

HEARING

STATE OF CALIFORNIA

WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

In the Matter of:)
 To Determine Whether to Adopt)
Draft Cease and Desist Order No.)
262.31-XX and Whether to Impose)
Administrative Civil Liability as)
Proposed in Administrative Civil)
Liability Complaint No. 262.5-46)
Against North San Joaquin Water)
Conservation District Mokelumne)
River Tributary to San Joaquin)
River, San Joaquin County.)
_____)

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THURSDAY, JUNE 21, 2007

1:22 P.M.

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LICENSE NUMBER 10063

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BOARD MEMBER BAGGETT: Okay. This is the time and place for hearing to receive evidence relevant to determining whether or not whether to adopt with or without revision a draft of cease and desist order number 262.31-XX, regarding the alleged unauthorized diversion of water and whether to impose an administrative civil liability as proposed in Administrative Civil Liability Complaint Number 262.5-46, issued by the Chief of the Division of Water Rights against the North San Joaquin Water Conservation District.

The hearing is being held in accordance with the notice of public hearing dated April 16th, 2007. And I think we've already introduced all the parties up here, myself and Board Member Hoppin, Erin Mahaney is our staff attorney and Jean McCue and Ernie Mona our engineers.

The hearing provides persons who have filed a notice of intent to appear and opportunity to present relevant testimony and other evidence that address the key issues of the hearing. Now those key issue I think so that everybody is aware of what this is about: One, should the State Water Board adopt the cease and desist order? If the draft cease and desist order should be adopted, should any modifications be made to the measures in the draft order and what is the basis for such

1 modifications?

2 The second issue is should the State Water Board
3 order liability in response to administrative civil
4 liability complaint 262.5-46? If the State Water Board
5 orders liability should the amount be increased or
6 decreased? And if so, what is the basis for that
7 modification?

8 After the hearing is closed the Board staff will
9 prepare a proposed order for consideration by the full
10 board. And then you will have 30 days after the adoption
11 of an order to submit a written petition for
12 reconsideration by the Board.

13 A court reporter is present and transcripts will
14 be made available in a couple weeks.

15 Policy statements. Do we have any blue cards?

16 Anyone wishing to make a policy statement?

17 I think you know all the rules by now.

18 MS. GILLICK: DeeAnne Gillick on behalf of the
19 County of San Joaquin. We didn't do a blue card, but we
20 are a party to this hearing as well.

21 BOARD MEMBER BAGGETT: You're fine.

22 MS. GILLICK: And, again, DeeAnne Gillick
23 representing the County of San Joaquin, the San Joaquin
24 County Flood Control and Water Conservation District and
25 the Mokelumne River Water and Power Authority.

1 The county parties would request that the State
2 Board not issue the CDO or the administrative penalties
3 against North San Joaquin. We believe that North San
4 Joaquin will present this afternoon their reasonable
5 beliefs that they were complying with terms 15 and 23 in
6 the previous permit.

7 We believe the evidence shows that their
8 reasonable belief that the fish screens were not required
9 after the '93 diversion season, as well as the reasonable
10 belief that the 1992 Mokelumne River hearing was
11 addressing the fish flow requirements on the Mokelumne
12 River, which also was handled in D-1641 when the State
13 Board stated that there would be no further fish flow
14 requirements on the Mokelumne River unless a future State
15 Board proceeding was noted.

16 We believe that the District was reasonable in
17 relying on both of those beliefs and we would request that
18 no fine be issued and the CDO not to be issued. The
19 District has traditionally struggled financially. We
20 believe they made great progress in the last few years and
21 are encouraged by the implementation of their recent
22 charge with the county supported. And it looks like real
23 projects can be implemented in the future.

24 It is our request that any finances the District
25 does have available to it not go towards fines, but

1 actually can be put to use by the District to develop and
2 implement these projects.

3 And for that, we request that you not issue the
4 CDO or the administrative penalties.

5 Thank you very much

6 BOARD MEMBER BAGGETT: Thank you.

7 Does the City of Stockton, do you have any
8 policies statements to make?

9 MR. GODWIN: No, I don't.

10 BOARD MEMBER BAGGETT: Any other persons?

11 Parties?

12 With that, let's move into the case in chiefs
13 then. We would hear the case in chiefs in the following
14 order: The State Water Resources Control Board
15 prosecution team followed by the North San Joaquin Water
16 Conservation District and then the Department of Fish and
17 Game.

18 And each party will have an opportunity to make
19 an opening statement. Then we will allow the presentation
20 of the witnesses, cross examination, redirect if parties
21 feel it necessary.

22 So with that --

23 MS. HARRIGFELD: I have one procedural question.
24 Will we be filing closing briefs as well in this matter?

25 BOARD MEMBER BAGGETT: I suspect so, but let's

1 talk about it afterwards at the end.

2 So we have 3 parties to present evidence. And I
3 guess we have a number of parties who have the opportunity
4 to cross examine if they so choose. With that, let's just
5 get on with it.

6 Oath of office. All those who plan to testify,
7 please stand and raise your hand.

8 (Thereupon Board Member Baggett swore
9 the witnesses to tell the truth.)

10 PROSPECTIVE WITNESSES: Yes.

11 BOARD MEMBER BAGGETT: Thank you.

12 With that, we'll begin with the opening
13 statements from the State Water Board prosecution team.

14 STAFF COUNSEL BULLOCK: Matthew Bullock for the
15 State Water Board prosecution team.

16 This hearing is all about Terms 15 and 23 of the
17 District's license. Term 15 requires that the District
18 have fish screens, or in the alternative, an operating
19 agreement with Fish and Game. After 1993, the evidence
20 will show that they had no fish screens. And the evidence
21 will also show that the District never had an operating
22 agreement with anyone.

23 Further, we will see that even if the Board
24 should believe everything the District says, there's still
25 no agreement with the Department of Fish and Game, just an

1 employee in the screen shop who had no authority to speak
2 for the Department of Fish and Game, no more so than I
3 would have the authority to issue an order in the name of
4 the State Water Board.

5 Term 23 requires bypass agreement with Fish and
6 Game or again in the alternative a further order by the
7 Board on bypass flows for aquatic life in the Mokelumne
8 River.

