STATE OF CALIFORNIA

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

STATE WATER RESOURCES CONTROL BOARD

In the Matter of:                              )
PUBLIC HEARING TO DETERMINE WHETHER )
TO ADOPT A DRAFT CEASE AND DESIST )
ORDER AGAINST THOMAS HILL, STEVEN )
GOMES, AND MILLVIEW COUNTY WATER )
DISTRICT )
~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~ )

JOE Serna JR./CalEPA BUILDING
1001 I STREET
COASTAL HEARING ROOM
SACRAMENTO, CALIFORNIA
Tuesday, January 26, 2010
9:00 A.M.

LINDA KAY RIGEL, CSR
CERTIFIED SHORTHAND REPORTER
LICENSE NUMBER 13196
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Tam M. Dudoc

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Jean McCue, Water Resource Control Engineer

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This is the time and the place for the hearing regarding the Draft Cease and Desist Order against Thomas Hill, Steven Gomes, and Millview County Water District. The draft CDO was issued by the Assistant Deputy Director of Water Rights on April 10, 2009.

I'm Mark Baggett, member of the State Water Board, and here with my colleague and fellow Board Member, Tam Doduc.

We are assisted today by counsel Dana Heinrich, Ernie Mona, and Jean McCue, staff engineers.

The hearing is being held in accordance with the Notice of Public Hearing dated September 3rd, 2009. The purpose of the hearing is to afford the Prosecution Team, Thomas Hill, Steven Gomes, Millview County Water District, and Sonoma County Water Agency an opportunity to present relevant oral testimony and other evidence which addresses the key issues of the September 3rd notice which is:

Should the State Water Board adopt the draft CDO issued on April 10, 2009. If the draft CDO should be adopted, should any modification be made to the measures in the draft order? And what is the basis for
such modifications?

A court reporter is present who will prepare a transcript of the proceeding. Anyone who would like a copy of the transcript must make a separate arrangement with the court reporter. To assist the court reporter, if you could please provide her a copy of your business card when you first come up to the microphone, I think it will make her job a little easier.

Before we get started, I would like to explain the order in which we will conduct the hearing. But first, if the alarms go off today, we have to suggest that you follow the exit signs outside the building across the street to the park and evacuate the room immediately, and leave your books behind.

Back to the hearing, an explanation of the order in which we will proceed. Before we begin the evidentiary portion of hearing, we will hear from any speakers who wish to make nonevidentiary policy statements. So far, I have two cards.

And if you wish to make a policy statement, fill out a card. If there's anyone else. Hearing none, we have two. We will also accept written policy statements.

A policy statement is nonevidentiary. It is subject to the limitations as identified in our hearing
notice. Persons making policy statements must not attempt to use the statement to present factual evidence orally or by introducing written exhibits.

Policy statements, we like to limit to five minutes. I think the request was for slightly longer, and we will probably accommodate that.

After hearing any policy statements, we will move to the evidentiary portion. The parties will present their case-in-chief or conduct cross-examination in the following order.

First, the Prosecution Team, the Division of Water Rights, followed by Millview County Water District, followed by Thomas Hill and Steven L. Gomes, and lastly Sonoma Water Agency.

At the beginning of each case-in-chief, the party may make a brief opening statement summarizing the position and the evidence you intend to establish.

After an opening statement, we'll hear from the parties' witnesses. Before testifying, witnesses should identify their written testimony as their own and confirm that it is true and correct. Witnesses should also summarize the key points in their written testimony.

And please do not read the written testimony. We have copies.
Direct testimony will be followed by cross-examination by other parties, Board staff, and Hearing Officers.

Redirect testimony and recross-examination will be limited to the scope of the redirect testimony and may be permitted.

After the cases-in-chief are complete, the parties may present rebuttal evidence if necessary. We will talk about that when we get to that point.

Parties are encouraged to be efficient in presenting their cases and their cross-examination. Except where I approve a variation, we will follow the procedures as set forth in the regulation and hearing notice.

Opening statements are limited to 20 minutes. For oral presentation of the direct testimony, each party is allowed up to two hours. Having reviewed this, I would hope we can present the direct testimony a little quicker than that.

I will limit any cross-examination to one hour per panel of witnesses for each party. Additional time may be allowed if you can make a showing of cause.

Oral closing arguments will not be permitted, and an opportunity will be permitted, though, for written closing briefs. We will discuss that at the end.
of the proceeding.

Before we begin with the evidentiary portion, we will hear the policy statements from the two parties. Again, I just want to make it clear these are not evidentiary statements, and they will not be relied upon as evidence in any order that we write subsequent to this proceeding.

So with that, we have Mr. Del Piero and then Sean White, whichever order you prefer.

We do have your written statement, Sean.

MR. WHITE: Yes. Good morning, Board Members.

Thank you for the opportunity to speak before you today. I will keep it as concise as I can because I know you have a very full agenda ahead of you, and we've already submitted our policy statement in writing.

Really what I would like to do is sort of summarize the crux of our interest in this proceeding which, from our perspective, is I think quite simple compared to everything else you'll be looking at today.

As you all know, the Waldteufel right was originally applied for an exercise on the west fork of the Russian River or upper mainstem.

That part of the river is generally considered ephemeral; and while there is sufficient flow in that part of the river during many months of the year to
satisfy the demands of the Waldteufel right, it's a pretty regular occurrence that during the summertime there is insufficient flow to satisfy the demand of the Waldteufel right, particularly during the months of July, August, and September, and I think the USGS gauge data from the west fork corroborates that.

We really became interested when Millview County Water District decided to relocate the point of diversion from the west fork to below the confluence with the east fork to their existing plant site.

The reason that concerned us is because the hydrologic situation below the confluence of the west and east fork changes dramatically. Once you're below the east fork, you're no longer relying on the water supply that was in the west fork. You're looking at the west fork commingled with releases from Lake Mendocino.

During the months when water isn't at the west fork, the water being released from Lake Mendocino is in all likelihood either water for our water right or water for Sonoma County Water Agency's water right.

Our concern was that by moving the point of diversion to a place where you would have access to that water would present an opportunity for water that was not ever available at the original Waldteufel point of diversion being applied to the Waldteufel right, even
though water at that period of time was not physically present at the original point of diversion.

When we received Millview County's water rights accounting for 2008, and when I reviewed the statement submitted to you by Tim Bradley for this proceeding where he stated that they relied on the Waldteufel right for summer supply during 2009, I think that really substantiated our concern because during both 2008 and 2009 in particular, if you look at the data for the west fork gauge, there simply wasn't water in the west fork at the original point of diversion to satisfy the amount of water diverted and reported under the Waldteufel right.

So essentially, the water that they're allocating to the Waldteufel right during the summer is not water that was ever available at that original location and is simply an inappropriate assignment of our water.

CO-HEARING OFFICER BAGGETT: Okay.

MR. WHITE: Thank you.

CO-HEARING OFFICER BAGGETT: Thank you.

And I will make it clear this is nonevidentiary so we won't be taking those facts into consideration, but I think some of them are already going to be admitted as evidence in other. The stream gauge data is
already proposed to be admitted anyway.

MR. DEL PIERO: All right. Good morning, Mr. Bagget, Ms. Dudoc and staff. I'm Marc J. Del Piero, Mendocino County Russian River Flood Control and Water Conservation Improvement District. My comments will be brief.

The policy that you need to deal with today is whether or not there's any water at the current location where Millview proposes to divert water under their claim of right based on the Waldteufel right.

A water right exists if there's water. A water right doesn't exist if there's no water. A water right exists at the place where it was filed for the point of diversion.

If someone proposes to use a water right someplace else, then they need to be able to prove that they've got some kind of right there. They can't just boldly and without substantiation assert a right and then say, oh, by the way, the State Water Resources Control Board doesn't have the jurisdictional authority to take a look at or even consider whether or not what they are doing is illegal.

The policy issue that you need to deal with here today is whether or not the diversions taking place below the confluence are in fact resulting in the
diversion of water that is subject to the jurisdictional
authority and responsibilities of the State Water
Resources Control Board.

We encourage you to look very carefully at the
evidence that will be subsequently presented because all
of the evidence is there, we believe, to demonstrate
that there is in fact no water upon which they can rely
other than the contract water that they're getting from
us already at that location.

Thank you.

CO-HEARING OFFICER BAGGETT: Thank you.

Next we'll invite the appearance of the parties
who are participating in the evidentiary portion of this
hearing. Those who are making an appearance, please
state your name and address and whom you represent so
the court reporter can enter that information into the
record.

First, the Division of Water Rights Prosecution
Team.

MR. ROSE: My name is David Rose, R-o-s-e, for
the Division of Water Rights Prosecution Team. Our
address is 1001 I Street, Sacramento, California.

CO-HEARING OFFICER BAGGETT: Millview County
Water District.

MR. NEARY: Yes. My name is Christopher Neary.
I represent Millview County Water District. My address is 110 South Main Street, Willits, California.

CO-HEARING OFFICER BAGGETT: Thomas Hill and Steven L. Gomes.

MR. CARTER: Thank you Mr. Chairman.

My name is Jared Carter. I'm accompanied by my partner Brian Carter and my associate Matisse Knight. We represent Messrs. Hill and Gomes. Our address is 444 North State Street, Ukiah, California.

CO-HEARING OFFICER BAGGETT: And Sonoma County Water Agency.

MR. LILLY: Good morning, Mr. Baggett.

Alan Lilly of Bartkiewicz, Kronick & Shanahan 1011 Twenty-Second Street, Sacramento, California 95816. I represent the Sonoma County Water Agency, and with me here at the table is Pamela Jeane, Deputy Chief Engineer For Operations, and Don Seymour, Principal Engineer with the water agency.

CO-HEARING OFFICER BAGGETT: Thank you.

Before we begin, we have a few procedural issues we need to address. I think the first is Steven Gomes submitted a declaration instead of written testimony. I just to want confirm, does that constitute his testimony?

MR. BRIAN CARTER: Yes.
CO-HEARING OFFICER BAGGETT: Is that --

MR. BRIAN CARTER: Yes, it does.

CO-HEARING OFFICER BAGGETT: Thank you.

Millview did not submit written testimony for Tim Bradley or Sam Lambert who were listed as expert witnesses on the Notice of Intent.

MR. NEARY: Yes, we did submit testimony.

(Interruption by the reporter)

MR. NEARY: We're not going to present Mr. Lambert as a witness, but we did provide written testimony for Tim Bradley. That's in our list of exhibits at 14.

CO-HEARING OFFICER BAGGETT: Okay, so let's --

maybe we should just, Mr. Neary, go over the witnesses that you have provided, you intend to call, because you had a list of two, four, six of them on your initial.

Why don't we just clarify which witnesses we have. Go down the list would be easier.

MR. NEARY: Sure. We're going to call Tim Bradley, Don McEdwards, and Dan Putnam. Three witnesses.


The third issue we had was Jared Carter submitted an amended Notice of Intent with -- and the
declaration, I assume again, also constitutes your testimony; that's correct?

MR. JARED CARTER: Yes, your Honor.

CO-HEARING OFFICER BAGGETT: And I notice most of it was authentication of the exhibits which you presented, which is fine.

There was some legal argument. When we get to it if there's objection, the legal argument, you'll have plenty of opportunity in closing briefs to make legal arguments but, you know, that's -- in these proceedings, we don't allow legal argument as testimony.

Lastly, Mr. Hill and Gomes submitted a request for judicial notice, to take official notice of six categories of documents.

It seemed that at least 2 through 6 were overbroad. I mean it was -- it could be reams of information. If you have -- if you could narrow that, it would make it a lot easier. I don't know if either of the other parties wants to address that.

MR. BRIAN CARTER: We believe that the documents that are in the submissions covered the subject matter. That request was made perhaps in an excess of caution. I think that it can essentially be withdrawn at this time to the extent it exceeds what has been submitted.
CO-HEARING OFFICER BAGGETT: Okay. That's fine. Thank you.

Millview submitted in their prehearing briefs that -- unless there's objection, the briefs, we can take the briefs under submission. You submitted briefs which aren't -- I know it's confusing.

This isn't like a court. It's an administrative hearing, and normally we don't accept briefs as submissions of evidence. But if there is no objection, we can do so when we get to that point.

MR. ROSE: Well, the Prosecution Team would object to any facts contained in there that may not be substantiated by evidence presented during the hearing.

And the legal conclusions, I think you already said that there will be an opportunity for closing briefs, and they can certainly resubmit their prehearing briefs with the same points and authorities at that point.

We intend to do the same. But otherwise, since it wasn't asked for in the Notice of Hearing and we weren't given the same opportunity by that notice to do so, I would object to consideration of those briefs.

CO-HEARING OFFICER BAGGETT: Any comments from Millview or other parties?

MR. LILLY: Excuse me, Mr. Baggett. Before you
ask for that response, can I just state my objection?

CO-HEARING OFFICER BAGGETT: Okay.

MR. LILLY: I just join in Mr. Rose's objection
to any factual statements in those briefs. Legal
arguments obviously can be made in closing, and I don't
mind if they repeat their arguments.

But we do object to the extent those briefs
give factual statements that are not supported by
evidence in the record.

CO-HEARING OFFICER BAGGETT: Mr. Neary.

MR. NEARY: Yes. I'd just like to point out
that the intention of our brief was to essentially
identify a jurisdictional issue for your early
consideration.

CO-HEARING OFFICER BAGGETT: Yes.

MR. NEARY: And I certainly have no objection
to your disregard of any assertions of fact, but I
believe that all of the assertions of fact in our
prehearing brief pointed directly to evidence that we
will be presenting.

So it's a modified opening statement.

CO-HEARING OFFICER BAGGETT: Okay, yeah.

That would be my understanding, having read
them also, but we haven't accepted evidence into the
record.
So I think they will probably be -- so we won't take them at this point. We won't admit them. But for closing argument, for closing briefs, you've done most of your work already, it appears -- or a lot of it, already.

Mr. Carter.

MR. CARTER: Yes, Mr. Chairman. I wanted to join with what Mr. Neary said, but I wanted to supplement with one additional point. I'm not terribly familiar with your proceeding, and I don't know at what time to make a motion. But I want to move that there be no record evidence of any of these statements of water diversion and use because under Section 5108 of the Water Code those statements are not to be used for any purpose.

And yet the prosecution's position in this case and the Rich report seem to rely entirely for their entire forfeiture argument on a handful of statements of water diversion and use that were filed many years ago by members of the Woods family.

And I think they cannot be used as evidence, and I would like them excluded from the Board's consideration.

And if this is the right time to say so, I want to make that motion now. But in any event, that will be
our position throughout this hearing. I don't want to
keep bobbing up and down and talking.

CO-HEARING OFFICER BAGGETT: I appreciate that, and it's probably appropriate to get this objection out
of the way at this point before the parties that have
that in their record.

So do we have a response? Mr. Lilly and then
Mr. Rose.

MR. LILLY: Yes, Mr. Baggett.

The Legislature repealed Water Code Section
5108 in the recent legislation, so -- and I believe that
was effective either immediately or on January 1st. So
that is no longer part of the Water Code, so therefore
any objection based on that statute is no longer valid
at this point.

MR. JARED CARTER: February 3rd, we understand,
is the effective date.

But in any event, all of the antecedent facts
that were put together here were put together in
reliance upon it at a time when there had been no
legislative action.

Our understanding is it is still effective
until February 3 in any event.

MR. LILLY: And of course, the Board's decision
will be issued after that date.
So they can be on the record, and we disagree with Mr. Carter's argument. We believe that the Board may rely on the information in those statements. I'm not sure that 5108 even supported his argument to begin with, but if it's not going to be on the books anymore, we don't have to get to that point.

CO-HEARING OFFICER BAGGETT: Mr. Rose.

MR. ROSE: Yeah.

I believe Mr. Lilly just brought up the issue of if 5108 is applicable in this case that it does say that the information shall be for informational purposes, which is what the Division is using it for, and says:

Neither the failure to file nor any error in the information shall have any legal consequences.

And we're not alleging that there was an error in the information filed or that this is a failure to file.

We're simply using the information that was provided to the Division of Water Rights for informational purposes to determine whether there is a right at issue here.

CO-HEARING OFFICER BAGGETT: I think that's a plain reading of the statute, and I don't know that we
need to go to whether it's effective February 3rd or not.

The statute, I think, speaks for itself. And it will be a legal argument which we'll -- the objection's noted. We'll proceed. We'll allow the information in as stated on the face of 5108.

And like I said, we will take the objection under submission so that you can feel free to make those legal arguments in the closing briefs.

With that, I think that's all of the beginning. I will now administer the oath. Those who plan to testify, can you please stand and raise your right hand.

Do you promise to tell the truth in these proceedings?

THE PROSPECTIVE WITNESSES (Collectively): Yes.

CO-HEARING OFFICER BAGGETT: Thank you.

We'll now hear the Prosecution Team's opening statement followed by their direct testimony and then cross-examine by Millview; Thomas Hill, et al.; and Sonoma County Water Agency.

MR. ROSE: Before we begin, if this is the appropriate time, I'd like to make a few objections to the written testimony of the other parties, specifically Hill and Gomes testimony.

Would you rather I do that now or later?
CO-HEARING OFFICER BAGGETT: You can make them, but I thought we ruled. But proceed.

MR. ROSE: These are other than the one --

CO-HEARING OFFICER BAGGETT: Other than --

MR. ROSE: -- specifically brought up.

CO-HEARING OFFICER BAGGETT: Okay.

MR. ROSE: First we'd like to object to the testimony submitted by Hill and Gomes. It's as Exhibit A, testimony of Steven Gomes. Point to page 4, paragraph ten.

We'd object that this is hearsay and speculation and ask that you not consider the written testimony at this point.

CO-HEARING OFFICER BAGGETT: If the objection is hearsay, I think you are aware this Board can take hearsay. We just can't use it to rely upon for a Finding and an Order.

MR. ROSE: I agree. I think that it's also speculation, and it is unsubstantiated at this point. I'm objecting as it being written, in the written testimony. If it is substantiated or in other ways backed up or supported during the oral testimony --

CO-HEARING OFFICER BAGGETT: Okay. Then let's wait till they present their case. Why don't we -- there are objections to their specific testimony; are
the other objections similar?

MR. ROSE: I object to that testimony as being speculation as well.

CO-HEARING OFFICER BAGGETT: Okay. Maybe just -- why don't you just outline it so counsel can think about it, and we won't rule on these objections until their witnesses come forward.

MR. ROSE: Okay.

Page 4, paragraph ten of Steven Gomes' testimony, his testimony that:

The soil was sandy, it did not hold water, and was not good agricultural land. Mr. Wood had to run his pump almost all the time.

I object to that as being hearsay and speculation as this is Mr. Gomes' testimony.

CO-HEARING OFFICER BAGGETT: Okay.

MR. ROSE: I also have others if you're not going to rule on that at this point.

CO-HEARING OFFICER BAGGETT: No, I think let's just wait until they come up with their testimony and see what they corroborate and what they don't, and maybe hold your objections till that time.

MR. ROSE: Okay.

CO-HEARING OFFICER BAGGETT: I think it will be
MR. ROSE: I would make one other objection that the testimony of Mr. Carter calls for legal conclusions, and he's testifying as a fact witness.

CO-HEARING OFFICER BAGGETT: I think we dealt with that in the opening, that to the extent they're legal arguments, they will be -- can be held with the closing brief.

Most of his testimony, I think, was to authenticate documents which is appropriate.

MR. ROSE: Just wanted to note my objection to the other portion.

CO-HEARING OFFICER BAGGETT: Okay.

MR. ROSE: Good morning, Board Member Baggett, Board Member Dudoc, members of the hearing team. Again, my name is David Rose. I'm representing the Division of Water Rights Prosecution Team in this matter.

The purpose of this hearing is to determine whether the Draft Cease and Desist Order should be adopted pursuant to Water Code Section 1831.

A few questions will have to be answered first, including whether there's sufficient evidence to support that water from the west fork Russian River was ever used pursuant to the pre-14 claim of right known as the Waldteufel right in any amount greater than the 15 acre
feet per annum determined by the June 2007 Staff Report of Investigation and, if so, whether any portion of that right was thereafter lost for nonuse.

The Prosecution Team's evidence will show the Waldteufel claim of right was initiated by a posting of a notice on March 24, 1914 pursuant to the Civil Code.

Between 1914 and 1967, the Waldteufel property was held by at least eight different parties.

Despite repeated requests from staff, there's no documentation showing that any of these parties put any specific amount of water from the west fork Russian River to use pursuant to the Waldteufel claim.

From 1947 to 1998, Lester Wood and his family owned approximately 20 percent of the place of use identified in the Waldteufel posting.

In 1967, Lester Wood filed Statement of Water Diversion and Use S-000272 with the State Water Board.

Supplement statements are also filed for the years 1970 to '72, 1979 to '81, 1985 to '87 by Mr. Wood or his son.

These statements reported diversions and beneficial use pursuant to the Waldteufel claim of right ranging from 7.5 to 15 acre feet of water per annum at a rate of 500 gallons per minute or 1.1 cubic feet per second.
These reports are the only evidence that has been provided to the Division for use pursuant to the Waldteufel claim from the time of the initial notice to the purchase of the Wood portion of the property by Thomas Hill and Steven Gomes in 1998.

Since 1998, it's unclear who owns the Waldteufel claim of right, in what proportion, and how much water has been diverted pursuant to that claim.

The Division received a complaint on March 6, 2006 from Lee Howard alleging that the Waldteufel claim had been lost due to nonuse and that the point of diversion had been moved downstream to the mainstem of the Russian River to access water not available from the west fork.

Division staff conducted an investigation in response to the complaint and concluded the Waldteufel right was either never perfected or else was forfeited for nonuse to the maximum of 1.1 cubic feet per second and 15 acre feet per year.

Division staff likewise concluded that increasing the right from the historically used amount up to the claimed 1450 acre feet per annum would severely impact both instream natural resources and diligently perfected water rights in the Russian River system.
At the end of this hearing, we'll ask that you adopt the Draft Cease and Desist Order with the statements of facts and information and the terms for draft cease and desist included therein.

Thank you.

I'd like to call Mr. Chuck Rich as our first and only witness.

(Discussion off the record)

CO-HEARING OFFICER BAGGETT: Let's go back on the record.

CHARLES RICH
Chief, Complaint Unit, Division of Water Rights
Called by Prosecution Team

DIRECT EXAMINATION BY MR. ROSE

BY MR. ROSE:

Q Good morning, Mr. Rich.

A Good morning.

Q Would you please state your name and place of employment for the record.

A My name is Charles Rich. I work for the Division of Water Rights in the State Water Resources Control Board.

Q What is your current position?

A I am Chief of the Complaint Unit in the Division of Water Rights.
Q: How long have you held your current position?
A: My current position for 11 and a half years.

Q: How long have you worked in the Division of Water Rights?
A: I started with the Division in 1973 and have worked exclusively with the Division except for a small stint with the solid waste management board in the mid to late 1970s.

Q: Have you reviewed your written testimony for this hearing?
A: Yes, I have.

Q: Would you say that it is true and accurate?
A: Yes, I would.

Q: Is there anything you would like to correct from your written testimony?
A: No.

Q: Mr. Rich, I'm going to ask you a few questions regarding your processing of complaints.

What is your normal process for reviewing complaints?
A: When we receive a complaint, we read it over, check it out to see what the allegations are, and determine if we have jurisdiction to deal with the complaint.

Once we've determined we have jurisdiction, we
will generally ask for a response from the party against whom the complaint was lodged.

Once we get the response in, we go over the information, determine if we have enough to proceed.

In the vast majority of the cases, we end up doing a field investigation to go out and collect additional evidence that's site-specific.

Then we prepare a report of investigation that outlines what the evidence is, the facts in the situation, how the law applies to them, and what our conclusions and recommendations are.

Q What information do you look at when you're investigating complaints?

A We look at information provided by the parties. We look at information available on the Internet from other public agencies, from other interested private parties that might step forward and provide information.

We will go just about anywhere to get information if we believe it has a valid bearing and we can substantiate its authenticity.

Q How do you weigh information you receive, if you receive it from anywhere?

A Information that has documentation, historical information where we can provide -- determine who came up with the old information, first-hand information that
people can testify to definitively, information that we've collected in the field through measurements and things like that we will give a higher weight than someone's mere I think it's this. Allegations don't get a very high weight unless they can be supported with some back-up information.

Q What types of water right complaints do you deal with?

A We have four basic types of water rights complaints that we have jurisdiction over.

One is violation of a term or condition contained in a permit or license issued by the State Water Resources Control Board.

The second one is an unauthorized diversion where someone is -- a diversion either wholly or partially without a basis of right.

The third would be waste and unreasonable use or unreasonable method of diversion, which is commonly known as misuse.

And the fourth would be an unreasonable adverse impact to Public Trust resources.

Q What type is at issue here?

A Unauthorized diversion.

Q Did you follow your normal process that you just described in the case?
A: Yes, we did.

Q: Were the responses to your request for further information -- you said you usually request further information?

A: Mm-hmm.

Q: Were the responses to your request for further information sufficient to rebut the allegations in this complaint?

A: At the time we received the complaint, it was not clear who was holding and acting with the water right. There was some question that had arisen.

So my initial request for an answer was sent to multiple parties, but Millview, Creekridge Homes, and Mr. Hill and Gomes. I asked all of them to kind of tell me what was going on, who was responsible for what diversion.

They did respond to those requests. However, they only gave me information regarding the use of water since Mr. Wood sold his interest in the claim. They did not go any further back than that.

Q: What conclusions did you reach based on this information?

A: That I didn't have enough information to determine that a pre-14 claim of right appeared to be valid and capable of justifying all diversion.
Q How did you go about getting the additional information you needed or asking for the additional information you needed?
A I conducted a field investigation, and during the course of the investigation, I repeatedly asked for information regarding historical use of water that would predate the current parties' interest.
Q Has anything you've seen since you wrote the report of investigation changed your mind about the conclusions you made in that report?
A No.
Q Mr. Rich, I'd like to direct your attention to Prosecution Team Exhibit 5, statement of Floyd Lawrence.
A Yes.
Q Did you review Mr. Lawrence's statement prior to issuing the Staff Report of Investigation?
A Yes, I did.
Q Please describe your impression of Mr. Lawrence's statement.
A Mr. Lawrence was very confused, especially at the start of the statement. He didn't seem to know what direction things were. He was having a hard time remembering things. He tended to ramble on, which was not uncommon for a person who's 92 years old. He spent more time talking about flooding conditions than he did.
about water use.

Just didn't seem to have a whole lot of
information that was really relevant to my needs.

Q Why did you conclude that Mr. Lawrence's
statement was insufficient to establish that the claimed
right was ever perfected?

A He didn't seem to have any special information
regarding irrigation operations, whether the water came
out of the river, whether it came from a well, whether
there was subirrigation.

He had some general information on crops that
he might have observed driving down the road, but he
just didn't have a whole lot of information about what
was actually going on on the property.

He had only been on the property a few times
and just was not very familiar at all with what had
happened over the years.

Q Did Mr. Lawrence say how much of the property
was planted with alfalfa?

A No, he did not.

Q Did Mr. Lawrence say how much of the property
was planted with any other crop, other than the small
orchard?

A He mentioned at one point he thought there
might have been six to eight acres of beans.
Mr. Rich, I'd like to ask you a few questions regarding water use claimed under this claim of right since 1998. Hill and Gomes purchased the Wood property in 1998; is that correct?

Yes, it is.

Is the parcel purchased by Hill and Gomes the entire place of use listed in the Waldteufel posting?

No, it's not. It only accounts for about 20 percent of the original place of use listed in the claim that was filed with the county recorder's Office.

And what's been the status of the Waldteufel claim since then?

The property has changed hands numerous times. I've not seen any deed that would indicate whether the water right actually went with the property or not.

Because a pre-14 appropriative right can be separated from the property, it would have been important for the deeds to also have transferred the water right with it. But I have no information. No one's ever provided copies of the deeds that show that happened.

Thereafter, Mr. Woods got the property. When he did transfer it to Mr. Hill and Gomes, he did sign a document saying he was transferring whatever claim of right he held to them.
And since that time, they entered into -- or
Mr. Hill and Gomes entered into a lease agreement with
Millview County Water District. And I understand,
although I've not seen the document, that within the
last year or so that a purchase agreement has been
consummated and that Millview is now the purported owner
of whatever interest exists in that water right.

MR. ROSE: Mr. Rich created a visual
representation of some of the evidence he's already
presented. I'd like to pass that out for reference for
the next few questions.

MR. NEARY: I would object to the presentation
of an exhibit that wasn't previously disclosed. I
understood that we had to provide our exhibits by a date
certain in January.

MR. ROSE: I could respond.

I agree. This is not an exhibit. All the
information claimed -- relied upon and used in this
visual aid has already been submitted in other exhibits
and testimony of Mr. Rich.

So this is nothing new. This is simply a
visual aid to assist the hearing team and anybody else,
including Mr. Rich, in explaining the next few points
which he's going to testify to.

CO-HEARING OFFICER BAGGETT: Have you provided
copies to everybody?

MR. ROSE: I have copies right here to provide
to everyone.

MR. NEARY: I've never seen a copy. Why
doesn't he just refer to the exhibits that were provided
to us?

CO-HEARING OFFICER BAGGETT: It's fine if it's
a summary. If it's just a visual representation, and we
aren't accepting the exhibit as evidence, only for
illustrative purposes, it's fine.

But could you pass it out? It would be a lot
easier if everybody could see what we're deciding
whether to allow or not.

MR. ROSE: I was waiting until you had
expressed that.

CO-HEARING OFFICER BAGGETT: Mr. Neary, does
this -- still have your objection?

