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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

CALIFORNIA WATERFIX WATER)
RIGHT CHANGE PETITION)
HEARING)

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
BYRON SHER AUDITORIUM
1001 I STREET
SECOND FLOOR
SACRAMENTO CALIFORNIA

PART 1A

Friday, July 29, 2016
9:00 A.M.

VOLUME 4

Reported By: Deborah Fuqua, CSR No. 1248

Computerized Transcription by ProCAT

1 APPEARANCES:
2 CALIFORNIA WATER RESOURCES BOARD
3 Division of Water Rights
4 Board Members Present
5 Tam Doduc, Co-Hearing Officer:
Felicia Marcus, Chair and Co-Hearing Officer:
6 Dorene D'Adamo, Board Member
7 Staff Present
8 Diane Riddle, Environmental Program Manager
Dana Heinrich, Senior Staff Attorney
9 Kyle Ochenduzsko, Senior Water Resources Control Engr.
10
11 For California Department of Water Resources
12 Mark Cowin, Director
James (Tripp) Mizell, Senior Attorney
13 Cathy Crothers, Assistant Chief Counsel
Ken Bogdan, Senior Attorney
14
Duane Morris, LLP
15 By: Thomas Martin Berliner, Attorney at Law
16
17 U.S. Department of the Interior, Bureau Reclamation,
and Fish and Wildlife Service
18 Amy Aufdemberge, Assistant Regional Solicitor
19 Bureau of Reclamation
David Murillo, Regional Director Mid-Pacific Region
20
21 State Water Contractors
22 Stefanie Morris
Adam Kear
23 Becky Sheehan
24
25 (Continued)

- 1 APPEARANCES (continued)
- 2 Save the California Delta Alliance, et al.
Michael Brodsky
- 3 San Joaquin Tributary Authority, et al.
4 Timothy O'Laughlin
- 5 Restore the Delta
Tim Stroshane
6 Earth Justice
- 7 Sacramento Valley Water Users, North Delta Water Users
Kevin O'Brien
- 8 Cities of Folsom and Roseville, San Juan Water
9 District, and Sacramento Suburban Water District
Alan Lilly
10 Ryan Bezerra
- 11 Tehema-Colusa Canal Authority
Meredith Nikkel
- 12 City of Brentwood
13 David Aladjem
- 14 Friant Water Authority
Greg Adams
- 15 San Joaquin River Exchange Contractors
16 Paul Minasian
- 17 Group 19
Osha Meserve
- 18 Delta Water Agency, et al.
19 John Herrick

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Amy Aufdemberge U.S. Department of the Interior 32

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1 Friday, July 29, 2016 9:00 a.m.

2 PROCEEDINGS

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4 CO-HEARING OFFICER DODUC: Good morning,
5 everyone. It is 9:00 o'clock. Welcome back to the
6 California WaterFix petition hearing. We are now
7 moving to the evidentiary portion of Part 1A of this
8 hearing.

9 I'm State Water Board Member and Hearing
10 Officer Tam Doduc, and to my right is Board Chair and
11 Co-Hearing Officer Felicia Marcus. To the Chair's
12 right is Board Member DeeDee D'Adamo. To my left are
13 Senior Staff Attorney Dana Heinrick, Environmental
14 Program Manager Diane Riddle, and Senior Water
15 Resources Control Engineer, Kyle Ochenduszko.

16 Other State Water Board staff are also present
17 to provide assistance if needed.

18 We always begin with this general
19 announcement. So first, please look around now and
20 identify the exits closest to you. Should an alarm
21 sound, we will evacuate this room immediately. Please
22 take your valuables with you and use the stairways, not
23 the elevators, to go down and exit to the relocation
24 site across the street in park. If you cannot use
25 stairs, you will be directed to a protected vestibule

1 inside a stairwell. This hearing is being webcast and
2 recorded. Both the audio and video are being recorded.

3 Please speak clearly into the microphone, and
4 beginning by stating your name and affiliation. A
5 court reporter is present today and will be preparing a
6 transcript of this entire hearing.

7 The transcript will be posted on our web site
8 as soon as possible after the completion of Part 1A.
9 If you would like to receive the transcript sooner,
10 please make arrangements with the court reporting
11 service.

12 Please take a moment now to turn off or mute
13 your cell phones. Even if you think it's already off
14 or muted, please take a moment to double-check.

15 (Pause in proceedings)

16 CO-HEARING OFFICER DODUC: Everyone has
17 checked? Thank you.

18 One other announcement, general announcement
19 for those who were not attentively watching the web
20 cast yesterday, listening to my every word during the
21 course of this hearing, we will generally try to stick
22 to a 9:00-to-5:00 schedule with a one-hour lunch break
23 midday. We'll also take a break in the morning, a
24 short break in the morning and the afternoon for the
25 court reporter.

1 We are -- I think that's all -- oh, yes, and
2 very important, Friday, business casual dress if you
3 would like.

4 And with that, let me go ahead and start with
5 layout for today. The petitioners will begin to
6 present their testimony and exhibits. And other
7 parties will conduct cross-examination of these
8 witnesses. Only parties who submitted a notice of
9 intent to appear in Part 1 by the January 5th deadline
10 may participate in this evidentiary portion.

11 As I mentioned on Tuesday, this hearing is
12 relatively narrow focused and is not a referendum on
13 the WaterFix project.

14 The purpose of the Change Petition hearing is
15 for this Board to receive information to inform our
16 decision on whether to improve the Change Petition
17 subject to terms and conditions or to disapprove the
18 petition.

19 To that end, this hearing will afford all
20 parties an opportunity to present relevant testimony
21 and other evidence that addresses the key issues
22 noticed in the Hearing Notice.

23 For the State Water Board to approve a Water
24 Right Change Petition, petitioners must establish and
25 we must find that the proposed change will not injure

1 any other legal user of the water involved or
2 unreasonably affect fish and wildlife.

3 In addition, a special provision contained in
4 the Delta Reform Act of 2009 requires the State Water
5 Board to include appropriate Delta flow criteria as a
6 condition of any approval of a Water Right Change
7 Petition for the California WaterFix project.

8 We will also consider whether the project is
9 in the public interest. The public evidentiary record
10 for the hearing will serve as the basis for the Board's
11 decision.

12 This record will also inform the consideration
13 of an application for water quality certification
14 pursuant to the Clean Water Act Section 401 for the
15 California WaterFix project.

16 As stated in our February 11th ruling, the
17 Board will process DWR's application for water quality
18 certification for the WaterFix project in a proceeding
19 separate from this hearing and under the delegated
20 authority of the State Water Board's Executive
21 Director.

22 The Executive Director will not issue a
23 decision on the 401 application until after this
24 hearing record for the Water Right Petition closes.
25 Any decision by the Executive Director would be subject

1 to reconsideration by the State Water Board.

2 As you all know, we are conducting this
3 hearing in two parts -- or in parts. In Part 1, we
4 will focus on the potential effects of the Petition on
5 agricultural, municipal, and industrial uses of water
6 and associated legal users of water.

7 Part 1 is further divided into two parts. In
8 Part 1A, we have heard policy statements from
9 interested persons, and today we'll start with the
10 Petitioner's case in chief.

11 In Part 1B, which is scheduled to commence on
12 October 20th, we will hear cases in chief from the
13 other parties participating in Part 1. And I will
14 explain the order of proceeding for Part 1B at that
15 time. But for now, we will focus on the order of
16 proceeding for Part 1A.

17 This hearing is being held in accordance with
18 the October 30th notice and subsequent revised notices
19 issued on March 25th and May 11th. Additionally,
20 Chair Marcus and I have issued various rulings in
21 letters earlier this year.

22 Except to the extent expressly modified by us,
23 the hearing requirements set forth in the original
24 hearing notice remain unchanged.

25 Additionally, our July 22nd ruling

1 acknowledged that we have received numerous evidentiary
2 objections to Petitioner's testimony and exhibits. In
3 our ruling, we advised the parties that, consistent
4 with our normal practice, we plan to rule on the
5 objections, to the extent necessary, later in the
6 hearing process.

7 Some comments regarding opening statements, we
8 will allow all of the parties 20 minutes to make an
9 opening statement before presentation of testimony.
10 Opening statements from parties presenting a case in
11 chief should briefly summarize the party's position and
12 what the party's evidence is intended to establish.
13 For Part 1A, we will hear an opening statement from the
14 petitioners only. The remaining parties will present
15 their opening statements in Part 1B.

16 Some parties have already presented policy
17 statements earlier this week, some, like DWR, may
18 present policy statements immediately before delivering
19 their opening statements.

20 We have allowed the parties a total of 20
21 minutes each to present both opening statements and any
22 policy statements. Consistent with this time limit, we
23 ask and trust those parties who have presented or will
24 present policy statements to reduce the amount of time
25 that they spend on their opening statements

1 accordingly.

2 After the petitioner's opening statements, we
3 will hear oral testimony from the petitioner's
4 witnesses. Witnesses should begin by identifying their
5 written testimony as their own and affirm that it is
6 true and correct. Witnesses should summarize key
7 points in their written testimony and should not read
8 their written testimony into the record.

9 In our February 11th ruling, we granted DWR's
10 request for 13 hours to summarize their witnesses'
11 direct testimony. Subsequently, DWR, when submitting
12 their witnesses' testimony, reduced that estimate to
13 six and a half hours of direct testimony.

14 The Department of the Interior did not provide
15 time estimates for their direct testimony but stated in
16 their written opening statement that DOI's witnesses
17 will testify along with DWR witnesses in a single
18 presentation. Petitioners will have one person
19 summarizing testimony related to each of the following
20 five subject areas.

21 First, WaterFix project description, second
22 engineering, operations, then modeling, and then water
23 rights. For cross-examination, the person summarizing
24 the direct testimony will be joined by a panel of
25 witnesses to respond to questions.

1 Oral testimony will be followed by
2 cross-examination by other parties and then, if
3 necessary, followed by questions from Board Members and
4 the hearing team staff.

5 Those of you who attended many of our public
6 meetings and hearings will note that there's a slight
7 difference there. Unlike our regular Board meetings
8 and workshops where Board members will ask many
9 questions during the course of the discussion, during
10 this hearing, we expect to first listen to the
11 testimony and cross-examination.

12 It is the Board's general practice in water
13 right hearings for the hearing officers and hearing
14 team staff to ask their questions last, after all the
15 other parties have completed their cross-examination.
16 By that time, many of our questions have already been
17 asked and answered. So just because we're not asking
18 many questions doesn't mean that we are not engaged.
19 In fact, it means that you are doing a good job.

20 Okay. The petitioners intend to present
21 witnesses and panels for cross-examination. Parties
22 will cross-examine one panel at a time following each
23 panel's direct testimony. Please note that, according
24 to the rules governing State Water Board hearings, the
25 scope of cross-examination is not limited to the scope

1 of a witness's direct testimony.

2 Each party will be limited to one hour of
3 cross-examination per witness or panel of witnesses in
4 Part 1A. I will allow additional time for
5 cross-examination if there's good cause demonstrated in
6 an offer of proof. In our February 11th ruling we
7 stated that, because we are allowing petitioners
8 additional time to present their direct testimony
9 commiserate time will be afforded for
10 cross-examination, but we expect that all parties will
11 be efficient in that process.

12 After completion of direct testimony and
13 cross-examination for each panel, redirect testimony by
14 the petitioners and re-cross examination by other
15 parties limited to the scope of the redirect testimony
16 may be permitted.

17 After all cases in chief are completed,
18 parties may present rebuttal evidence. Any rebuttal to
19 the petitioner's presentation evidence will be
20 presented at the end of Part 1B.

21 Similarly, time limits for redirect,
22 recross-examination, rebuttal, and rebuttal
23 cross-examination will be determined later in the
24 hearing.

25 Following the Petitioner's opening statements

1 and direct testimony, other parties will conduct
2 cross-examination in the order provided to the parties
3 by e-mail yesterday. If you do not have a copy, I
4 believe there are hard copies available up here. This
5 order will also be made available on our WaterFix
6 hearing website shortly.

7 Those parties will also conduct
8 recross-examination, if any, in order. Unless anyone
9 objects, I will skip reading the list of parties.

10 (No response)

11 CO-HEARING OFFICER DODUC: Good, no objection.

12 However, if there are any parties now that
13 have identified any errors on the list of order, list
14 of names, would you indicate that now.

15 (No respons)

16 CO-HEARING OFFICER DODUC: All right. Not
17 seeing any indication.

18 All right. Again, we encourage all parties to
19 be efficient in presenting their oral testimony and
20 conducting their cross-examination. Except where
21 Hearing Officer Marcus or I approved a variation, we
22 will follow the procedure set forth in the Board's
23 regulations, the hearing notice, and our rulings.

24 Before we begin, does anyone have any other
25 procedural issues or requests that need to be

1 addressed?

2 Please come up into the microphone, identify
3 yourself first, and then make your request.

4 Mr. O'Laughlin, please go ahead and come on up
5 as well.

6 MR. BRODSKY: Good morning.

7 Michael Brodsky --

8 CO-HEARING OFFICER DODUC: I'm sorry. Is your
9 microphone on?

10 MR. BRODSKY: Good morning. Michael
11 Brodsky -- Michael Brodsky --

12 CO-HEARING OFFICER DODUC: It's not on.

13 MR. BRODSKY: Michael Brodsky, representing
14 Save the California Delta Alliance, et al.

15 Just a brief point of clarification. You said
16 that parties who had submitted an NOI by January 5th
17 would be able to participate in Part 1. There was a
18 subsequent ruling allowing amended notices of intent to
19 allow persons who had submitted notices of intent in
20 Part 2 to participate in cross-examination in Part 1.
21 So I'm assuming that included in your statement those
22 persons who submitted timely notices that were
23 accepted.

24 CO-HEARING OFFICER DODUC: As a result of our
25 ruling, correct.

1 MR. BRODSKY: Thank you.

2 CO-HEARING OFFICER DODUC: Mr. O'Laughlin,
3 please come on up.

4 MR. O'LAUGHLIN: Good morning, Tim O'Laughlin,
5 San Joaquin Tributary Authority, et al.

6 I have a question in regards to the word
7 "later." So, numerous objections were made to the
8 testimony. So is the Board going to, before each
9 witness appears, go through the objections and rule on
10 the objections in regards to each witness before they
11 appear? Because there were numerous witnesses where
12 large portions were asked to be stricken from the
13 record.

14 Or should we assume that we're going to
15 cross-examine on the entire testimony that's been
16 presented, and maybe at some later time you'll make a
17 ruling on whether or not the testimony we've asked to
18 have stricken may in fact be stricken? Which way are
19 we going to be doing this? Because for efficiency of
20 time, I'll just say this --

21 CO-HEARING OFFICER DODUC: Mr. O'Laughlin, let
22 me interrupt you here and respond by saying that it is
23 the Board's normal practice -- and you've been part of
24 our petition hearings in the past -- to take objections
25 under consideration and rule on them as appropriate

1 during the hearing or at the end of the hearing as part
2 of the order. And a lot of the objections may also be
3 considered towards the weighing of the evidence.

4 So my answer to your question is to proceed
5 as -- you conduct your cross-examination, as you would
6 if these parties were, you know, were before you. And
7 then we will consider and we've noted all the
8 objections, and we will address them accordingly.

9 MR. O'LAUGHLIN: Great. So just so I'm clear,
10 then, so before each witness appears, then, should
11 we -- one final question. Should we renew our motions
12 before we start?

13 CO-HEARING OFFICER DODUC: You do not need to
14 renew your motions. They are in the record.

15 Mr. O'LAUGHLIN: Perfect. Thank you very
16 much.

17 CO-HEARING OFFICER DODUC: Thank you.

18 MR. STROSHANE: Good morning, Tim Stroshane,
19 representing Restore the Delta. Our attorney is now
20 Earth Justice. We are represented by them, and you
21 have them separate on the -- the order of groups for
22 appearance. And we were unclear whether that was an
23 error on your part or if there's some reason for that.

24 CO-HEARING OFFICER DODUC: If you would work
25 with Ms. McCue, we'll make that correction.

1 MR. STROSHANE: Very good.

2 CO-HEARING OFFICER DODUC: Not seeing anyone,
3 all right.

4 Some other housekeeping. Normally at this
5 time, I would invite appearances by the parties who are
6 participating in the evidentiary portion of the
7 hearing. With the large number of parties to this
8 hearing, however, I will not read the list, unless
9 anyone has an objection.

10 (No response)

11 CO-HEARING OFFICER DODUC: Not seeing any.

12 You all have had an opportunity to review the
13 list of parties and representatives, and it will be
14 part of the record.

15 Again, when you come up to speak today during
16 the course of this hearing, please use the microphone.
17 Please state your name, and whom you represent so that
18 the court reporter can capture this information for the
19 record.

20 Additionally, when you first come up to the
21 microphone to present your testimony or conduct
22 cross-examination, staff will provide you with a
23 nameplate that will be used for the duration of the
24 hearing.

25 Parties are responsible for bringing and

1 displaying their nameplates when you expect to be at
2 the microphone for an extended amount of time, like in
3 presenting your witnesses or conducting
4 cross-examination. This is both for the court reporter
5 as well as for the web casting audience.

6 All right. With that, I'm -- with that, we
7 will turn to DWR and DOI to present their opening
8 statements and any policy statements.

9 MR. COWIN: Good morning.

10 CO-HEARING OFFICER DODUC: Good morning.

11 MR. COWIN: I am Mark Cowin, and I am honored
12 to serve as Director of California's Department of
13 Water Resources. I want to start by thanking you for
14 the opportunity to help frame this important
15 proceeding --

16 CO-HEARING OFFICER DODUC: Mr. Cowin, let me
17 stop you so that the time can get started.

18 All right, Director, please proceed.

19 MR. COWIN: I could use that extra 20 seconds.

20 Let me just start by saying I do not envy your
21 role over the next weeks and months, but I am grateful
22 for the open and rigorous process that you've
23 established to consider our petition.

24 Throughout the proceedings to come, as you
25 hear from people concerned about the potential impacts

1 of three new diversion points, I ask you to keep in
2 mind that we are committed to meeting our obligation
3 under standards that you imposed to protect beneficial
4 uses of water, and we have a proven track record of
5 doing so.

6 I believe that simple point is the most
7 important takeaway from our testimony in the first part
8 of this proceeding.

9 There's a second point I want to make, also
10 important. No matter what standards you set, no matter
11 what future actions are needed to protect native fish,
12 no matter how climate change alters our weather
13 patterns and landscape, it will be easier to protect
14 all beneficial uses of delta water with new
15 infrastructure.

16 If we cannot modernize our delta water
17 conveyance system, we will miss opportunities to
18 capture and store water at times of high flow, as we
19 saw very clearly this past winter. Local water
20 districts will face increasing risk of shortages. We
21 will hobble other efforts to assist recovery of native
22 fish species. And gradually, we will strand the
23 billions of dollars that ratepayers and taxpayers have
24 invested in the State Water Project and the Central
25 Valley Project.

1 We understand that a project of this magnitude
2 raises concerns. The water quality standards and water
3 right conditions you establish are vital in addressing
4 these concerns, and so is our record of compliance with
5 those standards. Together, your standards and our
6 compliance record provide assurance that all beneficial
7 uses of water in the Delta are balanced.

8 My department manages 21 reservoirs, 700 miles
9 of canals and pipelines to serve large regions of
10 California. You oversee the water rights that allow us
11 to store and deliver water. The most complicated
12 aspect of our relationship as regulator and regulated
13 is in the Delta.

14 Implementation of your Bay-Delta Water Quality
15 Control Plan through Water Rights Decision 1641
16 established the flow and water quality standards
17 assigned to the Federal and State water projects for
18 the Delta. Since the objectives for D1641 were put in
19 place 21 years ago, our project and the Federal Central
20 Valley Project have met those standards 98.5 percent of
21 the time through 2015.

22 When the prior Decision 1485 was in place, the
23 Federal and State projects met the standards 99.5
24 percent of the time. You are working now to update the
25 requirements in the Bay-Delta Water Quality Control

1 Plan. When you establish new standards, we will meet
2 our assigned obligation just as we have met our
3 obligations under the previous standards for nearly the
4 last four decades. We will meet our assigned
5 obligations regardless of whether California WaterFix
6 advances. But I assure you, meeting those standards
7 will be easier with the flexibility provided by
8 additional intakes.

9 California's climate is changing. If trends
10 continue as expected, the Sierra snow pack will shrink
11 substantially. Sea levels will rise to levels that
12 make operation of our existing South Delta intakes
13 difficult, and shifting storm patterns will test delta
14 levees with higher tidal surge and outflows.

15 Additional water project intakes along the
16 Sacramento River would give us flexibility to better
17 cope with the changing hydrology and changing Delta
18 hydraulics. In addition, our work with Federal and
19 State fisher agencies convinces us that a new
20 configuration for delta conveyance, along with
21 effective fish screens will minimize entrainment,
22 impingement, and altered flow patterns that can harm
23 fish.

24 The new intakes we propose, if approved, will
25 be located upstream of habitats used by certain

1 protected species, and the screens would prevent
2 entrainment of even the juvenile stages of these
3 species.

4 You will hear in coming months from those who
5 believe our proposed project will harm other legal
6 users of water, our fish and wildlife in the Delta.
7 Modeling data may be offered as evidence.

8 As you consider these claims, I hope you will
9 bear this in mind: Models do not run water projects;
10 experienced human operators run water projects. That
11 human factor allows us to stay in compliance with water
12 quality standards nearly all of the time.

13 Models are useful tools to analyze changes in
14 a variety of factors that affect project operations.
15 But even the advanced models in use today are not
16 capable of simulating the full extent and complexity of
17 the watershed or simulating the real-time human
18 response necessary to deal with that complexity.

19 Only in extraordinary circumstances have we
20 exceeded the water quality standards you've set. And
21 rarely, if ever, do we use our full capacity to divert
22 water. None of this would change with California
23 WaterFix. To believe otherwise is to ignore the
24 factual record of water project operations. With our
25 petition, we seek not to expand our water rights but

1 only to change the place from which we divert water.
2 As with modeling of potential impacts, we understand
3 the limitations of the theoretical. We are committed
4 to putting in place the monitoring, research,
5 investments, and communication we need to adapt to
6 future conditions.

7 We understand the potential for our proposal
8 to generate new complexities. We will submit our
9 adaptive management proposal for you to review, and you
10 will always have the authority to influence the outcome
11 of adaptive management and revise standards for
12 protecting the Delta as you see fit. We have reached
13 the stage where we need you to hear the testimony,
14 weigh the evidence, and find a way within our water
15 rights system to accommodate our request, modernize
16 delta conveyance so that we can better protect native
17 fish, and guard against both sudden and gradual loss of
18 our current conveyance capacity.

19 Throughout this proceeding, I hope you will
20 bear in mind the fundamental respect my department
21 holds and has demonstrated for your authority and
22 critical role in protecting water users.

23 Thank you for your time and consideration.

24 MR. MURILLO: My name is David Murillo. I'm
25 the Regional Director for the Bureau of Reclamation,

1 the Mid-Pacific Region.

2 Thank you for the opportunity to share
3 Reclamation's perspective at this important proceeding
4 which will ultimately us help shape the future of
5 California water. As you know, planning for the Delta
6 fix using the Bay-Delta Conservation Plan as a concept
7 began in 2006 and has adapted to changing public input
8 and new information over the years.

9 As Regional Director for the Mid-Pacific
10 Region, I am frequently asked why the project is
11 important to reclamation. Our existing Central Valley
12 Project facilities face great risk from rising sea
13 levels and fish entrainment. Further, existing
14 operations at the Central Valley Project and the State
15 Water Project pumps in the Southern Delta causes
16 reverse river flows, which alters salmon migratory
17 patterns and partly contributes to the decline of
18 sensitive fish species such as delta smelt.

19 By adding a new point of water diversion to
20 the north, installing state-of-the-art fish screens and
21 establishing effective operating criteria, California's
22 WaterFix has the potential to improve native fish
23 migratory patterns and habitat conditions and allow for
24 greater operational flexibility via the old conveyance
25 system. Operation of the new and existing water

1 conveyance facilities will be managed to specific
2 criteria. The proposed project will provide the
3 ability of the CVP to continue to provide reliable
4 water supply deliveries to fulfill our contractual
5 obligations when hydrologic conditions result in the
6 availability [sic] of sufficient water consistent with
7 the requirements of the State and Federal law and the
8 terms and conditions of water delivery contracts.

9 New operational criteria will take effect once
10 the North Delta export facilities become operational
11 and after conferring with the U.S. Fish and Wildlife
12 Service and the National Marine Fishery Service. This
13 determination will be based on the best scientific and
14 commercial data available at the time the North Delta
15 export facilities become operational, at least ten
16 years from now, including data collected and analyzed
17 conducted [sic] through adaptive management.

18 As Director Cowin mentioned, it is likely that
19 modeling will result, will play a large role in the
20 hearing process. It is important to remember that
21 CALSIM 2 is a comparative tool that has been applied to
22 simulate the CVP and the SWP system at various levels
23 of development, system configuration, demand scenarios,
24 and operational rules. Results of the CALSIM 2
25 modeling are just that, modeling results. In reality,

1 operators and managers initiate real-time operations to
2 make necessary tweaks.

3 Over the ten years of construction of the
4 California WaterFix, operational criteria may be
5 adjusted to the extent allowed by law or regulatory
6 requirements based on new data or scientific analysis
7 such that operations will still adequately protect
8 listed species from jeopardy while maximizing water
9 supplies.

10 We feel that the analysis presented in the
11 EIS/EIR covers all of the potential impacts under a
12 variety of the circumstances, including any potential
13 adjustments, and are confident that we would operate
14 within those bookends.

15 Lastly, I concur with Director Cowin that,
16 when the Water Board establishes new standards, we will
17 meet our obligation under them with or without
18 California WaterFix. And having additional water
19 project intakes available to the system will surely
20 make it easier to do so.

21 Again, thank you for the hearing -- thank you
22 for hearing Reclamation. We appreciate the task before
23 you and look forward to answering any questions.

24 Thank you.

25 CO-HEARING OFFICER DODUC: Actually, before

1 Mr. Mizell starts, I didn't realize that the two
2 petitioners were combining their opening and policy
3 statements. So really, they should have a total of 40
4 minutes. Okay?

5 MR. MIZELL: Yes. We chose that order out of
6 respect for the time of the folks, so.

7 And so, good morning. My name is Tripp
8 Mizell. I'm a senior attorney with the Department of
9 Water Resources, and I will be representing the
10 Department through the course of this hearing.

11 The Department and U.S. Bureau of Reclamation
12 are here today to present evidence that will show
13 beyond any doubt that the California WaterFix, as
14 proposed, will avoid injury to legal users of water.

15 But before I get more into my opening
16 statement, I do want to take a moment to introduce the
17 co-counsel that I have helping me during the course of
18 this hearing.

19 So I'll be assisted by DWR Assistant Chief
20 Counsel Ms. Cathy Crothers, DWR Senior Attorney
21 Mr. Ken Bogdan, and Mr. Tom Berliner, a partner at
22 Duane Morris. And they're over here sitting to my
23 right.

24 Also, we have the Co-Petitioner of the Bureau
25 of Reclamation who will be represented by the Assistant

1 Regional Solicitor for the Department of the Interior
2 representing Reclamation, Ms. Amy Aufdemberge.

3 So I'd like to touch briefly upon the limited
4 nature of the change under consideration.

5 You're assessing the addition of three new
6 points of diversion on permits held by the Department
7 and the Bureau. What remains unchanged for existing
8 permits are the provisions for the source of water, the
9 amount of direct diversion, the amount of diversion to
10 and rediversion from storage, the places of use, the
11 purposes of use, and the season of diversion. Those
12 are all remaining unchanged. We're simply looking at a
13 change in point of diversion.

14 We have prepared our testimony in reliance
15 upon the notices and rulings that describe a reasonably
16 narrow scope for Part 1 of this hearing. The
17 Department will present evidence on an evaluation of
18 whether the requested new points of diversion will
19 operate to the injury of any legal user of water.

20 Hearing Officer Doduc, you mentioned it this
21 morning in your opening remarks as well as your opening
22 remarks on day one: Our focus is limited to our
23 specific request. So this hearing is not an open forum
24 for a broader critique of issues or aspects of the
25 Department's current or existing operations and that

1 Part 2 will be the focus for the potential effects on
2 Petition -- of the Petition on fish and wildlife and
3 recreation as well as the opportunity to discuss flow
4 standards under the Delta Reform Act.

5 I'd like to bring up two important points that
6 may frame the testimony as we move forward through the
7 course of Part 1.

8 This isn't a Water Quality Control Plan
9 update. You've recognized this. And to prejudge the
10 content of the Water Quality Control Plan Update is
11 inappropriate at this time. I just would like that to
12 be noted that our testimony does not attempt to modify
13 anything in the existing Water Quality Control Plan.
14 In fact, it's premised upon a continuation of the
15 existing Water Quality Control Plan until the
16 appropriate time when you've completed your update.

17 Additionally, this is not a hearing on the
18 CEQA document. In your February 11th ruling, you
19 appropriately indicated that the adequacy of the CEQA
20 documentation for the Cal WaterFix is not a key hearing
21 issue.

22 While the State Water Board must be able to
23 rely on upon a final environmental document to make the
24 their decision, in the March 4th ruling, the Board
25 indicated that the environmental document must be

1 finalized only prior to Part 2. Therefore, Part 1 is
2 not the point at which the adequacy of that
3 environmental document should be heard as the final
4 document has yet to be submitted.

5 Instead, through the testimony you will hear,
6 we have provided you a thorough project description and
7 other additional information for the State Water Board
8 to evaluate the project for the purposes of injury to
9 legal users of water.

10 I'd like to go into the structure of the
11 testimony. This testimony is crafted to provide the
12 information needed to approve the project when the
13 evidence is viewed as a whole. This will be a bit
14 challenging as we will be dealing with panels of
15 experts summarizing their testimony over the course of
16 many months.

17 We will try and have our experts reiterate the
18 fact that the testimony is cumulative in nature, and
19 many of these -- many of the aspects of the testimony
20 build upon one another.

21 I'd like to reference, just for visual
22 purposes, DWR Exhibit 1, Page 10, which is an
23 alternatives comparison. And I believe Jason has it
24 available.

25 This is one page out of the testimony that you

1 will later hear more about, but I think it's
2 instructive during the opening statement.

3 The Part 1 testimony provides an initial range
4 of operational criteria as indicated in the blue, and
5 it provides a broader range of operations for
6 consideration as indicated in the red. This evidence
7 will assure you and the public that what we later
8 discuss in Part 2, should it fall within these
9 boundaries, has been evaluated and that the Department
10 feels we've demonstrated that there's no injury to any
11 legal users of water. These operational scenarios are
12 all within the range of the alternatives analyzed in
13 the environmental document.

14 The evidence is comprehensive, and it will
15 show that the petitioners have met their burden for
16 demonstrating no injury to any other legal user of
17 water.

18 Thank you, Jason. I'm done with that slide.
19 Appreciate it.

20 MS. McCUE: Can I just interrupt for a second?
21 That was DWR Exhibit 1, Page 10 that you were referring
22 to?

23 MR. MIZELL: That's correct. That's correct.

24 MS. McCUE: Thank you.

25 So I'd like to touch upon the expert order

1 that you'll be hearing from over the course of the next
2 several months.

3 Today you will hear from the project
4 description testimony -- experts. They will concisely
5 present the project that is under consideration in this
6 portion of the hearing. The evidence will demonstrate
7 why the boundary analysis in combination with the
8 initial operating range is appropriate for Part 1 of
9 this hearing.

10 It will also demonstrate that the testimony
11 provides analysis of specific scenarios that are
12 selected to represent a broad range of operations and
13 that this assures that, when the petitioners receive
14 biological permits and if the State Water Board
15 approves this project, this hearing will have
16 considered testimony that fully addresses injury to
17 legal users of water.

18 The experts you will hear from today are best
19 equipped to answer questions regarding the project
20 description, its relationship to the environmental
21 document, and the interrelationship of all the
22 testimony.

23 Detailed questions on specifics for much of
24 the evidence are appropriately addressed by specific
25 expert panels that will follow. Following

1 cross-examination of today's experts, you will hear
2 from engineering experts who will describe the
3 potential construction effects that could affect legal
4 users of water and measures proposed to avoid or
5 mitigate those effects.

6 Their testimony will show that temporary and
7 permanent displacement of existing diversions or
8 drainage infrastructure will be offset by providing
9 replacement supplies or drainage infrastructure to
10 maintain the existing levels of service. Additionally,
11 they will discuss improvements of the project since the
12 draft environmental document that will show groundwater
13 impacts are mitigated and isolated through the use of
14 well-known construction techniques.

15 Following cross-examination of the engineering
16 panel, you will hear from operations experts. These
17 experts will discuss the current departmental
18 operational practices that avoid injury to legal users
19 of water and demonstrate that the successful record of
20 compliance can be relied upon as a predictor of future
21 compliance.

22 The evidence will show that the Department has
23 a highly successful record of meeting the regulatory
24 requirements set by this Board. Increased operational
25 flexibility gained through a dual command system as

1 proposed under the Cal WaterFix is worthwhile and will
2 increase, not decrease, the ability to adapt and
3 continue to meet regulatory standards.

4 And these experts will provide a concrete
5 example of how this project could have benefited the
6 State of California by preventing waste of flows in
7 excess of what the Board currently requires for the
8 protection of fish and wildlife.

9 Following cross-examination of the operations
10 panel, you will hear from the modeling experts. These
11 experts will present projections of future operations
12 using state-of-the-art models that are the industry
13 standard and have been used for evaluating just about
14 every major infrastructure project for water.

15 They will also discuss the comparisons of the
16 project scenarios with a projected future no-project
17 condition in order to appropriately delineate between
18 impacts of this project and what we project will happen
19 regardless. The testimony will prove that water
20 quality changes attributable to this project are minor
21 and do not rise to the level of injuring any legal user
22 of water. They will show that water supply changes
23 attributable to this project are minor and do not
24 injure any legal user of water, and they will show that
25 water level changes attributable to this project are

1 minor and do not rise to the level of injuring any
2 legal user of water.

3 Then lastly, following the cross-examination
4 of the modeling witnesses, you will hear from water
5 rights experts. Building upon all the previous aspects
6 of testimony and providing analysis and expert opinion
7 on the application of contracts held by the Department,
8 the testimony will present heavily supported analytical
9 information. This evidence will show that the
10 requested three points of diversion will not injure
11 another legal user of water, satisfies the contractual
12 obligations of the Department, and that the changes you
13 are considering in this hearing are limited and do not
14 constitute a new water right.

15 With that, I'm concluding the Department's
16 opening remarks. And, again, I'd like to introduce
17 Ms. Amy Aufdemberge.

18 MS. AUFDEMBERGE: Good morning, Hearing
19 Officers Doduc and Marcus and Board Members and Board
20 Staff. The benefit of going last is that I can be
21 very, very brief. I echo the comments made by Tripp
22 this morning. We also believe in the evidence and that
23 the -- and echo the statements of how the hearing
24 should play out.

25 My name is Amy Aufemberge. I'm an Assistant

1 Regional Solicitor for the U.S. Department of the
2 Interior, here, in Sacramento. I will be representing
3 both the Bureau of Reclamation and Fish and Wildlife
4 Service in these hearings. And for Part 1, we will be
5 offering witnesses from the Bureau of Reclamation.

6 As stated, we believe that the evidence will
7 show that the requested change to add the North of
8 Delta diversion points can be used in conjunction with
9 existing export facilities to improve Delta conditions
10 without causing injury to other legal users of water.
11 We believe this makes intuitive sense as that the point
12 of diversions are to serve a conveyance facility only.

13 We look forward to assisting the Hearing
14 Officers and the Board Members to also come to this
15 conclusion. Thank you very much.

