

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Action
ENF01951; ENF01949

WEST SIDE IRRIGATION
DISTRICT CEASE AND DESIST
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION
DISTRICT ADMINISTRATIVE
CIVIL LIABILITY HEARING.

VIDEOTAPED DEPOSITION OF THOMAS HOWARD

VOLUME II

November 25, 2015

Reported by: THRESHA SPENCER, CSR No. 11788

kathryndavis & associates
deposition reporting

WSID CDO/BBID ACL
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Eric Allen

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DEPOSITION OF THOMAS HOWARD, VOLUME II

1
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12
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16
17
18
19
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22
23
24
25

I N D E X O F E X A M I N A T I O N

	Page
Examination by Ms. Spaletta.....	127
Examination by Mr. O'Laughlin.....	164
Examination by Ms. Zolezzi.....	186
Further Examination by Mr. Kelly.....	190
Further Examination by Mr. O'Laughlin.....	195
Examination by Ms. McGinnis.....	200

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E X H I B I T S

Deposition Exhibit No.		Page
103	Notice of Public Workshop, September 24, 2014; four pages.....	125
104	Map - Delta Tide Levels; one page.....	125
105	Water Code Section 11460; one page.....	158
106	Delta Protection Act; one page.....	159
107	Excerpts from an April 6, 2015, Order Modifying an Order that Approved in Part and Denied in Part a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives In Response to Drought Conditions; seven pages.....	165

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
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24
25

E X H I B I T S (Continued)

Deposition Exhibit No.		Page
108	Attachment #2 - District Forecast of Operations dated 4/8/2015, based on a DWR 4/1 forecast of unimpaired flow; one page.....	169
109	Email chain dated March 31, 2015, to Tim O'Laughlin from Ronald Milligan.....	170
110	Email chain dated May 18, 2015 to Steve Knell from Tim O'Laughlin, with attached New Melones Operations Plan, May 2015; five pages.....	171
111	Draft Plan for Stanislaus River Operations to Protect Fish and Wildlife..	172

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1 BE IT REMEMBERED, that on Wednesday, November 25,
2 2015, commencing at the hour of 8:05 a.m. thereof, at the
3 Law Offices of Somach, Simmons & Dunn, 500 Capitol Mall,
4 Suite 1000, Sacramento, California, before me, THRESHA
5 SPENCER, a Certified Shorthand Reporter in the State of
6 California, duly authorized to administer oaths and
7 affirmations, there personally appeared

8 THOMAS HOWARD,

9 called as witness herein, who, having been duly sworn, was
10 thereupon examined and interrogated as hereinafter set
11 forth.

12 --o0o--

13 (Whereupon, Exhibit Nos. 103-104
14 were marked for identification.)

15 THE VIDEOGRAPHER: Good morning. My name is Eric
16 Allen. I will be videotaping this proceeding on behalf of
17 Sacramento Legal Video Center, LLC, located at 3550 Watt
18 Avenue, Suite 140, in Sacramento, California.

19 The date is November 25th, 2015, and the time on the
20 video monitor is 8:05 a.m. Our location is Somach, Simmons
21 & Dunn, 500 Capitol Mall, Suite 1000, Sacramento,
22 California.

23 We are here in the matter of In Re: Alleged
24 Unauthorized Diversion of Water by Byron-Bethany Irrigation
25 District.

1 This is Volume II in the continued -- continued
2 deposition of Thomas Howard. The noticing attorney is
3 Jennifer Spaletta. The court reporter is Thresha Spencer of
4 Kathryn Davis & Associates.

5 This is a single-track recording. Overlapping
6 voices cannot be separated. Private discussions on the
7 record will also be recorded.

8 Would counsel please identify yourselves, your
9 firms, and those you represent.

10 MS. SPALETTA: This is Jennifer Spaletta. I
11 represent Central Delta Water Agency, and we are sitting
12 around a round table, so we'll go ahead and have additional
13 introductions, starting with counsel for the witness.

14 MR. HILDRETH: Russell Hildreth, counsel for the
15 witness.

16 MS. AUE: Marianna Aue, State Water Resources
17 Control Board, Office of Chief Counsel.

18 MR. WEAVER: I'm Nathan Weaver, State Water
19 Resources Control Board, Office of Chief Counsel.

20 MR. TAURIAINEN: Andrew Tauriainen, Office of
21 Enforcement, for the Prosecution Team.

22 MR. KELLY: Daniel Kelly, Somach, Simmons & Dunn,
23 for Byron-Bethany Irrigation District.

24 MS. ZOLEZZI: Jeanne Zolezzi, General Counsel for
25 the West Side, Patterson, and Banta-Carbona Irrigation

1 Districts.

2 MR. GREEN: David Green with Spaletta Law,
3 representing Central Delta Water Agency.

4 MS. MCGINNIS: Robin McGinnis, counsel for
5 California Department of Water Resources.

6 MS. AKROYD: Rebecca Akroyd, Kronick Moskowitz, for
7 Westlands Water District.

8 MR. O'LAUGHLIN: Tim O'Laughlin, San Joaquin
9 Tributaries Authority.

10 (Whereupon, the witness was sworn.)

11 THE WITNESS: Thomas Howard, Executive Director,
12 State Water Resources Control Board.

13 EXAMINATION BY MS. SPALETTA

14 Q BY MS. SPALETTA: Good morning, Mr. Howard. Thank
15 you for coming back for the continuation of your deposition,
16 particularly on this day before a holiday, we do appreciate
17 it. We're going to go ahead and continue with my
18 questioning; Mr. Kelly questioned you before.

19 The first thing I'd like to ask you about are the
20 communications that you had with any representatives of the
21 Department of Water Resources regarding curtailments.

22 What communications did you have with the Department
23 of Water Resources regarding curtailments in 2015?

24 A I don't recall any specific conversations with the
25 Department regarding curtailments in 2015.

1 Q Who was your normal point of contact with the
2 Department of Water Resources?

3 A I didn't -- I wouldn't say I had a normal point of
4 contact, but I rarely talked to anyone other than perhaps
5 Mark and Bill Croyle.

6 Q And in what context did you talk --

7 A Mark Cowin, that is.

8 Q In what context did you talk to Mark Cowin and Bill
9 Croyle?

10 A Well, I see them at the Drought Task Force meetings,
11 and I occasionally have meetings regarding various issues
12 with Mark.

13 Bill I usually see at the Drought Task Force
14 meetings, which reminds me with respect to your previous
15 question. I did discuss that the timing of curtailments at
16 the Drought Task Force meetings that it was coming up or,
17 you know, the hydrology looked like we would be curtailing a
18 certain number of parties, and the Department of Water
19 Resources was at those meetings.

20 Q How frequently did the Drought Task Force meetings
21 occur?

22 A Once a week during part of the year, and then once
23 every two weeks during the other parts of the year.

24 Q And who attended those meetings?

25 A Well, there were a lot of people there from various

1 parts of the administration, most of them I didn't know.
2 Wade Crowfoot usually was chairing the meeting and Cal OES
3 was a representative of the Department of Water Resources,
4 the State Water Board, and plus about every other state
5 agency had a director or deputy director there. There were
6 often board people at these meetings.

7 Q Were there any people at these meetings who
8 represented an entity or a stakeholder other than a state
9 agency?

10 A No. I think it was exclusively for state agencies;
11 though, occasionally, I think there were some guests that
12 were invited after the regular meeting to do a presentation,
13 like PPIC report or something like that, when they would
14 come and talk for 15 minutes or so, but they wouldn't
15 participate in the meeting itself.

16 Q Did Mr. Cowin indicate to you during any of the
17 times that you met with him that he wanted the State Board
18 to undertake curtailments in 2015?

19 A I don't have any recollection of that.

20 Q Do you have any recollection at all of what you and
21 Mr. Cowin spoke about?

22 A Well, at those meetings, I don't believe we had any
23 real, you know, dialogue. These were meetings in which
24 people reported out what was, you know, happening in their
25 agency that was important.

1 Q You also said that you had --

2 A That was drought-related.

3 Q I'm sorry to cut you off.

4 A Sure. I'm sorry.

5 Q Is there anything else you wanted to add?

6 A No.

7 Q You also said you had other meetings with Mr. Cowin?

8 A Yeah. You know, I've had meetings off and on with

9 Mr. Cowin, yes.

10 Q Okay. And during those other meetings, did you and

11 Mr. Cowin discuss curtailments?

12 A Not to my recollection.

13 Q You don't remember that?

14 A No.

15 Q How about meetings with representatives of the

16 Bureau of Reclamation? Did you have any meetings with

17 representatives of the Bureau to discuss curtailments in

18 2015?

19 A Not to my recollection.

20 Q How about any meetings with representatives of

21 Westlands Water District?

22 A Not to my recollection.

23 Q Any meetings with representatives of the State Water

24 Contractors?

25 A Well, there was a meeting that I had where they

1 brought their complaint in -- or at least they hadn't filed
2 their complaint yet, and they -- regarding unlawful
3 diversion of water, Delta diverters, and they ran through
4 some of the plots that they -- that I later saw was in their
5 complaint.

6 Q And they filed their complaint in June of 2015, so
7 this meeting would have occurred before then?

8 A I think a week or so before; it was shortly before
9 they intended to file.

10 Q Did you discuss potential curtailments at that
11 meeting?

12 A Not to my recollection.

13 Q And I've asked you about meetings. What about
14 telephone calls? Have you had any telephone calls in 2015
15 with representatives of DWR regarding curtailments?

16 A Not to my recollection.

17 Q And what about any of the other entities that I just
18 asked you about regarding meetings? Bureau of Reclamation,
19 Westlands Water District, or State Water Contractors?

20 A Not to my recollection.

21 Q Is there anything that would refresh your memory?

22 A I wouldn't know how to answer that. I suppose if I
23 saw some communication that said I had had such a meeting,
24 but I -- I don't know.

25 Q Do you keep a log of the people you meet with or

1 your telephone calls?

2 A I have a calendar, and it will -- it identifies who
3 I meet with. I've never looked back at it, so I don't know
4 how long it is kept active. And I don't keep any record of
5 telephone calls, no.

6 Q Okay. We marked two exhibits before we started
7 today. The first one is Exhibit 103, which is a notice of
8 public workshop, and the second one is Exhibit 104, which is
9 a map of the Delta channels.

10 Have you had a chance to look at those exhibits?

11 A Not 104.

12 Q Okay.

13 A I was looking at 103 earlier.

14 Q Well, we're actually going to start with 104. So if
15 you could just take a minute to look at Exhibit 104, which I
16 will represent to you is a copy of page 20 out of the DWR
17 Sacramento-San Joaquin Delta Atlas.

18 A (Witness reviewing.) All right.

19 Q Okay. Thank you. So we have a copy of the Delta
20 Atlas, and do you understand Exhibit 104 to depict the Delta
21 and the various water channels of the Delta?

22 A Yes.

23 Q And do you see at the bottom, Clifton Court Forebay?

24 A Yes.

25 Q And do you understand that BBID's point of diversion

1 is a little bit north of Clifton Court Forebay?

2 A Yes.

3 Q Or in the vicinity of Clifton Court Forebay -- oh,
4 actually, Mr. Kelly is correcting me. It is slightly below
5 Clifton Court Forebay.

6 A Okay.

7 Q Do you understand that?

8 A Yes.

9 Q And then do you understand West Side Irrigation
10 District's point of diversion to be along Old River, which
11 is also near the bottom of the map?

12 A I don't know where West Side's diversion point is.

13 Q You don't?

14 A No.

15 Q Do you understand it to be on a channel of the
16 Delta?

17 A My understanding is it was within the legal
18 boundaries of the Delta.

19 Q Okay. Within the legal boundaries of the Delta,
20 what are the different sources of water present in the
21 channels?

22 A That's a difficult question since I imagine the
23 composition is different at different locations at the
24 Delta -- in the Delta.

25 On the Sacramento side, in the northern part, I

1 would assume it's mostly, if not exclusively, Sacramento
2 River water. Similarly, on the southern part on the San
3 Joaquin and on the east side tributaries.

4 As you move farther westward, I assume that there's
5 a combination of saltwater and fresh water, probably a
6 gradient of higher quantities of saltwater as you move
7 farther west.

8 Q Any other sources of water in these channels?

9 A No.

10 Q What about return flows from the use of groundwater?

11 A Well, yeah, but I assume that they originated from
12 either the Sacramento Basin or the San Joaquin Basin or from
13 the ocean.

14 Q And then another source would also be stored water
15 releases, right, that are not natural flow, as we've
16 discussed previously, correct?

17 A Yeah. Again, I only characterize them as fresh
18 waters flowing down the Sacramento, so that includes various
19 tributaries, stored water, abandoned water, yes.

20 Q Now, I believe we established during the first part
21 of your deposition that the water availability analysis that
22 your staff conducted only looked at full natural flow,
23 correct?

24 A Well, it looked at demand in the system as well and
25 did look at sources of supply, yes.

1 Q Well, which sources of supply did the water
2 availability analysis include?

3 A Well, I know that there were -- that they looked at
4 gages on upper -- on tributaries, which I would characterize
5 more as full natural flow, but I was under the understanding
6 that they were also looking at some of the gages at
7 downstream locations, which may have information other than
8 full natural flow in it.

9 Q Okay. Do you understand whether or not your staff
10 considered the combination of saltwater and fresh water in
11 the Delta?

12 A I don't believe that they counted saltwater, but --

13 Q What about the mixture?

14 A Well, I believe they were looking at upstream -- at
15 sources upstream of the Delta.

16 Q Why didn't they include the mixture of saltwater and
17 fresh water actually present in the Delta channels?

18 MR. HILDRETH: Calls for speculation.

19 MS. AUE: You can still answer.

20 THE WITNESS: Yeah. They were looking at sources of
21 supply flowing into the Delta.

22 Q BY MS. SPALETTA: But you would agree with me that
23 there is actually another source of supply in the Delta
24 channels that's a mixture of fresh water that previously
25 flowed into the Delta and saltwater, correct?

1 A There is water in Delta channels, yes.

2 Q So my question is why didn't your staff include the
3 water that's actually in the Delta channels that makes up
4 this mixture in the supply side of the water availability
5 analysis?

6 MR. HILDRETH: Calls for speculation. Lack of
7 foundation.

8 THE WITNESS: Well, again, it wasn't involved in the
9 methodology that we were using to determine water
10 availability.

11 Q BY MS. SPALETTA: I understand you weren't involved
12 in the methodology --

13 A No, I didn't say I wasn't involved. I said the
14 calculation they did, did not involve -- was used -- was a
15 different methodology than that.

16 Q So I understand that it was different, that it did
17 not include this mixture of water that's actually present in
18 the Delta channels. My question, though, is why not? Who
19 made the decision not to include it and what was the
20 rationale for that decision?

21 MR. HILDRETH: Calls for speculation.

22 THE WITNESS: I have no recollection of any
23 discussion in that regard.

24 Q BY MS. SPALETTA: Okay. So then let's look at
25 Exhibit 103. Exhibit 103 is the Notice of Public Workshop

1 for Central and Southern Delta Water Availability and Use
2 which was scheduled for Wednesday, September 24th, 2014, by
3 the State Water Resources Control Board.

4 Do you remember this workshop?

5 A Only vaguely, I must admit.

6 Q Whose idea was it to have this workshop?

7 A I don't recall.

8 Q Do these workshops normally get set up with your
9 input or does someone else just decide that they want to
10 have a workshop?

11 A I'm sure I had some input into the question.

12 Q So the purpose of this workshop was to receive
13 comments and discuss the process the State Water Board
14 should use to address recent allegations and legal theories
15 regarding the sources and quantity of water supplies
16 available for diversion and use within the central and
17 southern Delta.

18 Do you recall that as being the purpose?

19 A I looked at the notice, and that is what it says.

20 Q Do you have an understanding as to why it was
21 necessary for the State Board to hold this workshop?

22 A Well, it says in the notice that it was based on the
23 State Water Board receiving a joint letter signed by
24 Department of Water Resources and U.S. Bureau of Reclamation
25 claiming unlawful diversions of stored project water by

1 riparian and pre-1914 water users within central and
2 southern Delta. So that we had a complaint, I guess I
3 characterize it as, and the Board decided specific -- most
4 specifically, Felicia, would have decided, since she's the
5 one who sets the Board's agenda to hold a workshop.

6 Q So you've characterized the letter from the projects
7 as a complaint. Did the State Board officially make that
8 letter of complaint and seek responses to the complaint?

9 A Well, it's a claim of unlawful diversions, according
10 to the notice.

11 Q So did the State Board characterize the letter as a
12 formal complaint and seek responses?

13 A I don't think that -- I don't know whether they
14 characterized it as a formal complaint.

15 Q Now, my understanding is that this workshop was not
16 designed to actually resolve the issues raised by the
17 project's letter, but it was simply to obtain comments
18 related to the best process to resolve those issues; is that
19 your understanding as well?

20 A Yes.

21 Q And the State Board did, in fact, receive various
22 comments from different stakeholders, correct?

23 A Yes.

24 Q So what happened next at the State Board? Once they
25 had this workshop and they received the comments from the

1 stakeholders about the best process, what did the State
2 Board do?

3 A Regarding follow-up from the workshop, I don't
4 recall.

5 Q You don't recall?

6 A No.

7 Q You don't recall anything happening after the
8 workshop?

9 A I think we sent out information request orders to
10 get the amount of water that was being diverted by Delta
11 diverters. I mean, that's my recollection.

12 Q But wasn't the issue raised in the project's
13 complaint that people in the Delta had no right to divert
14 the bay water that was mixing in the Delta channels? I
15 mean, wasn't that the gist of the complaint?