MR. NEARY: You know, I think that there's --
if you're just going to use it as an aid, I would
reserve the right to cross-examine him on this exhibit
and --

CO-HEARING OFFICER BAGGETT: Of course.

MR. NEARY: -- the basis on which it was
prepared.

CO-HEARING OFFICER BAGGETT: Okay. Very good.
Then proceed.

BY MR. ROSE:

Q    Mr. Rich, when did Millview sign the lease agreement with Hill and Gomes to use this claimed right?
A    I believe it was October 2002.
Q    When did Millview begin recording use under this claimed right?
A    Pursuant to the Public Records Act request response that they provided us after the Report of Investigation was completed, and I believe April of 2001.
Q    2001?
A    Yes.
Q    Did you review water use data provided by Millview for the years 2002 to 2008?
A    Yes, I did.
Q    In almost all of those years, Millview claimed it diverted more than 15 acre feet under the Waldteufel claim of right. How did you reconcile this data with your conclusion that Millview had not increased its diversion pursuant to the right?
A    As this document or visual aid shows, Millview's use stayed pretty much constant over that period of time. What they changed was their reporting as to
what right they were allocating the water to. However, their total use was within what would have been authorized under their permit, their license, their contract with the Russian River Flood Control District, and a 15-acre-foot-per-annum limit on the Waldteufel claim of right.

Q So what do these numbers tell you?
A It tells me they're changing their reporting mechanisms back and forth.

At the time that I went out and did the investigation, they were telling me one thing as how they were using water; and when they submitted an answer to the Public Records Act request, they changed their accounting and starting allocating more water to the Waldteufel right.

Q So this visual aid that you prepared is based on what they initially gave to you as information or what they subsequently gave you?
A This is subsequently which came out of the Public Record Act request response that was not available when I did the Report of Investigation.

Q Mr. Rich, I have just a few more questions. Has there been sufficient water in the west fork Russian River to support greater diversion amounts than Millview or Hill or Gomes were taking during this
period that you have on your visual aid and PT-11?

A Over the course of the summer irrigation season, there's been more water available in the west fork of the Russian River than what has been diverted by Millview pursuant to their claim of pre-14 right.

Q What's the current status of the watershed?

A The watershed is currently right now fully appropriated. It's contained on the Board's listing, has been since 19 -- well, the listing was in '98, but it's based on a decision of 1963, and that decision refers back to a 1961 decision.

So the Board has determined that the system has been fully appropriated for probably over 40, almost 50 years.

Q In your opinion, what would the impact be on the watershed were the full amount claimed under this claim of right to be put to beneficial use?

A Downstream right holders that would be --

MR. JARED CARTER: I object, your Honor.

MR. ROSE: I believe I asked him what his opinion would be. We gave the statement of his qualifications that I believe would establish him as an
expert in this, and I'm merely asking him his opinion.

MR. JARED CARTER: It doesn't establish him as an expert to talk about -- it talks -- his qualifications indicate he has no expertise other than from what he's doing. That doesn't talk about the impact on all users downstream in the Russian River system.

MR. ROSE: Mr. Rich's qualifications of over 30 years working for the Division of Water Rights I think are sufficient to establish him as an expert in what would happen to other junior and downstream water right users were a senior right that is claimed to be increased a hundredfold.

MR. CARTER: Moreover, it's not in his testimony, and he's not authorized to talk about information that's not in his submitted testimony.

MR. ROSE: I can point to paragraph 11, pages 9 to 10 of Mr. Rich's written testimony.

CO-HEARING OFFICER BAGGETT: Can you rephrase the question? I think the objection to the impact on -- just rephrase the question.

BY MR. ROSE:

Q Mr. Rich, in your opinion, what possible effects might there be in the watershed were diversions to be increased under this claim of right?
A    If you went from an historic diversion of 15 to
50 acre foot and you increased it to almost 1500 acre
foot, it would result in other diverters downstream who
had previously seen water at their points of diversion
are going to see less water. They're not going to be
able to divert as much as they have in the past.

It may result in flows being lower at times,
depending on how fast the operators at Coyote Dam can
keep up with it to maintain minimum required flows for
Public Trust resources.

So I would expect there will be adverse impacts
both on right holders who have invested a great deal of
money in their projects as well as potential adverse
impacts to Public Trust resources.

Q    Mr. Rich, do you see any other --

MR. JARED CARTER: Excuse me, your Honor. Did
you rule on my objection?

CO-HEARING OFFICER BAGGETT: I asked him to
rephrase the question.

MR. JARED CARTER: And he did, and we had the
witness start blurring out an answer.

CO-HEARING OFFICER BAGGETT: So you object to
the rephrasing of the question?

MR. ROSE: I believe that objection is untimely
at this point. Mr. Rich has already answered the
CO-HEARING OFFICER BAGGETT: I would overrule the objection then. It's noted for the record.

BY MR. ROSE:

Q Mr. Rich, do you see any other reasons why the full use of this claim could cause problems?

A It sets up a very significant precedent where you have an old claim that may not have been used very much, if at all, and is on the books; and if you accept it, there are numerous other old notices that have been filed in Mendocino County and probably Sonoma County as well within the Russian River watershed. If they were all of a sudden to be reactivated --

MR. JARED CARTER: Your Honor, I object. It's nonresponsive. This is speculative. There's no factual foundation for all of these fears and apprehensions that he's articulating.

These are policy questions that have no justification from Mr. Rich as a water engineer here supposedly telling the Board what the facts are.

CO-HEARING OFFICER BAGGETT: Mr. Rose.

MR. ROSE: Inasmuch as Mr. Rich is testifying as an expert witness because of his experience long-standing with the Division in these types of issues, I'm merely asking him what his opinion would be
were this diversion to be increased, what problems this might cause.

The Board is going to make decisions on facts and policy. I think that Mr. Rich's opinion could inform either in both of these situations.

CO-HEARING OFFICER BAGGETT: I would sustain the objection to the extent he's making policy and, I guess, quasi-legal arguments.

If you could rephrase the question specifically to the impacts of this diversion, if this was allowed to stand, I will allow that. So rephrase the question. Make it narrower.

BY MR. ROSE:

Q  Mr. Rich, considering what you know about the Russian River watershed, do you see any other reasons why full use of this claim could cause problems?

A  Basically, it's going to adversely impact other right holders that have enjoyed a water supply that now are going to see that water supply disappear.

And it could also impact Public Trust resources that have seen water flow, that now that water could be diverted into a system, taken away from the river.

Q  Are you aware of any other similar claims that could be initiated --

MR. NEARY: I'm going to interpose an objection
The issue here is whether the right exists or not and so, you know, to talk about how --

CO-HEARING OFFICER BAGGETT: Go on.

MR. ROSE: I think that's one issue.

But the issue as described in the Notice of Public Hearing is whether the Draft Cease and Desist Order should be adopted, and Mr. Rich's testimony regarding the issues that could come from a 15-acre-foot right being increased a hundredfold are certainly relevant to that particular issue, the threat of unauthorized diversion.

CO-HEARING OFFICER BAGGETT: I would sustain the objection. Try to keep it to this particular water right and its impact.

I think we've allowed that testimony on how it would impact other legal uses of water downstream if it's allowed to stand, and we understand that. So why don't you focus on this water right.

MR. ROSE: That's fine. I have no further questions.

CO-HEARING OFFICER BAGGETT: Okay. Thank you.

With that, Millview?

(Discussion off the record)

CO-HEARING OFFICER BAGGETT: Okay. We're back
CROSS-EXAMINATION BY MR. NEARY
FOR MILLVIEW COUNTY WATER DISTRICT

BY MR. NEARY:

Q   Would it be correct to characterize
Mr. Howard's complaint as alleging that the Waldteufel
right had been forfeited for nonuse?

A   Yes.

Q   And would it be correct to characterize
Mr. Howard's complaint as also alleging that Millview's
present point of diversion injured downstream users?

A   Yes.

Q   Now, was Lee Howard known to you prior to his
making the complaint?

A   No.

Q   Do you know of anyone at the Division who
discussed his complaint prior to the filing of the
complaint?

MR. ROSE:  Objection; calls for speculation.

MR. NEARY:  I asked for his personal knowledge.

CO-HEARING OFFICER BAGGETT:  Overruled.

MR. RICH:  No, I do not.

BY MR. NEARY:

Q   Now did the complaint refer to any conflicting
use of water by Mr. Howard?
A: No, it did not.

Q: Are you aware as you sit here today of Mr. Howard having any conflicting use of water?

A: No, I'm not.

Q: Are you aware through your investigation of any judgments by a court of competent jurisdiction declaring a forfeiture of any portion of the Waldteufel right?

A: No, I'm not.

Q: Are you aware of any judgments of a court of competent jurisdiction determining that the Millview point of diversion injures anybody?

A: No.

Q: And was the time spent by you on this investigation motivated in part by the fact that it, in your words, sets up a precedent?

A: No.

Q: So how much time have you spent on this complaint prior to the Notice of Hearing?

MR. ROSE: Objection; relevance.

CO-HEARING OFFICER BAGGETT: Do you have a response?

MR. NEARY: Well, he's testified that -- you permitted him to testify that the recognition of this right would set up a precedent, and I'm just inquiring into the motivation for the great expenditure of
resources to pursue this complaint.

MR. ROSE: My objection is still on relevance.

CO-HEARING OFFICER BAGGETT: We did allow that information in, so please answer. Overruled.

MR. RICH: I can't tell you exactly how many hours or days I spent on it, but I would say that I spent less than the average amount of time that I spend on a complaint; that this one, because of the parties and the fact that it was one field investigation and write it up, I probably spent maybe 40 percent of the time -- or not 40 percent. Let's say 80 percent of the time as I would on an average complaint.

BY MR. NEARY:

Q Okay. Have you ever held the position that the Waldteufel right has a valid basis?

A I've held the position that it could have some basis.

Q I'd like to refer you to your staff report. I guess scroll down to get to page 16. On my computer it has a place where you can -- maybe this is --

CHIEF LINDSAY: I can get you to 16. There you go.

MR. NEARY: Okay. This is . . .

BY MR. NEARY:

Q Would you read into the record the highlighted
portion?

A (Reading:)

The pre-19 appropriative claim of right originated by Mr. Waldteufel in December 1914 and transferred over time to the Woods, Messrs. Hill and Gomes, and Millview has a valid basis. However, due to the forfeiture provisions of California water law, the right has degraded to the point where the maximum authorized diversion is 15 acre feet per annum.

Q Now, your -- this was written by you in a staff report?

A Yes.

Q And at the time you wrote this staff report, it was your determination that the Waldteufel water right has a valid basis?

A It was my belief that it could be found possibly by a court that the right did exist to that amount.

Q Would you agree that you did not place any qualifying statements in your staff report as to whether it was --

A I wrote what I wrote.
Okay. It stands for itself.

Also at page 8, did you also state that consequently the October 2002 agreement, which is Millview Exhibit 15, appears to have conveyed or transferred a valid pre-1914 appropriative claim of right to Messrs. Hill and Gomes?

MR. ROSE: Objection; the document speaks for itself.

BY MR. NEARY:

Q Would you agree that that was an opinion that was held by you at the time you prepared the staff report in 2007?

CO-HEARING OFFICER BAGGETT: Overruled. Answer to the extent you can.

MR. RICH: You want me to answer?

CO-HEARING OFFICER BAGGETT: Yes.

MR. RICH: Where specifically are you referring? I don't have a highlighted section up there.

BY MR. NEARY:

Q I'm sorry. Oh, page 7. Right here.

CO-HEARING OFFICER BAGGETT: Referring to?

BY MR. NEARY:

Q The word starting "consequently."

A Okay. It transferred whatever interest Mr. Woods had in that claim of right to Mr. Hill and Mr.
Gomes.

Q And I just want to ask you whether the reference to December 14, 1914: You really meant to say March of 1914; is that correct?

A Where is the reference you are referring to?

Q Well, throughout, you referred to the Waldteufel right as being a December 1914 right.

A If I did, the notice was filed in March.

Q Okay. Now when you prepared your testimony, you qualified your observations by saying that the appropriative claim by Mr. Waldteufel was initiated by Mr. Waldteufel in December of 1914.

A Yes.

Q And my original question at the outset was: Did you ever change your position as to whether or not the Waldteufel right was a valid right? I understand your testimony to be that you didn't, did not hold that position at one time or that you did?

A I don't believe that my position has changed.

Q Okay. So when you said in the staff report that the Waldteufel right has a valid basis, that's still your opinion?

A I believe it could have a valid basis up to 15 acre feet per annum.

Q If the Waldteufel right had a valid basis,
would that equate in your mind to the right being a vested right?

A If a court were to find that it was a valid basis of right, then it might have vested. I mean it's not so much what the court finds as what the conditions are that the court would confirm.

Q Do you believe that for the right to be vested that there needs to be a court adjudication?

A Not necessarily, no.

Q Now, is it safe to say that the staff report that you prepared in 2007 was premised upon the notion that there was a forfeiture of a portion of the Waldteufel right?

A Yes.

Q And in fact, you used the term "degrade," stating that the maximum authorized diversion degraded to 15 acre feet?

A Yes, I did.

Q And your use of the word "degrade" was essentially equivalent to forfeit; is that correct?

A That would be your words. Mine is that the right lessened in value.

Q Do you know of there being a doctrine of degradation of a water right?

A Yes.
Okay. And you've stated just as a doctrine of degradation?

It's stated that when you file a notice of appropriation you have an inchoate right. To the extent that the water is not put to actual beneficial use, the portion that is not put to actual beneficial use, under western water law, goes away.

And if it is put to actual beneficial use, it becomes a vested right?

It can be, yes.

Now, is the Draft Cease and Desist Order based upon a finding of forfeiture?

Not directly.

Well, isn't it true that the Draft Cease and Desist Order is premised upon the theory that the Waldteufel right has degraded to 15 acre feet?

Yes, I would agree with that.

And it has degraded by the doctrine of forfeiture?

I believe that's been asked and answered.

My view is that it probably has never vested.
I have no evidence to suggest that it has vested for anything more than 15 acre foot.

Now whether you want to call it degraded or forfeited or whatever else, you can put all sorts of different terms on it. But I have no evidence that that water was ever used in any more than 15 acre foot per annum prior to 1998, and that would be 84 years after the notice of appropriation was filed.

And I believe there's some references in the Civil Code that say you're supposed to proceed very diligently, sometimes within 60 days, to put the water to beneficial use. I have no evidence it was ever put to use above 15 acre foot.

BY MR. NEARY:

Q    Okay. We'll come back to that.

Now, in your testimony at page 8, did you reach the conclusion that Mr. Howard has a sufficient clash of right to assert a complaint?

A    Where -- are you referring to my report?

Q    Your testimony at page 8.


CO-HEARING OFFICER BAGGETT:  Could you be more specific?

MR. NEARY:  I can take you right there. I'm sorry, it's page 9.
BY MR. NEARY:

Q So my question is: Did you conclude that Mr. Howard had a sufficient clash of rights to assert his claim of forfeiture of the Waldteufel right?

A I believe he had a basis to be a concerned citizen who was expressing a potential problem to people in the watershed that could indirectly impact him.

Q As I understand your testimony that you reviewed this case, the North Kern Water Storage District versus Kern Delta Water District, and concluded that the standard therein announced that there be a clash of rights was satisfied with the Howard complaint?

A I believe that it would, yes.

Q Now, you don't have any legal training, do you?

A Just 35 years of working with water rights on a daily basis.

Q I don't want to denigrate that at all. I learned more about water law having lunch with you once than I did in any other hour period in my life.

But you don't -- do you understand that -- what the impact of a depublication of a case is?

A Yes.

Q And are you aware that the citation here to the North Kern case, 146 Cal.App.4th 424, was depublished by the applicable court of appeals?
A: I believe the original case was depublished, and after it went forward to the Supreme Court, I believe it came out and was published.

Q: Well, now, it never went to the Supreme Court. What happened was that the case in 2003, which is the citation that you have up there -- although you have wrong year, 146 Cal.App.4th, is -- was actually withdrawn by that appellate panel and a new decision put in its place. And that citation is 147 Cal.App.4th 555.

And you weren't aware of that?

A: I am aware of the case that I got off of Lexis that was provided me by staff that was dated February 5th, 2007.

And you're right. I do have the wrong cite because the case I reviewed has 555 on it. It does not have 424.

I had also seen the earlier case that had the clear statement that said that it was depublished.

Q: But -- perhaps this would be best left in detail to our closing briefs.

BY MR. NEARY:

Q: I would ask whether you were aware that the republished case provides that forfeiture of the right to appropriate water from a natural watercourse can be
established through a quiet title or declaratory
judgment action brought by one with a conflicting claim
to the unused water such as an owner of a junior right
to use the water in the same watercourse?
You weren't aware that that was the standard
that was ultimately announced in North Kern?
A    I'm not sure I would say that's the sole
standard.
Q    Okay.
CO-HEARING OFFICER BAGGETT:  Move on. I think
these are going to be legal questions that will be
briefed.
MR. NEARY:  Right. I agree.
BY MR. NEARY:
Q    So your staff report looked to the usage by Mr.
Wood in 1966 when he filed a statement of diversion
showing that for that year he diverted 15 acre feet?
A    I believe it was 1967; but yes, his initial
statement.
Q    It was filed in 1967 for the year 1966?
A    Okay.
Q    And that's what you relied upon? That's where
the 15 acre feet comes from?
A    That and his subsequent statements that he
filed several supplemental statements, and none of them
In fact, his initial statement said maximum use in recent years, I believe, was limited to seven and a half.

In fact, the subsequent statements filed by him did not state any quantity?

They didn't indicate that anything had changed.

Okay. But you didn't answer my question. The first report referred to 15 acre feet, and the subsequent reports did not contain a quantity of usage?

Can you point Mr. Rich to a specific portion of his testimony or exhibits, if that's what you're relying on.

I guess it's number 6.

I have that in front of me. Actually, his supplemental statement for the years 1970, '71, and '72, he defines a rate and a number of hours; and if you compute those all the way out, you get 13.7 acre feet that was used during those years.

So your conclusion of the right having degraded to 15 acre feet was based upon the -- that one year where he reported 15 acre feet?

No. It's based upon four years of record plus additional record thereafter where he didn't say he'd
done anything different.

He made an affirmation under penalty of perjury that this was all the water I've been using. He affirmed that. He didn't -- there was no other information available to indicate that anything else had been used.

Q All right. What I'm asking is: Is there any other place where the term "15 acre feet" appears so as to justify your conclusion that it degraded to that level?

A I'm not aware of any other documents that report use, so these are it.

Q So that's the -- so your --

A Those four years would be the only quantitative information we have.

Q And those years were not consecutive?

A No, they were not.

Q Now when you reviewed Mr. Howard's complaint, what period of forfeiture did you use?

A I didn't so much use period of forfeiture as I used, you know -- the term forfeiture and vested here were probably used interchangeably.

At the time the report of investigation was prepared, I did not have access to the North Kern case.

So I was going with the information that was available.
to me; and at that point, it did not look like there had
been any use greater than 15 acre feet.
And whether you call it forfeiture of the
inchoate right, the initial filing, or whether you call
it lack of vesture, either way, I think the facts under
the law are that the water did not appear to have been
used in sufficient quantity to justify a finding by
either this Board or the courts that there was more
water available under the right.
Q In fact, you used the term "degrade." You
didn't use the term "inchoate right" in your staff
report.
A Okay.
Q And the Draft Cease and Desist Order is based
on the staff report; isn't that right?
A It is one of the foundations for it, yes.
Q And the North Kern decision was adopted prior
to your preparation of your report June of 19 -- or
2007?
A Just prior to that.
Q And it provides that -- were you aware that it
provides at page 560 that in order to establish a
forfeiture, the plaintiff must prove the defendant
failed to use some portion of its water entitlement
continuously over a span of five years immediately prior
to plaintiff's assertion of a conflicting right to the
water?

A I'm not going to argue. If someone filed a
court -- case in court and argued that their right had
been adversely impacted, that would probably be
criteria.

In this particular case, I had a complaint on
behalf of large numbers of people in the watershed,
and -- saying that he didn't think the right was there.

And I went out and investigated and said yes, I
would agree; I don't have evidence to support the claim
of right.

Q But when you looked for the usage, you actually
in fact looked at the five-year period prior to
Mr. Howard's complaint in February 2006. You looked
back five years, didn't you?

A When we got ready to do testimony, at that
point, we still believed that the right hasn't vested.

If the Board or a court were to disagree with
my opinion and say yes, it has invested, then we
would -- we went to the second level and say okay, if it
has vested, what happened during the period most
recently that we have the Public Records Act request
information available, and that would be the 2001
through 2008, and we would say okay, what's the -- what
happened in that period of time.

Q If this was the court, I might move to have the
question stricken as being nonresponsive but I just want
to go back and ask this question again.

You actually used the 2006 -- or 2005, 2004,
2003, 2001 period to determine whether or not there had
been sufficient basis to determine this right that has a
valid basis had degraded.

MR. ROSE: Could you please point Mr. Rich to
where he did that? You're suggesting he looked at those
specific years. Could you please point out where he did
that?

MR. NEARY: I'm asking him.

MR. ROSE: Sounded like you were pointing to
something in particular. So I would object that you're
misstating the evidence unless you can point to where
Mr. Rich had already done so.

MR. NEARY: He's testifying. So I'm requesting
him -- I'm requesting him to state what forfeiture
period he used.

MR. ROSE: I didn't understand the question
that way. That would be fine with me.

MR. RICH: If you're talking what period would
I use with respect to my testimony? I would say it
would be the period preceding Mr. Howard's complaint.
BY MR. NEARY:

Q    Okay. And when you looked at that, did you
learn that in approximately 2001 the Waldteufel right
was changed from an agricultural use to a domestic use
serving residential structures?

A    I'm not aware of that, that it was done in
2001. My understanding was CreekBridge Homes was doing
construction but was not supplying domestic water at
that point in time.

Q    When is your understanding of when the
CreekBridge subdivision opened up?

A    Probably sometime in 2002 when the first homes
were -- you know, it's whenever Millview first started
to supply a domestic potable supply through their
pipelines to a house.

Prior to that time, all water that was diverted
from the west fork of the Russian River, as was
explained to me during the complaint investigation on
the field trip, was that all water prior to that time
was used for dust control and possibly some make-up
water for construction. But not for domestic purposes.

Q    Okay. So you did understand that for the
period of 2000 -- at least 2002 to the time of your
investigation that Millview was relying upon the
Waldteufel water right to serve the CreekBridge
subdivision, 125 homes, with water?

A As I recall, the statement was the only water that is being used under the Waldteufel right is being used to serve the domestic needs of whatever homes were constructed up until the time of full construction at the CreekBridge Homes situation.

Q And you're referring to Mr. Bradley's April 24th letter to you in response to your --

A Well, both --

Q -- request for information?

A Both that letter and the representations that both he and you made during the field investigation. You confirmed everything that was in that letter. And we went -- we spent about an hour and a half going over eight very detailed questions, and you guys confirmed it and said this is the best of your knowledge what you're doing.

Q Well, did you understand that the only use by Millview was for the CreekBridge subdivision?

A Yes. That was made fairly clear to me during both the response letter by Millview and the answers to the questions during the field investigation.

Q Let's take a look at the response letter. Now in this paragraph C, is this the response that you're referring to?
A What exhibit is that?
Q That's Prosecution Team 3.
A Okay. What specifically do you want to know?
Q My question was: Is that the statement that you are relying upon for the proposition that Millview claimed that its only use of the Waldteufel right was to supply the CreekBridge subdivision?
A I'd have to look at the exhibit here since you're not pointing to a specific section.
Q Paragraph C.
A Paragraph C.
Q Yes.
A (Reading:)

In the lease agreement attached to your letter, Mr. Hill and Mr. Gomes granted, conveyed, and assigned all right, title, and interest to the water right statement 272 to the District. Excepting a collective reservation of 125,000 gallons per day for use by Mr. Hill and Mr. Gomes or their assignees. It is our understanding the reservation was divided and one share deeded to each home constructed by CreekBridge.

I mean that's -- so they assigned everything
except 125,000 gallons per day through the lease agreement to Millview, and that's all it says in there is that's where they did it.

Q    So it's your understanding that you were provided with the lease agreement, that October 2002 lease agreement, at the time of your investigation?

A    Yes.

Q    And it provided that Millview could use the Waldteufel right, all of the Waldteufel right except for the CreekBridge-reserved 125,000 gallons per day?

MR. ROSE:  I'm going to object that Mr. Neary is misstating the evidence.

He's pointing to paragraph C to point to what Mr. Rich had previously relied on for paragraph B as though that isn't there.  I think that that's misstating the evidence, and then asking Mr. Rich a question on that behalf.

MR. NEARY:  Do you want to go back to B?

CO-HEARING OFFICER BAGGETT:  Yes.  Go back to B if that's what the question's on.

MR. NEARY:  So Mr. --

CO-HEARING OFFICER BAGGETT:  Objection sustained; continue.

BY MR. NEARY:

Q    Okay.  Mr. Rich, does paragraph B change your
A I think paragraph B says that the water is used exclusively at the Waldteufel place of use in the original which, at the time, was the approximately 33 and a half acres that -- of which 28 and a half I believe was the CreekBridge subdivision.

Q Do you see the word "exclusively" in that paragraph?

A No. But it also says is used. It doesn't say it's used anywhere else.

Q So your testimony here that Millview represented to you that they used only the 125,000 CreekBridge reservation is based on paragraphs B and C?

A No. It's based on that and the representations that you and Mr. Bradley made during the field investigation.

Q And those were your understandings of those representations?

A You were pretty clear about it. We talked about it several times. It was not a passing question. It was a detailed, in-depth attempt to understand what was going on.

Q Did it ever appear to you curious that Millview would go out and lease the Waldteufel right to have the right to use the entire right but for the CreekBridge
reservation?

A    No. I thought that if they were going to do something else they would tell me they were going to do something else. The fact that they didn't tell me, and I probed and asked, told me for whatever reason that Millview decided only use it there.

Q    Didn't you tell Mr. Bradley during that field inspection that he should report water usage under the Waldteufel right?

MR. ROSE: Objection. That calls for hearsay that -- unless Mr. Rich can substantiate that, asking what he told Mr. Bradley in 2006. I don't believe that's reported anywhere in the testimony.

MR. NEARY: He's present, testifying.

MR. ROSE: Are you asking him if he said something in particular?

MR. NEARY: Yes. That was the question.

CO-HEARING OFFICER BAGGETT: Overruled.

Answer the question to the extent of your recollection.

MR. RICH: I don't recall the specific statement. I probably would have told him that if Millview was going to divert the water under the claim that they needed to continue to file the statement of water diversion and use as the diverter and report what
they were using.

Not that he -- I wouldn't have given him legal
advice that told him he should, you know, claim and
additional use somewhere else. That would be up for his
legal counsel to tell him that.

BY MR. NEARY:

Q     Now, have you examined Millview Exhibit No. 1,
which is a deed in 1913 where Mr. Chandon deeded certain
property to Mr. Waldteufel?

A     I have vaguely or cursory looked at it, yes.

Q     And do you agree that it constitutes evidence
that alfalfa was being grown on the Waldteufel property
as it existed in 1914?

MR. LILLY: Excuse me, Mr. Baggett.

CO-HEARING OFFICER BAGGETT: Yes.

MR. LILLY: I object to that. This document
speaks for itself, and it does not help the
decisionmaker at all to hear Mr. Rich's interpretation
of a deed that was executed in 1913.

The Board can make its own interpretations of
this deed, and Mr. Rich doesn't have any particular
expertise that would facilitate the Board's
interpretation of this deed.

MR. JARED CARTER: Your Honor, this is Jared
Carter, and I'd like to be heard on that point though.
Mr. Rich testified vehemently and often that there was no evidence he had ever seen of any use beyond a certain amount, and he's being shown evidence that he has seen.

His credibility or competence is being attacked which is perfectly valid for cross-examination.

CO-HEARING OFFICER BAGGETT: Mr. Neary?

MR. NEARY: Yes. And that's precisely the point. This is a cross-examination to --

CO-HEARING OFFICER BAGGETT: I understand.

MR. NEARY: -- test his direct testimony.

His direct testimony was he has not seen any evidence that there was any use of the agricultural use of the property prior to 1967 or '66, whichever year is appropriate.

CO-HEARING OFFICER BAGGETT: Okay. The objections are overruled. Continue.

MR. RICH: Okay. To answer that question, first of all, I don't believe I said there isn't any evidence of agricultural use. I said there was no evidence of diversion of water to supply that agricultural use.

You've got a statement there. It doesn't indicate how many acres were there. It doesn't indicate whether it was grown as a dry farm, whether it was a
well, whether, you know, any other thing.

There's no indication as to where the water came from for a crop. It could have been a half acre. It could have been ten acres. It could have been dry crop. It could have been pumped from a well.

I can't tell you based on that information where the water came from.

MR. NEARY: Well, I would move that that answer be stricken as nonresponsive because the question was whether it constitutes evidence that alfalfa was being grown on the property in 1913.

MR. ROSE: I didn't hear the --

MR. RICH: I believe you asked me in the question if that was evidence of water use.

CO-HEARING OFFICER BAGGETT: I would overrule the motion to strike the testimony. He answered the question you asked.

If you have another question you want to clarify, proceed.

MR. NEARY: All right.

BY MR. NEARY:

Q The question is: Does this exhibit constitute evidence that alfalfa was being grown on the Waldteufel property in 1913?

A Yes.
And it was being grown on multiple cuttings?

Maybe, maybe not. You can't say after the first cutting whether there was a second.