16 CO-HEARING OFFICER DODUC: Thank you. With
17 that, are you prepared to present your witnesses for
18 the Panel 1? If you could have them all come up,
19 please.

20 Will the witnesses first please stand and
21 raise your right hand.

22 (Witnesses sworn)

23 STEVE CENTERWALL and JENNIFER PIERRE,
24 called as Project Description Panel
25 witnesses by the Petitioners, having

1 been first duly sworn, were examined
2 and testified as hereinafterset forth:

3 CO-HEARING OFFICER DODUC: Thank you.

4 You may begin, Mr. Mizell.

5 MR. MIZELL: Thank you.

6 So the experts before you at the moment are

7 Ms. Jennifer Pierre and Mr. Steve Centerwall.

8 DIRECT EXAMINATION BY MR. MIZELL

9 MR. MIZELL: Ms. Pierre, is DWR Exhibit 11 a
10 true and correct copy of your statement of
11 qualifications?

12 WITNESS PIERRE: Yes, it is.

13 MR. MIZELL: Is DWR Exhibit 51 a true and
14 correct copy of your testimony?

15 WITNESS PIERRE: Yes, it is.

16 MR. MIZELL: And is --

17 CO-HEARING OFFICER DODUC: Jennifer, you need
18 to use the microphone.

19 MS. McCUE: Can you please use the microphone?
20 It's for broadcasting purposes.

21 WITNESS PIERRE: Yeah, I just turned it on.

22 MR. MIZELL: And then is DWR Exhibit 1 a
23 correct copy of your presentation?

24 WITNESS PIERRE: Yes, it is.

25 MR. MIZELL: Thank you.

1 Mr. Centerwall, is DWR Exhibit 12 a true and
2 correct copy of your statement of qualifications?

3 MR. CENTERWALL: Yes, it is.

4 MR. MIZELL: And is DWR Exhibit 52 a true and
5 correct copy of your testimony?

6 MR. CENTERWALL: Yes, it is.

7 CO-HEARING OFFICER DODUC: Let me interrupt.

8 Mr. Centerwall, if it's more comfortable for
9 you, there is a microphone behind that monitor.

10 MR. CENTERWALL: Thank you.

11 MR. MIZELL: She'll be using the PowerPoint
12 that I gave to Jason this morning.

13 And, Steve, you can turn your monitor on if
14 you want to see it in front of you as well.

15 All right. Ms. Pierre, will you please
16 summarize your written testimony using the
17 presentation.

18 WITNESS PIERRE: Sure.

19 Good morning. Today my purpose here is to
20 summarize what is the California WaterFix that's being
21 proposed and how we've evaluated what's going to be
22 presented to you in subsequent hearing as Tripp
23 described earlier.

24 So, essentially the project is comprised of
25 three different pieces. There's the physical

1 components; there's the operational components; and
2 there's the collaborative science and adaptive
3 management program that's being proposed. And those
4 are the three pieces I'm going to provide some detail
5 around with subsequent detail provided in the following
6 testimonies.

7 So starting from where we are today, this
8 figure shows the location of the current points of
9 diversion in the South Delta at the Banks Pumping Plant
10 and Jones Pumping Plant.

11 The purpose of the California WaterFix as
12 described in the EIR/EIS is to make improvements to the
13 system to restore and protect ecosystem health, water
14 supplies, and water quality.

15 We have been evaluating this project for about
16 a decade now, and over that time, there have been a
17 number of adjustments to the project to try to minimize
18 the impacts of the project. This graphic is
19 demonstrating the revisions that have been made from
20 2012 on to the 2014 version of the project. Shown in
21 light blue is the 2012 version. The medium-colored
22 blue is refinements that were made in 2013. And in
23 2014, the project was further refined to continue to
24 reduce those impacts.

25 And what this is demonstrating is that from --

1 for the physical component aspects of the project,
2 which Mr. Bednarski will describe in a lot more detail
3 during the engineering testimony, the actual size of
4 the footprint has been substantially reduced. And
5 there's also been a pretty significant shift from the
6 use of private lands to the public lands. And these
7 things have together reduced a lot of the impacts that
8 we saw in some of the initial project designs.

9 The physical components themselves include a
10 few new infrastructure components. There would be two
11 tunnels that would be constructed up to 150 feet deep
12 that would carry water diverted that's screened in the
13 North Delta into a modified Clifton Court Forebay.
14 Each of the new intakes in the North Delta would have a
15 maximum diversion capacity of 3,000 cubic feet per
16 second. I'll talk about how they will be operated in a
17 moment.

18 There is also an intermediate forebay that
19 connects between the three new intakes and the two
20 tunnels I just described. And lastly, a new operable
21 Head of Old River gate would be constructed roughly in
22 the location of the rock barrier that's currently
23 constructed at the Head of Old River.

24 So these -- this map shows in -- a little bit
25 more precisely where the proposed intakes are. So

1 Intakes 2, 3, and 5 are the intakes proposed under
2 California WaterFix. And you can see in the very
3 bottom of the call-out graph there, the hatched
4 marking, that's the intermediate forebay.

5 So from that intermediate forebay, water would
6 be carried in the tunnels, the two tunnels that are 150
7 feet deep, into Clifton Court Forebay, as shown in this
8 call-out box. And the forebay itself would be modified
9 as shown in the hatching.

10 So that's the map or graphic representation of
11 what I just described and what are the primary physical
12 components. The Head of Old River gate is not shown
13 here. But, again, it would be located approximately in
14 the same location as the current rock barrier.

15 So moving on to the operational component of
16 the project, the concept is to use dual conveyance. So
17 we could continue to use the South Delta facilities,
18 but we would use the new North Delta facilities under
19 wetter conditions. In the drier conditions, the use of
20 the facilities is limited because of the operational
21 criteria proposed, which I'll describe in a moment.

22 The use of the coordinated or dual operations
23 will allow DWR-Reclamation to better meet water quality
24 objectives, maximize fish protection and water supply.

25 So as I mentioned earlier, this project has

1 been under analysis for quite some time. And there's
2 actually a number of processes currently underway. So
3 I wanted to highlight what -- what's different, what's
4 the same around the EIR/EIS, the BA that was submitted
5 in January that's been made available for public
6 review, and then how that relates and -- to the
7 hearings today and what we're presenting as part of
8 this hearing.

9 So Alternative 4A in the middle column
10 represents the physical components of the project. And
11 that's what I just described. There's no difference
12 between any three of these processes in terms of the
13 physical components that have been evaluated,
14 described, et cetera. So that's the two tunnels,
15 modified Clifton Court Forebay, the intermediate
16 forebay, an operable gate at Head of Old River barrier,
17 and three intakes on the Sacramento River. That's
18 Alternative 4A's physical components.

19 Moving into the last column relative to
20 operations, the EIR/EIS identified the range of H3 to
21 H4 as the Alternative 4A. And that's what's evaluated
22 in the recirculated draft. In the biological
23 assessment that was released in January, we picked a
24 point between H3 and H4, and that we call H3-Plus. So
25 that's a P- -- a component right in the middle. And I

1 will show in a moment -- it's the same graphic that
2 Tripp had called up in terms of that relationship.

3 For purposes of this proceeding, we're looking
4 at a range call Boundary 1 to Boundary 2. And the
5 purpose of that is because, as I mentioned in my very
6 first slide, this project also includes the
7 collaborative science and adaptive management program
8 and the ability to make adjustments to the initial
9 operating criteria based on science and monitoring and
10 data that is -- that comes to light over the course of
11 the construction period of this project as well as
12 beyond.

13 So Boundary 1 and 2 represent what we think at
14 this time, based on those uncertainties, the range of
15 potential adjustments that may be made. And we want to
16 make sure that you have that information for your
17 consideration relative to legal users so that those
18 adjustments can be accommodated based on the needs of
19 fish, other science information, and other things that
20 we come up with. So I'll describe the collaborative
21 science and its focus in just a moment.

22 So this is a graphic that Tripp showed
23 earlier.

24 The EIR/EIS identified eight -- there's 15
25 alternatives, but there's eight operational scenarios.

1 So those are represented by Alternatives 1 through 8 in
2 terms of the range of different outflows and exports
3 and operations. So that's all 1 through 8, and within
4 that falls Boundary 1 and 2.

5 So we will be -- Boundary 1 and 2, the impacts
6 of those have been evaluated in the EIR. They fall
7 within the impacts of Alternatives 1 and 8. And within
8 that -- oops.

9 Within that range is the Alternative 4A, H3 to
10 H4. So that's what was identified in the recirculated
11 EIR as Alternative 4A and then, just for context, H3
12 Plus.

13 So what we're looking at today, though, is
14 Boundaries 1 and 2. That's where we want to focus
15 because we don't -- H3-Plus is a representation of
16 what's in a BA, not a biological opinion. H3 to H4
17 have been acknowledged, and as part of the project, it
18 is adjustment based on adaptive management.

19 So looking at what are the initial operating
20 criteria, what's being proposed, what is H3 to H4, what
21 you want to start with, "What's not changing." It's
22 kind of the basis for where we started the development.

23 First of all, there's no proposal to change
24 the upstream operating criteria for the State Water
25 Project or the Central Valley Project. Those

1 components would continue to comply with the applicable
2 biological opinions and other regulations on those
3 facilities.

4 There is no proposal to change the water
5 contract or service areas. And as Tripp mentioned,
6 there's no proposal to change the quantity, rate,
7 timing, place, or purpose of use under the existing
8 permits.

9 So what is changing? What is being proposed
10 here for initial operating criteria? It can further be
11 divided into three pieces. We have what I'm going to
12 describe as the initial operating criteria, real-time
13 operations that can -- are adjustments made actually in
14 real-time -- and Mr. Leahigh will be able to describe a
15 lot more how the system is operated -- and a
16 collaborative science and adaptive management program
17 which is the basis for the need of looking at
18 Boundaries 1 and 2.

19 So starting with the initial operating
20 criteria, the intent is to continue to comply with
21 D1641. That's a base, a foundational place we start
22 with the development of the criteria. We also continue
23 to operate the Delta Cross Channel, the Salinity
24 Control Gate in the Suisun Marsh, and the Fall X2 RPA
25 that were in the current biological opinion. And we

1 continue to be consistent with the existing water
2 rights in the Delta.

3 So what are we changing?

4 The California WaterFix proposes new criteria
5 for the North Delta diversions, and this is in the form
6 of a bypass flow criteria, so how much water remains in
7 the Sacramento River; new OMR criteria in the South
8 Delta, which are generally more restrictive than what's
9 in the current biological opinion; operational criteria
10 for the new Head of Old River Gate, which can be
11 operated -- it's not just rocks; a new Rio Vista
12 minimum flow standard in January through August, when
13 there isn't one under D1641; and a potential new screen
14 outflow criteria, and that's actually the variation
15 between H3 and H4, so that's where we see that range.

16 So this table -- I'm going to walk through it
17 because I think this will be helpful in really
18 understanding the operational differences and
19 similarities among H3, H4, Boundary 1, and Boundary 2
20 and how they relate to the no-action alternative, which
21 is continued operation under the current rules.

22 So as I mentioned before, they all -- except
23 for the no-action alternative -- have the same physical
24 components, that 9,000 cfs maximum diversion capacity
25 at North Delta. So in the first column there, they all

1 answer the question, yes, that that's what's included.

2 In the second column, under Fall X2, they --
3 all of the scenarios except for Boundary 1 include the
4 continued implementation of the Fall X2 RPA.

5 In the next column under "Delta Outflow," this
6 is referring to other months -- other seasons, parts of
7 the year besides fall. Boundary 1 and H3 would
8 continue to comply with D1641. So in winter, spring,
9 and summer, it would be D1641 for outflow.

10 H4 increases outflow in March through May.
11 And Boundary 2 increases outflow year round. So we're
12 kind of starting to create our range around the
13 outflow.

14 Moving to the next column, the NMFS biological
15 opinion, included is San Joaquin River inflow-to-export
16 ratio. And that was similar to the Old and Middle
17 River reverse flow that was included in the 2008
18 biological opinion. And in the development of the
19 California WaterFix criteria, we incorporated the
20 inflow-to-export ratio as an OMR criteria. So keep
21 that in mind as we move to the next two columns.

22 So the No-Action Alternative does include the
23 IE ratio, San Joaquin IE. Boundary 1 does not. NH3,
24 NH4 and Boundary 2 do not; however, H3, H4, and
25 Boundary 2 incorporate it as an OMR criteria.

1 So H3 and H4 have the same OMR criteria.
2 Again, it's slightly more restrictive than the 2008 and
3 '09 biological opinions. And Boundary 2 has an even
4 more restrictive South Delta operation in the form of
5 an OMR criteria.

6 And lastly, the Head of Old River gate
7 operations moving from no action with the rock barrier
8 and then from Boundary 1, H3, H4, Boundary 2, it
9 becomes increasingly more restrictive with Boundary 1
10 only operating the gate in the fall. H3 and H4 have
11 the same operations, so there's a lot of real-time
12 operations that are included but generally operating in
13 the fall, winter, and spring months, and then Boundary
14 2 operating a little more aggressively.

15 So taking all this together, what we're trying
16 to show is that Boundary 1 and 2 are graphing what we
17 want you to be focused on during these proceedings but
18 that within that range also falls initial operating
19 criteria and how those are related. So I hope that was
20 helpful in understanding some of those relationships.

21 So moving on to the last piece, the
22 collaborative science and adaptive management, this is
23 the basis for wanting to look at Boundary 1 and 2 and
24 giving that space for this process to occur.

25 The collaborative sciences adaptive management

1 program itself is currently under development. It will
2 be provided as part of Part 2. There is a framework
3 that was included as part of the DWR exhibits that
4 outlines the general points of -- that will be included
5 in the adaptive management, but there's more work to be
6 done to really flesh out the full process that will be
7 available for Part 2.

8 But it will be focused on three important
9 things. First, it will focus on the screen design at
10 the North Delta diversion. The screen design is meant
11 to be state-of-the-art. There's been a lot of
12 multiple-agency discussion/input about how to go about
13 doing that. And the adaptive management program will
14 provide the basis for making sure that we're able to
15 really get the best design we can around that screen.

16 It will also focus on habitat restoration. So
17 there is habitat restoration included in California
18 WaterFix, and the adaptive management process will be
19 applied to the implementation and management of that
20 habitat.

21 And probably most importantly for the Part 1
22 proceedings is that it will affect and potentially
23 change the initial operating criteria through the
24 process that's outlined in the framework and that will
25 be expanded on in the full proposal, the ability to

1 make adjustments based on what we learn. As I believe
2 it was Director Cowin mentioned that it will add some
3 complexities to how it is operated. And I think this
4 is giving space to make adjustments based on what we
5 learn and how the climate moves forward into the future
6 and with this infrastructure.

7 So I think that's a really key point of the
8 project that we need to take into account when we're
9 looking what we think the impacts of the project are.

10 The collaborative science is -- it's
11 essentially what you'll read in the framework document
12 provided in the exhibit -- is it's meant to take
13 science, focused science and research, and feed that
14 back into the decision-making process. It's meant to
15 be transparent; it engages the State Fish and Wildlife
16 agencies for their input. And it would always be
17 consistent with whatever water quality control plan was
18 in place. So that, again, that will continue to be the
19 foundation of decision making within that framework.

20 In the development of the framework and as we
21 move forward with the development of the plan itself,
22 we have been looking a lot at existing State and
23 Federal adaptive management programs that have been
24 working. We also have been looking very closely at the
25 Delta Stewardship Council's review of adaptive

1 management from January. And during the independent
2 science panel review of the California WaterFix BA, we
3 got a lot of great feedback on what this program should
4 be.

5 So we are collating all of that information
6 and trying to come up with a really robust and good
7 plan that really achieves the goals that we set forth
8 in the framework.

9 This is just a graphic representing what I've
10 just described in terms of how we take information from
11 that monitoring and research and fold it into decisions
12 that get made and potentially adjustments to criteria.

13 So moving on, there will be engineering
14 testimony. So Tripp kind of reviewed this. And that
15 will provide a lot more detail on that construction
16 graphic and what the impacts are and how they're being
17 mitigated. Followed by that will be the operations
18 testimony to provide a lot more context about how the
19 State Water Project and Central Valley Project are
20 actually operated.

21 The modeling testimony is going to give you a
22 lot of information about the modeling results for water
23 levels, water supply, water quality, and reservoir
24 storage for Boundary 1, Boundary 2, H3, and H4 to
25 really dig in on what did we see, what did we evaluate.

1 And then lastly the water rights testimony
2 will provide detail around water rights and the status
3 and overview of the settlement agreements.

4 With that, I will be concluded.

5 CO-HEARING OFFICER DODUC: Thank you.

6 Mr. Mizell, any additional comments before we
7 get to cross-examination?

8 MR. MIZELL: No, Officer Doduc. That will
9 conclude our direct testimony at this time, and we can
10 move into cross-examination at your pleasure.

11 CO-HEARING OFFICER DODUC: Great. Thank you.

12 Then we will continue. Before we continue,
13 though, let me make a general announcement because
14 concern has been raised previously about recording
15 during the hearing.

16 Under the Bagley-Keene Open Meeting Act,
17 anyone who attends the meeting does have the right to
18 record, using camera or video, the proceedings.
19 However, that must be done in such a way that it does
20 not cause a disruption, including disruptions such as
21 noises and illumination. So I would ask that everyone
22 respect that as we continue in this hearing.

23 With that, we will begin the cross-examination
24 of this panel. And the first group up for
25 cross-examination is Group 3, the State Water

1 Contractors.

2 MS. MORRIS: Good morning. Stefanie Morris
3 for the State Water --

4 CO-HEARING OFFICER DODUC: Ms. Morris, please
5 hold on a second.

6 Ms. Morris and other cross-examiners, you may
7 take a seat over here, if you would like.

8 MS. MORRIS: I just have a brief statement.

9 CO-HEARING OFFICER DODUC: Oh.

10 MS. MORRIS: For the record, I'd like to note
11 I have with me my co-counsel Adam Kear and Becky
12 Sheehan, co-counsel for State Water Contractors.

13 At this time, I don't have any
14 cross-examination of the panel. However, I'd like to
15 reserve the right to cross-examine should
16 cross-examination by other parties go outside the scope
17 of the notice of Part 1A as -- or Part 1 as defined by
18 the Board.

19 CO-HEARING OFFICER DODUC: No, you may not
20 reserve that right. You may make an objection should
21 that happen.

22 MS. MORRIS: Well, I plan on objecting, but
23 I'm not sure how the Board would rule or if you will
24 rule at this time, since you've indicated that you may
25 or may not rule on objections, for the record. Thank

1 you.

2 CO-HEARING OFFICER DODUC: Thank you,
3 Ms. Morris.

4 MR. O'HANLON: Good morning. My name is
5 Daniel O'Hanlon. I'm appearing on behalf of Group 4,
6 the San Luis & Delta-Mendota Water Authority.

7 CO-HEARING OFFICER DODUC: Oh, so we are done
8 with the State Water Contractors' cross-examination?
9 Thank you.

10 Group 4.

11 MR. O'HANLON: Thank you. Mr. Rubin is also
12 authorized representative counsel for the Authority, I
13 am, as well as several other members of my firm are.
14 I'll make sure that our names are added to the list.

15 I don't have any cross-examination at this
16 time. Again, I join in Ms. Morris's comments about the
17 scope, and we intend to object if the scope of
18 questioning goes beyond Part 1A. Thank you.

19 CO-HEARING OFFICER DODUC: Thank you.

20 Group No. 5, Westlands Water District.

21 Mr. WILLIAMS: Good morning, Madam Chair,
22 Hearing Officers. My name is Phillip Williams,
23 appearing on behalf of Westlands Water District.

24 Westlands has no questions for
25 cross-examination. However, we raise the same issue

1 that State Water Contractors and the Authority have
2 pointed out. I think we're going to run into a
3 problem, which I hope we do not. But perhaps with the
4 scope being expanded under cross-examination and
5 parties that were ceded questions, I'm essentially
6 being precluded from addressing issues that may be
7 raised. So we just -- I would just repeat that
8 concern.

9 CO-HEARING OFFICER DODUC: Thank you.

10 Group 6 is up next, the Coalition for a
11 Sustainable Delta.

12 MR. BERLINER: Excuse me, Hearing Officer
13 Doduc. We're just dealing with a logistical issue
14 related to the court reporter and the iPad.

15 CO-HEARING OFFICER DODUC: Mr. Berliner, will
16 you identify yourself for the court reporter.

17 MR. BERLINER: Yes, please. Tom Berliner,
18 counsel for the Department of Water Resources.

19 Thank you. We've got it taken care of.

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

22 Coalition for a Sustainable Delta, do you wish
23 to cross-examine?

24 Is the Coalition representative here?

25 Not seeing anyone coming up, we will move on.

1 Group 7, the Sacramento Valley Group, which is
2 a combination of multiple groups.

3 MR. O'BRIEN: Good morning, Hearing Officer
4 Doduc, Hearing Officer Marcus, Board Member D'Adamo.

5 Kevin O'Brien here, representing Sacramento
6 Valley Water Users and also North Delta Water Users.
7 These questions are being asked on behalf of my
8 Sacramento Valley clients.

9 CROSS-EXAMINATION BY MR. O'BRIEN

10 MR. O'BRIEN: Good morning, Ms. Pierre and
11 Mr. Centerwall. Most of my questions are for
12 Ms. Pierre.

13 I would like to ask the staff to put up on the
14 screen DWR Exhibit 1, Page 11.

15 Ms. Pierre, your title is Consultant Deputy
16 Program Manager for the California WaterFix project?

17 WITNESS PIERRE: That's correct.

18 MR. O'BRIEN: And one of your tasks in that
19 position was to manage the preparation of the draft
20 biological assessment?

21 WITNESS PIERRE: Yes, I did.

22 MR. O'BRIEN: And you were also involved in
23 developing the operational scenarios that were used for
24 the modeling for the Cal WaterFix project; is that
25 correct?

1 WITNESS PIERRE: Yes.

2 MR. O'BRIEN: Can you tell me about the
3 general nature of your involvement in that latter
4 process?

5 WITNESS PIERRE: As the project manager for
6 the Bay-Delta Conservation Plan, I was involved in
7 discussions around the development of operating
8 criteria, but I'm not an expert in operations or
9 modeling. And so more so as a project manager in
10 trying to make sure all of the pieces that we needed to
11 evaluate were there and cohesive and fit together,
12 primarily in terms of the fish and aquatic resource
13 analysis.

14 MR. O'BRIEN: Who else was involved in those
15 discussions?

16 WITNESS PIERRE: Several people. Can you be
17 more specific?

18 MR. O'BRIEN: Well, why don't you go ahead and
19 name the several people.

20 WITNESS PIERRE: The operational criteria have
21 been under development for many years, even before I
22 was part of the project, so I don't think I could name
23 every single person that's been involved in the
24 development.

25 MR. O'BRIEN: Just based on your personal

1 knowledge.

2 WITNESS PIERRE: The -- Armin Munevar will be
3 testifying, and he was be part of that, as was John
4 Leahigh, who's also testifying. I think they can
5 answer some of the questions related to the specific
6 operations and modeling.

7 MR. O'BRIEN: Was there anyone else involved
8 in that process?

9 WITNESS PIERRE: Yes, there are a lot -- as I
10 said, there's a lot of people involved, over time, a
11 lot of discussions. So this wasn't a -- you know, one
12 meeting and we're done with the operation criteria.

13 MR. O'BRIEN: I understand that. I would like
14 to know who was involved to, your knowledge, in that
15 process.

16 WITNESS PIERRE: Director Cowin, Laura King
17 Moon, Jason Phillips, Michelle Banonis -- I mean, a
18 number of agency folks -- Maria Rae, Wren, just a
19 number of people.

20 MR. O'BRIEN: So these included
21 representatives from both the Department of Water
22 Resources and Bureau of Reclamation and also
23 representatives from Fish and Wildlife agencies?

24 WITNESS PIERRE: Yes.

25 MR. O'BRIEN: Director Murillo made the point

1 in their comments this morning that the proposed
2 WaterFix project would provide more operational
3 flexibility. Would you agree with that?

4 WITNESS PIERRE: Yes, I would.

5 MR. O'BRIEN: Would the California WaterFix
6 project provide additional export capacity, to your
7 knowledge?

8 WITNESS PIERRE: I think that the modeling and
9 operator testimony can provide that. I'm not an expert
10 on water yield, but I would agree that there is
11 flexibility provided.

12 MR. O'BRIEN: Well, that wasn't my question.

13 WITNESS PIERRE: I'm sorry.

14 MR. O'BRIEN: My question was whether it will
15 provide additional export capacity.

16 WITNESS PIERRE: I think that answer is -- it
17 is a "depends." The Boundary 1 and Boundary 2 is the
18 focus of today, and I think there's a range of
19 potential operations within that. And we're not done
20 with the CEQA document; we haven't received a
21 biological opinion. So it's uncertain as to the
22 specific yield of the project.

23 MR. O'BRIEN: Well, my question really didn't
24 go to the yield of the project. My question, I think,
25 is more narrow than that.

1 If these new diversions, new intakes get built
2 and the tunnels are constructed, will the Central
3 Valley Project and the State Water Project have
4 additional export capacity?

5 WITNESS PIERRE: It depends on what the
6 operational criteria would be applied to their export
7 locations.

8 MR. BERLINER: Excuse me. I think we're
9 having a misunderstanding here. I think the question
10 that's being asked and the answers that are being
11 developed aren't in sync with one another.

12 Mr. O'Brien's trying hard here, so I'd like
13 Mr. O'Brien to define what you mean by "export
14 capacity," because I think the witness isn't
15 understanding your question.

16 CO-HEARING OFFICER DODUC: That's a good
17 point, Mr. Berliner.

18 Mr. O'Brien?

19 Mr. O'BRIEN: I'll take Mr. Berliner up on
20 that suggestion.

21 So when I used the term "export capacity," I'm
22 really talking about the physical capacity to move
23 water from north of delta to south of delta, just
24 physical capacity.

25 WITNESS PIERRE: Yes, there would be

1 additional physical capacity.

2 MR. O'BRIEN: Thank you.

3 WITNESS PIERRE: Sorry about that.

4 MR. O'BRIEN: Not a problem.

5 To your knowledge, has there been situations
6 over the last decade where the Central Valley Project
7 and the State Water Project could have used additional
8 export capacity to move water through the Delta, north
9 to south, to augment south-of-delta supplies, if that
10 capacity was available?

11 WITNESS PIERRE: My team, it has not conducted
12 any such analysis. We've been focused on the basis of
13 the biological assessment, EIR. But I believe there's
14 other entities that have done some analyses of that
15 nature. But I'm not familiar with them, and I didn't
16 do them.

17 MR. O'BRIEN: So you can't answer my question?

18 WITNESS PIERRE: That's right.

19 MR. O'BRIEN: Okay. So moving to the slide,
20 DWR 1 Page 11, the far left part of that slide says,
21 "Upstream Operations of SWP CVP." Do you see that?

22 WITNESS PIERRE: Yes, I do.

23 MR. O'BRIEN: I interpret that as meaning
24 that, in all the various modeling that was done for the
25 State Water -- for the Cal WaterFix project to date,

1 that there was an assumption made that upstream
2 operations of State and Federal reservoirs would not
3 change; is that correct?

4 WITNESS PIERRE: The operating criteria that's
5 assumed is the same operating criteria that's
6 applicable today. And that's what I stated during my
7 testimony.

8 MR. O'BRIEN: Okay. And I want to dig into
9 that a little bit.

10 The reservoirs today -- or one of the factors
11 that affects reservoir operations is biological
12 opinions, correct?

13 WITNESS PIERRE: Yes.

14 MR. O'BRIEN: And in particular, the
15 requirements in the biological opinions relating to
16 coldwater pool?

17 WITNESS PIERRE: That's right, in NMFS
18 biological opinion.

19 MR. O'BRIEN: Yes, both groups, salmonids and
20 pens [phonetic], correct?

21 WITNESS PIERRE: No, I would say it's related
22 only to salmonids under the NMFS 2009 biological
23 opinion.

24 MR. O'BRIEN: So in a nutshell, those
25 requirements of the biological opinions require a

1 certain amount of water to be kept in storage in the
2 State and Federal project reservoirs; is that -- is
3 that correct?

4 WITNESS PIERRE: Yes. I'm not an expert on
5 the 2009 biological opinion, though, but I am familiar
6 with storage requirements that are within it.

7 MR. O'BRIEN: Are there any other regulatory
8 requirements that you're aware of that constrain how
9 much water can be released from the CVP and the State
10 Project reservoirs?

11 WITNESS PIERRE: I'm not an expert on what the
12 remainder of the requirements are in how to operate the
13 reservoirs.

14 MR. O'BRIEN: You're not aware of any
15 requirements?

16 MR. BERLINER: Objection, misstates the
17 witness's testimony.

18 CO-HEARING OFFICER DODUC: I'm sorry. What
19 was that,
20 Mr. Berliner?

21 MR. BERLINER: Mr. O'Brien's comment misstates
22 the witness's testimony. That's not what she said.

23 MR. O'BRIEN: I'm just trying to establish
24 whether this witness is aware of any other regulatory
25 requirements that would affect the ability to release

1 stored water. If the answer is "I don't know," that's
2 a fine answer. I just want to make sure that's clear.

3 CO-HEARING OFFICER DODUC: And is that the
4 answer, Ms. Pierre?

5 WITNESS PIERRE: Yes, I don't know.

6 CO-HEARING OFFICER DODUC: Thank you.

7 MR. BERLINER: Thank you.

8 MR. O'BRIEN: So the operational scenarios
9 that were used for Cal WaterFix assumed that, even with
10 the tunnels in place, there would be no additional
11 releases of stored water from upstream reservoirs; is
12 that correct?

13 WITNESS PIERRE: I think that the modeling
14 testimony needs to answer this because I think it's a
15 very complex question in terms of -- you know, I don't
16 want to answer definitively one way or another because
17 it's really a modeling result.

18 What I testified was that the criteria for how
19 the reservoirs are operated is not proposed to change
20 under the California WaterFix. And I think for --
21 digging into the details of what the modeling results
22 show is more appropriate for that testimony.

23 MR. O'BRIEN: Well, thank you for that. And
24 we will ask the operators.

25 But this is your slide.

1 WITNESS PIERRE: Mm-hmm.

2 MR. O'BRIEN: And it uses the heading "What
3 Isn't Changing," and I just want to confirm that, at
4 least from your standpoint based on your understanding,
5 it's your understanding that, even with the tunnels in
6 place, that the way that those upstream project
7 reservoirs operate won't change in from the way they're
8 operating currently?

9 WITNESS PIERRE: Right. My testimony was that
10 the criteria that are applied to how the reservoirs are
11 operated is not proposed to change under the California
12 WaterFix.

13 MR. O'BRIEN: Okay. You may or may not be
14 able to answer this question, but based -- you've been
15 involved in California water matters now for quite some
16 time.

17 And based on your background and experience,
18 if this project is built, tunnels are constructed and
19 new intakes are constructed, and you get into a
20 situation in a future year where there's water
21 available in storage in CVP and State Project
22 reservoirs that's over and above the water required to
23 meet the coldwater pool requirements or any other
24 regulatory requirements, wouldn't you expect the
25 Department of Water Resources and Bureau of Reclamation

1 operators to consider releasing that stored water so
2 that it could be picked up by these new intakes?

3 MR. BERLINER: Objection, calls for
4 speculation.

5 CO-HEARING OFFICER DODUC: Mr. Mizell, did you
6 have an objection as well?

7 MR. MIZELL: Yeah, I was just going to comment
8 that it's an incomplete hypothetical, calls for
9 speculation.

10 CO-HEARING OFFICER DODUC: The witness is free
11 to answer that she can't answer.

12 Ms. Pierre?

13 WITNESS PIERRE: I would agree. I think it's
14 speculative. I don't operate the projects, and I
15 think -- I don't know how they would operate. And what
16 I know is that, in the development of the WaterFix
17 criteria, we did not propose changing how the
18 reservoirs are operated. And that's what I know, and
19 that's what I'm testifying to. So I can't answer what
20 an operator would do in 15 years from now.

21 CO-HEARING OFFICER DODUC: Thank you, Ms.
22 Pierre.

23 MR. O'BRIEN: In this process you described
24 earlier, Ms. Pierre, about the development of the
25 operational scenarios, was this issue about whether to

1 assume any changes in reservoir operations, was that
2 ever discussed in any detail?

3 WITNESS PIERRE: In I believe it was
4 Alternative 1A, I think that that is what occurred. I
5 don't -- I wasn't part of the development of that
6 criteria. That was part of the -- I think we call it
7 the preliminary proposal at the time.

8 And there were changes in upstream operations
9 in that proposal, and that was the basis for comments
10 received and the desire to not have those impacts. And
11 that's the basis for the statement I'm making here,
12 that we are definitively not proposing to change any
13 criteria for upstream operations.

14 So to answer your question, there were
15 alternatives that did include changes, and the WaterFix
16 Alternative 4A, Boundary 1 and 2 does not propose that.
17 So there's differences among those.

18 MR. O'BRIEN: But my question is whether
19 anybody ever questioned whether that's a realistic
20 assumption. Do you ever remember that issue coming up.

21 MR. MIZELL: I'm going to object to this line
22 of questioning continuing. As the Hearing Officers
23 have indicated, what's before the Board today is the
24 proposed project we put in our petition and not the
25 myriad of alternatives that were considered at some

1 point in the past through the course of the development
2 of EIR.

3 CO-HEARING OFFICER DODUC: Mr. O'Brien, your
4 reasoning for going down this line of questioning?

5 MR. O'BRIEN: Well, I don't think it's
6 appropriate to just say what's in front of the Board is
7 what DWR and the Bureau decide to put in front of the
8 Board. The question is whether the analysis that went
9 into this proposal is appropriate and it was properly
10 undertaken.

11 And the question of whether some of the
12 assumptions that were embedded in the modeling, such as
13 no changes in upstream operations of reservoirs, is a
14 very legitimate issue to the question of whether there
15 are water supply impacts that will result from this
16 project. And we should not be limited to the four
17 corners of the boundary analysis that they put out
18 there. We should be allowed to probe what was excluded
19 from that analysis because that's the issue that's
20 important to the upstream water right holders that I
21 represent.

22 CO-HEARING OFFICER DODUC: I'm going to
23 sustain the objection. We want to focus on what is
24 before us. And to the extent that this witness can
25 provide information with respect to what is before us,

1 that's what I'm most interested in.

2 I appreciate that you want to probe some of
3 the background discussions. And -- but I'm going to
4 limit this discussion to what is before us.

5 MR. O'BRIEN: I understand your ruling. I'd
6 like to make an offer of proof.

7 I would ask this witness questions about
8 whether there was objection made to that assumption, by
9 whom the objections were made, whether the objections
10 were made in that regard by any official wildlife
11 agencies, and whether there was a decision made, a
12 formal decision, and if so, whether there's
13 documentation on that decision.

14 So that's my record, and I'll move on.

15 CO-HEARING OFFICER DODUC: Thank you,
16 Mr. O'Brien.

17 MR. O'BRIEN: Ms. Pierre, were you involved in
18 the process of establishing the no-action alternative?

19 WITNESS PIERRE: No, I was not.

20 MR. O'BRIEN: Are you familiar with the
21 no-action alternative?

22 WITNESS PIERRE: Yes, I am.

23 MR. O'BRIEN: Would you agree in general that
24 it's important from the standpoint of properly
25 analyzing the water supply impacts of the project to

1 make sure you get the no-action alternative right, in
2 other words that it represents reality?

3 WITNESS PIERRE: Actually, the no-action
4 alternative in my world is defined by the NEPA
5 requirements for no action as well as the ESA baseline
6 criteria. So it's not quite as you characterized it,
7 the work I do.

8 MR. O'BRIEN: I understand where it comes from
9 in terms of the NEPA/CEQA law. But it's important to
10 get it right, isn't it?