16 A I thought it was more they had no right to divert
17 stored water from project reservoirs.

18 Q So you didn't understand one of the issues to be
19 whether or not people in the Delta had a right to divert
20 this mixture of fresh and saltwater that's present in the
21 Delta channels?

22 A I must have misunderstood the question. I thought
23 you were asking why we held the workshop, which was what
24 initiated it again. And that, again, was the claim there
25 was somebody taking stored water, but the discussions

1 centered -- was -- involved broader questions of water
2 availability within the Delta.

3 Q So I think you and I are on the same page here that
4 there are really kind of two questions. One is the ability
5 of people in the Delta to divert stored water moving through
6 the Delta, and then there's also the separate question,
7 which is taking stored water out of the equation, the
8 ability of people in the Delta to divert this mixture of
9 fresh and saltwater that moves around in the Delta channels.

10 Do you agree with that?

11 A Could you repeat the question?

12 Q I'll have the court reporter read it back, please.

13 (Whereupon, the record was read.)

14 THE WITNESS: I don't know that I agree that there's
15 a question as to whether or not you can take out stored
16 water because you can't take out stored water; there will be
17 stored water in the Delta.

18 So the question is whether or not that stored water,
19 it requires some level of protection.

20 Q BY MS. SPALETTA: And what about the second part of
21 my question?

22 A Well, again, I don't know -- I've never thought of
23 it in that context because, as I said, there is stored water
24 in the Delta at certain times. And the question that I've
25 always been -- or that I've viewed it as is who has the

1 right to divert that stored water.

2 Q So let's look at BBID's water right for a minute,
3 and it has a priority date of 1914.

4 Do you understand that?

5 A I can't swear to that, but it sounds about right,
6 yes.

7 Q And you agree with me that that priority date is
8 quite a bit before the projects even came into existence?

9 A Yes.

10 Q So BBID had this water right to divert from a
11 channel of the Delta for several decades before we had the
12 issue of stored water being present in the Delta channels,
13 right?

14 MR. HILDRETH: Calls for a legal conclusion.

15 THE WITNESS: I think there was probably stored
16 water. There were storage reservoirs prior to 1914, I
17 understand, within the Central Valley.

18 Q BY MS. SPALETTA: But there wasn't the State Water
19 Project or Central Valley Project stored water?

20 A That is true.

21 Q So what I'm trying to understand is you think that
22 the water availability analysis for BBID's water right
23 changed from the time that they diverted pre-CVP and State
24 Water Project or has it been the same?

25 MR. HILDRETH: Calls for a legal conclusion.

1 THE WITNESS: Could you repeat the question?

2 (Whereupon, the record was read.)

3 THE WITNESS: I don't know the answer to that
4 question.

5 Q BY MS. SPALETTA: It wasn't a very good question, so
6 I'm going to ask a different one.

7 You've just described to me the issue raised in this
8 workshop as being centered on the issue of stored water
9 moving through the Delta, but what I'm trying to understand
10 is the second issue, which is the fact that there's this
11 mixture of fresh and saltwater in the Delta channels
12 regardless of whether you have the projects operating.

13 So since you were the one who issued the
14 curtailments, I'm trying to understand whether a curtailment
15 was based solely on the desire to protect the stored water
16 moving through the Delta during 2015 or whether the
17 curtailment was based on your view that entities like BBID
18 with a pre-1914 water right to divert from the Delta channel
19 had no right to divert this mixture of salt and fresh water
20 that would have been present in the Delta channels even
21 without the projects?

22 MR. HILDRETH: Calls for a legal conclusion.

23 Q BY MS. SPALETTA: You can answer.

24 A Well, I don't know if I, you know, agree with the
25 premise of the question that the purpose -- or that what I

1 was doing was protecting stored water. If I were doing
2 that, I would have requested that the party that my staff
3 use a Term 91 type of stored water release tracking in order
4 to decide whether or not there should be curtailments in the
5 system.

6 But we didn't use that method. We looked at the
7 amount of fresh water that was moving through the system,
8 and then, you know, tried to track what demands were being
9 placed on that fresh water.

10 So, I don't know, perhaps you could reframe the
11 question since you're assuming that we were -- it sounds
12 like the assumption was we were tracking stored water in the
13 system, which we weren't.

14 Q Let me just ask a simpler question.

15 Was one of the purposes of the curtailments to
16 protect stored water?

17 A No.

18 Q It wasn't?

19 A It was a consequence; it wasn't the purpose. The
20 purpose was to implement the state's water right priority
21 system, as we understood it.

22 Q But this is the first time in history that the State
23 Board has curtailed a pre-1914 water right in the Delta,
24 correct?

25 A I don't know the answer to that. I know we've

1 curtailed pre-1914 rights, but I don't know whether any were
2 curtailed within the legal Delta. And this was the worse
3 drought in, at least as far as I'm aware, over the last four
4 years in the state's history, which is why I felt it was
5 important to try to protect the state's water right priority
6 system.

7 Q So you said that protecting stored water was a
8 "consequence of the curtailments." How was it a
9 consequence?

10 A Well, the projects are the entity that are the
11 guarantor of the system of the water quality in the Delta,
12 and so to the extent that parties take water that's in
13 excess of the natural flow in the system, the projects have
14 to release stored water in order to maintain the salinity
15 gradient in the Delta.

16 Q So by curtailing diverters in the Delta, is it your
17 understanding that the projects then had to release less
18 stored water?

19 A That is the consequence.

20 Q Was that consequence actually documented this summer
21 after the curtailments?

22 A We did not attempt to document it.

23 Q What is your understanding that that is the
24 consequence based on if it wasn't documented?

25 A Well, if parties would have taken water during that

1 period, whether upstream or not, I would have assumed
2 additional salinity intrusion into the Delta that would have
3 had to require project stored water to be released in order
4 to maintain the standards that were in effect.

5 Q So then by curtailing these prior right holders, you
6 aided the salinity of the system?

7 A No. I -- the intent was to implement the water
8 right priority system in the State of California. I think
9 that had certain consequences, but that wasn't -- we weren't
10 doing it in order to alleviate those consequences, we were
11 doing it in order to implement the water right priority
12 system.

13 Q So if that was the reason, then is it -- is my
14 understanding correct that you do not believe that either
15 West Side or BBID has a right to divert the mixture of
16 saltwater and fresh water present in the Delta channels?

17 MR. HILDRETH: Calls for a legal conclusion.

18 THE WITNESS: Yeah. I don't know the answer to that
19 question.

20 Q BY MS. SPALETTA: Did you try to answer it before
21 you approved the water availability analysis and
22 curtailments for those entities?

23 A What we did was, I think, you know, what we've
24 described here in the past, we looked at what we believe to
25 be the available fresh water supply and we looked at the

1 demands that were being imposed on that supply, and we
2 curtailed people accordingly.

3 Q So based on that answer, I think the answer to my
4 question is no, you did not consider it?

5 MR. HILDRETH: Misstates his testimony.

6 Q BY MS. SPALETTA: Is that correct?

7 A Well, it wasn't in the calculation that we did.

8 Q So it was omitted as a source of supply?

9 A Well, no, I don't think it was omitted because there
10 was fresh water being diverted, and we were looking at the
11 availability of fresh water.

12 Q The water that was at BBID's point of diversion this
13 summer, was it 100 percent fresh water?

14 MR. HILDRETH: Calls for speculation.

15 Q BY MS. SPALETTA: Or was it a mixture?

16 A Well, 100 percent is, you know, a difficult question
17 to answer. I assume that at some times of the year it might
18 have been and at other times of the year it might not have
19 been.

20 Q Well, it was a mixture, though, according to what
21 you've said already today. The water at that place, BBID's
22 point of diversion, was a mixture --

23 MR. HILDRETH: Mischaracterizes his testimony.

24 Q BY MS. SPALETTA: -- of fresh water and saltwater?

25 MR. HILDRETH: And it's vague as to time also.

1 THE WITNESS: Yeah, I -- again, some times of the
2 year, yes; some times of the year, no. I think I testified
3 that as we move farther west, you see more and more of
4 potential, you know, ocean intrusion. I don't know where
5 BBID is in relation to that specifically, so, you know, I'm
6 uncertain as to the answer.

7 Q BY MS. SPALETTA: So going back to Exhibit 103,
8 which was this public workshop where the State Board
9 received comments on the process that it should use to
10 resolve these issues. Was there any follow-up discussion
11 after the workshop about how to take the information
12 received and move forward with the process?

13 MR. HILDRETH: Asked and answered. Follow-up
14 discussion with who?

15 Q BY MS. SPALETTA: You can answer.

16 A The only follow-up I recall are the information
17 orders. I'm not sure if they were specifically the
18 consequence of this or just a subsequent development of,
19 but --

20 Q BY MS. SPALETTA: Was there any discussion with any
21 member of the Board about, "How do we get this issue
22 resolved? Do we have an enforcement proceeding, do we have
23 a public hearing, do we let a court decide it?"

24 Is there any discussion to that effect?

25 MR. HILDRETH: You can answer yes or no, but you

1 can't talk about the content.

2 MS. SPALETTA: Is that a direction not to answer the
3 question?

4 MR. HILDRETH: No. It was a direction he can answer
5 yes or no. If your next question is what did he talk about,
6 then I will instruct him not to answer.

7 MS. SPALETTA: What is the instruction based on?

8 MR. HILDRETH: Deliberative process.

9 MS. SPALETTA: So you're going to instruct him not
10 to answer the question on deliberative process grounds?

11 MR. HILDRETH: If you ask that question, yes.

12 THE WITNESS: Could I have the question again?

13 (Whereupon, the record was read.)

14 THE WITNESS: Could I ask for clarification?

15 Q BY MS. SPALETTA: Yes.

16 A Do you mean related to this workshop?

17 Q Yes.

18 A Not to my recollection, directly related to this
19 workshop, no.

20 Q What about any discussion that was not directly
21 related to the workshop?

22 A Yes.

23 Q And do you understand that that discussion would
24 have been covered by a deliberative process privilege or did
25 it occur in a different context?

1 MR. HILDRETH: Let me clarify it. If it was in a
2 public meeting, he can answer the question.

3 Q BY MS. SPALETTA: Was it in a public meeting?

4 A No.

5 Q It was not in a public meeting?

6 A No.

7 Q Who was present?

8 A I know I've discussed this issue with board members,
9 perhaps all of them separately. I'm not sure whether I've
10 talked to all of them, so I can't give you a list of which
11 ones I've discussed, but with board members.

12 Q Anyone other than board members?

13 A I'm sure my staff as well.

14 Q And were those discussions a precursor to the BBID
15 or West Side enforcement actions?

16 A Well, not directly, no.

17 Q Okay. So they were not discussions relating to the
18 pending enforcement actions?

19 A Oh, no.

20 Q So what did the discussions relate to?

21 MR. HILDRETH: Are you talking about his discussions
22 with staff?

23 Q BY MS. SPALETTA: He indicated he had discussions
24 with the various board members.

25 A And staff.

1 Q And staff. Which staff were present?

2 A I don't recall, but I imagine -- well, I won't
3 imagine. I don't recall specifically.

4 Q Well, who is the group that could have been there?

5 A Caren Trgovcich, Barbara Evoy, John O'Hagan.

6 Q Michael George?

7 A Not to my recollection.

8 Q And one or more board members would have been
9 present during these discussions as well?

10 A Not to my recollection.

11 Q So you indicated that these discussions were not
12 directly affiliated with the two pending enforcement
13 actions. What was the affiliation or the context for those
14 discussions?

15 A The question was what would be the consequence of
16 issuing curtailment notices based on this methodology that we
17 used to determine water availability on Delta diverters, in
18 general.

19 Q And what were those consequences?

20 A Well, I guess we imagined -- I imagined that it
21 would be a -- eventually, a proceeding in front of the Board
22 to determine whether or not the method that we were using
23 was the appropriate method.

24 Q Was there any discussion about the desire to have
25 that proceeding occur before actually undertaking the

1 curtailment so that the issue could be decided before
2 people's water rights were cut off?

3 A I don't recall.

4 Q Whose idea was it to cut the water rights off first
5 and have the issue decided later?

6 A I don't recall. I don't believe we -- the
7 discussions were necessarily framed in that way.

8 Q Well, how were they framed?

9 A They were framed in the context that we believed we
10 had a method that was the appropriate way to determine water
11 availability, but what would be the consequence of that on
12 Delta diverters.

13 Q Did you understand that the method that you believe
14 was appropriate was not a method that those in the Delta
15 believed was appropriate?

16 A I believe I heard that sort of thing at the
17 workshop, yes.

18 Q Was there any authority or precedent that you were
19 relying on for your understanding that your method was
20 appropriate?

21 MR. HILDRETH: Calls for a legal conclusion. Calls
22 for -- if you had discussions with your lawyers about that,
23 you don't have to divulge that.

24 THE WITNESS: Could you repeat the question?

25 Q BY MS. SPALETTA: I'll ask the court reporter to

1 read it back, please.

2 (Whereupon, the record was read.)

3 THE WITNESS: It was just my understanding it was a
4 good characterization of water availability.

5 Q BY MS. SPALETTA: Well, did you do any due diligence
6 to confirm that understanding prior to selecting the
7 methodology?

8 A I don't know what you mean by "due diligence."

9 Q Well, there's more than one way to slice the pie,
10 right? So my question is, what did you do to educate
11 yourself on the method that you were going to choose?

12 MR. HILDRETH: Asked and answered.

13 THE WITNESS: I saw that there were two general
14 approaches, and I felt that this one was an appropriate
15 approach.

16 Q BY MS. SPALETTA: And why did you think that the
17 approach that you selected was appropriate?

18 A Ultimately, it's because my opinion is stored water
19 is a -- functionally, a property right. And to the extent
20 parties divert that stored water is past being -- the level
21 of stored water released has to be increased, and BBID was
22 diverting during a season when projects' stored water was
23 going into the Delta, that there wasn't -- and there wasn't
24 the natural flow to support that diversion and maintain the
25 salinity grading in the Delta that was necessary to protect

1 public trust uses and -- well, public trust uses. That
2 requires some other party to release stored water into the
3 system to support BBID's diversion.

4 Q Does the -- excuse me. Has the State Water Resource
5 Control Board conditioned BBID's water right to require it
6 to cease diversions to protect the salinity grading in the
7 Delta?

8 A Not that I'm aware of.

9 Q Has the State Water Resource Control Board
10 conditioned BBID's water right to protect public trust
11 values?

12 A Not that I'm aware of.

13 Q Now, under the Temporary Urgency Change Petition,
14 the projects had to provide monthly summary reports to the
15 Board, correct?

16 A That sounds right, but I wouldn't swear to it.

17 Q Who was in charge at the Board of receiving the
18 information from the projects pursuant to the Temporary
19 Urgency Change?

20 A I don't know the person.

21 Q It wasn't you?

22 A I don't recall seeing the monthly reports, no.

23 Q And you don't remember who you assigned that task
24 to?

25 A It would have been Division of Water Rights, so you

1 would have to ask Barbara who that task was assigned to.

2 Q Did you or anyone on your staff keep track of which
3 regulatory condition was controlling the release of stored
4 water by the projects during the summer of 2015?

5 A I believe that that was a subject of discussion --
6 that sort of thing was a subject of discussion at the RTDOT
7 meetings.

8 Q What's the RTDOT?

9 A Real Time Drought Operations Team.

10 Q Did you attend those meetings?

11 A No.

12 Q Who did for your staff?

13 A Les Grober and Diane Riddle.

14 Q Are they on the hearing team staff?

15 A I don't know which team they're on.

16 MS. SPALETTA: Okay. Let's take a five-minute
17 break.

18 THE VIDEOGRAPHER: We're now going off the record at
19 8:49 a.m.

20 (A recess was taken.)

21 THE VIDEOGRAPHER: We're now going back on the
22 record at 9:01 a.m.

23 Q BY MS. SPALETTA: All right. We're back from a
24 short break.

25 Mr. Howard, right before we took a break, you told

1 me that one of the consequences of the curtailments was to
2 protect public trust resources; is that correct?

3 A Yes, that is what I said.

4 Q And what is the public trust value that was
5 protected during June as a result of the curtailment?

6 MR. HILDRETH: June of 2015?

7 Q BY MS. SPALETTA: Yes.

8 A Well, I operate under the assumption that there are
9 a broad range of benefits for fresh water supply in a Delta
10 of, you know, fish protection, protection for -- of
11 agricultural quality, M&I water, aquatic habitat of various
12 sorts, wetlands, tidal wetlands.

13 Q Decision 1641 defines the parameters under which the
14 state and federal projects must operate to protect those
15 public trust values, correct?

16 MR. HILDRETH: Calls for a legal conclusion.

17 THE WITNESS: It provides the requirements under
18 which they must operate, yes.

19 Q BY MS. SPALETTA: And for June of 2015, what was the
20 controlling requirement under Decision 1641, if you know?

21 A Well, I don't know specifically, though I know that
22 at some point -- at some points it's actual flow standards
23 and sometimes it's salinity at various locations.

24 The assumption is that when we establish a standard
25 for a particular location, it actually has multiple

1 benefits, both to protect the specific targeted purpose plus
2 provide fishery protection, for example, and water supply
3 for wetlands and tidal wetlands, et cetera.

4 Q The Delta outflow objective in Decision 1641, are
5 you familiar with that?

6 A There are several Delta outflow objectives.

7 Q We previously marked an exhibit, I believe it is
8 Exhibit 67. Do you see that?

9 A I do.

10 Q And this was your order conditionally approving the
11 temporary urgency changes for the projects from -- let's see
12 what date this is -- July 2015? The date is on page 31.

13 A July 3rd, yes.

14 Q Okay. And then attached to this order are the
15 tables which identify the various salinity and flow
16 objectives.

17 A Yes.

18 Q Correct? Okay. And so the flow objectives you were
19 just talking about are in Table 3, continued on page 184 of
20 the attachment; is that right?

