDINS: I would like to ask Ms. Daly  
17 about the provisions in the contract for the -- and I'd  
18 like to do an offer of proof that, if I was allowed to  
19 ask the question, they would -- it would show that the  
20 contract provides that the utilities haven't been  
21 located and the contractor will be responsible for  
22 doing so.

23 CO-HEARING OFFICER DODUC: And you can  
24 certainly make that argument in your briefs. I think  
25 we've been through it with this -- with this draft work

1 contract that you've asked several witnesses now,  
2 pertaining to a December 2018 deadline which no one has  
3 committed to, as I understand it from the petitioners.

4 And we are going down the same path again.

5 And I'm not sure where the value is, especially since  
6 there is very tenuous, if any, linkage to Ms. Daly's  
7 direct rebuttal testimony.

8 MS. DES JARDINS: To the extent that this does  
9 not show DWR finding and locating utilities and gas  
10 pipelines prior to construction, I respectfully assert  
11 that it is directly relevant and it is not something  
12 that's been covered in cross of any other witnesses.

13 Ms. Daly is testifying about hazards from gas  
14 pipelines and from gassy ground during tunnel  
15 construction.

16 MS. ANSLEY: I would add an objection of  
17 relevance regarding this draft document, and I would  
18 also point out that Ms. Daly has no testimony regarding  
19 the timing or nature of the studies.

20 I understand, of course, that Ms. Daly is  
21 raising a legitimate concern about the potential for  
22 similar accidents that have to do with construction in  
23 the proximity of oil fields. You can find that on  
24 Page 10, where she is concluding her section on  
25 hazardous materials.

1 WITNESS DALY: May I say something?

2 CO-HEARING OFFICER DODUC: Who is speaking?

3 Oh, Ms. Daly. All right.

4 WITNESS DALY: I believe I learned about this  
5 construction on Bouldin Island after I wrote my  
6 testimony.

7 CO-HEARING OFFICER DODUC: Then it is indeed  
8 outside the scope of your testimony.

9 WITNESS DALY: Oh, okay. Well, I would  
10 have --

11 CO-HEARING OFFICER DODUC: Objection  
12 sustained.

13 WITNESS DALY: Okay. So. . .

14 MS. MESERVE: Is DWR objecting to their own  
15 exhibit?

16 CO-HEARING OFFICER DODUC: No. Let's not --  
17 let's not argue this point. Objection is made as being  
18 outside the scope of rebuttal testimony, and I concur;  
19 I sustain.

20 MS. DES JARDINS: Ms. Daly?

21 WITNESS DALY: Yes.

22 MS. DES JARDINS: With respect to DWR locating  
23 gas pipelines as stated in there, do you have concerns?  
24 Is this why you included that in the testimony?

25 WITNESS DALY: Yes, I have many concerns. I

1 did have to pick and choose because I had to keep my  
2 testimony to ten pages. So I would have chosen more  
3 information to comment on in that Supplemental EIR/EIS,  
4 but I wanted to pick the ones that had -- I had the  
5 most concern with.

6 And this did come up in Part 2 with  
7 Mark Pruner, who is on our fire department in  
8 Clarksburg. And they are first responders. And I  
9 actually did find a quote in the EIR/EIS that talked  
10 about the first responders will be the ones that will  
11 be called into action first in some of their  
12 documentation, but I didn't get it in here.

13 CO-HEARING OFFICER DODUC: So I'm really  
14 curious. I appreciate it, but why did you feel you had  
15 to limit your testimony to ten pages?

16 WITNESS DALY: That was my understanding, that  
17 it had to be ten pages. Maybe I got it mixed up with  
18 another ruling.

19 MS. ANSLEY: That would be the Court limit on  
20 reply briefs, but I do believe that we don't follow --

21 CO-HEARING OFFICER DODUC: Yes, I really  
22 appreciate the brevity and conciseness, but I don't --  
23 just so you know, there isn't a ten-page limit.

24 WITNESS DALY: There isn't? Oh, gosh.

25 CO-HEARING OFFICER DODUC: And, yes, thank you



1 for the idea.

2 MS. ANSLEY: And I would argue that testimony  
3 regarding first responders or any potential rebuttal to  
4 her own witness Mr. Pruner would be outside the scope.

5 CO-HEARING OFFICER DODUC: Sustained.

6 WITNESS DALY: I wasn't rebutting him. I was  
7 just stating what I thought he said. Okay. Anyway.

8 MS. DES JARDINS: Ms. Daly, and just -- I'd  
9 like to go to North Delta C.A.R.E.S., Page 255, please,  
10 to the top -- I'm sorry. Page 3. And I wanted to ask  
11 you about your concerns.

12 So it lists that the Supplemental EIR  
13 concludes that the impact under the proposed project  
14 would remain less than significant, correct?

15 WITNESS DALY: Yes.

16 MS. DES JARDINS: And -- but you're concerned  
17 that the project will have both devastating short and  
18 long-term effects on recreation in the Delta?

19 WITNESS DALY: Yes.

20 MS. DES JARDINS: And is that partly impacts  
21 on North Delta C.A.R.E.S. members and -- and towns in  
22 the North Delta that you're familiar with?

23 WITNESS DALY: Yes.

24 May I add to that?

25 MS. DES JARDINS: Yes.

1 CO-HEARING OFFICER DODUC: Ms. Daly, before  
2 you add to that, let me caution you that your testimony  
3 is actually very succinct, without a lot of details.  
4 And your answers should not go beyond what is in your  
5 written testimony, otherwise it will be surprise  
6 testimony.

7 WITNESS DALY: Oh. Could I say it, and then  
8 you could strike it?

9 CO-HEARING OFFICER DODUC: No. Let's not do  
10 that.

11 WITNESS DALY: Well, I'm not sure how to  
12 evaluate --

13 MS. MESERVE: I mean, her testimony begins  
14 with a discussion about North Delta C.A.R.E.S. Action  
15 Committee, and this question seems to be about what her  
16 members are concerned about. So I really -- I don't  
17 see how it would be a surprise to answer a question  
18 about that.

19 MS. ANSLEY: I would argue that she has raised  
20 a generalized concern for any of these topics.

21 CO-HEARING OFFICER DODUC: Yes.

22 MS. ANSLEY: And if she now starts providing  
23 detail about what the members of North Delta C.A.R.E.S.  
24 are specifically concerned with and protects -- maybe  
25 it's specific locations, maybe it's specific

1 activities -- that would be surprise testimony outside  
2 the scope of this rebuttal testimony, and I would have  
3 to have a standing objection to anything like that.

4 CO-HEARING OFFICER DODUC: And that is a  
5 problem, Ms. Daly. Your testimony is very general in  
6 nature.

7 WITNESS DALY: Could I give a general answer  
8 then?

9 CO-HEARING OFFICER DODUC: Yes.

10 WITNESS DALY: Okay. There is a map in the  
11 new EIR/EIS Supplemental of the recreation areas. And  
12 there are some recreation spots left off of it. That's  
13 kind of general. I'm not being specific about who  
14 [sic] they are, but that's concerning, you know, that  
15 they haven't all been identified.

16 CO-HEARING OFFICER DODUC: Okay.

17 MS. DES JARDINS: Before I continue, I'd like  
18 to request a clarification about the scope of  
19 cross-examination on testimony about the Supplemental  
20 EIR. So I understand that the rebuttal was expanded so  
21 that protestants could put in testimony on the  
22 supplemental --

23 CO-HEARING OFFICER DODUC: Yes.

24 MS. DES JARDINS: -- EIR.

25 CO-HEARING OFFICER DODUC: But your cross is

1 limited to her testimony, not everything in the  
2 Supplemental EIR.

3 MS. DES JARDINS: So I'm -- so with regard to  
4 your previous ruling that a document in the  
5 Supplemental EIR, Ms. Daly does refer to it, but she  
6 can't testify about anything in the Supplemental EIR  
7 that's not in her direct -- her testimony; is that --  
8 that's the ruling?

9 CO-HEARING OFFICER DODUC: Your cross is  
10 limited to what is in her written testimony.

11 MS. DES JARDINS: And solely the topics --  
12 solely within the scopes of the topics that are within  
13 her direct testimony?

14 CO-HEARING OFFICER DODUC: No, that's not the  
15 case because what she did was she cited certain topics.  
16 She reproduced language in the supplemental  
17 administrative draft, Supplemental EIR, and then she  
18 provided a very general statement of her concern.

19 So her answer now cannot go into details that  
20 are not included in her testimony.

21 MS. DES JARDINS: And that's the scope of  
22 rebuttal, correct?

23 CO-HEARING OFFICER DODUC: That is the scope  
24 of her rebuttal testimony, to which then your cross is  
25 limited.

1 MS. DES JARDINS: Okay. I would like to go to  
2 Page 1, please.

3 And you do state in North Delta C.A.R.E.S.  
4 Action Committee -- that you represent the people,  
5 businesses, and land in the primary-secondary zone of  
6 the California WaterFix. Is that an appropriate  
7 characterization of your organization?

8 WITNESS DALY: Yes.

9 MS. DES JARDINS: And is that reflective of  
10 the concerns that you're expressing --

11 WITNESS DALY: Yes.

12 MS. DES JARDINS: -- in this statement?

13 Let's see. So -- just a sec.

14 WITNESS DALY: It's our area to focus on.  
15 There are other people focusing on the fish and the  
16 other parts of the WaterFix. But this construction is  
17 right outside our door.

18 MS. DES JARDINS: And you state -- let's go to  
19 Page 2 of your testimony.

20 And there is -- there's some concerns there  
21 about temporary power line and other  
22 construction-related facilities in the immediate  
23 vicinity and that they would cause difficulty traveling  
24 to and throughout certain areas of Hood. That's --  
25 that's your concern of impacts on the community?

1           WITNESS DALY: Well, that as well as they're  
2 also listed under the hazardous materials as a  
3 compounded hazard for the sensitive receptors and the  
4 people who live there. So it's -- yes, transmission  
5 lines are part of it. It's a compounded issue.

6           MS. DES JARDINS: As well as potentially  
7 things like -- things that could emit hazardous  
8 materials or, like -- I'm not sure --

9           WITNESS DALY: Air quality, I didn't bring up  
10 air quality, so I don't know if I can say it. But of  
11 course air quality and noise and transmission lines.  
12 And -- it's just going to be very difficult to -- to be  
13 in the Delta around these legacy towns.

14          MS. DES JARDINS: And you also were asserting  
15 that the project is in conflict with the County land  
16 use plans and the Delta Protection Committee --  
17 Commission's Land Use and Resource Management Plan?

18          WITNESS DALY: Yes.

19          MS. DES JARDINS: What's that based on?

20          WITNESS DALY: That's based on --

21          CO-HEARING OFFICER DODUC: And you cannot go  
22 into details.

23          WITNESS DALY: Okay.

24          CO-HEARING OFFICER DODUC: Answer without  
25 going into details.

1           WITNESS DALY: The County in the area of  
2           Clarksburg -- well, Clarksburg is Yolo County and Hood,  
3           which is Sacramento County, have put in their land use  
4           plans that they want to keep the land agriculture, for  
5           agriculture use, not industrial use. And then they  
6           even -- it's very hard to develop, to build any houses  
7           in the area. You can't hardly get a permit to do that.  
8           So in keeping to the -- is this brief enough or --

9           CO-HEARING OFFICER DODUC: Ms. Ansley?

10          WITNESS DALY: Stop there?

11          MS. ANSLEY: Same objection, I'm looking at  
12          Page 2, where she asserts the land use plans.

13          CO-HEARING OFFICER DODUC: No.

14          MS. ANSLEY: I'm not sure that I remember the  
15          other topics about developments and the ability to pull  
16          permits. And I'm not quite sure about the desire to  
17          keep things in agricultural land.