9 We will see today that there never was an
10 agreement with Fish and Game and that there was never a
11 further order by the Board on bypass flows for fish in the
12 Mokelumne River.

13 The District today is most likely going to throw
14 out numerous documents trying to say that these stand in
15 as orders by the Board on bypass flows for fish in the
16 Mokelumne River. Not only do all of these postdate the
17 addition of Term 23 by at least 6 years, during which time
18 the District was diverting water, but more importantly
19 even a quick perusal of these documents is going to show
20 that not one of them or any combination of them fulfills
21 the requirements in Term 23.

22 We're going to see that the District has a 13
23 year history of violating the terms in their permit, and
24 that a cease and desist order is necessary to bring them
25 into compliance with the terms in their permit.

1 Finally, the evidence is going to show that the
2 division staff were very conservative in their estimates
3 and their setting of the liability, that they took the
4 appropriate considerations into account, and that the
5 civil liability recommended is fair to the point of
6 leniency.

7 Thank you.

8 BOARD MEMBER BAGGETT: Thank you. Would you like
9 to make an opening statement now?

10 MS. HARRIGFELD: Can we do it before our case?

11 BOARD MEMBER BAGGETT: You can do it before your
12 case in chief. Okay that's fine. You want to put your
13 evidence on at this point. Put your witnesses on with the
14 evidence.

15 STAFF COUNSEL BULLOCK: Ready?

16 DIRECT EXAMINATION

17 OF MR. STEVEN MARQUEZ AND MR. RICHARD SATKOWSKI
18 BY MR. MATTHEW BULLOCK, STAFF COUNSEL, representing the
19 State Water Board Prosecution Team:

20 Mr. Marquez, could you please state your name and
21 place of employment?

22 MR. MARQUEZ: My name is Steve Marquez and work
23 for the State Water Resources Control Board Division of
24 Water Rights License Unit.

25 STAFF COUNSEL BULLOCK: And have you taken an

1 oath in this proceeding?

2 MR. MARQUEZ: Yes, I have.

3 STAFF COUNSEL BULLOCK: Did you prepare the
4 statement of qualifications that is submitted as
5 Prosecution Team Exhibit WR-2?

6 MR. MARQUEZ: Yes, I did.

7 STAFF COUNSEL BULLOCK: Is Exhibit 2 a true and
8 accurate statement of your qualifications?

9 MR. MARQUEZ: Yes.

10 STAFF COUNSEL BULLOCK: Did you also prepare the
11 written statement submitted as Prosecution Team Exhibit
12 WR-1?

13 MR. MARQUEZ: Yes.

14 STAFF COUNSEL BULLOCK: And are the statements in
15 Enforcement Team Exhibit 1 true and accurate to the best
16 of your knowledge?

17 MR. MARQUEZ: Yes.

18 STAFF COUNSEL BULLOCK: Could you please briefly
19 describe the permitted project?

20 MR. MARQUEZ: Well, As shown on Water Right
21 Exhibit 8, page 12 and 13, the District is authorized to
22 store 20,000 acre feet of water in Camanche Reservoir,
23 shown as Point of Diversion number 1. Water is released
24 to the District's north and south pump, shown as Point of
25 Diversions 2 and 3 and delivered to the District's place

1 of use.

2 STAFF COUNSEL BULLOCK: When was this permit
3 issued initially?

4 MR. MARQUEZ: 1956.

5 STAFF COUNSEL BULLOCK: When were the terms at
6 issue in this hearing added?

7 MR. MARQUEZ: December 11th 1992.

8 STAFF COUNSEL BULLOCK: And if you know, why were
9 Terms 15 and 23 added to the permit?

10 MR. MARQUEZ: Terms 15 and 23 were added as they
11 originated from a stipulated agreement between the East
12 Bay Municipal Utility District, the Department of Fish and
13 Game and the California Sportfishing Protection Alliance
14 to resolve protests over the 1991 time extension petition
15 submitted by the District.

16 STAFF COUNSEL BULLOCK: Turning to those terms,
17 can you briefly explain what Term 15 says?

18 MR. MARQUEZ: Term 15 says, "No water shall be
19 diverted under this permit during the 1992 or subsequent
20 water years, until the permittee has constructed screening
21 facilities adequate to protect fish life and/or has
22 entered into an operating agreement with the Department of
23 Fish and Game that will protect fish life."

24 STAFF COUNSEL BULLOCK: And based on your
25 understanding of that term, how can the District comply

1 with Term 15?

2 MR. MARQUEZ: They can either construct the fish
3 screens or they can enter into an operating agreement with
4 the Department of Fish and Game.

5 STAFF COUNSEL BULLOCK: Has there been any period
6 when the District has been in compliance with the Term 15?

7 MR. MARQUEZ: Yes, the first season in 1993, when
8 they borrowed a fish screen from the Department of Fish
9 and Game, but not since.

10 STAFF COUNSEL BULLOCK: Turning now to Term 23,
11 what does it say?

12 MR. MARQUEZ: Term 23 says, "No diversions shall
13 be made under this permit until an agreement has been
14 reached between the permittee and the State Department of
15 Fish and Game with respect to flows to be bypassed for
16 aquatic life or failing to reach such agreement until a
17 further order is entered into by the State Water Resources
18 Control Board or its successors with respect to said
19 flows."

20 STAFF COUNSEL BULLOCK: And based again on your
21 understanding, how can the District comply with that term?

22 MR. MARQUEZ: The District can either reach an
23 agreement with Department of Fish and Game, or failing to
24 reach an agreement until a further order is entered by the
25 Water Board with respect to said flows.

1 STAFF COUNSEL BULLOCK: Has there been any period
2 since 1992 when the District was in compliance with Term
3 23?

4 MR. MARQUEZ: No, there is no agreement with
5 Department of Fish and Game and no order has been entered
6 from the Board.

7 STAFF COUNSEL BULLOCK: Have you reviewed Water
8 Rights Exhibit 11, the progress report submitted by the
9 District?

10 MR. MARQUEZ: Yes.

11 STAFF COUNSEL BULLOCK: What year did the
12 District file progress reports?

13 MR. MARQUEZ: They filed progress reports from
14 1993 through '98 and 2001 through 2005.

15 STAFF COUNSEL BULLOCK: On each of those progress
16 reports, did a representative of the District sign under
17 penalty of perjury that the District was complying with
18 all conditions of its permit?