21 A The objectives I was just referring to?

22 Q Yes.

23 A I don't know that they are exclusively on Table 3,
24 no.

25 Q Where else are they? The flow --

1 A I need some clarification on the question.

2 Q Sure. You said there were various flow objectives
3 in play in June of 2015, I believe?

4 A Flow and/or salinity, yeah.

5 Q Where are the flow objectives that were in play in
6 June of 2015?

7 A Well -- a difficult question for me. I've used
8 salinity objectives as being flow objectives as well, so I
9 can't look at just the flow table and say, "Those are the
10 flow objectives" because I would have to look at this -- the
11 whole table and look at salinity and flow and say that
12 those, in combination, establish flow requirements, and
13 those flow requirements achieve multiple purposes.

14 Q Okay. And those objectives that you've just
15 described are only imposed on the state and federal
16 projects, correct?

17 MR. HILDRETH: Calls for a legal conclusion.

18 THE WITNESS: As far as I know, they're the only
19 ones who have them in their water right permits, except for
20 people with Term 91.

21 Q BY MS. SPALETTA: And is Term 91 applicable to
22 BBID's water right?

23 MR. HILDRETH: Calls for a legal conclusion.

24 Q BY MS. SPALETTA: Do you know?

25 A It's not contained within BBID's water right.

1 Q Is it applicable regardless of the fact that it's
2 not contained in their water right?

3 MR. HILDRETH: Calls for a legal conclusion.

4 THE WITNESS: I would have to say that's a legal --
5 I don't know.

6 Q BY MS. SPALETTA: You don't know. Okay. Do you
7 know if Term 91 is in West Side's water right?

8 MR. HILDRETH: Calls for a legal conclusion.

9 THE WITNESS: I don't know if it's in West Side's
10 for certain. I suspect not, but that's --

11 Q BY MS. SPALETTA: Are you familiar with Water Code
12 Section 11460, the Watershed Protection Act?

13 A It sounds familiar, yes.

14 Q Did you take into account Water Code Section 11460
15 before making the curtailment decisions during 2015?

16 A I don't recall having any specific discussion about
17 11460; however, again, we were looking at whether water was
18 available under the water right priority system.

19 Q So we have just marked, as Exhibit --

20 MR. HILDRETH: 105.

21 Q BY MS. SPALETTA: -- 105, Water Code Section 11460.

22 (Whereupon, Exhibit No. 105 was
23 marked for identification.)

24 MS. AUE: Are there more copies?

25 MR. O'LAUGHLIN: We ran out.

1 MS. SPALETTA: You'll have to share. Sorry.

2 Q BY MS. SPALETTA: Could you please read back the
3 last answer.

4 (Whereupon, the record was read.)

5 Q BY MS. SPALETTA: Why didn't you evaluate the
6 watershed protection statute before making the curtailment
7 decisions?

8 A We were looking at water availability. If water
9 isn't available, then there's no water to divert for that
10 party.

11 (Whereupon, Exhibit No. 106 was
12 marked for identification.)

13 Q BY MS. SPALETTA: We have also marked, as
14 Exhibit 106, the Delta Protection Act. Are you familiar
15 with the Delta Protection Act, which is Water Code Sections
16 12202 through 12205?

17 A Well, I could read them now. I've heard of them
18 before and certainly read them in the past.

19 Q Take a minute to review them.

20 A (Witness reviewing.) Okay.

21 Q Now that you've had a minute to read over what we
22 marked as Exhibit 106, the Delta Protection Act, my question
23 was, did you take into consideration the requirements of the
24 Delta Protection Act in making the curtailment decisions in
25 2015?

1 A I don't recall any specific discussion about the
2 Delta Protection Act.

3 Q Why didn't you consider the Delta Protection Act in
4 making your curtailment decisions?

5 A Because we were looking at water availability.

6 Q Is it your understanding that the Delta Protection
7 Act requirements have no bearing on the analysis of how much
8 water is available for diverters in the Delta?

9 A It wasn't part of the calculation that we used.

10 Q Well, I'm not asking if it was part of the
11 calculation. You already told me it wasn't. What I'm
12 asking is whether it's your understanding that the Delta
13 Protection Act requirements have no bearing on the
14 determination of water availability for diverters in the
15 Delta?

16 MR. HILDRETH: Calls for a legal conclusion.

17 THE WITNESS: Could you repeat the question?

18 (Whereupon, the record was read.)

19 THE WITNESS: I don't have an opinion on that
20 matter.

21 Q BY MS. SPALETTA: I'm sorry, what was your answer?

22 A No opinion.

23 Q Okay. Did the projects continue to export water out
24 of the Delta after the curtailments in 2015?

25 A I believe in small quantities, yes.

1 Q If I could please turn your attention to what's
2 Section 12204 of Exhibit 106. It states, "In determining
3 the availability of water for export from the Sacramento-San
4 Joaquin Delta, no water shall be exported which is necessary
5 to meet the requirements of Sections 12202 and 12203 of this
6 chapter."

7 Do you see that?

8 A Yes, I do.

9 Q And then looking up at Section 12202, it says,
10 "Among the functions to be provided by the State Water
11 Resources Development System, in coordination with the
12 activities of the United States in providing salinity
13 control for the Delta through operation of the Federal
14 Central Valley Project, shall be the provision of salinity
15 control and an adequate water supply for the water users in
16 the Sacramento-San Joaquin Delta."

17 Was there any effort made to ensure that the
18 projects were fulfilling the obligations of Section 12202
19 prior to enabling the projects to continue exporting?

20 MR. HILDRETH: Calls for a legal conclusion.

21 THE WITNESS: I can only comment that we, as I've
22 described before, we had a methodology that didn't
23 particularly incorporate -- we did not -- we applied the
24 methodology that we developed to determine water availability,
25 and we applied it across all the water right holders.

1 Q BY MS. SPALETTA: Well, but you actually applied a
2 different methodology for the projects than you did for BBID
3 and West Side, correct?

4 MR. HILDRETH: Misstates his testimony.

5 THE WITNESS: Not that I'm aware of.

6 Q BY MS. SPALETTA: The projects were allowed to
7 continue to export water out of the Delta as long as the
8 provisions in your were met, correct?

9 A They were allowed to divert stored water, yes.

10 Q Didn't the Temporary Urgency Change Order actually
11 allow the projects to continue to divert natural flow and
12 abandoned flows?

13 MR. HILDRETH: Calls for a legal conclusion.

14 Q BY MS. SPALETTA: Can you answer the question?

15 A I would have to double-check.

16 Q Look at Exhibit 67, page 22, please.

17 A And where should I be looking?

18 Q The first full paragraph on page 22, it starts with
19 "To the extent that the projects divert natural or abandoned
20 flows."

21 A Yes, I see it.

22 Q So, to answer my question, the projects were allowed
23 to continue to divert natural or abandoned flows pursuant to
24 the Temporary Urgency Change Petition, correct?

25 A We -- it depends on whether you're using an

1 accounting methodology or whether you're using a particle
2 tracking methodology.

3 Q Explain, please.

4 A Well, using an accounting methodology, the projects
5 were pushing stored water into the system. They were
6 actually releasing more water throughout the system than
7 they were collecting. But at any particular location, that
8 might not necessarily be the case at any particular instant.
9 However, because from an accounting perspective, looking at
10 the system as a whole, they were providing more than the
11 natural flow into the system, no other legal user of the
12 water is injured by an operation of that nature.

13 Q Are BBID and West Side Irrigation District legal
14 users of water?

15 A As far as I know.

16 Q But they were curtailed?

17 A They were.

18 Q And yet the projects continued to be able to export
19 water from the Delta?

20 A Stored water, yes.

21 Q According to the accounting method, not the particle
22 tracking method, right?

23 A Yes.

24 Q How is that result consistent with, in your
25 understanding, the obligation of the projects under the

1 Delta Protection Act to provide salinity control and an
2 adequate water supply for users of water in the
3 Sacramento-San Joaquin Delta?

4 MR. HILDRETH: It calls for a legal conclusion.

5 THE WITNESS: I do not know.

6 Q BY MS. SPALETTA: Is it something that you sought to
7 evaluate prior to making the curtailment decision?

8 MR. HILDRETH: Asked and answered.

9 THE WITNESS: I think we've discussed this before.
10 I, you know, we used this accounting methodology, we thought
11 it was fully consistent with all applicable laws.

12 Q BY MS. SPALETTA: If I understand your prior
13 testimony, it was that you did not take into account the
14 obligations of the Delta Protection Act or the Watershed
15 Protection Statute prior to making your curtailment
16 decisions in 2015; is that correct?

17 MR. HILDRETH: Asked and answered.

18 THE WITNESS: That depends, I guess, on what you
19 mean by "take into account." I rely on my attorneys to
20 ensure that anything we do is legally defensible.

21 MS. SPALETTA: I think I'm at a point in my
22 questioning where I have a logical break, and so I'm going
23 to turn the questioning over to Mr. O'Laughlin.

24 EXAMINATION BY MR. O'LAUGHLIN

25 Q BY MR. O'LAUGHLIN: Thanks.

1 feel you need to go through the entire order to put context
2 on this, go right ahead, we can do that, and we might even
3 mark it if we need to. I don't think we will, but the
4 questions are going to be fairly limited to the Stanislaus
5 River.

6 You've worked on the Temporary Urgency Change
7 Petitions by the Department of Water Resources and
8 Reclamation in 2015; is that correct?

9 A I signed them --

10 Q Okay.

11 A -- and I read them. I don't know if I could say I
12 worked on them.

13 Q Okay. Did you do -- you had your staff work on
14 them; is that correct?

15 A Yes.

16 Q And that would be Diane Riddle and Les Grober?

17 A And others.

18 Q And others, okay. So early in the year you received
19 Temporary Urgency Change Petition from Reclamation to modify
20 the requirements for D-1641 on the San Joaquin River; is
21 that correct?

22 A It sounds correct.

23 Q Okay. And at some point in time on April 6th, you
24 approved the -- what's been marked as Exhibit 107, and on
25 page 42 it says the original was signed by Thomas Howard,

1 Executive Director, dated April 6, 2015.

2 Do you see that?

3 A Yes.

4 Q Okay. So were you aware, on April 6th when you were
5 signing this order, that there were additional problems at
6 New Melones Reservoir that would need further investigation
7 and resolution when you signed this order?

8 MR. HILDRETH: Lack of foundation -- I guess I take
9 that back.

10 THE WITNESS: I don't recall.

11 Q BY MR. O'LAUGHLIN: Okay. So turn to the second
12 page of Exhibit 107. Maybe this will help refresh your
13 recollection. It's date -- the page number is 27, Tom.

14 A Uh-huh.

15 Q And if you look at the second to the last paragraph,
16 it says, "The draft plan is due on April 15th with the final
17 plan due on April 25th, 2015, and that the Executive
18 Director provided advanced notification of this requirement
19 to Reclamation on March 30th, 2015."

20 Does that refresh your recollection that you weren't
21 in a position to grant the Temporary Urgency Change Petition
22 to Reclamation on April 6th for the New Melones Project?

23 A Yes.

24 Q Now, after the order was issued, did you become
25 aware of a request by National Marines Fishery for an

1 additional pulse flow from the Stanislaus River to meet the
2 April/May pulse flow requirement under D-1641?

3 A I don't recall what -- an additional pulse flow. I
4 know there was some discussion of pulse flows.

5 Q Okay. And, in fact, Oakdale and South San Joaquin
6 Irrigation District were refusing to release water to meet a
7 pulse flow in April unless they were guaranteed that their
8 water supplies were going to be made available in 2015,
9 correct?

10 A I recall that they refused to allow the water to
11 pass through their regulating reservoir, but I don't know
12 that that was conditional upon them receiving full
13 deliveries.

14 Q Did you attend a meeting with the United States
15 Bureau of Reclamation with Pablo Arroyave, National Marines
16 Fishery, and Maria Rae and myself? There were others, I
17 believe, present, and yourself, to discuss -- and
18 Mr. Murillo, I believe, was there, to discuss how operations
19 were going to occur on the Stanislaus River on April 10th,
20 2015?

21 A The meeting sounds vaguely familiar. I couldn't
22 swear to the date.

23 Q Okay. In that meeting, was there a discussion of
24 how the Stanislaus River was going to be operated for the
25 year -- the calendar year of 2015?

1 A I haven't thought about this for a while.

2 Q I know.

3 A If you could give me a minute to --

4 Q Well, I'm going to make your life harder because I'm
5 going to go back to D-1641 after all these questions.

6 A Could you repeat that question?

7 Q Sure. Well, why don't -- she can read it back.
8 She'll probably do a better job.

9 (Whereupon, the record was read.)

10 THE WITNESS: I'm not sure there was a discussion of
11 the entire year, but I believe that we discussed how to deal
12 with the pulse flow requirements that we were concerned
13 about.

14 Q BY MR. O'LAUGHLIN: Hand that over down the line,
15 and get that marked next in order.

16 (Whereupon, Exhibit No. 108 was
17 marked for identification.)

18 Q BY MS. SPALETTA: So we've had marked, as
19 Exhibit 108, it's called Attachment #2. It's a District
20 Forecast of Operations dated 4/8/2015, based on a DWR 4/1
21 forecast of unimpaired flow.

22 Do you know if you received this handout when you
23 attended the meeting on April 10th, 2015, or in that
24 meeting?

25 A I don't recall.

1 Q Okay. Do you know if one of the concerns at the
2 time was the amount of carryover storage -- End of Month
3 Storage September at New Melones Reservoir?

4 A Yes, that sounds familiar.

5 Q And all parties were concerned that the End of Month
6 Storage September, as projected in this forecast, was going
7 to be 147,000 acre-feet; is that correct?

8 A It was a subject of discussion, though I don't
9 recall the exact numbers.

10 Q Okay. Do you know, I'm going to apologize to
11 everyone. I've only made one copy of this document. I
12 didn't think we'd need it but, hopefully, it will refresh
13 your recollection about the discussion.

14 If you could hand that to the court reporter and
15 have it marked as Exhibit 109. And I'm sorry about this.
16 This might help you, Tom.

17 (Whereupon, Exhibit No. 109 was
18 marked for identification.)

19 Q BY MR. O'LAUGHLIN: So I'll represent to everyone
20 this is an email that was sent from Mr. Ron Milligan to
21 myself, and the attachment is a request from the State Water
22 Resources Control Board staff for additional information in
23 regards to the Temporary Urgency Change Petition.

24 A Yes. So your question was?

25 Q Yes. Does that refresh your recollection that

1 storage was a concern of the State Water Resources Control
2 Board staff in regards to the New Melones operations for
3 2015?

4 A Yes.

5 Q Do you know at the meeting that you were at if there
6 was an agreement reached on how operations were going to
7 occur, at least in the initial part of 2015 from April
8 through October, if the pulse flow was allowed to pass
9 through Tulloch and Goodwin, and be available in the
10 Stanislaus River?

11 A I remember there was an agreement.

12 Q Okay. Do you believe that that agreement was
13 eventually put into writing and submitted to you for your
14 approval?

15 A I don't recall actually receiving it, but I think I
16 recall actually -- I mean, I don't recall reading it. I
17 believe it was submitted to them.

18 Q Okay. Can you send that down, and we'll have it
19 marked. Hopefully, this will refresh your recollection.

20 (Whereupon, Exhibit No. 110 was
21 marked for identification.)

22 MR. O'LAUGHLIN: Which one was that marked? And
23 there's one more that goes into that. We'll mark that 111,
24 so, hopefully, this will put it into context for you.

25 ///

1 (Whereupon, Exhibit No. 111 was
2 marked for identification.)

3 MS. SPALETTA: Can you clarify which exhibit is
4 which?

5 MR. O'LAUGHLIN: Yes. The 110 is the cover from me.
6 It says "Tim O'Laughlin, sent Monday, May 18th" to a whole
7 bunch of people, and it's from Mr. Ron Milligan to Diane
8 Riddle. And there's an attachment to it which is the
9 updated operations plan for New Melones Lake, water year
10 2015, May 2015. And that's been marked Exhibit 110.

11 Exhibit 111 is a letter to Mr. Ron Milligan from
12 the -- Mr. Tom Howard, the Executive Director, in regards to
13 the draft plan for the Stanislaus River to protect fish and
14 wildlife.

15 THE WITNESS: And your question?

16 Q BY MR. O'LAUGHLIN: Okay. So coming out of the
17 meeting, was it your understanding that the OCAP-BO Table 2E
18 flows were going to be the flows on the Stanislaus River
19 below Goodwin from April through October 1st under the
20 operation plan?

21 A I remember we had an agreement as to what the
22 releases would be and the carryover storage -- or at least
23 what the carryover storage would be. I don't recall whether
24 they were specifically the OCAP flows that were agreed to.

25 Q Okay. Does looking at Exhibit 110 refresh your

1 recollection as to what the estimated releases would be?
2 And it would be the third page in. I know the print is
3 pretty small. It's that first graph, probably about
4 two-thirds of the way over.

5 A Are you referring to a table?

6 Q Yeah. The table where it says "minimum releases."

7 A Well, again, you know, I remember we reached an
8 agreement. There was a carryover storage and there were
9 releases, but, you know, I don't recall that that's the
10 specific table, though I assume it must have been.

11 Q Okay. And one of the goals of the Temporary Urgency
12 Change Petition -- oh, let me ask you a different way.

13 Was one of the goals of the Temporary Urgency Change
14 Petition that you granted to try to put as much water in
15 storage in New Melones as possible End the Month September?