18                 But this is a very difficult testimony to  
19          cross because it does only raise generalized concerns.  
20          So I apologize for continuing to having to stand up and  
21          object.

22          CO-HEARING OFFICER DODUC: Yes, it is very  
23          general.

24          MS. MESERVE: Don't witnesses get to answer  
25          questions about their statements? She's --

1 CO-HEARING OFFICER DODUC: Not to the extent  
2 where they provide additional details. It is surprise  
3 testimony, as you, as a lawyer, will know better than  
4 I.

5 All right. Next question, Ms. Des Jardins.

6 MS. DES JARDINS: I was just under the  
7 impression that cross-examination wasn't direct  
8 testimony, and so it wasn't surprise testimony. Is  
9 that --

10 CO-HEARING OFFICER DODUC: We're in the  
11 rebuttal phase, Ms. Des Jardins. During case in chief,  
12 you had a little more latitude in your  
13 cross-examination.

14 During the rebuttal phase, your cross must be  
15 limited to the rebuttal testimony. We have stated that  
16 numerous times in our various rulings and directions.

17 WITNESS DALY: I apologize. It's Barbara  
18 again.

19 CO-HEARING OFFICER DODUC: Oh, I keep hearing  
20 voices.

21 WITNESS DALY: I come from all over.

22 I just didn't know how to write it the way  
23 that you were needing it, or I would have certainly  
24 done that. But -- it's my lack of understanding. So  
25 I'm sorry to be so difficult.



1 CO-HEARING OFFICER DODUC: No, you're not.  
2 It's the constraint of all these legal requirements  
3 that are put in place that we all have to operate  
4 under.

5 MS. DES JARDINS: And finally, I'd like to go  
6 just to the bottom of Page 3 because it seemed  
7 like -- but says that -- you kind of summarized the  
8 parts of the CA WaterFix impacts in recreation,  
9 aesthetics, land use, socioeconomic, cultural  
10 resources, et cetera, and their significant adverse  
11 impacts, you know.

12 So this was based on your review, and you're  
13 sort of summarizing it, the sections of the  
14 Supplemental EIR/EIS?

15 WITNESS DALY: Yes, and I was kind of  
16 surprised, actually, on that summary. I didn't know  
17 what I was going to find when I went to them. And I  
18 actually did somewhat of a chart of what are the  
19 impacts -- what are all of the potential impacts, how  
20 are they listed, and then what -- after mitigation,  
21 what are the final results and how many of them in  
22 these areas were adverse, significant, and unavoidable  
23 even after mitigation, that --

24 MS. DES JARDINS: And so you saw that -- it's  
25 your opinion that, based on that, that they would -- it

1 would have a cumulative negative impact on recreation  
2 and tourism in the Delta?

3 WITNESS DALY: Yes, on the economy in the  
4 Delta, people's lives, their health. I'll stop there.

5 MS. DES JARDINS: Okay. Is there any request  
6 that you would have of this Board in connection with  
7 those findings?

8 CO-HEARING OFFICER DODUC: That would --

9 WITNESS DALY: Yes, I believe I wrote it in my  
10 summary.

11 CO-HEARING OFFICER DODUC: Oh, good, good.

12 WITNESS DALY: In my conclusion.

13 MS. DES JARDINS: Where's your summary?

14 WITNESS DALY: In my conclusion, that you do  
15 not request [sic] the -- the Department of Water  
16 Resources and the Board of Reclamation requested  
17 permits for the three intakes and the change in the  
18 point of diversion and support this.

19 And that's why I brought up other ways. There  
20 are other solutions that could and should be vetted  
21 that use conservation of water, actually bring up new  
22 water. And I believe that those should be some of the  
23 alternatives that would be more viable. They'd be less  
24 expensive and do less damage to the Delta, to the  
25 region, and create new water. They need to be

1 considered.

2 CO-HEARING OFFICER DODUC: Thank you. Hold  
3 on.

4 Ms. -- no?

5 MS. DES JARDINS: Could I do just one more  
6 question?

7 CO-HEARING OFFICER DODUC: "One more  
8 question," when I have I heard that before Ms. Suard  
9 [sic]? One more question. Okay.

10 MS. DES JARDINS: I'd just like to go to  
11 Page 1 of her testimony.

12 And Ms. Daly, you refer to the coequal goals  
13 being achieved in a manner that protects and enhances  
14 the unique cultural, recreational, and agricultural  
15 values of the Delta as an evolving place?

16 WITNESS DALY: Yes.

17 MS. DES JARDINS: And that's important to  
18 North Delta C.A.R.E.S., is it not?

19 WITNESS DALY: That is the most important  
20 thing to North Delta C.A.R.E.S.

21 MS. DES JARDINS: And you feel this plan falls  
22 short of that section of the Water Code?

23 WITNESS DALY: I'm sorry. Ask me that --

24 MS. DES JARDINS: This plan falls short of  
25 that section of the Water Code?

1           WITNESS DALY: With all of the unavoidable,  
2 significant, adverse impacts, I don't see anything that  
3 protects or enhances any of these unique cultural,  
4 recreational, natural resource, or agricultural values.  
5 I don't see it being considered as the -- part of the  
6 coequal goals that should be -- that shall be  
7 considered -- it's in the Water Code, that shall be  
8 considered. When the State creates a reliable water  
9 supply and restores the ecosystem, it shall be done in  
10 a way that protects and enhances. And I can't find it  
11 anywhere in the documentation.

12           MS. DES JARDINS: Okay. And --

13           CO-HEARING OFFICER DODUC: Always this one  
14 more question that never stops at one.

15           Thank you, Ms. Des Jardins.

16           Ms. Suard.

17           MS. SUARD: One topic. Not one question, one  
18 short topic.

19           CO-HEARING OFFICER DODUC: All right. At  
20 least she didn't say "one question."

21           WITNESS DALY: One surprise question.

22           CROSS-EXAMINATION BY MS. SUARD

23           MS. SUARD: Nikki Suard with Snug Harbor.

24           Could you please go to Snug Harbor's -- I  
25 always refer to the maps -- Snug Harbor's SHR-705,

1 please.

2 And what this is is a map of the active gas  
3 wells and inactive gas wells. Could you scroll it down  
4 a little bit, please, so we see more of the area --  
5 actually, right there. That's good.

6 So was this one of the of the maps that was  
7 sent down to Metropolitan Water District?

8 CO-HEARING OFFICER DODUC: Hold on. And  
9 before we get to objection, could you perhaps point me  
10 to her testimony, where you are focusing?

11 MS. SUARD: Ms. Daly talked about her concern  
12 for impacts, including risks from explosions from gas  
13 wells and --

14 CO-HEARING OFFICER DODUC: I understand.  
15 Point me to her testimony.

16 MS. SUARD: Page 10.

17 CO-HEARING OFFICER DODUC: 10?

18 WITNESS DALY: The middle of the page.

19 MS. SUARD: I think was -- your Point 6 was  
20 hazards?

21 WITNESS DALY: Yes, yes. Hazards and  
22 hazardous materials.

23 MS. SUARD: And she specifically --

24 CO-HEARING OFFICER DODUC: I can't -- I don't  
25 see it. Where are we looking? Page 10?

1 MS. SUARD: It says "Impact Haz-1."

2 MS. DALY: "On July 9th, 2018, North Delta  
3 C.A.R.E.S. wrote a letter" --

4 CO-HEARING OFFICER DODUC: Okay.

5 Okay. All right. All right. Then your  
6 question is?

7 MS. SUARD: So I'm referring back to one of  
8 the maps.

9 CO-HEARING OFFICER DODUC: Explain, please.

10 MS. SUARD: Okay. This is a map produced by  
11 the State of California Department of Conservation.  
12 They label this map -- I think it's 610. It would be  
13 in the upper right-hand corner. And it shows the  
14 location of all the active gas wells, the non-active  
15 gas wells.

16 And the purpose of these maps being sent to  
17 Metropolitan Water District -- well, why were these  
18 maps sent to Metropolitan Water District?

19 WITNESS DALY: They were having --

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

21 Ms. Ansley.

22 MS. ANSLEY: Yeah, and this is probably to  
23 resolve a confusion of mine. But Ms. Daly, on Page 10,  
24 and I'm looking at the same paragraph, references the  
25 article that --

1 CO-HEARING OFFICER DODUC: Yes, I see that.

2 MS. ANSLEY: -- says -- but in the letter in  
3 the article. And then she talks about a Figure 13-1.  
4 And what I think I'm looking at on this screen is a  
5 Snug Harbor exhibit. So I'm not sure what we're  
6 looking at is exactly the same map.

7 I would prefer we use Ms. Daly's exhibits.  
8 And then I can see what the question is before she  
9 answers questions about a map that doesn't seem to say  
10 "Figure 13-1." I'm not sure that they, like, line-up  
11 in any way. And I don't want to expand the scope of  
12 cross to be starting to opine on other maps unless the  
13 connection can be made between the two maps.

14 Is it the same map? What are we looking at?  
15 But what she's pulled up is a Snug Harbor exhibit, and  
16 what she's referencing is I believe a North Delta  
17 C.A.R.E.S. exhibit. So maybe more of a foundation  
18 needs to be laid, but that would be my initial concern  
19 would be going off on a different map that I'm not sure  
20 that Ms. Daly is aware of.

21 And she clearly has some testimony regarding  
22 this Figure 13-1 and a generalized concern. So my  
23 objection is to that figure.

24 CO-HEARING OFFICER DODUC: Yes. Can you help  
25 me understand, Ms. Suard, if there are any differences

1 between Figure 13.1 and Snug Harbor 705?

2 MS. SUARD: There was -- it was a group  
3 mailing sent to Metropolitan Water District. And I can  
4 testify that I sent that map to Metropolitan Water  
5 District in cooperation with --

6 CO-HEARING OFFICER DODUC: So am I to  
7 understand that SHR-705 is this Figure 13-1 that's  
8 referenced in Ms. Daly testimony?

9 MS. SUARD: No. But --

10 WITNESS DALY: 13-1 is the one that  
11 Deirdre Des Jardins and I testified in Part 2. I think  
12 it's a -- it's -- it is in -- there is an exhibit of  
13 it, but I don't know what the number is. It's  
14 practically all pink. Do you remember that one?

15 CO-HEARING OFFICER DODUC: So, Ms. Suard -- I  
16 want to call you Ms. Des Jardins because that's the  
17 name tag.

18 MS. SUARD: I'm happy to withdraw the  
19 question, and I will just bring it up again. That  
20 makes it easier.

21 CO-HEARING OFFICER DODUC: Bring it up --  
22 withdraw it and bring it up again? I don't know how  
23 that helps, but --

24 MS. SUARD: It's in my testimony as well.

25 CO-HEARING OFFICER DODUC: Oh, okay. All



1 right.

2 WITNESS DALY: North Delta C.A.R.E.S. 2-51,  
3 that's my exhibit. I did include it with this as an  
4 exhibit.

5 MS. SUARD: So I've withdrawn my question.

6 CO-HEARING OFFICER DODUC: Thank you. All  
7 right. We look forward to hearing about it in, like,  
8 five minutes when you come back up.

9 Are there any other -- any redirect?

10 (No response)

11 CO-HEARING OFFICER DODUC: All right. Thank  
12 you, Ms. Daly.

13 At this point, do you wish to move your  
14 exhibits or I guess Ms. Meserve -- actually, hold on.  
15 I think there is something from Chair Marcus.

16 CO-HEARING OFFICER MARCUS: I just want to  
17 correct something. You felt the need to apologize,  
18 like you did something wrong.