11 WITNESS PIERRE: It's important that it
12 complies with what's required under NEPA, yes.

13 MR. O'BRIEN: And if you don't do it in a way
14 that complies with what's required under NEPA and CEQA,
15 the result may be a skewed analysis of impacts,
16 correct?

17 WITNESS PIERRE: I suppose that's a
18 hypothetical. Yes, in general, under NEPA, you should
19 do a good no-action assumption.

20 MR. O'BRIEN: And in the no-action alternative
21 that has been used in the Cal WaterFix analyses, what
22 is your understanding of the assumptions that were made
23 about future releases from upstream reservoirs?

24 WITNESS PIERRE: Are you referring to the
25 analysis in the EIS?

1 MR. O'BRIEN: Yes.

2 WITNESS PIERRE: The no-action assumptions for
3 upstream reservoirs include the continued application
4 of the biological opinion regulations as well as any
5 other applicable regulations that would have been built
6 into the modeling assumptions. I think Mr. Munevar can
7 provide more detail around that.

8 MR. O'BRIEN: So again, similar to what's
9 indicated on DWR 1, Page 11, "Upstream Reservoir
10 Operations," correct?

11 WITNESS PIERRE: Yes. By definition, the no
12 action wouldn't be proposing an action other than the
13 project being evaluated. So the idea is that
14 everything else remains the same.

15 MR. O'BRIEN: You indicated earlier that you
16 were involved in preparing the biological assessment,
17 correct?

18 WITNESS PIERRE: Yes.

19 MR. O'BRIEN: And in that biological
20 assessment -- and by the way, I did want to mention for
21 the Hearing Officer that I don't believe the biological
22 assessment has been submitted as a staff exhibit. I
23 may be wrong about that -- but based on my review.

24 And I would like to request that it be
25 included in the record for this hearing. It's

1 certainly been referred to and I think will be referred
2 to some more. So I've got it on a CD, and I'd be
3 happy -- at the break, I'd be happy to...

4 CO-HEARING OFFICER DODUC: So noted,
5 Mr. O'Brien.

6 MR. O'BRIEN: Thank you.

7 Are you familiar with a provision in the
8 biological assessment -- and this relates to drought
9 year situations. And I can show you the reference if
10 you need me to. But there's essentially a statement in
11 there that, if we get into drought year scenarios,
12 we're going to come back to the Water Board with a
13 temporary urgency change petition. Do you recall that?

14 WITNESS PIERRE: There is a section at the end
15 of the project description that describes the drought
16 procedures that have been undertaken in the last
17 several years, the -- and other previous droughts. I'd
18 like to see specifically what you're referring to
19 before I agree to what you say it says.

20 MR. O'BRIEN: That's fair. That's fair.

21 WITNESS PIERRE: I haven't read it in a bit.

22 MR. O'BRIEN: If we need to pull out the
23 specific language, we can certainly do that.

24 I guess my question is when -- the biological
25 assessment indicates that the TUCP process will be used

1 in future droughts. Is it fair to say that we don't
2 know what the terms and conditions would be from any
3 orders from the Water Board that would come out of
4 those future processes?

5 WITNESS PIERRE: Yeah, I couldn't speculate
6 how the Board would rule under future drought
7 conditions.

8 CO-HEARING OFFICER DODUC: Thank you. I would
9 be willing to concur.

10 MR. O'BRIEN: I think we would all stipulate
11 to that.

12 Is the modeling that was done for the Draft BA
13 the same as the modeling that was done for the
14 California WaterFix project?

15 WITNESS PIERRE: Can you please clarify what
16 you mean by the "California WaterFix project"?

17 MR. O'BRIEN: Well, for the EIR/EIS.

18 WITNESS PIERRE: Oh, the biological assessment
19 includes a different Cal Calsim version. So it
20 includes a version from 2015 with an updated -- the
21 model itself is updated, put it that way.

22 So it's not exactly the same, but the
23 assumptions in the model around what the project is are
24 within the H3-to-H4 range that was evaluated in the
25 recirculated draft.

1 MR. O'BRIEN: Do you know what the modeling
2 that was done for the Draft BA reflects different Delta
3 outflow rules than the modeling that was done for the
4 EIR/EIS?

5 WITNESS PIERRE: So as I showed on -- which
6 slide is that? Maybe we can bring that up -- on 10.

7 So in the EIR/EIS, Alternative 4A was defined
8 as a range between H3 and H4, the blue. And in the
9 biological assessment, what we evaluated was H3-Plus,
10 which is a point within that range. So it's within it,
11 but it wasn't explicitly evaluated in the EIR/EIS as
12 Alternative 4A.

13 MR. O'BRIEN: Did the fish and wildlife
14 agencies -- NMFS, U.S. Fish and Wildlife Service and
15 California Department of Fish and Wildlife -- have any
16 input into the Delta outflow rules that are reflected
17 in the Draft BA modeling?

18 WITNESS PIERRE: Yes.

19 MR. O'BRIEN: And that's, again, this process
20 that you described earlier where the operational
21 scenarios were developed, or is that a different
22 process?

23 WITNESS PIERRE: In -- last year, last spring,
24 when we moved from the habitat conservation plan
25 approach to a Section 7 approach, we reconvened with

1 the five agencies to revisit the operational scenario
2 that had been included in the Bay-Delta Conservation
3 Plan, which were developed under an HCP process to
4 assess their appropriateness for a Section 7 proposal.

5 So they were involved in the development of
6 what we're calling here on this screen H3-Plus and what
7 was included in the biological assessment.

8 MR. O'BRIEN: Thank you.

9 To the best of your knowledge, are DWR and
10 Reclamation proposing in this proceeding that the State
11 Board insert any conditions in the approval of the
12 petition that would require the project to operate
13 according to the Delta outflow rules that are in the
14 modeling for the Draft BA?

15 WITNESS PIERRE: What we're focused on is
16 Boundary 1 to Boundary 2. So I think the answer would
17 be no.

18 Ms. MORRIS: I'd like to make an objection.

19 CO-HEARING OFFICER DODUC: Hold on.

20 Ms. Morris?

21 MS. MORRIS: My objection is that I think
22 there's confusion, and I'd like the record to
23 accurately reflect that Mr. O'Brien is talking about a
24 draft biological assessment. It's still in draft form.
25 He keeps referring to it as a BA, and it's a draft

1 form.

2 And I think the record needs to be clear
3 because, as the Board knows, when we move into Part 2,
4 there will be a biological opinion based on, presumably
5 a different document.

6 CO-HEARING OFFICER DODUC: Thank you, Ms.
7 Morris. But I believe Ms. Pierre used the term "BA"
8 for biological assessment.

9 WITNESS PIERRE: But it is draft, as it's been
10 submitted; it's a draft.

11 MR. O'BRIEN: So stipulated.

12 CO-HEARING OFFICER DODUC: So noted. Thanks.

13 MR. O'BRIEN: To the best of your knowledge,
14 Ms. Pierre are DWR and Reclamation proposing that the
15 State Board insert any conditions in the approval of
16 the petition that, once the tunnels are in place, the
17 CVP and SWP may not release any more water from
18 upstream storage than they do now?

19 WITNESS PIERRE: No, that's not part of the
20 WaterFix proposal.

21 MR. O'BRIEN: How am I doing on time?

22 CO-HEARING OFFICER DODUC: I believe you have
23 37 minutes left. But if this is a good break, I would
24 like to take a break for the court reporter.

25 MR. O'BRIEN: This would be a good break.

1 CO-HEARING OFFICER DODUC: Would a short break
2 until 11- -- I mean 10:45 be appropriate?

3 MR. O'BRIEN: Yes.

4 CO-HEARING OFFICER DODUC: All right. Let's
5 do that.

6 (Recess taken)

7 CO-HEARING OFFICER DODUC: And we are back on
8 the record.

9 Mr. O'Brien, please continue.

10 MR. O'BRIEN: Thank you.

11 Ms. Pierre, before the break, you mentioned a
12 meeting that was held last spring involving a number of
13 different agencies. I'd like to understand a little
14 bit more about that meeting.

15 First of all, can you tell me who was in
16 attendance at that meeting?

17 MR. MIZELL: Excuse me. Is that mike on?

18 MR. O'BRIEN: Yes.

19 CO-HEARING OFFICER DODUC: Perhaps you can get
20 closer to it, Mr. O'Brien. Please go ahead and repeat
21 that question.

22 MR. O'BRIEN: Sure.

23 Prior to the break, Ms. Pierre indicated that
24 there had been a meeting last spring involving a number
25 of different agencies. I think she said five agencies.

1 And I'd just like to first understand, maybe
2 you could just tell me which agencies were represented
3 at that meeting?

4 WITNESS PIERRE: Sure. And I'll just also
5 clarify that what I actually meant to say, if I didn't,
6 is that it was a process for reevaluating what were the
7 criteria that had been proposed as part of the Draft
8 BDCP, and so there's actually a number of meetings that
9 continued throughout the development of the BA, but
10 that was kind of the quote/unquote kick-off for that.

11 All five agencies attended. So that would be
12 National Marine Fishery Service, the Fish and Wildlife
13 Service, the California Department of Fish and
14 Wildlife, department of Water Resources, and Bureau of
15 Reclamation.

16 MR. O'BRIEN: And what was the specific
17 purpose of that kick-off meeting?

18 WITNESS PIERRE: There were -- because we used
19 an updated CALSIM run -- so we're now, you know, five
20 years past the modeling that we use in the EIR -- the
21 BDCP, in taking a look at the updated version of CALSIM
22 as well as evaluating, again, the criteria that had
23 been proposed in the Draft BDCP, we wanted to start
24 looking is that appropriate now, moving forward outside
25 of an HCP process and into Section 7.

1 So the idea was, in moving into a Section 7,
2 what should the operational criteria, what should the
3 project be defined as for purposes of Section 7. And
4 that was the purpose of these initial meetings was to
5 take a look at those factors.

6 MR. O'BRIEN: Was the State Water Board staff
7 involved in that initial meeting or any of the
8 subsequent meetings?

9 WITNESS PIERRE: No, they were not.

10 MR. O'BRIEN: I noticed in your testimony --
11 do you have that in front of you?

12 WITNESS PIERRE: Yes, I do. The written?

13 MR. O'BRIEN: Yes.

14 WITNESS PIERRE: I can -- oh, thank you.

15 MR. O'BRIEN: Page 11, Footnote 11. I'll just
16 read it so that you have it in mind.

17 It says, "The high outflow scenario is similar
18 to the scenario that was developed in response to the
19 State Water Board's April 19, 2011 letter to Mr. Gerald
20 Merrill and subsequent discussions with State Board
21 staff. That letter provided suggestions for an
22 alternative that would establish one side of a
23 reasonable range of alternatives," and then a
24 references to the exhibit.

25 "DWR continues to work with State Board staff

1 to refine this scenario."

2 So are there ongoing discussions with State
3 Board staff regarding the high outflow scenario?

4 WITNESS PIERRE: Yes, there are, as was
5 mentioned in my testimony, included as Appendix C in
6 the Recirculated draft EIR. And there was --
7 Alternative 8 was actually the original alternative
8 requested by the State Board. And that was evaluated
9 in the Draft EIR.

10 As part of the recirculated draft, the State
11 Board staff requested that we look at a revised version
12 of that and address some of the issues that were
13 described as part of the alternative evaluation, and
14 that was in Appendix C. And we're continuing to refine
15 that scenario that was in Appendix C of the
16 recirculated draft.

17 MR. O'BRIEN: Who from State Board staff is
18 the lead person in this?

19 WITNESS PIERRE: Ms. Riddle.

20 MR. O'BRIEN: And these discussions are
21 ongoing?

22 WITNESS PIERRE: Yes.

23 MR. O'BRIEN: Back to the question of
24 operational criteria, you testified before the break
25 that the operational criteria for the -- for the

1 reservoirs aren't changing. But then we heard from
2 Director Cowin about real-time management. And I'm
3 trying to understand the connection between your
4 statement that the operational criteria aren't changing
5 and his statement that there's going to be this robust
6 real-time management of the project going forward.

7 Can you help me understand that?

8 WITNESS PIERRE: Again, I'm not an expert in
9 operating, but I believe what Director Cowin stated was
10 that the flexibility would allow for -- for better
11 management. And he also stated that people operate the
12 project. And I think that's what -- he was just trying
13 to make the point that the modeling results themselves
14 are not what operates the project.

15 MR. O'BRIEN: So if I could try to interpret
16 that, you can either agree or disagree. What I'm
17 hearing is the operational criteria in the modeling
18 won't change, but the actual operations of the project
19 may change from what those criteria indicate?

20 WITNESS PIERRE: I think what I want to just
21 clarify is that it's operators that need to comply with
22 the criteria that are applicable to the reservoirs.
23 And I think that's consistent with what Director Cowin
24 stated and consistent with my testimony that the
25 criteria to which the operators need to operate is not

1 proposed to change.

2 MR. O'BRIEN: So are you proposing that as
3 part of this process the State Board require that the
4 two projects comply with the operational criteria that
5 are embedded in the modeling?

6 WITNESS PIERRE: No, that's not what we're
7 proposing. We're proposing no changes to the upstream
8 operating criteria.

9 MR. O'BRIEN: Well, Ms. Pierre, you just said
10 that the project operators need to comply with the
11 applicable criteria, right?

12 WITNESS PIERRE: Yes.

13 MR. O'BRIEN: When you used the term
14 "applicable criteria" what were you talking about?
15 Were you talking about the operations criteria used in
16 the modeling, or were you talking about criteria in the
17 BiOps and other regulatory requirements?

18 WITNESS PIERRE: I'm referring to the
19 operating criteria in the biological opinions and other
20 regulations applicable to those operations which were
21 assumptions included in the modeling for WaterFix
22 scenarios.

23 MR. O'BRIEN: So the project operators don't
24 have to comply with the operational criteria included
25 in the modeling, correct?

1 WITNESS PIERRE: That's not what I said. I
2 said they would continue to comply with the applicable
3 criteria. At this time, that is primarily the 2009
4 biological opinion. And those criteria are part of the
5 no action in the modeling, and we add WaterFix on top
6 of that.

7 I think the modeling experts can provide a lot
8 more detail around the specific assumptions. But I'm
9 not stating that the operators don't need to comply.

10 I'm stating that the criteria in the modeling
11 is consistent with the existing criteria in the
12 biological opinions to which we're saying the operators
13 would need to continue to comply or whatever's
14 applicable when they operate.

15 MR. O'BRIEN: I'm going to move to strike as
16 nonresponsive to the question.

17 I think my question is very simple.

18 WITNESS PIERRE: Okay.

19 MR. O'BRIEN: Will the project operators of
20 the Department of Water Resources and the Bureau of
21 Reclamation be required to comply with the operational
22 criteria that were used for the modeling that you've
23 discussed in this proceeding?

24 MR. MIZELL: I'm going to object. Ms. Pierre
25 can't speculate as to what will be required. Again,

1 that's what the State Water Board gets to determine.
2 And the testimony's already answered and the
3 presentation's already answered the fact that the
4 Department intends to comply with whatever's required
5 of the projects.

6 MR. O'BRIEN: May I respond?

7 CO-HEARING OFFICER DODUC: Quickly,
8 Mr. O'Brien.

9 MR. O'BRIEN: Quickly, the idea that an expert
10 witness can't be asked to speculate is, frankly, very
11 inconsistent with the Rules of Evidence.

12 Ms. Pierre has given opinions. I'm entitled
13 to test those opinions. And that's what my question is
14 trying to do.

15 CO-HEARING OFFICER DODUC: Thank you.

16 Ms. Pierre, please answer Mr. O'Brien
17 question.

18 WITNESS PIERRE: Can you restate it? I'm
19 sorry.

20 MR. O'BRIEN: Sure.

21 WITNESS PIERRE: Thank you.

22 MR. O'BRIEN: Will the project operators of
23 the Department of Water Resources and the Bureau of
24 Reclamation be required to comply with the operational
25 criteria that were used in the modeling for the

1 California WaterFix project?

2 WITNESS PIERRE: If that's the required and
3 applicable criteria at the time that the project is
4 operated, yes.

5 MR. O'BRIEN: Would you be willing -- would
6 the Department of Water Resources be willing to put
7 that commitment in the form of terms and conditions to
8 the order that comes out of this proceeding?

9 WITNESS PIERRE: I can't speak on their behalf
10 on that topic.

11 MR. O'BRIEN: Okay. Now, at some point
12 there's going to be a new biological opinion; is that
13 correct?

14 WITNESS PIERRE: You mean for the California
15 WaterFix?

16 MR. O'BRIEN: Yes. Sorry. That was not well
17 phrased. Basically, the process that started with the
18 Draft Biological Assessment will ultimately result in a
19 new biological opinion for the California WaterFix
20 project, correct?

21 WITNESS PIERRE: Yes. The only biological
22 opinion for the California WaterFix, yes.

23 MR. O'BRIEN: Okay. We don't know at this
24 point what that biological opinion will provide in
25 terms of terms and conditions, correct?

1 WITNESS PIERRE: That's correct.

2 MR. O'BRIEN: Is it possible in your mind that
3 this new biological opinion would include terms and
4 conditions that are inconsistent with the operational
5 criteria used in the modeling for the California
6 WaterFix project?

7 WITNESS PIERRE: USFW Service, the National
8 Marine Fishery Service, within their regulatory
9 purview, can include whatever they would like in their
10 biological opinion. So I think it's fair to say that
11 that's possible.

12 We have been working very closely with them
13 for the development of the biological assessment, so I
14 personally would be surprised if that were the case.

15 MR. O'BRIEN: And when you say you've been
16 working very closely with them, that's this process
17 that you've described earlier?

18 WITNESS PIERRE: Yes.

19 MR. O'BRIEN: Who are the lead
20 representatives -- let's start with National Marine
21 Fishery Service -- in that process?

22 WITNESS PIERRE: That would be Ryan Wulff and
23 Kathy Marcinkevage.

24 MR. O'BRIEN: And for U.S. Fish and Wildlife
25 Service?

1 WITNESS PIERRE: It's been somewhat
2 inconsistent. It was Larry Rabin, now Kaylee Allen,
3 Heather Swinney, Kim Turner.

4 MR. O'BRIEN: And for California Department of
5 Fish and Wildlife?

6 WITNESS PIERRE: That's been Carl Wilcox and
7 Chad Dibble primarily.

8 MR. O'BRIEN: Thank you. You testified about
9 the boundary approach or boundary analysis that was
10 used in connection with the WaterFix project. Do you
11 recall that?

12 WITNESS PIERRE: Yes.

13 MR. O'BRIEN: Have you been involved in other
14 projects where an analysis of this type was used for
15 purposes of analysis of impacts?

16 WITNESS PIERRE: I'm trying to recall.
17 There's always alternatives in CEQA and NEPA
18 evaluation, so it's similar in that way. In terms of a
19 range of operations being proposed for a single
20 alternative, I don't believe so.

21 MR. O'BRIEN: Okay. I'm trying to get at the
22 question of why the bookends -- or I'm sorry -- the
23 boundary analysis approach was used in the case.

24 Does it have something to do with the degree
25 of uncertainty about future regulatory requirements and

1 future operations? Is that sort of a fair way of
2 capturing why this was used here?

3 WITNESS PIERRE: I would describe it's purpose
4 for two reasons. First of all, we haven't received a
5 biological opinion yet. So we don't know what it's
6 going to say. We don't know if there will be
7 adjustments. Like I said, I don't personally think so,
8 but there's that possibility. So this is providing
9 some space for that.

10 But I think more importantly is the idea that
11 this project, if approved and we move forward with it,
12 wouldn't be operating for at least ten years. And the
13 climate conditions under which it would be operated,
14 the sciences developed over that time, what we learn
15 from, you know, initially operating it and really
16 understanding that operation may lead to adjustments.

17 And here in front of the Board, we're talking
18 about harm to legal users and allowing them the ability
19 to see that, if adjustments are made in the future
20 through collaborative science or by the issuance of a
21 BiOp, that within this range, those adjustments can be
22 made without having this process repeat itself over and
23 over again.

24 MR. O'BRIEN: So basically, there's
25 uncertainty with both operational and future regulatory

1 requirements; is that correct?

2 WITNESS PIERRE: That is a way to summarize
3 it, sure.

4 MR. O'BRIEN: Would you include in that
5 uncertainty uncertainty about how the projects will
6 utilize the additional export capacity that this Cal
7 WaterFix project would provide?

8 WITNESS PIERRE: I think Mr. Leahigh can
9 provide a lot more detail about how he would operate
10 with the tunnels in place. But I would offer that the
11 criteria -- and I mentioned in my testimony that each
12 component that is included has its own criteria. So
13 for the North Delta diversions, it has a criteria;
14 South Delta has a criteria. So together they create an
15 effect which is the subject of this Part 1 hearing.

16 So I wouldn't characterize it as uncertainty.
17 I would say we've included criteria that we think are
18 protective at each location and that together create a
19 protective environment, and the hydrologic conditions
20 fish presence, changes through adaptive management all
21 have the ability to cause adjustments to that. But I
22 wouldn't characterize that as an uncertainty in how we
23 would operate.

24 MR. O'BRIEN: Is this parameter we're talking
25 about as to how additional export capacity would be

1 utilized, is that included in the boundary analysis?

2 WITNESS PIERRE: I'm not sure I understand
3 your question.

4 MR. O'BRIEN: Was that part of the range of
5 parameters and impacts that are within the bookends of
6 the boundary analysis, or is that somehow outside that
7 analysis?

8 WITNESS PIERRE: We think it's within Boundary
9 1 and 2. I mean -- leave it at that.

10 MR. O'BRIEN: You were involved in developing
11 the project description for this project?

12 WITNESS PIERRE: Yes.

13 MR. O'BRIEN: Would you agree, as a matter of
14 NEPA and CEQA requirements, that a clear and stable
15 project description is an important part of any
16 analysis?

17 WITNESS PIERRE: Yes, I would.

18 MR. O'BRIEN: And would you also agree that a
19 clear and stable project description is essential to an
20 adequate analysis of question of injury to other legal
21 users of water?

22 WITNESS PIERRE: Yes, I would. I hope that's
23 what I'm helping to do today.

24 MR. O'BRIEN: And when we use the term
25 "project description," that includes both physical

1 facilities and project operations, correct?

2 WITNESS PIERRE: Right. And I noted in my
3 testimony I would describe it as three pieces: the
4 physical components, the operational component, and the
5 collaborative science. That's a key component of
6 what's being proposed here.

7 MR. O'BRIEN: Would you agree that the more
8 that assumptions about future project operations depart
9 from the reality of how the project will be operated in
10 the future, the more likely that you may end up with an
11 inadequate impacts analysis?

12 WITNESS PIERRE: It's speculative about what
13 the future outside of what's being proposed would look
14 like. Again, what's being proposed are Delta criteria
15 relative to how the new infrastructure would operate in
16 conjunction the existing infrastructure and pieces of
17 the Delta Project.

18 So I think if there were radical changes in
19 criteria or climate, there's obviously a potential that
20 the impacts we've disclosed with the assumptions we've
21 used could be different. But I don't know. That's
22 speculative to me.

23 We are -- in the context of NEPA, the "no
24 action" means there's literally no action. So we're
25 not making adjustments for things that we're not

1 proposing to adjust. And that's the evaluation we've
2 done.

3 MR. O'BRIEN: But if you're -- if your
4 assumptions about operations turn out to be wrong,
5 isn't it more likely that the impacts analysis will be
6 inadequate?

7 WITNESS PIERRE: Well, the impact analysis is
8 for making decisions right now. I think the
9 operational effects of this project won't be realized
10 for many years. And there is a number of backstops,
11 for lack of a better term, through the biological
12 opinion process, through the Water Quality Control Plan
13 revisions that would, you know, continue to govern
14 overall operations. This isn't the only piece. This
15 is one piece of that puzzle.

16 So -- and again, with the adaptive management
17 program, which includes fish and wildlife agencies,
18 with the commitment to science, I think that the bar is
19 what the impact is, at least from a biological
20 perspective, which maybe we should save for Part 2.

21 MR. O'BRIEN: Well, but the Water Board needs
22 to make a decision here at the conclusion of this
23 proceeding as to whether this proposed project, given
24 this current project description, will result in injury
25 to other legal users of water. So the Water Board

1 doesn't have the luxury of waiting ten years for future
2 processes to occur.

3 And getting back to my question, and I think
4 my question is a fairly simple one, that if you make
5 assumptions about how the project will be operated in
6 your project description that turn out to be inaccurate
7 assumptions, doesn't that then lead to an inadequate
8 analysis of impacts to the legal users of water?

9 WITNESS PIERRE: It would depend on --

10 MR. MIZELL: I'm going to object to
11 "inadequate" as being vague. I mean, Mr. O'Brien, if
12 you could define "inadequate," that might help the
13 expert answer the question.

14 MR. O'BRIEN: Do you understand what the word
15 "inadequate" means, Ms. Pierre?

16 MR. O'BRIEN: Yes. I --

17 MR. BERLINER: Excuse me --

18 CO-HEARING OFFICER DODUC: Hold on.

19 MR. BERLINER: We have an objection, and --

20 CO-HEARING OFFICER DODUC: And the objection
21 is overruled.

22 Ms. Pierre can answer the question.

23 WITNESS PIERRE: Yes, I understand what the
24 word "inadequate" means. And the answer to your
25 question is that it would depend on what those other

1 changes are. So it's possible that there's adjustments
2 in the future and that it doesn't effect what the
3 evaluation is currently saying. It's possible that
4 there's changes in the future that could affect it.
5 It's very speculative to understand that -- what may
6 change outside of the proposal that's here today.

7 MR. O'BRIEN: Thank you. I have no further
8 questions.

9 CO-HEARING OFFICER DODUC: Thank you,
10 Mr. O'Brien. Before you leave, though, I want to
11 revisit just to better understand -- you were pursuing
12 a line of questioning earlier to which I sustained an
13 objection from DWR.

14 Make the connection for me in terms of why
15 that line of questioning, in terms of alternatives that
16 are not before the Board, why that is relevant in this
17 matter.

18 MR. O'BRIEN: Well, I'm trying to recall
19 exactly the set of questions that I was asking at the
20 time. But as I recall the objection, it was based on
21 the notion that my question went beyond operations that
22 are contemplated in the project that's currently before
23 the Board.

24 CO-HEARING OFFICER DODUC: Correct.

25 MR. O'BRIEN: And my line of questions was

1 designed to focus on the question of whether the
2 assumptions that are being made about operations and,
3 in particular, operations of upstream reservoirs, are
4 realistic and valid.

5 My -- since you've asked, my clients belief is
6 that, if the State and Federal governments spend 15-,
7 \$20 billion building this project and they have excess
8 water in storage in upstream reservoirs that is excess
9 to the needs of the coldwater pool requirements of the
10 BiOp, that there's going to be a tremendous temptation
11 and pressure to move that water north to south, and
12 that the current analysis doesn't -- it basically just
13 assumes no change.

14 And I think that's a completely invalid
15 assumption. It's a completely unrealistic assumption,
16 and we're going to have a lot of testimony in this
17 proceeding about why that skews the analysis of injury
18 to other legal users of water, including my clients and
19 Mr. Lilly's clients, and other clients.

20 CO-HEARING OFFICER DODUC: Thank you, Mr.
21 O'Brien. That was helpful. And on the basis of that,
22 I will allow you to ask those questions of the
23 operations panel.

24 MR. O'BRIEN: Okay, thank you.

25 CO-HEARING OFFICER DODUC: Mr. Lilly, are you

1 going to continue the cross-examination for Group 7?

2 MR. LILLY: Yes.

3 For the record, Members of the -- Ms. Doduc,
4 Members of the Board and staff, my name is Alan Lilly,
5 and I'm here today representing the cities of Folsom
6 and Roseville, San Juan Water District, and Sacramento
7 Suburban Water District. And my colleague Ryan Bezerra
8 is with me as well.

9 CO-HEARING OFFICER DODUC: All right. Let's
10 go ahead and reset the clock to --

11 MR. LILLY: One hour. One hour should be more
12 than enough.

13 CO-HEARING OFFICER DODUC: Sixty minutes it
14 is.

15 CROSS-EXAMINATION BY MR. LILLY

16 MR. LILLY: I would ask that State Board staff
17 please put up Exhibit DWR 1, Slide 11 on the screen.

18 Good morning, Ms. Pierre. As I said, my name
19 is Alan Lilly, and you heard who I represent.

20 Regarding Slide 11, I just have a couple of
21 follow-up questions from Mr. O'Brien. This slide is
22 titled "What Isn't," that is, "What Is Not Changed,"
23 and in the left box is "Upstream Operations of CVP and
24 SWP."

25 So if you could just tell us what elements of

1 upstream operations of CVP and SWP, to your
2 understanding, are not changing.

3 WITNESS PIERRE: So, again, I'll clarify that
4 what we mean by this is the criteria that govern the
5 operations of upstream are not proposed to change. So
6 that means that the applicable biological opinions, the
7 settlement agreement on the Feather River and other
8 regulations I'm not as familiar with were assumed to
9 remain intact under the project, and that's what I'm
10 referring to in this slide.

11 MR. LILLY: Okay. Can you be any more
12 specific about what other regulations you're talking
13 about?

14 WITNESS PIERRE: I can't, but I think it would
15 be a great question for the modeling panel.

16 MR. LILLY: Okay. So then are the
17 petitioners, DWR and Reclamation, asking the State
18 Water Resources Control Board to include any new
19 conditions regarding upstream operations of the CVP and
20 SWP as part of this process in connection with Cal
21 WaterFix?

22 WITNESS PIERRE: No, that's not part of the
23 proposal.

24 MR. LILLY: So as long as the -- if the State
25 Water Resources Control Board were to grant the

1 petition without any additional -- such additional
2 conditions, then in fact the future operations of the
3 CVP and SWP with Cal WaterFix could change from present
4 operations as long as they're still within the
5 boundaries of the criteria you have just described; is
6 that correct?

7 WITNESS PIERRE: Not necessarily. I think
8 there's a number of things governing how the entire
9 system works. The biological opinions are the primary
10 governing piece on the upstream operating criteria, and
11 they're not being proposed to change under WaterFix.

12 MR. LILLY: Okay. Well, my question was could
13 they change. So when you say "not necessarily," that
14 sort of dodges the question. I understand they
15 aren't -- may not definitely change.

16 But my question is could upstream operations
17 of CVP and SWP reservoirs change with the Cal WaterFix
18 project in place so long as the operations remain in
19 compliance with all the existing regulatory criteria?

20 WITNESS PIERRE: I think that's a better
21 question for the operators and modeling experts
22 because, again, I think that gets to the specifics of
23 the modeling results and how the no-action versus the
24 WaterFix modeling and where there are/are not
25 differences in how -- what the modeling says relative

1 to operations.

2 The criteria themselves are not proposed to
3 change, and that's kind of a project description piece
4 I'm very familiar with. But in terms of how that plays
5 out in modeling is a question more appropriate for
6 those experts.

7 MR. LILLY: So then just to clarify, please
8 correct me if I've got this wrong, when you put up this
9 slide and said, "What Is Not Changing" regarding
10 upstream operations, you're talking about the
11 regulatory criteria are not changing, but you're not
12 talking about actual operations, and that's something
13 that the modelers are better equipped to address?

14 WITNESS PIERRE: Yes.

15 MR. LILLY: Thank you.

16 And I'll ask staff if you could now just flip
17 back one slide to Slide 10. Thank you.

18 On this slide, this slide is entitled
19 "Alternatives Comparison." And I believe you testified
20 about it on your direct testimony.

21 As I understand it, and please correct me if
22 I'm wrong, the variations that are shown on this from
23 the left to the right are variations in Delta outflow.
24 And I'm basing that assumption based on the fact that
25 it says "Similar to Existing Outflow" in the upper left

1 corner and "High Outflow" in the upper right corner.

2 So is it correct that the variations that are shown in
3 this are variations in Delta outflow criteria?

4 WITNESS PIERRE: I think that's one of the
5 major ones. But as I show on Slide 15, where I walked
6 through the different key Delta criteria also affecting
7 that are how we operate South Delta as well as the Head
8 of Old River Gate. So those also play into the
9 variation that you're seeing in this figure.

10 MR. LILLY: Okay. And then are there any
11 other parameters that vary among these different
12 scenarios other than the Delta outflow criteria and the
13 South Delta requirements that you've discussed from
14 Slide 15?

15 WITNESS PIERRE: So I'm going to look at DWR
16 Exhibit 515, which actually has the fuller description
17 of each of those scenarios. And if you'd like, I can
18 walk through what the differences are that may be
19 beyond those I summarized in my testimony?

20 MR. LILLY: Yes. And I think that now staff
21 has put up Exhibit 515. And if you could go ahead and
22 refer to that and, as appropriate, please refer to the
23 page number so the record is clear which page of this
24 exhibit you're referring to.

25 WITNESS PIERRE: Okay. So I'll focus on

1 anything that is different than South -- see if there's
2 anything -- it looks like that's all that there is,
3 actually, looking through that exhibit. It's outflows,
4 South Delta operations, and Head of Old River Gate
5 operations are the three variations shown on Page 10 of
6 my slide show.

7 MR. LILLY: Okay. That was Slide 10 of --

8 WITNESS PIERRE: Yeah.

9 MR. LILLY: -- Exhibit DWR 1?

10 WITNESS PIERRE: Yeah. I just wanted to
11 verify using DWR 15 that there wasn't any other level
12 demand on any other variations that I wanted to point
13 out.

14 MR. LILLY: So basically what you've called
15 the boundary analysis is an analysis of boundaries of
16 variations in those parameters that you've just
17 described?

18 WITNESS PIERRE: Yes.

19 MR. LILLY: So if there are other operational
20 parameters, like, for example, the one that we're
21 concerned about, how the CVP and SWP reservoirs might
22 be operated and how those operations might change with
23 the Cal WaterFix project, this boundary analysis does
24 not include variations in those operational parameters,
25 does it?

1 WITNESS PIERRE: Neither Boundary 1 or
2 Boundary 2 propose any changes in upstream operating
3 criteria. Again, the result of the modeling for
4 Boundary 1 and 2 can be presented as part of the
5 modeling testimony. So that's where I think detail
6 around what that modeling analysis is showing for
7 Boundary 1 and 2 can be further explored as to whether
8 or not there are any minor differences in actual or
9 modeled operations.

10 MR. LILLY: Okay. But to the best of your
11 knowledge, the parameters you've discussed, Delta
12 outflow and then the South Delta requirements, are the
13 only parameters that vary among these different
14 scenarios and particularly between Boundary 1 and
15 Boundary 2.

16 WITNESS PIERRE: And the and the Head of Old
17 River Gate operations, those three, mm-hmm.

18 MR. LILLY: Thank you.

19 I have a flash drive with a couple of State
20 Water Resources Control Board Exhibit pages
21 highlighted. It's just probably most efficient if we
22 put that up on the screen for everybody to look at.
23 And the first -- I'll ask staff to put that on the
24 screen.

25 CO-HEARING OFFICER DODUC: Mr. Lilly, the rest

1 of us are operating using paper exhibits. What are
2 their numbers?

3 MR. LILLY: Oh, yes. It's the first one.
4 It's SWR-CP 10, and it's pages -- Page 98. And I have
5 additional paper copies, if you would like to give them
6 to Board Members. It's up to you how you want to
7 proceed.

8 CO-HEARING OFFICER DODUC: Actually, that
9 would be very helpful, thank you.

10 WITNESS PIERRE: May have one also?

11 MR. LILLY: Absolutely.

12 WITNESS PIERRE: Thank you.

13 MR. LILLY: Sorry. I thought we were high
14 tech. I didn't know we still used paper, but I did
15 bring some paper.

16 CO-HEARING OFFICER DODUC: Some of us still
17 use paper.

18 MR. LILLY: All right. So for the record,
19 I've put up Exhibit SWRCB 10, Page 98. And just for
20 the record, this exhibit is Bureau of Reclamation's
21 Water Right Permit 11315, which is one of Reclamation's
22 permits for Folsom Reservoir operations. And I've
23 highlighted Permit Term 11.