19 MR. MARQUEZ: Yes.

20 STAFF COUNSEL BULLOCK: Turning now to the day of
21 the inspection on February 2nd of 2006. Were
22 representatives of the District present at that
23 inspection?

24 MR. MARQUEZ: Yes. There was Edward Steffani,
25 Fred Weybret and CL Weinzheimer, Junior.

1 STAFF COUNSEL BULLOCK: What was the purpose of
2 the inspection on that day?

3 MR. MARQUEZ: The purpose of the inspection was
4 to perform a pre-license inspection to determine the max
5 amount beneficially used.

6 STAFF COUNSEL BULLOCK: And what did the
7 inspection consist of, what did you do?

8 MR. MARQUEZ: The inspection consisted of an
9 initial meeting and a field inspection. The initial
10 meeting we discussed the divisions -- the District's
11 diversion records and discussed the compliance with the
12 terms and conditions of the permit.

13 After the meeting we observed the field -- in the
14 field the District's operations and we obtained some pump
15 capacity data. And then finally we also observed the
16 proposed pilot recharge project area.

17 STAFF COUNSEL BULLOCK: Did you discuss the terms
18 and conditions of the permit with the District
19 representatives?

20 MR. MARQUEZ: Yes, during the meeting prior to
21 the field inspection.

22 STAFF COUNSEL BULLOCK: Were they aware of Terms
23 15 and 23?

24 MR. MARQUEZ: Yes.

25 STAFF COUNSEL BULLOCK: Did you see any fish

1 screens in place during your inspection?

2 MR. MARQUEZ: No, I did not.

3 STAFF COUNSEL BULLOCK: Did any of the
4 representatives of the District that were there
5 acknowledge that fish screens were not in place at any
6 time after 1993?

7 MR. MARQUEZ: Yes.

8 STAFF COUNSEL BULLOCK: Has the District been in
9 violation of Term 15 of its permit since 1993 in your
10 opinion?

11 MR. MARQUEZ: Yes.

12 MS. HARRIGFELD: Objection. That calls for a
13 conclusion legal.

14 STAFF COUNSEL BULLOCK: I asked in his opinion.

15 MS. HARRIGFELD: Well, he's not a lawyer.

16 BOARD MEMBER BAGGETT: Could you restate your
17 question.

18 STAFF COUNSEL BULLOCK: Sure.

19 MS. MURRAY: I guess object. That's not a legal
20 conclusion. He's asking is he complying with permit
21 terms. He's an employee of the Water Board who reads
22 permits as part of his job. That's not a legal
23 conclusion.

24 STAFF COUNSEL BULLOCK: I can rephrase it.

25 BOARD MEMBER BAGGETT: Okay, why don't you

1 rephrase it.

2 STAFF COUNSEL BULLOCK: Sure. As part of your
3 position as an employee of the State Water Board, is it
4 your job to determine if people are in compliance during
5 inspections?

6 MR. MARQUEZ: Yes, it is.

7 STAFF COUNSEL BULLOCK: And on your inspection,
8 did you determine that the District was not in compliance
9 with Term 23?

10 MR. MARQUEZ: Term 15?

11 STAFF COUNSEL BULLOCK I'm sorry. Yes.

12 MR. MARQUEZ: Term 15, yes.

13 STAFF COUNSEL BULLOCK: Thank you. To your
14 knowledge, is there a bypass agreement in place between
15 the District and the Department of Fish and Game?

16 MR. MARQUEZ: No, there isn't.

17 STAFF COUNSEL BULLOCK: Did any of the
18 representatives that were there on the day of the
19 inspection acknowledge that there was no Fish and Game
20 negotiated bypass agreement?

21 MR. MARQUEZ: Yes, they did.

22 STAFF COUNSEL BULLOCK: And did you find on the
23 day of the inspection, based on what you saw, that the
24 District has been in violation of Term 23 of its permit
25 since it was added?

1 MR. MARQUEZ: Yes, it has.

2 STAFF COUNSEL BULLOCK: Turning now to the CDO.
3 Could you briefly describe what the requirements are under
4 the CDO?

5 MR. MARQUEZ: The cease and desist order requires
6 the District to cease diversion and come into compliance
7 with Terms 15 and 23 and produce a schedule of compliance.

8 STAFF COUNSEL BULLOCK: In your opinion should
9 the Board issue the administrative civil liability and the
10 cease and desist order to the District.

11 MR. MARQUEZ: Yes, I do.

12 STAFF COUNSEL BULLOCK: And why do you think
13 that?

14 MR. MARQUEZ: The District has been in violation
15 of their permit and has been since 1992.

16 STAFF COUNSEL BULLOCK: Thank you. That's all I
17 have for that witness.

18 Mr. Satkowski -- did you want to ask questions at
19 this point or --

20 BOARD MEMBER BAGGETT: We'll do them as a panel.

21 STAFF COUNSEL BULLOCK: Mr. Satkowski, could you
22 please state your name and place of employment.

23 MR. SATKOWSKI: My name is Richard Satkowski and
24 I'm a Senior Water Resource Control Engineer with the
25 Division of Water Rights in the Licensing Unit.

1 STAFF COUNSEL BULLOCK: Have you taken an oath in
2 this proceeding?

3 MR. SATKOWSKI: Yes, I have.

4 STAFF COUNSEL BULLOCK: Did you also prepare the
5 statement of qualifications submitted as Prosecution Team
6 Exhibit WR-4

7 MR. SATKOWSKI: Yes, I did.

8 STAFF COUNSEL BULLOCK: And is Exhibit 4 a true
9 and accurate statement of your qualifications?

10 MR. SATKOWSKI: Yes, it is.

11 STAFF COUNSEL BULLOCK: Did you also prepare the
12 written statement that is submitted as Prosecution Team
13 Exhibit 3?