Now does -- is there any quantitative evidence that points to a continuous nonuse of the Waldteufel right for five consecutive years during any five-year period?

Only the lack of affirmation that there was use.

So there was no quantitative evidence?

Not directly, no.

In your investigation, did you require that the holder of the right demonstrate to you that there had been no forfeiture?

I asked them to produce evidence of use.

And did you state in your staff report at page 11 that Mr. Lawrence's sworn statement describing the use of the property from 1917, from the time of his first memory, through 1998, that it provided very little quantifiable information?

Yes, I believe that's the case.

And now, did Mr. Howard provide you with any quantifiable information of nonuse?

No.

So the posture of your investigation was you
were requiring Millview to establish quantifiable
information of use, and you made a determination of
forfeiture without there being any quantifiable
information of nonuse?

MR. ROSE: Objection. I believe that misstates
Mr. Rich's -- everything he said, written testimony and
oral testimony. Asking that as a yes-or-no question is
inappropriate.

MR. NEARY: I think that's a legal argument,
but I think it is an appropriate question.

CO-HEARING OFFICER BAGGETT: Could you rephrase
the question? Sustain the objection.

MR. NEARY: I'll take it in smaller steps then.

CO-HEARING OFFICER BAGGETT: That would be
helpful.

BY MR. NEARY:

Q If -- it's true that you requested Millview and
Hill and Gomes to provide you with quantifiable evidence
of use of water prior to 1967?

A Yes.

Q And that you did not require Mr. Howard or any
other person to provide you quantifiable evidence of
nonuse?

A I did not ask him to do that. I did not expect
him to have to be able to do that.
So is it safe then to say that you required the owners to -- of the right -- to provide quantifiable information of usage after 1914?

If you're going to claim ownership of a property right, generally you need to be able to demonstrate that it's a valid right and exists. That's all I was asking.

Okay. Now, let's just talk a little bit about the Lawrence testimony.

The Lawrence sworn statement established that Mr. Lawrence was born in 1914 in a house directly across from the Waldteufel diversion point; is that correct?

Yes, I believe that is.

And that he lived on the property at the time -- from 1914 up until 2006, I believe, when the statement was given?

I think with the exception of a small break during World War II when he served overseas.

And in your testimony, you -- at page 5, for the benefit of your counsel -- you stated that there was no evidence that the Waldteufel right was not diverted from a source other than the Waldteufel right?

Can you rephrase that question?

In your testimony at page 5 --

Okay.
And I'll just take you to that. Would you just read that highlighted portion into the record?

Sure:

While the sworn statement suggests that some farming occurred on the property from the early 1920s, it does not indicate whether water was actually diverted from the west fork of the Russian River on a regular or continuous basis or whether the property was irrigated with percolating groundwater from a well on the property, irrigated with water obtained from a water district pipeline, or dry-farmed relying on rainfall and a high groundwater table to provide sufficient water for limited agricultural production.

Okay. And you provided the Lawrence statement that was provided to you as one of the Prosecution Team exhibits; is that correct?

Which one are you referring to?

Prosecution Team No. 5.

Okay. The statement of Floyd Lawrence.

Now do you see at page 20 to 21 where the question was:
When was the first time that you saw that pump?

And Mr. Lawrence answered:

Probably when I was about three years old. We used to swim down there right where the pump was. It was one of the few places where there was a nice big hole. It was a big hole in there about eight feet deep.

A Yes, I see that.

Q And is that -- did you consider that as being evidence that there was water being pumped to service the Waldteufel property out of the Russian River?

A No. I took that as evidence that there was a pump there. Whether it was used or not, you know, and how often it was used, whether it was used once every 20 years, whether it was used on a regular basis, there was no indication in his testimony as to how often it was using used.

Q Well, going back to your written testimony, you said that the -- there was no evidence to indicate whether water was actually diverted from the west fork of the Russian River.

A On a regular or continuous basis. There is a qualifier there, sir.
Okay. And that's the qualification you relied upon for your testimony?

Pardon me?

That's the qualification you relied upon for making your conclusion?

Yes.

Okay. Now, in connection with your investigation, were you provided with the actual Waldteufel right?

You mean a copy of the notice --

Correct.

-- filed with county recorder?

Yeah.

I believe we had a copy that was filed by Mr. Woods or Mr. Hill or Gomes in a statement. I'm not sure who submitted it, but in the statement 272 there was a copy of the notice.

And it also refers to the diversion work; is that correct?

I'm not sure that it refers to an existing one or whether a proposed one. Are you referring to the yellow area up there?

Correct.

It says I intend to divert. It does not say I have been diverting it. It says I intend to. Which
would lead me to believe that it was prospective in
nature, that he was filing this before he actually did
any diversion of water.

Q    Now, does the statement that, as contained
here, plus the fact that a pump was actually seen by
Mr. Lawrence lead you to the conclusion that Mr.
Waldteufel's notice was not a speculative claim on the
water right?

A    No, it would not.

Q    So you hold the opinion that it is possible
that the Waldteufel filing was a speculative claim?

A    I believe everything written in there would
indicate that it was. At three years of age, would have
been 1917 which would have been three years later than
this was filed.

Whether the pump was put in after, whether the
pump was an old pump that had been there for years and
years and was rarely used, if ever, I don't know.

There's not enough information to sort that out.

Q    You testified that Mr. Lawrence appeared to you
to be confused.

A    Yes. Based on the -- all I have is the written
record.

Q    So is it safe to characterize your assessment
of Mr. Lawrence's statement as you made a determination
as to his credibility?

A He didn't seem to have total command of everything that was going on. He didn't seem to have a lot of information. Throughout his statement, he would make statements like well, I wasn't really involved in that.

He did have some very vivid memories when flooding occurred and having to move cattle to higher ground and things like that.

But as I recall, there were several statements in there talking about water use when he was probed and he said I just wasn't that involved in that.

Q Do you recall Mr. Lawrence stating that he worked for Mr. Dowling on the Waldteufel property as an employee?

A I believe he did early on, possibly in some alfalfa operation, although he didn't reference what the source of water was. I think they were haying, so there was no water being applied at the time he would have been working there.

Q Now, Mr. Lawrence also stated that he remembered the pump as being an old style pump with a gasoline engine and that the pipe that left the pump was either 8 inches or 10 inches in diameter. Do you recall that?
A Yes.
Q And do you recall that he testified that Mr. Dowling irrigated by flood irrigation at page 22?
A He said he pumped water. I don't see where he said that he flood irrigated.
Q Well, this document stands for itself. If it does say that he irrigated by flood irrigation, would that pretty much rule out the concept of dry farming?
A Not necessarily. I mean you're in an area where we know that the flow later in the summer gets incredibly low. There probably wouldn't have been enough water to fully irrigate that property with an alfalfa crop all the way through the summer. Whether he irrigated at one time, he could have. Whether he irrigated it on a regular basis that way, you can't say. Farming operations, by nature, change over time quite often within a season.
Q Now Mr. Lawrence testified that that pump was used for at least 50 years, page 22.
A No, he says it was there for 50 years. I don't think he said it was used.
As I recall, Mr. Gomes said he recalled seeing it in 1998, but I don't know how good a condition it was. And especially if it was there during the flood
times, it probably wasn't in very good condition at all.
Q Would you look at page 22, lines 16 to 19,
where Mr. Lawrence testified that Mr. Wood had used that
pump?
A Yes.
Q Would you take that into account in making your
staff report?
A Yes. Mr. Wood told me he pumped in his
statements of water diversion use. He said I pumped
water from the river, 15 acre foot a year.
Q So going back to the -- to your statement that
there's no indication that water was actually diverted
from the west fork on a regular and continuous basis is
consistent with the fact that Mr. Wood was using it?
MR. ROSE: I believe Mr. Rich already answered
this line of questioning. So I'll object to continued
questioning on this line as asked and answered.
CO-HEARING OFFICER BAGGETT: Asked and
answered.
MR. NEARY: Okay.
BY MR. NEARY:
Q On your site visit, did -- were you taken to a
crib inlet that had remnants of a 6-inch pipe?
A Yes.
Q And did it appear that that 6-inch pipe was
used for diversion?

A Hard to say. The pipe was not connected to a pump. It didn't go very far. It was an older pipe. As I recall, it was riveted. It was not newer pipe.

The parties said they thought that's what had been used, but no one had any recollections prior to 1998 so I couldn't say exactly what it was or wasn't used for.

Q I just want to show you a picture here. This picture that's in the McEdwards testimony, does that illustrate the crib inlet that you referred to?

A Yes, I believe it does.

Q And does this -- the remnant pipe, is that the pipe that you saw for --

MR. ROSE: I'll object that these paragraphs have not been authenticated, and Mr. Rich, unless he's seen these, can't speak to whether that is the pipe. I believe his answer to the first question was he believes that is or does look like what he saw.

But inasmuch as he's being asked to testify that these paragraphs are what he saw, Mr. Rich hasn't authenticated these, and neither have we heard any testimony to that regard.

MR. NEARY: Perhaps he could help us authenticate it. Might we just ask the question.
BY MR. NEARY:

Q    Does this appear to be the crib inlet wall that
you saw when you were at the site?

A    It looks very similar to what I saw.

CO-HEARING OFFICER BAGGETT: Sustain that.

BY MR. NEARY:

Q    And the pipe is shown in the picture?

A    Yes, it looks about like what I recall seeing
out there. It's been several years, but.

Q    And you actually took some pictures of that
pipe, didn't you, while you were out there?

A    I don't recall whether I took pictures. I
don't believe there are any in the file. I'm not a big
picture taker when I'm out in the filed.

Q    Now, did your analysis rely in any way upon --
strike that.

Is it true that your conclusion of right --
well, strike that also. You've already answered it.

I want to take you to the Wood statement of
diversion. Is it true that statements of diversion
weren't provided for by code prior to 1967?

A    That is correct.

Q    So that would explain why there would be no
statements of diversion filed between 1914 and 1967?
A    That would be correct.
Q    Now, did Mr. Howard's complaint actually
address the use of the Waldteufel right to supply the
west fork subdivision?
A    I don't recall that.

CO-HEARING OFFICER BAGGETT: Mr. Neary, I
should just let you know. I don't know if you can see
the clock from where you are. You've got about five
minutes.

MR. NEARY: Okay. I didn't know that -- I have
about another 15 minutes.

CO-HEARING OFFICER BAGGETT: Let's see where
you're at when you got there, and we'll decide. Tell me
what you want to ask.

MR. NEARY: When we get to five minutes?

CO-HEARING OFFICER BAGGETT: You're at five
minutes.

MR. NEARY: So when we get to where? When I
get to the --

CO-HEARING OFFICER BAGGETT: When you get to
the end of the hour, if you have a compelling question,
we may allow it. But we've been -- there's been a lot
of asked and answered here. So continue.

BY MR. NEARY:
Q    Now is it true that statements of diversion do
not record availability?

A That is true.

Q And by availability, I mean availability of water?

A They record what was diverted, so you would say availability at least up to that amount, but not necessarily anything above it.

Q So you conducted an analysis of the USGS flow data that shows that, at least in some years, the surface flow was insufficient to supply diversion in the amount claimed by Waldteufel?

A Throughout the post season, yes.

Q Now, in your written statement you testified at page 12 that Judge Schafer suggested that this Board should take a reviewable action regarding the validity of the Waldteufel right?

A That is what I was informed.

Q Is it true that -- did you review Judge Schafer's decision?

A No, I did not.

Q So who informed you that that was what Judge Schafer had determined?

MR. ROSE: I'll object. I believe that Millview and Hill and Gomes submitted the order from Judge Schafer, and the document speaks for itself.
That's exactly what it says.

If Mr. Rich didn't read it, then the document speaks for itself, and he's answered the question to the best of his ability already.

MR. NEARY: He testified that he's been told that Judge Schafer said something, and the document's in the record.

CO-HEARING OFFICER BAGGETT: Overruled. Ask --

MR. NEARY: Okay.

CO-HEARING OFFICER BAGGETT: Answer the question if you can.

MR. RICH: Okay. My supervisor, John O'Hagan, was present and mentioned it to me. And it was either legal counsel who was working here at the time, Matthew Bullock, or David. I can't recall exactly who was present.

But they both said that the judge had issued a ruling, and that we needed to come up with some sort of an action in order to comply with his request.

BY MR. NEARY:

Q Okay. Now in your testimony, you refer to this, I guess, aid for benefit of the Board, Millview's water use 2001, 2008?

A Yes.

Q And in your testimony you stated that:
Water right law does not allow right holders to cycle their diversions through multiple water rights to avoid forfeiture of any one right.

Do you recall making that statement?

A I believe so, yes.

Q What law are you referring to?

A Well, typically, when you have a water right, if you are -- if you have a high priority right, it should be used first to the extent that you can use it, season, amount, et cetera.

Once you've exhausted that right, then you would move to your next highest priority right.

But you can't go along and use one year say well, I'm going to use my highest priority right, and the next year I'm not going to use it at all. I'm going to use my lowest priority right just to try to keep that right in place.

That provides an unreasonable impact to other diverters because it allows you to horde water rights, basically, and preclude other people from making beneficial use that they should be able to make use of.

Q Are you aware that most of Millview's summertime water use is -- aside from the Waldteufel right -- is based upon the Mendocino Right?
A You are referring to the contract with the flood control district?

Q Correct.

A Yes.

Q And that that is -- that right is merely a contractual right that Millview has with the Russian River district?

A Yes.

Q And it's revocable for any given number of reasons at the subjective determination of the Mendocino district?

A I believe it would be based on the contract. It is a contract between the District and Millview, and the conditions should dictate how it's operated.

Q So it is -- when your testimony referred to cycling between multiple water rights, would your testimony be the same if the question was whether it would be appropriate for Millview to decide whether it was going to use a water right or a contractual right from Russian River?

A I would say had the District -- had the flood control district gone to Millview and said, based on our contract, you can only have so much this year, then -- number one, that contract is secondary.

I would probably have used the pre-1914 first
as the better right because you have more control over
it than you do the contractual, per se, or there are
less exclusions.

But the District reported use under the permit,
paid the District for water, and then turned around in a
Public Records Act request and said oh, no, that never
occurred.

I mean Mr. Bradley filed under penalty of
perjury a statement -- or a progress report that said we
took this amount of water under our water right. And
then in a Public Record Act request a couple of years
later, he says, oh, no. That's not true. We didn't do
that. And that to me looks like it's cycling.

MR. NEARY: I would make a request that that
answer be stricken as nonresponsive. And that certainly
was a nonresponsive answer.

MR. ROSE: I disagree.

I think that that -- based on the question that
was asked, Mr. Rich's response went directly to that.
Cycling through water rights. Mr. Rich addressed issues
that that's not exactly what's happening here.

MR. NEARY: I was drawing the distinction
between water rights and a mere contractual right that's
revocable and expires.

CO-HEARING OFFICER BAGGETT: I'll allow the
testimony. Continue to the extent -- your time is out.

If you have other questions related to this
illustrative chart, I will allow those because it was
just provided to you.

MR. NEARY: Would I be able to just follow it
up with a few questions about the Cease and Desist
Order?

CO-HEARING OFFICER BAGGETT: Couple questions,
then let's conclude.

MR. NEARY: All right.

There's a pending question.

MR. ROSE: There is?

CO-HEARING OFFICER BAGGETT: What?

MR. NEARY: You overruled the objection?

CO-HEARING OFFICER BAGGETT: Yeah -- no, no. I
sustained it.

MR. NEARY: Okay. I'm sorry. All right. Well
then, I just have a few more questions about the Cease
and Desist Order.

BY MR. NEARY:

Q The Draft Cease and Desist Order, if adopted,
would require Millview to restrict diversions to less
than 15 acre feet under the Waldteufel right?

A Yes, I believe so.

Q And essentially, the Draft CDO and your staff
report upon which it's based recognizes that the
Waldteufel right is vested but for the fact that it has
been forfeited to 15 acre feet?

MR. ROSE: I'll object that that misstates the
evidence that Mr. Rich has already provided.

CO-HEARING OFFICER BAGGETT: Sustained. You
can re-ask.

BY MR. NEARY:

Q    Well, if the Board were to adopt the position
that it does not have jurisdiction to determine that the
right has been forfeited, would that leave us with the
proposition that the Waldteufel right is vested?

MR. ROSE: I'll object that that's hypothetical
and beyond Mr. Rich's expertise. It involves
speculation.

CO-HEARING OFFICER BAGGETT: I would sustain
that to the extent that could you -- it was a compound
question. Could you break the question down?

MR. NEARY: All right.

BY MR. NEARY:

Q    If this Board were to adopt the position that
it does not have jurisdiction to determine whether a
vested right has been forfeited, would that then leave
us with the proposition that this right was vested at
least to 15 acre feet?
MR. ROSE: Again, I'm going to object that this question assumes facts that are not in evidence such that it's assuming that this right is vested and that the Board will make jurisdictional conclusions. So I think it's I'm objecting on the grounds of speculation. I'm objecting on the grounds that it misstates evidence in asking Mr. Rich the question.

CO-HEARING OFFICER BAGGETT: I'll overrule that. I think he's asking a hypothetical.

MR. NEARY: That's correct.

CO-HEARING OFFICER BAGGETT: Maybe you could break the hypothetical down. It would be simpler.

BY MR. NEARY:

Q    Let's just assume as a hypothetical that this Board were to adopt the jurisdiction -- adopt the determination that the Board doesn't have the jurisdiction to declare that a pre-1914 right is forfeited. Okay?

And if that were the operative proposition, is it then true that at least a portion of the Waldteufel right has vested?

A    No, not necessarily. If the Board decides it can't make a finding on its own about the forfeiture, it does not preclude the Board as a separate entity from staff to going -- approaching the Attorney General's
office and asking that they go direct to court and ask
the court to determine that the right has or has not
been vested.

I don't think it precludes the Board with that
finding from any action that the Board wants to do.
And as far as staff is, we made a finding that
we would not argue over 15 acre feet, that above that we
would take a position we don't think it exists.

But I don't think we made a finding that 15
acre foot is vested. We just said we're not going to
argue about it. That's our prosecutorial discretion
that we choose not to go there.

MR. NEARY: Thank you.

CO-HEARING OFFICER BAGGETT: Thank you. Let's
take ten minutes, and then we'll come back. Go off the
record.

(Recess)

CO-HEARING OFFICER BAGGETT: Let's go back on
the record.

Cross-examination of Prosecution Team witness
by Mr. Carter. You're up.

MR. CARTER: Thank you, Hearing Officer

Baggett. Before I begin, I would like to say how much I
have appreciated the courtesies you and your excellent
staff have extended to me as I make the transition from
superior court to administration, and I apologize for any inconveniences that I may have caused.

CO-HEARING OFFICER BAGGETT: We appreciate that. Our goal in administrative proceedings is to get a full and complete record because we realize that's all everyone has to take to the court.

So we provide some leniency. We just ask that we try to refrain from legal arguments and just get to the facts of the case. So far, I think we've done a good job. So continue.

MR. CARTER: Thank you.

CROSS-EXAMINATION BY MR. BRIAN CARTER FOR THOMAS HILL and STEVEN GOMES

BY MR. BRIAN CARTER:

Q    Good morning, Mr. Rich. How are you?
A    Fine.

Q    My name is Brian Carter. I represent Tom Hill and Steve Gomes. This exhibit that your counsel handed out. Do you have that in front of you?
A    I think it's a visual aid.

Q    Visual aid.

MR. BRIAN CARTER: Shouldn't we give this a name or a number, Mr. Baggett? Exhibit 1 --

CO-HEARING OFFICER BAGGETT: We could use it as Prosecution Exhibit 14, if there's no objection, for
MR. BRIAN CARTER: Okay.

BY MR. BRIAN CARTER:

Q Looking at Prosecution Exhibit 14, Mr. Rich, it appears that in 2005 there was a whole bunch of water used under the pre-1914 water right, doesn't it?

A That's the amount that was listed in the information provided by the District.

Q And 2005 was in the five years preceding the complaint by Lee Howard, correct?

A Yes.

Q Now, in your report that came out in 2007, what did you conclude was the most amount of water that Millview had used in the immediately preceding five years?

A Based on the information available to me, 15 acre feet.

Q Okay. So what -- the information you now have is different from the information that you had when you published your report; is that what you're testifying?

A Yes.

Q Okay. And the additional information reflected in Exhibit 14 came from where?
Initially, it was a subpoena that was issued to Millview. They didn't respond. Then they did respond to a Public Record Act request. The bottom of every page says subpoena response, I believe, or something like that. But that's the information where it came from.

Q And the subpoena was issued in connection with the superior court lawsuit, correct?

A I am not sure I could testify to that.

Q But in connection with your investigation, what efforts did you take to obtain documents and thorough and complete information about Millview's use?

A I asked the parties to provide me all the information they could regarding the use of water. I reviewed the Division files, you know. And to the extent there was information in the Division files and what the parties provided me was pretty much what I was limited to.

Q The notice that you gave to Millview and others regarding your investigation consisted of your letter and a copy of the Howard complaint, correct?

A Yes. That was my initial request for answer.

Q Okay. That was the entirety of the notice to Millview, Gomes, and Hill that their water right was being tested and subject to forfeiture; wasn't it?
A: I don't know whether I'd call it notice. I mean I informed them of a complaint. And the complaint made allegations. I asked them to respond to the allegations.

Q: And this complaint and your investigation resulted in the conclusion that the water right has been forfeited to the extent of 99 percent, correct?

A: Yes.

Q: And the -- it now emerges that Millview says they used a whole heck of a lot more water under that water right than you concluded they had?

A: That's what they're claiming, yes.

Q: And was there a hearing during the course of your investigation and prior to your issuance of a report?

A: No, there was not.

Q: And were there any written notices given to Millview, Hill, or Gomes other than the letter you sent them shortly after receiving the Howard complaint?

A: They were sent the Staff Report of Investigation with a request to provide additional evidence, comments, whatever, you know, that they felt like. And they were provided an opportunity to review the report and comment on it, and I did receive some comment letters.
Q    I wasn't clear. I apologize.

Before you issued your report, the notice that

was given to these people that their right might be

forfeited 99 percent was one letter from you and the

Howard complaint, correct?

MR. LILLY: Excuse me, Mr. Baggett. I object
to the statement of forfeited 99 percent. That

mischaracterizes prior testimony.

Mr. Rich said it might be -- you might use the

legal term forfeit; you might use the legal term the

water right was never perfected.

So I just want to make sure we're clear on the

record because I believe that question may be misstating

Mr. Rich's prior testimony.

MR. JARED CARTER: Mr. Baggett, I'd like to be

heard on that.

CO-HEARING OFFICER BAGGETT: Mr. Carter.

MR. BRIAN CARTER: I don't know of any kind of

testimony that I object to in my heart of hearts more

than testimony that hurts my case, and that's what

Mr. Lilly is complaining about.

This antagonistic witness has just testified,

and now Mr. Lilly wants to get him to change his mind;

and I think that is a totally uncalled for interjection,

and it should be overruled peremptorily.
MR. NEARY: And I'd just like to point out that that Mr. Rich did testify that the actual findings in his report were that it was a valid right, that it had a valid -- has a valid basis, and that he applied a forfeiture determination, the word "degrade" being essentially equivalent with forfeiture.

CO-HEARING OFFICER BAGGETT: We'll allow the testimony to stand.

Continue, but I think we understand the confusion between "forfeiture" and "degrade" and that discussion.

MR. NEARY: Thank you.

BY MR. BRIAN CARTER:

Q Are you employed by a court?
A No.

Q Were you employed by a court at the relevant times?
A No.

Q You were employed by the State of California, correct?
A That is correct.

Q The Division of Water Rights?
A That is correct.

Q And are you familiar with -- do you have my Exhibit AA in front of you, Mr. Rich? Could you turn
Mr. Brian Carter: For the record, this is a document entitled State Water Resources Control Board Information Pertaining to Water Rights in California 1990.

By Mr. Brian Carter:

Q: Do you have that?
A: Yes, I do.

Q: Will you read into the record the sentence that starts at the very end of page 7 and carries over to page 8?

Mr. Rose: I'll object to Mr. Rich being asked to read it into the record. It's already been admitted -- or proposed as an exhibit. The document speaks for itself.

Co-hearing Officer Baggett: Overruled. Just if it's a sentence, read it.

Mr. Rich: Okay. The last sentence that starts?

By Mr. Brian Carter:

Q: The carryover sentence, yes.
A: (Reading:)

The State Water Resources Control Board does not have the authority to determine the validity of vested rights other than
appropriative rights initiated December 19, 1914 or later.

Q Mr. Rich, do you believe that is an accurate statement of your employer's authority?

A No, I do not.

Q Have you ever seen Exhibit AA before?

A Numerous times throughout my career.

Q Have you ever done anything to get it to conform to what you think is an accurate statement of your employer's authority?

A This document I don't believe is considered to be dicta for the Board. I don't believe the Board believes that it has to follow it. It has evolved over the years.

I think that the intent of the statement was that the Board is not obligated to pursue those things, but the Board has the discretion to do it.

Q Mr. Rich, are you familiar with contents of California Water Code Section 1831 subdivision (e)?

A Vaguely. I'm not going to cite it to you verse and chapter.

Q Well, let me read it for you:

This article shall not authorize the Board to regulate in any manner the diversion or use of water not otherwise
subject to regulation of the Board under this part.

Section 1831 of the Water Code is in part 2 of division 2, part 2 being entitled Appropriation of Water.

Now is it your understanding that Section 1831(e) says that the water board that you work for is not authorized to regulate in any manner a pre-1914 water right?

A I think I would disagree with that because the reasonableness provisions of Article 10, Section 2 and Section 100 and Section 275 of the Water Code clearly give the Board authority to regulate all water in the state of California.

Q And that's what you were doing when you did your investigation; wasn't it?

A I was investigating a complaint with allegations.

Q And the fact that this was a pre-1914 right that you were investigating didn't give you any pause, did it?

A To issue an opinion? No.

Q To investigate, much less issue an opinion?

A Section 1825 of the Water Code is an admonition by the Legislature that this Board take a very proactive
stance to look at unauthorized diversion. You cannot
look at unauthorized diversion unless you develop an
opinion as to whether it exists or not.

CO-HEARING OFFICER BAGGETT: Let me interject
here.

If we -- these are legal arguments which will
be taken up afterwards. To the extent you can go to the
factual issues before us would be, I think, a much more
expeditious -- you'll get ample opportunities to brief
this legal issue of whether this is beyond the Board's
authority or not.

MR. BRIAN CARTER: Thank you, Mr. Baggett.

BY MR. BRIAN CARTER:

Q    Now, the only scenario under which the
diversion that Mr. Howard complained of was unauthorized
is if they were diverting water that was coming out of
the Coyote -- Lake Mendocino; wasn't it?

A    I'm not sure I would go that far.

Q    Because if Millview's point of diversion were
still back at the spot where Waldteufel did it on the
west fork, there would be no possibility that they were
diverting project water, correct?

A    If they were up at Lake Mendocino Drive, no,
they could not divert water released from Lake
Mendocino.
Q    So then there would be no chance that Millview
was pumping water that actually should have gone down to
other users under the project?
A    No, I would not say that. If they were taking
water they didn't have a right to, and they didn't take
the water, that water would have gone on downstream
about 600 foot where it would have entered the mainstem
and commingled with water released from Lake Mendocino.
So downstream parties -- if I'm below that
confluence, I have a hard time telling which side of the
confluence the water comes from. It's all muddy ground
to me at that point.
Q    Now when you first saw the complaint from Lee
Howard -- that's Exhibit G to my evidence, one page,
February 27, 2006 letter from Lee O. Howard to Victoria
Whitney. Do you recall when you first saw that?
A    I don't recall specifically, no.
Q    Do you recall who handed it to you, if anybody?
A    Probably dropped into my in basket.
Q    Do you recall whether it had any instructions
attached to it or verbally given to you when you
received it?
A    I don't recall receiving any.
Q    Okay. What do you recall thinking upon reading
this document for the first time?
A: You know, this was almost four years ago. I could not tell you what I thought at the first moment. I couldn't tell you what I was doing at the time, whether I had other things on my mind or not. I have no idea.

Q: The second sentence in the first paragraph says that a pre-1914 water right is what's being -- the subject of this complaint, doesn't it? Did that give you any pause?

A: No.

Q: Did you think hey, maybe I don't have to investigate this because it's out of my jurisdiction?

A: No. If there's no basis of right, it wouldn't be.

Q: Did you ever speak to Lee Howard about his complaint?

A: During the field investigation, Mr. Howard was not able to make it, and I met with Mr. Hill, Mr. Gomes, Mr. Bradley, and Mr. Neary.

And I told them at that time that I was going to try to hook up with Mr. Howard thereafter so that he could understand what we did, to give him his opportunity to put in his side of the story.

And I did meet with him for probably a half hour thereafter at the hotel we were staying at, and we
managed to hook up on a cell phone, and he came by and
listened to what I told him we'd seen and what had been
there.

And he said thank you. He didn't provide a
whole lot of information, nor did -- you know, he wasn't
really proactive. His complaint pretty well stood for
his position.

That was my recollection of the conversation.

It wasn't --

Q    Had you spoken to him before the field
investigation to tell him that you were going to be up
there and to invite him to join in?

A    I probably did at that point. But I can't tell
you whether I spoke to him on the phone, whether I left
a voicemail. I know a lot of times that's what happens.
You leave people a voicemail.

Q    Okay.

A    But I can't tell you. I don't recall having a
great deal of conversation with him prior to the release
of the Report of Investigation.