19 You didn't do anything wrong. That was fine.  
20 It's people using cross-examination inappropriately.  
21 So don't feel bad that you didn't write what they  
22 wanted you to say.

23 WITNESS DALY: Okay. Well --

24 CO-HEARING OFFICER MARCUS: It's a  
25 cross-examination point.

1           WITNESS DALY:  It's an educational process.  
2  I'm learning a lot.

3           CO-HEARING OFFICER DODUC:  At this point, do  
4  you wish to move your exhibits into the record?

5           WITNESS DALY:  Yes.

6           CO-HEARING OFFICER DODUC:  Are there any  
7  objections?

8           (No response)

9           CO-HEARING OFFICER DODUC:  All right.  Your  
10  exhibits are in the record, Ms. Daly.

11           (North Delta C.A.R.E.S. Exhibits  
12           NDC-2-40, NDC-2-41, NDC-2-42,  
13           NDC-2-43, NDC-2-44, NDC-2-45,  
14           NDC-2-50, NDC-2-51, NDC-2-55,  
15           NDC-2-60 and NDC-2-61 admitted  
16           into evidence)

17           CO-HEARING OFFICER DODUC:  And why don't we  
18  take a short break before we ask -- as we ask Ms. Suard  
19  to set up.  And why don't we return at 3:25.

20           (Recess taken)

21           CO-HEARING OFFICER DODUC:  All right.  It's  
22  3:25, and we're back.

23           Before I turn to Ms. Suard, I have a ruling to  
24  read.  This is in response to DWR's motion to strike  
25  portions of Mr. Burke's testimony.

1           With respect to the motion to strike  
2 Mr. Burke's testimony related to Boundary 1 and  
3 Boundary 2, that motion is denied. I've already ruled  
4 on this previously. Boundary 1 and Boundary 2 was part  
5 of Ms. Buchholz's testimony, and therefore, Mr. Burke's  
6 rebuttal is responsive to that.

7           There was also a motion to strike Mr. Burke's  
8 testimony related to DSM-2 bathymetry. That was  
9 responsive to Ms. Smith's testimony, and therefore,  
10 that motion is denied.

11           There was a motion to strike Mr. Burke's  
12 testimony relating to DSM-2 time steps and use of DSM-2  
13 in a predictive mode. That testimony is responsive to  
14 direct from Mr. Ruiz -- Mr. Reyes, I'm sorry --  
15 actually, his cross-examination testimony. So that  
16 motion is denied as well.

17           Therefore, DWR's motions with respect to  
18 Mr. Burke's testimony are hereby denied. And that  
19 should help Mr. Ruiz prepare Mr. Burke for tomorrow.

20           And with that, unless there is another  
21 housekeeping matter, we'll turn to Ms. Suard.

22                               NIKKI SUARD,  
23                               called as a Part 2 Rebuttal witness  
24                               by protestant Snug Harbor Resorts,  
25                               LLC, having been previously duly

1           sworn, was examined and testified  
2           further as hereinafter set forth:

3                     DIRECT TESTIMONY BY MS. SUARD

4           WITNESS SUARD: Good afternoon, Nikki Suard,  
5 Snug Harbor Resorts, LLP. And I have a little bit of  
6 correction to -- I'm actually using SHR-701-Revised  
7 which had been revised by the Board. But there are a  
8 couple other -- except for corrections that I need to  
9 make.

10                    And I also wish to point out, as I'd already  
11 let DWR know this morning, I'm withdrawing the  
12 following rebuttal evidence items. It's SHR-702, 710,  
13 711, 715, 720, 721, and 722. And it was in the  
14 interest of brevity and realizing that some of those  
15 subjects, either the file didn't upload or the subjects  
16 had been covered. So those have been withdrawn.

17                    As far as the actual testimony, I would like  
18 to -- I'm going to have to correct it again to remove  
19 reference to those withdrawn items. But I would like  
20 to say that, on Page 3, Line 15, there is a word --  
21 SHR-722, and the word "there," T-H-E-R-E, should be the  
22 start of that sentence. And that removes that  
23 particular reference.

24                    And on Page 5, Line 2, there is the words,  
25 "Perhaps California Water Board should itself" -- and

1 so on. So I'd like to scratch the word "perhaps." And  
2 then after the words "California Water Board," it says  
3 "should itself." I wish to put in the word "has" and  
4 then "publish" should be "published."

5 And then Line 3, the word "and" should be  
6 "so," S-O.

7 And then again on Page 7, the very bottom  
8 line, it says, "SHR-702 shows" and goes on from there.  
9 That should be scratched all the way till line -- the  
10 end of Line 2 on Page 8 because that evidence is not  
11 submitted.

12 CO-HEARING OFFICER DODUC: I'm sorry. Could  
13 you cover that one again for me?

14 WITNESS SUARD: Sorry.

15 CO-HEARING OFFICER DODUC: Repeat that.

16 WITNESS SUARD: Okay. Page 7, Line 24. So  
17 the last line, it says, "SHR-702 shows low flow  
18 impacts." Just scratch those words. And then the  
19 sentence continues on Page 8. And Page 8, Lines 1 and  
20 2 should just be scratched entirely.

21 CO-HEARING OFFICER DODUC: Got it. Thank you.

22 While we're at it, do you want to correct on  
23 Line 16 on Page 7 Ms. Smith's first name, which is  
24 Tara?

25 WITNESS SUARD: Excuse me. Which page?

1 CO-HEARING OFFICER DODUC: Page 7, Line 16.

2 WITNESS SUARD: Oh, yes, sorry. That would be  
3 "Tara Smith." That's correct. So Line 16, the word  
4 "Tata" should be "Tara."

5 CO-HEARING OFFICER DODUC: It just happened to  
6 catch my eye, that's all. I wasn't looking for it.

7 Anything else, Ms. Suard?

8 WITNESS SUARD: No, not at this point in time.

9 CO-HEARING OFFICER DODUC: All right.  
10 Mr. Mizell.

11 MR. MIZELL: Yes, so if I understood Ms. Suard  
12 correctly, she proposes to submit a red line reflecting  
13 strike-outs. But I wasn't certain if it would include  
14 additional strike-outs in the references to the other  
15 exhibits that she has withdrawn or if what we just went  
16 through is the extent of the red lines.

17 WITNESS SUARD: No. To clarify, I will  
18 resubmit a revised SHR-101 Revision 2 that will strike  
19 out everything that I just withdrew.

20 CO-HEARING OFFICER DODUC: As well as  
21 references to exhibits that you -- are there any other  
22 references to exhibits that you have withdrawn that  
23 will be struck from this testimony?

24 WITNESS SUARD: Yes, but I haven't gone  
25 through all of them, so there are -- a couple of the

1 subject matters, I don't need to cover. So those --  
2 any reference to 702, 710, 711, and so on, what I said  
3 will be -- I will correct the testimony to remove those  
4 references by tomorrow. Okay?

5 MR. MIZELL: So depending on how you would  
6 like to approach this, we have rather extensive motions  
7 to strike portions of this testimony based upon  
8 improper rebuttal evidence. Some of them may overlap  
9 with what Ms. Suard plans to provide in her strike-out  
10 tonight; others, however, may not.

11 I am prepared to go through our motion to  
12 strike now or we can await the red-lined strike-out  
13 version and submit it in writing once we see that new  
14 version.

15 CO-HEARING OFFICER DODUC: Let's go through it  
16 now. And if there are any that -- that reflects the  
17 exhibits that Ms. Suard has already withdrawn, let's  
18 clarify and identify those so that they don't remain as  
19 things that we need to address.

20 MR. MIZELL: Very good.

21 If we could start with Page 3 of 701-Revised  
22 please.

23 CO-HEARING OFFICER DODUC: And Mr. Mizell, you  
24 could bring the microphone closer. I can barely hear  
25 you.

1 MR. MIZELL: Sure. Is this better?

2 CO-HEARING OFFICER DODUC: A little.

3 MR. MIZELL: Okay. So if we start with  
4 Page 3, looking at Lines 15 through 20. So Ms. Suard  
5 just indicated that she would be removing the initial  
6 citation to SHR-722 and replacing it with the word  
7 "there."

8 However, the Department would move to strike  
9 Line -- the sentences between Lines 15 and 20 that  
10 begin with "SHR-722" as non-responsive testimony to  
11 anything presented in the case in chief. It's provided  
12 no citation to any -- any case-in-chief testimony nor  
13 where it would be responsive to changes found in the  
14 Supplemental EIR/EIS.

15 CO-HEARING OFFICER DODUC: Hold on. Hold on,  
16 please.

17 MR. MIZELL: Yes.

18 CO-HEARING OFFICER DODUC: Page 3?

19 MR. MIZELL: Page 3, Lines --

20 CO-HEARING OFFICER DODUC: Lines 15 --

21 MR. MIZELL: -- through 20.

22 CO-HEARING OFFICER DODUC: Okay. Now, is it  
23 my understanding, Ms. Suard, that SHR-722 is one of the  
24 exhibits you have withdrawn?

25 WITNESS SUARD: Yes.



1 CO-HEARING OFFICER DODUC: And if that's the  
2 case, then why would that --

3 WITNESS SUARD: I was --

4 CO-HEARING OFFICER DODUC: I'm sorry. Why  
5 would that sentence still be there?

6 WITNESS SUARD: I was responding to -- there  
7 was testimony, rebuttal testimony by DWR regarding  
8 water levels. And so -- it's not going to say where it  
9 is.

10 CO-HEARING OFFICER DODUC: I'm confused, and  
11 perhaps Ms. Meserve can help you. If the video has now  
12 been withdrawn, why does the testimony still refer to  
13 it?

14 MS. MESERVE: This is in -- she's also  
15 suggested a condition requiring water levels to remain  
16 at navigable levels. So I think she's just saying she  
17 made a video, and it's describing it. I don't think  
18 she needs to submit the 722 in order to talk about  
19 what, you know, she -- is her support for this  
20 condition.

21 WITNESS SUARD: And there is a link to the  
22 video. I just didn't think we need to take the time in  
23 this hearing -- there is discussions -- this is about  
24 recreation, boating recreation, a lot of other issues,  
25 too. But boats can't go boating if the water levels

1 are too low.

2 And so my intent is, there is a lot of  
3 testimony about water levels and the intakes would  
4 reduce water levels or would it not. And I thought it  
5 would be helpful to have a reference to what it was  
6 like in -- in the Delta prior to that. And a condition  
7 of approval of WaterFix would be to make sure that we  
8 keep our historic levels for boating.

9 CO-HEARING OFFICER DODUC: But you have  
10 withdrawn the video, so it's no longer in the record  
11 upon which we can rely.

12 WITNESS SUARD: Okay. But my testimony still  
13 can stay as an opinion.

14 MS. MESERVE: And I believe the YouTube url,  
15 maybe, in addition.

16 Would that -- that's the same as SHR-722,  
17 isn't it, Ms. Suard?

18 WITNESS SUARD: Yes, it is.

19 MS. MESERVE: So we can delete the two  
20 references and then allow her to leave her description  
21 of why she has suggested this condition?

22 CO-HEARING OFFICER DODUC: Response to that,  
23 Mr. Mizell?

24 MR. MIZELL: It would still be our opinion  
25 that Lines 18 through the very beginning of 20 would

1 also need to be struck. The reference to a written  
2 description from the 1850s is nowhere else in the  
3 record, nor has anyone talked about old rigged ships'  
4 passage in the Delta.

5           Again, it doesn't provide any reference to  
6 evidence or testimony from the case-in-chief portion of  
7 the hearing. So I recognize that large portions of  
8 this first condition are her suggestions for terms and  
9 conditions. We're not objecting to that. We're simply  
10 objecting to what we view as new evidence that's being  
11 submitted in a manner that's inconsistent with the  
12 normal process.