14 MR. SATKOWSKI: Yes, I did.

15 STAFF COUNSEL BULLOCK: Are the statements in
16 that document true and accurate to the best of your
17 knowledge?

18 MR. SATKOWSKI: Yes, they are.

19 STAFF COUNSEL BULLOCK: Mr. Satkowski, do you
20 support issuance of the ACL and CDO?

21 MR. SATKOWSKI: Yes, I do.

22 STAFF COUNSEL BULLOCK: Could you please tell us
23 what the legal basis for the ACL was?

24 MR. SATKOWSKI: The legal basis is contained in
25 Water Code Section 1052.

1 STAFF COUNSEL BULLOCK: Could you also tell us
2 what the factual basis underlying the administrative civil
3 liability was?

4 MR. SATKOWSKI: Basically, it's that the
5 diversion the water by the District has been in violation
6 of their permit, because the permit says that no water
7 shall be diverted without the fish screens and the bypass
8 agreement. We know that except for one year the
9 Department did not have fish screens or do they have an
10 agreement with the Department of Fish and Game. Also, we
11 know that the District did not have a bypass or order from
12 the Board and they were diverting water during that time.

13 STAFF COUNSEL BULLOCK: I'd like to talk with you
14 now a little bit about the amount of liability. How is
15 the maximum liability calculated?

16 MR. SATKOWSKI: Well, as contained in Section
17 1052, the maximum civil liability is \$500 per day per day
18 of violation. And in our analysis, we used 150 days of
19 violation for 3 years, which equals 450 days total over 3
20 years.

21 STAFF COUNSEL BULLOCK: And how did you come up
22 with 150 days per year?

23 MR. SATKOWSKI: The 150 days per year was the
24 lower end of recorded historical use by the District as
25 contained -- shown in Water Right Exhibit 8, pages 5 and

1 19. And it's a very conservative estimate.

2 STAFF COUNSEL BULLOCK: So based on those
3 numbers, what was the maximum liability calculated?

4 MR. SATKOWSKI: The maximum liability calculated
5 is \$225,000, which is equal to 450 days of violation times
6 \$500 per day.

7 STAFF COUNSEL BULLOCK: What was your
8 recommendation on what the actual liability should be?

9 MR. SATKOWSKI: The recommendation by the
10 Division was \$66,400.

11 STAFF COUNSEL BULLOCK: And in coming up with
12 that amount, what factors did you take into consideration?

13 MR. SATKOWSKI: Well, we took into consideration
14 the factors that are listed in Water Code Section 1055.3.
15 They are that -- we looked at the harm caused by the
16 violation, the nature and persistence of the violation,
17 the length of time the violation occurred and the
18 corrective actions taken by the violator.

19 STAFF COUNSEL BULLOCK: Were there any other
20 factors not specifically noted in 1055.3 that were taken
21 into consideration?

22 MR. SATKOWSKI: Yes, there were. Other factors
23 that we took into consideration are the economic advantage
24 from the violation. For example, the District was able to
25 forego the cost of building, installing and maintaining

1 fish screens. And they were able to avoid the cost of
2 purchasing water, which we estimate to be about \$410,000.

3 Also, the other factors that were taken into
4 account was the staff time. We estimate that up until the
5 time we issued the ACL and the CDO, we had about \$9,400 in
6 staff time. And then finally we also discounted the
7 maximum liability in this effort to -- so that we could
8 achieve settlement with the permittee and to streamline
9 the enforcement process and finally to avoid the expense
10 of the hearing.

11 STAFF COUNSEL BULLOCK: Have you changed your
12 recommendation since the time the ACL was issued?

13 MR. SATKOWSKI: Yes, we have. As I mentioned
14 before, we discounted the maximum liability to avoid the
15 cost of a hearing. But now that we are at hearing, we
16 have accrued additional staff costs. And we estimate
17 those staff costs to be at least \$10,000.

18 STAFF COUNSEL BULLOCK: And how did you come up
19 with that amount, 10,000, is that a conservative estimate,
20 is it an exact amount?

21 MR. SATKOWSKI: Well, it's not exact, but we
22 added up the hours that we spent since the ACL and CDO
23 were issued and then multiplied times a rate per hour.

24 STAFF COUNSEL BULLOCK: Thank you. That's all
25 that the prosecution team has. And, at this time, I'd ask

1 that we move our evidence into the record.

2 BOARD MEMBER BAGGETT: I think we'll hold that
3 until we have a chance for cross then we'll do the
4 evidence.

5 Lets go for cross examination.

6 North San Joaquin?

7 CROSS EXAMINATION

8 OF MR. STEVEN MARQUEZ AND MR. RICHARD SATKOWSKI

9 BY MS. KARNA HARRIGFELD, ESQ., representing North San
10 Joaquin Water Conservation District:

11 Good afternoon. Karna Harrigfeld on behalf of
12 North San Joaquin. I'll address my first questions to Mr.
13 Marquez.

14 Mr. Marquez, your written testimony today states
15 that it is based on your personal knowledge of the
16 evidence and actions leading to the Division's notice of
17 an intent to issue a CDO; is that correct?

18 MR. MARQUEZ: That's correct.

19 MS. HARRIGFELD: Turning to WR-1 page 3 of your
20 testimony, you state that, "Based on the information in
21 the Division's records, the District has diverted and used
22 water in violation of Term 23 since 1992 and Term 15 since
23 1993." Please describe for me the information in the
24 Division records that you relied on?

25 MR. MARQUEZ: In the records we had a variety of

1 correspondence from Fish and Game -- or from the Division
2 to Fish and Game and in response to Fish and Game. In
3 terms of the fish screens, there was the April 8th 1993
4 Fish and Game response to us, which indicated that the
5 fish screens were a temporary basis and not a permanent
6 fish screen.

7 MS. HARRIGFELD: Are those records part of this
8 proceeding? I did not have those in the information that
9 you produced, so could you point to me the exhibits that
10 you're referring to and maybe we can walk through them.

11 MR. MARQUEZ: Okay.

12 MS. HARRIGFELD: So where is the communication
13 between the Department of Fish and Game and the --

14 MR. MARQUEZ: There's also one -- October 13th
15 2007 from --

16 MS. HARRIGFELD: Okay. But I guess my first
17 question is you said that you reviewed the records of the
18 State Board and there was communications between the State
19 Board staff and the Department of Fish and Game. Can you
20 point to that in the records here before us?