Q    So having received the letter from Mr. Howard,
you felt yourself compelled to conduct this
investigation and to prepare this report, but you only
spoke to him once after your cite inspection to -- and
you never dug down with him as to the basis or validity

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of his complaint; is that correct?

A I didn't ask him. He had very little
information to provide.

Q Did anybody tell you to perform an
investigation and prepare a report regarding the Howard
complaint?

A Not specifically. But generally, that's the
way we handle complaints. Probably 98 percent of our
complaints have a Report of Investigation done on them.

Q So how did the letter get from Whitney to you?

A We have an interoffice mail system.

Q And there were no communications that you
recall between Whitney and you or anybody else on your
staff about this letter, and you just ran off and did
your investigation and prepared your report, correct?

A Yes. That's why I'm Chief of the Complaint
Unit.

Q Okay. Now did you ever conclude that some of
the things stated in Mr. Howard's letter are inaccurate?

A I considered the possibility they could be.

Q That's not my question, sir.

A Okay.

Q Did you ever conclude that any of the things
stated in his letter are inaccurate?

A I don't know that I ever went there.
Q And you conducted a -- you spent approximately 80 percent of the time that you devote to an average complaint to your work on this complaint, correct?
A That would be correct.
Q There was no hearing in court?
A No.
Q And the result was a 99 percent forfeiture of a pre-1914 water right?
A No. It was not.
Q Did you have a result in mind, a result you desired, when you began your investigation into the Howard complaint?
A Absolutely not.
Q You indicated upon Mr. Neary's cross-exam that hoarding water rights is bad, and that a better result is for water to be released down the river to more users; is that your --
A Can you state that again?
Q Entities such as Millview cannot cycle its use through various water rights because that results in hoarding, and the better result is for them to have -- Millview to have less water rights so more water can go down to the river to other users. Is that an accurate statement of your attitude about water?
A No.
Okay. Do you have an opinion as to whether underflow would be validly pumped under a pre-1914 water right?

For example, Lawrence testified there's an eight-foot swimming hole in the Russian River where this pump and pipe was from the Waldteufel right, and the water was eight feet deep, even when the rest of the river was dry.

Is it your understanding that a person could pump that hole dry under a pre-1914 water right if he or she wanted to --

MR. ROSE: I'll object on the grounds that this is --

MR. BRIAN CARTER: -- or trying to --

MR. ROSE: -- conflating a hypothetical.

MR. BRIAN CARTER: I'm sorry. I should complete the sentence.

BY MR. BRIAN CARTER:

Pump that hole dry or try to pump that hole dry if she wanted to?

MR. BRIAN CARTER: I apologize for interrupting, counsel.

MR. ROSE: That's fine.

I will object on the grounds that this question is conflating a hypothetical situation with facts that
they're trying to prove and misstating the evidence as
to those.

MR. NEARY: I'm not sure what conflate means, your Honor. But this is very much a fact that is in
evidence which is that there was an eight-foot swimming
hole, and that's the hole where the pump and pipe were.

So my question is: Even though the rest of the
river is dry, and the gauging station upstream says it's
dry, there's water available to be pumped. And I'm
asking the witness whether under his understanding it's
proper to pump that.

CO-HEARING OFFICER BAGGETT: Overruled.

Answer please.

MR. RICH: First of all, I'm not sure that an
eight-foot hole represents that there's more water. If
that hole is down in the bedrock, there could be no more
additional flow there.

To the extent that there is water that is
available, either in the hole which is -- and the hole
is not part of an underflow, and I'm not sure that this
Board recognizes underflow.

But if it's there, and you have a valid basis
of right, you can pump the water.

If you don't have a valid basis of right, you
shouldn't pump the water.
BY MR. BRIAN CARTER:

Q    You've repeatedly indicated that you were --
you found an absence of evidence that would indicate the
validity of the Waldteufel right, correct?

A    I found lack of evidence to substantiate that
the right had vested.

Q    Right. And you indicated that one in
Millview's position needs to be able to demonstrate the
validity of that right. My question is: To whom does
Millview have to demonstrate the validity of its
pre-1914 water right?

A    If Millview can't demonstrate it, then the
prosecution staff of the State Board can do what we did,
initiate an enforcement action.

         If the Board upholds that enforcement action
         and it goes on to court, ultimately Millview or whoever
         claims to hold the right will have to be able to
         demonstrate to a court.

         And if the court says we don't think there's a
valid basis of right here, and we don't think it exists,
it can go to the appellate court. And eventually you
reach the end of the line where it doesn't exist.

Q    Thank you. At one point in your testimony
under Mr. Neary's cross-examination, you indicated that
you had a complaint, the Howard complaint, on behalf of
large numbers of persons in the watershed.

Did you believe that the Lee Howard complaint was made on behalf of a large number of persons in the watershed or on behalf of one individual?

A I believe it was an individual complaint made to protect the benefit of the people in the watershed. He certainly wasn't saying my personal right has been directly impacted. So the only thing I could conclude was he was saying there's an unauthorized diversion out here. It's impacting other people possibly.

And he was, if you want to call him, a good citizen who was trying to look out for the needs of his neighbors or whatever. He filed a complaint.

That would have been my best guess. I can't read his mind, and he didn't particularly -- you know, I didn't call him up, and he didn't give me a long-winded explanation.

But that would have been my assumption is that he's attempting to protect everybody else in the watershed and possibly Public Trust resources, although he certainly didn't specifically state it.

Q And you didn't seek any clarification from him on that point, did you?

A I wasn't required to. He had made a valid
complaint on an issue that we deal with.

Q    And I'm sorry if I'm making you defensive, sir.
I'm just asking questions here.

A    I'm not trying to be defensive. I'm just trying to answer.

Q    Okay. Now do you believe that the finding you made and that the Draft CDO embodies that Millview can only pump 15 acre feet a year amounts to a regulation of the Waldteufel water right?

A    I believe my finding is an opinion. If the Board upholds it, it will be based on the lack of a water right being present, in which case the Legislature has empowered the Board to take action.

Q    In your testimony, you mentioned a number of reasons about a number of things that you found problematic with Mr. Lawrence's testimony. He was confused. He didn't know what direction was what.

Isn't it true that you had that sworn statement of Mr. Lawrence before you issued your report, you considered it, you read it, and you actually referred to it in your report; but your report doesn't contain any of the statements about how you didn't find it credible.

Why didn't you include any statements in your report explaining why you didn't like -- you didn't choose to adopt some of his statements?
Unfortunately, the Complaint Unit had, at that
time, four staff people. We're now down to a little
more than one, not quite two. We have a large number of
complaints.

I don't have the option of writing ad
infinitum, ad infinitum.

I didn't find a whole lot of information in
there that was useful. I needed to address it because
it certainly had been provided. But to go through and
say why I didn't find it credible, I -- you know, other
than to say he seemed to be confused.

In the first few pages, he argued extensively
with the questioner regarding which way was north and
where his property was. And throughout it, there were
times when they broke from the record to try to get him
squared away.

You know, he had no quantifiable numbers. He
didn't have --

The question is why you didn't refute his
testimony in your report.

MR. ROSE: I believe that's --

MR. BRIAN CARTER: He's answered it. Thank you

Mr. Rich.

MR. RICH: Okay.
BY MR. BRIAN CARTER:

Q  On page 21 of Mr. Lawrence's statement -- that's your Exhibit 5.

A  Okay.

Q  At line 14 and 15, Mr. Lawrence referred to flood irrigation occurring on the property described in the Waldteufel filing, correct?

A  Yes.

Q  And you read that before you issued your report?

A  Yes.

Q  And on line 23 that same page, he states that he heard the pump running quote many, many times, end quote, correct?

A  Yes.

Q  Okay. And still you conclude that there wasn't very much water being used for agricultural purposes on that property, correct?

A  No, I'm not sure I would conclude it wasn't being used for agricultural purposes.

I think my conclusion was that this didn't document a specific diversion or amount, whether it was continuous, whether, you know, if it happened once in a while. Many, many times. Was that two or three times over a 50-year period? Was it five times a year?
Q  You don't know?
A  I don't know.
Q  Right? Isn't it possible that Waldteufel and his successors in the 1910s just irrigated the heck out of that land and used 1500 acre feet or more running that pump practically a hundred percent of the time, but we wouldn't know about it, and then the use maybe went down later? Isn't that possible based on what you know?
A  Yes.
Q  Okay. Looking at one of these statements of use. It is under tab 6 of my Exhibit 14. It says number 272 in the upper right, and it was signed on 2-12-1970.

MR. ROSE: I'm sorry. Did you say your Exhibit 14? Hill and Gomes Exhibit 14?

MR. BRIAN CARTER: Yeah. My Exhibit 14 is the administrative record. It's got 39 tabs. Do you have that?

MR. ROSE: I thought your exhibits were by letter, so.

BY MR. BRIAN CARTER:

Q  Under Exhibit 6 -- tab 6 on that is this supplemental statement of water diversion and use. It's Bates stamped 10,014 in the lower right corner.

Do you have that document in front of you?
Okay.

Okay. Mr. Rich, to what extent did you rely upon this document in concluding as to the amount of use that was made of the Waldteufel right?

Well, I took the fact that he reported so many hours at a certain rate. And if you total up -- he's got, I think, 149 hours at 500 gallons per minute which as I recall, if you compute that out, that's 13.7 acre foot. That's what he was showing for those year periods, the use.

CO-HEARING OFFICER BAGGETT: Just for the record, this is Exhibit U? Page or tab 6, correct? My copy says Exhibit U.

MR. BRIAN CARTER: You are correct, your Honor. I apologize.

CO-HEARING OFFICER BAGGETT: I just want to make sure so --

MR. BRIAN CARTER: My tab 14 and my clip -- it is Exhibit U.

BY MR. BRIAN CARTER:

Now you said 249?

249 hours. 25 plus a hundred plus -- I mean 149. Excuse me.

149 hours at 500 gallons per minute. If you compute it out, I believe it comes out to 13.7 acre
Q Okay. That's 149 hours, right?
A Correct.
Q And it says a minimum of X hours on each of those lines, m-i-n period. Do you see that?
A Okay.
Q Did you notice that when you performed your analysis?
MR. LILLY: I object. That's misstating. It says gallons per minute. It doesn't say minimum.
MR. RICH: Yes. That is right.
CO-HEARING OFFICER BAGGETT: Sustain that.
MR. BRIAN CARTER: That may be right, Mr. Lilly. Very confusing document.
BY MR. BRIAN CARTER:
Q Did you conclude that any of these statements of use contained projections of future use as opposed to statements of prior use?
A Well, I did note a relative pattern that they all seemed to be fairly consistent regarding season and types of crops and usage. It indicated that not much was changing while Mr. Wood owned the property, was the impression I was left with.
Certainly I didn't see anything to contradict that impression there.
Q     Now have you discussed with Millview in the
course of your work on this the possibility of them
moving their point of diversion back to the west fork
and thereby eliminating your concerns about the improper
use of the project water?
A     No.
Q     At the bottom of page 1 of your sworn written
testimony, the last sentence says:
      The complaint contains allegations that
      the pre-1914 appropriative claim of right
      of Messrs. Hill and Gomes for water from
      the west fork Russian River had been lost
due to nonuse and that the point of
diversion for this claim of right had
been moved downstream to the mainstem of
the Russian River below Coyote Dam in
order to access additional flow of water
that is not available on the west fork
Russian River.
My question is to you, sir, is: Where in
Exhibit G does it say that? Exhibit G is Lee Howard's
one-page complaint.
A     The last sentence says:
      It is my contention that pre-1914 no
      longer exists, and the individuals as
well as Millview County Water District
have no basis of proof that this water
has been used in like amounts and like
manner since 1914.

And then the paragraph before it says:
This pre-14 statement also indicates the
diversion point was relocated to the
south 400 feet. The original point of
diversion was on the west fork of the
Russian River as stated in the
description of water rights recorded in
the county records. The point of
diversion is now shown on the east fork
Russian River.

Q The last line and three words in your written
testimony says:

In order to access additional flow of
water that is not available on the west
fork Russian River.

Does that language appear anywhere in the
Howard complaint?

A No, it does not.

Q Why is it in your written testimony?

A Because that's what I believe was his
contention.
Q  And what is the basis for that belief?
A  It may have been the discussion I had with him, 
    the short discussion we had at the time of the field 
    investigation. But that is -- as far back as I can 
    remember, that is what I believed his contention was. 
Q  So Mr. Howard was complaining about the 
    movement of the point of diversion, right? 
A  I believe he was concerned with that, yes, that 
    it would provide additional water that would not have 
    been available upstream.
Q  Did you notice Mr. Howard's statement about 350 
    homes in the subdivision?
A  I see it there.
Q  In fact, there's 125 homes, right?
A  I believe you're correct.
Q  So as you sit here today, is there anybody 
    involved in this proceeding who claims to have a junior 
    right to the Waldteufel right who is in fact involved in 
    this dispute?
A  Yes. Sonoma County Water Agency.
Q  Was Sonoma County Water Agency involved in your 
    investigation?
A  No, they were not a party to the complaint.
Q  Did you speak to them at all before you 
    concluded there was a forfeiture of the Waldteufel
right?

A  No, I did not.

Q  And the result of your report and your recommendation was that Millview be allowed to pump 15 acre feet per year whereas they contend they have a right to 1500-something.

The result of your -- the adoption of this Draft Cease and Desist Order would be that some several hundred acre feet would be released to people down the river, correct?

A  No.

Q  In -- and I'm just about finished.

In your written testimony on page 9, paragraph 10 where you're talking about North Kern case, your second of three bullets says:

Forfeiture occurs not because the right holder is misusing the resource but instead so the State can assign the water right to someone who will use it.

So under your scenario, your understanding, of your job and your employer's authority, you go out and you look for forfeitures of pre-1914 rights so that you can go around and assign the resulting surplus to other users; is that correct?

A  No.
MR. BRIAN CARTER: That's all I have. Thank you very much.

CO-HEARING OFFICER BAGGETT: Thank you.

Mr. Lilly. Five minutes, huh?

CROSS-EXAMINATION BY MR. LILLY

FOR SONOMA COUNTY WATER AGENCY

BY MR. LILLY:

Q    Good morning, Mr. Rich. I'm Alan Lilly, and I represent Sonoma County Water Agency in this hearing. Could you please go to page 4 of your testimony, Exhibit PT-1?

A    Okay.

Q    Do you have that?

A    Yes, I do.

Q    Good. In paragraph -- in numbered paragraph 1, the second sentence says:

According to this notice, Mr. Waldteufel claimed a right to divert 100 miner's inches under a 4-inch pressure, or 2 cubic feet per second.

Do you see that?

A    Yes, I do.

Q    Can you just explain to us how you convert miner's inches to cubic feet per second and what the relevance of the inches of pressure is?
Okay. Typically in California, miner's inches are rated as either 4-inch pressure or 6-inch pressure. Under a 4-inch pressure, it's 50 miner's inches is equivalent to 1 cubic foot per second. Under a 6-inch pressure it's 40 miner's inches is equivalent to 1 cubic foot per second.

Q So basically, when there's higher pressure, there's a little higher flow?

A Correct.

Q All right. My next question is referring to numbered paragraph 2 on page 4 of your testimony, Exhibit PT-1.

The first sentence says:

The Waldteufel property consisted of about 165 acres circa 1914 located both north and south of what is now Lake Mendocino Drive and on the west side of the west fork of the Russian River.

Do you see that?

A Yes, I do.

Q What is the basis for your statement that this property consisted of about 150 -- 165 acres in about 1914?

A In the response that the Millview Water District provided to the complaint initially, they sent
in a map that showed an area that they contended was the
lot 103 of the Rancho Yokayo, I believe it is, which is
the place of use as listed in the notice that was filed
with the county recorder in 1914.

Q So do you have any other basis for knowing
whether or not Mr. Waldteufel actually owned this entire
lot 103 and therefore the entire 165 acres?
A I have no information as to whether he owned
all of that land or not or what portion of the land he
may have owned.

There's been one deed produced that indicates
there was a 33-acre parcel that he bought from the
Chaney's, I believe it was.

Q In about 1913?
A Correct. But whether he still owned it at the
time, I don't know.

Q So it's possible in fact that he owned
significantly less than 165 acres in 1914?
A It's certainly possible.

MR. LILLY: I have no further questions. Thank
you.

CO-HEARING OFFICER BAGGETT: Thank you.

Staff, any questions?

WATER RESOURCE CONTROL ENGINEER MONA: One
question.
EXAMINATION BY

HEARING OFFICERS AND/OR BOARD STAFF

FOR STATE WATER RESOURCES CONTROL BOARD

BY WATER RESOURCE CONTROL ENGINEER MONA:

Q Mr. Rich, on page 7 of the CDO order under the "it is hereby ordered" section, on number 1, you restrict the instantaneous rate of diversion to 1.1 cfs and also the annual amount to 15 acre feet.

Is there a reason why you didn't restrict the season of diversion? Or are we talking about year-round restriction? Are we talking about a 12-month diversion period or a lesser period?

MR. RICH: It probably would have been a lesser period. The statements of water diversion use filed by Mr. Wood indicated that water had only been used during the irrigation season, specifically probably no earlier than April and probably no later than October.

The original right indicated that it was -- or the original notice indicated culinary and irrigation uses. I'm not sure what -- whether the culinary was domestic. It might have been year round.

I've seen no indication that water was used on a year-round basis. Every indication that we got was that water was only used during the irrigation season, whatever that might be.
So yeah, that probably was an oversight on our part when we drafted the CDO. We probably should have limited it to an irrigation season.

WATER RESOURCE CONTROL ENGINEER MONA: June through November, or more specific dates?

MR. RICH: I'd have to look at the statements. One statement shows June and July. Others show April through September.

I doubt that staff would object to whatever extent we can to anything between April and September. We would believe that that might be supportable.

WATER RESOURCE CONTROL ENGINEER MONA: That's all. Thank you.

CO-HEARING OFFICER BAGGETT: Jane, Dana? Tam? I have no questions. Any redirect?

MR. ROSE: I do have some redirect. Should I sit over there?

CO-HEARING OFFICER BAGGETT: That would be helpful. We'll allow recross limited to the very narrow scope of the redirect.

REDIRECT-EXAMINATION BY MR. ROSE FOR PROSECUTION TEAM

BY MR. ROSE:

Q Mr. Rich, just a few questions.
You were asked on cross-examination about this visual aid that you prepared, specifically about 2005 usage; is that correct?

A    Yes.

Q    The specific question, or some of the specific questions, you were asked referred to the 2005 usage reported pursuant to the Waldteufel claim of right. Does that ring a bell?

A    Yes.

Q    You also stated that you concluded that this was not -- these numbers were not necessarily accurate. Can you explain that conclusion?

A    Well, we had conflicting bases. We had information that provided -- the flood control district, I asked them for copies of how much water was purchased. They sent me their itemized billing that indicated a certain amount of water had been purchased that did not agree with the number that was in here.

I looked at our progress reports in which case the District had indicated how much water had been diverted pursuant to the permit. It didn't match that at all.

Q    This will go in a completely different direction.

You were also asked questions about the nature
of the conclusions you made in the staff report. What is the nature of your staff report?

A    My staff report is a recommendation by staff that holds no regulatory authority per se. I investigated a complaint. I came up and said based upon the information that's available to me, this is what I believe the water right is worth.

Q    Would you say the same is true for the Draft Cease and Desist Order?

A    It is a recommendation by staff that we believe that there's a potential unauthorized diversion or a threatened unauthorized diversion that could occur.

We're not saying it has occurred as of yet. We think it could occur in the future.

MR. ROSE: Thank you. I don't have any further questions.

CO-HEARING OFFICER BAGGETT: Very good.

Is there any recross?

MR. NEARY: Yes.

RECROSS-EXAMINATION BY MR. NEARY

FOR MILLVIEW COUNTY WATER DISTRICT

BY MR. NEARY:

Q    On your visual aid, you report in green the water that Millview purchased from the Russian River Flood Control District for the years 2001 -- well, for
every year; is that right?
A The --
Q My question is --
A No. The only -- well, the visual aid shows all
the numbers that are here came from my Exhibit 11 which
is based upon the Public Records Act response that
Millview provided.
So every number on this chart came out of that
Public Records Act request response documents that are
included in PT-11.
Q So exhibit -- this -- the areas in green
represent a Millview determination of how much of the
Russian River water used for a specific year?
A Based upon the numbers that are shown in PT-11,
yes.
Q And how much of your determination was based
upon the billing records that you obtained from Russian
River Flood Control District showing that Russian River
billed Millview for water usage?
A Which determination are you talking about?
Q The determination that's depicted on this
visual aid.
A There is no determination made in there, per
se. I mean it doesn't show the billing records for --
the number from the billing records isn't displayed on
Q    So you didn't rely upon the billing records from Russian River Flood Control District to establish the amount that Millview used under the Russian River contract?
A    Not in developing this graph. In developing my conclusion, I did.
Q    Okay.
A    That it -- the numbers have changed. There was a definite discrepancy here.
Q    So if there was a -- if there is a discrepancy between the billing records and the statements by Millview, you relied more heavily upon the information you received from the Russian River district than you did from Millview?
A    No, I just relied -- that's what the District said they charged and they were paid, and this is what Millview -- I mean both of them made a statement.
Q    Moving away from the visual aid for a moment, did you rely upon the fact that Russian River Flood Control District billed Millview for water usage in making your determination of how much water Millview used of the Russian River allotment?
A    Yes.
Q    And so is it your belief that it is the Russian
River district that determines how much water to bill for each year?

A. My understanding was that in 2005 the Russian River Flood Control District was utilizing the meters of individual customers to determine how much water was taken. And therefore, they would have relied upon numbers provided by Millview at the time as to how much water was taken under the contract.

Q. Do those meters determine how much water is taken under the contract, or just how much water is delivered to customers?

A. They're utilized to develop the numbers. My understanding is the numbers in 2005 -- and I'm not sure it's the same way today -- but that in 2005 the District was relying upon a statement from the customer as to how much water they were taking under the contract, whatever meter they used.

Q. Have you seen that statement?

CO-HEARING OFFICER BAGGETT: Let me interject. This is well beyond. I've been lenient. This is well beyond the redirect.

MR. NEARY: That's fine. Okay. That's all I have then.

CO-HEARING OFFICER BAGGETT: Thank you.

Mr. Carters, either of you? No.
MR. LILLY: No further questions.

CO-HEARING OFFICER BAGGETT: Okay. With that, exhibits. Well, first we should put on the record: You did take the oath?

MR. RICH: Yes, I did.

CO-HEARING OFFICER BAGGETT: Thank you.

And exhibits, we have Exhibits 1 through 14?

MR. ROSE: That's right. The Prosecution Team would like to move Exhibits 1 through 14 into the record.

CO-HEARING OFFICER BAGGETT: If there's no objection?

MR. LILLY: Mr. Baggett, I do have some objections that I'd like to state.

In Exhibit PT-1, pages 4 to 5, paragraph three, there are discussions of the so-called sworn statement of Mr. Lawrence. And then Exhibit PT-5, the entire exhibit, is in fact the so-called sworn statement of Mr. Lawrence.

And these -- the sworn statement itself is hearsay, and the descriptions of statement are probably double hearsay. And I understand that the Board admits hearsay, but I just want to make sure that it's clear that we object to any use of that hearsay evidence
beyond the limitations that are provided for in Section 648.5.1 of the Board's regulations and Government Code Section 11513 subdivision (d).

So I don't object to them coming in, but I do object to any use beyond those limitations which are significant limitations here.

CO-HEARING OFFICER BAGGETT: Right, considering the witness is not here.

Any objection?

MR. NEARY: May I be heard on that?

CO-HEARING OFFICER BAGGETT: Sure.

MR. NEARY: The witness has testified that he relied upon the Lawrence testimony for his determination so -- I mean that's what he testified to.

CO-HEARING OFFICER BAGGETT: Mr. Lilly.

MR. LILLY: Mr. Rich did what he did as part of his investigation. I'm talking about what the Board may or may not do in its decision.

I think the Board is limited by the Government Code regardless of what Mr. Rich did.

CO-HEARING OFFICER BAGGETT: I would concur.

It will limit our ability to make findings.

MR. LILLY: The other objection I have is to Exhibit PT-3. This is the April 24th, 2006 letter from Mr. Bradley, the manager of Millview, to Mr. Rich.
And the objection I have is there are two pages of text. In that text, it says map attached as Exhibit A at the very bottom of the first page. And then there are two maps, and in between one what appears to be an old deed enclosed. And we have no foundation whatsoever regarding these last three pages of this exhibit.

And frankly, I really cannot tell which of these two maps is supposed to be Exhibit A, and we've had no foundation of that.

So I just object to any use of this by the Board of these last three pages unless there's some foundation for what they are or -- and some authentication.

CO-HEARING OFFICER BAGGETT: Anybody else want to be heard on that?

I would assume that Millview -- well, are these part of their exhibits later on, these maps? I concur there's no foundation. I mean the report speaks for itself, but -- okay.

Then we'll accept -- giving those clarifications, we'll accept Exhibits 1 through 14, Prosecution Team.

(Whereupon Exhibits PT 1-14 were admitted in evidence.)

MR. JARED CARTER: Your Honor, just want to
renew our objection, so it's clear on the record, just
to any use of those statements of water diversion and
use.

CO-HEARING OFFICER BAGGETT: Microphone.

MR. JARED CARTER: I want to make sure that my
continuing objection to the use of -- any use of those
statements of water diversion and use are in the record.

CO-HEARING OFFICER BAGGETT: The objection is
noted on the record.

We also have some other exhibits we should
probably deal with at this point. Millview, we cited
Exhibit 1, 2, and 7. Do we want to admit those now or
wait till Millview's up? They were used in
cross-examination.

And then we had other exhibit by Gomes et al.
that was used in cross-exam. I guess we can wait till
you bring them up in your --

MR. NEARY: Well, certainly we would have the
ability to present direct evidence of --

CO-HEARING OFFICER BAGGETT: Right. No, I
would concur. I was just saying do we want to enter
them now. We'll just wait. I just wanted to note that
they were used, so they need to be admitted at some
point. Okay.

MR. ROSE: Board Member Baggett, can I ask for
clarification as to what your ruling was in regard to
Mr. Lilly's objections? I'm not sure if I --

CO-HEARING OFFICER BAGGETT: That it was
hearsay. That the Board can use that evidence under our
hearsay rules, but we cannot use it for the truth of the
matter since the witness whose testimony you relied upon
is not here.

MR. ROSE: Thank you. I just wanted to hear
what the final wording was.

CO-HEARING OFFICER BAGGETT: Okay. Anything
else? If not, let's break for lunch.

(Lunch recess)
CO-HEARING OFFICER BAGGETT: Good afternoon. I think we're up with Millview, opening statement, and then you've got three witnesses, right?

MR. NEARY: Good afternoon. Hopefully, we'll -- it always seems that after lunch things move along a lot faster, and I predict that they will this afternoon.

I want to join in Mr. Carter's comments, Brian Carter's comments, that is, thanking the staff in helping us prepare for this hearing.

I really did appreciate all the help I received, especially from Mr. Mona. It was very much appreciated.

I'm not going to go through any legal argument or any conceptual argument about jurisdiction. I played that out in prehearing brief, and I think that you have had an opportunity to review that, so I'm not going to go through that now. But I don't want to leave any impression that that's not the foremost issue in my mind.

I just want to briefly lay out the evidence that's going to follow so that you just have a preview of it, and I'll just do it very briefly and let the
evidence speak for itself.

Our first witness -- well, first of all, I'm just going to give you a background on the Waldteufel right. You've seen a little bit of disjoined presentation as to this right. I want to just go back and put it in chronological order in terms of an overview and then go through our projected evidence.

The first documentary evidence that we see of any use on this property is that 1913 deed where Mr. Waldteufel bought 32 acres in the vicinity where he had other property.

And the deed itself said that the seller of the property was reserving the right to come back and get the first cutting of alfalfa, and that alfalfa is the first indication of what was going on on the property in 1913.

Mr. Waldteufel acquired property, I think it's in April 1913, owned it all through the following summer irrigation season, and in March of 1914, he recorded a claim of right indicating the amount of water that he was claiming, where he was diverting it, and where he intended to use it.

The amount that he claimed was this 100 miner's inches, which has -- you know, it was not the most exact term. It's not -- certainly doesn't have any
engineering precision. But it -- we think it translates out to about 1500 acre feet per year.

The evidence that the property was in agricultural use comes from, first -- and then let me just point out that the actual diversion facilities that are referred to in Mr. Waldteufel's claim of right are partially remaining on the ground today, and we're going to see -- you've seen some pictures of those facilities or what's left of them.

But it's fairly clear that not only did Mr. Waldteufel have a plan, and in fact I think the correct inference is that his -- he was actually using the water at the time he filed the claim of right, but that he actually diverted it because there's the remnant facilities in place, and there is corroborating evidence in the form of Mr. Lawrence's sworn statement when he was 94 years old. He's now almost 97 years old.

And that was that there was -- the diversion was at that point and that there was a long diversion of that water from that point for what he said was over 50 years.

The agricultural use of the property changed from era to era. Alfalfa was the most prominent crop in the early part of the twentieth century, and the Ukiah Valley the crops changed to was more likely to produce
the greater profit.

And by the time that the property was sold in 1998 by the last person to have farmed it, they were growing grapes and had a completely different type of use of the property.

The -- we're going to enter -- enter into evidence the testimony of Daniel Putnam who is designated as an expert witness. He's going to testify as to the probable amount of water usage or the range of water usage necessary to support a typical 1913 alfalfa operation on 165 acres.