13           CO-HEARING OFFICER DODUC: Yes, I understand  
14 that proposed terms and conditions must be supported by  
15 evidence in the record.

16           And let me get clarification from legal  
17 counsel as to whether that supporting evidence is  
18 required to be in the record before the proposed terms  
19 and condition is being proposed.

20           MR. DEERINGER: So as the Hearing Officers  
21 have said on a number of occasions, proposed terms can  
22 be introduced at any time during proceeding. And  
23 before the Hearing Officers can decide to incorporate  
24 any of those into any final order they might issue,  
25 they have to be supported by evidence in the record.

1           What that means is that that evidence needs to  
2 be in the record at some point before the final  
3 decision is made. Otherwise, when the evidence enters  
4 the record, it is a pretty open question.

5           The only requirement is that the evidence be  
6 introduced during the ordinary course of the hearing,  
7 meaning that, if it's introduced during rebuttal, it's  
8 within the rebuttal scope; if it's introduced during  
9 the case in chief, then it's within the case-in-chief  
10 scope; if it's introduced on cross, it's in compliance  
11 with the Hearing Officer's direction on cross.

12           So the direction about terms and conditions  
13 having to be supported by evidence the record, that  
14 doesn't change the ordinary rules for introducing  
15 evidence into the record I guess is what I'm trying to  
16 say.

17           CO-HEARING OFFICER DODUC: All right. So  
18 thank you for that clarification.

19           We're back then to Mr. Mizell's objection that  
20 you do not believe 722 or the languages you referenced  
21 in Lines 15 through 20 is proper rebuttal testimony  
22 because it does not respond to any evidence introduced  
23 during Part 2 case in chief.

24           Do I understand that?

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

1 it's not providing a citation to where it may have  
2 previously been introduced in the normal course of the  
3 hearing.

4 CO-HEARING OFFICER DODUC: As directed by our  
5 directions.

6 Response to that, please, now that we've  
7 narrowed it down a little bit.

8 WITNESS SUARD: I know that in Part 1 I  
9 submitted maps that included water depths in general  
10 from the first survey. That included that area. I  
11 believe it was SHR-67. But it's -- that's in a  
12 different evidence.

13 CO-HEARING OFFICER DODUC: Yes. You need  
14 to -- you need to explain how this is responsive to  
15 Part 2 case in chief.

16 WITNESS SUARD: There was -- I think it was --  
17 I'm going to go to exactly which -- whose testimony.

18 Tara Smith, DWR-1027, and her testimony talked  
19 about water levels and -- water quality, water levels,  
20 DSM-2, CalSim. She kind of covered a lot of different  
21 things.

22 And my experience with the No Action  
23 Alternative -- which means what we are now -- and  
24 what's being proposed is that there isn't enough flow  
25 now in the waterway. And with what's being proposed as

1 H3+, they did not cover water levels on Steamboat  
2 Slough. And so it's what they didn't cover that is the  
3 issue here. It was not modeled.

4 CO-HEARING OFFICER DODUC: All right.  
5 Mr. Mizell, I'm going to allow it and say it goes to  
6 weight.

7 MR. MIZELL: Very good. When you're ready,  
8 I'll move on. If we can go to Page 4, please. Looking  
9 at Line 4, the sentence leading up to citation SHR-702.

10 WITNESS SUARD: Okay. And I'm sorry, that  
11 should be 709. I missed that correction. That should  
12 SHR-709.

13 MR. MIZELL: I think we'll continue to object  
14 to the statement, even with the corrected citation.  
15 This sentence goes to existing conditions and  
16 assertions made about existing conditions.

17 It's not California WaterFix, and at no point  
18 has the Department or others testified in the case in  
19 chief on the existing water levels and whether or not  
20 those are sufficient for navigation.

21 And so absent a citation to where in the  
22 record she's responding, I don't believe it's  
23 appropriate rebuttal evidence.

24 WITNESS SUARD: Again, Tara Smith 1027, there  
25 is discussion about water quality and water levels.

1 This is actually a water quality issue.

2 I'm providing a real-life, real-time example  
3 of what happens when there's insufficient flow and the  
4 cost incurred when insufficient flows on North Delta  
5 waterways impacts the drinking water aquifer.

6 CO-HEARING OFFICER DODUC: But Ms. Suard, his  
7 point is that you are discussing an existing alleged  
8 violation due to excessive diversion which is not  
9 dependant on the WaterFix.

10 WITNESS SUARD: WaterFix -- the modeling uses  
11 No Action Alternative H3, H4, all these boundaries.  
12 And I'm looking at No Action and saying we're already  
13 in trouble. The No Action Alternative is not a good  
14 measure for -- there should be more flow.

15 CO-HEARING OFFICER DODUC: Again --

16 WITNESS SUARD: And I'm giving that as an  
17 example.

18 CO-HEARING OFFICER DODUC: Ms. Suard,  
19 Ms. Suard.

20 WITNESS SUARD: Yes.

21 CO-HEARING OFFICER DODUC: Mr. Mizell, that  
22 objection is sustained. We will strike that particular  
23 language.

24 WITNESS SUARD: So is that striking just that  
25 one line, "Low flow impacts that can result in damage

1 and cost"?

2 CO-HEARING OFFICER DODUC: I was looking at  
3 the "DWR MWD excessive diversion causing violation."

4 MS. MESERVE: This is a proposed condition,  
5 begins on the Line 20 of Page 3, and that's kind of  
6 going into Page 4, I believe. So I think that's what  
7 she's proposing would be a condition.

8 CO-HEARING OFFICER DODUC: Yes, but she is --  
9 go ahead, Mr. Mizell.

10 MR. MIZELL: I was going to state that  
11 Ms. Suard had identified the one sentence correctly. I  
12 was focusing on "low flow impacts that can result in  
13 damages and costs," SHR, as corrected, 709.

14 CO-HEARING OFFICER DODUC: All right. Then,  
15 we will strike that sentence. Next.

16 MR. MIZELL: Next would be same page, Page 4,  
17 starting on Line 6 and then proceeding through Page 5,  
18 Line 11. This large section is discussing CalSim 3.  
19 CalSim 3 is a draft model that has been produced by the  
20 Department but not presented at any point in this  
21 hearing.

22 CalSim 3 has not been run for California  
23 WaterFix, nor has it been run for the existing  
24 conditions. So at this point, CalSim 3 and discussions  
25 about what is contained in CalSim 3 are outside the



1 scope of appropriate rebuttal.

2 WITNESS SUARD: I'm actually doing a  
3 comparison of -- and one of my -- I think it's SHR-17.  
4 I have been comparing water flow charts for many, many  
5 years and brought this to the attention of DWR staff  
6 and others.

7 And if the inconsistency of how these  
8 different agencies calculate between, you know, going  
9 from cubic feet per second to acre-feet and recording  
10 that -- it's inconsistent. And I'm just simply saying  
11 as a condition that Water Boards say, "You need to use  
12 our conversion chart and no other one," because --

13 CO-HEARING OFFICER DODUC: I understand that  
14 that discussion was presented for that purpose, and  
15 so -- which is responsive.

16 So based on that, Mr. Mizell, your motion is  
17 denied.

18 MR. MIZELL: If we could move to Page 6,  
19 please, focusing on Lines 7 through 9, beginning with  
20 the sentence, "Large and loud helicopters." Again,  
21 helicopter noise and use has not been a topic in this  
22 hearing to date, as far as I'm aware. It provides no  
23 citation to where in the record she's responding. I  
24 would object as improper rebuttal evidence.

25 WITNESS SUARD: I actually asked Mr. Bednarski

1 questions about the helicopter noise. But it doesn't  
2 matter. I don't mind taking that out. I was pointing  
3 out that we're already getting the helicopter noise  
4 from the change of the electrical. But --

5 MS. MESERVE: This is a proposed condition as  
6 well, though. So I think that the language is  
7 describing that suggestion.

8 MR. MIZELL: The languages makes an assertion  
9 that there is use of loud helicopters already in the  
10 Delta. I don't believe that that's been evidence  
11 submitted by anybody.

12 WITNESS SUARD: And Ms. Meserve is correct  
13 because I'm already experiencing some unusual noises in  
14 our area of the Delta. I -- looking forward, I did  
15 bring this up to Mr. Bednarski, and I do realize that a  
16 lot of equipment can be delivered by helicopter.

17 And I just want to propose that that  
18 helicopter pathway, if that's what's going to be done,  
19 avoid flying over homes and, you know, residences,  
20 businesses, and parks like mine.

21 CO-HEARING OFFICER DODUC: So responding to  
22 cross is proper rebuttal, Mr. Mizell.

23 MR. MIZELL: I'm unaware that Mr. Bednarski  
24 indicated that materials would be moved by helicopter.  
25 His testimony was focused on truck traffic and barge

1 traffic.

2           Again, this goes to sort of a lack of  
3 citation. Certainly Mr. Bednarski may have made an  
4 offhand comment. If there is a citation, I can be more  
5 certain as to whether or not my objection is grounded.  
6 However, my recollection is we did not present any  
7 testimony on the use of helicopters.

8           As to Ms. Meserve's point about it being part  
9 of the condition, the condition actually starts on the  
10 next sentence. And that is not what we're trying to  
11 strike. The sentence being, "Therefore, it is  
12 proposed" is her term and condition. I'm suggesting we  
13 leave that in the testimony.

14           I believe the only thing I'm trying to strike  
15 is a reference to evidence that's not properly before  
16 the -- before the hearing.

17           WITNESS SUARD: Okay. Mr. Bednarski's  
18 DWR-1212, Page 16, Line 1 and several other of his  
19 testimony, he basically indicated that DWR/Metropolitan  
20 Water District would leave it up to the contractors to  
21 determine the best way to transport necessary equipment  
22 and supplies.

23           And so I do know for a fact that one of the  
24 ways that equipment can be transported is not --

25           CO-HEARING OFFICER DODUC: Hold on. We're not

1 going to continue this argument.

2 Do you have a question Mr. Deeringer --

3 Mr. Deeringer.

4 MR. DEERINGER: Just for the record, DWR-1212,

5 that's a DWR Part 2 Rebuttal exhibit rather than a

6 Part 2 case-in-chief exhibit. Am I correct? Am I

7 reading that correctly from the exhibit list?

8 CO-HEARING OFFICER DODUC: In any case,

9 Mr. Mizell's motion was to strike that one sentence and

10 still keep the proposed condition. So therefore,

11 Mr. Mizell, your motion is granted.

12 Next one.

13 WITNESS SUARD: I'm sorry. Which sentence got

14 struck?

15 CO-HEARING OFFICER DODUC: I believe it's

16 since -- what was it? I'm trying to find it now. I

17 lost it. 7, yes.

18 MS. MESERVE: 7 through 9.

19 CO-HEARING OFFICER DODUC: Yes.

20 CO-HEARING OFFICER DODUC: Next, Mr. Mizell.

21 MR. MIZELL: Yes. If we move down that same

22 page, Page 6, down to Line 18 through Line 24, this is

23 citation to an example about a man who died on Empire

24 Cut.

25 WITNESS SUARD: Uhm --

1 CO-HEARING OFFICER DODUC: I'm sorry. I need  
2 to hear the rest of his motion.

3 MR. MIZELL: Yes. So I would object as not  
4 responding to any -- any evidence or testimony in  
5 Part 2 case in chief and, so, improper rebuttal  
6 testimony.

7 CO-HEARING OFFICER DODUC: And Ms. Meserve,  
8 will say that it is a proposed condition of permit.  
9 And your response to that would be?