21 MR. MARQUEZ: Yeah. In Water Right Exhibit 9
22 page 1, there was a letter in response to one of our
23 letters that we sent September 14 2005. This is directed
24 to Steve Herrera from the North San Joaquin Water
25 Conservation District. And in there it specifies Term 15

1 and Term 23. The District mentioned that they have
2 no -- they show no agreement for installations of a fish
3 screen was made with the Department of Fish and Game.

4 Also, it mentions Term 23 where the District has
5 stated that they revealed there's no agreement with Fish
6 and Game relative to flows to be bypassed for aquatic
7 life.

8 MS. HARRIGFELD: Okay. But I'm looking for your
9 communication between the Department of Fish and Game and
10 the State with respect to compliance. This is the letter
11 from --

12 STAFF COUNSEL BULLOCK: Ms. Harrigfeld, could you
13 please point to where you're referencing in his testimony.

14 MS. HARRIGFELD: It was in his -- well, it's
15 right here, page 3.

16 STAFF COUNSEL BULLOCK: Thank you.

17 MS. HARRIGFELD: So the entire basis for your
18 position that no fish screens were in place are the
19 statements contained on page 3 of the District's letter?

20 STAFF COUNSEL BULLOCK: Objection. In the
21 testimony he just gave he clearly stated that on the day
22 that he was out there there were none. And so she's
23 misstating facts in evidence.

24 MS. HARRIGFELD: Well, I'm looking for evidence
25 in this record in this proceeding that communications back

1 and forth from the Department of Fish and Game and the
2 State Board that indicate that there was no agreement, and
3 that's what I'm looking for. He's pointed to one letter
4 with respect to the District, but he mentioned in response
5 to my question that he reviewed State Board records and he
6 had seen correspondence back and forth from the State
7 Board with the Department of Fish and Game. I don't see
8 that in this record. I see one letter from Ed Steffani.

9 STAFF COUNSEL BULLOCK: To the extent that things
10 aren't in the record, I think it's clearly stated in Mr.
11 Marquez's testimony that he did review the record and
12 those are public documents, which --

13 MS. HARRIGFELD: Well, in an enforcement
14 proceeding, we need to be able to question him with
15 respect to the documents that you are claiming that we
16 violated. So they have to be in our record in order to
17 ask questions about them and they're not in our record of
18 the proceedings.

19 BOARD MEMBER BAGGETT: It seems there might be
20 some confusion on the question that was asked. Could you
21 ask the question again and let's get a clear response. I
22 think now that the witness understands fully the question.

23 MS. HARRIGFELD: His statement -- written
24 statement states, "Based on the information in the
25 Division records, the District has diverted water in

1 violation of permit Term 23 and permit Term 15." My
2 question is what information in the Division records that
3 is produced in here so we can cross examine him, what
4 information is before us today?

5 MR. MARQUEZ: Okay. The District's October 13,
6 2005 letter to the Division clearly states that Term 15,
7 "The District's records show than an agreement for
8 installation of a fish screen was made with the DFG on
9 4/30/1993 and material shows that one year tests of a
10 screen to be provided by DFG was to be constructed."
11 That's what our basis was for Term 15.

12 MS. HARRIGFELD: Do did you have any
13 communication with the Department of Fish and Game, you
14 personally, as to whether or not permit Term 15 has in
15 fact been complied with?

16 MR. MARQUEZ: No, I didn't.

17 MS. HARRIGFELD: So you're basing this solely on
18 this one letter. So you did not communicate independently
19 as part of your prosecution to verify or not whether Term
20 15 has been complied with?

21 MR. MARQUEZ: Term 15 was also dealt with during
22 the discussion with the District --

23 MS. HARRIGFELD: Right. Okay --

24 MR. MARQUEZ: -- and they also acknowledged that
25 there was no fish screens installed.

1 MS. HARRIGFELD: Okay. Let's turn to Term 15,
2 because there is a -- there's 2 parts to Term 15. Term 15
3 on Water Rights 7 page 3, it says, "No water shall be
4 diverted under this permit during 1992 or subsequent years
5 until the District has constructed screening facilities
6 and/or has entered into an operating agreement with the
7 Department of Fish and Game." Is that a correct
8 statement?

9 MR. MARQUEZ: Yes.

10 MS. HARRIGFELD: So when you testified a few
11 minutes ago that based on your inspection, you determined
12 that the District was in violation of the permit term?

13 MR. MARQUEZ: There was no fish screens installed
14 at the time, yes.

15 MS. HARRIGFELD: Are you aware that the permit
16 term requires either or, either a screen or an operating
17 agreement?

18 MR. MARQUEZ: Yes.

19 MS. HARRIGFELD: Okay. Thank you.

20 Can you turn to -- on page 3 of your testimony it
21 states, "DFG has informed Division staff that DFG is not
22 aware of construction of a permanent fish screen or an
23 operation agreement." For the record, have you spoken to
24 the Department of Fish and Game?

25 MR. MARQUEZ: Personally, no.

1 MS. HARRIGFELD: Was there any contact reports in
2 the State Board files evidencing any discussion with the
3 Department of Fish and Game?

4 MR. MARQUEZ: I can't recall any dates, but I did
5 see some correspondence from the Division.

6 MS. HARRIGFELD: Okay. Why was that not produced
7 in this proceeding?

8 MR. MARQUEZ: It's entered as part of the record.

9 MS. HARRIGFELD: But we're not introducing the
10 entire record.

11 STAFF COUNSEL BULLOCK: Objection. At this
12 point, she's starting to badger the witness about things
13 that are within the realm of Fish and Game. Mr. Marquez
14 has already stated what his evidence and what his
15 knowledge was based on. If Ms. Harrigfeld, at some later
16 point, would like to question Fish and Game about other
17 information that was not within the realm of what Mr.
18 Marquez knew, we're fine with that. But he's already
19 stated that based on the knowledge that he had there was
20 no fish screen or agreement.

21 MS. HARRIGFELD: My fundamental problem is that
22 this -- the evidence that was produced that you will be
23 evaluating to impose a CDO and an ACL doesn't include any
24 of the correspondence, contact reports, anything that we
25 could ask the Department -- the State Board about. It has

1 one letter from my client who did, to the best of his
2 knowledge, a look as to whether or not there was
3 compliance. And so I'm having a very difficult time
4 understanding how we can effectively cross examination
5 when the record is so deficient.