We don't have pumping regards for Mr. Waldteufel. We don't have meters. We don't, you know, have that type of evidence. So the best that we can do when Mr. Rich says give us evidence of what use was made to this property is to provide the best evidence that we can reconstruct almost 100 years later.

But one thing that I think it is important to note, and despite the -- this -- the references in the staff report and the draft CDO upon which this is premised, is that there is evidence there was agricultural use of the property in 1913, and that agricultural use is shown to have continued all the way through until 1998 when the property was sold for conversion to a residential subdivision.
And even while it was being converted to a residential subdivision, it was -- the water was used for dust control during construction.

So essentially, what you have is evidence that starting in 1913 there was probable usage of water on this property and that the usage was continuous until the present because starting in 2001, when the subdivision units were first starting to be sold, the water was being used to supply those houses.

And incidentally, the point of diversion and the whole place of use is within the Millview traditional boundaries.

So along -- and then we'll have the testimony of Don McEdwards who is an engineer who is going to testify as to the capacity of the remnant facilities to determine what it could -- whether it could have produced the type of flow necessary for the flood irrigation that was referred to by Mr. Lawrence.

And lastly, the general manager of Millview will testify as to the -- to authenticate several documents and to testify as to what Millview's need for the water is, how its position has changed under various water rights, what water rights it has, and the challenges it faces in providing service to its customers.
But the evidence will establish that this right was properly claimed under the statutory procedure. I don't think there's any question there.

I don't think there's any question in the evidence that the diversion was completed. The remnant facilities are still there today and corroborated by the Lawrence testimony.

And I don't think that there's any question that the water was put to beneficial use. We don't have pumping regards to provide you, so we have to provide you with inferential-type evidence as to the beneficial use.

Now all of this evidence that I'm talking about is without prejudice to our argument that we shouldn't be put in this position of having to come in and prove, as Mr. Rich required us to do, how much water was used at any particular point in time.

The conclusion made in Mr. Rich's staff report which -- upon which the draft CDO is based is that there was a valid Waldteufel water right, that the right was valid, but that it had been forfeited to 15 acre feet because the only quantifiable evidence that he could find is a statement of diversion in 1967. For that particular year, there was 15 acre feet.

And we will reserve for the legal briefs.
whether or not that establishes forfeiture under the law
or can establish forfeiture. And I think that the
argument is not -- and if that's the case, then I think
that putting us to the burden of establishing what our
usage was, or what the usage of our predecessors was, is
then irrelevant.

But I don't want to presuppose what your ruling
will be on the jurisdictional issue, and this evidence
is being presented to preserve the record, not to
establish our right.

So with that, my first witness will be Daniel
Putnam.

DANIEL PUTNAM, PhD
University of California, Davis
Called by MILLVIEW COUNTY WATER DISTRICT
DIRECT EXAMINATION BY MR. NEARY

BY MR. NEARY:

Q Mr. Putnam, would you state your name and
address for the record?

A My name is Daniel H. Putnam P-u-t-n-a-m. I
live at 2318 Regis Drive in Davis, California.

Q Could you briefly summarize your educational
background.

A Yes. I have a PhD in plant and soil sciences
from the University of Massachusetts, Amherst, and
I've --

And what has basically been your employment history, just generally summarized?

Okay. I spent six years at the University of Minnesota working on field crops including some irrigation work.

And the last 17 years, I've been the alfalfa specialist at UC Davis working on a whole range of issues associated with alfalfa, essentially statewide specialist for California's number one acreage crop.

So is it safe to characterize your area of specialty is the -- is alfalfa?

Yes, that's safe to say.

And you have been requested by Millview County Water District to extrapolate the water -- potential water use in 1913 for an alfalfa crop on a 165-acre tract; is that correct?

Correct.

And you have prepared a written report of that -- of your findings?

Yes.

And it's been provided in the Millview documents at tab 10.

Is that your -- does that report reflect your opinion as to the usage that a crop of alfalfa on a
165-acre tract in 1913 would have required?

A    Yes.

Q    And would you briefly summarize what your conclusion is in terms of the amount of water that would be used for such a crop?

A    Yeah. After thinking through this issue pretty carefully, I came to the conclusion that it would be, on the low end, water application of about 300 -- 932 acre feet per annum and on a high end about 310 acre feet per annum for an alfalfa crop in that region.

Q    And is it possible that conveyance losses could be higher than the conveyance losses --

A    Well --

Q    -- you assumed?

A    -- it's certainly possible.

I considered conveyance losses here of approximately 15 percent. The estimates depend upon a whole range of factors including soil type, length of conveyance, lots of different kinds of issues like that.

Q    And did you have any information about the soil types?

A    Yes. I had information about the soil types on the property. I was able to access the Soil Conservation Service records and on that particular site.
Okay. And what were your -- did those records disclose?

Well, it's essentially a fairly sandy, gravelly area in many parts, although there's some variation on the site, with -- certainly it's a site that is something that can be farmed.

But it does have somewhat excess drainage, I think, is fair to say with -- but again, it's an agriculturally suitable soil.

So when soil is sandy, it tends to not hold water and --

Correct.

-- require greater usage?

That's correct.

That's all I have.

Why don't we just have your next witness come up and we'll leave the panel. I'll let them cross-examine all three witnesses at once.

You have no other witnesses? If you've got other witnesses, why don't you put them on.

Mr. Putnam wants to get back to work. Would it be possible to proceed with his cross-examination?

Sure. We can do
Prosecution Team?

CROSS-EXAMINATION BY MR. ROSE
FOR PROSECUTION TEAM

BY MR. ROSE:

Q Good afternoon, Mr. Putnam. I'd like to ask you a few questions regarding your written testimony. First, I'd like to point you to page 1, paragraph two, where you state that the parcel you considered contained 162 acres of alfalfa and two acres of orchards. Did you -- you assumed that this tract contained 162 acres of alfalfa and two acres of orchards in 1913; is that correct?

A That's correct.

Q I'd point you to paragraph four on page 2 of your testimony. In that paragraph, you assume the adequacy of available water; is that correct?

A Yes, that's correct.

Q And you assume the availability of labor; is that correct?

A That's correct. Somebody would have had to have irrigated.

Q And you assume adequate pump capacity; is that correct?
A    Assuming that the water could be delivered in some fashion or another, whether through a pump or through gravity-fed, yes.

Q    Right. You're assuming that the water could get from --

A    Exactly.

Q    You assumed it was available, and you assumed that it could get to the --

A    Correct.

Q    -- land? Okay.

MR. ROSE: I have no further questions.

CO-HEARING OFFICER BAGGETT: Mr. Carter, do you have any? Mr. Lilly?

CROSS-EXAMINATION BY MR. LILLY FOR SONOMA COUNTY WATER AGENCY

BY MR. LILLY:

Q    Good afternoon, Dr. Putnam. I'm Alan Lilly, and I represent Sonoma County Water Agency.

Do you have your testimony, your report, Exhibit 10 in front of you?

A    Talking about my report or somebody else's?

Q    Your report for this proceeding which has been marked as Millview Exhibit 10?

A    Okay. Yes, I do.

Q    Down near the bottom of the first page, the
second to last bullet says:

We would assume approximately 50 to 60 percent irrigation efficiency.

Do you see that?

A Yes.

Q Now can you explain for us what irrigation efficiency means?

A Yes. The amount of -- here, it's the amount of water applied in relationship to the true water demand of the cop. So this would assume that the, for example, efficiencies common in irrigation systems might range from a very low end of 40 to 50 percent up to, for example, 90 percent or 95 percent.

There is no irrigation system that I know of that is 100-percent efficient.

Q So basically, the percent -- your numbers are the percent of the applied water that actually turns into evapotranspiration?

A Correct.

Q So if you have a 50 to 60 percent irrigation efficiency, then what happens to the other water, the other 50 to 40 --

A Well --

Q -- percent of the water?

A Yeah. The -- well, some of that water may be
lost through a conveyance, for example, which is calculated in my table there. Some of the water may be lost through deep percolation or through runoff off of the fields.

Q Okay. Well, you actually have the conveyance losses --

A Separate.

Q -- as separate?

A That's correct.

Q Okay. So it certainly is possible that some and even a significant portion of that water that did not turn into evapotranspiration actually flowed back into the Russian River?

A That is possible, yes.

Q Now, regarding the 15 percent conveyance loss -- and I believe that's on the second page of your --

A Right.

Q -- report down near the bottom, again, what happens to that 15 percent of the water that's lost through conveyance?

A It could be, usually through deep percolation in -- particularly in sandy soils, you would have much greater conveyance losses than you would have under, say, a tighter clay-type soil.
Q    So again, some or even a significant portion of that water could go back to the river?
A    It certainly is possible.
Q    All right. Are you familiar with the concept of return flows?
A    Yes.
Q    What are return flows?
A    Return flows are those waters which are -- come from irrigated fields which in some fashion or another come back to the source of the water.
Q    Okay. And in your work for this project, did you calculate or estimate the return flows that would be associated with this?
A    No, I did not. It was -- I estimated the applied water.
Q    Okay. So again, just so we're clear, applied water, in this case, it's actually the total amount that would be delivered to the head of the ditch before conveyance losses and before application?
A    That's correct.
Q    Okay. Have you ever been out to the site of this property?
A    No, I have not.
Q    Is that something you normally do in your professional work?
A I -- do I visit farms?

Q When you're reviewing or doing calculations for water balance for a particular farm or other area, do you normally go out and look at the site and look at the soil and do a field investigation?

A Depends on the situation. I think -- in this case, I felt that I had adequate information from the soil type estimates and the information that was provided to me to make that estimate.

Q Okay. And did you make any analysis of the return flows that occur from the present water usage by Millview County Water District's customers?

A No.

MR. LILLY: No further questions. Thank you.

MR. NEARY: Mr. Chairman, just one thing.

It's just been called to my attention that I did not ask Mr. Putnam to verify the accuracy of his statement, and I would ask him to do that now.

CO-HEARING OFFICER BAGGETT: Would you verify the accuracy of your statements, and have you taken the oath?

DR. PUTMAN: Yes, I have.

CO-HEARING OFFICER BAGGETT: Okay. Thank you.

Questions? Ernie, Jean, Dana? Anybody?

I only have one, Dr. Putman. I'm looking at
your summary, and you've got a low and high. So your
low numbers, it appears, are based on wet years, and the
higher numbers are based on a dry year? Is that --

DR. PUTMAN: Yes. Generally speaking, in a low
application year, this would be a situation where
adequate ET was supplied from spring rains for the first
cutting or the second cutting.

We certainly see that in -- we see both
situations where inadequate rains are provided for the
first grow period or situations where adequate rains are
supplied from the first grow period.

CO-HEARING OFFICER BAGGETT: But you didn't
calculate in a dry year whether there would even be
water available to --

DR. PUTMAN: That was an assumption --

CO-HEARING OFFICER BAGGETT: -- irrigate in
August, September?

DR. PUTMAN: -- that I made that water would be
available for irrigation. That's correct.

CO-HEARING OFFICER BAGGETT: And all -- so
these numbers would have to be -- looking at the
hydrograph for different water year types, these numbers
would change based on that also, whether there actually
was water.

DR. PUTMAN: Yeah. I didn't make a
determination as to whether water would be available for
irrigation. I assumed that as a given.

CO-HEARING OFFICER BAGGETT: So you might only
get four cuttings in a dry year instead of six. So
these weren't based on crops or cuttings so much as --

DR. PUTMAN: Well, actually, the cuttings
figured in because, generally speaking, dry land
alfalfa, you're not going to be able to obtain four
cuttings of alfalfa hay. That's an irrigated crop,
generally speaking.

Current cutting schedules are closer to five or
six cuttings, but that's with modern equipment.

CO-HEARING OFFICER BAGGETT: Right.

DR. PUTMAN: And we're talking about different
systems back then.

CO-HEARING OFFICER BAGGETT: Okay. Thank you.
Any redirect? No redirect. Thank you.

Mr. Neary, you're back up with two other
witnesses.

MR. NEARY: Yes. We call Don McEdwards.

DONALD G. McEDWARDS, PhD
Principal Hydrologist, The McEdwards Group
Called by MILLVIEW COUNTY WATER DISTRICT
DIRECT EXAMINATION OF DR. MCEDWARDS BY MR. NEARY

151
BY MR. NEARY:

Q    Dr. McEdwards, would you state your name and address?

A    Donald G. McEdwards. 1025 First Willits Road, Willits, California.

Q    And you've presented a statement of qualifications in this proceeding. It's tab 7. That summarizes your experience. I'm just going to ask you: What is your educational background?

A    I have a BS in geology and an MS and PhD in engineering science.

Q    And what registrations and licenses do you hold?

A    I'm a Registered Civil Engineer, geologist, and a Certified Hydrogeologist and a Certified Engineering Geologist.

Q    And did you -- were you asked by Millview County Water District to perform an investigation on the property adjacent to the Russian River?

A    Yes. At the Waldteufel diversion site, I was told it was called.

Q    And what were you asked to do?

A    To look at what structures remained and see if those structures had any possibility of conveyance of flow and, if so, what amount of flow.
Q    And you prepared a written report?
A    Yes.
Q    Is that a true and accurate recitation of your
findings?
A    Yes.
Q    Would you summarize your findings?
A    The -- I found a crib-like enclosure, retaining
wall, maybe 10 feet by 20 feet, open end facing the
river.
And in there was a 6-inch steel pipe. It was
detached. You could see where it was coming out of the
very end of the crib wall. It was kind of crushed, but
it was through-going at one time, based on my
observations.
I measured the diameter by putting a tape
around it and getting a circumference, and it was a
6-inch steel pipe.
And then I went to a handy reference book, how
to measure flows. And from a horizontal discharge, it
tells you how many inches of drop -- 4 inches of drop,
how long does it take for 4 inches of drop to occur?
How far is that from the pipe? And from that, you can
determine the flow in the pipe, given the diameter of
the pipe.
Q    And what was your conclusion?
A You asked me to find out if you could convey 2 cfs, 2 cubic feet per second, and it could easily convey that.

Q Could it convey up to 2.6 cubic feet per second?

A I was asked later what is the capacity, and I -- and the same table shows for 4 inches in two feet is 1120 gallons a minute from a 6-inch pipe.

MR. NEARY: Could we have Exhibit No. 10 put up on the screen?

BY MR. NEARY:

Q Would you just walk us through each of these pictures and tell us what they depict?

A The upper right is hard to see, but looking out toward the river. And the downstream wall is what you see there.

And it's hard to see, but there's a pipe at the very end going out the river. The upper left -- I'm sorry; that was the upper left. The upper right shows the pipe in better detail.

The lower left, if you look at the second post next to the green grass, at the base of it, you can see what looks like -- it's a squashed metal pipe. That -- right in middle of the picture, actually.

Then the other last picture there is my tape
around the pipe showing, as I say, 1.6 feet in
circumference which is 6 inches diameter.

Q And in your opinion, would these facilities be
sufficient with an electric pump to lift 2.6 cubic feet
per second 15 feet onto the Waldteufel property?

A Yes. If the person wanted to pump that much,
he'd get an electric or gasoline pump, and you could --
if you want to pump more water, just get a bigger pump.
The pipe is adequate to deliver 1200 gallons a
minute or more.

Q And when was your -- when were these pictures
taken?

A Oh, boy. August or September, I think.

Q Of 2009?

A Yes.

Q So you found these facilities in place when you
were there?

A Yes.

MR. NEARY: That's all I have.

CO-HEARING OFFICER BAGGETT: Thank you.

Prosecution Team?

MR. ROSE: Would you prefer we do the witnesses
one at a time?

CO-HEARING OFFICER BAGGETT: Do you want to do
them as a panel, we can do both. Save some time here.
Do you have another witness?

MR. NEARY: Yes. Call Tim Bradley.

CO-HEARING OFFICER BAGGETT: You can stay up there. Might as well do both of you. Little more efficient.

TIM BRADLEY

General Manager, Millview County Water District

Called by MILLVIEW COUNTY WATER DISTRICT

DIRECT EXAMINATION BY MR. NEARY

BY MR. NEARY:

Q    Mr. Bradley, would you state your name and address for the record?

A    Tim Bradley, 3081 North State Street, Ukiah, California.

Q    And how are you employed?

A    General manager of the Millview County Water District.

Q    Approximately how long have you been general manager?

A    Approximately nine years.

Q    What are the duties of the general manager of the County Water District?

A    Oversee general day-to-day operations, budgetary items.

Q    And what is the size of the Millview Water
District?

A  It covers an area approximately 8 to 10 square miles, serves a population of about 5,000 customers through 1500 service connections.

Q  Would you briefly summarize what water rights Millview holds at present.

A  Currently we have permit 13936. I believe that's the correct number. For 3 cubic feet second from November 1st through June 30th.

License 492, which is through -- I believe diversion date is June 15th to -- or June 1st to August 15th. That's for approximately 27 acre feet.

We have a contract with the Russian River Flood Control District for approximately 970 acre feet.

And pre-1914 water right.

Q  And what is the nature of the arrangement with the Russian River Flood Control District?

A  Well, we do have a contract with them for 970 acre feet. However, that is subject to reduction. And that is part of the reason that the District was placed under a moratorium for service connections.

Q  And when -- the District is presently under a moratorium for service connections?

A  That's correct, due to insufficient source capacity.
Q And who imposed the moratorium?
A It was the Department of Health Services.
Q And do you know under what circumstances it was imposed?
A Well again, because of insufficient source capacity, summertime water supply.
Q And was the characteristic of the Russian River contract factored into that decision?
A It was.

MR. LILLY: Excuse me. I'm going to object to this, Mr. Baggett.

If we're going to get evidence about the Department of Health Services or Department of Public Health order, we need to have that order rather than Mr. Bradley's characterization of that order.

CO-HEARING OFFICER BAGGETT: I would --
MR. NEARY: Well, he can certainly testify as the general manager of the District to matters which are in his personal knowledge.

CO-HEARING OFFICER BAGGETT: I would sustain the objection on the fact that he's stating what's in an order.

To the extent that, as a manager of the District, he can say how he's managing the District under requirements set forth, that's acceptable.
So why don't you just rephrase the question, I think. How it affects his operations is one thing, but to state what an order says when we don't have the order in front of us, I don't think is appropriate.

How you operate the District, I would agree.

That's administrative.

BY MR. NEARY:

Q    Does the order prohibit -- have you been prohibited from making any new service connections as a result of an order issued by the Department of Public Health?

A    Well, the District has been allowed some service connections based on a request, but they're very limited. And as of this date, any new connection would require that it brings its own water supply in order to be served by the District.

Q    And is it your understanding that the Russian River contract would be sufficient to demonstrate source supply to the Department of Public Health to relieve the District of the moratorium?

MR. LILLY: And excuse me; I'm going to object to that on the grounds of lack of foundation. We're now asking this witness to speculate what the Department of Public Health might do in response to something.

CO-HEARING OFFICER BAGGETT: Sustained.
Can you lay a foundation?

BY MR. NEARY:

Q    Have you cited to the Department of Public Health the existence of the Russian River contract to demonstrate the ability to supply water in the dry weather period?

A    Yes, I have. And because of the nature of the contract -- it is subject to reduction -- he does not consider it a reliable source of supply.

Q    And does the Russian River contract have an expiration date?

A    I believe it's up for renewal in this coming year, 2010.

Q    Do you have any information as you sit here today whether it will be renewed?

A    We're hoping it will be renewed.

Q    Do you have any information that it will be?

A    No.

Q    Have you requested from the Russian River Flood Control District that you be given -- that Millview be given a permanent right that could be relied upon?

A    We have requested that, and that may be something that will be considered in 2010. But again, that's the flood control district, that's -- it's a request that we have made.
Q In addition to arrangements with regard to the Waldteufel water right, has Millview made any other efforts to resolve its summertime source deficiency?
A We did negotiation with the Masonite Corporation for a year-round license that was -- I believe the amount was 4200 acre feet per year from the Russian River underflow. A complaint was filed on that by Mr. Howard, and a request to revoke the license is pending hearing.
Q Is Mr. Howard known to you to hold any official position at present?
A I believe he's the president of the flood control district.
Q And that's the -- when you say flood control district, that's synonymous with the Russian River --
A Russian River Flood Control District.
Q And is the resolution of the Masonite forfeiture still pending before this Board?
A Yes, it is.
Q When did Millview first have any involvement with the Waldteufel water right?
A I believe it was October. Well, probably October 2001 or October 2002 is when we entered into an agreement.
Q And was that agreement -- did that shortly
follow the installation of a procedure by the Russian River Flood Control District to put strict limits on contractual use of the Mendocino right?

A    Well, it was December 2001 or January 2002 the flood control district declared that all water under their permit had been fully allocated, and that prompted us to go out and seek additional sources of water.

Q    And prior to 2001, had Millview been required to make any formal reporting to the Russian River Flood Control District?

A    We did report our annual usage to the flood control district.

Q    And do you do that today?

A    Yes, we do.

Q    In what fashion?

A    Basically now we submit a worksheet or -- truthfully, it seems to change every year.

Now that they have a new executive director or general manager, they are reading our meters; but we also submit our own readings.

Q    When did they start reading the Millview meters?

A    Just this past year.

Q    And for prior years, when -- what information did you supply to the Russian River Flood Control
District?

A We tried to provide them with a breakdown, a worksheet with all the water rights. The general manager at the time chose not to accept that and allocated the water how they felt was necessary.

Q And who was that former general manager?

A Barbara Spazek.

Q Now, you've provided written testimony in this proceeding?

A Yes.

Q And are all the statements in that testimony true and correct?

A Yes.

MR. NEARY: That's all I have.

CO-HEARING OFFICER BAGGETT: Thank you. And you have taken the oath, correct? You took the oath earlier?

DR. McEDWARDS: Yes, I did.

CO-HEARING OFFICER BAGGETT: Thank you. Okay.

Your witnesses, if you like. You're up, prosecution.

CROSS-EXAMINATION BY MR. ROSE

FOR PROSECUTION TEAM

BY MR. ROSE:

Q Good afternoon, Mr. McEdwards, Mr. Bradley.
Mr. McEdwards, I'll ask you a few questions first.

Your opinions as stated in your testimony, Millview Exhibit 009, those opinions are based on the pipe that you saw in 2009; is that correct?

A    Yes. Is this Exhibit 9? I don't know what Exhibit 9 is.

Q    It's -- I believe it's Exhibit 9.

CO-HEARING OFFICER BAGGETT: Yes.

BY MR. ROSE:

Q    Yeah. Your testimony.

A    Yes. The question again?

Q    Your opinions and your testimony are based on a pipe seen at the site in 2009; is that correct?

A    That's correct.

Q    And you didn't go out to the site before this, did you?

A    No.

Q    And your conclusions don't make any accounting for a pump or any other ability to make full use of the pipes' capacity, do they?

A    The pump was not there when I saw it, so, but I . . .

Q    So --

A    I don't know what you're asking actually.

Q    Your conclusions are based solely on the pipe's
capacity?

A That's what I was asked to quantify, yes.

Q Right. So that you don't make any conclusions regarding whether there would be other limitations on what could flow through the pipe; is that correct?

A No.

Q And you didn't see a pump?

A No, I did not.

Q Okay. You don't know how much water actually went through the pipe?

A No, I do not.

Q Okay.

MR. ROSE: I have no further questions for Mr. McEdwards. I have a few questions for Mr. Bradley.

CO-HEARING OFFICER BAGGETT: Okay.

BY MR. ROSE:

Q Mr. Bradley, you said that you are the general manager for the Millview County Water District; is that correct?

A That's correct.

Q And you said that you have been the general manager for approximately nine years; is that correct?

A Yes.

Q Okay. Going to point to Millview Exhibit 014 which I believe from your exhibit identification index
is your testimony. I'd like to point to page 4 of your
testimony, Mr. Bradley. On page 4 of your testimony --
are you there?

A    Okay.

Q    Looking at the second full paragraph, the one
that begins with "in 2005," in this paragraph, you say:

In 2005, Millview endeavored to attribute
as much of its summertime use as possible
to the Waldteufel right due to the
owner's encouragement for use of the
right and Millview's continuing concern
that the contract right with the RRFCWCID
right could not be relied on the long
run.

Is that accurate for what you said?

A    Yes, sir.

Q    I'd like to point to document Prosecution Team
No. 12. I'm not sure if you have that available online.

A    I don't have it.

Q    Mr. Bradley, this is Prosecution Team Exhibit
No. 12. Do you recognize this?

A    Yes, I do.

Q    Okay. This document reports -- do you
recognize, just to be clear, do you recognize this as
the progress report submitted for 2005 for the Millview
County Water District for permit 13936? You can scroll down --

A   Yes, it is.

Q   -- if that helps you or I can provide you a hard copy. Did you say yes?

A   Yes, I did.

Q   Thank you. This document reports that Millview used 740.75 acre feet of water in the year 2005 pursuant to permit 13936; does it not?

A   Yes, it does.

Q   And if you could scroll to the bottom of the document, the bottom of the page -- right there is fine. Is that your signature at the bottom?

A   Yes.

Q   Thank you.

MR. ROSE: I have no further questions.

CO-HEARING OFFICER BAGGETT: Mr. Carter, do you have any?

MR. JARED CARTER: Thank you, Mr. Chairman.

CROSS-EXAMINATION BY MR. JARED CARTER FOR THOMAS HILL and STEVE GOMES

BY MR. JARED CARTER:

Q   I'm Jared Carter, I represent Messrs. Hill and Gomes. Mr. Bradley, there are a couple of questions I have that I don't believe you covered on your report,
but maybe you did, and that is: How many customers does Millview have?

A  Approximately 1500 service connections and a population of about 5,000.

Q  And how long -- low large is the service area?

A  Between 8 and 10 square miles.

Q  And have you been forced to curtail service in the last two or three years for lack of adequate water supply?

A  Yes. As far as a lack of -- unable to add additional service connections.

Q  Well, isn't it true that you were unable to supply all the water that all of your customers wanted in the last summer?

MR. ROSE:  Objection; that's a leading -- I'll withdraw my objection.

CO-HEARING OFFICER BAGGETT:  Continue.

MR. BRADLEY:  Well, no. We weren't able to serve all of their needs. There was a mandatory 50 percent reduction imposed by the State.

BY MR. JARED CARTER:

Q  So the State imposed a requirement on you to reduce your service level?

A  Yes.

Q  And was that because you didn't have adequate
water supply to meet your customers' needs?

A That's correct. But it wasn't just Millview in this past year. That would have been everybody in the area.

MR. JARED CARTER: I have no further questions.

CO-HEARING OFFICER BAGGETT: Now Mr. Lilly.

CROSS-EXAMINATION BY MR. LILLY

FOR SONOMA COUNTY WATER AGENCY

BY MR. LILLY:

Q Good afternoon, Mr. Bradley. I do have some questions for you.

Mr. McEdwards, you can relax. I'm not going to ask you any questions today. Mr. Rose covered it.

Don't worry.

Mr. Bradley, I do have some questions for you.

Can you get your testimony, Exhibit Millview 14, in front of you? Do you have that Millview?

A I don't have an exhibit number. If you can tell me what it is.

Q It's your written testimony.

A I do have a copy of that, yes.

Q Okay. And please refer to page 4 of that.

A (Complying)

Q Okay. Do you have page 4? They're numbered at the bottom left.
Okay. The very first line says "it," referring to Millview:

... also acquired most of the amount reserved by Messrs. Hill and Gomes to serve the 125-home subdivision so as to guarantee its legal ability to provide service to that subdivision.

Do you see that?

We acquired all of it.

Okay. It says most. It actually should say all?

Yes.

Okay.

Well, I -- read my --

I'm sorry. You need to speak into the microphone?

It does say that the option remained in effect until August of 2009. And that is when Millview did acquire its water right with the -- there is an outstanding reservation, I believe, for the 125 homes.

Okay. That's what I'm trying to get at.
Because it says Millview acquired most of the amount
reserved for these 125 homes, so I'm just wondering if
you can tell me what amount Millview acquired of that
125-home reservation and what amount Millview does not
have.

A    To the best of my understanding, it -- we hope
to get that reservation back that may have been deeded.
There's still some question as to that.

Q    So you don't know what part of the reservation
Millview has right now?

A    I'm going to make the assumption that the
125,000 is included in our agreement with Hill and
Gomes.

Q    Okay. So then to the best of your
understanding, Hill and Gomes have transferred all of
their interest in this alleged Waldteufel right?

A    That's correct.

Q    To Millview?

A    Yes.

Q    Okay. So what is Millview's position regarding
the maximum rate in cubic feet per second at which it
now may divert water under this alleged water right?

A    It's interesting. Mr. Rich quoted a formula
earlier. Mine wasn't quite as scientific.

I was told that a miner's inch was either nine
gallons per minute or 12 gallons per minute, depending on the location in the state.

Now, whether I have it correctly or not, I was under the impression it was nine gallons per minute. I've been told that it's 12 gallons per minute in northern California and nine in southern California, but I --

Q So can you convert to cubic feet per second regarding what Millview's position is regarding its right to divert water on this alleged water right? How many cubic feet per second?

A Roughly 2 cubic feet per second.

Q Okay. And what is Millview's position regarding the maximum number of acre feet per year that it may divert under this alleged water right?

A We believe it's somewhere in the 1400 acre range.

Q Okay. Now, do you have -- or if you don't have a copy of Exhibit PT-11, I'll give you a copy so you can look at that, and I'll ask the State Board staff to put that up on the screen as well.

Now if you can flip to the second page. Unfortunately -- oh, there. It was twisted sideways, but now it's correctly shown on the screen.