16 MR. HILDRETH: Calls for speculation. Calls for a
17 legal conclusion.

18 THE WITNESS: I believe we were trying to maintain
19 temperature of conditions which had -- which required some
20 kind of storage level.

21 Q BY MR. O'LAUGHLIN: And the State Board didn't
22 actually request a firm carryover reservoir storage number
23 in the order that you approved; is that correct?

24 MR. HILDRETH: The order speaks for itself.

25 THE WITNESS: I don't recall what --

1 Q BY MR. O'LAUGHLIN: Okay. Do you remember asking
2 Oakdale and South San Joaquin Irrigation Districts to
3 conserve additional water so that that water would remain in
4 storage in New Melones in water year 2015?

5 A Yes, I recall that.

6 Q Okay. And do you recall also, as well, that the
7 districts stated that they would try to conserve as much
8 water as possible to put into storage in New Melones in
9 2015?

10 A Yes.

11 Q Okay. And do you recall that as part of your -- is
12 it your understanding, as part of this operation plan that
13 was put together, that the '88 agreement between the United
14 States Bureau of Reclamation and the districts would be
15 abided by in regard to water allocations for 2015?

16 MR. HILDRETH: Calls for speculation.

17 THE WITNESS: I believe that to be true, but I, you
18 know, can't swear that I recall specifically that.

19 Q BY MR. O'LAUGHLIN: Okay. Did you, when you were
20 done with the April 20th letter to Mr. Milligan, was it your
21 understanding that you would get a revised operation plan
22 back from Mr. Milligan, and you would have a plan in front
23 of you that would be subject to your final approval? Or on
24 April 20th had you already, the parameters of how the
25 operations were going to look were in place, and you just

1 needed something in writing to affirm that?

2 A I don't recall.

3 Q Okay. Did you ever discuss with Mr. O'Hagan what
4 you were trying to accomplish on the Stanislaus River in
5 regards to carryover storage and allocation of water
6 resources?

7 A I thought -- my recollection is we were concerned
8 about temperature issues for steelhead in the system.

9 Q Right. And the goal in order to protect the
10 temperature for steelhead was to try to keep much as water
11 as possible in New Melones End of Month September, correct?

12 A Yes.

13 Q Okay. So here's my question that I'm perplexed
14 about. If we -- if a deal was struck on April 20th with the
15 districts, NMFS, and Reclamation on how New Melones was
16 going to be operated, why didn't Mr. O'Hagan send a
17 curtailment request to Oakdale and South San Joaquin on
18 their post-14 water rights?

19 MR. HILDRETH: Calls for speculation.

20 THE WITNESS: My recollection is that we were
21 sending curtailment notices to everyone as their water right
22 priority came up. We understood that a lot of people
23 would -- a lot of people who had stored water contracts
24 would continue -- who had contracts would continue to
25 operate under provision of stored water.

1 Q BY MR. O'LAUGHLIN: So -- but on the -- on the -- on
2 the Stanislaus River above New Melones, there's the -- are
3 you familiar with the Donnells and Beardsley projects?

4 A No.

5 Q And do you -- I'll just represent to you that they
6 are two reservoir storage upstream of New Melones.

7 So in the project operation plan that was provided
8 to you, it showed projected inflow into New Melones
9 Reservoir, correct? And take your time and go look at
10 Attachment 2, which has been marked as Exhibit 108, I
11 believe.

12 A It's marked what exhibit?

13 Q It's 108, and it's marked New Melones Inflow -- NM
14 Inflow.

15 A Yes, I see it.

16 Q Okay. So is your understanding when you approved
17 the plan that the State Board understood what waters would
18 be released from Donnells and Beardsley to flow into New
19 Melones Reservoir in water year 2015?

20 MR. HILDRETH: Calls for speculation.

21 THE WITNESS: Yes, I don't recall.

22 Q BY MR. O'LAUGHLIN: Okay. Is it your understanding
23 that when the April 23rd order was issued, that a goal of
24 that order was to move water from upstream reservoirs
25 through New Melones to downstream senior water right

1 holders?

2 A I don't recall.

3 Q Okay. When the plan was -- is your understanding
4 that the release of water in the summertime to meet the flow
5 requirements of -- that were set forth under the NMFS, Table
6 2E for stored water, how those would show up in the
7 methodology that your staff used?

8 A I don't know how that would have shown up.

9 Q Now, did, in fact, the Oakdale and South San Joaquin
10 Irrigation Districts conserve water through the year and
11 store it in the New Melones Reservoir?

12 MR. HILDRETH: Calls for speculation.

13 THE WITNESS: I recall reading that they had
14 stored -- been conserving water and that there was
15 additional stored water.

16 Q BY MR. O'LAUGHLIN: I want to talk a little bit
17 about D-1641. Did you, as a -- were you currently employed
18 at the State Water Resources Control Board when D-1641 was
19 being worked on?

20 A Yes.

21 Q And did you work on D-1641 as a staff person?

22 A Yes.

23 Q And what was your job duties at the time when you
24 worked on D-1641?

25 A I think I was the Assistant Division Chief.

1 Q Okay. So I have some questions about D-1641. We've
2 been talking a lot today about stored water and water
3 releases, so were you aware when the San Joaquin River
4 agreement was proposed, that the parties who proposed it
5 filed simultaneously a water petition under Water Code
6 Section 1707 to protect the releases to the -- to Vernalis?

7 A I don't recall.

8 Q Okay. Do you remember in the discussion on D-1641
9 and the testimony that occurred, if there were discussions
10 by the projects as to who would be responsible for losses of
11 releases in order to meet a water quality objective?

12 A I'm sorry. Losses of releases?

13 Q Yeah. Losses of water as it moved down the river?
14 So if they were releasing water from Shasta, water was
15 moving down the Sacramento River, depletions or losses
16 occurred, not enough water showed up to meet the salinity
17 requirement, who would be responsible for making up the
18 losses. Do you remember that discussion?

19 A I recall that the projects committed to meeting
20 salinity objectives.

21 Q Okay. And, currently, the -- only the projects are
22 required to meet salinity objectives, correct?

23 A They are the only ones with those requirements in
24 their permits, assuming -- Term 91 is sort of a confounding
25 factor, but --

1 Q Okay. So then it was -- was it your understanding
2 coming out of D-1641, that there would be further
3 proceedings allocating the responsibility to meet -- I'll
4 call it X2 or Delta outflow requirements other than the two
5 projects?

6 A Well, there was the Phase 8 that was still left open
7 for a couple of years.

8 Q And it never -- it never -- Phase 8 never occurred,
9 correct?

10 A No. And it was eventually closed out.

11 Q Right. So from the time D-1641 was ordered, even
12 through the 206 -- 2006 review of the Water Quality Control
13 Plan, the projects were still responsible for meeting the
14 salinity requirement?

15 A Yes.

16 Q Okay. Now, we've had previous witnesses talk about
17 how water was released from Shasta and whether -- and how it
18 moves through the system. So just bear with me, and we'll
19 see if we can get through this without too much problem.

20 Now, water is released from Shasta this past year,
21 and it was stored water and it went down the river, and I
22 want you to picture in your mind that the roughly 1,000 to
23 1,500 that was continually moving through the Delta and was
24 eventually exported, I don't want to talk about that, okay?
25 So that's the water that was stored up in Shasta, went

1 through the system, got re-diverted, went down and met
2 health and safety concerns down south.

3 I want to focus on the 3 to 4,000 CFS that was
4 entering the Delta to meet Delta outflow requirements in X2.
5 So is there a -- that's a requirement in the Water Quality
6 Control Plan, correct?

7 A Yes.

8 Q Is there a provision in the Water Quality Control
9 Plan in D-1641 that protects that water from diversion by
10 others before it reaches the Water Quality Control Plan
11 objective?

12 MR. HILDRETH: Calls for a legal conclusion. The
13 document speaks for itself.

14 THE WITNESS: Not that I'm aware of.

15 Q BY MR. O'LAUGHLIN: Okay. Now, are you aware of,
16 when we were doing D-1641, if the tributaries were concerned
17 about the releases of water to meet a Water Quality Control
18 Plan objective at Vernalis and whether or not those would be
19 diverted by intermediate diverters?

20 MR. HILDRETH: Calls for speculation.

21 THE WITNESS: Could you repeat the question?

22 Q BY MR. O'LAUGHLIN: No, I'll phrase it differently.
23 So let me go to another point.

24 So if water is being released and moving through the
25 system to meet X2 requirements, is there a requirement in

1 the Clean Water Act that you know of that protects that
2 water from diversion by others until it meets its water
3 quality -- the objective?

4 MR. HILDRETH: Calls for a legal conclusion.

5 THE WITNESS: In the Clean Water Act?

6 Q BY MR. O'LAUGHLIN: Clean Water Act.

7 A Again, the Clean Water Act, I don't think, covers
8 these issues at all.

9 Q Okay. All right. So I'm going -- so are you aware
10 of a requirement or a condition in the Porter-Cologne Act
11 that protects water released to meet a water quality
12 objective from diversion until it meets its objective?

13 MR. HILDRETH: Calls for a legal conclusion.

14 THE WITNESS: I don't know the answer to that
15 question.

16 Q BY MR. O'LAUGHLIN: Is it your understanding that
17 water that -- I'm going to use the New Melones Project now.
18 If water is released from the New Melones Project by the
19 United States Bureau of Reclamation to meet the salinity
20 requirement at Vernalis, is that water then abandoned after
21 it meets its salinity requirement at Vernalis?

22 MR. HILDRETH: Calls for a legal conclusion. Calls
23 for speculation.

24 THE WITNESS: Yeah, I don't know exactly.

25 Q BY MR. O'LAUGHLIN: Okay. Do you know how the

1 projects treat that under their coordinated -- how the
2 releases of water from New Melones that are meant to meet a
3 salinity requirement at Vernalis are handled under the
4 coordinated operation agreement between the CVP and SWP?

5 MR. HILDRETH: Calls for speculation.

6 THE WITNESS: I don't know.

7 Q BY MR. O'LAUGHLIN: In your mind -- in your opinion,
8 is water that is released by the projects that meets the X2
9 requirement abandoned at the point in time that it meets the
10 objective in the Delta?

11 MR. HILDRETH: Calls for a legal conclusion. Calls
12 for speculation.

13 THE WITNESS: I don't know.

14 Q BY MR. O'LAUGHLIN: One of your staff, since you're
15 the Executive Director, you have the entire staff, so --
16 we've been talking about abandonment in these -- in these
17 previous depositions. Do you have an understanding of what
18 abandoned water is?

19 A Well, I think so, but I don't know necessarily that
20 I could, you know, legally say if any particular piece of,
21 you know, block of water is abandoned.

22 Q No -- absolutely. You have wonderful attorneys at
23 the state, and I'm sure they'll opine too.

24 I want to know what your understanding as the
25 Executive Director of the Department of the State Board is

1 as to what is or isn't abandoned water. Just your
2 understanding.

3 A Water that perhaps was previously used but was -- is
4 no longer needed by the party that diverted it and returns
5 it to the system.

6 Q Okay. Now, do you, in your mind, is that -- is that
7 a political boundary issue so if water left an irrigation
8 district, would you say that that water would be abandoned
9 once it left the irrigation district?

10 MR. HILDRETH: Calls for a legal conclusion.

11 THE WITNESS: I don't know if that's always the
12 case.

13 Q BY MR. O'LAUGHLIN: Right. Because, in fact, the
14 district could have a point downstream where they could pick
15 that water up, they could sell or transfer that water to
16 someone, couldn't they?

17 A Like I say --

18 MR. HILDRETH: Was that a question?

19 THE WITNESS: -- I don't know if that's always the
20 case, yes.

21 Q BY MR. O'LAUGHLIN: So is the issue of abandonment
22 one of control or is it based on geology or political
23 boundaries, in your -- in your opinion?

24 MR. HILDRETH: Calls for a legal conclusion.

25 THE WITNESS: I don't know.

1 Q BY MR. O'LAUGHLIN: If a district had water in a
2 system and -- drain water in a system leaving their district
3 and made an agreement with the entity next door to have them
4 purchase that water, would you say that that water had been
5 abandoned?

6 MR. HILDRETH: Calls for a legal conclusion.

7 THE WITNESS: Yeah, I don't know.

8 Q BY MR. O'LAUGHLIN: Okay. When -- are you aware if
9 Oakdale and South San Joaquin Irrigation Districts received
10 curtailment orders under their pre-1914 water rights?

11 A I don't know.

12 Q Would you have an understanding if they did, in
13 June, why Mr. O'Hagan would send a pre-1914 curtailment
14 order to the two districts?

15 MR. HILDRETH: Calls for speculation. Lack of
16 foundation.

17 THE WITNESS: We used this methodology, which has
18 been described, and we applied it as the outcome of -- you
19 know, derived through the supply/demand curves, and we
20 didn't think if there were some parties that might have
21 agreements or whatnot that that was something we would
22 concern ourselves with in deciding whether or not to issue
23 such letters. If they had other sources of water, then they
24 were free to use them. But we just, if that was the date
25 that we had in our calculations, then that's the date that

1 we sent out notices to.

2 Q BY MR. O'LAUGHLIN: So based on that response, would
3 it be safe to say then that you had no expectation that if
4 Oakdale and South San Joaquin Irrigation Districts received
5 that order in June, that you would see additional flow down
6 the Stanislaus River below Goodwin Dam?

7 MR. HILDRETH: Calls for speculation.

8 THE WITNESS: I don't know specifically.

9 Q BY MS. SPALETTA: Well, what I'm perplexed about,
10 Tom, is that if there was an agreement in place on how the
11 Stanislaus was going to operate and were doing curtailments,
12 how -- what was the supposed benefit from the curtailments
13 to people downstream, or was this just one of those things
14 like you said earlier, you looked down the list and where
15 people fell on the list and if they were there, you'd just
16 send them an order realizing that the TUCP was in place and
17 nothing was really going to change anyway?

18 MR. HILDRETH: Calls for speculation, calls for a
19 legal conclusion, and it's argumentative.

20 MR. O'LAUGHLIN: Sure -- oh, I don't want to be
21 argue -- I'm not being argumentative. You know that, right?
22 I'm just trying to understand.

23 THE WITNESS: We, you know, did not -- we put on
24 blinders, basically. We were implementing what we saw was
25 the water right priority system, so we did the cutoffs the

1 way the calculation showed to everyone. And then we, in our
2 letters, I think, as I recall, we said, "If you have some
3 other source of water, like stored water, then you're free
4 to go ahead and use that water, or a contract with someone
5 who had stored water."

6 MR. O'LAUGHLIN: Thank you. I have no further
7 questions.

8 MR. KELLY: I have a couple of follow-up, but I
9 don't know if anybody else has any.

10 EXAMINATION BY MS. ZOLEZZI

11 Q BY MS. ZOLEZZI: Yes. Jeanne Zolezzi, questioning
12 for the West Side Irrigation District.

13 Mr. Howard, when you were answering questions that
14 Ms. Spaletta posed to you earlier, you stated that, in
15 issuing the curtailments, you were protecting the state's
16 water right priority system.

17 Do you recall that?

18 A I would probably say implementing, but yes --

19 Q Okay.

20 A -- something like that.

21 Q Can you explain your understanding of what you meant
22 by implementing the water right priority system?

23 A Water -- we were calculating when water was
24 available for water right holders and issuing them
25 curtailments when we believed that that was no longer the

1 case.

2 Q And the purpose of that is to protect senior water
3 rights?

4 A Yes.

5 Q Can you articulate your understanding of who those
6 senior water right holders were?

7 A Well, they were people who had a priority in excess
8 of -- senior to the party that we sent the notice to or they
9 were people who were releasing stored water into the system.

10 Q Did you or your staff identify, prior to sending out
11 the curtailments, whether or not any senior water right
12 holders were actually being injured?

13 A No.

14 Q Did you or your staff attempt to document or
15 identify any injury before the curtailments were sent out?

16 A Well, it depends on what you mean by "any injury."
17 We were well aware that if we did not implement the state's
18 water right priority system that additional stored water
19 would be needed to be released into the system.

20 Q And how did you document that? That was just your
21 understanding or did you do any calculation?

22 A I think I would say we did both calculations and
23 that was my understanding.

24 Q Have those calculations been made available in the
25 Public Records Act request responses?

1 A Well, when I say "we did calculations," what I mean
2 is that we knew that all the water that wasn't diverted as a
3 result of a curtailment was water that would not have to be
4 made up. I don't believe -- I don't recall seeing a -- you
5 know, a list of specific calculations.

6 Q So there was nothing in writing, the calculations
7 were done in your head or your staff's head?

8 A Well, yes.

9 Q Do you believe the State Board can issue
10 curtailments to protect senior water right holders from
11 potential injury or does there have to be a documented
12 injury?

13 MR. HILDRETH: Calls for a legal conclusion.

14 THE WITNESS: I don't know.

15 Q BY MS. ZOLEZZI: So you didn't take into
16 consideration when you signed the curtailment orders whether
17 or not there was actual injury to senior water right
18 holders?

19 A I know there was injury, yes.

20 Q And how do you know that?

21 A Again, because of the need to release stored water
22 to make up for all the releases that were -- all the water
23 that was being diverted when there wasn't natural flow to
24 satisfy that right.

25 Q Do you believe that those releases from -- of stored

1 water being made affected the Delta or did it affect other
2 upstream tributaries as well?

3 A Well, I imagine it would have potentially affected
4 both.

5 Q Can you explain your understanding of how?

6 A If there was insufficient stored water, for example,
7 someone would have to come to me and ask for a TUCP, the
8 projects requested a Temporary Urgency Change Petition to
9 decrease the protection in the Delta for public trust
10 resources. There was also the potential for harm in
11 upstream tributaries due to reduced flows and higher
12 temperatures.