6 STAFF COUNSEL BULLOCK: Ms. Harrigfeld is asking
7 for proof of a negative. She's asking us to show that
8 there is absolutely no evidence. And what Mr. Marquez has
9 testified to is that he has not seen any evidence of an
10 agreement. If the District would like to later on present
11 evidence during their direct showing that there is
12 evidence to the contrary, we have no objection to that.

13 MS. HARRIGFELD: I'm trying to get at what
14 evidence and documents the State Board relied on in making
15 his finding that we were in violation of permit Term 15
16 and permit Term 23. And there --

17 BOARD MEMBER BAGGETT: And he has answered that
18 question I think at least twice now.

19 MS. HARRIGFELD: Okay.

20 BOARD MEMBER BAGGETT: Maybe not to the detail
21 that you would like, but he has answered the question.

22 MS. HARRIGFELD: Well, it's difficult when
23 there's only a couple abstract documents and he is making
24 generalized statements in his written testimony that he
25 reviewed the Division staff's file. Well, the Division

1 staff's file isn't here.

2 BOARD MEMBER BAGGETT: I understand. And, of
3 course, you know we take evidence to the weight and
4 hearsay evidence particularly to the weight that we feel
5 necessary. We don't have the normal 76 hearsay
6 exceptions.

7 MS. HARRIGFELD: That's true.

8 BOARD MEMBER BAGGETT: So you can make that
9 point. I think you've made it, and you can --

10 MS. HARRIGFELD: Move on

11 BOARD MEMBER BAGGETT: You are more than welcome
12 to make it in your closing brief again, but move on.

13 MS. HARRIGFELD: I'd like to move to page 7 of
14 WR-9. Could you tell me what this document is?

15 MR. MARQUEZ: This was a letter written from
16 James Sorensen who was the District's consultant at that
17 time to the Department of Fish and Game in regards to a
18 temporary fish screen that was going to be installed.

19 MS. HARRIGFELD: Okay. Could you read for me the
20 last paragraph on that page through the top of the next
21 page.

22 MR. MARQUEZ: Starting on Page 7?

23 MS. HARRIGFELD: Yes.

24 MR. MARQUEZ: "The District will
25 cooperate with the Department of Fish

1 and Game to attempt to reach a permanent
2 solution to adequately protect fish life
3 after the resolution of the myriad of
4 issues now before the State Water
5 Resources Control Board in the Mokelumne
6 River hearings, including but not
7 limited to water entitlement of the
8 District, fish screening
9 responsibilities under the provisions of
10 the Fish and Game code and obligations
11 of the District, if any, to bear
12 financial responsibility for same."

13 "If the foregoing..." --

14 MS. HARRIGFELD: That's good.

15 MR. MARQUEZ: Okay.

16 MS. HARRIGFELD: Was this document approved and
17 accepted by the Department of Fish and Game?

18 STAFF COUNSEL BULLOCK: Objection. That's not
19 necessarily -- she's asking for speculation. She should
20 be asking if he knows not whether it was or not.

21 BOARD MEMBER BAGGETT: Okay, could you rephrase.

22 MR. HARRIGFELD: Well, I would turn your
23 attention to page 9. Can you read the section that says
24 approved and accepted?

25 MR. MARQUEZ: Yes, it was -- yes.

1 MS. HARRIGFELD: Yes. So does page 9 on Water
2 Rights Exhibit 9 indicate the signature of Ryan Broddrick
3 as to agreement and acceptance to this letter and the
4 commitment to reach a permanent solution with respect to
5 fish screens at a later date?

6 MR. MARQUEZ: Yes, it does.

7 MS. HARRIGFELD: Thank you. Are you aware that
8 the State Water Board held hearings in 1992 regarding
9 public trust resources on the Mokelumne River?

10 MS. MURRAY: Objection. Vague and ambiguous.
11 She's not saying what was the number of the proceeding.
12 If she's leading up to D-1641, she's need to say that.

13 BOARD MEMBER BAGGETT: Can you be more specific
14 with your request.

15 MS. HARRIGFELD: Well, the letter from James
16 Sorensen the information that you just read states that,
17 "...the resolution of a myriad of issues now before the
18 State Board in the Mokelumne River Hearings..." Were you
19 aware of the 1992 Mokelumne River hearings proceedings?

20 MR. MARQUEZ: I was aware, but I wasn't around at
21 the time.

22 MS. HARRIGFELD: Did the 1992 Mokelumne River
23 hearings address public trust resources?

24 STAFF COUNSEL BULLOCK: Objection. If he knows.

25 MR. MARQUEZ: I don't know.

1 MS. HARRIGFELD: Okay, you don't know.

2 Are you aware of the State Water Board conducting
3 hearings regarding implementation of the 1995 Water
4 Quality Control Plan?

5 MR. MARQUEZ: Not necessarily, no.

6 MS. HARRIGFELD: You haven't worked on that,
7 okay.

8 On Water Rights Exhibit 1 page 7, the basis of
9 the ACL is for diversions by the District in 2003, 2004
10 and 2005; is that correct?

11 MR. MARQUEZ: That's correct.

12 MS. HARRIGFELD: Can you turn to Water Rights
13 Exhibit 11. What is this exhibit?

14 MR. MARQUEZ: This is the progress reports by
15 permittee that were submitted by the District.

16 MS. HARRIGFELD: Do these reports identify the
17 quantity diverted by a water right holder?

18 MR. MARQUEZ: It looks like -- actually, not 93,
19 but it looks like 94, 95 --

20 MS. HARRIGFELD: In general, do they?

21 MR. MARQUEZ: Yeah, they do, except for '93.

22 MS. HARRIGFELD: Were these diversion records
23 factored in in determining the proposed ACL?

24 MR. MARQUEZ: Yes, they were.

25 MS. HARRIGFELD: Can you identify how much water

1 was reported diverted in 2003?