Was this table prepared by Millview?
A    Yes, it was.
Q    Okay. And how did Millview determine how much
water to report as being diverted under statement S00272
in 2001?
A    In 2001, that was water that was being used
reportedly by the contractors doing work out at the
subdivision.
Q    Okay. Now please go forward then to the next
page for 2002. How did Millview determine the numbers
to report under the statement for this year?
A    Again, that had to do with some construction
work and some existing homes.
Q    Okay. And I'll try to make this fairly quick,
but for 2003, how were the numbers in the column for
this statement determined by Millview?
A    Again, those are the same. Housing that was
being built within the subdivision and construction
activities.
Q    Okay. And then the same question for 2004:
How were the numbers in this column determined that year
by Millview?
A    Again, 2004 would be the same.
Q    Okay. And then in 2005, on the next page, the
numbers are a lot higher. Please tell us how Millview
determined the numbers to put in this column for
statement S00272 in 2005?

As per our agreement of renewal and extension of a contract with Hill and Gomes for the lease auction, we agreed to start maximizing usage under the 1914 right.

Okay. So how -- when you say maximize usage then, how did you determine what numbers to put in here?

Based on how much water we were using.

So basically you put in the entire amount that you were using in this column up to the number that equates to 2 cubic feet per second?

Yeah, but I would like to also point out that this was our intention for 2005, to report this water, yes.

Okay. And now going forward to 2006, how did Millview determine what numbers to put in the column for this year?

Same method that we used the previous year.

However, in 2005, I believe -- what you're going to get at here is a discrepancy on the progress report?

Well, these are just Millview's tables. And I'm just wondering: In 2005, the numbers that reported total 1174.75 acre feet, and 2006 they total 55.17. So I'm just wondering what method you used to determine what numbers to put into this table each year.
MR. NEARY: I'd like to object. The question assumes that these are reports or reported amounts. There's been no foundation to establish that.

MR. LILLY: There is a foundation that these numbers were provided to Mr. Rich as part of his investigation, and they were prepared for by Millview; so I believe I am entitled to ask how Millview prepared them.

MR. NEARY: Actually, these documents were presented to the Prosecution Team in response to a public records request as it's indicated on Mr. Rich's documents. And basically, that meant that they received a file, a copy of a file. And there were no representations made as to any of the documents in the file. It was a public records request. We copied it. We gave it to them.

MR. LILLY: I don't understand that response. Millview prepared these documents. They were provided to Mr. Rich. They have been discussed by the Prosecution Team. I believe I'm entitled to ask Mr. Bradley how he prepared them.

MR. NEARY: He's entitled to ask how he prepared them, but he's not --
CO-HEARING OFFICER BAGGETT: That's what he's asking.

MR. NEARY: -- allowed to characterize them as reports to --

CO-HEARING OFFICER BAGGETT: Okay.

I will sustain the objection referring to it as an official report, and just re-ask the question.

MR. LILLY: Okay. I'm sorry. I'll call them tables to avoid that controversy.

CO-HEARING OFFICER BAGGETT: Very good. Thank you.

BY MR. LILLY:

Q So Mr. Bradley, how did you prepare the numbers in this table for 2006?

A Okay. Very similar to how I did in 2005. We had hoped to maximize usage or report maximum usage in 2005; however, due to the complaint being filed, we tried to again minimize usage under the statement until we could get some resolution and some answer.

Q Okay. So that's why the numbers are much lower for 2006 than 2005?

A Yes.

Q All right. And how did you actually determine the numbers that are in this table for 2006?

A Based on the District's water usage.
Q Based on the District's water usage where?
A Within our boundaries.
Q I guess I'm confused. For example, if we look at -- let's just look at January.

On the previous page, January 2005, there's 0 reported for permit 13936, and 23.57 reported for the statement.

Now, in 2006, the total water usage is similar, but we have 32.385 reported under the permit and 0.539 reported under the statement.

I just would like you to explain for us why there's a difference in the way those numbers were prepared for 2005 and for 2006?
A We were reporting water under the statement rather than under the permit on one year; and the following year, we were reporting water under both the permit and the statement.
Q Okay. And why did you do it differently in those two years?
A Again, in 2005, we were going to try and maximize water usage under the statement. In 2006 when the complaint was filed, we reduced our water usage under the statement pending further clarification from the Division of Water Rights on the 1914.
Q Okay. And --
MR. JARED CARTER: I'm going to object to this line of questioning on the grounds that it is not relevant to any issue in this case.

Millview may be incompetent or they may be -- have something else wrong with the way they report, but no element of this case is going to depend upon the accuracy of these reports.

So I object to this line of questioning and request that it -- the answers be stricken.

MR. LILLY: I think everything in this case depends on Millview's intent for how much water it's claiming that it's using under this particular alleged pre-14 right, and these questions are directly related to that.

CO-HEARING OFFICER BAGGETT: I would overrule. I think it's relevant in terms of -- I don't think it's going to competence. It's going to how you divide up which right in which year. And I think that's what we're trying to get at.

Maybe you could get there quicker, would be appreciated. I don't think we have to drag this out another hour.

MR. LILLY: All right. I'll go on to 2007 then, the next page.

BY MR. LILLY:
And Mr. Bradley, please tell us how you determined how much of the District's total diversions to report in the statement column in 2007.

In 2007, under the statement again, we were trying to use the water under the statement. In August of 2007, we received a letter from an Eric Oppenheimer that stated that no further use or development under the permit 13963 or license 492 should occur pending a State Board review of those two permits, so we were trying to allocate, again, our water under the statement.

Okay. Now, I'm going to hand you a copy of a table that the District prepared for 2008. The one in the record was not for the complete year, and we received a table for the complete year in the flood control district's policy statement, so I'll ask that Exhibit SCWA-8 be put up on the screen, and I'll hand you a copy of that as well.

Now Mr. Bradley, did you in fact prepare this table for 2008?

I -- it does look familiar. It does. I mean it looks like Millview's, but I don't --

Okay. Now I realize you didn't put the handwriting in there in the rows for June, July, and August; but otherwise, this is a table prepared by
Millview?

A That's correct.

Q And why are there no entries under statement S00272 for September, October, November, or December of 2008?

A I couldn't -- honestly, I don't know. I don't remember.

Q When you determined the number to put down for August 2008, the 38.76 million gallons, did you consider the amount of water that was flowing in the west fork of the Russian River on any particular day during that month?

A I don't -- no, I don't believe so.

Q Okay. I'm going to hand you what I'm marking as Exhibit SCWA-9 and ask you to look at that.

Now these are the USGS gauge flows for the west fork Russian River at its gauge which is just above where the Waldteufel alleged right point of diversion was.

MR. JARED CARTER: Your Honor, we object.

This document hasn't been verified. There is no foundation for this document. Mr. Lilly is testifying as to what it is, and that's not his office.

MR. LILLY: Mr. Baggett, this is a question of order of witnesses. Our witness can certainly
authenticate this, and I am certainly willing to have
the Board delay its ruling on whether or not to offer
this into evidence, and I will rephrase the question.

CO-HEARING OFFICER BAGGETT: Rephrase the
question, and we'll deal with the evidentiary issue when
you get to your witness.

BY MR. LILLY:

Q Mr. Bradley, assuming these numbers in this
table for the column for August 2008 are in fact
accurate depictions of the GS measured flows in the west
fork Russian River, did you consider any of these flows
when you prepared the diversion number that's listed in
Exhibit SCWA-8 for August 2008?

A No.

Q Has Millview determined yet how much water to
report as being diverted under statement S00279 for
2009?

A Yes, but I haven't got it present, so --
and I'm not going to commit from memory to tell you what
it is.

Q Well, I'm not going to ask you the numbers.
Obviously, you wouldn't remember those.

But can you tell us what method you used to
determine how much water to report as being diverted
under the statement during 2009?
A Based on need, to fill the shortfall.
Q Could you --
A Based on our conservation that was required for this past year.
Q So -- but how -- of Millview's total diversions during each month of 2009, how did you decide how much to report under this -- as being diverted under this statement versus being diverted under the other water rights that Millview has access to?
A Okay. For instance, again, the District pumps flood control district water from June through November 1st, June 30th to November 1st.
This year was somewhat unique in that we only had 450 -- 485 acre feet available under the flood control district contract.
While we achieved a 47 1/2 percent level of conservation, we still fell somewhat short so we have also used the 1914 to make up some of that water.
Q Okay. And how did you decide how much to report under the statement versus how much to report under the flood control district contract?
A Based on need.
Q Well --
A We're still trying to maximize our use. We're trying to balance it. So here we have a flood control
district contract that is up for review and subject to
reduction, so we're trying to balance it out.

Q Okay. So if on a given day there you could
report some of the water as being under the statement or
under the flood control district contract, how do you
decide how much to report under each?

A Again, based on demand.

Q I'm not -- Mr. Bradley, I'm not following that.

Demand gives you a total number. You have to
decide every day or at least every month how to split up
that total between the statement and the contract, and
I'm just asking you how do you do that?

A Based on need or demand.

Q Okay. Doesn't demand just give you the total
number? Let's split it up. Let's say for August 2009
you have a certain amount of demand; is that correct?

A Yes.

Q Okay. Let's just for the sake of argument say
that that's 40 million gallons during August of 2009.

Now, if that were the case, and you had leeway as to how
much of that to report as being diverted under the
statement and how much to report as being diverted under
the flood control district --

A Okay.

Q -- how are you going to decide that?
A: How much water is available based on cubic feet per second under the 1914 right, and the remainder would be filled in based on what's available from the flood control district.

Q: Okay. That's -- I'm sorry if I wasn't clear before. So basically, you report what you can under the statement and then the remainder under the flood control district correct?

A: (Nodding head)

Q: Okay.

I'm going to hand you what's been marked as Exhibit SCWA-10, and I'll just ask you: Have you ever seen this table before or a table with this information before?

A: No.

Q: So did you consider the flow data for the west fork Russian River when you were deciding how much water to record under the statement during the months in 2009?

A: No.

Q: All right. Now if you can go back to your testimony, which is Exhibit 14, and flip to page 2 of that. Do you have that?

A: Yes.

Q: Okay. In the middle of the page, there's a paragraph that says:
Unfortunately the expectation that Millview could rely upon the RRFCWCID for dependable supply of water has not been realized. Although Millview currently holds the water supply contract with RRFCWCID, it is revocable at the sole discretion of RRFCWCID and is limited to a term which soon expires.

Do you see that testimony?

A    Yes.

Q    And first of all, I think you said earlier that the total amount of water that Millview can divert under that contract is 970 acre feet per year; is that correct?

A    Correct.

Q    Okay. Has Millview ever reported the full 970 acre feet per year as being diverted under this contract during any year since 2001?

A    I don't recall whether it has or not. No, I don't believe so.

Q    Okay.

A    Not the entire amount, no.

Q    Okay. If we wanted to get the exact amounts, we could look at those tables we talked about?

A    Mm-hmm.
Q Is that correct?
A Yes.

Q Okay. So in fact, during each of those years, you could have reported more water as being diverted under this contract and less water diverted under the statement; is that correct?
A It could, very limited amount more.
Q Well, up to 970; is that correct?
A Yes.
Q But of course, then Millview would have had to pay the Russian River Flood Control District for whatever the additional amount is; is that correct?
A That is correct.
Q And what is the price per acre foot that Millview pays for that?
A It was 47. Now it's $100 an acre foot.
Q And under that -- are you familiar with that contract between your district and the flood control district?
A Mm-hmm.
Q Have you read it?
A Not lately, but yes, I have read it.
Q Are you generally familiar with that contract?
A Yes.
Q Okay. And is Millview's right to receive water
under this contract during any particular year affected
by the amount of water that Millview diverted and paid
for under this contract during the previous year?

A I'm sorry. I'm not quite sure I understand
that.

Q Okay. Let's look forward to 2010. Is the
amount of water that Millview may divert and pay for
under its contract with the flood control district
affected by the amount of water that Millview diverted
and paid for during 2009?

A I believe it can be, yes.

Q Okay. And I'll hand you what we're going to
mark as Exhibit SCWA-11.

Now I realize you don't have time to read this
whole contract. Is this in fact a copy of the contract
between Millview and the flood control district?

A Yes.

Q Now regarding the -- you've mentioned an order
from the Department of Public Health that has caused at
least a limitation, if not an absolute moratorium, on
connections within your district; is that correct?

A That's correct.

Q Is your understanding that that order and the
moratorium is based on lack of water treatment capacity?

A Initially that was cited as one of the
deficiencies, storage capacity, and source capacity.

The District was able to address its treatment capacity and its storage capacity within a year, the first year, of the compliance order being put into effect.

Q So at this point, what are the limitations on -- in your understanding, the limitations on the District? Why is the moratorium still in place, according to your understanding?

A Inadequate source water capacity.

Q That's the sole reason?

A Yes.

Q Now, if you can go forward to your testimony to page 4 -- you have page 4 handy?

A Okay.

Q The very last sentence on page 4 says:

Millview intends to divert under the subject water right from the mainstem of the Russian River, also referred to as the west fork by the Division, when this draft CDO is resolved rather than from its water plant location.

Do you see that?

A Yes, I do.

Q So exactly where does Millview plan to divert
water under this alleged water right?
A Somewhere near its existing diversion point on
the west fork.
Q Okay. But the District -- but Millview would
have to construct new facilities to do that?
A That's correct.
Q And the plan is to have the new facilities be
where they could only divert west fork water and not
water that comes out of Lake Mendocino?
A Most likely.
Q When is this Millview plan to construct these
facilities?
A I think it's going to be based on the outcome
of this hearing.
Q Does Millview have any plans yet, any
construction plans or anything like that, for these new
facilities?
A We do have an engineer, and we have done some
preliminary work on the site.
Q Has Millview obtained any of the permits that
would be required for this construction?
A Not as of yet. Only for the preliminary test
well.
Q And will Millview attempt to continue to divert
water under the alleged Waldteufel right before these
new facilities are in operation?

A It may.

Q And if Millview -- first of all, what's going to determine whether or not Millview attempts to do that?

A I think conditions for addressing water rights.

Q And why is Millview planning on constructing this new diversion facility on the west fork?

A Basically to try and appease Sonoma County Water Agency.

Q Okay. And before this new facility is completed and in operation, will Millview do anything to limit the amounts of water that it diverts at its existing facilities that it accounts for as being under this alleged pre-14 right?

A I don't think so.

Q So they won't -- Millview does not plan to look at the flow data for the west fork to determine how much water to report as being diverted under this alleged pre-14 right?

A I think we will consider the flow.

Q What do you mean by that? How will you consider it?

A We will consider the flow that's in the west fork, but it is my understanding that we can move the
1 point of diversion.
2 Q From -- excuse me. Move the point of diversion
3 from where to where?
4 A From the existing 1914 point of diversion to
5 our treatment facility on the mainstem.
6 Q Oh. It's your understanding you can do that;
7 but nevertheless, you're planning on moving it back up
8 to the west fork?
9 A Mm-hmm.
10 Q Is that right?
11 A It's something that's under discussion.
12 Q So there hasn't been a final decision by
13 Millview on that?
14 A No.
15 Q All right.
16 If you can go forward to page 5 of your
17 testimony, in the last paragraph, the first sentence
18 says:
19 Mr. Howard also complained that the point
20 of diversion was moved several hundred
21 yards upstream to the Millview water
22 plant.
23 Do you actually mean downstream there?
24 A Yes, I do. That was a typographical error; I'm
25 sorry.
Okay. And then on page 6, the first full paragraph says:

It should be noted that the point of diversion of the Waldteufel water right and its original claimed place of use is entirely within the boundaries of Millview County Water District and has been since Millview's creation.

Do you see that?

Yes.

Is this really true?

Yes.

Didn't Millview actually annex that area in 2006?

That actual small parcel of land was annexed into the District. However, it was within the District's boundaries, surrounding boundaries.

But the parcel of land including the CreekBridge Homes subdivision was actually annexed in 2006; was it not?

I believe so.

All right. I'm going to just hand you what we've marked as Exhibit SCWA-13. Again, I'm not going to ask you to read through this, but is this in fact a copy of the documents that the LAFCO of Mendocino County
prepared for that annexation in 2006?

A Yes, but it had previously been filed with --
in 1996, I believe. There was some problem with LAFCO,
and in 2001 documents had been filed, the fees had been
paid to the Board of Equalization, and the map was
either lost or some of the documents for that annexation
were lost.

There was two attempts made to get that
straightened out, and finally in 2006 the final map was
filed for annexation.

Q Thank you.

MR. LILLY: And I don't have any further
questions. I would like to offer into evidence Exhibits
SCWA-8, 11, and 13.

CO-HEARING OFFICER BAGGETT: We'll wait till
we're done with cross.

MR. LILLY: Okay. Thank you.

CO-HEARING OFFICER BAGGETT: Is there any
redirect of any of your witnesses?

MR. CARTER: No.

CO-HEARING OFFICER BAGGETT: With that, we have
questions of staff.

EXAMINATION BY

HEARING OFFICERS AND/OR BOARD STAFF

FOR STATE WATER RESOURCES CONTROL BOARD
Q Mr. Bradley, on page 4 of your written testimony, at the top of the page there is a reference to the 125-home subdivision. I'm assuming that's a reference to the CreekBridge Homes subdivision?

A Yes.

Q Okay. And then in the second full paragraph at the end, the last sentence, you refer to the 125 "acre" subdivision. Should that be "home"?

A Yes.

Q Okay. And I'm assuming based on the allocation of 1200 acre feet that Millview made under the pre-14 claim of right for 2005 that not all that water went to those 125 homes; is that correct?

A That's correct.

STAFF COUNSEL HEINRICH: Okay. That's all I had, thanks.

CO-HEARING OFFICER BAGGETT: Any other questions?

BY WATER RESOURCE CONTROL ENGINEER MONA:

Q Mr. Bradley, Condition 2 of the Draft CDO requires that the District maintain a record of all diversions of water on a daily basis. Does the District have the operational capability to maintain those kind of records?
A. The District does have flow meters on each of its diversions. So yes, we could maintain -- and we do, on a daily basis, take meter readings of what our daily flows are, so.

WATER RESOURCE CONTROL ENGINEER MONA: Okay.

Thank you.

CO-HEARING OFFICER BAGGETT: Anything else? If not, now the exhibits.

MR. LILLY: I do have one follow-up on Ms. Heinrich's question, if we're allowed to do for recross.

CO-HEARING OFFICER BAGGETT: No. You can't recross -- you didn't put any redistrict on. You have had your chance. Otherwise everybody else will. You know how it will go.

MR. LILLY: Fair enough.

CO-HEARING OFFICER BAGGETT: With that, exhibits. Millview, want to submit your exhibits?

MR. NEARY: Yes. We'd submit Exhibits 1 through 16.

CO-HEARING OFFICER BAGGETT: Any objections?

If not, then they are admitted.

MR. LILLY: There are.

CO-HEARING OFFICER BAGGETT: Okay, Mr. Lilly. Before we accept them, what are your objections?

MR. LILLY: Exhibits Millview 3, 4, 5, and 6,
we have no foundation for. They're not referred to in
any witness's testimony, and basically we don't know
what they are. So I object on the grounds of lack of
foundation to those.

MR. NEARY: I'd just point out that they are
mentioned in Mr. Bradley's written testimony. But if
that's determined to be inadequate, I'd ask to reopen
just to have Mr. Bradley identify these three documents.

CO-HEARING OFFICER BAGGETT: To the extent they
are referred to in his testimony, he already testified
it was a true and correct statement. They will be
admitted. Any other?

MR. LILLY: I didn't see any reference to them,
but we'll address it in closing briefs.

My only other objection is to Exhibit 16 which
is a letter from Mr. Neary to Mr. Rich. And I just
object to that to the extent that there are any factual
statements in there, both on the grounds of hearsay and
basically lack of any witness testifying to those
things.

MR. NEARY: I would point out that this was
included because Mr. Rich testified that -- well, first
of all, their exhibits did not include the assignment of
water rights, which is attached. And that's the purpose
of this exhibit.
There is an assignment of water rights three pages in signed by Mr. Robert Wood on January 7, 1998.

And the assignment specifically refers to the Waldteufel right and when it was transferred from Mr. Wood to Mr. Hill and Mr. Gomes.

And Mr. Rich testified that they essentially quit claimed any rights they might have. This exhibit shows the actual document, and it shows that they specifically referred -- Mr. Wood, when he transferred this, specifically referred to this specific water right.

CO-HEARING OFFICER BAGGETT: Any --

MR. ROSE: Mr. Baggett, if I could, PT-7 of the Division's exhibits is the transfer -- includes the transfer documents between Robert Wood Living Trust and Messrs. Hill and Gomes.

CO-HEARING OFFICER BAGGETT: So they are already in the record.

MR. ROSE: The letter is not included with our exhibit, but what Mr. Neary was just discussing is included as our PT-7.

MR. NEARY: I did not find the actual assignment of water rights in that exhibit that the Prosecution Team offered, yet this letter was sent to Mr. Rich in May of 2007 and shows that we provided it.
CO-HEARING OFFICER BAGGETT: We've already got the files in the record anyway. So that record will be included, Mr. Lilly, in the files which are already included in the record. That's an official correspondence.

MR. LILLY: And that's fine. Then I just ask that the Board treat any hearsay statements in there under its normal limitations.

CO-HEARING OFFICER BAGGETT: That would be appropriate.

MR. LILLY: Thank you.

CO-HEARING OFFICER BAGGETT: With that, they're admitted.

(Whereupon Exhibits Millview 1-16 were admitted in evidence.)

CO-HEARING OFFICER BAGGETT: Mr. Lilly, do you want to just wait? Are your exhibits also part of your case-in-chief? You can admit them all at once if they're already in there. Or are these additional?

MR. LILLY: These are additional -- Exhibits SCWA-8, 11, and 13 are new. They are not part of our case-in-chief. I ask they be admitted now. We're not planning to talk about them any more.

CO-HEARING OFFICER BAGGETT: Any objection to the three exhibits Mr. Lilly used?
MR. NEARY: No. I'm not even sure -- well, to
the certificate of completion and the uniform water
supply agreement, I have no objection to that. All
these tables that floated by, I'm not sure --

CO-HEARING OFFICER BAGGETT: The USGS tables
are not part of those three exhibits.

MR. LILLY: That's correct. Those are
Exhibits 9 and 10, we'll ask Ms. Jeane to authenticate.

CO-HEARING OFFICER BAGGETT: Contracts with the
District, I assume those --

MR. LILLY: And then Exhibit 8 was the complete
table for 2008.

CO-HEARING OFFICER BAGGETT: Okay. With that,
they're admitted.

(Whereupon Exhibits SCWA-8, 11, and 13
were accepted in evidence.)

MR. NEARY: Mr. Chairman, I did check with
Mr. Bradley's testimony, and I was in error. He did not
refer to Exhibits 3, 4, and 5. And of particular
interest is Exhibit 3, and I'd like to have -- just have
Mr. Bradley issue a foundation for that.

CO-HEARING OFFICER BAGGETT: We'll leave that
to Mr. Lilly. I've already accepted them. I mean I'm
willing to accept them. We can get the witness back up
here and have him verify. It is up to -- is that --
MR. LILLY: I think it would be valuable for him to explain what Exhibit 3 is. You've accepted it into the record, but we still don't know what it is.

MR. NEARY: I think it would just be two or three questions.

CO-HEARING OFFICER BAGGETT: Okay. Before we take a break then, we'll go back to the case-in-chief of Millview.

FURTHER REDIRECT EXAMINATION BY MR. NEARY

FOR MILLVIEW COUNTY WATER DISTRICT

BY MR. NEARY:

Q Mr. Bradley, on Exhibit 3, do you recognize that document?

A Yes. It's a map that we hired an engineer to plot the location of lot 103 of the Yokayo Rancho.

Q Was this applied to Mr. Rich at the time of his field investigation --

A Yes.

Q -- in 2006?

A Yes.

Q And the lot number 103 is the same lot that's referred to in the Waldteufel water claim?

A That's correct.

Q Millview Exhibit No. 2?

CO-HEARING OFFICER BAGGETT: Do you want to do
-- 5 and 6, are those . . . While you've got him up here, I assume those are --

BY MR. NEARY:

Q    Do you recognize Exhibit 5 and Exhibit 6, two aerial photographs?
A    The actual photographs? Okay. Yes. Those were from -- those were government aerial photos obtained by Millview staff from the Mendocino County Museum, aerial photographs of the site.

Q    Number 4 is for the date July 15, 1952?
A    Correct.

Q    And next one is for August 4, 1963?
A    Yes.


Mr. Lilly?

MR. LILLY: If we can put Exhibit 3 back up there, now that we know what it is.

CROSS-EXAMINATION BY MR. LILLY FOR SONOMA COUNTY WATER AGENCY

BY MR. LILLY:

Q    Mr. Bradley, does the District contend that its current diversions and use of water under the alleged Waldteufel right must be used within the boundaries of this lot 103 or does the District contend that water may
be used throughout the district?

A  We believe the water can be used throughout the district.

MR. LILLY:  No further questions. Thank you.

CO-HEARING OFFICER BAGGETT:  Prosecution, any questions? Mr. Carter, any questions?

MR. ROSE:  No.

MR. BRIAN CARTER:  No.

CO-HEARING OFFICER BAGGETT:  If not, thank you very much. Let's take ten minutes, and we'll come back with, I guess, Gomes et al. case-in-chief.

(Recess)

CO-HEARING OFFICER BAGGETT:  We about ready?

Who is up next?  I think we're down to Thomas Hill and Steven L. Gomes. Mr. Carters.

MR. JARED CARTER:  We represent Messrs. Hill and Gomes.

Following -- what we intend to put on is just my declaration. I'm a witness to authenticate the various documents, and if anybody wants to cross-examine me about that, I'm available. Otherwise, we'll just submit them for the record.

I don't know, to be frank with you, whether any of them are new or whether we've got them duplicated. I think almost everything we're offering has already been
offered by somebody else.

We will also offer Mr. Steven Gomes to testify largely about what he's done in order, before purchasing this water right, to exercise due diligence to determine what was available.

And I want to give a perspective on what I see are the evidence in this case and the issues for you to consider not only Mr. Gomes' testimony but all of that testimony in this framework.

It seems to me that what we've seen is that all of the parties have admitted at one time or another that there was a valid pre-1914 water right in this case.

The State has backed way off, or attempted to back way off, of the position it initially took in the saga of differences between these parties where it originally said yes, there was a valid pre-1914 right but it either has been degraded or forfeited down to now about one percent of what it originally was.

We believe the right was validly established at 2 cubic feet per second and that, once it became established as a pre-1914 right, it's beyond your jurisdiction.

If you decide you're going to examine the question of whether it was validly established, we believe that the testimony that we have seen, primarily
the testimony of Mr. Lawrence, though hearsay, it's
certainly corroborated by the existence of various
collection capacity.

It's corroborated by the deed showing that
there was alfalfa growing there back in that 1913 deed.

It's corroborated by other testimony that
explains why that hearsay would be valid. That is, the
alfalfa expert explaining what it takes to grow a crop
of alfalfa.

There was only one place that that water could
come from. There was only one place the noise of the
constantly running motor could come from.

And we've got a deep hole physically on the
place that a lot of people have seen.

So that's corroborating evidence to support
Mr. Lawrence's testimony, and what it shows is that 165
acres of alfalfa was put into place. It was developed.

It was used.

So once that right was established, it became a
vested pre-1914 right, and it can't be taken away except
through forfeiture. There's no evidence of abandonment
of any kind at any place, so we're dealing only with
forfeiture.

Now, the State's case, and particularly
Mr. Rich's report, misstates almost every concept of the
law of forfeiture.

It's got to be the five years before. There's argument about that point, but the latest reported case says it's got to be in the five years before.

And to a have a forfeiture, you have to have a contestant. There is no contestant here. Nobody else is claiming that right.

The most anybody is claiming is that by moving the point of diversion Millview is erroneously or intentionally, or whatever way, taking some other water that Sonoma County has a claim to.

It's hard to see in this case, frankly, why and how we're all taking so much time on it on the basis of the claim of the Russian River District.

I understand Sonoma County's position. They have got a reasonable and valid claim. But the Russian River District, Lee Howard's the president of the Russian River District.

Their right under D-1030 and modifications of that order that have come from this Board since 1961 clearly state that the Russian River Water District, that this Board had to foist water right onto, to Mendocino County -- they didn't even want water rights out of that dam project -- but that all of their rights are subject to all previously existing appropriative
rights, and they pertain only to the Project water.

So Russian River comes in and says we want to knock off basically 99 percent of the Waldteufel right.

Now what happens if they succeed?

That means that about 14- to 1500 acre feet less are available for use in Mendocino County. So I understand Sonoma County Water Agency's position. But what valid purpose is going to be served by reducing the total water supply in Mendocino County by 1500 acre feet?

We've got a water district that can't meet all of its needs. We spent a bunch of time arguing about whether they know how to fill out tables and whether they're being a little skullduggerous in trying to say well, I'm using this right this day and I'm using this right next week.

But Members of the Board, what is wrong with maximizing your water rights?

If you read the constitutional provision, Article 10, Section 2, it says it's in the policy of the State to maximize the beneficial use of water. We all depend on it. Our economy depends upon it. And the Water Code -- I think it's Section 106 -- says the priority right is domestic use.

Now what's happened here? Some intelligent
people saw that here's a water right that nobody's paid
any attention to. There hasn't even been an erroneous
statement of diversion and use filed for 40 years, and
for 50 years before that, there had been nothing in the
file.

So nobody's paid any attention to this water
right, which is every bit as much property as a hunk of
real estate, for some 90 years.

And along comes Hill and Gomes and says hey, we
believe in the constitution. We want to do what the
constitution says and put this to beneficial use. So
let's go get it. Let's make sure it's perfected -- and
Gomes is going to testify as to what they did -- and
then let's sell it to a municipal district that's short
of water. 5,000 people depend on it.