13 Q So someone diverting water in the San Joaquin River
14 upstream of the Delta was injuring senior water right
15 holders in the Delta?

16 A Well, again, we're back into the question of you're
17 saying senior water right holders and I'm saying stored
18 water.

19 Q Are those the same thing, in your mind?

20 A I believe stored water is -- has a high priority in
21 the water right system.

22 Q Did the curtailment notices that you signed mention
23 public trust as a justification for the curtailment?

24 MR. HILDRETH: The document speaks for itself.

25 Q BY MS. ZOLEZZI: I'm asking for his understanding.

1 He has brought up the issue of public trust, and it's not
2 included as a statement in the curtailments. So I'm asking
3 if his understanding, when he signed the curtailments, was
4 that it included water being needed for public trust
5 purposes?

6 A We were implementing the water right priority
7 system, and I believe that if we hadn't done so there would
8 have been potential damage to public trust resources, yes.

9 MS. ZOLEZZI: Thank you. I don't have any more
10 questions.

11 FURTHER EXAMINATION BY MR. KELLY

12 Q BY MR. KELLY: Mr. Howard, I just have a couple of
13 follow-up questions based upon your answers to a couple of
14 questions today.

15 One of them is Mr. O'Laughlin asked you a little bit
16 about D-1641. And, if I recall correctly, you testified at
17 the first part of your deposition that you attended or had
18 your deposition taken one other time prior to this
19 proceeding, and you've recalled that it was either D-1641 or
20 Delta related. Is that -- is that correct, do you recall?

21 A Yes, I believe that's what I said.

22 Q And so I just -- I want to -- I want you to think
23 about and see if you can recall what proceeding that was
24 actually in.

25 Was it a -- was it a deposition taken as part of an

1 administrative proceeding at the Water Board, do you recall,
2 or would it have been in court, if you remember?

3 A I believe it was a court deposition.

4 Q And do you remember what proceeding -- what case it
5 involved?

6 A No.

7 Q Do you recall who took the deposition?

8 A Yes.

9 Q Who took the deposition?

10 A Dante Nomellini.

11 Q Do you know if anybody else questioned you during
12 the deposition, do you recall?

13 A Not to my recollection.

14 Q Okay. Thank you. You -- in response to
15 Mr. O'Laughlin's questions, you said that -- part of your
16 consideration this year was that you knew that there was
17 stored water present in the Delta, and I believe that you
18 said that you thought that there was a property right in
19 stored water that was present in the Delta.

20 Was that your testimony?

21 A I believe that's what I said, yes.

22 Q And your belief that there was stored water in the
23 Delta, what's that belief based on?

24 A Well, I do look occasionally at the Term 91
25 calculation, which shows when there is large quantities of

1 stored water being released into the system.

2 Q Did you do anything to determine whether or not the
3 stored water that was released actually flowed out of the
4 Delta versus remained in the Delta?

5 A This was an accounting exercise methodology we used.
6 We did not use particle tracking methodology.

7 Q And did you do anything then to determine if there
8 was any water other than stored water in the Delta? Whether
9 based on particle tracking or an accounting method?

10 A No, we did not.

11 Q And why did you not do that?

12 MR. HILDRETH: Asked and answered.

13 THE WITNESS: Again, we have this methodology that
14 we were using which we thought was a valid way to look at
15 whether water was available, and we applied it.

16 Q BY MR. KELLY: But what I'm trying to understand is,
17 you have that methodology, but, at the same time in
18 responding to questions about water that was present in the
19 Delta, you said that it was your understanding that there
20 was stored project water in the Delta, and that was one of
21 the reasons why that presence of that water was excluded
22 from the availability. And so I'm just curious as to
23 whether or not you directed your staff or made a
24 determination if there was other water in the Delta?

25 A The only water we were tracking was what was, you

1 know, the supply/demand curves that we developed.

2 Q Okay. So you didn't do anything to determine if
3 there was other water available in the Delta besides stored
4 water, correct?

5 MR. HILDRETH: Asked and answered.

6 THE WITNESS: Again, I'm not sure whether or not the
7 methodology would necessarily address that, but, you know,
8 my answer continues to be that we were looking at the supply
9 and demand curves in determining whether water was
10 available.

11 Q BY MR. KELLY: In implementing the curtailments, you
12 talked also about making -- issuing curtailments that the
13 projects didn't have to release additional stored water to
14 meet Delta water quality control requirements.

15 In issuing the curtailments, were you concerned that
16 people were diverting stored project water in 2015 or was
17 the idea to curtail water rights so the projects didn't have
18 to release more stored water to continue to meet those water
19 quality control requirements?

20 A Could you repeat that question?

21 Q Yeah. Let me -- let me rephrase it.

22 In issuing curtailments, was it your concern or
23 understanding that curtailments were needed to prevent
24 people from diverting stored project water, or simply that
25 if you didn't curtail them, the projects would have to

1 release additional stored water to meet those water quality
2 control requirements?

3 A My concern was that it was our -- that we had an
4 obligation to ensure that the state's water right priority
5 system was honored, and so we attempted to do that. We were
6 well aware that if the state's water right priority system
7 was not honored, that there would be consequences associated
8 with project stored water and potentially with public trust
9 resources as well.

10 Q Were the curtailments that were issued to prevent
11 water right holders from diverting stored project water or
12 were they issued so that the projects wouldn't have to
13 release additional stored water to meet water quality
14 control requirements?

15 MR. HILDRETH: Asked and answered.

16 THE WITNESS: We didn't -- I wasn't tracking stored
17 water, so, you know, I'm not sure I can answer your
18 question.

19 Q BY MR. KELLY: Do you think that -- that any of the
20 water right holders in the Delta this year diverted stored
21 project water?

22 MR. HILDRETH: Calls for speculation. Lack of
23 foundation.

24 THE WITNESS: Could you repeat the question?

25 Q BY MR. KELLY: Do you think that any of the water

1 right holders in the Delta this year diverted stored project
2 water?

3 A Yes.

4 Q Do you think that, prior to June, that any water
5 right holders in the Delta diverted stored project water?

6 MR. HILDRETH: Same objections.

7 THE WITNESS: I don't know.

8 Q BY MR. KELLY: Do you think that, prior to July 1st,
9 any water right holders in the Delta diverted stored project
10 water?

11 A I don't know.

12 MR. KELLY: Okay. I have no further questions.

13 MR. O'LAUGHLIN: I have -- I have one follow-up. Do
14 you want to take a break?

15 MR. KELLY: Yeah.

16 THE VIDEOGRAPHER: This is the end of disk number 1,
17 the video deposition of Thomas Howard, Volume II. We are
18 now going off the record at 10:11 a.m.

19 (A recess was taken.)

20 THE VIDEOGRAPHER: This begins disk number 2 of the
21 video deposition of Thomas Howard, Volume II. We're now
22 going back on the record at 10:19 a.m.

23 FURTHER EXAMINATION BY MR. O'LAUGHLIN

24 Q BY MR. O'LAUGHLIN: Hi, Tom, I just have a couple of
25 follow-up questions.

1 Were you -- or are you aware of how pre -- people
2 who reported pre-14 riparians on their statements of
3 diversion of use were treated in the methodology that you
4 used -- the State Board used for the demand analysis?

5 A I thought that they were -- we were -- people who
6 had claimed both that we were assuming riparian, but I -- I
7 couldn't swear to that.

8 Q Do you know if at first they were treated as
9 post-14s -- I mean, as pre-14s and then subsequently they
10 were all changed to riparians in the analysis?

11 A That sounds familiar. In fact, it might have been
12 something that I talked about with John, but, you know,
13 again, that's a little fuzzy.

14 Q Okay. Before you made the decision to change the
15 statements of diversion of use for the demand analysis that
16 were pre-14 riparians to all riparians, did you seek advice
17 from counsel as to the effect of the Millview case on such a
18 determination?

19 MR. HILDRETH: You can answer that yes or no.

20 THE WITNESS: Not that I recall.

21 Q BY MR. O'LAUGHLIN: Okay. And the same question in
22 regards to the Delta pool theory and its effect on making
23 such a determination. And your counsel is right, yes or no
24 would suffice.

25 A I'm sorry. Could you repeat the full question?

1 Q Yeah, sure.

2 So, in other words, when you were looking at the
3 change from pre-14 riparians to all riparians, did you ask
4 your counsel as to the effect of the Delta pool theory on
5 that determination?

6 A Not that I recall.

7 Q Did you ask -- did you ask Mr. O'Hagan what the
8 effect of changing the pre-14 riparian designations to
9 strictly riparian would be on junior pre-14 water right
10 holders?

11 A Not that I recall.

12 Q Okay. Did you ask your staff to look at how the
13 change from pre-14 riparian demand to strictly riparian
14 demand, whether or not it was quantified in an amount,
15 whether in acre-feet or CFS per month?

16 A Not that I recall.

17 Q Do you know of a -- an entity called Woods
18 Irrigation Company?

19 A I have heard of that company.

20 Q Do you know whether or not they claimed pre-14 and
21 riparian rights?

22 A I do not.

23 Q Okay.

24 MS. AUE: Can you pause for just a second?

25 MR. O'LAUGHLIN: Sure. I'm sorry.

1 MS. AUE: That's okay. Consult here with the
2 objecting attorney.

3 MR. HILDRETH: Go ahead.

4 Q BY MR. O'LAUGHLIN: Okay. Are you aware of a
5 pending matter in front of the State Water Resources Control
6 Board regarding Woods Irrigation Company?

7 A I'm aware that we have been working on -- that we
8 have, in the past, worked on a Woods Irrigation District
9 issue, and I believe it's still pending, but I wouldn't
10 swear to it.

11 Q Okay. Do you know if, in the past, there was an
12 actual order issued by the State Water Resources Control
13 Board in regards to the Woods Irrigation Company?

14 A Yes, there was.

15 Q Do you know if, in that order, there was a
16 determination made by the State Water Resources Control
17 Board as to the likelihood of the pre-1914 date for Woods
18 Irrigation Company?

19 MR. HILDRETH: Calls for a legal conclusion. The
20 document speaks for itself.

21 THE WITNESS: I don't recall the date, no.

22 Q BY MR. O'LAUGHLIN: So what was your thought process
23 if people were claiming pre-14 and riparian demands in the
24 Delta, were all changed to riparians, as to how that would
25 impact junior pre-14 water rights?

1 A I don't recall making that consideration.

2 Q So if I told you that the demand calculation done by
3 your staff for the month of June changed by approximately
4 200,000 acre-feet from pre-14 to strictly riparian, would
5 that lead you to believe then that 200,000 acre-feet of
6 demand had now been taken away from junior pre-14 water
7 rights?

8 MR. HILDRETH: Calls for speculation and calls for a
9 legal conclusion. Assumes facts not in evidence.

10 THE WITNESS: I don't know what you mean by "taken
11 away."

12 Q BY MR. O'LAUGHLIN: Well, in other words, if in the
13 demand analysis it was assumed under a pre-14 right, pre-14
14 rights, it's your understanding based on the methodology of
15 using FNF, are of lower priority than riparians, correct?

16 A Generally, yes.

17 Q Generally, yes. There's exceptions to the general
18 rule, but the general rule is that, in an FNF methodology,
19 riparians are number one, correct?

20 A Could you tell me what an FNF --

21 Q Full natural flow. Do you understand -- that's the
22 methodology that --

23 A Could you repeat the question, then?

24 Q Sure. Why don't you read it back, please.

25 (Whereupon, the record was read.)

1 THE WITNESS: Yes.

2 Q BY MR. O'LAUGHLIN: So if now people who had
3 previously been put in a pre-14 category were switched to a
4 riparian category, they would now have a higher priority
5 under the methodology that was used by the State Board; is
6 that correct?

7 A Yes.

8 Q Okay. And so it would be possible, depending on the
9 calculations that were done, that that would cut off junior
10 pre-14s at a time when, in fact, they may not have been --
11 strike that.

12 Did you ask Mr. O'Hagan to -- or his staff to
13 provide you with a calculation as to the amount of the
14 change that was made when you switched from pre-14 riparians
15 to strictly riparians?

16 A No.

17 MR. O'LAUGHLIN: Thank you. I have no further
18 questions.

19 THE WITNESS: Not that I recall, actually.

20 MR. O'LAUGHLIN: I have no further questions. Thank
21 you, Tom.

22 EXAMINATION BY MS. MCGINNIS

23 Q BY MS. MCGINNIS: I have a couple. Do I need a
24 microphone?

25 When you were asked earlier today about curtailments

1 and curtailment orders, what was your understanding of what
2 those terms meant?

3 A Well, I assume when we say "curtailment and
4 curtailment orders" that we're talking about notices that we
5 sent out telling people that we, based on our calculations,
6 there was not water available for them to divert under their
7 priority.

8 Q And did they order the parties to do anything?

9 A Well, it wasn't our opinion that they did, no.

10 MS. MCGINNIS: Okay. That's it. Thank you.

11 MR. KELLY: Anybody else?

12 MS. SPALETTA: It looks like we have no further
13 questions, so thank you, again, Mr. Howard, for taking time
14 for your deposition today.

15 THE WITNESS: Well, you're welcome.

16 THE VIDEOGRAPHER: This concludes today's proceeding
17 of Thomas Howard. There were two disks used. We are now
18 going off the record at 10:29 a.m.

19 (The deposition concluded at 10:29 a.m.)

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THE WITNESS

DATE SIGNED

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REPORTER'S CERTIFICATE

State of California)
) ss.
County of Sacramento)

I certify that the witness in the foregoing deposition,

THOMAS HOWARD,

was by me duly sworn to testify in the within-entitled cause; that said deposition was taken at the time and place therein named; that the testimony of said witness was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said deposition.

IN WITNESS WHEREOF, I have hereunto set my hand this day of December 2, 2015.

THRESHA SPENCER
Certified Shorthand Reporter
Certificate No. 11788

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DISPOSITION OF ORIGINAL TRANSCRIPT

Date _____

Check One

_____ Signature waived.

_____ I certify that the witness was given the statutory allowable time within which to read and sign the deposition, and the witness failed to appear for such reading and signing.

_____ I certify that the witness has read and signed the deposition and has made any changes indicated therein.

By _____
KATHRYN DAVIS & ASSOCIATES

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December 2, 2015

THOMAS HOWARD, Witness
Department of Justice, Office of the Attorney General
Attn: Russell B. Hildreth, Attorney
1300 I Street
Sacramento, California 94244-2550

Re: West Side Irrigation District Cease and Desist Order
and Byron-Bethany Irrigation District Civil Hearing

Date Taken: November 25, 2015

Dear Mr. Howard:

Your deposition transcript is now available for review
and signature, and will be available for the next 30 days.
This review is optional. An appointment is required to
review your transcript. Please bring this letter with you.

You may wish to discuss with your attorney whether he/she
requires that it be read, corrected, and signed, before it
is filed with the Court.

If you are represented by an attorney, you may read his or
her copy of the transcript. If you read your attorney's
copy of the transcript, please send us a photocopy of the
Signature Line and Deponent's Change Sheet.

If you choose not to read your deposition, please sign here
and return this letter to our office.

Signature

Date

Sincerely,

THRESHA SPENCER, CSR No. 11788

cc: Ms. Spaletta; Mr. Kelly; Ms. Zolezzi; Ms. Akroyd;
Mr. O'Laughlin; Mr. Tauriainen; Mr. Hildreth; Ms. Aue;
Ms. McGinnis; Ms. Sheehan; Mr. Ruiz; Mr. Weaver

DEPOSITION OF THOMAS HOWARD, VOLUME II

<hr/>	108 169:16,19 176:10,13	190 123:7
Exhibits	109 124:6 170:15,17	1914 141:3,16
Exhibit 103 132:7 136:25 147:7	10:11 195:18	195 123:8
Exhibit 104 132:8,15,20	10:19 195:22	1st 172:19 195:8
Exhibit 105 158:22	10:29 201:18,19	<hr/>
Exhibit 106 159:11,14,22 161:2	10th 168:19 169:23	2
Exhibit 107 165:7,24 166:24 167:12	110 171:20 172:5,10,25	2 176:10 195:20
Exhibit 108 169:16,19 176:10	1104 122:6	20 132:16
Exhibit 109 170:15,17	111 124:10 171:23 172:1,11	200 123:9
Exhibit 110 171:20 172:10,25	1121 122:11	200,000 199:4,5
Exhibit 111 172:1,11	11460 123:19 158:12,14,17,21	2006 179:12
<hr/>	12202 159:16 161:5,9,18	2014 123:17 137:2
#	12203 161:5	2015 123:21 124:6,7,8 125:2,19 127:23,25 129:18 130:18 131:6, 14 142:16 154:4 155:6,19 156:12 157:3,6 158:15 159:25 160:24 164:16 165:22 166:8 167:1,17,19 168:8,20,25 169:23 171:3,7 172:10 174:4,9,15 176:19 193:16
#2 124:3 169:19	12204 161:2	206 179:12
<hr/>	12205 159:16	20th 174:20,24 175:14
-	125 123:17,18	22 162:16,18
<hr/>	127 123:4	23rd 176:23
--o0o-- 122:20 124:14 125:12 201:21,25	140 125:18	24 123:17
--ooo-- 123:12	1416 122:6	24th 137:2
<hr/>	147,000 170:7	25 125:1
1	15 129:14	25th 125:19 167:17
1 195:16	158 123:19	27 167:13
1,000 179:22	159 123:20	2E 172:17 177:6
1,500 179:23	15th 167:16	<hr/>
10 165:10	164 123:5	3
100 146:13,16	1641 155:13,20 156:4	3 156:19,23 180:3
1000 125:4,21	165 123:24	30th 167:19
103 132:7,13 136:25 147:7	169 124:5	31 124:6 156:12
103-104 125:13	170 124:6	3550 125:17
104 123:18 132:8,11,14,15,20	1707 178:6	3rd 156:13
105 123:19 158:20,21,22	171 124:9	
106 123:20 159:11,14,22 161:2	172 124:10	
107 123:21 165:7,11,24 166:24 167:12	18 124:7	
	184 156:19	
	186 123:6	
	18th 172:6	