10 MR. MIZELL: I'm -- I was conferring with  
11 co-counsel. What was the question?

12 CO-HEARING OFFICER DODUC: I see that the line  
13 you pointed out is part of a proposed condition of  
14 permits. So --

15 MR. MIZELL: So beginning on Line 18 at the  
16 end that states, "For example, recently a man died  
17 because he was sucked into an intake at Empire Cut,"  
18 and it proceeds through the end of that page.

19 CO-HEARING OFFICER DODUC: And you are moving  
20 to strike from Line 18, starting with, "For example,"  
21 to Line --

22 MR. MIZELL: Through the end of the sentence  
23 that begins -- or that ends on Line 24, up until -- so  
24 strike up until the words, "For example, DWR-1035."

25 MS. MESERVE: Seems like she's trying to

1 describe why she would propose this term. I think  
2 whether something similar could happen at these intakes  
3 is obviously something that there could be surrebuttal  
4 or cross-examination on if DWR wishes to test it  
5 further.

6 CO-HEARING OFFICER DODUC: Actually, the rest  
7 of the paragraph would remain to support her proposed  
8 condition.

9 Yes? Do you have a question?

10 MR. DEERINGER: Ms. Suard, would you be able  
11 to identify what Part 2 case-in-chief evidence the  
12 proposed strike is responding to?

13 WITNESS SUARD: There was evidence, discussion  
14 by Mr. Bednarski that, during the -- when we were  
15 talking about boating traffic on the Sacramento River,  
16 only -- only literally, just in rebuttal, did  
17 Mr. Bednarski finally admit where the boating traffic  
18 was going to go and -- because he -- he said the  
19 Sacramento River, and he named certain bridges that  
20 told us the pathway.

21 And there was discussion about how you keep  
22 the boaters safe, you know, does a five-mile-an hour  
23 zone do that or not.

24 And this is in response to it is not just  
25 no-wake that keeps boaters safe. There's other issues.

1 In particular, this whole intake issue is very  
2 concerning.

3 CO-HEARING OFFICER DODUC: No. I think I --  
4 we've been very clear in our written direction to  
5 everyone preparing their rebuttal testimony that you  
6 must identify the evidence in the case in chief to  
7 which you are responding.

8 And this on-the-fly kind of adjustment is  
9 not -- not working. So I don't see that clear  
10 connection between these lines here and what you just  
11 said, Ms. Suard.

12 So I'm granting Mr. Mizell's motion to strike  
13 those lines.

14 WITNESS SUARD: Could we know exactly which  
15 lines he's talking about?

16 CO-HEARING OFFICER DODUC: Yes. It is --  
17 where are we now -- starting on Line 18 beginning with  
18 "For example," going through Line 24, ending with -- I  
19 believe it's "could harm fish and humans."

20 Is that correct?

21 WITNESS SUARD: Are you on Page 6?

22 CO-HEARING OFFICER DODUC: I'm on Page 6, yes.

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

24 MS. MESERVE: Just to be clear, though, this  
25 is not rebuttal. This is a proposed term and

1 condition.

2 CO-HEARING OFFICER DODUC: Yes. But do you  
3 want to clarify again, Mr. Deeringer, because this is  
4 one of those legal concepts.

5 MR. DEERINGER: Yes. So the terms themselves  
6 can be proposed at any time. But the supporting  
7 evidence has to be introduced in the correct timing and  
8 within the scope and accordance with the hearing  
9 procedures. So the supporting evidence is subject to  
10 those kind of time limitations, whereas the terms  
11 themselves can be proposed at any time.

12 CO-HEARING OFFICER DODUC: Time is what is  
13 scope of limitations.

14 WITNESS SUARD: Okay. So you're saying,  
15 starting Line 18, the word "For example" is not talked  
16 about and then on from there?

17 CO-HEARING OFFICER DODUC: From there through  
18 Line 24 ending with "humans," period. And this is why  
19 it is important to clarify testimony.

20 All right. Next, Mr. Mizell.

21 MR. MIZELL: Yes. If we can turn to Page 7,  
22 please, looking at Line 19.

23 CO-HEARING OFFICER DODUC: Okay.

24 MR. MIZELL: Looking at Line 19 through  
25 Page 8, Line 2, so to the end of the paragraph. Same



1 objection, that this goes beyond appropriate rebuttal  
2 evidence, doesn't cite to testimony or evidence in the  
3 case in chief of Part 2.

4 CO-HEARING OFFICER DODUC: Response?

5 WITNESS SUARD: Could you give me that page  
6 again?

7 MR. MIZELL: Certainly. Looking at Page 7,  
8 Line 19, starting at the beginning of that line with  
9 the word "However" and then ending at the end of the  
10 paragraph which ends Page 8, Line 2.

11 WITNESS SUARD: Right above that, starting on  
12 Line 15, I refer to Ms. Tara Smith in -- in --  
13 representations regarding H3+ that happened in the  
14 rebuttal phase. And I don't have access to transcripts  
15 yet. They're not up there that I've found. So I  
16 couldn't refer to that. It does -- it relates to  
17 DWR-1027, Pages 17, 26, and 33.

18 And my intent is to give examples of impacts  
19 from low flows if we were operating other H3+ or the  
20 flows roughly called for with H3+.

21 CO-HEARING OFFICER DODUC: All right. I'm  
22 going to allow that, and you will have the chance to  
23 cross-examine her on her calculations and analysis,  
24 Mr. Mizell.

25 MR. MIZELL: Thank you.

1 CO-HEARING OFFICER DODUC: And I believe 703  
2 is one of the exhibits she withdrew, right?

3 WITNESS SUARD: No.

4 CO-HEARING OFFICER DODUC: No.

5 WITNESS SUARD: 702. 703 is a video that  
6 first wouldn't play and is now working.

7 CO-HEARING OFFICER DODUC: All right. Next,  
8 Mr. Mizell?

9 MR. MIZELL: Yes, if we could turn to the last  
10 page, Page 9, please, looking at the last two sentences  
11 after the struck portion from the Board. So beginning  
12 last part of Line 8 through 14. And again, we would  
13 object as being beyond the appropriate scope of  
14 rebuttal, introducing new evidence without citing to  
15 where it's being responsive.

16 CO-HEARING OFFICER DODUC: Response,  
17 Ms. Suard?

18 And keep in mind that, when Mr. Mizell objects  
19 to it not being responsive to testimony, it should be  
20 responsive to evidence introduced in Part 2, whether it  
21 be testimony or other form of evidence.

22 MS. MESERVE: The second sentence seems to be  
23 further explaining why she would be suggesting the  
24 funds to reimburse Delta landowners for damage that  
25 begins at the bottom of Page 8. It's kind of a sum-up.

1           WITNESS SUARD: It is an example of why  
2 mitigation and the fund to help --

3           CO-HEARING OFFICER DODUC: But, again, these  
4 examples to support your proposed conditions need to  
5 also fall within the scope of rebuttal, which is  
6 responsive to testimony, evidence introduced in case in  
7 chief, or somehow responding to the changes as  
8 reflected in the administrative draft of the  
9 Supplemental Environmental document.

10          WITNESS SUARD: I reviewed all the mitigation,  
11 you know, that was proposed. And sometimes the  
12 omission of a mitigation needs to be brought up. And  
13 this is an example of trying to bring up a mitigation  
14 that should be in there.

15          CO-HEARING OFFICER DODUC: And to what extent  
16 does our record to date demonstrate the first part of  
17 Mr. Mizell's objection, which would be the first  
18 sentence regarding degradation of local drinking water?

19          WITNESS SUARD: You've already ruled that  
20 that's to be out of there. So, you know, that's --  
21 that's a repeat of a couple pages back. So that is  
22 that same example, 709. So that would be crossed out.  
23 I'm not going to argue that.

24                 But I -- I do believe that the mitigation  
25 proposal to set up a specific fund to support Delta --

1 CO-HEARING OFFICER DODUC: I understand your  
2 proposed condition, but I'm struggling with, again, the  
3 constraints that we all operate under, and that is the  
4 supporting evidence has to comply with the scope of  
5 this portion of the hearing.

6 MR. MIZELL: Based upon what we have just  
7 heard, I would move only to strike Lines 8 through 10,  
8 ending with the cite "SHR-709," as indicated by  
9 Ms. Suard.

10 And then I believe she is already going to be  
11 striking the last part of 13 on to 14 because those are  
12 exhibits that she indicated she's withdrawing. So --

13 CO-HEARING OFFICER DODUC: Is that correct,  
14 Ms. Suard?

15 WITNESS SUARD: That's correct.

16 CO-HEARING OFFICER DODUC: All right. Let's  
17 do that.

18 MR. MIZELL: And I will try and make this very  
19 quick. If we can turn to SHR-707, please.

20 So I'll try and be as descriptive as possible.  
21 This doesn't have line numbers. In this first  
22 paragraph, starting at the end of the third line that  
23 reads, "Hitting one of these gas wells could" going to  
24 the end of that paragraph, we would move to strike that  
25 sentence based on lack of evidence in the record, not

1 responsive to testimony or evidence presented in the  
2 Part 2 cases in chief, assumes facts not in evidence.

3 CO-HEARING OFFICER DODUC: Response?

4 WITNESS SUARD: I have no problems with just  
5 these -- excuse me, words being struck. This --

6 CO-HEARING OFFICER DODUC: Okay, fine.

7 Accepted. Struck.

8 Next, Mr. Mizell.

9 MR. MIZELL: If we go below the graphic on  
10 this page, the first sentence that starts with, "Since  
11 the State of California did not require" through the  
12 end of that first sentence, we move to strike as not  
13 being relevant to the California WaterFix. It  
14 critiques, apparently, another state agency on its  
15 rules and procedures. It's not properly part of this  
16 hearing.

17 CO-HEARING OFFICER DODUC: Response, please.

18 WITNESS SUARD: It just states the truth. But  
19 if it has to be struck, that's fine.

20 CO-HEARING OFFICER DODUC: You know what? It  
21 is a simple statement. Denied, Mr. Mizell.

22 MR. MIZELL: If we could go to Page 3, top.

23 So this paragraph, with the exception of the  
24 last sentence, we would move to strike it as evidence  
25 not responsive to any cited evidence or testimony in

1 the Part 2 cases in chief and assuming facts not in  
2 evidence.

3 CO-HEARING OFFICER DODUC: Response, please.

4 WITNESS SUARD: So I disagree with Mr. Mizell.  
5 This is in direct response to the testimony regarding  
6 gas wells and the locations of them. And this  
7 particular map, if it scrolls down, shows the  
8 wastewater well.

9 CO-HEARING OFFICER DODUC: Hold on. Hold on.  
10 Hold on.

11 And specifically which witness's testimony are  
12 you referring to?

13 WITNESS SUARD: I'm blanking. I think  
14 Mr. Bednarski also talked about avoiding wells, but  
15 there was a different DWR person that -- so I can't --  
16 I'm sorry. I can't -- the topic came up, but I can't  
17 recall who it is.

18 So can you tell me again the lines you want to  
19 strike?

20 MR. MIZELL: Well, there are no line numbers,  
21 but it would be this paragraph -- all of this paragraph  
22 except for the last sentence that reads, "Map is from  
23 Food and Water Watch Organization website," with a  
24 citation.

25 WITNESS SUARD: I feel like the -- the line

1 "Damage from tunnel boring to the fracking wastewater  
2 well located on Staten Island, for example, would  
3 release toxins into the Mokelumne River and the  
4 drinking water aquifer," I think that is responsive to  
5 the concern that's been expressed over and over again  
6 that -- regarding the possibility of rupturing gas  
7 wells. This would be rupturing a, you know, Class 2  
8 wastewater well.