24 So Ms. Pierre, please read this term to
25 yourself, and let us know when you are done reading

1 that.

2 WITNESS PIERRE: Okay.

3 MR. LILLY: Are you familiar with this permit
4 term?

5 WITNESS PIERRE: No, I'm not.

6 MR. LILLY: Do you know whether or not the Cal
7 WaterFix modeling that you've described in your
8 testimony contains any provisions to implement this
9 term?

10 WITNESS PIERRE: No, I'm not familiar.

11 MR. LILLY: All right. And then I'll just
12 flip to the next page of the stapled paper copies and
13 electronic file which is Exhibit SWRCB 11, Page 165.
14 And this is another one of the Bureau of Reclamation's
15 water right permits for Folsom Reservoir, and I've
16 highlighted Permit Term 11, which has the exact same
17 language as the previous one. So I'm just going to ask
18 you the same questions. Are you familiar with this
19 permit term?

20 WITNESS PIERRE: No, I'm not.

21 MR. LILLY: So do you know whether or not the
22 Cal WaterFix modeling that you've described in your
23 testimony contains any provisions to implement this
24 term?

25 WITNESS PIERRE: No, I don't.

1 MR. LILLY: Okay. Now, are you familiar with
2 the National -- I think you've talked about it. I just
3 want to make sure.

4 Are you familiar with the National Marine
5 Fisheries Service's 2009 biological and conference
6 opinion for the long-term operations of the CVP and
7 SWP?

8 WITNESS PIERRE: Certain portions of it, yes.

9 MR. LILLY: Please tell us what your
10 understanding is of the effects of this biological
11 opinion on the operations of the CVP and SWP?

12 WITNESS PIERRE: That's a big question.

13 MR. LILLY: Yeah, well, just a general answer
14 at this point; obviously it has a lot of detail.

15 WITNESS PIERRE: It was a jeopardy opinion
16 that established storage criteria for Shasta coldwater
17 pool and a number of other upstream actions to protect
18 winter and spring run, and it limited the export
19 capacity of the South Delta is that.

20 MR. LILLY: Okay.

21 WITNESS PIERRE: And included a bunch of RPAs
22 as well.

23 MR. LILLY: Okay. And that's actually --
24 that's one of the lead-ins I'm going to ask you about,
25 one of the RPA's. And just for the record, RPA stands

1 for reasonable and pursuant alternative; is that
2 correct?

3 WITNESS PIERRE: Yes.

4 MR. LILLY: So I'll ask staff to put up the
5 next page of that electronic file you just had up
6 there, which is an excerpt from Exhibit SWRCB 84, and
7 it's Page 595. And I've just highlighted some text in
8 the middle of the page, which is titled "Action
9 1.2.2.C, Implementation and Exception Procedures for
10 EOS Storage of 1.9 MAF or Below."

11 And then the lead-in text says or states, "If
12 the EOS storage is at or below 1.9 MAF, then
13 Reclamation shall..."

14 Do you see that text there?

15 WITNESS PIERRE: Yes, I do.

16 MR. LILLY: And are you at least generally
17 familiar with this RPA measure?

18 WITNESS PIERRE: Generally, yes.

19 MR. LILLY: And then I'm just going to ask you
20 about -- or go to the next page of that where I have
21 highlighted Paragraph 5, which states, "If operational
22 changes are necessary to meet Delta outflow, X2 or
23 other legal requirements during this time, then..." and
24 I've highlighted Subparagraphs (b) and (b).

25 Subparagraph (b) reads, "If it is necessary to

1 curtail combined exports to values more restrictive
2 than 2,000 cfs in order to meet Delta outflow, X2 or
3 other legal requirements, then Reclamation and DWR
4 shall, as an overall strategy, first increase releases
5 from Orville or Folsom and" -- and then Paragraph (c)
6 says, "In general, Reclamation shall increase releases
7 from Keswick as a last resort."

8 Did you see that text?

9 WITNESS PIERRE: I do.

10 MR. LILLY: And have you had a chance -- if
11 you want to take just a minute to read that to
12 yourself, please do so and let me know when you're
13 ready.

14 WITNESS PIERRE: I read it. Thank you.

15 MR. LILLY: Okay. And are you familiar with
16 this particular measure in the reasonable and prudent
17 alternative in this biological opinion?

18 WITNESS PIERRE: No.

19 MR. LILLY: Okay. Well, is it your
20 understanding that DWR and the Bureau of Reclamation
21 have to implement all of the reasonable and prudent
22 measures stated in the biological opinion?

23 MR. MIZELL: Objection, this is -- she's
24 already indicated that she does not know the degree of
25 the complexity of this document. And I would expect

1 that she would need significant time to review the
2 entire thing if she were going to weigh in on that
3 opinion.

4 CO-HEARING OFFICER DODUC: And she is free to
5 answer as such.

6 Ms. Pierre?

7 WITNESS PIERRE: In general, DWR and
8 Reclamation are required to comply with both this
9 biological opinion and the 2008 smelt biological
10 opinion. And it's my understanding they're doing so
11 and intend to implement what's included in those RPAs.

12 MR. LILLY: Okay. So are there any provisions
13 in the Cal WaterFix hydrologic modeling that you have
14 described in your testimony that implement these
15 subparagraphs?

16 WITNESS PIERRE: The Delta operations,
17 including outflows that are included in some instances
18 and some alternatives -- for example, in the H4
19 Boundary 2, increase outflows. And the restrictions in
20 this biological opinion on Shasta are so strict that
21 you can't change really how you get water.

22 So I would say that the operations for higher
23 outflows are consistent in general with Paragraph (c),
24 which says that Keswick is a last resort. In fact, we
25 don't really go there in the H -- in our analysis.

1 That's just an untouchable place because of trying to
2 continue to comply with the biological opinion.

3 And again, I'd offer that Mr. Leahigh and
4 Munevar can provide a lot more detail. I'm just trying
5 to provide some context around that.

6 MR. LILLY: Okay. So is that really about the
7 extent of your understanding of the hydrologic
8 modelings, how it addresses this point?

9 WITNESS PIERRE: Yes.

10 MR. LILLY: So I'm going to shift over for a
11 minute to the American River and the City of
12 Sacramento. Are you familiar with the water right
13 permits that the City of Sacramento holds that
14 authorize it to divert water from the Lower American
15 River at the City's Fairbairn Water Treatment Plant?

16 WITNESS PIERRE: No, I'm not.

17 MR. LILLY: Okay. So do you know whether or
18 not the Cal WaterFix hydrologic modeling described in
19 your testimony analyzes any impacts that the Cal
20 WaterFix Project might have on the City of Sacramento's
21 rights to divert water under those permits?

22 WITNESS PIERRE: I'm not familiar with the
23 water rights analysis.

24 MR. LILLY: Okay. I think you said you're not
25 familiar with the water right analysis. Does that mean

1 you're also not familiar with any water supply impacts,
2 in other words, how much water the City could divert
3 under those permits?

4 WITNESS PIERRE: Right. I'm not familiar with
5 their water rights or supplies or...

6 MR. LILLY: Or how the modeling might address
7 its impacts on those?

8 WITNESS PIERRE: In general, I understand what
9 the modeling results say, as I've managed the project,
10 but I'm not the expert on modeling. So in terms of the
11 detail I would assume you want to get into, I'm not
12 going to be able to provide that.

13 MR. LILLY: Okay. Well, I'm not -- don't make
14 assumptions --

15 WITNESS PIERRE: Okay.

16 MR. LILLY: -- about what detail I want to get
17 into.

18 I just want to know your understanding and
19 whether you have any understanding beyond what you just
20 described of how the -- what the modeling shows about
21 potential impacts of the City's ability to divert water
22 under these water right permits.

23 MR. BERLINER: Objection, the question's
24 vague.

25 CO-HEARING OFFICER DODUC: Mr. Lilly, could

1 you expand?

2 MR. LILLY: Okay.

3 What is your understanding of how the Cal
4 WaterFix modeling that you've described in your
5 testimony analyzes the impacts of the Cal WaterFix
6 Project on the City of Sacramento's ability to divert
7 water from the American River under these water right
8 permits?

9 WITNESS PIERRE: In general, the analysis was
10 done by comparing the WaterFix scenarios action
11 alternatives in the EIR to the no-action alternative.
12 And the difference between those is what's described as
13 the NEPA impact.

14 And similarly for CEQA, we look at existing
15 conditions, which is slightly different than the
16 no-action, and we describe that difference. I'm not
17 familiar with if the EIR pulls out impacts specifically
18 to the City of Sacramento. What I do know is that,
19 when we generally look at the modeling results for that
20 no-action comparison to the WaterFix scenarios in H3
21 and H4, that the changes on the American River and on
22 the Sacramento River are minimal or none.

23 And that's -- that's what I understand. And
24 that's the extent of my modeling interpretation.

25 MR. LILLY: Okay. So if we want more detail,

1 we should ask the modelers or the operators?

2 WITNESS PIERRE: Yes, I'd agree with that.

3 MR. LILLY: Okay. All right. I'm going to
4 ask the staff to put up the next exhibit on the flash
5 drive -- and don't worry; I only have three -- which is
6 ex copies of pages of the Cal WaterFix draft biological
7 assessment, the 2016 draft biological assessment. And
8 I do have some paper copies, too.

9 Okay. I've circulated paper copies, and we
10 have up on the screen the first page of the electronic
11 file. And this is the title page of the January 2016
12 Draft Biological Assessment from Cal WaterFix.

13 Are you familiar with this document?

14 WITNESS PIERRE: Yes, I am.

15 MR. LILLY: Okay. And I'll flip to Page 2.
16 And this -- and I highlighted it at the bottom. In
17 fact, this document was prepared by ICF International,
18 which is your firm. And you're listed as the contact
19 person; is that correct?

20 WITNESS PIERRE: Yes.

21 MR. LILLY: All right. Now, if I can flip to
22 the next page of the excerpts -- and obviously this is
23 a long document, and I've only excerpted a few pages.
24 The next page is the heading for the beginning of
25 Chapter 3 which is titled "Description of Proposed

1 Action."

2 Are you familiar with this Chapter 3?

3 WITNESS PIERRE: Yes, I am.

4 MR. LILLY: Okay. And then I'll flip forward
5 to the next page which is Page 3-214. And I've
6 highlighted Section 3.7.2, which is titled "Proposed
7 Future Drought Procedures."

8 And the text reads -- the first introductory
9 text reads, "The following is a list of generalized
10 procedures for implementation of future drought
11 response actions for operations at Delta facilities."
12 Are you familiar with this?

13 WITNESS PIERRE: Yes, I am.

14 MR. LILLY: Okay. And then I want to just
15 flip to the next page, which is the last action listed
16 there in Paragraph H, which states, "Reclamation and
17 DWR will prepare TUCPs as needed for submittal to the
18 SWRCB." Do you see that text?

19 WITNESS PIERRE: I do see that.

20 MR. LILLY: So what is your understanding of
21 what types of requests DWR and the Bureau of
22 Reclamation will make in such future TUCPs?

23 MR. BERLINER: Objection, calls for
24 speculation.

25 Mr. LILLY: I think I'm entitled to ask her

1 for her understanding of the document she prepared.

2 CO-HEARING OFFICER DODUC: Please answer, Ms.
3 Pierre.

4 WITNESS PIERRE: I think that's going to
5 depend on -- first of all, I just want to point out
6 this is Item H of the list of steps that would be
7 taken. It's the final step listed in the drought
8 procedures identified in the proposed action.

9 The preceding procedures have to do with
10 hydrologic conditions and how we respond to that and
11 biological evaluations that would be done based on that
12 information. So in terms of the nature of the TUCP,
13 that may be requested after all those steps are
14 implemented and that evaluation's done. I don't know
15 what that would be.

16 I believe that, speaking on behalf a little
17 bit for the fish agencies, there was a desire to
18 outline the fact that the procedures that have been
19 used under existing conditions would continue to be
20 used in the future. It's important to understand that
21 this project description is meant to cover all of the
22 Delta operations once the WaterFix infrastructure's in
23 place. So it's not limited only to the new facilities.
24 It's everything that's within the Delta, within the
25 State Water Project and Central Valley Project.

1 And so the project description includes kind
2 of the entire envelope of decisions and operations that
3 may occur in the Delta. And drought conditions is one
4 of them, and this is trying to address how that might
5 move forward so that wasn't a hole in that discussion,
6 especially coming out of the drought.

7 MR. LILLY: Okay. So is it fair to say that,
8 if the Cal WaterFix project is constructed and begins
9 operations and then we have a drought similar to or
10 more severe than the one that occurred during 2012
11 through 2015, that Reclamation and DWR might have to
12 file TUCPs to address those severe drought conditions?

13 MR. MIZELL: Objection, misstates the
14 evidence. This is a Draft BA, and it hasn't and
15 finalized and may be revised in the future. To say
16 that it dictates what the projects would do in the
17 future is highly speculative.

18 CO-HEARING OFFICER DODUC: Mr. Lilly?

19 MR. LILLY: Yeah, she has described this as
20 the proposed action of a document she prepared. I
21 think I'm entitled to ask her some details of what her
22 understanding is of what DWR and the Bureau might do in
23 the future with the Cal WaterFix in place.

24 CO-HEARING OFFICER DODUC: To the extent that
25 you can, please answer.

1 WITNESS PIERRE: Yeah, I think the short
2 answer is that they're acknowledging the processes that
3 have occurred in the last several years and are
4 proposing that those processes could be implemented
5 similarly in the future.

6 MR. LILLY: Does the Cal WaterFix modeling
7 that is described in your testimony contain any
8 provisions to implement any future TUCPs?

9 WITNESS PIERRE: The modeling includes the
10 82-year record, which does have a number of droughts on
11 it. It doesn't include adjustments for TUCPs during
12 those periods.

13 MR. LILLY: All right. My last exhibit I will
14 distribute is excerpts from the State Water Resources
15 Control Board Order 2015-0043.

16 And the first page of this order, WR 2015-0043
17 is now on the screen.

18 CO-HEARING OFFICER DODUC: Mr. Lilly, hold on
19 a second.

20 If staff could use the page width so that the
21 font would be larger for people who are straining to
22 see.

23 MR. LILLY: Oh. And I did just distribute
24 paper copies as well.

25 CO-HEARING OFFICER DODUC: No, no. In the

1 audience. I saw Mr. Herrick trying to read.

2 MR. LILLY: Oh, you mean there are other
3 people with old eyes besides you and me? Thank you for
4 the help.

5 Okay. So I just highlighted the -- some text
6 on the first page of this order and in the first
7 paragraph, which states that the order denies in part
8 and grants in part petitions for reconsideration of the
9 Executive Director's February 3th, 2015 order approving
10 in part and denying in part a temporary urgency change
11 petition to change requirements of the State Water
12 Project and Central Valley Project to meet water
13 quality objectives in the San Francisco Bay, San
14 Joaquin Estuary and subsequent modifications thereto.

15 I just wanted to read that so it's clear on
16 the record what this order is.

17 Ms. Pierre, are you familiar with this order?

18 WITNESS PIERRE: No, I'm not.

19 MR. LILLY: Okay. Well, then I'll just flip
20 forward to the next page of the excerpt, which is Page
21 63 of the order. And in particular, I've highlighted
22 the bottom of that page, Term 4 in the order, which
23 states, "In coordination with the American River water
24 supply providers, the Water Forum and the fishery
25 agencies, Reclamation shall develop a plan for

1 operations of Folsom Reservoir," and then we have to go
2 on to page -- the next page, Page 64, which now is up
3 on the screen, "that provides for reasonable protection
4 of municipal water supplies and fisheries dependant on
5 Folsom Reservoir."

6 And I won't read the rest of the highlighted
7 text, but it basically states that a plan to provide a
8 minimum end-of-October-2016 storage level of at least
9 200,000 acre feet in Folsom Reservoir to ensure
10 adequate water supplies for municipal uses going into
11 2017 water year shall be prepared by the Bureau and
12 provided to be filed with the Executive Director.

13 So my question for you is are you familiar
14 with this text and particularly this temporary
15 requirement that was imposed on the CVP and SWP?

16 WITNESS PIERRE: No, I'm not familiar with it.

17 MR. LILLY: So do you know whether or not DWR
18 and Reclamation will ask for terms like this in any
19 future TUCPs that they file for CVP operations and SWP
20 operations if the Cal WaterFix goes forward?

21 Mr. BERLINER: Objection, speculative.

22 CO-HEARING OFFICER DODUC: She is free to
23 answer that she does not know.

24 WITNESS PIERRE: I don't know.

25 MR. LILLY: Do you know whether the Cal

1 WaterFix modeling that you've described in your
2 testimony contains any provisions regarding minimum
3 Folsom Reservoir storage amounts?

4 WITNESS PIERRE: If -- only to the extent
5 that, if there is existing minimum storage on Folsom,
6 then we would have included that as a criteria in the
7 modelings, but I'm not familiar.

8 MR. LILLY: If you could just clarify, what do
9 you mean by an existing requirement for minimum Folsom
10 Reservoir storage?

11 WITNESS PIERRE: If the NMFS biological
12 opinion, if one of the RPAs had minimum flows or
13 minimum storage -- which I'm not sure it did -- then
14 the modeling that was done for the California WaterFix
15 would have assumed that that criteria was in place in
16 part of operating the projects.

17 MR. LILLY: And is that the extent of your
18 understanding of the modeling on this issue of Folsom
19 Reservoir minimum storage?

20 MR. BERLINER: Point of procedure. Alan, are
21 you going to introduce this as an exhibit?

22 MR. LILLY: Actually, I was just to that
23 point. I'm done with my questions. And since I'm the
24 first person to do this on cross-ex for this hearing, I
25 want to know how the Board would like to handle the

1 numbering of these exhibits.

2 We would like to have them numbered and
3 submitted into the administrative record. And we're
4 not sure how to do that. I don't think there was
5 anything in the hearing notice that said how to do
6 cross-ex exhibits.

7 CO-HEARING OFFICER DODUC: No, there isn't. I
8 would like for it to be numbered. And let me suggest,
9 looking to my legal counsel for advice here, that we
10 number it for identification purposes, and then you may
11 move it into evidence into the record when you complete
12 your cross-examination.

13 Mr. LILLY: Okay. And this is on behalf of
14 our four American River water agency clients. So I
15 would propose that these three exhibits be labeled as
16 AWRA-1 and -2.

17 I misspoke, AWRA-1, -2, and-3. And this is
18 the end of my questioning, so I move that these be
19 admitted into evidence.

20 CO-HEARING OFFICER DODUC: I was thinking towards
21 at the end of Part 1A.

22 Staff has advised me that since you are
23 submitting what might be staff numbered exits already,
24 it may not necessary to bring it back -- to add it to
25 the record.

1 Let me turn it over to Ms. Riddle.

2 MR. LILLY: Okay.

3 MS. RIDDLE: So at least this one is not a
4 State Board numbered exhibit. You would need to enter
5 the State Board exhibits into evidence if they have
6 been already done so.

7 I think we can sort it out at a break and
8 return to this to make sure we get it straight on
9 numbering?

10 MR. LILLY: I think that is an excellent idea.
11 I would be glad to meet with Ms. Heinrick and
12 Ms. Riddle to do that.

13 Just to clarify, we're only moving exhibits of
14 the pages of the State Board staff exhibits. And they
15 are different than State Board staff exhibits because
16 we have added some highlighted.

17 MS. RIDDLE: They may be separate exhibits.

18 MR. LILLY: I will be glad to work with you on
19 a break, and then we'll report back to you.

20 CO-HEARING OFFICER DODUC: Thank you,
21 Mr. Lilly.

22 MR. LILLY: And with that, I thank you,
23 Ms. Pierre. I appreciate your attention to my
24 questions.

25 CO-HEARING OFFICER DODUC: Mr. Bezerra, are

1 you next?

2 MR. BEZERRA: No.

3 MR. BERLINER: Ms. Hearing Officer, I have a
4 point of clarification.

5 CO-HEARING OFFICER DODUC: Mr. Berliner?

6 MR. BERLINER: Yes, thank you. You allowed
7 Mr. Williams and Mr. Bezerra another hour of
8 cross-examination time. But we understood that they
9 were part of Group 7.

10 So the question is are you going to allow
11 everybody in Group 7 to have an hour apiece, or --
12 otherwise we don't really understand the point of
13 grouping. We thought each group would get an hour or
14 such additional time as they would have an offer of
15 proof.

16 CO-HEARING OFFICER DODUC: Yes, each group
17 would have -- well, each party was promised an hour for
18 cross-examination. So in theory Group 7, would have 22
19 hours, which I strongly discourage.

20 The premise that I'm going by is, as long as
21 the cross-examination is not duplicative, is relevant,
22 is proceeding in a manner that is helpful to this Board
23 and our consideration and does not abuse the time
24 constraints, then we will allow it to continue as
25 appropriate.

1 Mr. LILLY: I thought I did pretty well for
2 four clients. I only took 30 minutes. I had four
3 hours.

4 CO-HEARING OFFICER DODUC: Congratulations,
5 Mr. Lilly.

6 MR. LILLY: Thank you.

7 CO-HEARING OFFICER DODUC: It is now 11:50.
8 Is there any other cross-examination from Group 7? And
9 if so, how long do you anticipate needing?

10 (No response)

11 CO-HEARING OFFICER DODUC: There are no other
12 cross-examinations from Group 7. Okay.

13 Group 8?

14 MR. BERLINER: Sorry to interrupt again, while
15 they're coming up. The connection with court reporter
16 for the reporting doesn't seem to be working. Could I
17 take just a minute to confer with the court reporter to
18 see if we can get this device working?

19 CO-HEARING OFFICER DODUC: Okay. Actually,
20 while you're doing that, how much time do you
21 anticipate you need for your cross-examination?

22 MS. NIKKEL: I don't think more than ten
23 minutes.

24 CO-HEARING OFFICER DODUC: Okay.

25 MR. BERLINER: Why don't I wait till the end

1 then.

2 CO-HEARING OFFICER DODUC: Then let's do that
3 then.

4 If you could start by identifying yourself and
5 spelling your last name for the court reporter.

6 MS. NIKKEL: Thank you. Is this on?

7 CO-HEARING OFFICER DODUC: Now it's on.

8 CROSS-EXAMINATION BY MS. NIKKEL

9 MS. NIKKEL: Good morning. My name is
10 Meredith Nikkel, N-I-K-K-E-L. And I'm here on behalf
11 of the Tehema-Colusa Canal Authority and water service
12 contractors in its service area.

13 Thank your for your time this morning. And I
14 just have a few questions, won't take long before our
15 lunch hour.

16 So my understanding of the proposed project is
17 that it includes new points of diversion that will be
18 shared between the Central Valley Project and the State
19 Water Project; is that correct?

20 WITNESS PIERRE: The two projects are operated
21 in a coordinated fashion. So at this point, I don't
22 think it's been completely determined how that sharing
23 of the new facilities will work, though it's described
24 in the Draft Biological Assessment is that DWR would
25 construct and operate the new facilities, and that the

1 CVP may also utilize, in coordination with the
2 coordinated ops under State Water Project, that export
3 capacity.

4 MS. NIKKEL: I appreciate that you anticipated
5 where I was headed, but let's just -- just to the
6 record's clear, I want to make sure I understand how
7 the points of diversion are going to be operated --
8 well, actually how they're going to be assigned.

9 So my first question is are the proposed
10 points of diversion going to be shared as a matter of
11 water rights between the Department of Water Resources
12 and Bureau of Reclamation?

13 WITNESS PIERRE: I can't answer that. I don't
14 know. I think the water rights --

15 MS. NIKKEL: I'm asking you a question about
16 the petition, the proposed petition here.

17 WITNESS PIERRE: Right. And what I -- my
18 limited understanding has to do with what we've
19 described in the Draft Biological Assessment, which is
20 that DWR would construct and operate the facilities and
21 that, because Bureau of Reclamation operates the CVP in
22 coordination with the State Water Project, they would
23 also -- their operations would be affected by and be
24 part of the overall operation.

25 So I can't describe for you what the water

1 rights outcome would be relative to each of the
2 projects in this new facility. I think the water
3 rights panel could answer that more specifically than I
4 can.

5 MS. NIKKEL: Let me try one more time, and
6 then we'll move on.

7 WITNESS PIERRE: Okay.

8 MS. NIKKEL: The petition would result in new
9 points of diversion that would be on the water rights
10 permits for both the Department of Water Resources and
11 Bureau of Reclamation, correct?

12 WITNESS PIERRE: That's my understanding.

13 MS. NIKKEL: Okay. So I also want to ask, as
14 you had started anticipating, how will the use of this
15 shared point of diversion be allocated as between the
16 projects, if you know?

17 WITNESS PIERRE: I do not know.

18 MS. NIKKEL: And do you know if/how that use
19 was shared in the modeling?

20 WITNESS PIERRE: No, I'm not familiar with
21 those specific outputs of the modeling.

22 MS. NIKKEL: Okay. I'll ask the modeling
23 team.

24 And thank you for your time this morning.

25 CO-HEARING OFFICER DODUC: All right. Thank

1 you.

2 With that, we will take our lunch break. We
3 will resume at 1:00 p.m. with cross-examination by
4 Group No. 9, North Delta Water Agency and member
5 districts.

6 (Whereupon, the luncheon recess was
7 taken at 11:52 a.m.)

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AFTERNOON SESSION

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(Whereupon, all parties having been
duly noted for the record, the
proceedings resumed at 1:00 p.m.)

CO-HEARING OFFICER DODUC: Good afternoon,
everyone.

We are back in session, and at this point,
I'll ask Mr. O'Brien, do you have cross-exam on behalf
of North Delta Water Agency and member districts?

MR. O'BRIEN: You'll all be pleased to hear
that it's just a few questions, so.

CO-HEARING OFFICER DODUC: Thank you,
Mr. O'Brien. As long as they're relevant and helpful
to us, you're welcome to ask them.

MR. O'BRIEN: Those are the only kind I ask.
Before we get into the cross --

CO-HEARING OFFICER DODUC: Hang on,
Mr. O'Brien. Staff has a question regarding exhibits.

MS. RIDDLE: I think we were going to address
the entering of the cross-examination exhibits before
we get started, if you don't mind.

MR. O'BRIEN: Well, I had one, the Draft
Biological Assessment, 2016 which we have provided on a
CD, and we would propose to mark that as SVWU-1. So I

1 will move that into evidence.

2 (Exhibit SVWU-1 marked for identification)

3 CO-HEARING OFFICER DODUC: Is that all,

4 Mr. O'Brien?

5 MR. O'BRIEN: Yes.

6 CO-HEARING OFFICER DODUC: Mr. Lilly?

7 MR. LILLY: Yes. I met with Ms. Heinrich and
8 Ms. Riddle, and we agreed on a numbering system for the
9 three exhibits that I used during cross-examination.
10 The first will be BKS-1, and that was the excerpts from
11 the various State Water Resources Control Board staff
12 exhibits.

13 (Exhibit BKS-1 marked for identification)

14 MR. LILLY: And then the next will be BKS-2,
15 and that's the excerpts from the Cal WaterFix
16 January 2016, Draft Biological Assessment.

17 (Exhibit BKS-2 marked for identification)

18 MR. LILLY: And then the last is
19 Exhibit BKS-3, which is the cover page and excerpts
20 from the State Water Board's Order WR2015-00043.

21 (Exhibit BKS-3 marked for identification)

22 MR. LILLY: So I would ask that those be
23 labeled and that they be admitted into evidence.

24 CO-HEARING OFFICER DODUC: Any objections?

25 (No response)

1 CO-HEARING OFFICER DODUC: All right. Thank
2 you, Mr. Lilly and Mr. O'Brien.

3 MR. LILLY: Does that mean they're admitted?
4 I just want the record to be clear. Does that mean the
5 exhibits are admitted into evidence?

6 CO-HEARING OFFICER DODUC: Hearing no
7 objections, they're admitted.

8 MR. LILLY: Thank you.

9 MR. O'BRIEN: Thank you.

10 (Exhibit SVWU-1 admitted into evidence)

11 (Exhibits BKS-1, BKS-2, and BKS-3 admitted
12 into evidence)

13 CO-HEARING OFFICER DODUC: Mr. O'Brien, you
14 may begin.

15 MR. O'BRIEN: Thank you.

16 FURTHER CROSS-EXAMINATION BY MR. O'BRIEN

17 MR. O'BRIEN: Ms. Pierre, are you generally
18 aware that there is a contract that was executed in
19 1981 between the Department of Water Resources and the
20 North Delta Water Agency?

21 WITNESS PIERRE: I'm generally aware that that
22 occurred, yes.

23 MR. O'BRIEN: Okay. Are you generally
24 familiar with the terms of that contract and the
25 purpose of contract?

1 WITNESS PIERRE: No, I'm not.

2 MR. O'BRIEN: Okay. I suspect I know the
3 answer to this, but I need ask it anyway.

4 So, to your knowledge, were the requirements
5 of the North Delta Water Agency DWR 1981 contract taken
6 into consideration when the operational parameters for
7 the modeling was established -- were established?

8 WITNESS PIERRE: Yes, I believe they were. I
9 just -- I know that that was part of the discussions,
10 but I don't recall any other details around that.

11 MR. O'BRIEN: So I should ask the modelers
12 that?

13 WITNESS PIERRE: Yes, I think they can more
14 specifically describe how they were.

15 MR. O'BRIEN: Thank you. That's all.

16 CO-HEARING OFFICER DODUC: Thank you,
17 Mr. O'Brien.

18 City of Brentwood, Mr. Aladjem.

19 MR. ALADJEM: Good morning -- or good
20 afternoon, Chair Doduc, Chair Marcus, Member D'Adamo.

21 I'm David Aladjem, Downey Brand, on behalf of
22 the City of Brentwood.

23 CROSS-EXAMINATION BY MR. ALADJEM

24 MR. ALADJEM: Good afternoon, Ms. Pierre.

25 WITNESS PIERRE: Good afternoon.

1 MR. O'BRIEN: Thank you very much for all
2 the --

3 CO-HEARING OFFICER DODUC: Excuse me,
4 Mr. Aladjem. Let me clarify. Are you representing
5 just the City or Group 10?

6 MR. ALADJEM: Just the City.

7 CO-HEARING OFFICER DODUC: Okay.

8 MR. ALADJEM: Ms. Pierre, I have just a very
9 few questions this afternoon. Following up on
10 Mr. O'Brien's line of questioning about the North Delta
11 Water Agency contract, are you aware of the contract --
12 are you familiar with the contract between East Contra
13 Costa Irrigation District and the Department?

14 WITNESS PIERRE: Not at all.

15 MR. O'BRIEN: I think I know the answer to
16 this question. Do you know whether the provisions of
17 that contract were taken into account in developing the
18 California WaterFix project and the modeling
19 assumption -- and/or the modeling assumptions?

20 WITNESS PIERRE: No, I don't know.

21 MR. ALADJEM: I would like to ask State Water
22 Board staff to put DWR No. 1, Page 10, back up on the
23 screen if you might.

24 Ms. Pierre, we spent a goodly amount of time
25 this morning with this slide, and you prepared it,

1 correct?

2 WITNESS PIERRE: Yes, I did.

3 MR. ALADJEM: I'd like to check my
4 understanding of the way in which the project might be
5 operated over time. Is it correct that the initial
6 operations after the project is completed would be
7 somewhere in the range there between what is label
8 4A-H3 and 4A-H4?

9 WITNESS PIERRE: That's what's proposed in the
10 EIR, but, however, these proceedings as well as the
11 biological opinion issuance has potential to address
12 that.

13 MR. ALADJEM: But the proposed project would
14 be between those two project alternatives?

15 WITNESS PIERRE: That's what's being proposed,
16 yes.

17 MR. ALADJEM: Okay. And then if I understood
18 your testimony this morning, the adaptive management
19 portion of the project, the third component, could over
20 time allow for the project to be operated anywhere
21 between Boundary 1 and Boundary 2; is that correct?

22 WITNESS PIERRE: That's correct.

23 MR. ALADJEM: No further questions.

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

1 Any other questions from Group 10?

2 Not seeing any, we'll move to 11, the Water

3 Farm. Mr. Goran, are you here today?

4 Mr. Goran is not here.

5 12, County of Colusa?

6 No? All right.

7 13, Sac Regional?

8 No.

9 County of Yolo, 14?

10 No.

11 15, East Bay Utility District?

12 MR. ETHERIDGE: We have no questions.

13 CO-HEARING OFFICER DODUC: That was --

14 Please come up to the microphone, just so we
15 have it for the record.

16 MR. ETHERIDGE: Good afternoon. I am
17 Fred Etheridge for the East Bay Municipal Utility
18 District, and we have no question for the witness
19 panel.

20 CO-HEARING OFFICER DODUC: Thank you,
21 Mr. Etheridge.

22 Group No. 16.

23 MR. ADAMS: Good morning. My name is Greg
24 Adams. I'm appearing on behalf of Friant Water
25 Authority. And I only have a few questions. And

1 actually, if we can leave that slide up -- and just a
2 few points of clarification about the boundary
3 analysis.

4 WITNESS PIERRE: Okay.

5 CROSS-EXAMINATION BY MR. ADAMS

6 MR. ADAMS: So the slide identifies H3 and H4
7 as the initial operating criteria. But then on -- and
8 just for clarification, on Page 10 of your written
9 testimony, you say the actual initial operating
10 criteria is unknown and will not be known until
11 issuance of the biological opinion; is that correct?

12 WITNESS PIERRE: As I stated just a moment
13 ago, the initial operating criteria as proposed are
14 just that, they're proposed, but the permits that
15 are -- place additional conditions might be different.
16 So I think that's the basis of the statement in the
17 written testimony.

18 MR. ADAMS: Then just after that, you also
19 testified that -- and I guess that would be consistent
20 with that -- that the boundaries do not represent the
21 proposed project.

22 WITNESS PIERRE: The boundaries represent the
23 proposed project in that they incorporate the potential
24 adjustments under the adaptive management program, and
25 that's why it's appropriate for these proceedings for

1 Boundary 1 and 2 to be the characterization of what's
2 being proposed.

3 MR. ADAMS: Then could you clarify why, on
4 Page 10, at Line 16 you say that the boundaries do not
5 represent the proposed project, or at least explain
6 that discrepancy?

7 On Page 10 --

8 WITNESS PIERRE: Right. So -- yeah. So this
9 is a little bit difficult.

10 So what's being proposed are the initial
11 operating criteria. That's what's evaluated in the
12 EIR. That's what frames up what we think the
13 biological opinion will fall within that range.

14 Boundary 1 and 2 are part of the proposed
15 project in that they accommodate the adaptive
16 management that could happen, but they're not, in and
17 of themselves, what is proposed as the initial
18 operating criteria. So hopefully that clarifies.

19 MR. ADAMS: I think it does.

20 WITNESS PIERRE: Okay.

21 MR. ADAMS: So I guess the question I have
22 following along with that is are DWR and Reclamation
23 proposing that the State Board insert conditions in any
24 approval of the permit that any operational criteria
25 will fit within Boundaries 1 and 2, and I guess any

1 initial operational criteria and then also future
2 operational criteria as potentially modified by
3 adaptive management?

4 MR. BERLINER: Objection, compound question.
5 Maybe we can take those one at a time.

6 CO-HEARING OFFICER DODUC: Yes, please break
7 up your questions, Mr. Adams.

8 MR. ADAMS: I apologize.

9 So let's start first. So is DWR and
10 Reclamation -- or are DWR and Reclamation proposing
11 that the State Board insert conditions in any approval
12 of the permit that any initial operating criteria will
13 fit within the boundaries of 1 and 2?