<hr/> 4 <hr/>	abandoned 134:19 162:12,19, 23 181:20 182:9,18,21 183:1,8 184:5	agency 126:11 127:3 129:5,9, 25
4,000 180:3	abandonment 182:16 183:21	agenda 138:5
4/1 124:4 169:20	abided 174:15	agree 135:22 140:10,14 141:7 142:24
4/8/2015 124:4 169:20	ability 140:4,8	agreed 172:24
42 166:25	absolutely 182:22	agreement 171:6,11,12 172:21 173:8 174:13 178:4 182:4 184:3 185:10
<hr/> 5 <hr/>	accomplish 175:4	agreements 184:21
500 125:3,21	account 158:14 164:13,19	agricultural 155:11
511460 165:13	accounting 163:1,4,9,21 164:10 192:5,9	ahead 126:12 127:17 166:2 186:4 198:3
<hr/> 6 <hr/>	achieve 157:13	aided 145:6
6 123:21 167:1	acre-feet 170:7 197:15 199:4,5	Akroyd 127:6
67 156:8 162:16	Act 123:20 158:12 159:14,15, 22,24 160:2,3,7,13 164:1,14 181:1,5,6,7,10 187:25	allegations 137:14
6th 165:4,22 166:23 167:4,22	actions 149:15,18 150:13	Alleged 125:23
<hr/> 8 <hr/>	active 132:4	Allen 122:18 125:16
8 179:6,8	activities 161:12	alleviate 145:10
88 174:13	actual 155:22 188:17 198:12	allocating 179:3
8:05 125:2,20	add 130:5	allocation 175:5
8:49 154:19	additional 126:12 145:2 167:5 168:1,3 170:22 174:3 177:15 185:5 187:18 193:13 194:1,13	allocations 174:15
<hr/> 9 <hr/>	address 137:14 193:7	allowed 162:6,9,22 171:8
900 122:11	adequate 161:15 164:2	amount 139:10 143:7 170:2 197:14 200:13
91 143:3 157:20,21 158:7 178:24 191:24	administer 125:6	analysis 134:21 135:2 136:5 141:22 145:21 160:7 196:4,10, 15 199:13
916 451-7600 122:17	administration 129:1	and/or 157:4
95814 122:6	administrative 191:1	Andrew 126:20
95814-3974 122:11	admit 137:5	answering 186:13
9:01 154:22	advanced 167:18	answers 190:13
9:22 165:17	advice 196:16	apologize 170:10
9:23 165:20	affect 189:1	APPEARANCES 122:1
<hr/> A <hr/>	affected 189:1,3	appeared 125:7
a.m. 125:2,20 154:19,22 165:17, 20 195:18,22 201:18,19	affiliated 150:12	applicable 157:21 158:1 164:11
	affiliation 150:13	applied 161:23,25 162:1 184:18 192:15
	affirm 175:1	approach 152:15,17
	affirmations 125:7	
	agencies 129:10	

approaches 152:14	authorized 125:6	bit 133:1 141:8 177:16 190:15
approval 171:14 174:23	availability 134:21 135:2 136:4,10 137:1 140:2 141:22 145:21 146:11 150:17 151:11 152:4 159:8 160:5,14 161:3,24 192:22	blinders 185:24
approved 123:21 145:21 166:24 173:23 176:16	Avenue 125:18	block 182:21
approving 156:10	aware 144:3 153:8,12 162:5 167:4,25 178:3 180:14,15 181:9 184:8 187:17 194:6 196:1 198:4,7	board 126:17,19 127:12 129:4, 6,17 137:3,13,21,23 138:3,7,11, 21,24 139:2 143:23 147:8,21 149:8,11,12,24 150:8,21 153:5, 9,15,17 170:22 171:2 173:21 176:17 177:18 182:25 188:9 191:1 196:4 198:6,13,17 200:5
approximately 199:3		Board's 138:5
April 123:21 165:4,22 166:23 167:1,4,16,17,22 168:7,19 169:23 171:7 172:19 174:20,24 175:14 176:23		bottom 132:23 133:11
April/may 168:2	<hr/> B <hr/>	boundaries 133:18,19 183:23
aquatic 155:11	back 127:15 132:3 140:12 147:7 152:1 154:21,23 159:2 165:19 167:9 169:5,7 174:22 189:16 195:22 199:24	boundary 183:7
argue 185:21	Banta-carbona 126:25	break 154:17,24,25 164:22 165:14 195:14
argumentative 185:19,21	Barbara 150:5 154:1	broad 155:9
Arroyave 168:15	based 124:4 137:22 142:15,17 144:24 146:3 148:7 150:16 169:20 183:22 185:2 190:13 191:23 192:9 199:14 201:5	broader 140:1
articulate 187:5	basically 185:24	brought 131:1 190:1
assigned 153:23 154:1	Basin 134:12	bunch 172:7
Assistant 177:25	bay 139:14	Bureau 130:16,17 131:18 137:24 168:15 174:14 181:19
Associates 126:4	BBID 141:10 142:17 145:15 147:5 149:14 152:21 162:2 163:13	Byron-bethany 125:24 126:23
assume 134:1,4,11 146:17 173:10 201:3	BBID'S 132:25 141:2,22 146:12,21 153:3,5,10 157:22,25	<hr/> C <hr/>
assumed 145:1 199:13	bear 179:18	Cal 129:2
Assumes 199:9	Beardsley 176:3,18	calculating 186:23
assuming 143:11 178:24 196:6	bearing 160:7,13	calculation 136:14 146:7 160:9,11 186:1 187:21 191:25 199:2 200:13
assumption 143:12 155:8,24	BECKY 122:10	calculations 184:25 187:22,24 188:1,5,6 200:9 201:5
Atlas 132:17,20	begins 195:20	calendar 132:2 168:25
attached 124:8 156:14	behalf 125:16	California 122:3,6,9,11 125:4, 6,18,22 127:5 145:8
attachment 124:3 156:20 169:19 170:21 172:8 176:10	belief 191:22,23	call 179:4
attempt 144:22 187:14	believed 151:9,15 186:25	called 125:9 169:19 197:17
attempted 194:5	benefit 185:12	calls 131:14 132:1,5 135:18 136:6,21 141:14,25 142:22 145:17 146:14 151:21 155:16 157:17,23 158:3,8 160:16 161:20 162:13 164:4 173:16
attend 154:10 168:14	benefits 155:9 156:1	
attended 128:24 169:23 190:17	Bill 128:5,8,13	
attention 161:1		
attorney 122:5,10 126:2 198:2		
attorneys 164:19 182:22		
Aue 126:16 135:19 158:24 165:9,12 197:24 198:1		
authority 127:9 151:18 165:2		

174:16 175:19 176:20 177:12 180:12,20 181:4,13,22 182:5,11 183:10,24 184:6,15 185:7,18 188:13 194:22 198:19 199:8	choose 152:11	condition 154:3 181:10
Capitol 125:3,21	claim 138:9 139:24	conditional 168:12
Caren 150:5	claimed 196:6 197:20	conditionally 156:10
carryover 170:2 172:22,23 173:8,22 175:5	claiming 137:25 198:23	conditioned 153:5,10
case 163:8 165:5 183:12,20 187:1 191:4 196:17	clarification 148:14 157:1	conditions 123:23,24 173:19
category 200:3,4	clarify 149:1 172:3	conducted 134:22
cease 153:6	Clean 181:1,5,6,7	confirm 152:6
Center 122:17 125:17	Clifton 132:23 133:1,3,5	confounding 178:24
centered 140:1 142:8	closed 179:10	consequence 143:19 144:8,9, 19,20,24 147:18 150:15 151:11
central 126:11 127:3 137:1,16 138:1 141:17,19 161:14	Code 123:19 158:11,14,21 159:15 178:5	consequences 145:9,10 150:19 155:1 194:7
Certified 125:5	collecting 163:7	conserve 174:3,7 177:10
cetera 156:3	combination 134:5 135:10 157:12	conserving 177:14
CFS 180:3 197:15	commencing 125:2	consideration 159:23 188:16 191:16 199:1
chain 124:6,7	comment 161:21	considered 135:10
chairing 129:2	comments 137:13 138:17,22, 25 147:9	consistent 163:24 164:11
chance 132:10	committed 178:19	Consult 198:1
change 153:13,19 162:10,24 165:4,23 166:6,19 167:21 170:23 173:12,13 185:17 189:8 196:14 197:3,13 200:14	communication 131:23	contact 128:1,4
changed 141:23 196:10 198:24 199:3	communications 127:20,22	contained 157:25 158:2
changing 197:8	company 197:18,19 198:6,13, 18	content 148:1
channel 133:15 141:11 142:18	complaint 131:1,2,5,6 138:2,7, 8,12,14 139:13,15	context 128:6,8 140:23 148:25 150:13 151:9 166:1 171:24
channels 132:9,21 133:21 134:8 135:17,24 136:1,3,18 139:14,21 140:9 141:12 142:11, 20 145:16	Compliance 123:23	continually 179:23
chapter 161:6	composition 133:23	continuation 127:15
characterization 152:4	concern 171:1 184:22 193:22 194:3	continue 127:17 160:23 161:19 162:7,11,23 175:24 193:18
characterize 134:17 135:4 138:3,11	concerned 169:12 170:5 175:7 180:16 193:15	continued 122:1 124:1 126:1 156:19 163:18
characterized 138:6,14	concerns 170:1 180:2	continues 193:8
charge 153:17	concluded 201:19	contract 186:4
Chief 122:4 126:17,19 177:25	concludes 201:16	Contractors 122:8 130:24 131:19
	conclusion 141:14,25 142:22 145:17 151:21 155:16 157:17, 23 158:3,8 160:16 161:20 162:13 164:4 173:17 180:12 181:4,13,22 182:11 183:10,24 184:6 185:19 188:13 198:19 199:9	contracts 175:23,24
		control 126:17,19 127:12 137:3 153:5,9 161:13,15 164:1 170:22 171:1 177:18 179:12 180:6,8, 10,17 183:22 193:14,19 194:2, 14 198:5,12,16

controlling 154:3 155:20	128:15 129:18 130:11,17	DELL 122:10
conversations 127:24	131:10,15 142:14 143:4,15	Delta 123:18,20,23 126:11
coordinated 182:1,4	144:8,21 145:22 155:1 160:24	127:3 131:3 132:9,17,19,20,21
coordination 161:11	185:11,12 186:15,25 187:11,15	133:16,18,19,24 135:11,15,17,
copied 165:4	188:10 190:2,3 193:11,12,15,	21,23,25 136:1,3,18 137:1,17
copies 158:24	22,23 194:10 200:25	138:2 139:10,13,14,19,21
copy 132:16,19 170:11	curves 184:19 193:1,9	140:2,5,6,8,9,17,24 141:11,12
correct 134:16,23 135:25	cut 130:3 151:2,4 200:9	142:9,11,16,18,20 143:23
138:22 143:24 145:14 146:6	cutoffs 185:25	144:2,11,15,16 145:2,16 150:17
153:15 155:2,15 156:18 157:16	CVP 182:4	151:12,14 152:23,25 153:7
162:3,8,24 164:16 166:8,14,21,		155:9 156:4,6 159:14,15,22,24
22 168:9 170:7 173:23 175:11	D	160:2,3,6,8,12,15,24 161:4,13,
176:9 178:22 179:9 180:6		16 162:7 163:19 164:1,3,14
190:20 193:4 199:15,19 200:6	D-1641 166:20 168:2 169:5	179:4,23 180:4 182:10 189:1,9,
correcting 133:4	177:17,18,21,24 178:1,8 179:2,	14,15 190:20 191:17,19,23
correctly 190:16	11 180:9,16 190:16,19	192:4,8,19,20,24 193:3,14
counsel 122:4 126:8,13,14,17,	Dam 185:6	194:20 195:1,5,9 196:22 197:4
19,24 127:4 196:17,23 197:4	damage 190:8	198:24
counted 135:12	Daniel 126:22	demand 134:24 193:9 196:4,15
couple 179:7 186:8 190:12,13	Dante 191:10	197:13,14 199:2,6,13
195:24 200:23	date 125:19 141:3,7 156:12	demands 143:8 146:1 198:23
court 126:3 132:23 133:1,3,5	167:13 168:22 184:24,25	Denied 123:22
140:12 147:23 151:25 170:14	198:17,21 201:23	Department 122:3,4 127:5,21,
191:2,3	dated 124:4,6,7 167:1 169:20	22,25 128:2,18 129:3 137:24
cover 172:5	David 127:2	166:7 182:25
covered 148:24	Davis 126:4	depending 200:8
covers 181:7	day 127:16	depends 162:25 164:18 187:16
Cowin 128:7,8 129:16,21 130:7,	deal 169:11 175:14	depict 132:20
9,11	decades 141:11	depletions 178:15
Crowfoot 129:2	decide 137:9 143:4 147:23	deposition 123:15 124:2 126:2
Croyle 128:5,9	decided 138:3,4 151:1,5	127:15 134:21 190:17,18,25
curious 192:22	deciding 184:22	191:3,7,9,12 195:17,21 201:14,
curtail 193:17,25	decision 136:19,20 155:13,20	19
curtailed 143:23 144:1,2 146:2	156:4 164:7 196:14	depositions 182:17
163:16	decisions 158:15 159:7,24	deputy 129:5
curtailing 128:17 144:16 145:5	160:4 164:16	derived 184:19
curtailment 142:14,17 150:16	decrease 189:9	designations 197:8
151:1 155:5 158:15 159:6,24	defensible 164:20	designed 138:16
160:4 164:7,15 175:17,21	defines 155:13	desire 142:15 150:24
184:10,13 188:3,16 189:22,23	deliberative 148:8,10,24	determination 160:14 192:24
201:1,3,4	deliveries 168:13	196:18,23 197:5 198:16
curtailments 127:21,23,25		determine 136:9 150:17,22

developed 161:24 193:1	180:19 183:4 188:2,23 194:20 195:1,5,9	email 124:6,7 170:20
development 147:18 161:11	diverters 131:3 139:11 144:16 150:17 151:12 160:8,14 180:19	employed 177:17
dialogue 129:23	diverting 152:22 189:13 193:16,24 194:11	enabling 161:19
Diane 154:13 166:16 172:7	Division 153:25 177:25	end 170:2,5 173:15 175:11 195:16
differently 180:22	divulge 151:23	enforcement 126:21 147:22 149:15,18 150:12
difficult 133:22 146:16 157:7	document 144:22 165:9 170:11 180:13 187:14,20 189:24 198:20	ensure 161:17 164:20 194:4
diligence 152:5,8	documented 144:20,24 188:11	entering 180:4
directed 192:23	documents 165:3	entire 166:1 169:11 182:15
direction 148:2,4	Donnells 176:3,18	entities 131:17 142:17 145:22
directly 148:18,20 149:16 150:12	door 184:3	entity 129:8 144:10 184:3 197:17
director 127:11 129:5 167:1,18 172:12 182:15,25	double-check 162:15	equation 140:7
discuss 128:15 130:11,17 131:10 137:13 168:17,18 175:3	downstream 135:7 176:25 183:14 185:13	Eric 122:18 125:15
discussed 134:16 149:8,11 164:9 169:11	draft 124:10 167:16 172:13	establish 155:24 157:12
discussion 136:23 147:10,14, 20,24 148:20,23 150:24 154:5,6 158:16 160:1 165:18 168:4,23 169:10 170:8,13 178:8,18	drain 184:2	established 134:20
discussions 126:6 139:25 149:14,17,20,21,23 150:9,11,14 151:7,22 178:9	drought 123:24 128:10,13,16, 20 144:3 154:9	estimated 173:1
disk 195:16,20	drought-related 130:2	evaluate 159:5 164:7
disks 201:17	due 152:5,8 167:16,17 189:11	eventually 150:21 171:13 179:10,24
district 122:9 124:3 125:25 126:23 127:7 130:21 131:19 163:13 168:6 169:19 183:8,9,14 184:1,2 186:12 198:8	duly 125:6,9	evidence 199:9
District's 133:10	Dunn 125:3,21 126:22	Evoy 150:5
districts 127:1 174:2,7,14 175:15 177:10 184:9,14 185:4	duties 177:23	exact 170:9
diversion 125:24 131:3 132:25 133:10,12 137:16 146:12,22 152:24 153:3 180:9 181:2,12 196:3,15	DWR 124:4 131:15 132:16 169:20	Examination 123:4,5,6,7,8,9 127:13 164:24 186:10 190:11 195:23 200:22
diversions 137:25 138:9 153:6	<hr/> E <hr/>	examined 125:10
divert 139:13,16,19 140:5,8 141:1,10 142:18,19 145:15 152:20 159:9 162:9,11,19,23 201:6	earlier 132:13 185:14 186:14 200:25	exceptions 199:17
diverted 139:10 141:23 146:10	early 166:18	excerpts 123:21 165:24
	east 134:3	excess 144:13 187:7
	educate 152:10	excluded 192:21
	effect 145:4 147:24 196:17,22 197:4,8	exclusively 129:10 134:1 156:23
	effort 161:17	excuse 153:4
		Executive 127:11 167:1,17 172:12 182:15,25
		exercise 192:5
		exhibit 123:15 124:2 125:13 132:7,8,15,20 136:25 147:7