9 CO-HEARING OFFICER DODUC: Where is there  
10 testimony in the record to support that? Could we  
11 scroll down a little bit so I can see the rest of this  
12 page, please? And continue.

13 WITNESS SUARD: So -- oops. The last one was  
14 blank.

15 So that's Staten Island. And there's a  
16 Class 2 wastewater injection well on Staten Island  
17 according to --

18 CO-HEARING OFFICER DODUC: All right.

19 WITNESS SUARD: Okay.

20 CO-HEARING OFFICER DODUC: Mr. Mizell, since  
21 it's getting late, we're going to put this one on goes  
22 toward weight.

23 MR. MIZELL: Thank you very much. That wraps  
24 up my objections. Thank you for your patience.

25 CO-HEARING OFFICER DODUC: And with that, I

1 hope you kept track of all those strike-outs,  
2 Ms. Suard. You may begin your direct testimony.

3 WITNESS SUARD: So thank you for this  
4 opportunity to propose some mitigations and concerns.

5 Again, my name is Nikki Suard. I'm the owner  
6 of a marina and RV park on Steamboat Slough in the  
7 North Delta region.

8 And I'm -- most of anything I'm going to say  
9 relates to Mr. Bednarski's testimony, -- and that would  
10 be SHR-1212, and I can refer to specific pages that I  
11 did write down -- and also DWR-1143, which relates to  
12 proposed operations under H3+ and my concerns of low  
13 water levels, water quality, the water temperature; all  
14 of that had been brought up. I'm responding to what  
15 was said for that.

16 I actually have spent a lot of time over the  
17 years trying to learn. And I -- it's a huge job you  
18 have, and I really understand, and I appreciate that  
19 you take the time to listen because I can tell from  
20 questions you're listening.

21 So I am not going to cover everything in my  
22 testimony. I hope you will look at some of the  
23 testimony. I have been repeatedly asking over this  
24 whole process how much flow is going to be left on the  
25 Steamboat Slough.



1           DWR has responded in some ways, and I continue  
2 to still be very concerned about how much water flow  
3 will be left on Steamboat Slough. Will it be  
4 sufficient for water quality, water levels?

5           And I -- DWR had provided me with charts.  
6 They're in evidence as SHR-350 and 352. I don't want  
7 to bring those up right now, but I wanted to bring  
8 up -- I created a video. This is SHR-703. And we're  
9 going to start in the middle of it. It's actually a  
10 ten-minute video.

11           And what it is is I simply went to the CDEC  
12 station, the website, and you can click on the  
13 different monitoring stations in the Delta. And you  
14 can see what the flow is at any point in time.

15           That happens to be important when you're a  
16 marina and you're going to have a lot of people there  
17 and you have to post that the water flows are going to  
18 be so low that the docks are on mud so people can't  
19 jump off the docks. It's really important. So I  
20 actually pay a lot of attention that particular  
21 website.

22           So if we can play 703 and start with -- and  
23 this is sort of rebutting what DWR's water engineers or  
24 the -- you know, CalSim and all that, what they're  
25 saying are the flow splits. This happens to be July

1 3rd. It's 7,000 cubic feet per second flowing from  
2 Freeport. And I just want you to see what flow splits  
3 look like. This is higher flow than what is proposed  
4 under C -- H3+.

5 CO-HEARING OFFICER DODUC: So let's make sure,  
6 though, Ms. Suard. You're referring to SHR-073-Errata?

7 WITNESS SUARD: Yes. 703 was submitted, but  
8 for some reason, it wouldn't play, so I had to  
9 resubmit. And it's working, for some reason, now. I  
10 don't understand -- the sound doesn't work, so I have  
11 to narrate it.

12 CO-HEARING OFFICER DODUC: Okay. Hold on.  
13 Ms. Ansley.

14 MS. ANSLEY: Yes, Ms. Suard did come to me  
15 today, and she tried to explain about what was going on  
16 with 703. We had it on our list of videos that did not  
17 work or were unavailable in some way. So at this  
18 point, we would object to something that was just  
19 submitted today as a working video. And it says on the  
20 Water Board's website now that this was uploaded on  
21 8/27/18, which would be this morning.

22 CO-HEARING OFFICER DODUC: So am I to  
23 understand, Ms. Ansley, you did not have access to this  
24 video prior to now?

25 MS. ANSLEY: That's correct. There were a

1 number of videos, some of which we have a list of, that  
2 were unavailable to us to review, and they simply  
3 didn't work; none of the links worked, for the most  
4 part, any videos. And Mr. Mizell has a list.

5           So Ms. Suard did come to me while I was doing  
6 cross-examination and told me that she had worked with  
7 staff this morning -- I think Mr. Hunt probably or  
8 someone -- to post a corrected version this morning of  
9 703.

10           WITNESS SUARD: I actually contacted staff a  
11 week or more ago and asked why was this video not  
12 working because it's an MP4 format, which should not be  
13 a problem. And staff said it's -- so I don't even know  
14 why it wasn't working because other videos I've  
15 submitted worked.

16           So there are -- I handed it to him, and it's  
17 working now.

18           CO-HEARING OFFICER DODUC: My thought is, now,  
19 is, as a matter of due process, all parties need to  
20 have access to the evidence prior to -- well, actually,  
21 they have to have access to it in accordance with the  
22 deadlines we set.

23           So I'm not sure what the procedure is for  
24 this.

25           MS. MESERVE: I think what Ms. Suard's trying

1 to say as well that she did upload it in a timely  
2 manner, and she was not aware that it did not  
3 apparently correctly upload until quite recently.

4 So I don't think that it is Ms. Suard's fault  
5 that it was apparently not playable.

6 CO-HEARING OFFICER DODUC: I'm not saying it's  
7 her fault. I'm asking, given this glitch in the  
8 procedure, which I'm sure has happened before, how do  
9 we handle this?

10 MR. DEERINGER: I'm actually not aware if it  
11 has happened before.

12 CO-HEARING OFFICER DODUC: Of course not.

13 MR. DEERINGER: At least not while I've been  
14 here. So I'm not sure we have an established  
15 procedure. Go ahead.

16 MS. McCUE: We did check, and the video file  
17 that was uploaded was not working. And in the ruling  
18 about uploading things, it said it was up to the  
19 parties to check to make sure everything was uploaded  
20 correctly, so. . .

21 WITNESS SUARD: Which is what I did. I  
22 checked and said -- and then I -- it's -- it's a large  
23 file. So then I contacted, very quickly afterwards --  
24 they have the records of it. Well, I don't know if it  
25 was very quickly afterwards. But I did contact and

1 say, "Hey, I'm not sure," but I was told I could bring  
2 a thumb drive up or something like that.

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

4 Let's go ahead and watch this. And then,  
5 Ms. Ansley, Mr. Mizell, I will give you the opportunity  
6 to formally object. But let us see what it is first  
7 and see how significant in terms of substantive it is,  
8 to which you would have then, if necessary, additional  
9 time to conduct cross-examination.

10 But let's take a look at it.

11 WITNESS SUARD: Okay. And then I'm going to  
12 be narrating it because I found out even in the upload  
13 this morning the sound isn't loud enough.

14 CO-HEARING OFFICER DODUC: So in narrating it,  
15 you're actually providing surprise testimony.

16 MS. MESERVE: I think she's going to repeat  
17 what the recording already said.

18 WITNESS SUARD: I won't be able to do it  
19 exactly the right words.

20 CO-HEARING OFFICER DODUC: Well, I don't think  
21 any of us, having not seen the video, know that that's  
22 the case.

23 Any suggestion? Looking at my Co-Hearing  
24 Officer.

25 WITNESS SUARD: You know what, the video by

1     itself in silence will probably show some abnormalities  
2     [sic], abnormal flow situation.

3             CO-HEARING OFFICER DODUC: All right. Let's  
4     see it.

5             WITNESS SUARD: We're only going to start at,  
6     like, 1 minute and 30 seconds, right at about Freeport,  
7     when it shows Freeport flow and just go for -- I don't  
8     know. It might be two minutes, three minutes.

9             CO-HEARING OFFICER DODUC: Ms. Ansley.

10            MS. ANSLEY: And we would just like our  
11     objection lodged for the record. This is a little bit  
12     strange. Like, obviously we're going to watch it  
13     silently now, but, you know, none of us have seen it.

14            There are about five exhibits on her list that  
15     were unavailable -- thankfully, much of which she has  
16     voluntarily withdrawn just now at the beginning. But  
17     it is kind of a repeat problem with her exhibits that  
18     the videos often do not work, I will say.

19            So I think we have experienced this maybe  
20     before but perhaps not made a big deal about it. But  
21     yes, I do object to late exhibits and narration and  
22     anything I haven't viewed.

23            CO-HEARING OFFICER DODUC: And, well, let's go  
24     ahead and see it.

25            (Video playing)

1                   North Delta. I'm going to start  
2                   with this one. This is Freeport. I  
3                   want to see -- so at this point in  
4                   time, you can see the -- the timing of  
5                   the -- as it says on here, when that's  
6                   shown online. It is the 3rd. And  
7                   it's 7- -- over 7,000 cubic feet per  
8                   second of flow. And that is flow  
9                   flowing down or south into the Delta.  
10                  Flow is going out.

11                  So then I -- the next  
12                  down-river monitoring station is  
13                  at Sutter Slough. And we see that,  
14                  at Sutter Slough, it's a little over  
15                  1100 cubic feet per second on Sutter  
16                  Slough.

17                  Now, DWR says that with  
18                  WaterFix, if bypass flow is, like,  
19                  7,000 cubic feet per second at  
20                  Freeport, it's supposed to be split  
21                  five ways. That's what they say  
22                  their computer model says, five-way  
23                  split between Steamboat Slough,  
24                  Sutter Slough, Lower Sacramento  
25                  River, Delta Cross Channel Gates,

1 and Georgiana.

2 So we're going to look at that  
3 and see. You just saw Sutter Slough.  
4 You saw that. Now I'm going to look  
5 at -- I'm going to -- actually, Sutter  
6 Slough flows down like this. A lot of  
7 that flow goes to Miner Slough  
8 sometimes. It used to go on down  
9 Steamboat Slough. But let's see what  
10 Miner Slough's doing.

11 Okay. So it is tide-going-out  
12 time. And what's happening on Miner  
13 Slough? The flow's going the opposite  
14 direction of what would be logical for  
15 tide going out. So you've got this  
16 minus.

17 Now, somebody might say, well, it  
18 is flowing down into here; it normally  
19 would be going this direction. So  
20 something is drawing the flow over this  
21 direction.

22 Let's see what's happening over at  
23 Steamboat Slough. Look at this.  
24 Minus. That's a very small amount.  
25 Earlier, it was over a thousand cubic



1 feet per second minus. That means the  
2 flow is going this way. Tide is  
3 supposed to be going out this  
4 direction. You saw that, where it's  
5 supposed to be heading down this way  
6 and instead it's going up this  
7 direction.

8 So why is that? What is drawing  
9 the flow up over here?

10 Let's see what kind of flows in  
11 this direction. Okay. So this is  
12 4200, almost 4300 cubic feet per  
13 second. We have over 7100 cubic feet  
14 per second, minus the 1100. So that  
15 should be about 6,000 cubic feet per  
16 second of flow at this point. And  
17 instead, you've got 42-. So we've  
18 got, you know, close to 2,000 of flow  
19 that is not being accounted for.

20 (Video interrupted)

21 WITNESS SUARD: Okay. We can stop --

22 (Video continuing)

23 Plus there's flow --

24 (Video paused)

25 WITNESS SUARD: Thank you. You can keep going

1 on. There's more unusual flow in monitoring station  
2 numbers that sometimes don't make sense. I did that  
3 live that day. And it goes through more of that.