2 MR. MARQUEZ: In 2003 the District reported 3152
3 acre feet.

4 MS. HARRIGFELD: How about for 2004?

5 MR. MARQUEZ: For 2004 2415.6 acre feet.

6 MS. HARRIGFELD: How about for 2005?

7 MR. MARQUEZ: At the time of the inspection
8 report, it wasn't into the record.

9 MS. HARRIGFELD: Okay. So there is no evidence
10 in the record with respect to the diversions amount for
11 2005?

12 MR. MARQUEZ: Not in -- at the time, not in the
13 progress reports. The progress reports weren't in the
14 file at the time.

15 MS. HARRIGFELD: Can you please turn to -- okay,
16 that's all I had for Mr. Marquez.

17 Mr. Satkowski, your written testimony today
18 states that it is based on your personal knowledge of the
19 evidence and actions; is that correct?

20 MR. SATKOWSKI: That's correct.

21 MS. HARRIGFELD: What actions were take by you to
22 determine if the District entered into an operating
23 agreement with the Department of Fish and Game pursuant to
24 Term 15?

25 MR. SATKOWSKI: None directly, although we --

1 MS. HARRIGFELD: Thank you.

2 MR. SATKOWSKI: -- we looked at correspondence in
3 the file --

4 MS. HARRIGFELD: Thank you. The question was
5 very specific. What actions were taken by you to
6 determine if the District had reached agreement with the
7 Department of Fish and Game regarding bypass flows
8 pursuant to Term 23?

9 MR. SATKOWSKI: None directly.

10 MS. HARRIGFELD: Thank you. On page 2 of Water
11 Rights Exhibit 3, you state that, "The maximum ACL amount
12 authorized by statute is \$500 for each day in which the
13 unauthorized diversion occurred." Are you required by law
14 to impose the maximum amount?

15 MR. SATKOWSKI: No.

16 MS. HARRIGFELD: What is the minimum ACL amount?

17 MR. SATKOWSKI: Well, the minimum would be 0.

18 MS. HARRIGFELD: Thank you. That's all I have.

19 BOARD MEMBER BAGGETT: Does Fish and Game, do you
20 have any cross examination.

21 MS. MURRAY: I just have one question for Mr.
22 Marquez.

23 CROSS EXAMINATION

24 OF MR. STEVEN MARQUEZ AND MR. RICHARD SATKOWSKI
25 BY MS. NANCEE MURRAY, SENIOR STAFF COUNSEL, representing

1 the Department of Fish and Game:

2 Would you please turn to Water Right Exhibit 9.

3 There just seemed to be some confusion. This
4 exhibit has many letters attached to it. Could you
5 describe for me the letters, the correspondence, that are
6 contained in Water Right Exhibit 9?

7 MR. MARQUEZ: Water Right Exhibit 9 that was
8 submitted by the District involves a response to the
9 Division's September 14th 2005 letter requesting
10 information to determine their compliance with permit term
11 10477. It looks like North San Joaquin submitted portions
12 of the minutes of March 10th '93. They submitted to the
13 Department of Fish and Game a letter dated April 8th 1993
14 in regard to the fish screens. They also submitted an
15 April 15th 1993 letter from James Sorensen to the Fish and
16 Game. And on page 9 they also submitted the acceptance
17 from Fish and Game. And finally there was a letter from
18 Fish and Game dated April 19th 1993 to James Sorensen to
19 clarify Item 3 of the letter.

20 MS. MURRAY: And in the April 19th letter it's --
21 we agree to loan the District --

22 MR. MARQUEZ: Yes, that's correct.

23 MS. MURRAY: Thank you.

24 BOARD MEMBER BAGGETT: Any questions from the
25 Department or staff?

1 Jean

2 WATER RESOURCES CONTROL ENGINEER McCUE: He can
3 go first

4 BOARD MEMBER BAGGETT: Do you want to go first
5 then.

6 Any other parties?

7 Do the counties have any cross?

8 MS. GILLICK: I don't have any cross examination.

9 BOARD MEMBER BAGGETT: You don't, okay.
10 I'm glad you spoke up.

11 CROSS EXAMINATION

12 OF MR. STEVEN MARQUEZ AND MR. RICHARD SATKOWSKI
13 BY MR. ARTHUR F. GODWIN, ESQ, representing the City of
14 Stockton:

15 MR. GODWIN: My first question is for Mr.
16 Satkowski. Does the District have a contract with the
17 State Water Project?

18 MR. SATKOWSKI: Not that I'm aware of.

19 MR. GODWIN: Do they have any means of getting
20 State Water Project water to the District?

21 MR. SATKOWSKI: Currently in the present
22 configuration, I do not believe so.

23 MR. GODWIN: Do they have a contract with the
24 Central Valley Project?

25 MR. SATKOWSKI: Not that I'm aware of.

1 MR. GODWIN: And do they have facilities to take
2 CVP water?

3 MR. SATKOWSKI: Not that I'm aware of.

4 MR. GODWIN: In the absence of State Water
5 Project water or Central Valley Project water, what other
6 sources of water are available to the District?

7 MR. SATKOWSKI: Another source of water would be
8 groundwater pumping.

9 MR. GODWIN: Okay. Thank you.

10 Mr. Marquez, what is the date of amended Permit
11 10477?

12 MR. MARQUEZ: December 11th 1992.

13 MR. GODWIN: Okay. And what were the minimum
14 in-stream flows on the Mokelumne River at the time the
15 permit was issued, do you know?

16 MR. MARQUEZ: There was none. I do not recall.

17 MR. GODWIN: Okay. Why were bypass flows
18 required as part of this permit?

19 MR. MARQUEZ: They were originated from an
20 agreement, a stipulated agreement, between East Bay MUD,
21 California Sportfishing Alliance and the Department of
22 Fish and Game.