14 WITNESS PIERRE: Yes.

15 MR. ADAMS: And then so are the -- are DWR and
16 Reclamation proposing that the State Board insert
17 conditions in the approval of the permit that any
18 operational criteria for any future operational
19 criteria developed through adaptive management will
20 also be within Boundaries 1 and 2?

21 WITNESS PIERRE: Yes, I believe so, if I
22 understand your question. The idea is that, within
23 this proceeding, the Board allows that the boundaries
24 be -- that are established by Boundary 1 and 2 are what
25 determine condition to allow the flexibility within

1 those two boundaries.

2 MR. ADAMS: And you would be -- the Petitioner
3 would be asking conditions that any -- that they would
4 be limited, then, any initial operating criteria would
5 be limited to what is within Boundaries 1 and 2?

6 I guess to get maybe more at the heart of it,
7 would any process through adaptive management or
8 through studying the initial operating criteria, is it
9 possible that it could produce something outside of
10 Boundaries 1 or 2?

11 WITNESS PIERRE: The adaptive management
12 program has the potential to produce something outside
13 Boundaries 1 and 2, but then it wouldn't have been --
14 you know, it's outside of this, what we're proposing
15 right now, to explain that.

16 MR. ADAMS: So just to clarify that, so if it
17 were to fall outside the Boundaries 1 and 2, you would
18 agree that that operating type could not go forward
19 because it would be outside what is approved under this
20 permit?

21 MR. BERLINER: Objection, speculation. He
22 doesn't know what the DWR --

23 CO-HEARING OFFICER DODUC: I don't believe
24 your microphone is on, Mr. Berliner.

25 MR. BERLINER: My apologies. Objection, that

1 calls for speculation as to what the Department or
2 Reclamation might accept in the future as a condition.

3 CO-HEARING OFFICER DODUC: Would you like to
4 restate that, Mr. Adams?

5 MR. ADAMS: Well, I guess the question goes to
6 if something falls outside -- so if it, through
7 adaptive management, we come to an operations criteria
8 that falls outside of this, what would -- how would the
9 petitioners -- how would the petitioners operate the
10 project, seeing that it is outside of the boundaries of
11 1 and 2?

12 CO-HEARING OFFICER DODUC: I can hear your
13 objection, now, Mr. Berliner.

14 And I believe Ms. Pierre may answer that she
15 does not know, if that's the case.

16 WITNESS PIERRE: Right. I don't know.

17 MR. ADAMS: Okay. All right. No further
18 questions.

19 CO-HEARING OFFICER DODUC: Thank you,
20 Mr. Adams.

21 Any other questions from Group 16?

22 Not seeing any, we will now move to 17, San
23 Joaquin River Exchange Contractors Water Authority.

24 MR. MINASIAN: Members of the Board,
25 Ms. Pierre, my name is Paul Minasian. I represent the

1 San Joaquin River Exchange Contractors.

2 CROSS-EXAMINATION BY MR. MINASIAN

3 Mr. MINASIAN: Now, on Page 8 of your
4 testimony, Line 22 and 23, you state, "In addition, the
5 NDD," which is the North Delta Diversion, "would also
6 help protect critical water supplies against the
7 threats of sea-level rise and earthquakes."

8 Do you see that?

9 WITNESS PIERRE: I do.

10 MR. MINASIAN: It appears from your curriculum
11 vitae that you've spent a large part of your career
12 dealing with the levees and the channels of the Delta;
13 is that correct?

14 WITNESS PIERRE: No. Actually, I think it has
15 been more about the water supply and not the levees
16 themselves.

17 MR. MINASIAN: Okay. And when you say that it
18 would help protect critical water supplies, are you
19 indicating in your testimony that having tunnels would
20 mean that the water delivery south of the Delta would
21 not necessarily have to depend upon the channels being
22 open and the levees being intact for delivery?

23 WITNESS PIERRE: No, that's not what it's
24 stating.

25 MR. MINASIAN: What did you mean by that

1 language?

2 WITNESS PIERRE: What I mean by this language
3 is that a change point in diversion allows the
4 flexibility to respond to sea-level rise and threats of
5 an earthquake. And the effects of that earthquake is,
6 you know, unknown. So it has obviously the potential
7 for some levee damage or none or the different factors
8 that have been explored in other reports.

9 And the change point of diversion does provide
10 the second place to divert water in case that were to
11 happen. But nothing to do necessarily with dependence
12 in part or not at all on levees in the Delta.

13 MR. MINASIAN: Are you aware if there is a
14 central financing authority and a centralized
15 well-organized program for inspection and repair of
16 levees throughout the Delta to maintain the ability to
17 pass water from the north to the south to the pumps if
18 the NDD is not built or not in operation?

19 WITNESS PIERRE: That's outside my expertise.
20 I'm not aware.

21 MR. MINASIAN: Who would have made the
22 decision, in regard to the Bureau and DWR's proposal,
23 in regard to how far it should go in terms of proposing
24 improvements to the channel clearing, dredging, and
25 levees?

1 MR. BERLINER: Objection, relevance.

2 CO-HEARING OFFICER DODUC: Mr. Minasian?

3 MR. MINASIAN: The relevance is that, for
4 substantial periods of time, the tunnels may not be
5 utilized. And in order to have a reasonable beneficial
6 use of water generally, we view -- if you start to
7 supply cropland or field land, you must be able to
8 finish the crop year, or else you're not reasonably
9 beneficially using water. So that's the relevance.

10 MR. BERLINER: I fail to see how levee
11 maintenance in case of an emergency has any relevance
12 to beneficial use.

13 CO-HEARING OFFICER DODUC: I'm going to allow
14 that.

15 Go ahead, Ms. Pierre. Answer to the extent
16 that you're able to.

17 MR. MINASIAN: Would you like me to repeat it?

18 WITNESS PIERRE: Yes, please.

19 MR. MINASIAN: I think my question was at what
20 stage was it decided or who decided not to extend the
21 plan to include some means of financing inspection and
22 repair of levees if they failed?

23 WITNESS PIERRE: I don't know. I've never
24 been involved in any discussions around that topic.

25 MR. MINASIAN: Okay. Now, let's -- let's look

1 at what you did include. You included the Delta Cross
2 Channel Gates as an operable facility, did you not?

3 WITNESS PIERRE: Yes, that's included as part
4 of the WaterFix.

5 MR. MINASIAN: And you included a new variable
6 gate system for Old and Middle River to take the place
7 of this kind of haphazard pile of rocks that's put out
8 there every year, did you not?

9 WITNESS PIERRE: Actually, that gate's at the
10 Head of Old River near San Joaquin, so it's not near
11 Middle River. It's for the Old River.

12 MR. MINASIAN: I stand corrected. Thank you.

13 My question to you is, if authorized, the
14 tunnels would not be operated at certain points in
15 time, would they? They'd be inoperable under your
16 hypothesis and your boundaries, would they not?

17 WITNESS PIERRE: Which hypothesis are you
18 referring to?

19 MR. MINASIAN: Let me give you an example. Is
20 it true that, in dry years, there would be a tendency
21 not to operate the tunnels because that would mitigate
22 or reduce the risk of harm to water users?

23 WITNESS PIERRE: There's criteria applicable
24 to the North Delta diversion in the form of bypass
25 flows, and they are based on -- not on water year type.

1 They're based on actual hydrology in the Sacramento
2 River. So other factors, of course, like meeting water
3 quality compliance points, play a factor into the
4 overall operations of the Delta.

5 But I wouldn't characterize North Delta
6 operations being driven by water year type, it's more
7 hydraulic. So I can't answer your question relative to
8 dry years.

9 Mr. MINASIAN: If I may, ma'am, may I rephrase
10 the question?

11 CO-HEARING OFFICER DODUC: Please,
12 Mr. Minasian.

13 MR. MINASIAN: Will there be times under your
14 understanding of the project that the project does not
15 divert water into the tunnels because, if water was
16 diverted, there might be harm to water users?

17 WITNESS PIERRE: I'm not -- I'm not sure. I
18 think that's a good question for the modeling panel to
19 dig in on those instances if they occur.

20 MR. MINASIAN: On the theory that the modeling
21 panel needs to go home sometime, let me just ask one
22 more follow-up question.

23 Is it possible that the project that is being
24 proposed would be a better project if there was a
25 proposal to finance and organize maintenance of Delta

1 levees so that the water that doesn't go through the
2 tunnel at certain times or in certain quantities but
3 has to get south of the Delta could be better assured
4 it would arrive?

5 MR. BERLINER: Objection, this is totally
6 beyond the scope of the project that we're proposing.
7 We're not proposing Delta rehabilitation as part of
8 this project.

9 MR. MINASIAN: That's my point.

10 CO-HEARING OFFICER DODUC: Okay. Enough,
11 enough.

12 Ms. Pierre, just please answer the question to
13 the extent that you can.

14 WITNESS PIERRE: That's a policy question that
15 I'm not involved in.

16 CO-HEARING OFFICER DODUC: Thank you.

17 MR. MINASIAN: Okay. So would you agree that
18 adaptive management means that you don't use this new
19 tool at certain times?

20 WITNESS PIERRE: Not necessarily.

21 MR. MINASIAN: Okay. What -- does adaptive
22 management also stand for the proposition we can reduce
23 the risk of harm to water users?

24 WITNESS PIERRE: The adaptive management can
25 be used to make adjustments to the criteria. And to

1 the extent -- and to the operations in a way that
2 maximizes benefits for fish and water users. So I
3 think that it could be used in that way.

4 MR. MINASIAN: Would you agree that a program
5 for maintenance and organization of the maintenance and
6 the financing of Delta levee protection when sea levels
7 rise would be a beneficial addition to the stability of
8 the operations of the project that you envision?

9 MR. MIZELL: Objection, asked and answered.

10 MR. MINASIAN: Nothing further.

11 CO-HEARING OFFICER DODUC: I will ask
12 Ms. Pierre to answer that one more time for the record.
13 And then, Mr. Minasian, please move on.

14 WITNESS PIERRE: It's outside my area of
15 expertise. It's a policy question I'm not involved in.

16 MR. MINASIAN: Thank you.

17 CO-HEARING OFFICER DODUC: Does that conclude
18 your cross-examination?

19 MR. MINASIAN: It does. Thank you.

20 CO-HEARING OFFICER DODUC: Thank you,
21 Mr. Minasian.

22 No. 18, Mr. O'Laughlin.

23 MR. O'LAUGHLIN: Good afternoon, San Joaquin
24 Tributary Authority and the other members units
25 designated in Group 18.

1 CROSS-EXAMINATION BY MR. O'LAUGHLIN

2 MR. O'LAUGHLIN: My questions are mainly for
3 Ms. Pierre.

4 First of all, I'd like to talk a little bit
5 about your testimony today. Did you prepare an initial
6 draft of your testimony?

7 WITNESS PIERRE: Yes.

8 MR. O'LAUGHLIN: Okay. Did anybody review
9 your draft testimony?

10 WITNESS PIERRE: Yes.

11 MR. O'LAUGHLIN: Okay. Who reviewed your
12 draft testimony?

13 WITNESS PIERRE: Our attorneys.

14 MR. O'LAUGHLIN: Is that Mr. Berliner and
15 Mr. Mizell?

16 WITNESS PIERRE: Yes.

17 MR. O'LAUGHLIN: Was there anybody else?

18 WITNESS PIERRE: Yes, DWR attorneys.

19 MR. O'LAUGHLIN: And who would that be?

20 WITNESS PIERRE: Ken Bogdan.

21 MR. O'LAUGHLIN: Anybody else?

22 WITNESS PIERRE: Cathy Carothers.

23 MR. O'LAUGHLIN: Anybody else?

24 WITNESS PIERRE: Not that I recall.

25 MR. O'LAUGHLIN: Okay. So in looking at your

1 testimony, so you did an initial draft, and then
2 basically four attorneys reviewed it and commented on
3 it; is that correct?

4 WITNESS PIERRE: Yes.

5 MR. O'LAUGHLIN: Do you know how much time
6 your attorneys spent in reviewing and redrafting your
7 testimony?

8 WITNESS PIERRE: They didn't redraft it.

9 MR. MIZELL: Objection, misstates her
10 evidence. She never said "redrafted."

11 MR. O'LAUGHLIN: No, I just asked a question.

12 MR. MIZELL: Wait --

13 CO-HEARING OFFICER DODUC: Gentlemen --

14 MR. O'LAUGHLIN: I asked a question --

15 CO-HEARING OFFICER DODUC: Mr. O'Laughlin,
16 take a moment, ask your question again.

17 MR. O'LAUGHLIN: Okay. I'll rephrase it.

18 How long did it take your attorneys to comment
19 on your draft testimony?

20 WITNESS PIERRE: I don't recall.

21 MR. O'LAUGHLIN: Do you know if your attorneys
22 made any changes to your draft testimony?

23 WITNESS PIERRE: There were changes, but they
24 were primarily reorganization.

25 MR. O'LAUGHLIN: Okay. So in other words,

1 there were no substantive changes to your testimony
2 that you've presented today based on the work of four
3 attorneys reviewing it and commenting on it?

4 WITNESS PIERRE: Not that I recall. This is
5 my testimony, so...

6 MR. O'LAUGHLIN: Thank you. I found it
7 interesting in your testimony that one of the key
8 components of moving forward in the WaterFix petition
9 is appropriate Delta flow criteria and noticeably
10 lacking in your overview is any discussion of
11 appropriate Delta flow criteria. Can you tell me why
12 that occurred?

13 WITNESS PIERRE: I'm providing the project
14 overview, and that was what my testimony was meant to
15 do. I think the appropriate flow criteria is to be
16 set, I understand, by the Board as part of this
17 proceeding. And I was only presenting what was being
18 proposed as part of the WaterFix.

19 MR. O'LAUGHLIN: Okay. So you didn't look at
20 Water Code Section 85086-C2 to determine that the
21 petition should include the appropriate Delta flow
22 criteria?

23 WITNESS PIERRE: I'm sorry. Where are you
24 reading from?

25 MR. O'LAUGHLIN: Did you review Water Code Section

1 85086-C2 and determine whether or not appropriate Delta
2 flow criteria should be included in the petition?

3 MR. BERLINER: Compound question. If you want
4 to ask her if she looked at it, that's fine.

5 MR. O'LAUGHLIN: Okay. I'll ask her if she
6 looked at it first.

7 Did you look at Water Code Section 85086-C2?

8 WITNESS PIERRE: Yes.

9 MR. O'LAUGHLIN: Okay. So is it your
10 understanding that the appropriate Delta flow criteria
11 shall be included in DWR and Reclamation's petition to
12 the State Water Resources Control Board?

13 MR. MIZELL: I'd like to object. This is
14 clearly within the bounds of Part 2 of this hearing,
15 not Part 1.

16 MR. O'LAUGHLIN: No, no.

17 CO-HEARING OFFICER DODUC: Hold on,
18 Mr. O'Laughlin. Let him finish.

19 Mr. Mizell.

20 MR. MIZELL: Discussions about whether or not
21 we were to prepare evidence that addresses the
22 appropriate Delta flow criteria is squarely within the
23 bullet points for the major issues on Part 2.

24 MR. O'LAUGHLIN: Well, that was --

25 CO-HEARING OFFICER DODUC: Mr. O'Laughlin, why

1 are you asking it now?

2 MR. O'LAUGHLIN: Well, there's two things.

3 One is, when we made our motion on appropriate Delta
4 flow criteria, you told the petitioners to have it in
5 their case in chief. So we're here now on their case
6 in chief, and it's not here.

7 Part 2 is, in determining what amount of flow
8 we shall be looking at for my clients, I need to know
9 what they are proposing as the appropriate Delta flow
10 criteria so I can determine what impacts to my legal
11 users of water may or may not be.

12 So I realize that appropriate Delta flow
13 criteria may occur in a different -- in Part 2 in
14 regards to how we come up with it, which I'm still
15 uncertain of. But they at least have to tell us what
16 their view of appropriate Delta flow criteria is so I
17 can start to hone in on whether or not there is in fact
18 an injury to my clients.

19 CO-HEARING OFFICER DODUC: Thank you,
20 Mr. O'Laughlin. Hold on, please.

21 Mr. Herrick.

22 MR. HERRICK: Thank you. John Herrick for
23 South Delta and the parties. I would just like to
24 reinforce what Mr. O'Laughlin is saying.

25 The flow criteria, although they may be

1 designed for fish, those flows change a lot of things,
2 and they will certainly have impacts on other water
3 users. And this is the time we're supposed to
4 determine whether the changes affect legal users.

5 So absent the flow being presented here, there
6 isn't any way to examine the impacts on legal users.

7 Thank you.

8 CO-HEARING OFFICER DODUC: Mr. Berliner.

9 MR. BERLINER: Yes. In the Board's ruling on
10 October 30th, 2015, it says, and I'll quote, "The
11 second part of the hearing would focus on the potential
12 affects of the petition on fish and wildlife and
13 recreational uses and conditions that should be placed
14 on any approval of the petition to protect those uses,
15 including consideration of appropriate Delta flow
16 criteria for the California WaterFix project. Detailed
17 key hearing issues are provided below."

18 MR. O'LAUGHLIN: Yes, but that's been
19 trumped -- and I knew you were going to say that -- was
20 trumped by the April 25th, 2016 revised hearing
21 schedule, revised notices of intent to appear, and
22 motion to disqualify the hearing officers, wherein the
23 Board stated, "Delta flow criteria could affect water
24 flows or water qualities in a manner that causes
25 impacts to other legal users of water."

1 CO-HEARING OFFICER DODUC: All right enough,
2 enough. Enough, gentlemen. I will allow
3 Mr. O'Laughlin to ask these questions.

4 And Ms. Pierre, please answer them to the best
5 of your ability.

6 MR. O'LAUGHLIN: Thank you.

7 WITNESS PIERRE: Okay. Can you restate the
8 question?

9 MR. O'LAUGHLIN: I'll go back to the
10 beginning, then.

11 So are you familiar with Water Code Section
12 85086-C2?

13 WITNESS PIERRE: I'm familiar, yes.

14 MR. O'LAUGHLIN: Okay. Have you had
15 discussions with your attorney regarding setting forth
16 in your declaration what the appropriate Delta flow
17 criteria should be?

18 WITNESS PIERRE: No. I think what I'm here to
19 do and what my testimony is saying is what is being
20 proposed as part of the project. And what we're trying
21 to evaluate during these proceedings is Boundary 1 to
22 Boundary 2. And that's the extent of my knowledge
23 relative to what's being proposed on the project.

24 MR. O'LAUGHLIN: So you developed -- were you
25 one of the people who developed the operational

1 scenarios for the WaterFix project?

2 WITNESS PIERRE: Yes.

3 MR. O'LAUGHLIN: Is there a reason -- is there
4 a reason -- you have Boundary 1 and Boundary 2, and you
5 have H3 and H4, and you've got all these numbers. Why
6 isn't there a simple matrix that shows what DWR
7 believes to be the appropriate Delta flow criteria?

8 MR. BERLINER: I'm going to renew my objection
9 because I just looked at the language from the Board's
10 order of March 24th, 2016, and it repeats the same
11 language, that this is a Part 2 issue.

12 CO-HEARING OFFICER DODUC: Thank you,
13 Mr. Berliner. Your objection is noted.

14 And Ms. Pierre will again answer to the best
15 of her ability.

16 WITNESS PIERRE: I think once we have the
17 biological opinions -- and that will be part of
18 Part 2 -- we can have a better discussion about more
19 specific criteria. But we're trying to give space for
20 discussion around what might happen there as well as
21 adaptive management using Boundaries 1 and 2.

22 MR. O'LAUGHLIN: So as you sit here today, if
23 I was to look to my client and tell them, "I'm going to
24 try to explain to you what the flow proposal is by DWR
25 that may injure you," what would your answer be?

1 WITNESS PIERRE: To evaluate --

2 MR. BERLINER: Objection, calls for
3 speculation. How do we know what Mr. O'Laughlin's
4 going to tell his client?

5 MR. O'LAUGHLIN: I don't --

6 Mr. BERLINER: Isn't --

7 CO-HEARING OFFICER DODUC: Enough, enough, enough.

8 Ms. Pierre, answer to the best of your
9 ability. You do not have to try to read
10 Mr. O'Laughlin's mind. I will not subject you to that.

11 MR. O'LAUGHLIN: Oh, god no.

12 WITNESS PIERRE: I would evaluate the effects
13 of Boundary 1 and the effects of Boundary 2.

14 MR. O'LAUGHLIN: Okay. So if you could put up
15 that slide again which has the Boundary 1 and
16 Boundary 2, I think it's Slide 10.

17 I wanted to focus on 4A first. So the first
18 thing embedded within 4A is that D1641 will be met; is
19 that correct?

20 WITNESS PIERRE: Yes.

21 MR. O'LAUGHLIN: Now, did you look at -- I'm
22 going to focus on the San Joaquin River side of the
23 aisle, not the Sacramento side.

24 So when you were doing 4A modeling, did
25 that -- and the CVP has a facility at Friant, correct?

1 WITNESS PIERRE: I didn't do the modeling.

2 MR. O'LAUGHLIN: Okay. Would you be able to
3 answer any of the questions regarding modeling in
4 regards to San Joaquin River flows proposed under
5 4A-H3?

6 WITNESS PIERRE: No, I can't. The modeling
7 panel can, though.

8 MR. O'LAUGHLIN: All right. The next one that
9 you described in your previous slide was -- that goes
10 along with this is you said that there's a potential
11 for spring pulse flows. Did you say that? Correct?

12 WITNESS PIERRE: I did say that.

13 MR. O'LAUGHLIN: So where in the modeling are
14 the potential for spring pulse flows modeled? Which
15 runs?

16 WITNESS PIERRE: So as I mentioned during my
17 presentation, the difference between H3 and H4 is a
18 spring outflow criteria. Under H3, spring outflow is
19 consistent with the spring outflow criteria set forth
20 in D1641. And under H4, it is consistent with an
21 exceedence plot that increases spring outflow.

22 MR. O'LAUGHLIN: In regard to H4, in the Draft
23 EIR/EIS, it says that -- well, wait. Let me go back.
24 Sorry.

25 What amount of water is to be made available

1 under 4H -- 4A-H4 for the spring outflow?

2 WITNESS PIERRE: It's an exceedence of 10
3 percent exceedence based on the Eight River Index.

4 MR. O'LAUGHLIN: Where is that in the document
5 that somebody could access that in a readily fashion?

6 WITNESS PIERRE: I'm going to ask Steve
7 Centerwall to answer that for the EIR.

8 MR. O'LAUGHLIN: Sure.

9 WITNESS CENTERWALL: I don't know exactly
10 where it is, but I believe it's in Chapter 3 of the
11 EIR.

12 MR. O'LAUGHLIN: Okay. Thank you.

13 So in addition to H4, you have potential
14 spring flows. Are there also additional fall outflows
15 in 4A-H4?

16 WITNESS PIERRE: H3 and H4 both include the
17 Fall X2 RPA.

18 MR. O'LAUGHLIN: Thank you. And in regards to
19 the spring flow that is to occur, the potential flow
20 that is to occur, the EIR/EIS states at Page 4.1-6,
21 "The proposed project includes spring outflow criteria
22 which are to be provided through the acquisition of
23 water from willing sellers."

24 And if Mr. Centerwall feels more comfortable
25 answering this question, that's fine with me.

1 Is that still the case today as we sit here?

2 WITNESS PIERRE: What document are you
3 referring to?

4 MR. O'LAUGHLIN: The RDEIR/SDEIS.

5 WITNESS CENTERWALL: I would have to look at
6 the document to confirm that that's so, in the
7 document.

8 MR. O'LAUGHLIN: In the current document?

9 WITNESS CENTERWALL: Correct.

10 MR. O'LAUGHLIN: Let's go on the assumption
11 that it still is. Do you know of any contracts that
12 have been entered by DWR or Reclamation to acquire
13 water from willing sellers and willing buyers?

14 WITNESS PIERRE: I'm not familiar with any,
15 no.

16 MR. O'LAUGHLIN: Okay. So in the modeling, in
17 the regulatory operational world then, if you have
18 these additional spring pulse flows that are to be
19 provided, those -- and if you don't have any willing
20 sellers, willing buyers, does Reclamation and DWR have
21 the ability to make those flows available?

22 WITNESS PIERRE: I want to clarify that we're
23 talking about spring Delta outflow, not pulse flows.

24 MR. O'LAUGHLIN: Sure, spring Delta outflow,
25 that sounds better.

1 WITNESS PIERRE: And it was modeled under H4
2 to come from export reductions and from Oroville.

3 MR. O'LAUGHLIN: Okay. So when you modeled
4 it, none of the water that was for 4A-H4 was, on a
5 modeling basis, to come from the San Joaquin River; is
6 that correct?

7 WITNESS PIERRE: That's my understanding, but
8 I'm not the expert on modeling, so I think that's a
9 better question for the modeling panel.

10 MR. O'LAUGHLIN: Okay. Do you know if, in
11 fact, based -- I want to talk a little bit -- was the
12 modeling that was done for 4A-H4 using Oroville only
13 done for modeling purposes only, or does DWR envision
14 getting water from other sources other than Oroville to
15 meet the spring outflow requirement?

16 WITNESS PIERRE: Each 4 represents an attempt
17 by the Department of Reclamation to understand the
18 maximum amount of spring flow that could occur from the
19 project, and that's what it represents in the modeling.

20 MR. O'LAUGHLIN: So that's the maximum that
21 the Department could make -- the Department and
22 Reclamation could make available; is that correct?

23 WITNESS PIERRE: And still meet the regulatory
24 requirements upstream.

25 MR. O'LAUGHLIN: Thank you. Turning to H3

1 real quick, 4A-H3, that embeds -- has D1641 embedded in
2 it, correct?

3 WITNESS PIERRE: Yes.

4 MR. O'LAUGHLIN: Do you know if, on the
5 San Joaquin River side of the aisle, how often the
6 vernalis objective has been met in the last five years,
7 flow objective?

8 WITNESS PIERRE: I don't.

9 MR. O'LAUGHLIN: Do you know how many times
10 it's been exceeded?

11 WITNESS PIERRE: I don't.

12 MR. O'LAUGHLIN: Do you know how many TUCPs
13 have been requested by Reclamation?

14 WITNESS PIERRE: No, I don't.

15 MR. O'LAUGHLIN: I have an interesting one in
16 regards New Melones as well in regards to the modeling
17 work that was done. Did you assume that the
18 OCAP-BO RPA flows would be made available first in
19 their modeling, or did you assume that the State Water
20 Resources Control Board D1641 flows would have
21 priority?

22 WITNESS PIERRE: I think you need to ask the
23 modeling panel that question.

24 MR. O'LAUGHLIN: Okay. Thank you.

25 In regards to the 4A-H4, does that include the

1 more restrictive OMR flows as well -- or criteria?

2 Sorry.

3 WITNESS PIERRE: H3 and H4 include the same
4 South Delta OMR criteria which are slightly more
5 restrictive than the exiting OMR criteria.

6 MR. O'LAUGHLIN: Would you agree that a
7 component of the OMR flows are the San Joaquin River
8 flows at Vernalis or inflow from the San Joaquin River?

9 WITNESS PIERRE: Do you mean do I agree that
10 San Joaquin contributes to Old Middle River flows?

11 MR. O'LAUGHLIN: That's much better said, yes.

12 WITNESS PIERRE: Yes, I agree that the San
13 Joaquin River contributes to Old Middle River flows.

14 MR. O'LAUGHLIN: When you were doing your
15 modeling exercise for determining San Joaquin River
16 flows, did you include the Friant restoration flows?

17 WITNESS PIERRE: I didn't do the modeling, and
18 that question would need to be answered by the modeling
19 panel.

20 MR. O'LAUGHLIN: When flows -- and don't
21 worry, I'm going to go through a series of these
22 questions, and that was a perfectly great answer. But
23 just bear with me. This is for record, not for any
24 edification.

25 WITNESS PIERRE: Okay.

1 MR. O'LAUGHLIN: So when you were doing your
2 modeling, did you look at whether or not water would
3 have to be made available from Friant to the Exchange
4 Contractors during your modeling runs?

5 WITNESS PIERRE: The modeling panel will
6 answer that.

7 MR. O'LAUGHLIN: Do you know if your modeling
8 analysis showed that there would have to be bypass
9 flows of water release from Friant past the Exchange
10 Contractors?

11 WITNESS PIERRE: I don't know. You'll need to
12 ask the modeling panel.

13 MR. O'LAUGHLIN: What assumptions did you use
14 for Merced River flows?

15 WITNESS PIERRE: I don't know. You'll need to
16 ask the modeling panel.

17 MR. O'LAUGHLIN: What criteria did you use for
18 the Tuolumne River?

19 WITNESS PIERRE: I don't know. You'll need to
20 ask the modeling panel.

21 MR. O'LAUGHLIN: Okay. And finally, on the
22 New Melones, now, the CVP is part of this project,
23 correct?

24 WITNESS PIERRE: Yes, it is.

25 MR. O'LAUGHLIN: And who did you deal with on

1 your side of the aisle that knew and understood about
2 CVP operations at New Melones?

3 WITNESS PIERRE: I didn't do the modeling, so
4 you'll need to ask the modeling panel.

5 MR. O'LAUGHLIN: Do you have any understanding
6 of the operations at New Melones?

7 WITNESS PIERRE: No, I do not.

8 MR. O'LAUGHLIN: Would it be safe to say that
9 the amount of water that can be exported in a given
10 year will be determined in large part by the OMR
11 criteria set forth in this proposal?

12 WITNESS PIERRE: I would say that's one of the
13 criteria that will govern Delta operations and,
14 therefore, exports.

15 MR. O'LAUGHLIN: Is Reclamation and DWR
16 agreeable to a criteria which says that, if -- there
17 shall be no increase in the San Joaquin River flows to
18 meet Delta exports as part of this petition?

19 WITNESS PIERRE: I don't know.

20 MR. O'LAUGHLIN: So would one of the goals of
21 this petition be to increase San Joaquin River flows so
22 in fact more water can be exported based on the --
23 given that the OMR criteria had been heightened or
24 scrutinized?

25 WITNESS PIERRE: Not to my knowledge, no.

1 MR. O'LAUGHLIN: One of the last ones is I've
2 been looking at the modeling, and you say ask your
3 modelers. I've found a dirth of information in regards
4 to the modeling on the San Joaquin River side of the
5 aisle. Can you tell me why that is?

6 So I'll give you an example. That wasn't
7 really fair. So I'll give you an example. So, like,
8 you have storage reservoir levels for the American and
9 Oroville and Shasta. But you don't have any for New
10 Melones. Is there a reason why?

11 WITNESS PIERRE: So starting with
12 Alterative 1A, like I mentioned, that was the initial
13 preliminary proposal. And that looked at, I think,
14 broader system changes than what are being proposed
15 under Boundary 1 and 2 or even initial criteria within
16 that.

17 And so I think as we honed in on these
18 boundaries and these initial operating criteria, we
19 were confirming that there actually weren't any impacts
20 on anything, in fact, CALSIM showing literally zero
21 differences. So at some point, it became an efficiency
22 to not go into temperature modeling and the same robust
23 modeling that we had been doing on the Sacramento River
24 side.

25 MR. O'LAUGHLIN: Is it my understanding based

1 on the modeling that, if the United States Bureau of
2 Reclamation had sought a temporary urgency change
3 petition that, for modeling purposes, the model treats
4 the urgency change petition as meeting the requirements
5 of D1641?

6 WITNESS PIERRE: I don't know.

7 MR. O'LAUGHLIN: Do you know if your modelers
8 ran -- there are no SWP DWR facilities on the San
9 Joaquin River; is that correct?

10 WITNESS PIERRE: Not to my knowledge.

11 MR. O'LAUGHLIN: Do you know if, in the
12 modeling that was done, if there was any use or looking
13 at recirculating water from the DMC into the San
14 Joaquin River to meet Delta inflow?

15 WITNESS PIERRE: I'm not aware that that was
16 part of a modeling run.

17 MR. O'LAUGHLIN: Okay. I think one of the
18 things that concerns a great many of the people in the
19 room today -- and this is a follow-up on Mr. Lilly
20 questions -- by denoting that you are recognizing that
21 TUCPs are part of your petition, it's pretty clear that
22 you don't currently -- as proposed, the project doesn't
23 have a viable operation plan through the drought
24 periods; is that correct?

25 MR. BERLINER: Objection, misstates what the

1 plan is. TUCPs are not part of the plan. They're
2 identified for a totally separate purposes.

3 Mr. O'LAUGHLIN: Well --

4 CO-HEARING OFFICER DODUC: Mr. O'Laughlin,
5 just please restate your question into a direct
6 question for the witness.

7 MR. O'LAUGHLIN: Sure.

8 Does the proposal by DWR and Reclamation as
9 proposed allow for a viable operation through the '87
10 through '92 drought?

11 MR. BERLINER: Objection as to the term
12 "viable," if you want to define that.

13 MR. O'LAUGHLIN: Yeah, meeting all the
14 requirements of the D1641 and the OCAP-BOs and their
15 contract deliveries.

16 CO-HEARING OFFICER DODUC: Thank you,
17 Mr. O'Laughlin.

18 Please answer.

19 WITNESS PIERRE: The modeling panel will need
20 to describe and show you the modeling results for those
21 years if you're interested in this.

22 Mr. O'LAUGHLIN: What about 2011, 2012 through
23 '15?

24 WITNESS PIERRE: Yes, they can show you those
25 results as well.

1 MR. O'LAUGHLIN: Do you know why in the BA
2 that was currently -- previously on the screen that
3 TUCPs were identified as the last alternative that
4 needed to be looked at in regards to the project
5 proposal?

6 WITNESS PIERRE: I just want to clarify that
7 that's the draft biological assessment.

8 MR. O'LAUGHLIN: Oh, I'm sorry. Draft.

9 WITNESS PIERRE: It's not the project
10 proposal. The project proposal is the criteria
11 identified in Boundary 1 and Boundary 2 for purposes of
12 this proceeding.

13 MR. O'LAUGHLIN: So do you know why it was in
14 the draft BA?

15 WITNESS PIERRE: It was in the draft BA
16 because we're coming out of a drought, and I think
17 there was a need to try to clarify that, in the future,
18 a similar process to what has been done would continue
19 to be implemented should a drought occur when the
20 WaterFix was in place.

21 MR. O'LAUGHLIN: What I'm concerned about,
22 though, is from -- if we're going to go spend billions
23 of dollars and change the way we operate and you
24 recognize that climate change is part of the conditions
25 in California and you recognize that droughts are part

1 of the condition in California, why wouldn't DWR and
2 Reclamation plan for an operation that would get them
3 through certain drought periods, like 28 through 36
4 realizing that there's always outliers?

5 MR. BERLINER: Objection, calls for
6 speculation. It's also outside the project.

7 CO-HEARING OFFICER DODUC: I think it's a
8 valid question in terms of what DWR considered in terms
9 of the proposed project.

10 So, Ms. Pierre, please answer.

11 WITNESS PIERRE: As I mentioned before, we
12 used the 82-year record. And there's I believe three
13 drought periods that occur within that record. So the
14 analysis is showing how the project would perform and
15 what impacts it would have during the drought
16 conditions that we've -- you know, that we've
17 experienced in this state in the last 82 years.

18 And that's part of the evaluation that's
19 provided, so I think it has been considered.

20 MR. O'LAUGHLIN: No, I agree with that. Thank
21 you for making that statement. But if you look at the
22 criteria that are contained within the modeling that's
23 done for those time periods, it assumes that you're not
24 going to meet D1641, you're not going to meet DO path
25 flows, you're not going to meet your contractual

1 entitlements because there's just not enough water. So
2 where's the water going to come from?

3 MR. MIZELL: Objection, assumes facts not in
4 evidence. What modeling assumptions are you referring
5 to where we indicate that?