4 CO-HEARING OFFICER DODUC: All right.

5 WITNESS SUARD: And I'm glad the sound worked.

6 CO-HEARING OFFICER DODUC: Let's stop you and  
7 hear from Ms. Ansley.

8 MS. ANSLEY: Yes. We obviously will be  
9 lodging the exact same objection. This is surprise  
10 testimony.

11 And also I'd like to add in I believe she said  
12 earlier this goes to the rebuttal to Ms. Smith's  
13 testimony. But, again, when we don't have the  
14 references to specific testimony, I have a really hard  
15 time sort of figuring out what that exactly was to  
16 rebut.

17 And my main problem, though, beyond the  
18 rebuttal scope, is that that was pointing out -- I  
19 believe I caught July 3rd, 2018. And it was looking at  
20 a number of gauges. So it's talking about specific  
21 conditions that, you know, I'm not clear as I stand  
22 here today what's going on in those channels on that  
23 day since I didn't know what day we were going to be  
24 looking at.

25 So, I mean, I would prefer not to come back

1 and recross her on an exhibit that is sprung on this  
2 day. I would prefer that this exhibit be struck in its  
3 entirety, especially since now we're only going to  
4 watch a tiny excerpt of it. I don't particularly want  
5 to see the whole thing right now.

6 But I'm -- what I'm saying is is this is too  
7 detailed, and it's too hard to tell what exactly this  
8 is meant to address. And so I do believe it's proper  
9 that it just be struck as opposed to forcing the DWR to  
10 now review it, pull its experts and develop cross for  
11 another day. I think its time has come.

12 CO-HEARING OFFICER DODUC: Ms. Suard enough,  
13 enough, enough. I mean, it -- it was your  
14 responsibility. And I believe the staff, at one point,  
15 offered you the option of providing this on a thumb  
16 drive so that they could upload it, but you preferred  
17 to upload it yourself.

18 So at this point, it is late. It is surprise  
19 testimony. And I don't believe the probative value of  
20 it is -- merits the additional time as well as, really,  
21 a violation of the direction that was given to all  
22 parties in terms of proper timely submission of  
23 evidence as well as specifically identifying the  
24 rebuttal testimony to which it is responsive.

25 So on that ground, I'm granting DWR's motion

1 to strike this particular video.

2 WITNESS SUARD: Okay. The video, but what  
3 about my mitigation proposal?

4 CO-HEARING OFFICER DODUC: It is still --

5 WITNESS SUARD: I really would like --

6 CO-HEARING OFFICER DODUC: It is still there,  
7 Mrs. Suard. I believe the only reference, at least  
8 that could I see quickly, is on Page 7 starting on  
9 Line 23 that references SHR-703. The remainder of your  
10 testimony relating to that proposed condition I think  
11 is there.

12 I usually chafe at the constraint of all these  
13 legal requirements and parameters, but they are there  
14 for a reason. It is to ensure everyone appropriate  
15 access and to be prepared for these hearings so that it  
16 may be conducted in an efficient and effective manner.

17 And we need to move on.

18 WITNESS SUARD: Okay. It's very boring  
19 anyway.

20 CO-HEARING OFFICER DODUC: It's not boring,  
21 but at the -- as an engineer, I actually appreciated  
22 that very much. But, still, it has to be timely; it  
23 has to be submitted properly in accordance with the  
24 instructions that all parties must comply with.

25 So move on, Ms. Suard, please.

1           WITNESS SUARD: Okay. Well, I'm just going  
2 to -- I'm going to just start talking about what that  
3 video was supposed to be about. And I --

4           CO-HEARING OFFICER DODUC: You're not going to  
5 talk about what that video is about.

6           WITNESS SUARD: Okay. Sorry. Not the video  
7 in particular.

8           CO-HEARING OFFICER DODUC: I don't know how  
9 much time -- I assumed you stopped the clock every time  
10 there was a -- so you really need to sum up your  
11 testimony.

12          WITNESS SUARD: Okay. I didn't see the  
13 stopped clocking -- the clock stopping. My  
14 testimony --

15          CO-HEARING OFFICER DODUC: Considering we  
16 started at 3:25, it's now 4:28.

17          WITNESS SUARD: So I tried to focus on  
18 mitigations. And one of those mitigations is to assure  
19 that the water quality, the water levels, the water  
20 flows are accurate for each and every waterway because  
21 they are different.

22          The Delta's all connected, but each waterway  
23 has different things that happen, the direction it  
24 flows. And so I believe that there should be -- I did  
25 put up a map. It's one of the -- one of my evidences

1 is a -- that there should be monitoring stations at the  
2 beginning and end, at the, you know, mouth of each --  
3 of each waterway, and that it should include EC or  
4 chloride, it should -- water temperatures.

5           And it should also include both near-surface  
6 water quality and at the bottom because there is a  
7 difference. And I do have reference to a couple other  
8 evidences of other organizations or studies that say we  
9 need to monitor the bottom as well as the surface.

10           So that is one of the mitigations. And I  
11 had -- believe that, in particular, the North Delta  
12 waterways, Steamboat Slough and Sutter Slough, they  
13 were not covered in a lot of the modeling. There's  
14 just this assumption that it's going to be the same  
15 thing.

16           And, in fact, when I did ask the questions of  
17 Ms. Smith and -- they referred to Barker Slough and  
18 said that our water quality would be the same as Barker  
19 Slough. That's great, but I never saw any modeling to  
20 show that. So that's one of the major mitigations I  
21 want to talk about.

22           And then the other one was Mr. Bednarski did  
23 talk about, in 1212 -- I can go to the page, hopefully.  
24 He talked about needing to open the bridges of -- the  
25 Rio Vista Bridge and then Isleton Bridge, Walnut Grove

1 Bridge, and also the Paintersville Bridge. And that is  
2 a terrible route. If these are big barges, especially  
3 right at Walnut --

4 CO-HEARING OFFICER DODUC: So what is the  
5 condition you're proposing?

6 WITNESS SUARD: That I'm -- the condition I'm  
7 proposing is go up the Sacramento ship channel, and --  
8 big ships. They're already opening the bridge. They  
9 can do that. Take parts up the Sacramento ship  
10 channel, unload there, and then use very low, flat  
11 barges and go under that new road that's there. I don't  
12 know if it's called River Road now or whatever.

13 They would have to open up the waterway there  
14 to be able to maybe -- open the lock there that's been  
15 closed for a long time to be able to take the pieces  
16 down river, or else just have them only take the pieces  
17 off of Highway 5.

18 There's been lots of tunnels --

19 CO-HEARING OFFICER DODUC: All right. Thank  
20 you.

21 WITNESS SUARD: Okay.

22 CO-HEARING OFFICER DODUC: Is there anything  
23 else you need to summarize, since we need to get to  
24 cross?

25 WITNESS SUARD: Yes, I -- I'm very concerned

1 about the impacts to boaters that are anywhere in the  
2 vicinity of intakes. There's no evidence that I could  
3 tell that -- besides having a no-wake zone. I'm  
4 concerned about safety to humans, not just from the  
5 barge traveling back and forth.

6 And, again, Mr. Bednarski was never specific  
7 about how many barges on -- on Sacramento River. He  
8 was specific about the other waterways, but not  
9 Sacramento River.

10 And that could be devastating to -- there is a  
11 video that did upload in time that is working that  
12 shows just a little tiny boat going under the bridge at  
13 Walnut Grove and shows how narrow it is there. And you  
14 can just imagine how much damage it would do to that  
15 area to have a bunch -- if it was one or two, it would  
16 be fine.

17 If you limited how many barges per day and,  
18 you know, the time of day -- if there were limits so  
19 that it's not a constant barrage of barges back and  
20 forth in the legacy towns, then that would be a huge  
21 mitigation.

22 CO-HEARING OFFICER DODUC: Thank you. I think  
23 we ran out of time a while back.

24 With that, cross. I actually have DWR for 15  
25 minutes.



1 MR. MIZELL: We will not be crossing

2 Ms. Suard.

3 CO-HEARING OFFICER DODUC: And let me guess;

4 Ms. Des Jardins would like to cross.

5 MS. DES JARDINS: I did reserve 20 minutes.

6 CO-HEARING OFFICER DODUC: I actually don't

7 have you on my list.

8 MS. DES JARDINS: Oh, okay. I thought I had.

9 CO-HEARING OFFICER DODUC: But go ahead.

10 MS. DES JARDINS: Well, I'm very aware that

11 I'm standing between you and the end of the day.

12 CO-HEARING OFFICER DODUC: As long as you

13 actually make it helpful and productive, you may

14 proceed.

15 CROSS-EXAMINATION BY MS. DES JARDINS

16 MS. DES JARDINS: So, Deirdre Des Jardins with

17 California Water Research.

18 And, Ms. Suard, I'd like to bring up your

19 testimony, which is SHR-701-Revised. And can we go to

20 Page 2, please, at Line 3.

21 So, Ms. Suard, you mention a concern about --

22 you mention a proposed mitigation of adding a new chart

23 with required water flow, water level, and water

24 quality criteria for each natural waterway of the Delta

25 on these lines; is that correct? Is that your proposed

1 mitigation?

2           WITNESS SUARD: Yes. Thank you for bringing  
3 that up. We see all these other mitigation references,  
4 and it seems to me that, for each waterway in the  
5 Delta, having a chart specify this is what the water  
6 quality has to be on this waterway; this is what the  
7 water level has to be; this is what the water flows  
8 have to be --and this doesn't relate to fish flows or  
9 something like that; fish flows are important, too --  
10 but each of these freshwater waterways, to protect  
11 them, be very clear about what is supposed to be there.

12           And at any point in time when that's not  
13 there -- because there would be monitoring stations on  
14 both ends. If -- if there is a failure to comply with  
15 those water quality and water levels, then the tunnels  
16 have to slow down or stop operation until the water  
17 quality is there.

18           MS. DES JARDINS: Okay, Ms. Suard. And on  
19 Line 10, you're recommending that additional monitoring  
20 would be Steamboat Slough, Sutter Slough, Miner Slough,  
21 Georgiana Slough, and the Sacramento River in several  
22 new locations between Freeport and Rio Vista; is that  
23 correct?

24           WITNESS SUARD: That's correct. And I did  
25 create a map. I'm blanking on which number it is right

1 now. I'm sorry.

2 MS. DES JARDINS: How about if we just go on.  
3 Let's go on to Line 22 to 24. And you would like the  
4 monitoring stations to remain live and post real-time  
5 data minimum of 15 minutes every line?

6 WITNESS SUARD: That's correct.

7 MS. DES JARDINS: And is that partly so you  
8 yourself could monitor it?

9 WITNESS SUARD: So, not just me, but  
10 everybody -- a lot of marinas rely on that information,  
11 especially in high-flow times. Those monitoring  
12 stations let us know if we're about to be flooded  
13 because, if it's certain level at Freeport, we know  
14 it's going to hit us.

15 So it's not just the low flows, it's the high  
16 flows that we need to watch.

17 MS. DES JARDINS: Thank you. Can we go to  
18 Page 3 at Line 11, please.

19 And I believe that you state there that you  
20 would like to require water levels to remain at  
21 navigable levels all times during low tide, where you  
22 design [sic] navigable power vessels, shifts [sic] with  
23 draft of a minimum of 12 feet. And --

24 WITNESS SUARD: Yes, I was responding to  
25 DWR-1071 regarding water levels below intakes. And

1 they did not present any evidence about Steamboat  
2 Slough. And there is historical evidence of, you know,  
3 what type of navigation is on -- not just Steamboat  
4 Slough but the whole Sacramento River between Rio Vista  
5 and Sacramento.