156:7,8 158:19,22 159:11,14,22 161:2 162:16 165:7,24 166:24 167:12 169:16,19 170:15,17 171:20 172:1,3,10,11,25 176:10,12	144:13 152:24 155:22 156:15, 18,25 157:2,4,5,8,9,10,11,12,13 162:11 163:11 168:1,2,3,7 169:12,21 171:8 176:18 177:4 185:5 188:23 199:21	199:17,18 Generally 199:16,17 geology 183:22 George 150:6 gist 139:15 give 149:10 165:3 169:3 goal 175:9 176:23 goals 173:11,13 good 125:15 127:14 142:5 152:4 Goodwin 171:9 172:19 185:6 gradient 134:6 144:15 grading 152:25 153:6 grant 167:21 granted 173:14 graph 173:3 Green 127:2 Grober 154:13 166:16 grounds 148:10 groundwater 134:10 group 150:4 guaranteed 168:7 guarantor 144:11 guess 138:2 150:20 164:18 167:8 guests 129:11
exhibits 132:6,10	flowed 135:25 192:3	
existence 141:8	flowing 134:18 135:21	
expectation 185:3	flows 134:10 162:12,20,23 168:4 172:18,24 189:11	
explain 163:3 186:21 189:5	FNF 199:15,18,20	
export 160:23 161:3 162:7 163:18	focus 180:3	
exported 161:4 179:24	follow-up 139:3 147:10,13,16 186:8 190:13 195:13,25	
exporting 161:19	Force 128:10,13,16,20	
extent 144:12 152:19 162:19	Forebay 132:23 133:1,3,5	
	forecast 124:3,4 169:20,21 170:6	
<hr/> F <hr/>	formal 138:12,14	
fact 138:21 142:10 158:1 168:5 177:9 183:13 196:11 200:10	forward 147:12	
factor 178:25	foundation 136:7 167:8 184:16 194:23	
facts 199:9	framed 151:7,8,9	
fairly 166:4	free 184:24 186:3	
familiar 156:5 158:11,13 159:14 168:21 170:4 176:3 196:11	frequently 128:20	
farther 134:4,7 147:3	fresh 134:5,17 135:10,17,24 139:20 140:9 142:11,19 143:7,9 145:16,25 146:10,11,13,24 155:9	
federal 155:14 157:15 161:13	front 150:21 165:21 174:22 198:5	
feel 166:1	fulfilling 161:18	
Felicia 138:4	full 134:22 135:5,8 162:18 165:22 168:12 196:25 199:21	
fell 185:15	fully 164:11	
felt 144:4 152:14	functionally 152:19	
file 131:9	functions 161:10	
filed 131:1,6 178:5	fuzzy 196:13	
final 167:16 174:23		
firm 173:22	<hr/> G <hr/>	
firms 126:9	gages 135:4,6	
fish 124:10 155:10 172:13	general 126:24 150:18 152:13	
fishery 156:2 167:25 168:16		
five-minute 154:16		
flow 124:4 134:15,22 135:5,8		
		<hr/> H <hr/>
		habitat 155:11 hand 169:14 170:14 handled 182:3 handout 169:22 happened 138:24 happening 129:24 139:7 harder 169:4 harm 189:10 head 188:7

Kronick 127:6	logical 164:22	180:4,17,25 181:11,19 182:2 193:14,18 194:1,13
<hr/>	long 132:4 162:7	
L	longer 183:4 186:25	meeting 129:2,12,15 130:25 131:7,11,23 149:2,3,5 168:14, 21,23 169:23,24 171:5 172:17 178:19 179:13
Lack 136:6 167:8 184:15 194:22	looked 128:17 132:3 134:22,24 135:3 137:19 143:6 145:24,25 185:14	meetings 128:10,11,14,16,19, 20,24 129:6,7,22,23 130:7,8,10, 15,16,20,23 131:13,18 154:7,10
Lake 172:9	losses 178:10,12,13,15,18	meets 181:2,12,21 182:8,9
large 191:25	lot 128:25 175:22,23 178:2	Melones 124:8 167:6,22 170:3 171:2 172:9 173:15 174:4,8 175:11,15 176:2,6,8,13,19,25 177:11 181:17,18 182:2
Law 122:5,10 125:3 127:2	lower 199:15	
laws 164:11	<hr/>	
lawyers 151:22	M	
lead 199:5	M&i 155:11	member 147:21
leaving 184:2	made 136:19 161:17 168:8 170:11 184:3 187:24 188:4 189:1 192:23 196:14 198:16 200:14	members 149:8,11,12,24 150:8
left 179:6 183:7,9	maintain 144:14 145:4 152:24 173:18	memory 131:21
legal 122:17 125:17 133:17,19 137:14 141:14,25 142:22 144:2 145:17 151:21 155:16 157:17, 23 158:3,4,8 160:16 161:20 162:13 163:11,13 164:4 173:17 180:12 181:4,13,22 182:11 183:10,24 184:6 185:19 188:13 198:19 199:9	make 138:7 169:4 188:22	mention 189:22
legally 164:20 182:20	makes 136:3	met 129:17 162:8 180:1
Les 154:13 166:16	making 158:15 159:6,24 160:4 164:7,15 178:17 193:12 196:22 199:1	method 143:6 150:22,23 151:10,13,14,19 152:11 163:21, 22 192:9
letter 137:23 138:6,8,11,17 172:11 174:20	Mall 125:3,21	methodology 136:9,12,15 152:7 161:22 162:2 163:1,2 164:10 177:7 184:17 192:5,6, 13,17 193:7 196:3 199:14,18,22 200:5
letters 184:23 186:2	map 123:18 132:9 133:11	methology 150:16 161:24 163:4
level 140:19 152:20 173:20	March 124:6 167:19	METROPOLITAN 122:9
Levels 123:18	Maria 168:16	Michael 150:6
LIA 122:14	Marianna 126:16	microphone 200:24
License 123:22	Marines 167:25 168:15	Milligan 124:6 170:20 172:7,11 174:20,22
life 169:4	mark 128:5,7,8,12 165:6 166:3 171:23	Millview 196:17
likelihood 198:17	marked 125:14 132:6 156:7 158:19,23 159:12,13,22 165:8, 24 166:24 169:15,17,18 170:15, 18 171:19,21,22 172:2,10 176:10,12,13	mind 179:22 182:7 183:6 189:19
limited 166:4	matter 125:23 160:20 198:5	minimum 173:6
list 149:10 185:14,15 188:5	Mcginnis 122:5 123:9 127:4 200:22,23 201:10	minute 132:15 141:2 159:19,21 169:3
LLC 125:17	meant 182:2 186:21 201:2	minutes 129:14
located 125:17	meet 131:25 132:3 161:5 168:1, 6 177:4 178:11,16,22 179:3	Mischaracterizes 146:23
location 125:20 155:25 163:7		Misstates 146:5 162:4
locations 133:23 135:7 155:23		
log 131:25		

misunderstood 139:22	northern 133:25	191:24
mixing 139:14	Nos 125:13	occur 128:21 148:25 150:25 168:19 171:7
mixture 135:13,16,24 136:4,17 139:20 140:8 142:11,19 145:15 146:15,20,22	notice 123:16 132:7 136:25 137:19,22 138:10 187:8	occurred 131:7 178:9,16 179:8
modify 166:19	notices 150:16 175:21 185:1 189:22 201:4	ocean 134:13 147:4
Modifying 123:21 165:22	noticing 126:2	October 171:8 172:19
Monday 172:6	notification 167:18	OES 129:2
monitor 125:20	November 125:1,19	off-the-record 165:18
month 170:2,5 173:15 175:11 197:15 199:3	number 128:18 167:13 173:22 195:16,20 199:19	Office 122:4 126:17,19,20
monthly 153:14,22	numbers 170:9	Offices 125:3
morning 125:15 127:14		officially 138:7
Moskovitz 127:6	<hr/> O <hr/>	omitted 146:8,9
move 134:4,6 147:3,12 176:24	O'hagan 150:5 175:3,16 184:13 197:7 200:12	open 179:6
moved 178:13	O'laughlin 123:5,8 124:6,8 127:8 158:25 164:23,24,25 165:1,10,21 167:11 169:14 170:19 171:22 172:5,6,16 173:21 174:1,19 176:1,22 177:16 180:15,22 181:6,16,25 182:7,14 183:13,21 184:1,8 185:2,20 186:6 190:15 195:13, 23,24 196:21 197:25 198:4,22 199:12 200:2,17,20	operate 155:8,14,18 175:25 185:11
moves 140:9 179:18		operated 168:24 175:16
moving 140:5 142:9,16 143:7 178:15 179:23 180:24		operating 142:12
multiple 155:25 157:13		operation 161:13 163:12 172:20 174:12,21 176:7 182:4
Murillo 168:18		operations 124:4,8,10 154:9 168:18 169:20 171:2,6 172:9 174:25
<hr/> N <hr/>		opine 182:23
Nathan 126:18	O'laughlin's 191:15	opinion 152:18 160:19,22 182:7 183:23 201:9
National 167:25 168:15	Oakdale 168:5 174:2 175:17 177:9 184:9 185:4	order 123:21 143:3 144:14 145:3,10,11 156:10,14 162:10 165:6,10,22 166:1 167:5,7,24 169:15 173:23,24 175:9 176:23, 24 178:11 184:14 185:5,16 198:12,15 201:8
natural 134:15,22 135:5,8 144:13 152:24 162:11,19,23 163:11 188:23 199:21	oaths 125:6	ordered 179:11
nature 163:12	objecting 198:2	orders 139:9 147:17 184:10 188:16 201:1,4
necessarily 151:7 163:8 182:19 193:7	objections 195:6	original 166:25
needed 175:1 183:4 187:19 190:4 193:23	objective 156:4 178:11 180:11, 18 181:3,12 182:10	originated 134:11
Ninth 122:6	objectives 123:24 156:6,16,18, 21 157:2,5,8,10,14 178:20,22	outcome 184:18
NM 176:13	obligation 163:25 194:4	outflow 156:4,6 179:4 180:4
NMFS 175:15 177:5	obligations 161:18 164:14	Overlapping 126:5
Nomellini 191:10	obtain 138:17	
normal 128:1,3	OCAP 172:24	
north 133:1	OCAP-BO 172:17	
	occasionally 128:11 129:11	

P		
	Petitions 165:23 166:7	present 122:13 133:20 135:17 136:17 139:20 141:12 142:20 145:16 149:7 150:1,9 168:17 191:17,19 192:18
	Phase 179:6,8	
Pablo 168:15	phrase 180:22	presentation 129:12
pages 123:17,24 124:9	pick 183:14	pretty 173:3
paragraph 162:18 167:15	picture 179:22	prevent 193:23 194:10
parameters 155:13 174:24	pie 152:9	previous 128:14 179:16 182:17
part 123:21,22 128:22 133:25 134:2,20 140:20 160:9,10 171:7 174:11,12 190:17,25 191:15	piece 182:20	previously 134:16 135:24 156:7 183:3 200:3
participate 129:15	place 146:21 174:25 185:10,16	print 173:2
particle 163:1,21 192:6,9	plan 124:8,10 167:16,17 172:9, 13,20 174:12,21,22 176:7,17 177:3 179:13 180:6,9,10,18	prior 141:16 145:5 152:6 161:19 164:7,12,15 187:10 190:18 195:4,8
parties 128:18 144:12,25 152:20 170:5 178:4 184:20 201:8	play 157:3,5	priority 141:3,7 143:20 144:5 145:8,11 158:18 175:22 185:25 186:16,22 187:7,18 189:20 190:6 194:4,6 199:15 200:4 201:7
parts 128:23 129:1	plots 131:4	Private 126:6
party 143:2 153:2 159:10 183:4 187:8	point 128:1,3 132:25 133:10,12 146:12,22 155:22 164:21 166:23 180:23 182:9 183:14	privilege 148:24
pass 168:11 171:8	points 155:22	problem 179:19
past 145:24 152:20 159:18 179:20 198:8,11	political 183:7,22	problems 167:5
Patterson 126:25	pool 196:22 197:4	proceeding 125:16 147:22 150:21,25 190:19,23 191:1,4 201:16
pause 197:24	Porter-cologne 181:10	proceedings 179:3
pending 149:18 150:12 198:5,9	posed 186:14	process 137:13 138:18 139:1 147:9,12 148:8,10,24 198:22
people 128:25 129:6,7,24 131:25 139:13,19 140:5,8 146:2 157:20 172:7 175:22,23 185:13, 15 187:7,9 193:16,24 196:1,5 198:23 200:2 201:5	position 167:21	project 137:25 139:17 141:19, 24 145:3 161:14 167:22 176:7 181:17,18 192:20 193:16,24 194:8,11,21 195:1,5,9
people's 151:2	post-14 175:18	project's 138:17 139:12
percent 146:13,16	post-14s 196:9	projected 170:6 176:8
period 145:1	potential 131:10 147:4 188:11 189:10 190:8	projects 138:6 141:8 142:12,21 144:10,13,17 153:14,18 154:4 155:14 156:11 157:16 160:23 161:18,19 162:2,6,11,19,22 163:4,18,25 176:3 178:10,19,21 179:5,13 182:1,8 189:8 193:13, 17,25 194:12
Permit 123:23	potentially 189:3 194:8	projects' 152:22
permits 157:19 178:24	PPIC 129:13	property 152:19 191:18
perplexed 175:13 185:9	pre 196:1	
person 153:20 177:21	pre-14 196:2,16 197:3,8,9,13,20 198:23,25 199:4,6,13 200:3,14	
personally 125:7	pre-14s 196:9 200:10	
perspective 163:9	pre-1914 138:1 142:18 143:23 144:1 184:10,13 198:17	
petition 123:22 153:13 162:24 166:19 167:21 170:23 173:12, 14 178:5 189:8	pre-cvp 141:23	
	precedent 151:18	
	precursor 149:14	
	premise 142:25	
	presence 192:21	

proposed 178:4	question 128:15 133:22 136:2, 18 137:11 139:22 140:6,11,15, 18,21,24 142:1,4,5,25 143:11, 14 145:19 146:4,16 148:3,5,10, 11,12 149:2 150:15 151:24 152:10 157:1,7 159:22 160:17 162:14,22 169:6 170:24 172:15 175:13 180:21 181:15 183:18 189:16 193:20 194:18,24 196:21,25 199:23	178:7,19 186:2,17 188:4 190:16,20,23 191:1,7,12 196:20 197:6,11,16 198:21 199:1 200:19
Prosecution 126:21		recalled 190:19
protect 124:10 142:15 143:16 144:5 152:25 153:6,10 155:2,14 156:1 172:13 175:9 178:6 187:2 188:10		receive 137:12 138:21
protected 155:5		received 138:25 147:9,12 166:18 169:22 184:9 185:4
protecting 143:1 144:7 186:15		receiving 137:23 153:17 168:12 171:15
protection 123:20 140:19 155:10 156:2 158:12 159:6,14, 15,22,24 160:2,3,6,13 164:1,14, 15 189:9	questioned 127:18 191:11	recent 137:14
protects 180:9 181:1,11	questioning 127:18 164:22,23 186:11	recess 154:20 195:19
provide 153:14 156:2 164:1 200:13	questions 140:1,4 165:25 166:4 169:5 178:1 186:7,13 190:10,13,14 191:15 192:18 195:12,25 200:18,20 201:13	Reclamation 130:16 131:18 137:24 166:8,19 167:19,22 168:15 174:14 175:15 181:19
provided 161:10 167:18 176:7		recollection 129:19,20 130:12, 19,22 131:12,16,20 136:22 139:11 148:18 150:7,10 165:5 167:13,20 170:13,25 171:19 173:1 175:7,20 191:13
providing 161:12 163:10	<hr/> R <hr/>	record 126:7 132:4 140:13 142:2 148:13 152:2 154:18,22 159:4 160:18 165:15,16,19 169:9 195:18,22 199:25 201:18
provision 161:14 175:25 180:8	Rae 168:16	recorded 126:7
provisions 162:8	raised 138:16 139:12 142:7	recording 126:5
public 123:16 132:8 136:25 147:8,23 149:2,3,5 153:1,10 155:2,4,15 187:25 189:9,23 190:1,4,8 194:8	ran 131:3 158:25	Records 187:25
pulse 168:1,2,3,4,7 169:12 171:8	range 155:9	reduced 189:11
purchase 184:4	rarely 128:4	referring 156:21 173:5
purpose 137:12,18 142:25 143:19,20 156:1 187:2	rational 136:20	reframe 143:10
purposes 143:15 157:13 190:5	re-diverted 180:1	refresh 131:21 165:5 167:12,20 170:12,25 171:19 172:25
pursuant 153:18 162:23	reached 171:6 173:7	refused 168:10
pushing 163:5	reaches 180:10	refusing 168:6
put 165:21 166:1 171:13,24 173:14 174:8,13 185:23 200:3	read 140:12,13 142:2 148:13 152:1,2 159:2,4,17,18,21 160:18 166:11 169:7,9 199:24, 25	regard 136:23 174:15
<hr/> Q <hr/>	reading 171:16 177:13	regular 129:12
quality 123:23 144:11 155:11 178:11 179:12 180:5,8,10,17 181:3,11 193:14,19 194:1,13	real 129:23 154:9	regulating 168:11
quantified 197:14	realizing 185:16	regulatory 154:3
quantities 134:6 160:25 191:25	reason 145:13	relate 149:20
quantity 137:15	reasons 192:21	related 138:18 148:16,18,21 190:20
	Rebecca 127:6	relating 149:17
	recall 127:24 137:7,18 139:4,5, 7 147:16 150:2,3 151:3,6 153:22 158:16 160:1 167:10 168:3,10 169:25 170:9 171:15, 16 172:23 173:9,25 174:5,6,11, 18 175:2 176:21 177:2,13	