And that's what happened.

So the question is: Why are we trying to stop
that?

I don't think Russian River District has the
slightest concept of what their interest is or why
they're involved in this whole episode unless they want
more cash flow.

I listen to this testimony, and the question of
the rate going up from $27 to $100 an acre foot and we
don't know whether they're going to renew our contract,
and we're in negotiation. People are looking for
leverage to maximize their water right to serve people
through a municipal water district.

And my plea to you, my argument to you, is:

That's what you're supposed to help.

And so Sonoma County Water Agency's claim that
they're going to be hurt -- now it's not in evidence,
but we all know and you know because you're involved is
here they are saying we don't want to take some -- I
don't know what the number was, 60- or 70,000 acre feet
through a pipeline out of Lake Sonoma down to our water
area. We're going to beat up Mendocino County and get
1500 acre feet from them rather than exercise that
right.

Does that make good policy sense? Is that
consistent with the constitutional notion to put this
water right to maximum use?

We say no.

We say under the constitutional provision and
the Section 106 and under such cases as I think they
were Peabody and Meridian -- I cited them before, and
we'll cite them in our final argument -- they say that
this Board and the courts have a duty. Not just hey,
don't hurt us. They say you got a duty to help preserve
these kind of rights.
And then I guess the most shocking thing I heard today is that this Board shouldn't pay any attention to what you've been telling the public about what your jurisdiction is.

I think Mr. Rich is a commendable guy, very impressive, knows a lot, works hard. But when he says I don't agree with this publication that we've been telling everybody in the state that we don't have jurisdiction over pre-1914 rights, I think that's wrong, and I don't pay any attention to it when I do my investigations, I point out, and I'm sure you're aware, that in a case presently pending before the State Supreme Court this Board's lawyers have taken the position in the Farm Bureau case -- I don't know if it's under submission. I don't think it's under submission. I don't think it's been argued, but it's been pending for something like 12 years, or whatever it is, the longest pending case before the court -- this Board took the position we don't have jurisdiction over pre-1914 rights.

Now, if you're going to willy-nilly change that, and you're going to support this kind of a case, what is the effect on the thousands of pre-1914 rights holders that are in this state?

One guy comes along, president of a local
competing water agency, and files a complaint. Are you
going to make every holder of one of those 1850 or 1870
gold mining claims that have undoubtedly been passed on
in families or put into local water districts in the
foothills of the Sierras -- are you going to make those
people go through what we've had to go through to prove
our right?

If you're going to, I commend to you an article
in Saturday's edition of the Economist magazine. That
article says that the San Joaquin-Sacramento Valley is
destined to be Appalachia west because the water rights
aren't available to sustain the multibillion dollar
economy that this state relies upon.

And the reason they're not reliable, partly
it's geological, partly it's natural. But partly it's
because of a foul regulatory system.

And if entrepreneurs and investors and water
districts and water users and home builders can't rely
upon what you say you'll do, and they can't rely upon
the validity of rights that have been advertised to the
world as valid as real property rights, and if they have
to come in and defend them the way we have had to spend
hundreds -- I bet we spent 150- or $200,000 so far. If
this has to go to court, we'll have to spend a whole
bunch more.
People are just going to give up, and the
economy's going to get a lot worse.

So our plea is reenforce your jurisdictional
position that you have been articulating to the Supreme
Court and to the public and in many cases in this state,
and throw out this proceeding.

You don't have jurisdiction to determine the
validity or the extent of a pre-1914 right.

If you reject that, then decide this pre-1914
right is valid, and it hasn't been forfeited. You
certainly don't have the jurisdiction to determine a
forfeiture.

If somebody wants to sue us, including this
agency, file a complaint and let's go to court where we
can have an evidentiary hearing. Let's not jerk these
people around for a policy deal where we've got one side
of the staff saying this and one side of the staff
saying that.

These are very bad proceedings for an
individual property owner to have to come and defend his
rights.

Thank you very much.

CO-HEARING OFFICER BAGGETT: You can bring both
of your witnesses up if you want do them both at once.

MR. BRIAN CARTER: Thank you.
CO-HEARING OFFICER BAGGETT: Actually, Mr. Carter's might be rather quick. I don't know. Just basically authenticating documents. I don't know if there's any objection from anybody with the documents he's --

MR. BRIAN CARTER: We offer Jared Carter's written testimony which authenticates documents and would be willing to submit on that basis.

MR. LILLY: Mr. Baggett, that's fine with us. And we will waive any right to cross-examine Mr. Carter, provided of course that the State Board follows the caveat that I believe you, Mr. Baggett, made earlier that there are quite a few legal arguments in his testimony.

CO-HEARING OFFICER BAGGETT: Right.

MR. LILLY: As long as those are treated as legal arguments and not evidence.

CO-HEARING OFFICER BAGGETT: They will be. Do you have any objection, Mr. Rose?

MR. ROSE: I agree with Mr. Lilly.

CO-HEARING OFFICER BAGGETT: That was an easy witness.

MR. BRIAN CARTER: Thank you.
CO-HEARING OFFICER BAGGETT: Okay.

STEVEN L. GOMES

Called by THOMAS HILL and STEVE GOMES

DIRECT EXAMINATION BY MR. BRIAN CARTER

BY MR. BRIAN CARTER:

Q    Steve, how are you?

A    Very good. Yeah, Mr. Chairman and Board. My
name is Steve Gomes. I live in 433 Kenwood Drive,

Ukiah, California.

Q    Did you take the oath earlier today?

A    Yes, I did.

Q    Okay. Have you read the Declaration of Steven
Gomes that I submitted as Exhibit A in this proceeding?

A    Yes, I have.

Q    Is that statement accurate?

A    Yes, it is.

Q    Would you generally describe for this Board
what you and Tom Hill did prior to purchasing the
Waldteufel right to confirm its -- to check it out?

A    Well, the first thing we were presented with
was the actual document from Mr. Wood saying he had
pumped this water right and they owned this property
since 1947.

And so I called the Water Rights Division and
talked to Mr. Andy Chu. And after -- actually, Tom Hill
made the initial contact.

So I followed up with Mr. Chu and asked him,
you know, is this water right good?

And he indicated it was fine. He pulled the
statements on this water right and said I have a
statement here. And basically, he said as long as we
know it's out there and it's being used, it exists, and
to pump it to its fullest extent.

He never talked about anything, well, we need
to investigate.

Q    Did you hire counsel in connection with your
due diligence?

A    Yes. I hired Mr. David Rapport, an attorney in
Ukiah. He's the city attorney for the City of Ukiah.

Q    What did he tell you?

A    He, you know, got back to me in a couple of
weeks and said that he had the whole body of law that
applied to these pre-1914 rights, and I didn't know
about them.

And he gave me things, documents, you know,
1872 and other years before. And, you know, his
comments were that that's the body of law that governs a
pre-14 right.

Q    So you had discussions with Chu and discussions
with counsel prior to paying money to Mr. Wood for the
water right?

A Right. I had a follow-up call to Mr. Chu. We talked extensively. And I was exploring whether or not this was an appropriative right.

And he says I can't tell you that.

And I said who can tell me that? And we never got to the conclusion of who could tell me if this is an appropriative right or not.

So there was some confusion whether or not it was an appropriative right, although during Mr. Rich's investigation he announced that somewhere in the mid '20s the Legislature had in fact defined these pre-14 rights as appropriative rights.

Q Now Mr. Gomes, there were some photographs that Mr. Bradley testified to regarding pipes at the river's edge along this property. Have you seen such pipes?

A Yes.

Q Were the pipes that you saw those same pipes that were depicted in Millview's photographs?

A Yes, they were in use at the time when I met Mr. Wood.

Q Have you seen water from the river used on the property?

A Yes.

MR. CARTER: That's all I have. Thank you very
CO-HEARING OFFICER BAGGETT: Okay. Sit by your witness, and we'll have cross-examination.

Do you have any questions from the Prosecution?

CROSS-EXAMINATION BY MR. ROSE

FOR PROSECUTION TEAM

BY MR. ROSE:

Q    Good afternoon, Mr. Gomes. I just have a few questions for you. Just a moment ago, you testified that you spoke with Andy Chu of the Division of Water Rights?

A    That's correct.

Q    And you said that Mr. Chu pulled statements of water diversion and use?

A    Yes, he did.

Q    And you said that he told you that this claim of right was valid?

A    That's what he said.

Q    And you testified that he told you to use it to the fullest extent?

A    That's correct. He read from the statement that it was a water right of 2.5 cubic feet per second.

Q    And did you get any written confirmation of what Mr. Chu said?

A    He sent us all the water statements, and he
also sent us a -- per Mr. Hill's request. And he sent
us the typical handout that you get from the Water
Rights Division of what's a water right, and it has
miners and kind of a newspaper element. And that was
all we got from him.

Q So you don't have anything in writing
documenting what Mr. Chu said about the validity of the
right or how much water to use under the right?

A No. He sent me the statement and said this is
the statement, and that's what it is.

MR. ROSE: No further questions. Thank you.

CO-HEARING OFFICER BAGGETT: Millview, any
questions?

MR. NEARY: Yes. Would you be able to put up
Hill and Gomes Exhibit Z?

CO-HEARING OFFICER BAGGETT: Do you want to
come up to the microphone?

CROSS-EXAMINATION BY MR. NEARY
FOR MILLVIEW COUNTY WATER DISTRICT

BY MR. NEARY:

Q Mr. Gomes, do you recognize that picture?

A Yes.

Q What does that picture depict?

A That's a -- approximately an 8-inch casing from
a well that ended up in my lot 10, unit 1, of the west
fork subdivision.
And was it on the property when you purchased it?
Yes, it was.
And did you ever have any discussions with Bob Wood as to this well?
Yes, I did.
What did he tell you about it?
Well, that it's a shallow well, that they had difficult time drilling it, digging it out. They had to use a cable tool because it was caving in because of the water that was available for it. And after that, I asked him how many gallons per minute he could get.
And he said well, I couldn't afford the pump to pump it out. I think he had a 20 horsepower pump on that one.
And was it in operation at the time you purchased the property?
Yes.
And it was lot 10 located on the Waldteufel property?
Yeah. It was the northwest corner of the subdivided property.
MR. NEARY: That's all I have.
CO-HEARING OFFICER BAGGETT: Mr. Lilly.

CROSS-EXAMINATION BY MR. LILLY

FOR SONOMA COUNTY WATER AGENCY

BY MR. LILLY:

Q Good afternoon, Mr. Gomes. As you know, I'm Alan Lilly, attorney for Sonoma County Water Agency.

I'd like it if you could get your testimony, which is Exhibit A, in front of you and flip to page 2 of that.

A Yes.

Q Okay. Now paragraph two at the top of page 2 states that in early January 1998 you and Mr. Hill purchased the Waldteufel right from Mr. Robert Wood.

And then paragraph three right below that says at the same time you and Mr. Hill also purchased from Robert Wood the real property called the Wood property.

What is the Wood property?

A Well, that was everything I purchased from Bob Wood. It included all of the 32 acres, approximately. It included some river frontage.

And also there was approximately a seven-acre parcel that's in between the two forks of the river that extend south of the Wood subdivision.

And it wasn't part of the developable property.

In fact, that's been transferred with this sale to
Q Okay. What was the total purchase price that you and Mr. Hill paid Mr. Wood for the land and the alleged water right?

A Approximately 1.2 million.

Q And was that purchase price divided any way between the land and the alleged water right?

A Not exactly, no. Not by documentation, no.

Q Well, did you have any understanding of the division or --

A Well, Mr. Wood said it was valuable. He thought it was a valuable water right, and we just made a deal for the land including this water right.

Q Okay. Then if you can go back to paragraph two of your testimony, the second line, line 2, the sentence in the middle starts out:

I understand that the Waldteufel right is memorialized or embodied in the recorded document, a copy of which is attached hereto as Exhibit C.

What do you mean by memorialized or embodied?

A Well, I mean memorialized, in my opinion, was the fact that it was recorded with the county recorder's office and gave public notice to its existence, and that the actual volume of water was clearly spelled out --
well, if you knew what miner's inches are -- and there
was water available that's been calculated.

Q    So is your understanding that this notice in
fact was a water right?

A    Well, it was a recording of this. And, you
know, I didn't know -- I knew very little about pre-14
rights, but I knew they had to be recorded and -- prior
to the water act being in December of 1914.

Q    So that was basically your understanding in
1998 when you purchased this property and the alleged
water right?

A    Yeah, that's right.

Q    Okay. On page 3, if you can go on to page 3 of
your testimony. This is Exhibit A. And particularly
starting at line 22, I'm just going to read this, and
then I'll ask you a question. It says:

My recollection of the agreements with
Millview was that its ability to change
the point of diversion from the original
point to Millview's downstream
established point of diversion and
pumping station was an important
component of the agreement.

Why was changing this established -- changing
this point of diversion an important component of the
agreement?

A Well, mainly because of Millview's function as a water district. They have their water treatment facility, a filtration system established downstream, and that we knew about the fact that it could be changed.

I actually talked to Andy Chu. That was part of my conversation with him, that we needed to change the point -- we desired to change the point of diversion to their existing pumping station.

Q And was that so that there would be access to the water released from Lake Mendocino at that point of diversion?

A No, not at all.

Q Oh. Why was it then?

A Just that they had their facilities established, and the construction of new facilities just didn't seem to be necessary at that point.

Q Okay. Then going on in that same paragraph, at line 28, you refer to Millview's application to change the point of diversion.

A Well --

Q What do you mean by Millview's application to change the point of diversion?

A Well, Millview filed their paperwork with the
Division of Water Rights and requested a change in the plan of diversion as normally done for this type of change.

Q Have you seen any such filing?
A I personally didn't sign off on it, no.

Q Okay. And then the previous sentence says:

The State did subsequently review and knowingly approve this application.

What do you -- what action by the State are you referring to there?

A Well, the Millview Water District conveyed to me that they had successfully got an approved change to their point of diversion.

Q So again, you didn't see any written order from the State. This is just based on what Millview told you?
A That's correct.

Q Okay. Then in paragraph nine on page 4 of your testimony, I believe in response to some questions from Mr. Neary, you talked about this well in the northeast corner of the property.

You mentioned that the well had a 20 horse pump in it. I didn't hear any reference to what the pumping capacity of that well is. Do you know what the pumping capacity was?
A: It's unknown.

Q: Okay. Do you have any handle to the nearest hundreds of gallons per minute or anything like that?

A: The only comment I had from Mr. Wood was that it kept caving in, and usually that means there's quite a lot of water movement through a sandy or gravel situation.

Q: Okay. And was this well used to irrigate crops?

A: Yes.

Q: Okay. What crops or what area was irrigated from this well?

A: Well, he dripped irrigation for the vineyards, and he ran both systems at once at times.

Q: Do you how many acres he was irrigating from this well?

A: Not exactly.

Q: Do you know what the time frame was, what years he was using this well?

A: All the time that I knew him, which I met him in October of 1991 until we purchased the property.

Q: So 1991 through when, 1998?


Q: Okay.

A: Actually, I should add to that. He actually
used that for a few more years because he did live on the property for a while longer, and that was part of the system that fed the house.

MR. LILLY: Okay. I don't have any further questions. Thank you.

CO-HEARING OFFICER BAGGETT: Any questions of staff?

I just -- this 20-horsepower well intrigues me. I don't know where -- it's on, I assume, lot 103 someplace, that map?

MR. GOMES: Yes, it is.

CO-HEARING OFFICER BAGGETT: Can you pull that up, Millview 003, where it has the point of diversion. I'm just curious if you can give me some idea of where it is on this map.

MR. GOMES: On the document there, that -- the P where the word "point" is. Just in that area.

CO-HEARING OFFICER BAGGETT: Pretty much in the center of the parcel.

MR. GOMES: Yeah, right.

CO-HEARING OFFICER BAGGETT: A little bit south.

MR. GOMES: Well, you know, I didn't purchase a little bit of that property to the west. The P is kind of my northwest corner.
CO-HEARING OFFICER BAGGETT: Okay. So this --

so the parcel that was on is not -- it didn't serve the
whole parcel, just part of this lot 103.

MR. GOMES: It just served everything existing
the date I purchased the property.

CO-HEARING OFFICER BAGGETT: Okay. And I guess
you -- I think I just heard the answer to my other
questions. How many gallons, what is the pump running.

We just know a 20-horsepower pump.

MR. GOMES: I really don't know. It was
whatever he needed.

CO-HEARING OFFICER BAGGETT: And was the
Prosecution Team, were they aware of this, existence of
this pump?

MR. GOMES: I have no idea.

CO-HEARING OFFICER BAGGETT: In all the
investigations -- or you don't know?

MR. GOMES: Nobody asked.

CO-HEARING OFFICER BAGGETT: Nobody asked.

Okay.

Any other questions? If not, do you have any
redirect?

MR. BRIAN CARTER: Yes.

REDIRECT EXAMINATION BY MR. BRIAN CARTER

FOR THOMAS HILL and STEVEN L. GOMES
BY MR. BRIAN CARTER:

Q Mr. Gomes, was it your understanding that
Millview treated the water it pumped from the river
prior to distributing it to its residential customers?
A Yes.

Q And was it your understanding that it did so at
the point below the confluence of two forks of the
river?
A Yes.

Q And is that why it wanted to change the point
of diversion, for the Waldteufel right?
A For the purpose of treating it?
Q Yes.
A Yes.

MR. BRIAN CARTER: That's all I have.

CO-HEARING OFFICER BAGGETT: Any redirect by
any party on that narrow -- or recross on the redirect?
Okay.

With that, exhibits? Would you like to --

MR. BRIAN CARTER: We would like to offer all
our exhibits, Hearing Officer, A through double B.

CO-HEARING OFFICER BAGGETT: And U?

MR. CARTER: Including U.

CO-HEARING OFFICER BAGGETT: Mr. Lily, can

I . . .
MR. LILLY: Do you want me to start with my objections?

CO-HEARING OFFICER BAGGETT: Sure.

MR. LILLY: All right. I do have a few.

In Exhibit A, Mr. Gomes' testimony -- I don't object to the testimony coming in, obviously, but there are hearsay statements there, and I just ask that the Board have its normal rule.

I'm sorry I have to keep stating this objection, but the Government Code says it has to be under objection, so if I don't state it, it's unclear that the limitation applies.

CO-HEARING OFFICER BAGGETT: All right.

MR. LILLY: So I object to the hearsay statements of Mr. Chu that are in Exhibit A and also the statements of Mr. Wood that are described in Exhibit A for that basis. They can come in, but there's limitations on the Board's use of those statements.

The other -- next objection, this Exhibit I, we've seen this. This was a Prosecution Team letter -- I mean exhibit -- which was an April 24th, 2006 letter from Mr. Bradley.

We've heard about the text, the first two pages, and this map that's the third page. We still have no foundation or any understanding whatsoever
regarding pages 4 and 5 of that letter.

They're not referenced in the letter. We don't know what they are. So I object to those two pages under lack of foundation.

CO-HEARING OFFICER BAGGETT: Is that it?

MR. LILLY: No. I didn't know whether you wanted to rule on each one. I'll state them all, then you can rule. Excuse me.

Exhibit J is the statement of Floyd Lawrence. We object on the same basis that we objected when this same exhibit was offered by the Prosecution Team. It's hearsay. Any use of it by the Board is subject to the limitations on the use of hearsay evidence.

And then Exhibit N, O, R, X and Y -- that's N, O, R, X and Y -- are various letters from the attorneys for, I believe, Hill and Gomes and Millview. And we just object to those to the extent they're making factual statements or hearsay.

Again, legal arguments can be treated as legal arguments, but we object to them having any evidentiary weight.

And finally, Exhibit U is this so-called administrative record that was filed in the superior court action. Many documents in this Exhibit U have in fact been offered as separate exhibits, and we've
addressed those as separate exhibits.

But we object to this simply as burdensome.

The parts that have not been offered as separate exhibits, Messrs. Hill and Gomes and their attorneys have not explained why it needs to be admitted into evidence.

This record was never certified by the State Water Resources Control Board for the court proceeding, and so therefore we object to it as unnecessarily cumulative and frankly confusing.

MR. BRIAN CARTER: Your Honor, the documents in that Exhibit U are shown by Mr. Jared Carter's testimony to have been the administrative record in the superior court in which proceeding Judge Schafer issued an order attesting to his conclusion that it would be an abuse of discretion for the Board and staff to adopt the posture that they had.

I think that as such it is relevant and material to the burdens and litigation and other expense that my clients have all had to endure and bear, and therefore I think it is relevant.

I do acknowledge that it's burdensome, but if this is the worst record you have to handle this month, I think you'd be in pretty good shape, frankly.

CO-HEARING OFFICER BAGGETT: Yeah. Any -- Mr.
Rose, do you have any comments?

MR. ROSE: I largely agree with Mr. Lily for most of the reasons he has cited.

I mean there are a lot of things in here that are not part of the administrative record when we initially looked at all of this and essentially are not relevant to that.

CO-HEARING OFFICER BAGGETT: Anything else, Mr. Lily?

MR. LILLY: Yeah. I'm sorry, but Mr. Carter's justification is not -- if the only reason all these docs are being offered is to show that this has been a burdensome proceeding, that's not relevant.

We haven't heard any other specific reason why any of these pages of Exhibit U that are not designated as other exhibits should come in.

So I continue with my objection.

CO-HEARING OFFICER BAGGETT: Okay. I would -- we will note the hearsay objections which will apply to all of these exhibits as we discussed on prior issues.

That will apply to the endorsed file copy on Exhibit U to the extent these articles are hearsay.

The legal arguments raised on any of this testimony will not be -- you can remake them in your closing briefs.
I'm not -- I think it would be not the wisest
and best use of our time to proceed to go through 40
separate tabs on this binder today, so I will allow the
whole thing in as -- the whole document in as a document
from the court, not necessarily for the truth.

We'll follow the hearsay exceptions; the legal
arguments, we'll parse out as we rely on them when we
draft whatever order we draft.

So with that, the exhibits are admitted.

MR. CARTER: Thank you, your Honor.

(Whereupon Exhibits H&G A through BB were
admitted in evidence.)

CO-HEARING OFFICER BAGGETT: Okay.

With that, let's -- Mr. Lily, I think Sonoma
County Water Agency is up. You said a few minutes?
We'll see.

MR. LILLY: First of all I appreciate,
Mr. Baggett, you and your colleagues, Ms. Dudoc, taking
the time today. We appreciate your attention. We find
these water right hearings fascinating, and I'm sure you
do too.

But whether you do or not, I do greatly
appreciate the attention and the seriousness you give to
these proceedings, this one and all the others. And
believe me, it's truly appreciated by all of us.
For an opening statement, I'm going to keep it really to the point because I know the hour is late.

First of all, there have been some statements that no party disputes the existence of this alleged pre-14 water right, and that's obviously not true for Sonoma County Water Agency. We've never agreed that any such appropriative right ever was perfected.

Obviously, a Notice of Appropriation is one of three steps that was needed to perfect the pre-14 right. It may show intent, but to perfect a pre-14 right there must be an actual diversion of water and an actual beneficial use of the diverted water.

So there are some significant questions as to whether there is any competent admissible evidence showing actual diversion of water under this alleged right and application of that diverted water to beneficial use.

Secondly, even if the alleged right was perfected for some amount of authorized diversion, we contend it's substantially less than the amount that would apply if the two cubic feet per second rate that's stated in the 1914 notice could be diverted 365 days a year, as Millview apparently now is claiming.

We will save our arguments for the distinction between perfection of an appropriative right and
forfeiture of a right for our closing brief.

The other point is: There's been testimony that no one has offered any evidence that diversions under this right -- basically, I guess, whether authorized or unauthorized -- will impact any other legal user of water.

And the bottom line is Sonoma County Water Agency is the water right holder that will be impacted, and Pamela Jeane's testimony will go to that.

The bottom line is that because the Sonoma County Water Agency must maintain minimum instream flows throughout the Russian River system, as specified in this Board's Decision 1610 which was then incorporated into the Sonoma County Water Agency's water right permits, any diversion of water in the Russian River water system will impact the amounts of water available for diversion and use under Sonoma's water right and, in particular, any diversion from the upper Russian River in the vicinity of Ukiah will lead normally one-for-one to Sonoma having to release additional water from Lake Mendocino storage.

And this Board is all too familiar with the problems that have happened with low storage levels in Lake Mendocino; and as you undoubtedly recall, we have been here for temporary urgency change petitions already

So we are concerned, and obviously the Board should be concerned, because any unauthorized diversion of water will have a direct and significant impact on frankly Sonoma supplies and the entire Russian River system.

With that, I'm ready to proceed with our evidence. We have one witness, Pamela Jeane.

PAMELA JEANE

Sonoma County Water Agency, Deputy Chief Engineer - Operations

Called by SONOMA COUNTY WATER AGENCY

DIRECT EXAMINATION BY MR. LILLY

BY MR. LILLY:

Q    First of all, Ms. Jeane, please state your name and spell your last name for the record. After the green light goes on.

A    My name is Pamela Jeane. The last name is J-e-a-n-e.

Q    And have you taken the oath for this hearing today?

A    I have.

Q    And is Exhibit SCWA-1 an accurate statement of your testimony for this hearing?

A    Yes, it is.
Is Exhibit SCWA-2 an accurate statement of your education and work experience?

Yes, it is.

Whom do you work for now?

I currently work for the Sonoma County Water Agency.

What is your current position with the Sonoma County Water Agency?

My position -- my job title is Deputy Chief Engineer, which essentially means that I manage operations at the agency.

Okay. And before I go into your testimony, just so I don't forget it, I'm going to ask you to examine and ask Mr. Lindsay to put up on the screen Exhibit SCWA-9 and then Exhibit SCWA-10.

Is Exhibit SCWA-9 in fact a table that accurately shows the US Geology Survey flow -- daily flow data for the west fork Russian River gauge?

Yes.

And is Exhibit SCWA-10 a table that shows the flow data for the same gauge for 2009?

Yes, it is.

All right. Now to start your --

MR. JARED CARTER: Could we get some kind of authentication to verify that fact? How does Ms. Jeane
MR. LILLY: We can spend as much time as you want on this. I think it's pretty clear that somebody who's Deputy Chief Engineer For Operations of the Sonoma County Water Agency will have personal knowledge of GS flow data on the Russian River.

MR. JARED CARTER: My point is I don't know, and I don't think it's been made clear to the record, whether this is a well-maintained flow station. The fact that the USGS daily or weekly or every once in a while publishes some data doesn't make it true.

And so we're coming in here, and we say we got an engineer who's received some data from some other engineers, and we're going to turn the results -- is the argument we're going to turn the results of this hearing on this piece of paper?

I don't think that there's been a valid basis for this piece of paper establishing any facts at issue in this hearing.

MR. NEARY: Millview joins in the objection.

MR. LILLY: Those objections clearly go to the weight of the evidence, not its admissibility. They can address those on cross-examination if appropriate.

CO-HEARING OFFICER BAGGETT: We will note the
objections and allow Mr. Lilly to continue, and I would
concur that on your cross you'll have a chance to verify
how accurate what the knowledge is of this information,
one.

And two, we don't have anybody from USGS, so is
it hearsay? Is it an official record of USGS? That
would be another question.

Continue, Mr. Lily.

BY MR. LILLY:

Q All right. If you can now summarize your
direct testimony -- first of all, if we can put up
Exhibit SCWA-3, then I'll ask you to just summarize
Exhibit SCWA-3.

Might want to wait just one minute. Now it's
on the screen.

A Okay. The Russian River system is a managed
system, as I think you all are very well aware of. In
releases of water from reservoirs, both Lake Mendocino
and Lake Sonoma often control river flows, especially in
the summertime and into the fall during the dry season.

When tributary stream flows are low, the Agency
releases water that was previously stored in Lake
Mendocino and Lake Sonoma to supplement natural flows in
the Russian River. Releases provide flows for water
supply, recreation, and aquatic habit.
The Agency makes water supply releases from Lake Mendocino and Lake Sonoma to implement minimum instream flow requirements that are required in the Agency's water rights as laid out in Decision 1610 by this Board in 1986.

This exhibit here, SCWA-3 depicts the Russian River system and describes the Decision 1610 minimum stream flow requirements that apply to various reaches in the Russian River.

As required by 1610 and the Agency's water rights permits, the Agency sets the rate at which water is released from Lake Mendocino each day in order to have sufficient water to maintain minimum stream flow at the gauges that you can see on this diagram.

Those gauges are many. They lie between Lake Mendocino all the way down to Healdsburg and even downstream of that.

And we also operate with a bit of what I call an operational buffer that allows us to not have to know exactly what all users in the system are doing at any given time, and we release a little extra water in order to cover diversions that may happen that we are not aware of.

Q All right. Let's move forward. Now please explain and summarize Exhibit SCWA-4.
So as I just described, the Agency must maintain instream flow requirements in the upper Russian River at or above the applicable Decision 1610 flow requirements regardless of the amount of water that legal or illegal diversions are made in the upper Russian River or any of the tributaries to the Russian River.

If the Millview County Water District -- and I will refer to them as Millview -- makes any unauthorized diversions of water during any time that the Agency is controlling releases, the amounts of water that are being released have to be increased in order for the Agency to make up for the diversion.

The amount of Millview's unauthorized diversion can in fact -- would occur -- that -- the diversions they would make if they were unauthorized would cause us to increase releases to those above what they would be if their diversion was not happening.

Additional releases of water from Lake Mendocino normally will result in additional releases and corresponding reductions in the amount of water that remain in storage in Lake Mendocino.