6 MS. DES JARDINS: And on Line 15, you'd like  
7 the Board to require that freshwater match pre-project  
8 water quality?

9 WITNESS SUARD: Yes.

10 MS. DES JARDINS: And that would be at those  
11 monitoring stations?

12 WITNESS SUARD: Yes.

13 MS. DES JARDINS: And then on Page -- 20,  
14 Lines 20 to 24 -- let's scroll down a little.

15 You're proposing that the Board require that,  
16 at any point in time where the monitoring station  
17 indicates a violation of one of the water quality,  
18 water level, or water flow criteria -- I guess these  
19 list one, two, or all three of the intakes must be shut  
20 down to minimum intake flow, is that -- until --

21 WITNESS SUARD: Yes.

22 MS. DES JARDINS: -- they're back in  
23 compliance?

24 WITNESS SUARD: That's what I'm -- I -- I feel  
25 like, if there isn't a stated response when there's a

1 violation, then there's going to be years of argument.  
2 How do you -- how do you enforce requirements if there  
3 isn't a stated response to failure to meet, like, the  
4 water quality? That's a huge one.

5 MS. DES JARDINS: And you also indicate  
6 penalty. "Repeated failure to reduce diversions when  
7 violations are indicated will result in a loss of right  
8 to operate the intakes and a fine equal to three times  
9 the value of the water that continued to be diverted  
10 into the tunnels"?

11 WITNESS SUARD: Yes. I'm proposing a, you  
12 know, fine if -- if the water quality -- and this  
13 should really apply to the whole Delta. I'm just  
14 talking about North Delta. There should be similar  
15 monitoring stations in the entire Delta.

16 And when the water quality degrades, or the  
17 water levels or flows, there should be in place that,  
18 when this happens, then do you this. And that includes  
19 violations and the costs because they're going to keep  
20 violating until it costs them too much.

21 MS. DES JARDINS: Can we go to the top of  
22 Line 4 at -- Page 4, Line 2, please.

23 And so you've proposed that the assessed  
24 violation funds would be paid into a fund to cover  
25 damages, loss of income, or other impacts from the

1 excessive diversions?

2 WITNESS SUARD: Yes, I think there needs to be  
3 a fund to help all the individuals and businesses, the  
4 residents in the Delta that are impacted by this.

5 MS. DES JARDINS: And I'd like to go to Page 5  
6 at 12.

7 And there, you're proposing that the Board  
8 prohibit use of specific roads and waterways for  
9 construction traffic at specific times of year.

10 WITNESS SUARD: Yes. That's actually labeled  
11 SHR-714. And it's a map.

12 And I -- again, I'm focusing on North Delta as  
13 far as I -- I believe that the westside roads entirely  
14 should be prohibited from being used -- and I think the  
15 wells brought it up, too, that use Highway 5 and come  
16 in from the east side.

17 It's an eastside project -- and to protect the  
18 legacy towns and the whole west part of the Delta that  
19 prohibit -- just flat-out prohibit use of those roads  
20 for truck traffic more than, like, one truck -- dump  
21 trucks.

22 MS. DES JARDINS: And let's go to Lines 21  
23 through 24. And you suggest avoiding negative impacts  
24 from water transports. You want to have Steamboat  
25 Slough, Sutter Slough, Elk Slough, and the Sacramento

1 River between Sacramento to below Rio Vista may not be  
2 used for tunnel equipment or supplies transport from  
3 April through October?

4 WITNESS SUARD: Yes. I specified April  
5 through October because those are prime recreation  
6 months. I think other, like, fish agencies might not  
7 like it other months. But I specified because of  
8 the -- to minimize impact to recreation, that -- that  
9 any kind of waterway or land tunnel traffic can't  
10 happen during April through October.

11 MS. DES JARDINS: In those locations?

12 WITNESS SUARD: Yes.

13 MS. DES JARDINS: So let's go to Page 6 at  
14 Line 4. And you actually suggest that DWR, MWD, USBR  
15 be held liable for damages to all boats and docks along  
16 the water route if wakes or accidents occur.

17 WITNESS SUARD: Yes. It's actually a  
18 navigation law that said that. But enforcing that is  
19 sometimes difficult. So having that be a stated  
20 mitigation would be important.

21 MS. DES JARDINS: And there's a second part to  
22 that where you propose that marinas or landowners with  
23 docks along the barge traffic route should be entitled  
24 to loss of income based on the posted rates of the  
25 Sacramento Marina dockage?

1           WITNESS SUARD: Yes. I believe, especially  
2 along the Sacramento River route, the DWR maps missed  
3 quite a few recreation facilities. Ms. Daly talked  
4 about that. And boaters are not going to keep their  
5 boats at marinas like that if there's constant wakes.

6           And the problem is we don't know how many  
7 boats. We don't know how many barges. If it's two  
8 barges a day, that's not a big deal. If you've got,  
9 you know, 200 barges a day, those marinas won't be able  
10 to keep their boaters. And during the time of  
11 construction, those marinas should be compensated for  
12 the loss of income.

13           MS. DES JARDINS: Thank you. And Page 6 at  
14 Line 10 through 12, I believe you propose that, if  
15 helicopters or some other large flying vehicles are  
16 used to transport construction equipment or tunnel  
17 parts, you propose that the flights should be  
18 prohibited from flying over Delta towns or communities,  
19 marinas or RV parks or housing communities.

20           WITNESS SUARD: Speaking from experience,  
21 helicopters flying over residential or businesses that  
22 are carrying large equipment are very disturbing to  
23 customers. And it's -- it's a very simple to just  
24 helicopters pilots not to fly over populated places and  
25 not over the legacy communities. They can pick flight



1 paths over, you know, like, open fields.

2 MS. DES JARDINS: Okay. And then I'd like to  
3 go to Page 8 at Line 6. And I think you were proposing  
4 as a condition of permit DWR required to complete a  
5 survey and report of all known and unknown drinking  
6 water wells, natural gas wells, wastewater wells, and  
7 oil wells within the footprint, within vibration range  
8 of the footprint?

9 WITNESS SUARD: Yes. And I'm proposing that  
10 because the DWR maps and all the information they've  
11 used in this hearing omitted a lot of existing wells.  
12 They omitted homes and recreation facilities.

13 And I actually provided -- trying to be  
14 helpful, I provided SHR-705, 706, 707, 708, all of  
15 which are public records available at California's  
16 website that showed -- and provide even Excel  
17 spreadsheets that shows all of the gas wells and -- by  
18 their GPS coordinates. Unfortunately, the older wells  
19 don't have the correct one.

20 And I believe that, before a final pathway is  
21 determined, they better look at -- you know, get  
22 better, more accurate records of what they are doing.

23 MS. DES JARDINS: Thank you, Ms. Suard.

24 And I'd like to go to Page 8 at Line 20 to 21.  
25 You propose that the Board require DWR to establish --

1 or the petitioners to establish and maintain a fund to  
2 reimburse Delta landowners for damages caused by DWR  
3 managements of high flows and low flows through the  
4 Delta?

5 WITNESS SUARD: Yes. Having listened to a lot  
6 of different people's testimony and the battles they've  
7 had with DWR over many years, 50-year span, it's very  
8 clear that that there has to be some agency or -- and  
9 the funding to protect the people who are going to be  
10 most impacted. And that's anybody along those barge  
11 routes, anybody whose business is impacted by road  
12 closures due to barge transportation or trucks,  
13 excessive trucking or road damage.

14 And it just seems reasonable to make the cost  
15 of mitigation, the impacts to sensitive receptors, be  
16 that a part of the cost of this project.

17 MS. DES JARDINS: And I'd like to go to Page 9  
18 on Line 1. You recommend that the fund be managed by a  
19 designated county person in each Delta area county or  
20 another local Delta entity?

21 WITNESS SUARD: Yes. I -- I believe that  
22 county people tend to have vested interest in  
23 protecting the people in the counties -- or there would  
24 be a Delta agency that would receive those funds, that  
25 would then utilize those funds and make it a little bit

1 easier on -- you know, you're talking about farmers  
2 who, you know, have their impacts. And they might  
3 never have been on a computer or anything. Just make  
4 it a more local type of fund specifically to mitigate  
5 those individuals and businesses and residences that  
6 are impacted by WaterFix construction and operation.

7 MS. DES JARDINS: Thank you, Ms. Suard.

8 And, finally, I'd like to go to Line 4 and  
9 Page 24 -- I mean, Line 24 at Page 4.

10 And Ms. Suard, I think you noted here that  
11 CalSim has different conversion formulas for -- is it  
12 for cfs to acre-feet?

13 WITNESS SUARD: Yes. I -- over -- probably  
14 since 2009, I've been noticing use of different  
15 conversion factors. And I just -- I think Water Board  
16 is the one that seems to be in control of a lot of  
17 this.

18 And since Water Board has published, in a way,  
19 a conversion factor in -- when farmers or any other  
20 diverters have -- we have to report. And we report in  
21 gallons. And then there is a conversion chart on the  
22 Water Board website, converts those gallons to  
23 acre-feet. I'm just asking that all modeling and  
24 documents conform to Water Board's conversion chart.

25 MS. DES JARDINS: Thank you, Ms. Suard.

1           WITNESS SUARD: I'm just asking for  
2 consistency.

3           MS. DES JARDINS: Yeah.

4           And, finally, on the last page of your di- --  
5 your te- -- on Page 9 of 9, Line 12, you state that, so  
6 far, DWR fails to recognize impacts and reports and  
7 assessments when planning changes and -- such as the  
8 proposed WaterFix tunnels.

9           Is this one of your main concerns?

10          WITNESS SUARD: Yes. I am expressing my  
11 opinion that, after many years of submitting  
12 comments -- and I did, you know, way back, starting --  
13 I think starting 2003 on a marina to look at -- and  
14 probably 2006, 2007 on inaccuracies in -- in what were  
15 supposed to be Delta facts in several of those  
16 different phases that we've all gone through.

17          And I've submitted information to Bay Delta  
18 Conservation Plan. And they're all being ignored. You  
19 know, we do exist. And even if they want to pretend we  
20 don't exist, we do exist.

21          MS. DES JARDINS: Thank you, Ms. Suard.

22          That concludes my cross-examination.

23          WITNESS SUARD: Thank you.

24          CO-HEARING OFFICER DODUC: All right. Once  
25 again, example of friendly cross to expand the

1 witness's testimony, which apparently we are allowing.

2 On that note, I assume you don't need any  
3 redirect.

4 At this point, I'm not going to ask Ms. Suard  
5 to move her exhibits, since there are so many changes  
6 that she needs to make. So I --

7 WITNESS SUARD: I --

8 CO-HEARING OFFICER DODUC: No. I will direct  
9 you to send an e-mail to which you will be transmitting  
10 your revised -- was it 701 Revision 2, anyway, and  
11 clarify in that e-mail the exhibits that you have  
12 withdrawn and those that you will be moving into the  
13 record.

14 Please do so by close of business tomorrow,  
15 meaning 5:00 p.m.

16 WITNESS SUARD: Thank you. Will do.

17 CO-HEARING OFFICER DODUC: With that, are  
18 there any other housekeeping matters?

19 MR. MIZELL: Is there any time frame when you  
20 would like any objections should we disagree with the  
21 submitted exhibits?

22 CO-HEARING OFFICER DODUC: You may have until  
23 5:00 p.m. on Wednesday.

24 With that, we're adjourned.

25 (Proceedings adjourned at 4:53 p.m.)



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 Pages 1 - 141 are a full, true, and correct  
14 transcription of said shorthand notes, and a full, true  
15 and correct transcript of all proceedings had and  
16 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: September 3, 2018

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Candace L. Yount, CSR No. 2737