relation 147:5	requirement 155:20 167:18 168:2 178:17 179:14 180:5,25 181:10,20,21 182:3,9	riparians 196:2,10,16 197:3 198:24 199:15,19 200:14,15
release 143:3 144:14,17 153:2 154:3 168:6 177:4 188:21 193:13,18 194:1,13	requirements 155:17 157:12, 13 159:23 160:7,13 161:5 166:20 169:12 177:5 178:23 179:4 180:4,25 193:14,19 194:2,14	river 124:10 133:10 134:2 166:5,20 168:1,19,24 171:10 172:13,18 175:4 176:2 178:3, 13,15 179:21 185:6 189:13
released 145:3 152:21 176:18 179:17,20 180:24 181:11,18 182:8 187:19 192:1,3	requires 140:19 153:2	Robin 122:5 127:4
releases 134:15 172:22 173:1, 6,9 178:3,6,11,12 180:17 182:2 188:22,25	Requiring 123:23	Ron 170:20 172:7,11
releasing 163:6 178:14 187:9	reservoir 167:6 168:11 170:3 173:22 176:6,9,19 177:11	Ronald 124:6
rely 164:19	reservoirs 139:17 141:16 176:24	Room 122:6
relying 151:19	resolution 167:7	roughly 179:22
remain 174:3	resolve 138:16,18 147:10	round 126:12
remained 192:4	resolved 147:22	RTDOT 154:6,8
remember 130:13 137:4 153:23 171:11 172:21 173:7 174:1 178:8,18 191:2,4	Resource 153:4,9	rule 199:18
REMEMBERED 125:1	resources 122:3,4 126:16,19 127:5,12,21,23 128:2,19 129:3 137:3,24 155:2 161:11 166:7 170:22 171:1 175:6 177:18 189:10 190:8 194:9 198:5,12,16	Russell 126:14
reminds 128:14	respect 128:14	<hr/> S <hr/>
repeat 140:11 142:1 151:24 160:17 169:6 180:21 193:20 194:24 196:25 199:23	responding 192:18	Sacramento 122:6,11,17 125:4,17,18,21 133:25 134:1, 12,18 178:15
rephrase 193:21	response 123:24 185:2 191:14	Sacramento-san 132:17 161:3,16 164:3
report 129:13	responses 138:8,12 187:25	safe 185:3
reported 129:24 196:2	responsibility 179:3	safety 180:2
reporter 125:5 126:3 140:12 151:25 170:14	responsible 178:10,17 179:13	salinity 144:14 145:2,6 152:25 153:6 155:23 156:15 157:4,8,11 161:12,14 164:1 178:16,20,22 179:14 181:19,21 182:3
reports 153:14,22	result 155:5 163:24 188:3	salt 142:19
represent 126:9,11 132:16 170:19 176:5	return 134:10	saltwater 134:5,6 135:10,12, 16,25 139:20 140:9 142:11 145:16 146:24
representative 129:3	returns 183:4	San 127:8 134:2,12 165:1 166:20 168:5 174:2 175:17 177:9 178:3 184:9 185:4 189:13
representatives 127:20 130:15,17,20,23 131:15	review 159:19 179:12	satisfy 188:24
represented 129:8	reviewing 132:18 159:20	scheduled 137:2
representing 127:3 165:1	revised 174:21	season 152:22
request 139:9 167:25 170:21 173:22 175:17 187:25	Riddle 154:13 166:16 172:8	Section 123:19 158:12,14,21 161:2,9,18 178:6
requested 143:2 189:8	rights 144:1 151:2,4 153:25 175:18 184:10 187:3 193:17 197:21 198:25 199:7,14	Sections 159:15 161:5
require 145:3 153:5	riparian 138:1 196:6 197:8,9, 13,21 198:23 199:4 200:4	
required 173:19 178:22		

DEPOSITION OF THOMAS HOWARD, VOLUME II

seek 138:8,12 196:16	simultaneously 178:5	194:22 199:8
selected 152:17	single-track 126:5	Spencer 125:5 126:3
selecting 152:6	sitting 126:11	spoke 129:21
sell 183:15	slice 152:9	staff 134:22 135:9 136:2 143:2
send 171:18 175:16 184:13 185:16	slightly 133:4	149:13,22,25 150:1 154:2,12,14
sending 175:21 187:10	small 160:25 173:3	166:13 170:22 171:2 177:7,21
senior 176:25 187:2,6,8,11 188:10,17 189:14,17	solely 142:15	182:14,15 187:10,14 192:23
separate 140:6	Somach 125:3,20 126:22	197:12 199:3 200:12
separated 126:6	someone's 165:12	staff's 188:7
separately 149:9	sort 151:16 154:6 178:24	stakeholder 129:8
September 123:16 137:2 170:3,6 173:15 175:11	sorts 155:12	stakeholders 138:22 139:1
set 125:10 137:8 177:5	sought 164:6	standard 155:24
sets 138:5	sounds 141:5 143:11 153:16 158:13 166:22 168:21 170:4 196:11	standards 145:4 155:22
share 159:1	source 134:14 135:23 146:8 186:3	Stanislaus 124:10 166:4 168:1, 19,24 171:10 172:13,18 175:4 176:2 185:6,11
Shasta 178:14 179:17,20,25	sources 133:20 134:8,25 135:1,15,20 137:15 184:23	start 132:14
She'll 169:8	south 168:5 174:2 175:17 177:9 180:2 184:9 185:4	started 132:6
SHEEHAN 122:10	southern 122:9 134:2 137:1,17 138:2	starting 126:13
short 154:24	Spaletta 122:14 123:4 126:3,10 127:2,13,14 135:22 136:11,24 140:20 141:18 142:5,23 145:20 146:6,15,24 147:7,15,20 148:2, 7,9,15 149:3,23 151:25 152:5, 16 154:16,23 155:7,19 157:21, 24 158:6,11,21 159:1,2,5,13 160:21 162:1,6,14 164:6,12,21 169:18 172:3 185:9 186:14 201:12	starts 162:18
Shorthand 125:5	speaks 173:24 180:13 189:24 198:20	state 122:8 125:5 126:16,18 127:12 129:4,8,10,17 130:23 131:19 137:3,13,21,23 138:7, 11,21,24 139:1 141:18,23 143:22 145:8 147:8 153:4,9 155:14 157:15 161:10 170:21 171:1 173:21 176:17 177:18 182:23,25 188:9 196:4 198:5, 12,16 200:5
shortly 131:8	specific 127:24 138:3 156:1 158:16 160:1 173:10 188:5	state's 143:20 144:4,5 186:15 187:17 194:4,6
show 177:6	specifically 138:4 147:5,17 150:3 155:21 172:24 174:18 185:8	stated 174:7 186:14
showed 176:8 178:16 186:1	speculation 135:18 136:6,21 146:14 173:16 174:16 175:19 176:20 177:12 180:20 181:23 182:5,12 184:15 185:7,18	statement 190:2
shown 177:8		statements 196:2,15
shows 191:25		states 161:2,12 168:14 174:14 181:19
side 126:25 133:9,25 134:3 136:4 145:15 149:15 162:3 163:13 186:12		statute 159:6 164:15
Side's 133:12 158:7,9		steelhead 175:8,10
signed 137:23 166:9,25 167:7 188:16 189:22 190:3 201:23		Steve 124:7
signing 167:5		storage 141:16 170:2,3,6 171:1 172:22,23 173:8,15,20,22 174:4,8 175:5 176:6
Similarly 134:2		
Simmons 125:3,20 126:22		
simpler 143:14		
simply 138:17 193:24		

store 177:11	175:8 179:18 180:1,25 183:5	Thomas 125:8 126:2 127:11
stored 134:14,19 137:25 139:17,25 140:5,7,15,16,17,18, 23 141:1,12,15,19 142:8,15 143:1,3,12,16 144:7,14,18 145:3 152:18,20,21,22 153:2 154:3 162:9 163:5,20 175:23,25 177:6,14,15 178:2 179:21,25 186:3,5 187:9,18 188:21,25 189:6,17,20 191:17,19,22 192:1,3,8,20 193:3,13,16,18,24 194:1,8,11,13,16,20 195:1,5,9	184:2 185:25 186:16,22 187:9, 18,19 189:21 190:7 192:1 194:5,6	166:25 195:17,21 201:17
Street 122:6,11		thought 139:16,22 140:22 164:10 169:1 175:7 191:18 192:14 196:5 198:22
strictly 197:9,13 199:4 200:15		Thresha 125:4 126:3
strike 200:11		tidal 155:12 156:3
struck 175:14		Tide 123:18
subject 154:5,6 170:8 174:23		Tim 124:6,8 127:8 165:1 172:6
submitted 171:13,17		time 125:19 141:23 143:22 146:25 154:9 165:25 166:23 170:2 176:9 177:23 179:11 182:9 190:18 192:17 200:10 201:13
subsequent 147:18		times 129:17 140:24 146:17,18 147:1,2
subsequently 196:9		timing 128:15
suffice 196:24		today 132:7 146:21 178:2 190:14 200:25 201:14
Suite 122:11 125:4,18,21		today's 201:16
summary 153:14		told 154:25 160:11 199:2
summer 144:20 146:13 154:4		Tom 165:1 167:13 170:16 172:12 185:10 195:24 200:21
summertime 177:4		track 143:8 154:2
supplies 137:15 168:8		tracking 143:3,12 163:2,22 192:6,9,25 194:16
supply 134:25 135:1,21,23 136:4 145:25 146:1,8 155:9 156:2 161:15 164:2 193:8		transfer 183:15
supply/demand 184:19 193:1		treat 182:1
support 152:24 153:3		treated 196:3,8
suppose 131:22		Trgovcich 150:5
supposed 185:12		tributaries 127:9 134:3,19 135:4 165:2 180:16 189:2,11
suspect 158:10		true 141:20 174:17
swear 141:5 153:16 168:22 174:18 196:7 198:10		trust 153:1,10 155:2,4,15 189:9, 23 190:1,4,8 194:8
switched 200:3,14		TUCP 185:16 189:7
sworn 125:9 127:10		Tulloch 171:9
SWP 182:4		turn 161:1 164:23 167:11
system 134:24 143:5,7,13,21 144:6,11,13 145:6,8,12 153:3 158:18 161:11 163:5,6,10,11		two-thirds 173:4
		type 143:3
	T	
	table 126:12 156:19,23 157:9, 11 172:17 173:5,6,10 177:5	
	tables 156:15	
	taking 139:25 140:7 201:13	
	talk 128:6,8 129:14 148:1,5 177:16 179:16,24	
	talked 128:4 149:10 193:12 196:12	
	talking 149:21 156:19 178:2 182:16 201:4	
	targeted 156:1	
	task 128:10,13,16,20 153:23 154:1	
	Tauriainen 126:20	
	team 126:21 154:9,14,15	
	telephone 131:14 132:1,5	
	telling 201:5	
	temperature 173:19 175:8,10	
	temperatures 189:12	
	temporary 123:22 153:13,18 156:11 162:10,24 165:4,23 166:6,19 167:21 170:23 173:11, 13 189:8	
	Term 143:3 157:20,21 158:7 178:24 191:24	
	terms 123:23 201:2	
	testified 147:2 190:16	
	testimony 146:5,23 162:4 164:13 178:9 191:20	
	theories 137:14	
	theory 196:22 197:4	
	thereof 125:2	
	thing 127:19 151:16 154:6 165:5 189:19	
	things 185:13	

<hr/> U <hr/>	vaguely 137:5 168:21	9,11,18 188:2,3,10,17,21,22 189:1,6,13,14,17,18,20,21 190:4,6 191:1,17,19,22 192:1,3, 8,15,18,20,21,24,25 193:3,4,9, 13,14,16,17,18,24 194:1,4,6,8, 11,13,17,20,21,25 195:2,4,5,9, 10 197:9 198:5,12,16,25 199:6 201:6
U.S. 137:24	valid 192:14	
Uh-huh 167:14	Valley 141:17,19 161:14	
Ultimately 152:18	values 153:11 155:15	
Unauthorized 125:24	Vernalis 178:6 180:18 181:20, 21 182:3	waters 134:18 176:17
uncertain 147:6	versus 192:4	watershed 158:12 159:6 164:14
understand 132:20,25 133:7,9, 15 135:9 136:11,16 139:18 141:4,17,21 142:9,14 148:23 151:13 164:12 185:22 192:16 199:21	vicinity 133:3	Watt 125:17
understanding 133:17 135:5 137:20 138:15,19 144:17,23 145:14 151:19 152:3,6 160:6,12 163:25 172:17 174:12,21 176:16,22 177:3 179:1 181:16 182:17,24 183:2 184:12 186:21 187:5,21,23 189:5,25 190:3 192:19 193:23 199:14 201:1	video 122:17 125:17,20 195:17, 21	Weaver 126:18
understood 143:21 175:22 176:17	view 142:17	Wednesday 125:1 137:2
undertake 129:18	viewed 140:25	week 128:22 131:8
undertaking 150:25	voices 126:6	weeks 128:23
unimpaired 124:4 169:21	Volume 126:1 195:17,21	west 126:25 133:9,12 134:7 145:15 147:3 149:15 158:7,9 162:3 163:13 186:12
United 161:12 168:14 174:13 181:19	<hr/> W <hr/>	Westlands 127:7 130:21 131:19
unlawful 131:2 137:25 138:9	Wade 129:2	westward 134:4
updated 172:9	wanted 129:17 130:5	wetlands 155:12 156:3
upper 135:4	water 122:3,4,8,9 123:19,23 125:24 126:11,16,18 127:3,5,7, 12,21,23 128:2,18 129:3,4 130:21,23 131:3,19 132:21 133:20 134:2,5,8,14,19,21 135:1,10,17,24 136:1,3,4,9,17 137:1,3,13,15,23,24,25 138:1 139:10,14,17,25 140:1,5,7,16, 17,18,23 141:1,2,10,12,16,18, 19,22,24 142:8,15,18,19 143:1, 3,7,9,12,16,20,23 144:5,7,11, 12,14,18,25 145:3,7,11,16,21, 25 146:10,11,12,13,21,24 150:17 151:2,4,10 152:4,18,20, 21,22 153:2,4,5,9,10,25 154:4 155:9,11 156:2 157:19,22,25 158:2,7,11,14,17,18,21 159:8,9, 15 160:5,8,14,23 161:3,4,10,15, 24,25 162:7,9 163:5,6,12,14,19, 20 164:2 166:7 168:6,8,10 170:21 171:1 172:9 173:14 174:3,4,8,15 175:5,10,18,21,23, 25 176:19,24,25 177:4,6,10,14, 15,18 178:2,5,11,13,14,16 179:12,17,20,21,25 180:5,8,9, 10,17,24 181:1,2,5,6,7,11,17, 18,20 182:2,8,18,21 183:1,3,7, 8,15 184:1,2,4,10,23 185:25 186:3,4,5,16,22,23,24 187:2,6,	whatnot 184:21
upstream 135:14,15 145:1 176:6,24 189:2,11,14		wildlife 124:10 172:14
urgency 123:22 153:13,19 156:11 162:10,24 165:4,23 166:6,19 167:21 170:23 173:11, 13 189:8		witnesses 179:16
user 163:11		wonderful 182:22
users 138:1 161:15 163:14 164:2		Woods 197:17 198:6,8,13,17
<hr/> V <hr/>		words 197:2 199:12
vague 146:25		work 166:13 177:21
		worked 166:6,12 177:19,24 198:8
		working 198:7
		workshop 123:16 132:8 136:25 137:4,6,10,12,21 138:5,15,25 139:3,8,23 142:8 147:8,11 148:16,19,21 151:17
		workshops 137:8
		worse 144:2
		writing 171:13 175:1 188:6

X

X2 179:4 180:4,25 182:8

Y

year 128:22,23 146:17,18 147:2
166:18 168:25 169:11 172:9
174:4 176:19 177:10 179:20
191:16 194:20 195:1

years 144:4 179:7

Z

Zolezzi 123:6 126:24 165:13
186:10,11 188:15 189:25 190:9

1 and curtailment orders, what was your understanding of what
2 those terms meant?

3 A Well, I assume when we say "curtailment and
4 curtailment orders" that we're talking about notices that we
5 sent out telling people that we, based on our calculations,
6 there was not water available for them to divert under their
7 priority.

8 Q And did they order the parties to do anything?

9 A Well, it wasn't our opinion that they did, no.

10 MS. MCGINNIS: Okay. That's it. Thank you.

11 MR. KELLY: Anybody else?

12 MS. SPALETTA: It looks like we have no further
13 questions, so thank you, again, Mr. Howard, for taking time
14 for your deposition today.

15 THE WITNESS: Well, you're welcome.

16 THE VIDEOGRAPHER: This concludes today's proceeding
17 of Thomas Howard. There were two disks used. We are now
18 going off the record at 10:29 a.m.

19 (The deposition concluded at 10:29 a.m.)

20

21 --o0o--

22

23 Thomas Howard
24 THE WITNESS

23 January 8, 2016
24 DATE SIGNED

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DEPONENT'S CHANGES OR CORRECTIONS

Note: If you are adding to your testimony, print the exact words you want to add. If you are deleting from your testimony, print the exact words you want to delete. Specify with "add" or "delete" and sign this form.

DEPOSITION OF: THOMAS HOWARD

CASE: In re: Byron-Bethany Irrigation District

DATE OF DEPO: November 25, 2015

Page	Line	CHANGE/ADD/DELETE
149	11	Add "it with" between "discussed" and "but" (move comma)
195	11	Change "I don't know" to "Yes, Term 91 was in effect so the projects are releasing stored water to meet delta standards and instream obligations. Some of that stored water reaches the delta."

Deponent's Signature Thomas Howard Date 1/8/16