6 MR. O'LAUGHLIN: Well, it's in your modeling.
7 As the witness just stated, there's three drought
8 periods that they've identified. And if you look at
9 the modeling results from those time periods, they
10 can't meet the requirements.

11 So my --

12 CO-HEARING OFFICER DODUC: Stop, stop,
13 Mr. O'Laughlin.

14 Ms. Pierre?

15 WITNESS PIERRE: That's outside my area of
16 expertise.

17 CO-HEARING OFFICER DODUC: Thank you.

18 MR. O'LAUGHLIN: Well, then if it's --

19 Can I ask --

20 So if it's outside your area of expertise, how
21 can you opine as an expert witness that there's not
22 going to be any change in upstream operations if you
23 don't know what's going to happen during the drought?

24 WITNESS PIERRE: What I testified is that
25 there is no proposal to change the upstream operating

1 criteria and that any changes that have been modeled
2 upstream can be described and examined in the modeling
3 panel.

4 MR. O'LAUGHLIN: Is it your understanding,
5 based on the work that you've participated in with DWR
6 in Reclamation, that, when you talk about no changes to
7 upstream operation, you mean that your -- DWR and
8 Reclamation are operating within their terms and
9 conditions from the State Water Resources Control
10 Board?

11 WITNESS PIERRE: Yes.

12 MR. O'LAUGHLIN: Do you -- when you -- did you
13 have any discussions with your attorneys or with your
14 staff or anybody else as to the requirement for a
15 change petition as opposed to the requirements for
16 meeting your current permit terms and conditions?

17 WITNESS PIERRE: No.

18 MR. O'LAUGHLIN: Did you look at what the
19 standard is for injury to legal users of water in
20 regards to a changed petition?

21 WITNESS PIERRE: No, I have not.

22 MR. O'LAUGHLIN: Do you have any expertise in
23 looking at water rights and water right -- water
24 rights, first?

25 WITNESS PIERRE: No, that's not my expertise.

1 MR. O'LAUGHLIN: Okay. Who did you -- who did
2 you rely upon in your team to look at water rights and
3 water right availability?

4 WITNESS PIERRE: Ms. Sergent from DWR is the
5 head of the water rights team.

6 MR. O'LAUGHLIN: Is it your general
7 understanding, based on the modeling that has been done
8 in this matter, that, due to the project operation,
9 that there are times when upstream reservoir storage in
10 Shasta will be lower than what the no-action
11 alternative is?

12 WITNESS PIERRE: Not in May or September, when
13 it's currently regulated.

14 MR. O'LAUGHLIN: But at other times it would
15 be, correct?

16 WITNESS PIERRE: I don't know for sure.

17 MR. O'LAUGHLIN: Is that a question for your
18 modelers?

19 WITNESS PIERRE: It would be a good one for
20 them, yes.

21 MR. O'LAUGHLIN: I have the same question in
22 regards to Oroville.

23 WITNESS PIERRE: The Oroville storage is
24 maintained in end of September.

25 MR. O'LAUGHLIN: And the same question for the

1 Folsom?

2 WITNESS PIERRE: I believe we -- that that is
3 maintained in May and September as well, similar to
4 Shasta.

5 MR. O'LAUGHLIN: But as you sit here today, I
6 should ask the modelers if, at other times, due to the
7 project proposal, storage would be drawn down in some
8 years and some months more than what it would currently
9 exist under the no-action alternative, correct?

10 WITNESS PIERRE: Yes, the modeling panel is
11 the right place to ask.

12 MR. O'LAUGHLIN: Okay. Thank you very much.
13 Thank you.

14 CO-HEARING OFFICER DODUC: Thank you,
15 Mr. O'Laughlin.

16 Group No. 19.

17 MS. McCUE: Excuse me, Mr. O'Laughlin, before
18 you leave?

19 CO-HEARING OFFICER DODUC: Ms. McCue

20 MS. McCUE: I just have a question. When
21 you're referring to, for the record, for the EIR/EIS,
22 you're talking about SWRCB 3, the Recirculated Draft
23 EIR/EIS?

24 MR. O'LAUGHLIN: Yes.

25 MS. McCUE: Thank you.

1 CO-HEARING OFFICER DODUC: Thank you.

2 Group No. 19.

3 MS. MESERVE: Good afternoon. I just have a
4 few questions on behalf of Group 19. My name is
5 Osha Meserve. I'm working with a group of Northern
6 Delta water users and agencies.

7 So I think most of my questions may be for
8 Ms. Pierre, but we can adjust as needed.

9 CROSS-EXAMINATION BY MS. MESERVE

10 MS. MESERVE: In the initial testimony this
11 morning, when you were speaking, Ms. Pierre, you spoke
12 about the project still being under development. I --
13 just for the sake of clarity, I would like you to
14 summarize briefly what things about the project that
15 are proposed in this petition today still need to be
16 determined?

17 WITNESS PIERRE: I think I was referring to
18 the adaptive management program when I said that.

19 MS. MESERVE: So is it your testimony that
20 only the adaptive management is still under
21 development?

22 WITNESS PIERRE: Well, ultimately, a
23 biological assessment will be submitted and a
24 biological opinion will be provided and that has
25 potential to be different than what's being presented.

1 The State Board also could set terms and
2 conditions that might make things different.

3 MS. MESERVE: On Page 10 of your testimony,
4 which is at DWR-11 [sic], it states that the boundaries
5 are not the proposed project. So doesn't the proposed
6 project operation still need to be developed in
7 addition to adaptive management?

8 WITNESS PIERRE: I believe I answered this.
9 So -- but I'm happy to continue to explain.

10 So maybe we can bring up the Slide 10.

11 MS. MESERVE: I'm referring to Page 10 of your
12 testimony, which is --

13 WITNESS PIERRE: I understand. But I think
14 that the slide will help explain what I'm going to
15 answer to your question.

16 We should print a poster of this.

17 MS. MESERVE: Which slide?

18 WITNESS PIERRE: So what I'm stating is that
19 the initial operating criteria, what's described in the
20 Recirculated Draft EIR/EIS as the proposed project
21 Alternative 4A is a range between H3 and H4.
22 Boundaries 1 and 2 are broader than that, and they're
23 what we hope is considered as part of this proceeding
24 to allow for adjustments via adaptive management.

25 So that's why the statement says boundaries

1 themselves are not the proposed project. What's being
2 proposed is a range between H3 and H4, but Boundary 1
3 and 2 allow adjustment through adaptive management.

4 MS. MESERVE: Okay. So for purposes of
5 determining what the injury or impact would be on the
6 specific legal users of water in the Delta, what do you
7 suggest that we would assume is the operation or the
8 project?

9 WITNESS PIERRE: I would evaluate the impacts
10 of Boundary 1 and the impacts of Boundary 2.

11 MS. MESERVE: Okay. I'm going to move on to a
12 different area.

13 On Page 5 of the written testimony, which is
14 DWR-51 -- I'm sorry. I misspoke earlier -- it states
15 that a fundamental purpose of this project is to
16 restore and protect ecosystem health. Can you please
17 describe how construction of the intakes, quote,
18 "restores and protects ecosystem health"?

19 MR. MIZELL: Objection, this is in Part 2.
20 She's explained what the project is and what the
21 purposes are, but we don't want to get into why until
22 Part 2 is my understanding.

23 MS. MESERVE: This is in Ms. Pierre's
24 testimony, which she's provided an overview of the
25 project. I'm simply asking to explain how does

1 construction of tunnels do what she says it does in the
2 testimony.

3 CO-HEARING OFFICER DODUC: Thank you.

4 Ms. Pierre, you may provide a general response
5 to that question to the best of your ability.

6 WITNESS PIERRE: Changing the point of
7 diversion from the South Delta to the North Delta, as
8 Director Cowin noted this morning, does move to point
9 of diversion outside a region of some of the listed
10 fish as well as change the hydrodynamics of the Delta
11 in a way that benefits them. And we can explore that
12 more in Part 2.

13 Ms. MESERVE: Thank you.

14 Okay. In DWR-11, Page 9, it refers to
15 fish-free water. You mentioned earlier in your
16 testimony that -- and also on Page 16 that the screens
17 are still under development. Is it true that no fish
18 would be harmed or killed during the course of
19 diversion from the new North Delta diversions?

20 MR. MIZELL: Again, same objection. This is
21 really getting into biological aspects of this.

22 CO-HEARING OFFICER DODUC: Ms. Meserve?

23 MS. MESERVE: Again, these are things in her
24 testimony. I'm just looking for a brief answer as to
25 why it says these things like "fish free" in testimony

1 that's under oath and if it's true.

2 CO-HEARING OFFICER DODUC: All right. Let's,
3 again, and to any other related questions, you may
4 answer in generalities as best as you can to the
5 question. And Mr. Mizell is correct in that we will
6 get into the details later, in Part 2.

7 WITNESS PIERRE: The fish screens have not
8 been designed. There's a process for designing them.
9 And, again, they are outside the main range of the
10 listed species. They include operational criteria;
11 they include screen size and certain approach and
12 sweeping velocities that are meant to exclude fish from
13 entrainment at that point.

14 Ms. MESERVE: Thank you. Just in following up
15 to that, I actually have a printout from the biological
16 opinion, which I understand is now Sacramento Valley
17 Water Users Exhibit 1, perhaps.

18 May I provide the requisite page from that to
19 be shown on the screen?

20 CO-HEARING OFFICER DODUC: Please.

21 MS. MESERVE: Did I give it to you? Sorry. I
22 didn't notice.

23 CO-HEARING OFFICER DODUC: Something to be put
24 on the screen, or --

25 Ms. MESERVE: Yes.

1 MS. McCUE: What page is it?

2 MS. MESERVE: 7-29, although I would like to
3 use the highlighting like he did.

4 MS. McCUE: We don't have the ability to put
5 that on the screen. We were getting that from the
6 electronic files.

7 MS. MESERVE: Oh, I'm sorry. Okay. I can
8 just go -- I don't need to -- and I won't take up all
9 my time, I promise.

10 So on Page 7-29 of this exhibit that I'm
11 referring to -- if it can be found, that would be
12 awesome; if not, that's okay.

13 It is called Table 7-1, and it lists the
14 determination of effects for species addressed in the
15 draft BA of which Ms. Pierre was an author.

16 And my question is throughout the testimony
17 there's been the -- it's said that it's going to
18 improve conditions for the ecosystem, including fish.

19 Can you explain why they're -- this project is
20 determined in the draft BA to be likely to adversely
21 affect Chinook salmon, steelhead, sturgeon and delta
22 smelt, which is summarized on this page, which I would
23 like to show but can't. I'm sorry.

24 CO-HEARING OFFICER DODUC: Actually, why don't
25 you show it to the witness --

1 Ms. MESERVE: Sure.

2 CO-HEARING OFFICER DODUC: -- while staff is
3 looking for it.

4 Ms. McCUE: Could you give me the page number
5 again?

6 MR. MIZELL: I would like to renew the
7 objection. Explaining why a biological conclusion is
8 drawn in a draft BA wasn't what we were prepared to
9 discuss in Part 1.

10 CO-HEARING OFFICER DODUC: Ms. Meserve?

11 I believe she is trying to direct it to the
12 testimony that was being provided by Ms. Pierre.

13 MS. MESERVE: That's right, yes. Ms. Pierre's
14 testifying now. I think this is our chance to question
15 her. And she's stated in the testimony that this is
16 going to restore the ecosystem and reduce killing of
17 fish.

18 And I would just like to ask about how that
19 squares with this page of the biological assessment
20 which she helped draft.

21 Ms. MORRIS: I'd like to make an objection,
22 misstates the testimony. The witness's written
23 testimony says that --

24 CO-HEARING OFFICER DODUC: Ms. Morris, you
25 need to get closer to the microphone. I didn't hear

1 part of what you said.

2 Ms. MORRIS: It's an objection -- the
3 questioner is misstating the witness's testimony.

4 MS. MESERVE: Right here on Page 9 of the
5 testimony it says that the water would be fish free.

6 CO-HEARING OFFICER DODUC: All right.
7 Ms. Pierre, please answer to the best of your ability.

8 WITNESS PIERRE: I actually like this
9 question.

10 CO-HEARING OFFICER DODUC: Please answer to
11 the best of your ability.

12 WITNESS PIERRE: The draft biological
13 assessment is meant to be used for consultation under
14 the Endangered Species Act. And under the Endangered
15 Species Act, if you so much as harm or harass one fish,
16 you have take; therefore, you have this conclusion.

17 So this conclusion does not reflect at all the
18 magnitude of the effect. It reflects that during
19 construction, for example, you could harass a fish.

20 Now, that's not the entirety of the analysis
21 presented in this BA, and I think that's a Part 2
22 topic. But I think it's an important clarification
23 when we're looking at words that say, under an ESA
24 document "likely to adversely effect," it literally
25 means you could have impacted one individual of that

1 species, and that finding would be required under ESA.

2 So I think that's actually a good
3 clarification around this questioning.

4 CO-HEARING OFFICER DODUC: Thank you.

5 Mr. Jackson, I didn't mean to ignore you, but
6 now that you've sat down, I don't mean to encourage you
7 either. Microphone --

8 MR. JACKSON: I'll wait until -- I think
9 you're going to get to me. And then we'll do this.

10 CO-HEARING OFFICER DODUC: I cannot wait.

11 Mr. JACKSON: I don't know how you separate --

12 CO-HEARING OFFICER DODUC: Please, hold it.

13 Okay.

14 MS. MESERVE: Okay. All right. So anyway, so
15 you acknowledge, Ms. Pierre, that this project, whether
16 it's during construction -- and I believe this
17 encompasses operation as well in the BA -- will be
18 likely to adverse these fish?

19 CO-HEARING OFFICER DODUC: Yes, I can hear the
20 objection coming. Please restate your question.

21 MS. MESERVE: The BA that you helped write
22 states that these fish will be likely to adversely be
23 affected.

24 WITNESS PIERRE: The draft biological
25 assessment states that some of the species that are

1 evaluated in the draft biological assessment may likely
2 be adversely affected.

3 MS. MESERVE: Okay. We'll move on. Let's
4 see.

5 On Page 5 of the testimony, and actually in
6 your earlier testimony, you mentioned that restoration
7 is proposed by this project. I was wondering if you
8 could describe what -- just for purposes of
9 understanding the project description, what restoration
10 is proposed by this project, which is a Section 7
11 project application?

12 WITNESS PIERRE: That was also in the draft
13 biological assessment. And under Section 7, we need to
14 minimize and mitigate. And we are doing so by
15 mitigating at various ratios for habitat losses
16 relative to the footprint of the facilities being
17 constructed.

18 It's Table 3.4-1 in the Draft Biological
19 Assessment.

20 MS. MESERVE: Okay. So really this, quote,
21 "restoration" is footprint mitigation required under
22 ESA and CESA, correct?

23 WITNESS PIERRE: There is some mitigation
24 proposed for operations.

25 MS. MESERVE: On DWR-1, Slide 5, there's a

1 summary of -- and it's this bar chart which talks about
2 project refinements. And I was wondering, since I'm
3 looking in Part 1, in terms of injury to legal user of
4 water, are any of the changes listed here expected, in
5 your opinion, to reduce impacts to water users in the
6 Delta in terms of water quality, water supply, and
7 those types of things?

8 WITNESS PIERRE: I'm not sure, actually, if
9 the Intermediate Forebay previous footprint has some
10 sort of impact that was reduced. I don't know. My
11 focus is primarily in the water.

12 MS. MESERVE: On Page 6 of your testimony, you
13 refer to the findings of the Blue Ribbon Task Force
14 that some kind of conveyance, better conveyance was
15 needed.

16 In your opinion, does the Blue Ribbon Task
17 Force have any force of law, or the findings of a Blue
18 Ribbon Task Force?

19 MR. MIZELL: Objection, calls for a legal
20 conclusion.

21 CO-HEARING OFFICER DODUC: She's --

22 MS. MESERVE: I'm just looking --

23 CO-HEARING OFFICER DODUC: I hear you.

24 Just answer to the best of your ability. It's
25 in your testimony, so answer the question.

1 WITNESS PIERRE: Right. I don't think so.

2 MS. MESERVE: In addition, I think there may
3 be a typo here, but I'm just going to read to you again
4 from Page 6.

5 It says that, the CALFED record of decision,
6 "The agency has agreed that through-Delta-conveyance
7 approach is appropriate if CALFED's purposes cannot be
8 fully achieved." Is that a typo? Do they mean to
9 say -- I'm asking DWR now, that a --

10 My question is has, since you mentioned,
11 Ms. Pierre, the CALFED record of decision, and I'm
12 familiar with it -- under CALFED, isolated conveyance
13 was supposed to be a last resort after everything else
14 was tried. Has everything else been tried?

15 WITNESS PIERRE: I'm not sure that that's how
16 I would interpret the record of decision. And it's,
17 you know, a 16-year-old document and not really the
18 point of what I'm trying to say in my testimony.

19 The point I'm trying to make is that there's a
20 number of findings through various studies that have
21 indicated the concept of dual conveyance as one that
22 should be pursued, and that's the purpose of what's
23 written here on this page.

24 MS. MESERVE: No one thinks that's a typo
25 there on Lines 19 and 20? You might want to check it

1 out. I know you had an errata sheet, DWR, but...

2 Okay. I'll leave it at that. Thank you.

3 CO-HEARING OFFICER DODUC: Before you leave, I
4 believe staff has a question for you.

5 MR. OCHENDUSZKO: So Ms. Meserve, earlier in
6 your line of questioning, you were referencing
7 DWR Exhibit 11 as the testimony by Ms. Pierre. Were
8 you referring in fact to DWR-51?

9 MS. MESERVE: Yes, thank you.

10 MR. OCHENDUSZKO: Thank you for the clarity in
11 the record.

12 CO-HEARING OFFICER DODUC: Before you leave,
13 Ms. Meserve, are you also representing Mr. Daniel
14 Wilson, Group 20, or is Mr. Wilson here?

15 MS. MESERVE: I believe I'm the only person
16 here. I think things progressed a little more quickly
17 than people expected.

18 CO-HEARING OFFICER DODUC: Thank you.

19 Group No. 21, Delta Water Agency et al.,
20 Mr. Herrick.

21 WITNESS PIERRE: Hearing Officer Doduc?

22 CO-HEARING OFFICER DODUC: Yes, Ms. Pierre?

23 WITNESS PIERRE: I'm expecting this one to
24 maybe be an hour long, and I was wondering if there's a
25 chance to take a restroom break before we get started,

1 since it will be...

2 CO-HEARING OFFICER DODUC: Yes. Actually,
3 thank you for the reminder.

4 MR. HERRICK: I resent the implication.

5 CO-HEARING OFFICER DODUC: Now, we will take a
6 ten-minute break, please.

7 We will resume -- we'll make it 2:25.

8 (Recess taken)

9 CO-HEARING OFFICER DODUC: All right. We are
10 back in session.

11 MR. HERRICK: It's my anniversary, so I
12 shouldn't even be here.

13 CO-HEARING OFFICER DODUC: Oh,
14 congratulations.

15 Mr. HERRICK: I know lot's of people said I
16 should leave, but thank you.

17 My name is John Herrick. I represent Central
18 Delta, South Delta Water Agencies and a number of other
19 parties in that group. I don't have that many
20 questions, but it could well take most of an hour.

21 CROSS-EXAMINATION BY MR. HERRICK

22 Mr. HERRICK: Ms. Pierre, on Page 4 of your
23 testimony, I think Lines 6 through 8, you talk about
24 before any water's diverted under the SWP water right
25 permits to deliver water to their long-term contracts,

1 that DWR must comply with the terms of its permit.

2 Do you see that?

3 WITNESS PIERRE: I do.

4 Mr. HERRICK: Is that your understanding, that
5 it -- it is not permitted to divert and export any
6 water unless all permit term conditions are met?

7 WITNESS PIERRE: The sentence here is
8 essentially stating that, before it's delivering water,
9 DWR must comply with the permit terms applicable.

10 MR. HERRICK: So is it your understanding
11 that, if the water quality standards in the South Delta
12 are being violated, no exports can occur?

13 WITNESS PIERRE: No. I think -- no, that's
14 not what I'm saying. I think if -- DWR must first meet
15 the standards before exports can occur, whatever those
16 standards are at the time.

17 MR. HERRICK: Do you understand the South
18 Delta salinity standards, as I'm describing them, are
19 permit terms and conditions of the State Water Project?

20 WITNESS PIERRE: I wasn't aware of that. I
21 was aware of the water quality compliance stations in
22 the South Delta.

23 MR. HERRICK: That's the same thing. I'm
24 sorry.

25 WITNESS PIERRE: Right.

1 MR. HERRICK: So no diversions are occurring
2 unless those are in -- being complied with? Excuse me
3 for ending that sentence with a preposition.

4 WITNESS PIERRE: Can you be more specific
5 about what you're asking?

6 MR. HERRICK: Well, your statement seems to be
7 contrary to currently what's going on. I think one or
8 two of the standards are violated right now. But we
9 are diverting and exporting; is that not correct?

10 Mr. MIZELL: Objection, calls for a legal
11 conclusion. The term "violated" is something that the
12 Board gets to determine.

13 MR. HERRICK: That question didn't have to do
14 with violations. That question restated what the I was
15 asserting were facts and asked her if it was her
16 position that no exports were occurring when that was
17 happening.

18 MR. MIZELL: Then I object to using facts that
19 aren't in evidence.

20 CO-HEARING OFFICER DODUC: Mr. Herrick, let's
21 try to rephrase that question.

22 MR. HERRICK: Okay.

23 Ms. Pierre, are you aware of the recent notice
24 to the State Water Resource Control Board of ongoing
25 violations at the South Delta salinity compliance

1 locations?

2 WITNESS PIERRE: No.

3 MR. HERRICK: The modeling -- there are lots
4 of these questions, obviously, for the modelers in
5 specifics. But I just want to get your understanding.

6 The modeling done, you said, was done over the
7 80-year term or 82 years?

8 WITNESS PIERRE: For CALSIM, yes, 82-year
9 record.

10 MR. HERRICK: DSM2 was a much shorter period;
11 is that correct?

12 WITNESS PIERRE: It's a 16-year record.

13 MR. HERRICK: Is there a reason why the entire
14 years used in CALSIM were not also run through DSM2?

15 WITNESS PIERRE: There is a reason, but I
16 don't know what it is.

17 MR. HERRICK: Does CALSIM 2 assume certain --
18 excuse me. Let me start again.

19 Does CALSIM 2 have limitations that protect
20 exports rather than fully meeting any ongoing
21 obligations under the permits of DWR and the USBR?

22 WITNESS PIERRE: I'm not sure. I think that's
23 a good question for the modeling panel.

24 MR. HERRICK: The -- I believe you mentioned
25 that, in answer to a question about no-action

1 alternative, that your job was to make sure that the
2 no-action alternative was compliant with CEQA and NEPA;
3 is that generally correct?

4 WITNESS PIERRE: My job was to -- actually,
5 that was Steve's job to make sure that the no-action
6 alternative was compliant with NEPA. What's used in
7 CEQA is the -- what we call existing conditions.

8 MR. HERRICK: Does the no-action alternative
9 require compliance with mandatory obligations that will
10 become effective in the near future? In other words,
11 if set, they're known that they will occur?

12 WITNESS PIERRE: The no-action alternative
13 doesn't require anything. The no-action alternative
14 assumes the implementation of existing applicable
15 regulations including the current biological opinion.

16 MR. HERRICK: And you talked about those
17 current obligations include D1641; is that correct?

18 WITNESS PIERRE: I'm going to ask Steve to
19 answer if the no-action alternative explicitly
20 defined -- is defined as D1641 in the EIR.

21 WITNESS CENTERWALL: Yeah, I don't know if in
22 modeling, if that's what you're asking --

23 CO-HEARING OFFICER DODUC: We can't hear you,
24 so perhaps try using a different microphone.

25 WITNESS CENTERWALL: Can you hear me now?

1 I'm not -- I'm not sure what is defined in the
2 modeling, but we do need to ask the modelers that
3 question.

4 Mr. HERRICK: I'm not trying to make too big
5 of a point here.

6 Does your testimony, Ms. Pierre, say D1641 is
7 the baseline?

8 WITNESS PIERRE: Yes, yes.

9 MR. HERRICK: Does that include any changes
10 that have been made to D1641 since the year 2000, when
11 it was adopted, the revised order was adopted?

12 WITNESS PIERRE: I can't answer that for
13 certain.

14 MR. HERRICK: If there were changes to D1641's
15 obligations placed on DWR and USBR, would those needs
16 to be in the no-action alternative?

17 WITNESS PIERRE: Yes.

18 MR. HERRICK: Are you aware of the cease and
19 desist orders issued by the State Board against DWR and
20 the Bureau in 2008 -- excuse me, 2006 and amended in
21 2010?

22 WITNESS PIERRE: No.

23 MR. HERRICK: Okay. If those CDOs had new
24 obligations place upon the Bureau and DWR, in your
25 opinion, would those need to be part of the analysis

1 for the WaterFix?

2 WITNESS PIERRE: I think it would depend what
3 they are. I'm not familiar with what they are, so I
4 think it just depends their current legal status and
5 the whole number of questions that would be answered in
6 determining the appropriateness of something in a
7 no-action alternative.

8 MR. HERRICK: Absolutely. But if the changes
9 that were in a CDO required some change of operations,
10 those would need to be evaluated as part of the
11 WaterFix, would they not?

12 MR. MIZELL: Objection, asked and answered.

13 CO-HEARING OFFICER DODUC: I think she has
14 answered. Please move on, Mr. Herrick.

15 MR. HERRICK: You also listed a number of
16 other things that the -- the analysis used as a both
17 baselines and changes. Those include the OMR Flows
18 and -- excuse me. Let me find your list really fast
19 here -- water quality objectives, outflow objectives,
20 Delta Cross Channel. You remember that testimony do
21 you not?

22 WITNESS PIERRE: I'd like to reread it --

23 MR. HERRICK: Yeah, I'm sorry. Page 12.

24 WITNESS PIERRE: -- see if you misstated it.

25 MR. HERRICK: Page 12. I would never misstate

1 it.

2 WITNESS PIERRE: You mean Page 12 of my
3 written testimony?

4 MR. HERRICK: Yes, DWR-51.

5 WITNESS PIERRE: Okay. The -- it states,
6 starting on Line 17, "Existing regulatory requirements
7 that will not change include terms imposed through
8 D1641, assigning responsibility for water quality
9 control plan objectives, water quality objectives,
10 outflow objectives, Delta Cross Channel Gate
11 operations, Suisun Marsh Salinity Control Gate
12 operations --

13 (Interruption by Reporter)

14 WITNESS PIERRE: Operations.

15 MR. HERRICK: You can say et cetera. I'm not
16 trying to test you on it. I'm just -- you listed the
17 beginning conditions for the analysis, correct?

18 WITNESS PIERRE: Yes, but I wanted to clarify
19 because you also mentioned at first the OMR, and that's
20 not listed here. We are proposing to change that.

21 MR. HERRICK: That's the changes later. But
22 the current -- excuse me. The no-action alternative
23 has the current OMR requirements under the biological
24 opinions?

25 WITNESS PIERRE: Yes. The no-action

1 alternative includes the implementation of both the '08
2 and '09 biological opinions in the South Delta.

3 MR. HERRICK: On top of that Page 12, on
4 Line 1, you talk about existing -- that the analysis
5 includes an existing outflow scenario that nearly
6 resembles existing regulatory conditions. Could you
7 please explain what "nearly" means?

8 WITNESS PIERRE: I would need to look more
9 specifically at Alternative 1. Let me see if I have
10 that in front of me.

11 MR. HERRICK: As you're looking, I'm just
12 trying to find out, if the no-action alternative
13 doesn't have existing out-flow, what those -- what
14 changes would have been made or what's assumed in the
15 model.

16 WITNESS PIERRE: The no-action alternative, as
17 I mentioned on my slides this morning, includes the
18 Fall X2 RPA, and for the seasons in the winter, spring,
19 and summer would be compliance with D1641.

20 MR. HERRICK: And, again, do you know, then,
21 what the "nearly" means? I mean, what's not there that
22 is there now?

23 WITNESS PIERRE: So this is referring to
24 Alternative 1 in the EIR which is not even within
25 Boundary 1 and Boundary 2.

1 MR. HERRICK: And the question still?

2 WITNESS PIERRE: I would need to go back and
3 look. I mean, it's very, very close. So I added
4 "nearly" probably to caveat a very, very minor
5 difference that I saw in terms of regulatory
6 conditions.

7 I -- in Alternative 1, there was no Fall X2.
8 There was continued compliance with D1641 in terms of
9 outflow year round. It may have been referring to a
10 change in the Emmaton standard to Three Mile Slough,
11 was included in Alternative 1. There were some
12 adjustments to South Delta operations. I believe that
13 maybe have been D1641 also. These are all outlined in
14 the modeling appendix of the EIR, what the assumptions
15 would be.

16 MR. HERRICK: Is the Fall X2 a current
17 biological opinion requirement?

18 WITNESS PIERRE: Yes, it is.

19 MR. HERRICK: So why would it not be in the
20 no-action alternative, the Alternative 1?

21 WITNESS PIERRE: No-action alternative and
22 Alternative 1 are different scenarios.

23 MR. HERRICK: All right. Which scenario is it
24 not in?

25 WITNESS PIERRE: It wasn't included in

1 Alternative 1. It was included in the no-action
2 alternative.

3 MR. HERRICK: Why would it not be in
4 Alternative 1? Isn't that an existing
5 condition that --

6 WITNESS PIERRE: No. It was action
7 alternative evaluated in the EIR.

8 MR. HERRICK: Without X2 in it?

9 MR. MIZELL: I'd like to object. This is all
10 about Alternative 1, which is not part of either of the
11 boundary proposals or the initial operating criteria.
12 We're talking about something that's in the EIR only,
13 and it's not before you as part of the project.

14 CO-HEARING OFFICER DODUC: Is noted. But
15 Alternative 1 is mentioned in her testimony, so I will
16 allow Mr. Herrick some leeway in questioning her, since
17 she will not be back in the other panels.

18 MR. HERRICK: That's okay. I'll move on.

19 CO-HEARING OFFICER DODUC: Well, gee, after I
20 granted you that request?

21 MR. HERRICK: I won't make any comments.

22 The existing regulatory requirements that were
23 sort of the -- these are my terms, not yours -- sort of
24 the baseline for beginning the analysis, do they
25 include other obligations not listed by you on Page 12?

1 And by that, I mean, did it include things like the
2 CPV IA?

3 WITNESS PIERRE: Which component of CVP IA are
4 you referring to?

5 MR. HERRICK: Most specifically, the
6 anadromous fish doubling program.

7 WITNESS PIERRE: In terms of a condition, I'm
8 not aware that there is any specific conditions or
9 operations that would have -- that have been put on as
10 a proposal for criteria for that. So these are listing
11 various criteria that are included in the proposed
12 project.

13 MR. HERRICK: Do you understand CVP IA to be
14 federal law?

15 WITNESS PIERRE: Yes, I do.

16 MR. HERRICK: So if CVP IA requires some
17 action be done, would you -- would you conclude that
18 compliance with that would need to be an operational
19 criteria to be analyzed?

20 MR. MIZELL: Objection, requires a legal
21 conclusion as to who it applies to, who it's binding
22 upon and how it's integrated into this project.

23 MR. HERRICK: Well, I don't think there's any
24 confusion in this world about who CVP IA puts
25 conditions on. I think that's the Bureau, so.

1 CO-HEARING OFFICER DODUC: Ms. Pierre, just
2 answer to the best of your ability.

3 WITNESS PIERRE: Sure. I think this is
4 outside my area of expertise, and it's outside the
5 scope of what's been evaluated, presented.

6 MR. HERRICK: Are you familiar with the Water
7 Code Section 12205?

8 WITNESS PIERRE: Which is?

9 MR. HERRICK: It deals with the San Joaquin
10 Delta. It's a limitation on exports from the Delta.
11 If you're not aware of it, that's fine.

12 WITNESS PIERRE: I don't think so.

13 MR. HERRICK: So to your knowledge, it was not
14 taken into consideration in the modeling?

15 MR. MIZELL: Objection, misstates what she
16 just said.

17 MR. HERRICK: I asked her. I didn't restate
18 it.

19 WITNESS PIERRE: I don't know. You'll need to
20 ask the modeling panel.

21 MR. HERRICK: Thank you.

22 Now, in -- I think it was Mr. O'Laughlin's
23 questioning, there were a few discussions about the
24 three drought periods over the past historic record.
25 Do you remember that?

1 WITNESS PIERRE: Mm-hmm.

2 MR. HERRICK: Now, those drought periods don't
3 necessarily translate into the only times when the
4 conditions in the draft biological assessment might
5 kick in for drought conditions; is that correct?

6 WITNESS PIERRE: The draft biological
7 assessment does not indicate when these would kick in
8 other than the steps outlined right above the TUCP
9 language we reviewed earlier.

10 MR. HERRICK: Well, doesn't it say that, after
11 one dry or critical year, if by February of the next
12 water year it's anticipated to be dry or critical,
13 then -- and then it goes through all those possible
14 actions including the TUCPs; isn't that correct?

15 WITNESS PIERRE: That is the first step is
16 identifying the previous year by October 1st as either
17 dry or critical.

18 MR. HERRICK: And then, as the following year
19 progresses, if you -- when you reach February and it's
20 still, in that year, anticipated to be dry or critical,
21 that's when those various activities or options come
22 into play, correct?

23 WITNESS PIERRE: Which activities and options
24 are you referring to?

25 MR. HERRICK: The ones you were discussing

1 about they meet, they have a committee, and the last
2 one being the TUCPs, the use of TUCPs.

3 WITNESS PIERRE: Right. But the next step
4 after the February 1st determination would be to put
5 together a drought exceptions procedures team and
6 prepare a draft contingency plan.

7 MR. HERRICK: Right. And so that anticipates
8 that, under certain conditions, it is either -- is it
9 likely that the Bureau and DWR might use TUCPs to try
10 to get certain obligations relaxed?

11 MR. MIZELL: Objection, speculative.

12 CO-HEARING OFFICER DODUC: Yes, I can hear the
13 objection.

14 Mr. Herrick, please restate that.

15 MR. HERRICK: Doesn't the biological
16 assessment contemplate the use of TUCPs after -- what
17 is that -- 12 -- is that 16 months of dry or critical
18 conditions?

19 WITNESS PIERRE: I think that's the right
20 number of months, yes. And the draft biological
21 assessment does include a description of the procedures
22 that have been in place that would continue to be in
23 place under the WaterFix for dealing with drought
24 conditions.

25 MR. HERRICK: And did you -- did you -- by

1 "you" I mean the group of people that are under your
2 scope of work -- did you count up the number of times
3 in the historical record that those conditions might
4 exist? By that, I mean those same number of dry or
5 critical months in a row?

6 WITNESS PIERRE: I didn't personally. It's
7 not a discussion that I had -- it's -- some modeler may
8 have done that out of interest.

9 MR. HERRICK: Let's take a hypothetical then.
10 Let's say, since 1922, there have been approximately 21
11 times when that condition occurred. That's the
12 hypothetical I'm giving to you.

13 So that would be, under that hypothetical,
14 somewhere over -- just over a fifth of the time the
15 biological assessment, the draft biological assessment
16 anticipates the use of TUCPs as a possibility; is that
17 correct?

18 MR. MIZELL: Objection, incomplete
19 hypothetical. There's a whole laundry list of
20 conditions it'd have to go through, including
21 development of the lands, which are speculative, to
22 determine what, actually, John Herrick's trying to get
23 at.

24 MR. HERRICK: I think it's an excellent
25 hypothetical.

1 CO-HEARING OFFICER DODUC: We'll take it as a
2 hypothetical.

3 And Ms. Pierre, just...

4 WITNESS PIERRE: I think the question is is 21
5 out of 82, about one fourth? I mean, what are you
6 asking? I don't understand.