Such reduction in the lake often -- in lake storage will often have significant impacts later in the dry season.
This exhibit shows the historical amounts of water that were in Lake Mendocino storage during 2002, 2004, 2007, 2008, and 2009. And as shown on this diagram, storage in Lake Mendocino declined to low levels in all of those years.

Such low lake levels during the late fall are severe threats to the Russian River fishery, namely to Chinook salmon who use the Russian River to migrate upstream for spawning in the fall.

These low storage levels also threaten water supplies for users that rely on the upper Russian River including the Sonoma County Water Agency and Mendocino County residents.

Q All right. Let's go on to SCWA-5, and if you could please just summarize your testimony regarding this exhibit.

A Even if some diversions of water are authorized by the allegation Waldteufel pre-1914 right, increases in diversion under this alleged right will have impacts. Exhibit 5 and Exhibit 6 depict Lake Mendocino, the Russian River system in the area, various points of diversion, and several places of use that are depicted in various documents in the State Water Board's files. The details of those exhibits are described in my written testimony.
If the authorized point of diversion for the alleged Waldteufel right were to be moved from one point on the west fork of the -- the upper Russian River at the point labeled Millview CWD-2006 in these exhibits, then the total amounts of water that could be diverted under this alleged right would be substantially higher than the amount that could be diverted under the alleged right at one of the previous points of diversion.

The previous points of diversion, just to clarify for you, are the ones in the upper portion of the slide, and the proposed point of diversion is the one on the lower portion of the slide.

MR. LILLY: If I can just interrupt, for the record, we've shifted to Exhibit SCWA-6. And we thank Mr. Lindsay for making that shift.

MS. JEANE: The reason there would be an issue with moving this, the point of diversion, downstream is as I said because in the absence of Lake Mendocino water the water might not be available for diversion at those upstream points of diversion.

This is because the flows in the west fork of the Russian River normally drop to very low levels between mid July and mid September of each year while flows in the upper river are maintained at much higher levels due to the releases from storage in Lake
MR. LILLY: Okay. Let's go on to Exhibit SCWA-7, and you can talk about that now.

MS. JEANE: The flow values for February 2006 through 2008 for west fork and east branch of the Russian River are shown here on Exhibit 7.

Diversions under the alleged Waldteufel right also would increase the authorized purpose of use if the alleged right were to change for irrigation to domestic or municipal use.

These increases are described in my written testimony.

Diversions under the alleged Waldteufel right also would increase if the authorized place of use for the alleged right were increased from one of the places of use shown on our prior exhibits to Millview's entire service area which is shown in Exhibit 5.

These increases are described in my written testimony.

And as discussed in my written testimony, any of these increases in diversion would cause impacts to Lake Mendocino storage levels and the related impacts under various hydrological conditions.

MR. LILLY: Does this complete the summary of your direct testimony?
MS. JEANE: It does.

CO-HEARING OFFICER BAGGETT: Okay.

Cross-examination. Prosecution Team, do you have any questions?

MR. ROSE: No, we don't.

CO-HEARING OFFICER BAGGETT: Millview?

MR. NEARY: Yes, I've got a few questions.

CO-HEARING OFFICER BAGGETT: You're up.

While we're waiting, does anybody anticipate rebuttal testimony?

MR. LILLY: We have short rebuttal testimony, yes.

MR. NEARY: On that, I'd like to confer with Mr. Carter before I make a decision.

CO-HEARING OFFICER BAGGETT: Let's continue.

Then you --

MR. NEARY: Okay.

CROSS-EXAMINATION BY MR. NEARY

FOR MILLVIEW COUNTY WATER DISTRICT

BY MR. NEARY:

Q Good afternoon, Ms. Jeane. As I understand your testimony, you're stating that Sonoma County Water Agency would be injured if there was an unauthorized diversion under the Waldteufel right?

A What I stated was that the Sonoma County
Water -- there would be impacts to a change in the Waldteufel right or the -- if they were to start using the right.

Q In your testimony, you refer to unauthorized diversions.

A Mm-hmm. Could you tell me what specifically you're talking about in my testimony?

Q Well, did you testify that the -- I don't know where it is. I don't have your testimony in front of me.

A In the written testimony.

Q Did I understand your testimony that you -- that Sonoma County Water Agency would be injured or the stream flows would be injured if there was an unauthorized diversion by Millview?

A What I said was there would be impacts if there was unauthorized diversion.

Q Okay. Would those impacts also exist if the diversion was authorized?

A Yes, they would.

Q Do you know of any action by the Sonoma County Water Agency that would impart notice to any holder of the Waldteufel water right that Sonoma County Water Agency was diverting adversely to the Waldteufel water right?
A: I didn't understand your question. Would you repeat it?

Q: Do you know of any action by Sonoma County Water Agency that would have said we're using the Waldteufel water right?

A: By the Sonoma County Water Agency? No, I'm not aware of any action.

Q: Okay. Now, recently Sonoma County Water Agency filed an application to amend the existing order, to reduce the stream flows; is that correct?

A: We filed a petition in compliance with the Biological Opinion that was issued by the National Marine Fisheries Service in September 2008 to reduce instream flow requirements for the benefit of the fishery, yes.

Q: And do you believe that's a meritorious application?

A: I don't know what you mean by meritorious, sorry.

Q: Do you believe it's meritorious? Do you believe that it will be adopted by the Board?

A: Oh. I do not know.

Q: Now, I just have a question. If we could put up SCWA-6? I just didn't truly understand this.

There's a purple dot, there's a green dot, and
a rust-colored dot. Where did you get the information
to determine that there was a diversion at the location
of the green dot?

A The green dot? I'm not sure exactly what the
green dot came from, but I can tell you that all of
these dots that were put on this particular diagram
here, or map here, were taken from State Board files.
And they are from statements of diversion and
the 1914 claim. They're all public documents that I
have with me, if you'd like to see them.

Q So you're saying that these documents
support -- all right. Would you show me a document that
supports the location of the rust-colored dot? Or I
guess it's a red-colored dot?

A Hold on a second. Which one is that? The
red-colored dot?

Q Yes.

A Do you want me to describe it to you?

Q Yes.

A This is Statement of Diversion 2000, 2003, 2004
filed by Thomas Hill.

Q And what on that document --

A Actually, it's signed by Steve Gomes; I'm
sorry.

Q And what on that document leads you to locate
the point of diversion at the red location?

A It describes the point of diversion as being

400 feet -- being relocated 400 feet --

Q I see.

A -- to the south. So we obviously looked at a

prior one and went 400 feet south.

Q I see. Thank you.

Do you have any knowledge as to the manner in

which Millview has been diverting water from the current

place of diversion?

A No, I don't.

Q Would it be of any significance to you that

there are diversions from underflow wells on that site?

A Would it be of any significance?

Q Yes.

A Not really.

Q So you -- it's your -- your instream flow

requirements would be affected by removal of or drawing

on an underflow well at the current place of diversion?

A I don't know for sure without seeing some data,

but I can tell you that our wells which are adjacent to

the Russian River definitely impact stream flow.

Q Okay. But you don't have any way to tell

whether that's true at the Millview location?

A I do not.
1 Q Okay.

2 MR. NEARY: That's all I have.

3 CO-HEARING OFFICER BAGGETT: Mr. Carter, you're up.

4 CROSS-EXAMINATION BY MR. BRIAN CARTER

5 FOR THOMAS HILL and STEVE GOMES

6 BY MR. CARTER:

7 Q Good afternoon, Ms. Jeane. My name is Brian Carter. I represent Tom Hill and Steve Gomes.

8 Is it true that Sonoma County Water Agency has recently decided not to build a pipeline to carry water from the Warm Springs Dam to the Russian River?

9 A No, that's not true.

10 Q Has the Agency dropped any plans to convey water through a pipeline anywhere?

11 A No.

12 Q The application to reduce the flow to comply with the September '08 opinion by NMFS: What body of water is that going to affect, what bodies?

13 A The Biological Opinion that was issued by NMFS will impact both the mainstem of the Russian River as well as Dry Creek.

14 Q The Russian River has been characterized as being fully appropriated; has it not?

15 A My understanding is that Mendocino County is
fully appropriated. I'm not sure I have that right.

Q    How about the Russian River in Sonoma County?

A    As far as I know, it has not been deemed fully
     appropriated.

Q    Okay. Do you know whether the conclusion that

the Russian River in Mendocino County is fully

appropriated includes any determination or conclusion as

to how much water is appropriated pursuant to the

Waldteufel right that we're talking about here today?

A    I don't have any knowledge of that.

Q    Who would?

A    You might ask State Water Board staff that made

that determination.

Q    And your testimony is that an unauthorized

diversion by Hill and Gomes or Millview under the

Waldteufel water right would damage your agency?

A    No. Any diversion, whether it's authorized or

unauthorized, could impact our operation and could

impact what happens in the river.

Q    Right. But you're here today, or your attorney

has you here today, in order to prevent Millview from

diverting 1500 acre feet instead of 15 correct? Because

you think that will be in your agency's interest?

A    I'm here to present testimony.

Q    Okay. The gauging station by which the water
flow in the west fork of the Russian River is measured, the subject of the documents you put up, where is that located?

A Where is the gauge located?
Q Yes.
A The gauge -- I'm not sure the exact location, but it's upstream, just upstream is my understanding, of the point of diversion for the Waldteufel right.
Q If we look at Exhibit SCWA-6, it is depicted on that exhibit; isn't it?
A Yes, it is.
Q And have you ever physically seen that station?
A I have, although it was probably a decade ago.
Q Okay. I have never seen such a thing. What actually does one see when you go take a look at a gauging station?
A Not a whole lot.
Q Is it under water?
A Honestly, most people don't even realize they're there. A lot of the equipment itself is in the water, so you're not -- you don't see it.
Essentially, you see a -- usually some sort of electrical coming in because they do need electricity to operate, so there probably is some power coming in.
And you'll see a large cylindrical-shaped --
essentially just a big drum that is -- houses all the
equipment. They're usually not very obvious.

Q And if all the water were out of the river, how
much of this object would be visible? Would you see the
top half? Would you see the whole thing? Or is it
above the bed?

A In this particular location, I don't know.

Q All right. To what extent does this gauging
station -- well, before I get -- before I get onto that,
is there -- are there marks on this exhibit that show
how far north of the Wood property this gauging station
is. A section is a square mile. I can't tell if these
are section lines or exactly how far --

A There's a -- there is a measurement down below,
a thousand feet. It looks to me like it's about 2000,
2500 feet upstream of the multicolored dots, the red,
green, yellow, and blue dots. 2000 to 2500 feet
upstream.

Q To what extent does the amount of surface flow
at the gauging station tell you what the surface flow is
going to be at the point of diversion down by the Wood
property, if you know?

A I don't know. Without seeing a topographical
map, I couldn't estimate.

Q There's some evidence to the effect that there
is a big eight-foot deep or more hole where kids used to
swim in the 1910s where there was this diversion pipe
and the pump when this water right was first asserted.
To what extent would a gauging station measure
underflow?
These gauging stations -- this one here does
not measure underflow. It measures stream flow.
Okay. I noticed in your direct testimony there
was discussion of how certain things might occur if the
point of diversion for this right were moved. In fact,
it has been moved.
Is it your understanding that the point --
there is an official point of diversion for the
Waldteufel water right and that it's still up on the
west fork of the Russian River?
That's my understanding, based on the document
that I read, the original claim.
Based on the 1913 -- March 1914 recorded
document?
Yes.
Okay. And if there were some sort of Agency
decision or acknowledgement or a de facto change in
point of diversion, would you have become aware of it in
the course of your work?
MR. LILLY: I have to object to that. That
calls for speculation about what she might have known
about something that might have been issued? I mean
that's just so speculative, it's not useful.

MR. BRIAN CARTER: I will rephrase the
question.

CO-HEARING OFFICER BAGGETT: Rephrase.

MR. BRIAN CARTER: Okay.

BY MR. BRIAN CARTER:

Q Ms. Jeane, are you aware of the points of
diversion of the various appropriators from the Russian
River?

A I am aware of ours, and I am aware of a couple
of other significant ones, but I'm not aware of all of
them.

Q Okay. To what extent does your agency's
contern flow from the fact that the current point of
diversion is below the confluence, and therefore could
result in the pumping of Project water as opposed to on
the west fork where they're clearly not getting any
water out of Lake Mendocino?

A Our concern -- one of our three concerns is to
that point, that there may be Project water available to
them that they will divert.

Q But to the extent the Waldteufel right is valid
and, to whatever extent it's valid, your agency doesn't
object to Millview diverting water at any point as long as it is diverting only the water to which it is entitled under that right, correct?

A It depends on how they are diverting and what they're diverting and where they're diverting it.

MR. CARTER: Thank you very much.

CO-HEARING OFFICER BAGGETT: Any questions from staff? Jean and then Dana.

EXAMINATION BY

HEARING OFFICERS AND/OR BOARD STAFF

FOR STATE WATER RESOURCES CONTROL BOARD

WATER RESOURCE CONTROL ENGINEER McCUE: I just had one clarifying question. I may have missed it, and I don't have the exhibits in front of me, but for SCWA-9 and -10, are there units associated with those numbers?

MS. JEANE: I don't know if they're on here. They're cubic feet per second, but I actually don't see them on here.

WATER RESOURCE CONTROL ENGINEER McCUE: Thank you.

CO-HEARING OFFICER BAGGETT: Dana?

STAFF COUNSEL HEINRICH: Ms. Jeane, in your experience, is data from a USGS gauge reliable data?

MS. JEANE: The US Geological Survey is an organization that is very, very concerned about accuracy
And if you look at some of the tables that we put up, they actually have little designations on them that designate that they have not gone through a quality control, quality assurance process to verify the data. They spend a lot of time gathering data. They spend a lot of time making sure that their data is accurate before it's ever published. And in my experience of both using their data and working with their staff, who we do work with regularly, they are a very, very reliable source of data.

STAFF COUNSEL HEINRICH: Thank you.

CO-HEARING OFFICER BAGGETT: Any other questions? Okay.

Exhibits?

MR. LILLY: Yes, we offer Exhibits SCWA 1 through 7 and 9 and 10 into evidence in the record.

CO-HEARING OFFICER BAGGETT: Any objection?

Okay. They're admitted.

(Whereupon Exhibits SCWA 1-7, 9, and 10 were admitted in evidence.)

CO-HEARING OFFICER BAGGETT: That concludes the cases in chief. Any rebuttal testimony?

MR. ROSE: Mr. Baggett, the Prosecution Team has some rebuttal testimony.
CO-HEARING OFFICER BAGGETT: Do you have exhibits to -- exhibits, or just --

MR. ROSE: We don't have exhibits. I was simply going to call Mr. Rich to provide a little bit more information for the hearing team regarding the location of the gauge that was just in issue.

CO-HEARING OFFICER BAGGETT: Okay.

Then Mr. Lily, you said you had --

MR. LILLY: Ten minutes max.

CO-HEARING OFFICER BAGGETT: Millview? Mr. Carter? No?

Then let's go with the Prosecution Team, and then we'll follow with Mr. Lily. We're on a roll; we might as well keep going.

MR. RICH

Recalled by PROSECUTION TEAM

REBUTTAL EXAMINATION BY MR. ROSE

MR. ROSE: I think for the purposes of Mr. Rich's testimony, if you could bring back up Exhibit SCWA number 6 it might be helpful for these few brief questions.

BY MR. ROSE:

Q Mr. Rich, are you familiar with the gauging station on the west fork of the Russian River that was recently discussed in the Sonoma County Water Agency
testimony?

A    Yes, I am.

Q    And do you know where that gauge currently is?

A    The gauge shown on the map has been moved. It

was moved due to high flows and changes.

   It is now located on the northern edge of the

Lake Mendocino dry bridge which for purposes of that

map -- if you look at the blue dot, and there's a

roadway immediately above it, on the north side of that

roadway on the west side of the river is where the

gauging facility is located.

   They have a permanent structure. It's not much

larger than a 4-by-4 building. They use a nitrogen gas

bubbleometer to measure stage.

   USGS then goes out and does a flow correlation

with stage and uses the long-term stage records from the

bubbleometer to determine what the actual flow is. It

has a very high degree of precision compared to most

surface flow.

   I doubt you're going to get a whole lot more

accurate on the river like that than what they've got

there right now.

Q    Mr. Rich, do you see the scale at the bottom

listing number of feet?

A    Yes, I do.
Q Approximately how many feet, using that scale -- or how far, using that scale, from the blue dot on Exhibit SCWA-6 upstream would you say the gauge is?
A Oh, 100, 150 feet.
Q And Mr. Rich, are you familiar or do you know of any other water rights between the gauging station and the Waldteufel claimed point of diversion?
A I am not aware of any. When we were doing the field investigation, we looked along there, and none of the parties present knew of any other diversions of any significance, and we did not observe any facilities take any significant amounts of water out of the river.
MR. ROSE: I don't have any other questions.
CO-HEARING OFFICER BAGGETT: Either party have any cross?
MR. JARED CARTER: Could I just ask Mr. Rose to ask him when that station was moved? We didn't get that.
MR. ROSE: Are you familiar with when that station was moved?
MR. RICH: I can't give you an exact date. It's been within probably the last ten or 15 years. If you go onto the USGS Internet site, it will tell you exactly when the record was moved.
I'm not aware of any diversions between the
gauging location shown on the map and the current location, so I believe that the continuous record pretty much reflects the same flows.

There are no significant streams flowing in between the two, and USGS generally does not like to move gauging stations if it's going to have a material change in the record. They like to keep them very close, and they do everything they can to -- this one just became so much easier to access and deal with, I'm sure that's the reason they moved it.

CO-HEARING OFFICER BAGGETT: That's what the follow-up of my question was, the date. So we don't know within a range of 10 to 15 years.

MR. RICH: It's available on their published documents. It's a, you know, on their website, they've got it out there. I didn't know it was going to be an issue today or I would have had that here.

CO-HEARING OFFICER BAGGETT: And the second question is: So there are no diversions between the old gauging station and the new gauging station?

MR. RICH: I am not aware of any. I have not walked that particular stretch of the stream, but we have no reported diversions to the Board at all in that reach.

CO-HEARING OFFICER BAGGETT: As we know,
everyone reports their diversions to us.

(Laughter)

MR. RICH: The best we can do.


No new exhibits based on that.

Mr. Lily?

MR. LILLY: Mr. Baggett, for a rebuttal on the question of the allocations of water between -- of Mendocino County Flood Control District water to Millview County Water District, I would like to call Sean White, the general manager of the Mendocino Flood Control District for a few questions in rebuttal.

CO-HEARING OFFICER BAGGETT: Okay.

SEAN WHITE

General Manager, Russian River Flood Control District

Called by SONOMA COUNTY WATER AGENCY

REBUTTAL EXAMINATION BY MR. LILLY

CO-HEARING OFFICER BAGGETT: Have you taken the oath?

MR. WHITE: Yes, I did.

CO-HEARING OFFICER BAGGETT: Okay.

BY MR. LILLY:

Q First of all, just before you state your name, Mr. White, for housekeeping matters, have you taken the
oath today?
A I did take the oath this morning, yes.
Q Please state your name and spell your last name?
A My name is Sean White, W-h-i-t-e.
Q And what is your job?
A I am certainly the general manager of the Russian River Flood Control District.
Q How long have you been in that position?
A About a year and a half.
MR. NEARY: I have an objection.
Mr. White was not listed as a witness. Why would he have taken the oath at the commencement of the hearing if he did not expect to testify but for rebuttal?
So what I'm -- my issue is: Is this a surprise at the end of this hearing at 4:10 that was anticipated long ago? Because why else would he have taken the oath? He wasn't a designated witness.
MR. WHITE: I can answer that question if you would like.
This is my first hearing ever. I didn't know any better, so when everybody took their oath, I joined the party.

CO-HEARING OFFICER BAGGETT: Half the audience
took the oath. And it is rebuttal testimony, so they
can bring in a witness.

BY MR. LILLY:

Q    And just very briefly describe what your
responsibilities are as general manager of the Mendocino
Russian River Flood Control District.

A    Sure. In summary, my responsibilities are to
administer our district's water rights that are held in
Lake Mendocino.

Q    Do you have a copy of Exhibit SCWA-11 -- that's
the agreement between the flood control district and
Millview County Water District -- in front of you?

A    I have the one you provided earlier today.

Q    All right. And if you could just briefly
describe, and refer to this contract as necessary, how
your district allocates water to each of the contracting
parties each year?

A    Our annual allocation is based on two things.

     Basically, the District reads meters every
month, even now for our municipal customers. We did not
do that in the past, but we now do read all the meters
for all of our contractors to basically verify that
water was utilized.

     But Millview is no different than the vast
majority of our other customers in that they have a
contractual relationship with the District, and then they also have their own water rights that they can exercise as well.

So at the end of the year, we basically will ask the contractor to let us know how much of their gross pumping they would like applied to their district contract.

So in essence, we get that number from our contractors.

Q And does the amount of water that Millview reports as being received from the flood control district in one year affect the amount that's available for Millview from the District in following years?

A It certainly can. Our district's contract has, for lack of a better term, a use-it-or-lose-it clause, and if Millview basically didn't exercise the full extent of their contract for multiple years, which is basically the condition at the moment, our district would have the ability to reduce the amount of their contract. But we've not chosen to do so.

Q Okay. Maybe you can briefly refer to paragraph nine on pages 7 through 8 of Exhibit SCWA-11. I think there's been some confusion regarding the termination date.

Could you just explain what Millview's rights
are to continue to receive water from the district in years -- in 2010 and subsequent years?

A  Sure. And this particular aspect of all of our contracts is identical. They all expire on the same day. That was basically done as these contracts, including Millview's, was the first round of contractual relationships the District had ever issued.

And they put a termination date in there so if there was something that needed to be corrected basically districtwide we could do that through the reissuance process.

But essentially, it says in there that if no one does anything, they renew automatically.

Q  So is the best way for Millview to protect its contract right to 970 acre feet to report the diversion of that amount of water to the District each year?

A  In a use-it-or-lose-it situation, that is sound advice.

Q  And how does your district determine how much to bill or -- how much water to bill Millview for each year?

A  Based on their reporting to us as to the amount they used.

MR. LILLY: Thank you. I have no further questions.
CO-HEARING OFFICER BAGGETT: Prosecution?

MR. ROSE: No.

CO-HEARING OFFICER BAGGETT: Millview.

CROSS-EXAMINATION BY MR. NEARY FOR MILLVIEW COUNTY WATER DISTRICT

BY MR. NEARY:

Q Mr. White, how long have you been with the Russian River district?

A I started in July of 2008.

Q And the practice concerning the solicitation of the respective rights used by contractors, do you have any personal knowledge of how that was done prior to July of 2008?

A Well, I do, only because I had to ask when I took the job over. So like anything else, you ask your predecessor how this is done.

Interestingly, that was actually a duty that was not done by the general manager and has been abdicated to our meter reader, so I continue with that practice.

So basically, the solicitation of reported amounts has always been done by our meter reader, Pat Ford.

Q What about the solicitation of assignment to various rights?
A Exactly. The same person does that.

So basically what will happen at the end of any year when we reconcile or meter readings, our meter reader, Pat Ford, will contact each and every one of our contractors and say, you know, for example you had a gross pumping of 4,000 acre feet. How much of that would you like to apply to your contract?

Q And just one last question. Has Millview requested in writing clarification of the automatic -- or of the termination on December 31st, 2010?

A To my knowledge, the only thing they've asked for to date in writing was an expansion of their current agreement to a level higher than what they have now. They currently have 970 acre feet, and they have requested more.

I have spoken personally to a number of their board members to let them know that we do have the water available; but to honor their request, I would have to have a certified CEQA document to execute that agreement, and I don't have one.

Q Have you responded in writing to the written request by the general manager of Millview?

A You know, I haven't. And I'll tell you why. The reason I didn't do that was simply an act of charity to Millview. Because if I was forced to do a
formal review of their use and their request for an 
expansion of their use, because they have not been 
exercising their contract to the fullest extent I would 
have actually had to reduce their amount.

Q And what directors of Millview have you spoken 
to?
A Mostly Will Carson. But I did come to a full 
board meeting about six months ago, letting them know 
that I was trying to secure additional supply for 
Millview.

MR. NEARY: That's all I have.

CO-HEARING OFFICER BAGGETT: Mr. Carter?

MR. JARED CARTER: Thank you, Mr. Chairman.

CROSS-EXAMINATION BY JARED CARTER

FOR THOMAS HILL and STEVE GOMES

BY MR. JARED CARTER:

Q Mr. White, my name is Jared Carter. I 
represent Messrs. Hill and Gomes.

My questions have to do with your right to 
Project water. Your district has a right to 8,000 acre 
feet of project water; isn't that true?
A We currently have a right to 8,000 acre feet 
and a pending application for an additional 6,000.
Q And that application has not been provided; is 
that correct?
A: No, we just went through the protest process.

Q: So your -- this is a permit that was initially issued when to get your 8,000 acre feet?

A: We originally became through the process known as partial reassignment on February 14, 1958.

Q: And then D 1030 formalized that right issued in 1961; isn't that correct?

A: I would decline to say yes or no on that. I'm unsure.

Q: Okay. Now, we heard Mr. Lilly state that in order to appropriate water and complete an appropriation, you file an application, you get a permit, you create a point of diversion, and you put the water to beneficial use.

Does the Millview district have any -- I mean does the Russian River district have any point of diversion?

MR. LILLY: I have to object. That totally mischaracterizes my statement. Not totally, but that statement -- that -- Mr. Carter's question mischaracterizes my opening statement.

CO-HEARING OFFICER BAGGETT: And also add, the cross is restricted to his testimony which wasn't on the general operations of the flood control district. It was very narrow on the relationship of gauging water use
and meter readings between the two districts, so.

MR. JARED CARTER: I understand.

What I was trying to get at, Mr. Chairman, is

motivation of the Russian River district to trying to

sell as much of its water to Millview.

CO-HEARING OFFICER BAGGETT: Okay.

MR. JARED CARTER: And I thought that's what he
came to testify about is why they were counting and how
they were counting how Millview had rights to water.

And I was trying to examine into the motivation for

that.

If it's inappropriate it's --

CO-HEARING OFFICER BAGGETT: Yeah, I didn't

think he was -- the testimony was just more mechanical.

It wasn't what they were trying to accomplish.

MR. JARED CARTER: I have no other questions.

CO-HEARING OFFICER BAGGETT: Thank you.

Staff? No other rebuttal questions. Your

exhibit's already in the record. So no issues there.

Okay. With that, that concludes the testimony.

MR. NEARY: Mr. Chairman, I'd like to call

Mr. Bradley as rebuttal witness to Mr. White. Just for

a few questions.

CO-HEARING OFFICER BAGGETT: If they are very

short. I mean, you had your chance, but I'll allow you.
Just a few questions?

MR. NEARY: Yes.

CO-HEARING OFFICER BAGGETT: Okay.

TIM BRADLEY

Recalled by MILLVIEW COUNTY WATER DISTRICT

REBUTTAL EXAMINATION BY MR. NEARY

BY MR. NEARY:

Q Mr. Bradley, you heard Mr. White testify. Have you ever had any discussions with any meter reader from the Russian River district as to allocation of Millview's various water rights?

A I have never met one of the flood control district's meter readers or spoken with them other than to give them authorization to read a meter at the treatment plant.

Q And what questions were posed by Mr. White's predecessor, Barbara Spazek, on that same issue?

A They just wanted a total accounting of our annual water use. There was never a separation of under what right. They made the decision.

MR. NEARY: That's all.

CO-HEARING OFFICER BAGGETT: Thank you.

Any cross? Okay. Thank you.

With that, we will not have closing oral arguments. I realize there's a lot of issues that
parties will want to brief, some legal arguments.
I mean normally on a proceeding like this, I do
ten pages double-spaced, 12 point Arial type. But I
would allow parties more if you think it's -- there's
so few parties, and I think the issues are significant.

Does anybody have a suggestion what type of
page limits you would propose? Mr. Carter?

MR. JARED CARTER: I would just suggest not
over 30. I don't think anybody's going to want to write
any more than they have to.

CO-HEARING OFFICER BAGGETT: Okay.

Well, normally, I would go 20, I think. 20
pages is pretty significant given the record we've got
before us. I would not encourage you to use all 20,
like you said.

But I think given the legal issues and the fact
that I think we all have an idea where this is heading
no matter what happens, I would allow up to 20 pages.

MR. ROSE: Did you specify double-spaced?

CO-HEARING OFFICER BAGGETT: Normally we do
double-space Arial font. But that's what I would like.

12 point type. Off the record.

(Discussion off the record)

CO-HEARING OFFICER BAGGETT: 30 days is fine.

So 30 days from the time transcripts are available, so
that's roughly six weeks from today. So whatever. Pick
a rough date for now. What's -- April 1st.
    April 2nd. We'll make it -- assuming the
transcripts are out in two weeks, we'll say close of
business April 2nd. Anything else?
    Thank you very much.

      *   *   *

(Thereupon the WATER RESOURCES CONTROL
BOARD hearing adjourned at 4:21 p.m.)
CERTIFICATE OF REPORTER

I, LINDA KAY RIGEL, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that

the foregoing WATER RESOURCES CONTROL BOARD hearing was
reported in shorthand by me, Linda Kay Rigel, a
Certified Shorthand Reporter of the State of California,
and thereafter transcribed into typewriting.

I further certify that I am not of counsel or
attorney for any of the parties to said meeting nor in
any way interested in the outcome of said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand

this February 4, 2010.

LINDA KAY RIGEL, CSR
Certified Shorthand Reporter
License No. 13196