7 MR. HERRICK: Well, the hypothetical is, if
8 there are, say, 21 times when this occurs, would you
9 agree that's somewhere above 20 percent of the time?

10 MR. MIZELL: Objection, vague.

11 WITNESS PIERRE: Yeah, it's -- I mean, you're
12 asking a math question, not a project question. I
13 think this is hypothetical.

14 MR. HERRICK: It's definitely hypothetical.
15 That's why we have experts.

16 Well, let me put it to you this way. If
17 you're analyzing a project that contemplates 20 percent
18 of the time they may ask for relief from the existing
19 standards, how would you analyze impacts to third
20 parties?

21 WITNESS PIERRE: I would have to give that a
22 lot more thought. That would be a different analysis
23 than what we've done.

24 MR. HERRICK: Does it raise any concerns with you
25 as project manager that not knowing the number of times

1 that this sort of process might be used, you may be
2 incapable of actually analyzing the impacts to third
3 parties?

4 WITNESS PIERRE: I don't view this procedure
5 as describing the draft BA as any change from the
6 no-action or baseline conditions. So I don't feel that
7 that's a -- any effects of that are associated with the
8 project that we've evaluated.

9 MR. HERRICK: Well, let me back up then.
10 The standards that we keep talking about
11 generally and the water quality objectives, those are
12 in order to protect beneficial uses; is that your
13 understanding?

14 WITNESS PIERRE: Yes.

15 MR. HERRICK: And so those are set, and many
16 times they have differing criteria depending on the
17 year type. So if you have a wet year, it might be
18 different than when it's a dry year; is that correct?

19 WITNESS PIERRE: Yes, for some standards.

20 MR. HERRICK: So if you have a process, a TUCP
21 process, which seeks to temporarily lower or relax
22 those standards, wouldn't that necessarily be adverse
23 to the beneficial uses?

24 WITNESS PIERRE: I think the Board would
25 decide that at the time.

1 MR. HERRICK: Well, I'm not asking you what
2 the Board would do. I'm asking what you think because
3 are you saying that the standards, if relaxed, are not
4 relevant to an analysis of impacts to third parties?

5 WITNESS PIERRE: I don't know what that
6 relaxation would look like, so I don't know how to
7 answer that question.

8 MR. HERRICK: Well, the relaxation would be a
9 less protected number than the current standard
10 because, by definition, we're relaxing them.

11 WITNESS PIERRE: And it would need to be
12 evaluated at that time.

13 MR. HERRICK: That's the purpose of my
14 question to you. If there's a substantial number of
15 years that that might happen and we don't have the
16 analysis, are you confident that you can then be part
17 of a determination of impacts to third parties and
18 whether that's adverse or not?

19 MR. MIZELL: Objection, asked and answered.

20 CO-HEARING OFFICER DODUC: Let's -- it's an
21 important question. So let's get it on the record one
22 more time.

23 WITNESS PIERRE: I'm confident that our
24 analysis describes the impacts of the project. I don't
25 view the changes -- or the description of drought

1 procedures as any change related to the California
2 WaterFix.

3 MR. HERRICK: Did your modeling include the
4 years that TUCPs might be used or exclude them?

5 WITNESS PIERRE: I can't answer that. The
6 modeling panel would need to.

7 MR. HERRICK: Would you agree that, if the
8 modeling includes those years, then it's not accurately
9 reflecting what's anticipated under biological
10 assessment?

11 WITNESS PIERRE: If the modeling includes
12 years when a TUCP was granted -- sorry. Can you
13 restate the question?

14 MR. HERRICK: Yes, the modeling reviewed the
15 historic years, correct?

16 WITNESS PIERRE: Yes.

17 MR. HERRICK: Okay. So the modeling is acting
18 as if or giving results that state what happens when
19 D1645 -- excuse me -- when D1641 or other mandatory
20 obligations are being met, correct?

21 WITNESS PIERRE: I think the modeling panel
22 needs to answer more specifically exactly how the years
23 in which a TUCP was granted in the historical record
24 were handled in the modeling.

25 The analysis we do is a comparative analysis

1 that's looking at the effects of the project with and
2 without the project in place.

3 So in terms of the effects of the TUCP within
4 that modeling, I'm not able to answer that.

5 MR. HERRICK: But how are you able to make
6 conclusions about what the modeling shows if some
7 number of years are just plain wrong because TUCPs will
8 be used in those times?

9 MR. MIZELL: Again, assumes facts not in
10 evidence. I'd like to see where in the record it says
11 that those years are wrong or the modeling includes
12 incorrect information.

13 CO-HEARING OFFICER DODUC: Mr. Herrick?

14 MR. HERRICK: Well, if you're modeling
15 historic record, the criteria is D1641. But then you
16 say, "But some of those years, we won't operate to
17 D1641," then necessarily the modeling results are
18 incorrect, probably not just for those years but for
19 the following years because they assume something in
20 compliance with D1641, whereas the plan is to make sure
21 we don't comply with D1641.

22 CO-HEARING OFFICER DODUC: Mr. Herrick, I
23 appreciate -- actually not -- your commentary.

24 Please restate your question without framing
25 it in the context of something being incorrect.

1 MR. HERRICK: Can I use the word "error"?

2 CO-HEARING OFFICER DODUC: No, Mr. Herrick.

3 You may use the word "different."

4 MR. HERRICK: Ms. Pierre, you talked about
5 H3-plus as being in between H3 and H4; is that correct?

6 WITNESS PIERRE: That is correct.

7 MR. HERRICK: Let me try another hypothetical.
8 If H3-plus has years in it -- if operating under
9 H3-plus has years in it when TUCPs are granted, then it
10 really doesn't reflect H -- it doesn't fall between H3
11 and H4 because it would have different outflow;
12 wouldn't that be correct?

13 WITNESS PIERRE: I think it would depend if
14 the modeling included that TUCP or not. And that's
15 what I can't answer. And I think that's why this line
16 of questioning has been difficult.

17 I think the modeling group needs to answer if,
18 in the drought years or the years on the record that a
19 TUCP was issued -- if the modeling reflected that or if
20 the modeling assumed D1641 compliance. I can't answer
21 that question.

22 MR. HERRICK: Well, that's very frank of you.
23 You don't know that the modeling dealt with TUCP years
24 or not?

25 MR. MIZELL: Asked and answered.

1 MR. HERRICK: I don't think I'm wasting
2 anybody's time here.

3 WITNESS PIERRE: I don't know if the years --
4 in the historical years in which a TUCP has been
5 granted, if the modeling assumed that TUCP or D1641
6 compliance.

7 CO-HEARING OFFICER DODUC: All right. I think
8 that's definitive enough.

9 Mr. Herrick, move on, please.

10 MR. HERRICK: Good enough.

11 Ms. Pierre, on Page 11 of your testimony,
12 on -- let's see here. I think it starts on Line 8,
13 you say, "As noted in Appendix C of the Draft EIR, an
14 alternative that includes the high outflow operational
15 scenario would not meet the project objectives or
16 purpose and need statement. Do you see that?

17 WITNESS PIERRE: I do. But it's the
18 recirculated draft, just to be clear.

19 MR. HERRICK: Yeah, I'm not -- that's fine.
20 The recirculated draft, the newest draft dealing with
21 the WaterFix.

22 You may not be able to say this on behalf of
23 DWR. Does that mean if the flows and the high flow
24 scenario are eventually adopted by the SWRCB, then the
25 project cannot operate?

1 MR. MIZELL: Objection beyond her expertise.

2 CO-HEARING OFFICER DODUC: He did say she can
3 answer it if she knows.

4 WITNESS PIERRE: Yeah, I can't answer this
5 question. I think there's --

6 MR. HERRICK: I'm not trying to beat a dead
7 horse, but you're the project --

8 WITNESS PIERRE: I'm a horse, yeah.

9 MR. HERRICK: Beat a dead witness or
10 something.

11 But that's an important issue here. I mean,
12 did you have any understanding in your discussions with
13 all the parties that were involved in the development
14 of this, you know, is that a -- is that -- does that
15 prevent the twin tunnel project from going forward if
16 the high outflow is adopted? I'm just basing it on
17 your statement there that apparently you have concluded
18 that the high flow doesn't meet the project purpose and
19 need.

20 WITNESS PIERRE: I don't know that it would --
21 that the project could not go forward. I can't answer
22 that question.

23 MR. HERRICK: Now, isn't -- you work for ICF;
24 is that right?

25 WITNESS PIERRE: I do.

1 MR. HERRICK: Isn't ICF the State Board's
2 consultant for the Bay-Delta Plan update?

3 WITNESS PIERRE: Yes, we are.

4 MR. HERRICK: So you're both proposing a
5 project that doesn't want to operate under high flows
6 and consulting the people who are developing the high
7 flow criteria; is that correct?

8 MR. BERLINER: Objection, relevance.

9 MR. HERRICK: I think the relevance is obvious
10 on its face that it's perfectly appropriate to question
11 witnesses' motivations and conclusions if there's an
12 apparent conflict. And if one project cannot move
13 forward, generally speaking, if something happens, and
14 that person's also or that organization is also
15 advising the Board on what high flow should be, that
16 should be a very important fact in the record.

17 CO-HEARING OFFICER DODUC: I'm going to give
18 you a little bit of leeway on this one, Mr. Herrick.

19 Ms. Pierre?

20 WITNESS PIERRE: I'd be happy to answer this.

21 I think it's good to clarify that, within ICF,
22 I personally, nor does our team of folks that are
23 working on putting together the operations, have
24 anything to do with the work that my company is also
25 doing for the State Board under the Water Quality

1 Control plan. There's a complete firewall. I
2 personally have no idea what any of that says or is
3 doing.

4 We are very careful about that. We've
5 responded to that in writing I believe at least once,
6 maybe twice now, the outlines, the various firewalls
7 and other procedures we have in place to ensure that
8 there's no conflict there.

9 As to the operability, I also want to clarify
10 a point. What Mr. Herrick is asking me about is about
11 the development of a high outflow scenario relative to
12 WaterFix in which the limitation on water available for
13 out flow comes from either the State Water Project or
14 the CVP. And that's a much more narrow scope, is my
15 understanding, than what you're looking at under the
16 Water Quality Control Plan relative to high outflow.

17 CO-HEARING OFFICER DODUC: Thank you.

18 Hold on, Mr. Herrick.

19 Mr. Porgans?

20 MR. PORGANS: Yes [inaudible].

21 CO-HEARING OFFICER DODUC: I cannot hear you.

22 MR. PORGANS: I have a problem with my --

23 CO-HEARING OFFICER DODUC: Hold on. I don't
24 think your microphone is on.

25 MR. PORGANS: Thank you. I've only slept six

1 hours in the last 40 years. I'm only working on one
2 cylinder. Normally it's two.

3 The point that I want to make here is I'm in
4 agreement with Mr. Herrick here. I'm somewhat familiar
5 with ICF and their contracts with --

6 CO-HEARING OFFICER DODUC: Thank you. So
7 you're in concurrence with Mr. Herrick's line of
8 questioning and you're not making an objection?

9 MR. PORGANS: No. I'm just stating that we
10 need to look at --

11 CO-HEARING OFFICER DODUC: Thank you very
12 much, Mr. Porgans. Please sit down.

13 And Mr. Herrick, you now have support from
14 Mr. Porgans to continue.

15 MR. HERRICK: Thank you.

16 Could we maybe have DWR-1, that's at Page 10
17 again. Yeah, 10, please. And this time, I'm close
18 enough to be able to read things.

19 Ms. Pierre, does Boundary 1 include the
20 current standard at Emmaton? Is this better for -- was
21 it 15, the chart of which criteria, Page 15?

22 WITNESS PIERRE: That's not on 15. It may be
23 on DWR-515, so I'll look at that briefly to see if
24 that's specified, and if it's not, we'll need to ask
25 the modeling group.

1 MR. HERRICK: Okay.

2 WITNESS PIERRE: Since it's not explicitly
3 stated within DWR-515, I don't want to speculate.
4 We'll need to ask the modeling panel.

5 MR. HERRICK: Do you know if Boundary 1
6 includes the current Fall X2 under the BiOps?

7 WITNESS PIERRE: It does not include Fall X2.

8 MR. HERRICK: I don't mean to go too far
9 afield here, but why would Boundary 1 not include the
10 existing Fall X2?

11 WITNESS PIERRE: Well, one reason would be
12 that is an area of active scientific research as to the
13 appropriateness of that RPA. So -- and in establishing
14 a range of what we want to look at and acknowledging
15 that the adaptive management program would be
16 implemented and that that is one potential outcome of
17 that, we wanted to ensure that that was reflected
18 within the range that's being evaluated as part of this
19 proceeding.

20 MR. HERRICK: But isn't it a current RPA in
21 the BiOps?

22 WITNESS PIERRE: It is a current RPA, yes.

23 MR. HERRICK: So the Bureau and I guess, I
24 don't know, DWR, in discussions with -- is it NMFS? --
25 over whether or how to implement that, correct?

1 WITNESS PIERRE: It's a discussion with Fish
2 and Wildlife Service because an RPA for delta smelt.

3 MR. HERRICK: Sorry, sorry, Fish and Wildlife.

4 But that's a good enough reason not to model
5 it as an existing condition because there are
6 discussions about potential changes?

7 MR. MIZELL: Objection, vague as to which
8 scenario he's asking about the modeling for.

9 CO-HEARING OFFICER DODUC: Mr. Herrick, please
10 be more specific if possible.

11 MR. HERRICK: Yeah, we're talking about
12 Boundary 1. And that's the, I guess, the lower
13 boundary of the analysis being presented for the State
14 Board for this petition.

15 I'm just asking for Ms. Pierre's understanding
16 of why an existing condition in a biological opinion is
17 not in the analysis. Her answer was that, well, there
18 are discussions going on because there's dis- -- I
19 don't know disagreement -- there's issues about whether
20 or how or should they. But that could be for any group
21 criteria. So I'm asking why the fact that there are
22 discussions going on on this would result in it being
23 precluded from the analysis.

24 CO-HEARING OFFICER DODUC: Please, answer,
25 Ms. Pierre.

1 WITNESS PIERRE: Fall X2 is not precluded from
2 the analysis.

3 What we're looking at is a range of potential
4 future operations with a starting point of initial
5 operations and a collaborative adaptive management
6 science program.

7 If there is science that indicates at some
8 future period that the Fall X2 RPA is not necessary, we
9 wanted to make sure that the potential effects on legal
10 users from that reduction in outflow compared to the
11 no-action alternative, which does include Fall X2, that
12 you have that information in front of you as part of
13 these proceedings.

14 So the other three H scenarios that are part
15 of this proceeding include Fall X2. There's no
16 proposal to not include it or not evaluate it. It's
17 not removed from the baseline. It's simply not
18 included on that one outer boundary for these
19 proceedings.

20 CO-HEARING OFFICER DODUC: As part of the
21 adaptive management program?

22 WITNESS PIERRE: Right. Boundary 1.

23 CO-HEARING OFFICER DODUC: Mr. Herrick.

24 MR. HERRICK: There are numerous criteria that
25 the Bureau's not, shall we say, happy about meeting. I

1 mean, how did you decide on the X2 not being in there
2 whereas San Joaquin River flows at Vernalis and the
3 pulse?

4 MR. MIZELL: Objection to the relevance of the
5 thought process that went on behind developing
6 Boundary 1 and Boundary 2. This does represent our
7 project.

8 MR. HERRICK: I think we're examining the
9 potential effects of the project. And they're the ones
10 that created the boundary conditions. And if the Board
11 doesn't want anybody to explore boundary conditions,
12 they can say so. But I can't imagine how that's not
13 relevant.

14 CO-HEARING OFFICER DODUC: Please answer,
15 Ms. Pierre.

16 WITNESS PIERRE: Sure. On Page -- might be
17 to 9 of my testimony this morning --

18 MR. HERRICK: Did you say "9"?

19 WITNESS PIERRE: It's not 9. Sorry. I'm
20 looking for 15. It might be just helpful to put this
21 up, if you can. DWR-1, Page 15.

22 MR. HERRICK: Oh, DWR-1. I'm sorry.

23 WITNESS PIERRE: Yes, I'm sorry. Not my
24 written; it's this table here.

25 So as I walked through this this morning,

1 these are the key Delta criteria. And Fall X2 is one
2 of them. So you're right there's a lot of different
3 variations we could have come up with.

4 But what we attempted to do was develop a
5 range represented by Boundary 1 and Boundary 2 that
6 accounted for variation among these key Delta criteria.
7 And that's really all it is.

8 So -- and I think in anticipation of where
9 various science efforts will be, where there's the most
10 uncertainty and/or controversy around various
11 requirements or potential requirements, we're trying to
12 capture what that future adjustment and consideration
13 might be.

14 So I think by -- I'm trying to show you this
15 to show that these are the different things that were
16 varied in the boundaries. And, of course, they're not
17 every possible thing in the Delta, but we think it's a
18 nice range.

19 MR. HERRICK: On your Page 15 of DWR-1, one of
20 the columns is the Head of Old River Barrier; is that
21 correct?

22 WITNESS PIERRE: Yes.

23 MR. HERRICK: Now, the proposal in -- I guess
24 it's H3-plus is to have a permanent Head of Old River
25 barrier permit being operable that is operated

1 beginning in March; is that correct?

2 WITNESS PIERRE: No. I believe real-time
3 operations can begin operations at the gate under H3
4 and H4 as early as January, should salmonid presence be
5 detected.

6 MR. HERRICK: Did the thought process that
7 came up with the Head of Old River barrier becoming
8 permanent and having greater operational time frames
9 take into account the 30 years of history with South
10 Delta and the, shall we say, disagreements over the
11 adverse impacts of the Head of Old River Barrier?

12 WITNESS PIERRE: The operation of the barrier
13 as described in the draft BA and I believe in the EIR
14 are pretty explicit that flood control water quality
15 are considerations in operating the gate.

16 MR. HERRICK: Are you aware that there are
17 currently agreements between DWR and South Delta on the
18 operation, removal, and construction of the temporary
19 Head of Old River Barrier?

20 WITNESS PIERRE: I'm aware of settlement
21 agreement? Is that what you're referring to?

22 MR. HERRICK: No.

23 WITNESS PIERRE: Okay.

24 MR. HERRICK: There are operational agreements
25 between DWR and South Delta dealing with the Head of

1 Old River Barrier. If you're not familiar, that's
2 fine.

3 WITNESS PIERRE: I'm not.

4 MR. HERRICK: You understand -- this is not
5 being snide.

6 You understand how the Head of Old River
7 Barrier works? I mean, it closes off the flow,
8 correct?

9 WITNESS PIERRE: The rock barrier is leaky, as
10 I understand it, and the permanent gate could also be
11 operated at partial closure. So fully closed is an
12 option; fully opened is an option; and basically
13 anything in between in terms of a permanent operable
14 gate is also an option.

15 MR. HERRICK: When you say that it currently
16 is leaky, it has culverts on it; is that correct?

17 WITNESS PIERRE: Yes.

18 MR. HERRICK: That allow water through?

19 WITNESS PIERRE: Yes.

20 MR. HERRICK: Okay. And, of course, the water
21 leaks through the rocks themselves.

22 But the issue is the -- the question is is
23 there a reason why the WaterFix process and/or DWR made
24 no effort to discuss a permanent Head of Old River
25 Barrier that did not include permanent agricultural

1 barriers downstream?

2 WITNESS PIERRE: I've not been part of those
3 conversations. My understanding is that, with the
4 operations proposed under WaterFix, those may not be
5 needed. But I don't know. You'll need to ask the
6 modelers.

7 MR. HERRICK: I'm sorry. I didn't understand.
8 What may not be needed?

9 WITNESS PIERRE: Permanent gates.

10 MR. HERRICK: Oh. Oh, okay.

11 Are you aware of federal statute authorizing
12 the barriers, the barrier project?

13 WITNESS PIERRE: The federal statute
14 authorizes the Head of Old River Barrier.

15 MR. HERRICK: Well, the federal statute that
16 authorizes -- let me represent to you, the federal
17 statute that authorized the barriers includes the three
18 downstream barriers as mitigation of the Head of Old
19 River Barrier. Are you familiar with that?

20 WITNESS PIERRE: I can't say that I am for
21 sure.

22 MR. HERRICK: Okay. Lastly, I want to return
23 to a topic that Mr. O'Laughlin touched upon.

24 And the Chair may yell at me, but I don't
25 think the discussion resulted in a clear answer.

1 In the operations -- excuse me. In the
2 modeling, assuming operations for or under CALSIM 2,
3 that provided for under, what, H -- well, all three Hs
4 and the upper boundary, that provided for additional
5 outflow; is that correct?

6 WITNESS PIERRE: Which scenario are you
7 referring to specifically?

8 MR. HERRICK: All three of the Hs and the
9 upper boundary.

10 WITNESS PIERRE: There's two Hs. Do you mean
11 H3, H4, and Boundary 2?

12 MR. HERRICK: Well, there's H3, H4, and
13 H3-plus, aren't there?

14 WITNESS PIERRE: Oh, yes. It's between. So
15 your question is do they include more outflow?

16 MR. HERRICK: Yes.

17 WITNESS PIERRE: So we need to take one at a
18 time.

19 MR. HERRICK: Okay.

20 WITNESS PIERRE: H3 includes the Fall X2, and
21 the rest of the year would be compliant with D1641
22 relative to outflow.

23 H4 includes Fall X2, and in the spring, March
24 through May period, would have an increased spring
25 outflow and in summer and winter would comply with

1 D1641.

2 H3-plus is right in the middle. It would
3 include, as described in the draft BA, a spring
4 criteria that essentially maintains the outflow that's
5 incidental to the current operations South Delta. And
6 Boundary 2 includes year-round increases in outflow
7 compared to D1641.

8 MR. HERRICK: And those year-round increases
9 are in the Recirculated Draft EIR/EIS, correct?

10 WITNESS PIERRE: As part of that scenario that
11 we looked at in Appendix C.

12 MR. HERRICK: Now, does that -- as
13 Mr. O'Laughlin said, the Boundary 2 is presented here
14 as sort of an outer operational possibility; it's not
15 what's being proposed. But it becomes very important
16 if there are substantial increases in outflow all year
17 where that water comes from because where it comes from
18 might then determine who might be affected. Would you
19 agree with that statement?

20 WITNESS PIERRE: Yes.

21 MR. HERRICK: So, again, could you explain why
22 nothing has been presented as to where that water might
23 come from because that might determine effects on third
24 parties?

25 MR. BERLINER: I'm going to object. It's

1 asked and answered. Mr. O'Laughlin went through this
2 as to water transfers, and Ms. Pierre also testified
3 that it would be increased reservoir releases or
4 decreased exports.

5 CO-HEARING OFFICER DODUC: All right.

6 MR. HERRICK: I'm sorry.

7 CO-HEARING OFFICER DODUC: Mr. Herrick?

8 MR. HERRICK: The reason I want to address
9 this is I don't think we got -- because of the
10 objections, I don't think we got a good answer.

11 And I'm trying to figure out through this
12 process whether or not a potential operational scenario
13 adversely affects people.

14 Now, whether or not we have a later process
15 that specifically looks at a specific thing, if this
16 process goes forward and there are those increased
17 flows, that must affect reservoir stores, that affects
18 future year operations, that affects everything.

19 So even though there's more outflow, that
20 doesn't mean everybody's better. The following year,
21 they may be less water for water quality.

22 So, again, I'm just -- maybe I'm missing
23 something. Is it in the -- is it in the research, the
24 EIR? Is there some reason why it wasn't presented for
25 this? That's my question, I guess.

1 CO-HEARING OFFICER DODUC: All right.

2 Mr. Herrick, I understand your rationale.

3 Ms. Pierre, please answer to the best of your
4 ability.

5 WITNESS PIERRE: So first of all, I think --
6 you know, I'm providing the project overview. So the
7 modeling testimony will provide the detail around what
8 exactly has been modeled for Boundary 2.

9 But because this is in the Recirculated Draft,
10 you can also find the modeling results there if you
11 were really anxious to see them this weekend, or -- but
12 the modeling results for Boundary 2 are presented in
13 the recert. That's what you're asking, right?

14 MR. HERRICK: Well, kind of. Is that part of
15 the petition?

16 WITNESS PIERRE: Yes.

17 MR. HERRICK: So the effects in Boundary 2 as
18 analyzed in the Recirculated EIR, that's one of the
19 things you want the Board to examine as to whether or
20 not there are adverse effects to third parties?

21 WITNESS PIERRE: Yes, including the modeling
22 testimony that will be presented.

23 MR. HERRICK: That's all I have. Thank you.

24 CO-HEARING OFFICER DODUC: Thank you, Mr.
25 Herrick. Happy anniversary to you and your wife.

1 Mr. HERRICK: Thank you very much.

2 UNIDENTIFIED SPEAKER: Wait, how many years?

3 MR. HERRICK: Poor lady. Pardon me?

4 UNIDENTIFIED SPEAKER: How many years?

5 MR. HERRICK: Only ten. I'm a late bloomer.

6 CO-HEARING OFFICER DODUC: And that ends the
7 social portion of this hearing.

8 Okay. Next is Group No. 22, City of Stockton,
9 who is not present.

10 Group No. 23, Stockton East Water District,
11 who is not present.

12 24, North San Joaquin Water Conservation
13 District.

14 MS. SPALETTA: Good afternoon, Jennifer
15 Spaletta on behalf of North San Joaquin. I'm also
16 appearing specially for Tom Keeling on behalf of San
17 Joaquin County, and we have no questions for this
18 panel. Thank you.

19 CO-HEARING OFFICER DODUC: Thank you. And
20 that would be Group 24 as well, Ms. Spaletta?

21 MS. SPALETTA: Same.

22 CO-HEARING OFFICER DODUC: 23 and 24. All
23 right.

24 No. 25, County of Solano.

25 MR. MILJANICH: Good afternoon, Peter

1 Miljanich, County of Solano. And that's
2 M-I-L-J-A-N-I-C-H. And Group 25 has no questions on
3 cross for this panel.

4 CO-HEARING OFFICER DODUC: Thank you.

5 No. 26, Contra Costa Water District, not here.

6 27 City of Antioch, not here.

7 28, California Delta Chambers and Visitors

8 Bureau, Mr. Wells? Not here.

9 29 Steamboat Resort, also not here.

10 30, Group 30 Save the California Delta

11 Alliance, et al. Mr. Brodsky?

12 MR. BRODSKY: Yes.

13 CO-HEARING OFFICER DODUC: All right.

14 MR. BRODSKY: Good afternoon, Ms. Pierre,

15 Board Members. Michael Brodsky on behalf of Save the

16 California Delta Alliance, et al.

17 And I'm shocked that we're moving this fast.

18 I wasn't going to prepare anything for today, and I'm

19 glad I did.

20 CROSS-EXAMINATION BY MR. BRODSKY

21 MR. BRODSKY: So I'd like to start by looking

22 at Ms. Pierre's written testimony, DWR-51. If we can

23 take a look at Page 1.

24 So on Lines 24 to 27, Ms. Pierre informs us

25 that she assists DWR and USBR in developing and

1 defining the project description, including various
2 operational scenarios for CWF, also managed the
3 preparation of the Fish and Aquatic Resources chapter
4 for the CWF EIR and, in addition, managed the January
5 2016 draft Biological Assessment.

6 So, Ms. Pierre, you're familiar with these
7 documents and their interrelationship? In other words,
8 we've had many instances today where you've referred us
9 to the modeling panel for specific drill-down technical
10 questions. But as far as an overview of how these
11 documents fit together, you're familiar with them, and
12 you're the one who's here to tell us about that?

13 WITNESS PIERRE: Yes, that's correct.

14 MR. BRODSKY: Okay. Great. Okay.

15 I'd like to take a look at Page 2 of your
16 written testimony, Lines 12 to 14. And you tell us
17 that you're going to give -- you give a description of
18 current operations.

19 You -- let me -- you're familiar with the
20 existing operating criteria under which water is
21 currently exported from the Delta through the CVP and
22 SWP; is that correct?

23 WITNESS PIERRE: Yes, that's true.

24 MR. BRODSKY: And you're also familiar with
25 the new operating criteria that's being proposed for

1 CWF?

2 WITNESS PIERRE: Yes, I am.

3 MR. BRODSKY: And the new operating criteria,
4 in some respects, is different from the existing
5 operating criteria?

6 WITNESS PIERRE: Yes, that's correct.

7 MR. BRODSKY: And the existing operating
8 criteria includes that the SWP and CVP be operated to
9 meet the requirements of D1641; is that correct?

10 WITNESS PIERRE: Yes, it is.

11 MR. BRODSKY: Okay. And I'd like to take a
12 look at Page 12 of your written testimony. And at
13 Lines 12 to 17, you stated that the existing regular
14 [sic] requirements that will not change include the
15 terms imposed through D1641; is that correct?

16 WITNESS PIERRE: Yes.

17 MR. BRODSKY: And there, one of the -- going
18 down to one of the bullet points there, the first,
19 second, third, fourth, fifth bullet point down, it's
20 your testimony that the export-to-inflow ratio, which
21 is one of the terms of D1641, will not change under the
22 new operating criteria?

23 WITNESS PIERRE: That's correct.

24 MR. BRODSKY: At Page 4 of your testimony, you
25 refer to SWRCB-21, which is a copy of D1641. And I'll

1 hazard a guess that most people in the room are
2 familiar with that document.

3 And I'd like to take a look at D1641 on the
4 screen if we could, Page 184 of that document, which is
5 Table 3. And then down near the bottom of Table 3 on
6 the left-hand side, it says "Export Limits." And then
7 over toward the right, we see 35 percent of Delta
8 inflow is allowed between February and June, and 65
9 percent of Delta inflow is allowed between July and
10 January.

11 And are you familiar, is it your
12 understanding, that that is the EI ratio of D1641 to
13 which you refer at Page 12 of your written testimony?

14 WITNESS PIERRE: Yes.

15 MR. BRODSKY: Okay. And then I'd like to go
16 to Page 190.

17 And up in the box at the top, it says,
18 "Percent inflow diverted equals CCF plus TTP divided by
19 Delta inflow." And that is the export to -- that
20 expresses the terms of the export-to-inflow ratio; is
21 that correct?

22 WITNESS PIERRE: I actually never looked at
23 that page before.

24 MR. BRODSKY: Okay. Let's go back, then, to
25 Page -- let's go back for a minute to Page -- Page 184.

1 then where it says "Combined Export Rate," there's a
2 Footnote 16 under there. And that Footnote 1 then is
3 going to appear on Page 186. If we could go to 186.

4 So it says, "The combined export rate for this
5 objective," which is the export-to-inflow objective,
6 "is defined as Clifton Court Forebay inflow minus
7 actual Byron-Bethany Irrigation District and the export
8 rate of the Tracy Pumping Plant."

9 So is it your understanding that Clifton Court
10 Forebay plus Tracy represent the total exports of the
11 CVP and SWP from the Delta?

12 WITNESS PIERRE: Yes.

13 MR. BRODSKY: I guess, except that -- other
14 than the North Bay Aqueduct?

15 WITNESS PIERRE: And Contra Costa.

16 MR. BRODSKY: Well, Contra Costa is -- okay,
17 correct. Okay.

18 So then if we can now go to back to 190. So
19 the percent inflow diverted is equal to Clifton Court
20 Forebay plus Tracy Pumping Plant, that's Jones and
21 Banks, divided by Delta inflow. So I'm representing to
22 you that this is the definition of the export-to-inflow
23 ratio. Do you agree with that?

24 WITNESS PIERRE: I'm following.

25 MR. BRODSKY: Okay. Then down below that, we

1 say Delta inflow is equal to the sum of Sac, plus SRTP,
2 plus Yolo, plus East, plus miscellaneous, plus San
3 Joaquin River.

4 So that inflow is the various streams that are
5 flowing into the Delta that make up its inflow for this
6 calculation; is that your understanding?

7 WITNESS PIERRE: Yes, I'm read reading this.

8 MR. BRODSKY: Okay. And then we see "Sac" is
9 defined there as "measure of the Sacramento River at
10 Freeport."

11 WITNESS PIERRE: I see that, yes.

12 MR. BRODSKY: Are you familiar with the
13 location of Freeport?

14 WITNESS PIERRE: Yes.

15 MR. BRODSKY: And is it upstream or downstream
16 from the proposed new North Delta intakes?

17 WITNESS PIERRE: Upstream.

18 MR. BRODSKY: Okay. I'd like to turn now to
19 the Draft Biological Assessment. And please, if I ever
20 refer to this document as the BA or the Biological
21 Assessment without "Draft" in front of it, hear that as
22 draft; we understand this is a draft document.

23 WITNESS PIERRE: Okay.

24 MR. BRODSKY: And so, again, I apologize. I
25 didn't prepare a flash drive like some other folks did.

1 I didn't think we were going to get this far. But we
2 do have this document in the record.

3 So if I could ask the projectionist to go to
4 the July 19th, 2016 filing of Save the California Delta
5 Alliance, there's a declaration of Michael A. Brodsky.
6 And Chapter 3 of the Draft Biological Assessment is
7 attached as Exhibit 8 of that declaration.

8 And I did prepare some copies.

9 I'm sorry. I only have three copies. I
10 didn't fully know what to expect today.

11 Should be the first attachment following the
12 pleading paper. It's not very far down.

13 There it is. So if we could go to Page 3-75
14 of that document. And up at the top of 3-75, it says,
15 "This is Table 3-3.1, New and Existing Water
16 Operations, Flow Criteria, and Relationship to
17 Assumptions in CALSIM's Modeling."

18 And then I'd like to go to Page 3-80. And
19 then up here at the top, we have the export-to-inflow
20 ratio. And what it says there is, "The D1641
21 export-to-inflow ratio calculation was largely designed
22 to protect fish from South Delta entrainment. For the
23 PA Reclamation and DWR propose that the NDD be excluded
24 from the EI ratio calculations. In other words,
25 Sacramento River inflow is defined as flows downstream

1 of the NDD, and only South Delta exports are included
2 for the export component of the criteria."

3 Isn't it true that DWR is proposing to
4 redefine the export-to-inflow ratio for D1641 as part
5 of their approvals for this change petition?

6 WITNESS PIERRE: So, again, this is a Draft
7 Biological Assessment, and the ratio itself is not
8 being proposed to change. But the location that where
9 were measuring inflow is being proposed to change under
10 the California WaterFix and this draft. I think that
11 the modeling panel can give the Board a lot of
12 information about what the implications of that change
13 are.

14 MR. BRODSKY: I'm not asking you about the
15 implications. I'm just trying to establish the fact of
16 what's being changed.

17 WITNESS PIERRE: Okay.

18 MR. BRODSKY: And your answer is that what I
19 just read you is not a change in the way the
20 export-to-inflow calc- -- ratio is calculated?

21 WITNESS PIERRE: It's a -- it's a -- yeah, I
22 think it's a bit nuanced. It's not proposing a change
23 in the percentages that are being measured. It's a
24 change in where you're measuring the inflow.

25 MR. BRODSKY: And that's not a change?

1 Changing a compliance point is not a change in D1641?

2 If I decided to change Emmaton to Collinsville, would

3 that be a change?

4 WITNESS PIERRE: I don't see it as the same as
5 a compliance point.

6 MR. BRODSKY: You're changing the point where
7 the flow of the Sacramento River is measured for
8 purposes of the D1641 calculation; is that correct?

9 WITNESS PIERRE: For purposes of a calculation
10 that, if you read the definition of the purpose of
11 that --

12 MR. BRODSKY: It's a yes or no question.

13 You're changing the location of where the flow
14 of the Sacramento River is measured to calculate the
15 export-inflow ratio; yes or no?

16 WITNESS PIERRE: That's correct.

17 MR. BRODSKY: To the right there, it says
18 "Summary of CALSIM's modeling assumptions." It says,
19 "Combined export rate is defined as the diversion rate
20 of the Banks Pumping Plant and Jones Pumping Plant from
21 the South Delta channels. Delta inflow is defined as
22 the sum of the Sacramento River flow downstream of the
23 proposed North Delta diversion intakes, the Old Bypass
24 flow, Mokelumne River flow, Cosumnes flow," et cetera,
25 et cetera.

1 The point there is that inflow is measured
2 downstream of the new intake. So for purposes of the
3 CALSIM's modeling that was presented to the Board, you
4 took the measurement of Sacramento River flow at a
5 point different from Freeport; isn't that correct?

6 WITNESS PIERRE: Yes, that's what's being
7 proposed in this criteria, and that's how it was also
8 modeled.

9 MR. BRODSKY: And it's also correct that,
10 where DWR represents repeatedly to this Board that "our
11 modeling shows that, under all these operating
12 scenarios between Boundary 1 and Boundary 2, we
13 continue to meet D1641," you mean you meet it as you've
14 redefined the export-to-inflow ratio; isn't that
15 correct?

16 MR. MIZELL: Objection, misstates the
17 testimony. He's talking about a Draft BA which is not
18 part of the modeling analysis presented in front of the
19 Board.

20 MR. BRODSKY: That's not what the witness
21 said. She said that the modeling that was presented to
22 the Board assumed the redefined export-to-inflow as
23 it's written here.

24 CO-HEARING OFFICER DODUC: That's what I
25 heard.

1 So, Ms. Pierre, correct that it is not true?

2 Answer the question.

3 WITNESS PIERRE: So in my opinion in working
4 on the development of this project, I've -- and also in
5 looking at the modeling results, which will be
6 presented at --

7 MR. BRODSKY: The witness is unresponsive.

8 CO-HEARING OFFICER DODUC: Let her finish,
9 please, Mr. Brodsky.

10 WITNESS PIERRE: The change has been largely
11 inconsequential. And therefore, the ratio that's being
12 applied is still being applied. There's not a change
13 in the actual E and I. It's the location of the
14 measurement of the I.

15 So if I've misrepresented that, it wasn't
16 intentional. It was, in my opinion and based on the
17 modeling and the information I've had in front of me,
18 it wasn't a change the D1641. It -- based on the
19 results we are looking at, it's still compliant. It
20 just happens to be that the North Delta diversions are
21 downstream of Freeport. And that's -- it's that
22 simple, in my mind at least.

23 So it's not an intention to misrepresent.
24 This is how it's being described in the Draft BA. It's
25 how it was modeled. And it will be part of the

1 presentation from the modeling panel as well to assess
2 whether or not that change in where we're measuring the
3 ratio, not the ratio changing, has any effect on
4 beneficial users.

5 CO-HEARING OFFICER DODUC: Thank you,
6 Ms. Pierre.

7 Mr. Brodsky, you've made your point, and
8 you've made it very well. So let's move on.

9 MR. BRODSKY: There's more, quite a bit
10 more --

11 CO-HEARING OFFICER DODUC: Okay.

12 MR. BRODSKY: -- to this point.

13 So it's not only that the compliance point has
14 changed, it's that in the export term, everything
15 that's being exported through the tunnels is excluded
16 from exports; isn't that correct?

17 CO-HEARING OFFICER DODUC: I'm not sure even I
18 followed that one.

19 MR. BRODSKY: It says here that --

20 CO-HEARING OFFICER DODUC: Where are you?

21 MR. BRODSKY: On Page 3-80, at the box on the
22 left, the second clause of the sentence says,
23 "Reclamation and DWR propose that NDD be excluded from
24 the EI ratio calculation." In other words, Sacramento
25 River inflow is defined as flows downstream of the NDD

1 and only South Delta exports are included for the
2 export component.

3 So doesn't that mean that, if, for example,
4 you were exporting 5,000 cubic feet per second through
5 the new intakes and you were exporting zero through the
6 existing South Delta intakes, perhaps because smelt
7 were present, the exports for terms of -- for purposes
8 of calculating this ratio would be zero?

9 WITNESS PIERRE: I really think the question
10 needs to go to the modeling. This is very deep in the
11 weeds in terms of what was assumed and beyond my
12 expertise in getting there.

13 MR. BRODSKY: And so --

14 CO-HEARING OFFICER DODUC: Mr. Brodsky, you
15 flagged this point. We will make sure that it is
16 covered in the later panels.

17 MR. BRODSKY: Okay.

18 Does it occur to you as odd that this wasn't
19 just simply presented up front, that we have to go to a
20 table buried in an ancillary document to find out that
21 this change has been made? Isn't this something that
22 should have just been presented in your testimony,
23 "We're proposing to change this, and we think it's a
24 good idea, and here's why"?

25 MR. MIZELL: Objection, compound and

1 relevance.

2 CO-HEARING OFFICER DODUC: Mr. Brodsky, do you
3 wish to restate that?

4 MR. BRODSKY: Do you think it would have been
5 better to have presented this change in the
6 export-to-inflow ratio up front in your testimony?

7 WITNESS PIERRE: Given the attention, I think
8 I could have. There was no intention to hide or bury
9 this information. Again, I explained that, based on
10 what I've look at, I framed it the way I did.

11 CO-HEARING OFFICER DODUC: Thank you, Ms.
12 Pierre.

13 MR. BRODSKY: I'll move on to a different
14 topic if that's okay.

15 CO-HEARING OFFICER DODUC: Mr. Brodsky,
16 please.

17 MR. BRODSKY: Okay.

18 Okay. I'd I like to direct your attention to
19 Page 14 of your testimony. And also if the
20 projectionist could get us there.

21 Let me just ask you about adaptive management
22 a little bit. We've talked about adaptive management
23 some, and it's one of the things that's been mentioned
24 that's under development. And you've described that
25 you're going to make a major effort to have a good

1 adaptive management program; is that correct?

2 WITNESS PIERRE: Yes.

3 MR. BRODSKY: Can you just give us a little
4 bit, what is your opinion of how important adaptive
5 management is to the success or failure of the CWF?

6 WITNESS PIERRE: I think it's very important.
7 I think we're in potentially installing new
8 infrastructure in a changing climate. And I think we
9 need to have the flexibility to make adjustments that
10 benefit the users of the facilities and of the Delta
11 and the ecosystem and all of the different components
12 that are considered during operation.

13 MR. BRODSKY: And I'm sorry if I missed
14 earlier, how long have you been with the -- with the
15 project?

16 WITNESS PIERRE: I began in February of 2011.

17 MR. BRODSKY: So you've been with it for --

18 WITNESS PIERRE: Too long.

19 MR. BRODSKY: For quite a while. As I recall,
20 we started back in about 2006.

21 WITNESS PIERRE: Right. I wasn't involved
22 back then.

23 MR. BRODSKY: Since you've been involved has
24 that been pretty much known that adaptive management is
25 going to be a very important part of this proposal,

1 whether it be BDCP or whatever alternative it was going
2 to be?

3 WITNESS PIERRE: Yes, it's always been a
4 component of the BDCP, and I think it's become
5 increasingly important as we work through the analysis
6 and the information we have and the feedback we've
7 received.

8 MR. BRODSKY: And are you familiar with the
9 Delta Plan, which we don't quite know what the status
10 of it is right now. But as the preparation of your
11 testimony, DWR's testimony, refers to the Delta Plan's
12 requirements, that the Delta Plan does require adaptive
13 management of all covered actions?

14 WITNESS PIERRE: I'm familiar with that, yes.

15 MR. BRODSKY: And you -- you and your team
16 strove to comply with that?

17 WITNESS PIERRE: We struggled?

18 MR. BRODSKY: Strove.

19 WITNESS PIERRE: Oh. Yes, we're working on
20 that. I think we've had a number of iterations, and I
21 think, based on the feedback we recently received from
22 the independent science panel, we have really good
23 direction on how to complete the document.

24 MR. BRODSKY: Okay. Great. So at Page 14
25 then, on Lines 22 to 23, you say that CWF proposes a

1 robust program for collaborative science and adaptive
2 management. And then you cite SWRCB-3 in support of
3 that assertion of fact.

4 And SWRCB-3 is the 2015 Recirculated Draft
5 Environmental Impact Report/Supplemental Environmental
6 Impact Statement; is that correct?

7 WITNESS PIERRE: Yes.

8 MR. BRODSKY: Okay. And I'd like to refer
9 your attention now to Exhibit SWRCB-49. And if we
10 could have that on the screen also. And if we could go
11 to Page 5 of that document.

12 By the way, do you agree that the Delta ISB
13 has the appropriate expertise to evaluate the
14 WaterFix's adaptive management program?

15 WITNESS PIERRE: I didn't personally
16 participate in the Phase 1, and I didn't take very good
17 note of who was selected on the panel. But I would
18 assume that, given that they were selected by the Delta
19 Stewardship Council, that they were appropriate for
20 reviewing it, yes.

21 MR. BRODSKY: All right. So I'd like to read
22 you the last sentence of the second paragraph, which
23 says, "The lack of a substantive treatment of adaptive
24 management in the current draft indicates that it is
25 not considered a high priority or the proposers have

1 been unable to develop a substantive idea of how
2 adaptive management would work for the project."

3 WITNESS PIERRE: What document is this?

4 MR. BRODSKY: This is the Delta Independent
5 Science Board's review of the 2015 Recirculated Draft
6 Environmental Impact Report, which you cited on Page 14
7 of your testimony as support for the assertion that CWF
8 has a robust adaptive management program.

9 WITNESS PIERRE: So I think we just need to
10 clarify. What I was referring to is the science panel
11 review of the Draft Biological Assessment in their
12 Phase 1. And they will, in their Phase 2 review, be
13 reviewing a draft biological opinion later this year,
14 their feedback of which would be incorporated into a
15 final adaptive management program that will be
16 submitted as part of Part 2.

17 So this is the EIR review. And what I'm
18 referring to is the biological assessment and BiOp
19 review process.

20 MR. BRODSKY: Right. So there's two --
21 there's an Aquatic Science Peer Review which was
22 conducted in January of 2016 by -- that was --

23 WITNESS PIERRE: I think it was March.

24 MR. BRODSKY: The independent review panel
25 report for the 2016 California WaterFix Aquatic Science

1 Peer Review, that was a review of the BA?

2 WITNESS PIERRE: The draft BA.

3 MR. BRODSKY: The draft. Always here "draft"
4 when I say the words "BA." So that's what you thought
5 I was referring to. I'm going to come to that document
6 in a few minutes.

7 WITNESS PIERRE: Okay.

8 MR. BRODSKY: But what I'm referring to now is
9 the Delta Independent Science Board. Are you familiar
10 with the Delta Independent Science Board?

11 WITNESS PIERRE: I am, but not their review of
12 the EIR.

13 MR. BRODSKY: Okay. Let me just switch back,
14 since you're not quite familiar with them as much as
15 you are with the Aquatic Science Peer Review, and
16 direct your attention -- if I could have the
17 projectionist put up DWR-117. Go to Page 5.

18 And the second bullet point down under A,
19 there, "The DISB," which is the Delta Independent
20 Science Board, "provides a standing board of nationally
21 or internationally prominent scientists with
22 appropriate expertise to evaluate the broad range of
23 scientific programs that support adaptive management in
24 the Delta."

25 And this DWR-17 is the draft adaptive

1 management framework for the California WaterFix that
2 was, I assume, developed by DWR; is that correct?

3 WITNESS PIERRE: It was developed by all five
4 agencies.

5 MR. BRODSKY: And the five agencies are
6 asserting that the Independent Science Board knows what
7 it's doing, if I read that correctly?

8 WITNESS PIERRE: That's how I would read it
9 too, yes.

10 MR. BRODSKY: Okay. Thank you very much.

11 So I would like to go back then, to SWRCB-49,
12 Page 5. And this section is titled, "Adaptive
13 Management." So the Delta ISB on September 30th of
14 2015 reviewed your adaptive management program as it
15 then stood, and their conclusion was, "The lack of a
16 substantive treatment of adaptive management in the
17 current draft indicates that it is not considered a
18 high priority or the proposers have been unable to
19 develop a substantive idea of how adaptive management
20 will work for the project."

21 They're highly critical of your progress to
22 date, aren't they, as of September 30th, 2015?

23 WITNESS PIERRE: Yeah, almost a year ago.
24 There's been quite a bit of progress made, including
25 the framework included in my exhibit. And it continues

1 to be made. It's a -- I would call it a high priority
2 commitment by all five agencies to get that done and
3 get it right.

4 CO-HEARING OFFICER DODUC: Mr. Berliner?

5 MR. BERLINER: Yes?

6 CO-HEARING OFFICER DODUC: Your microphone is
7 not on.

8 MR. BERLINER: This is essentially hearsay
9 evidence, which I understand is admissible at the
10 Board. But Mr. Brodsky's trying to prove a point. And
11 there's an exception when hearsay is not admissible at
12 the Board, which is for the truth of the matter stated.
13 And that's where he's going with this, which is an
14 entirely different matter.

15 CO-HEARING OFFICER DODUC: Your objection is
16 noted.

17 Mr. Brodsky?

18 MR. BRODSKY: Yes. These are official
19 scientific documents. They're also comments that have
20 been submitted on the EIR. I've made a request for
21 official notice for the Board to take note of the facts
22 in these documents, which is pending. And I believe
23 that they are admissible for the fact of the matter,
24 under the Rules of Evidence would be in court and are
25 before this Board.

1 And DWR has submitted an opposition to my
2 request for official notice. And you'll receive a
3 reply to that opposition shortly.

4 CO-HEARING OFFICER DODUC: Thank you. We'll
5 take both under advisement.

6 But for now, Mr. Brodsky, you may continue.

7 MR. BRODSKY: Thank you.

8 Mr. BERLINER: Thank you.

9 MR. BRODSKY: So you said you're working on
10 it. This is a year old, and you're committed to
11 getting it right?

12 WITNESS PIERRE: There's a great amount of
13 effort being put towards it, yes.

14 MR. BRODSKY: Has there been ample time up to
15 now or up to a year ago to have gotten this done?

16 WITNESS PIERRE: It's -- I think the priority
17 has been to move the planning process forward. That
18 doesn't mean that it wasn't ever a priority to do an
19 adaptive management program. It's not easy to do. And
20 I think we have a lot of attention on it, and we have a
21 lot of feedback on what to do. And that's what's being
22 done now.

23 I wouldn't describe it as a lack of priority
24 or interest or wanting to get it done at any other
25 time. It's just, there's a lot to do.

1 MR. BRODSKY: Okay. So if it's been a
2 priority, has there been ample time to have gotten it
3 done by now?

4 CO-HEARING OFFICER DODUC: Hold on.

5 Ms. Morris?

6 MS. MORRIS: For the State Water Contractors.

7 I object to this entire line of questioning.
8 It seems to me that, as the Board has dictated,
9 adaptive management would be discussed very thoroughly
10 in Part 2 of these proceedings. And seems
11 inappropriate at this point in time.

12 CO-HEARING OFFICER DODUC: Thank you. I'll
13 note that objection, Ms. Morris. Ms. Pierre, however,
14 I don't believe is scheduled to be back in Part 2.

15 WITNESS PIERRE: Ah, no.

16 CO-HEARING OFFICER DODUC: Oh, you are?

17 WITNESS PIERRE: Oh, yes.

18 MR. BRODSKY: I'd like -- if I may respond?

19 CO-HEARING OFFICER DODUC: Mr. Brodsky?

20 MR. BRODSKY: This goes directly to her direct
21 testimony. Her direct written testimony is, part of
22 the reason that CWF is a good program is because it
23 proposes a robust program for collaborative science and
24 adaptive management.

25 And there's several other places in her direct

1 testimony that rely on the adaptive management program,
2 so it's fair game for cross.

3 CO-HEARING OFFICER DODUC: All right.

4 Ms. Morris?

5 MS. MORRIS: Of course her testimony talks
6 about adaptive management. It's the presentation of
7 the project description. That doesn't mean that we
8 need to go into details about who said what about
9 adaptive management.

10 CO-HEARING OFFICER DODUC: I understand.

11 MS. MORRIS: I also object on the basis of
12 relevance. The witness talking about the adaptive
13 management that is no longer -- it's completely changed
14 over a year ago, and this is in a 2015 document.

15 CO-HEARING OFFICER DODUC: Thank you,
16 Ms. Morris. And I believe Ms. Pierre has stated as
17 such.

18 I will allow Mr. Brodsky to continue his line
19 of questioning. But I will advise Ms. Pierre that she
20 may feel free to defer detailed explanation to Part 2
21 of the hearing.

22 MR. BRODSKY: I believe it's appropriate to
23 have her answer with "if she knows," at this point.

24 CO-HEARING OFFICER DODUC: That is correct.

25 MR. BRODSKY: Okay.

1 CO-HEARING OFFICER DODUC: She may answer to
2 the extent that she's able to in Part 1 in her role
3 right now, providing a broad project overview.

4 MR. BRODSKY: All right. So from what you
5 know of the process -- you've been with it four or five
6 years -- and within your scope of expertise, has there
7 been ample time to have fleshed out the adaptive
8 management program and completed it by now?

9 WITNESS PIERRE: The people that would need to
10 be focused on this are now focused on it. And that's
11 how the workload has been managed. And I think that's
12 the way I want to answer that question.

13 MR. BRODSKY: Okay. Well, let me read you the
14 second paragraph on Page 6.

15 "The protracted development of the BDCP and
16 its successors have has provided ample time for the
17 adaptive management plan to be fleshed out. The
18 current draft does little more than promise that
19 collaborations will occur and that adaptive management
20 will be implemented. This level of assurance contrasts
21 with the central role of adaptive management in the
22 Delta Plan and with the need to manage adaptively as
23 climate continues to change and new contingencies
24 arise."

25 CO-HEARING OFFICER DODUC: And what is your

1 question, Mr. Brodsky?

2 MR. BRODSKY: Would you agree that the Delta
3 Independent Science Board felt that you were not giving
4 adequate attention to adaptive management in this
5 report.

6 WITNESS PIERRE: That's precisely the feedback
7 we we're responding to in the development of the full
8 plan which we will discuss in Part 2.

9 MR. BRODSKY: All right. And I'd like to turn
10 now if I could -- thank you very much -- turn now to
11 the Draft Biological Assessment.

12 If we can get that up on the screen.

13 Just as a reminder, that's Exhibit A to the
14 Brodsky declaration of July 19th, 2016.

15 And Page 3-194, and that section there,
16 "Memorandum of Agreement," I'd like to read to you and
17 get your comment.

18 "Commitments to adaptive management and
19 collaborative science will be secured through an MOA
20 between Reclamation, DWR, public water agencies, NMFS,
21 U.S. Fish and Wildlife Service, and California
22 Department of Fish and Wildlife. Details of the
23 collaborative science and adaptive management process
24 including adaptive management decision making, an
25 organizational structure for adaptive management

1 decisions, and funding for collaborative science will
2 be developed through the MOA as needed. The MOA will
3 incorporate the concepts described in this document as
4 well as the attached adaptive management process for
5 Delta operations key concepts."

6 So isn't it true at this point that what you
7 have, basically, is a promise to develop an adaptive
8 management plan, or perhaps we could call it a work
9 plan to get to an adaptive management plan?

10 WITNESS PIERRE: This is a draft from January,
11 so this is already seven months old. We are actively
12 working on a robust adaptive management program which
13 will be part of Part 2.

14 MR. BRODSKY: Okay. Let's turn to the Aquatic
15 Science Peer Review that you mentioned earlier. And
16 that is going to be...

17 For the projectionist, that's going to be
18 Exhibit C to that same declaration that you have on the
19 board.

20 MS. McCUE: Do you have a page number?

21 MR. BRODSKY: Page 57.

22 MR. BERLINER: Mr. Brodsky, are there several
23 pages here?

24 MR. BRODSKY: In the --

25 MR. BERLINER: As to what you're going to be

1 referring to? It would just be good for the witness to
2 have the pages in front of her.

3 MR. BRODSKY: Yeah, I'm going to refer to
4 Pages 57 and 58.

5 You know, I'm sorry I didn't have more copies
6 here. I didn't think we were going to get this far
7 today at all.

8 MS. McCUE: Is there a page number at the
9 bottom, like 3 dash something?

10 MR. BRODSKY: I don't think we're on the right
11 document. We want to get to Exhibit C of the Brodsky
12 declaration. So I think you're still on Exhibit A
13 there.

14 I'll prepare a flash drive for future
15 cross-examination. I apologize for the skipping around
16 a little bit.

17 MR. BRODSKY: And if we could go to Page 57.

18 So this is the Aquatic Science Peer Review
19 panel that we talked about earlier and that you have
20 good confidence in; is that correct?

21 WITNESS PIERRE: I'm familiar with it.

22 MR. BRODSKY: Okay. Do you feel that these
23 people on the panel that's listed on Page 1 --
24 Simenstad, Resources [sic] Professor, University of
25 Washington; Van Sickle, Ph.D., Environmental

1 Statistics; Nancy Monsen, Ph.D., Civil/Environmental
2 Engineering; Ernst Peebles, Professor of Marine
3 Science; Gregory T. Ruggerone, Ph.D., Natural
4 Resources; and Hannah Gosnell -- do you have any -- do
5 you believe these people are qualified to comment on
6 your adaptive management plan?

7 WITNESS PIERRE: Yes, I thought they did a
8 good job.

9 MR. BRODSKY: Okay. So at Page 57, it says,
10 "What is unclear is exactly how AM will be structured,
11 how it will be funded, and how it will be carried out."

12 So as of this peer review, what did you say
13 the date of this was?

14 WITNESS PIERRE: I believe this was March of
15 this year.

16 MR. BRODSKY: Okay. So as of March. We're in
17 July now.

18 WITNESS PIERRE: Can you point me to the exact
19 line that you're reading, please?

20 MR. BRODSKY: So it would be -- let's see.

21 I need you to go up a little bit, if the
22 projectionist could. There.

23 So it's the last sentence of that paragraph
24 that begins, "Based on the BA, what is unclear..."

25 WITNESS PIERRE: Okay.

1 MR. BERLINER: Just for the record, I want to
2 renew my objection on the hearsay issue. I'll just
3 have it as a continuing objection.

4 CO-HEARING OFFICER DODUC: Thank you,
5 Mr. Berliner.

6 WITNESS PIERRE: So was there a question?

7 MR. BRODSKY: So as of March, the Aquatic
8 Science Peer Review concluded it was unclear how it
9 would be structured, how it would be funded, and how it
10 would be carried out. That seems like it's not very
11 well developed at that point, wouldn't you agree?

12 WITNESS PIERRE: I would agree. I think it's
13 important to also note that this review is what was on
14 what they're calling the analytical approach to
15 developing the biological opinion. And that's
16 important because the adaptive management program has
17 always been intended to be attached to the biological
18 opinion.

19 So when that panel reviewed the Draft
20 Biological Assessment, they were reviewing it as a
21 forward look into what the biological opinion might
22 look like and providing feedback so that materials,
23 including other analyses and the adaptive management
24 program, could be developed as part of the draft
25 biological opinion, which the same panel will be

1 reviewing as part of Phase 2 later this year.

2 MR. BRODSKY: Well, my -- you're going -- CWF
3 is going to have one adaptive management program for
4 operations, for the BiOps, for satisfying the Board's
5 requirements?

6 WITNESS PIERRE: That's right.

7 MR. BRODSKY: That's correct?

8 WITNESS PIERRE: Mm-hmm.

9 MR. BRODSKY: Okay. All right. So I'd like
10 to refer your attention now to Page 58.

11 And up a little bit.

12 No, down. I'm sorry. Down below the bullet
13 points. Yeah, that paragraph that begins, "The BA."

14 "The BA continually refers to Section 3.4.7,
15 collaborative science and adaptive management program
16 and AM generally but is lacking in details about
17 monitoring plans and triggers. For example, Sections
18 3.1.5 and 3.3.3 of the BA describe the real-time
19 decision process aimed at responding to the potential
20 for adverse conditions as they arise, but there is no
21 information to judge how effective this process would
22 be under the PA. The BA does not attempt to consider
23 the effects of real-time management, instead deferring
24 such assessment to the future, saying that, quote, 'The
25 operating criteria will be periodically evaluated and

1 possibly modified throughout the adaptive management
2 process,' end quote. We recommend that real-time
3 operational decision-making process be linked more
4 explicitly to a formal AM program."

5 Ms. Pierre, where the panel says the BA
6 continually refers to Section 3.47 and then we go to
7 Section 3.47 and we find there's really nothing there,
8 isn't that a recurring theme that every peer reviewer
9 has found in the -- in CWF's adaptive management
10 program proposals?

11 WITNESS PIERRE: As I stated, we are taking it
12 seriously, and we're developing this. And this is the
13 type of feedback we are responding to in developing the
14 full program that will be presented as Part 2.

15 CO-HEARING OFFICER DODUC: Thank you, Mr.
16 Brodsky. I am now finding this line of questioning
17 repetitive. You have made your point. Ms. Pierre has
18 addressed it many times and recognizing that they're
19 working on improving this for Phase 2 -- Part 2 of this
20 hearing.

21 So I would ask you to move on to your next
22 line of questioning and revisit this in Part 2.

23 MR. BRODSKY: Very good.

24 Ms. Pierre, do you know when -- this draft BA
25 is a precursor to the biological opinion. Do you know

1 when you expect the biological opinion to be issued?

2 WITNESS PIERRE: By the end of this year.

3 MR. BRODSKY: By the end of this year. Thank
4 you.

5 Okay. I'd like to turn to a different topic,
6 and that is the project description.

7 Could we have that famous slide up there
8 again? I think it was Page 10 of -- was it DWR-1? I
9 can't remember. That's the one. We'll just refer to
10 that as the famous slide from now on.

11 So earlier today, I believe it was from --
12 Mr. O'Brien was questioning you, and this is not an
13 exact quote; it went buy pretty fast. So I want to ask
14 you your opinion about it.

15 You said something to the effect, and correct
16 me if I'm wrong, that the boundary analysis, Boundary 1
17 and Boundary 2, was to allow legal users of water to
18 see these adjustments can be made without repeating
19 this process over and over again.

20 Did I get the gist of that right?

21 WITNESS PIERRE: Yes, generally.

22 MR. BRODSKY: Generally. So you would expect
23 legal users of water -- I mean the burden of proof is
24 on DWR to show no injuries to legal users of water.
25 But you would expect legal users of water, if they knew

1 about it, to point out any injury that occurred
2 anywhere between Boundary 1 and Boundary 2 in these
3 proceedings, right?

4 WITNESS PIERRE: Yes.

5 MR. BRODSKY: And then I'd like to --

6 If we could have up on the screen, the May
7 16th, 2016 letter from DWR which is titled "Status
8 Report Regarding Hearings on California WaterFix/Water
9 Rights Change Petition."

10 MR. BAKER: Mr. Brodsky, could you
11 characterize the nature of that letter to help us
12 located it a little better?

13 MR. BRODSKY: It's May 16th, 2016. And the
14 title is, "Re Status Report Regarding Hearings on
15 California WaterFix/Water Rights Change Petition."
16 It's from DWR to Hearing Chair Doduc and Marcus. I
17 have a hard copy. Should I show that to you, or --

18 CO-HEARING OFFICER DODUC: If this is going to
19 take a while, I'll say let's stop the clock, take a
20 five-minute break.

21 (Recess taken)

22 CO-HEARING OFFICER DODUC: We are back on the
23 record.

24 Before Mr. Brodsky continues, just a couple of
25 housekeeping items --actually, timekeeping items.

1 Mr. Jackson?

2 MR. JACKSON: Yes?

3 CO-HEARING OFFICER DODUC: Oh, there you are. you
4 are next for Group 31. Do you have a time estimate?

5 MR. JACKSON: An hour.

6 CO-HEARING OFFICER DODUC: An hour.

7 Mr. Brodsky, do you anticipate using the
8 remaining 17 minutes?

9 MR. BRODSKY: No, I hope not to be more than
10 five minutes. I'll try for three.

11 CO-HEARING OFFICER DODUC: Okay.

12 WITNESS PIERRE: I'm give him part of that
13 hour if he needs more time.

14 CO-HEARING OFFICER DODUC: So generous,
15 Mr. Jackson. Thank you.

16 For our planning purposes then, if Mr. Jackson
17 is going to keep to an hour and Mr. Brodsky is going to
18 finish in about five minutes, then are there any
19 objections to continuing with Mr. Jackson's
20 cross-examination today? Everyone can stay until about
21 5:30 at the latest?

22 Mr. JACKSON: My cross-examination --

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

25 Mr. BAKER: 5:00 o'clock.

1 CO-HEARING OFFICER DODUC: 5:00 o'clock. I'm
2 sorry. That's right.

3 Mr. JACKSON: I was saying, my
4 cross-examination will not be so blinding that anybody
5 even has to stay.

6 CO-HEARING OFFICER DODUC: No, actually, we do
7 have trouble with the audio-video and webcasting, which
8 will shut down at 5:00 so in that case, then, what we
9 will do is -- unless Restore the Delta -- Mr. Stroshane
10 will your cross-examination take half an hour or less?

11 MR. STROSHANE: Yes.

12 CO-HEARING OFFICER DODUC: Okay. Let's see
13 how that goes. My aim is to finish by 5:00 o'clock
14 simply because the audio shuts off at 5:00 o'clock.

15 MR. STROSHANE: Alternatively --

16 CO-HEARING OFFICER DODUC: You need to come up
17 and speak into the microphone.

18 Or does everyone want to leave early on a
19 Friday afternoon.

20 MR. STROSHANE: Yes, I was going to say, why
21 don't we leave early on a Friday afternoon?

22 CO-HEARING OFFICER DODUC: All right. Any
23 objections to leaving early on a Friday afternoon --
24 under threat of pain and torture?

25 Seeing none, what we will do then is finish up

1 with Mr. Brodsky's cross-examination, and then we will
2 adjourn early.

3 With that, Mr. Brodsky.

4 MR. BRODSKY: I'd better go ahead.

5 CO-HEARING OFFICER DODUC: Pressure's on you
6 now.

7 MR. BRODSKY: Oh, okay. Thank you.

8 You want to start the clock?

9 So let me just note one procedural point that
10 perhaps should have been raised earlier. And also let
11 me thank Ms. Pierre. I know it's been a long day, and
12 you're doing your best and very well to answer all the
13 questions.

14 I did see Ms. Pierre conferring with her
15 lawyers in the hallway during the break. And typically
16 in a court proceeding, witnesses are not allowed to
17 confer with their attorneys during cross-examination.
18 And I think that that would be the best procedure here
19 going forward.

20 I'll submit a short request for a ruling on
21 that to the Board.

22 CO-HEARING OFFICER DODUC: Mr. Berliner or
23 Mr. Mizell?

24 MR. BERLINER: I have never had a court stop
25 me from talking to my witness in the hallway or

1 anywhere else during a break. And I've been doing this
2 at least as long as Mr. Brodsky.

3 CO-HEARING OFFICER DODUC: We will take that
4 under advisement, and we will inform you next Thursday
5 I believe is when we reconvene on this matter.

6 MR. BRODSKY: I give you a short written
7 request with a citation to authorities for that
8 proposition.

9 CO-HEARING OFFICER DODUC: Thank you, Mr.
10 Brodsky.

11 All right. With that, please continue with
12 your cross-exam.

13 Mr. BRODSKY: So we've got the May 16, 2016
14 letter. And if we could go to Page 2, and the final
15 paragraph, it says, "Finally, as part of testimony to
16 be submitted on May 31st, petitioners will present
17 updated modeling relating to the proposed project and
18 modeling on an adaptive operational range for the
19 Board's consideration of potential injury to other
20 legal users of water."

21 And then I'd like to, with that in mind, go
22 back to Page 10 of SWRCB-1.

23 So isn't it true, Ms. Pierre, that the project
24 description as far as legal users of water are
25 concerned, is the initial operating criteria as it's

1 adaptively managed between Boundary 1 and Boundary 2?

2 WITNESS PIERRE: Yes.

3 MR. BRODSKY: Thank you. No further
4 questions.

5 CO-HEARING OFFICER DODUC: Thank you.

6 With that, let me clarify something.

7 Mr. Brodsky, you will submit something in
8 writing with respect to your request regarding
9 conferring with counsel?

10 MR. BRODSKY: Yes.

11 CO-HEARING OFFICER DODUC: You'll do so by
12 noon on Monday.

13 MR. BRODSKY: Yes, ma'am.

14 CO-HEARING OFFICER DODUC: Petitioners and
15 anyone else who wish to comment that will have noon --
16 until Tuesday to do so, and we will issue a ruling on
17 Thursday.

18 MR. BRODSKY: And that will be only with
19 regard to on cross-examination, not -- on direct,
20 attorneys confer all the time.

21 CO-HEARING OFFICER DODUC: I will leave you to
22 present your request however you wish Mr. Brodsky.
23 With that, I want to thank everyone for the very
24 efficient and professional conduct today. Thank you to
25 also the witness for your cooperation during this

1 hearing.

2 We will adjourn early.

3 Mr. Lilly? You're preventing us from
4 adjourning early.

5 MR. LILLY: Sorry. I'm not going to be a
6 party-pooper, but I think it would be good for all of
7 us for preparation purposes to have an idea of what the
8 plan is for Wednesday and Thursday and Friday of next
9 week, and specifically if we can get any handle -- if
10 we finish cross-ex on Panel 1, is the Board going to go
11 immediately into direct testimony and cross-ex for
12 Panel 2, or is there going to be some other process?
13 Just to help us all with planning purposes.

14 CO-HEARING OFFICER DODUC: My expectation --
15 I'm sorry -- is after a completion of
16 cross-examination, we will go through redirect if any,
17 and recross, and then we will move to panel 2.

18 MR. LILLY: Okay. Thank you.

19 CO-HEARING OFFICER DODUC: I expect that we --
20 we will perhaps finish cross-exam on Wednesday [sic],
21 given -- I'm sorry, Thursday.

22 Given that we're on Group 31 and we only
23 have -- we have 14 groups to go through, and then any
24 redirect and recross.

25 Mr. Porgans?

1 MR. PORGANS: Yes. So when we come back next
2 Thursday, can you give me an idea where I am on that
3 list?

4 CO-HEARING OFFICER DODUC: You do not have a
5 list? There's a copy up here. You are No. 40 on the
6 list.

7 MR. PORGANS: Thank you.

8 MR. BRODSKY: And it is Thursday not
9 Wednesday?

10 CO-HEARING OFFICER DODUC: Yes, my apologies.
11 We are reconvening on Thursday and Friday. Thank you.

12 Actually, before we -- Mr. Mizell, you had a
13 witness who would not be available until August 15th or
14 17th, I believe?

15 MR. MIZELL: 17th.

16 CO-HEARING OFFICER DODUC: 17th. Now, which
17 panel is he on?

18 MR. MIZELL: He is one of the engineering
19 cross-examination witnesses for the panel.

20 But the direct testimony and much of the
21 cross-examination will take place in his absence. We
22 can always bring him in for additional questions if
23 needed.

24 CO-HEARING OFFICER DODUC: All right. Thank
25 you.

1 Any other questions?

2 If not, I wish you all a good weekend, and I
3 will see you on Thursday.

4 (Whereupon, the proceedings recessed
5 at 4:18 p.m.)

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1 STATE OF CALIFORNIA)
2 COUNTY OF MARIN) ss.

3 I, DEBORAH FUQUA, a Certified Shorthand
4 Reporter of the State of California, do hereby certify
5 that the foregoing proceedings were reported by me, a
6 disinterested person, and thereafter transcribed under
7 my direction into typewriting and is a true and correct
8 transcription of said proceedings.

9 I further certify that I am not of counsel or
10 attorney for either or any of the parties in the
11 foregoing proceeding and caption named, nor in any way
12 interested in the outcome of the cause named in said
13 caption.

14 Dated the 5th day of August, 2016.

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DEBORAH FUQUA
CSR NO. 12948