23 MR. GODWIN: Right, but do you know what the
24 purpose of the bypass flows were?

25 MR. MARQUEZ: To -- it was for aquatic life.

1 MS. MURRAY: I object. It calls for speculation.

2 MR. GODWIN: I just asked him if he knew.

3 BOARD MEMBER BAGGETT: I think it's -- continue.

4 Overruled. It's a legitimate question.

5 Rephrase it. Could you just restate the
6 question.

7 MR. GODWIN: Okay. Are you familiar with the
8 stipulated agreement?

9 MR. MARQUEZ: I have read it, yes.

10 MR. GODWIN: Okay.

11 MR. MARQUEZ: Yeah, I've read it.

12 MR. GODWIN: And the bypass flows that are
13 contained in that agreement, are you familiar with those?

14 MR. MARQUEZ: In the agreement between --

15 MR. GODWIN: The stipulated agreement.

16 MR. MARQUEZ: There was none.

17 MR. GODWIN: Okay. And do you know why the
18 parties agreed to a bypass flow in that stipulated
19 agreement?

20 MR. MARQUEZ: It was in respect for aquatic life,
21 fish life.

22 MR. GODWIN: All right, thank you. And do you
23 know if new minimum in-stream flows have been established
24 in the Mokelumne River since the permit was issued in
25 1992?

1 MR. MARQUEZ: For North San Joaquin, no.

2 MR. GODWIN: No, minimum flows in the Mokelumne
3 River itself.

4 MR. MARQUEZ: Yes.

5 MR. GODWIN: Thank you.

6 Mr. Marquez, what unit do you work in at the
7 State Water Resources Control Board?

8 MR. MARQUEZ: License unit.

9 MR. GODWIN: Okay. Is part of your job to review
10 permit terms and conditions?

11 MR. MARQUEZ: Definitely, yes.

12 MR. GODWIN: Do you also review the reports of
13 permittees that are on file?

14 MR. MARQUEZ: Yes.

15 MR. GODWIN: Okay. And so in going through the
16 file you would have seen that there's no DFG agreement in
17 the file?

18 MR. MARQUEZ: Yes.

19 MR. GODWIN: So potentially the State Board was
20 aware that there was no Fish and Game agreement since as
21 early as 1993 when the first report of permittee was
22 filed; is that right?

23 MR. MARQUEZ: Yes.

24 MR. GODWIN: And why did the State Board wait
25 until 2006 to conduct its first inspection?

1 STAFF COUNSEL BULLOCK: Objection. This is
2 outside the scope of the knowledge of Mr. Marquez.

3 BOARD MEMBER BAGGETT: I would sustain. SO can
4 you rephrase if you have --

5 MR. GODWIN: Does the State Water Resources
6 Control Board have a policy on enforcing water right terms
7 and conditions?

8 MR. MARQUEZ: A policy, No.

9 MR. GODWIN: Okay. Thank you.

10 BOARD MEMBER BAGGETT: Now Jean.

11 QUESTIONS BY BOARD AND STAFF

12 OF MR. STEVEN MARQUEZ AND MR. RICHARD SATKOWSKI

13 WATER RESOURCES CONTROL ENGINEER McCUE: I'm just
14 trying to understand -- or make sure I understand. Mr.
15 Marquez, on Water Right 8 page 19, it looks like you did a
16 calculation to come up with the 114 days of diversion. I
17 just want to confirm, so you just looked at -- or I guess
18 can you explain this table how you came up with the 114
19 days?

20 MR. MARQUEZ: I think Rich Satkowski will explain
21 that.

22 WATER RESOURCES CONTROL ENGINEER McCUE: Oh,
23 okay. Thank you.

24 MR. SATKOWSKI: What we did here was to on -- in
25 Water Right Exhibit 8 page 19 is try to come up with one

1 possible pumping scenario. And the reason we did this is
2 because we did not have daily pumping data. We had
3 monthly pumping data. So what we wanted to see is -- we
4 wanted to come up with -- see what a conservative estimate
5 is of pumping to see how many days of violation there
6 might be during the years 2003, 2004 and 2005.

7 And so we took the records for pumping, the
8 monthly records, in acre feet and assumed a 40 cubic feet
9 per second rate at any one facility. And we did that in
10 part because according to previous licensing inspection of
11 the file the maximum rate to date was back in, I believe,
12 the -- it was either the late eighties or nineties was
13 about 33 cubic feet per second. So we assumed a pumping
14 rate of 40 cubic feet per second, converted that to an
15 acre feet per day, then on the next column came up with
16 the days of diversion. And, for example -- say, for
17 example, on June of 2003, the calculation came out with
18 2.975 days of violation, so we rounded it up to 3 days of
19 violation, because a partial day is a day. And then
20 totaled those up and came up with 114 days.

21 WATER RESOURCES CONTROL ENGINEER McCUE: Okay.
22 Thank you.

23 And then for your maximum liability amount you
24 used 450 days and that was based on some other records?

25 MR. SATKOWSKI: Yes. The 450 days was based on

1 assuming 150 days of diversion and use by the District.
2 And if you look at the historical pumping records for the
3 District, also in Exhibit 8...

4 We're trying to get the right page here. Okay,
5 that would be on page 9.

6 No, I'm sorry. It's not on page 9, it's on
7 page -- on page 19. If we assume -- we looked at the
8 records and in some years they were pumping in most of the
9 months or all the months. But in most of the years, they
10 were pumping only in 5 months. So you have 5 months of
11 pumping that would equate to about 150 days. And so we
12 just assumed 150 days of pumping for each of those 3
13 years. And the total would be 450.

14 WATER RESOURCES CONTROL ENGINEER McCUE: So you
15 were still talking about Water Right 8 page 19?

16 MR. SATKOWSKI: Yes.

17 WATER RESOURCES CONTROL ENGINEER McCUE: Okay.
18 So for your discounted liability of \$66,400, it looks like
19 you used the 114 days times \$500 a day plus staff costs is
20 that what that was?

21 MR. SATKOWSKI: Yes. And what we did is we said
22 that this is one possible pumping scenario, and it was a
23 conservative pumping scenario. We took 114 days
24 multiplied times 500 and added the staff costs, and that's
25 how we came up with the amount. And then the Division had

1 decided that was a reasonable amount to recommend.

2 WATER RESOURCES CONTROL ENGINEER McCUE: Thank
3 you.

4 BOARD MEMBER BAGGETT: Other questions?

5 Do you have any redirect?

6 STAFF COUNSEL BULLOCK: Yes, just a little bit,
7 just to kind of help clarify. It seems like there's maybe
8 some confusion on this 114 versus 150.

9 REDIRECT EXAMINATION

10 OF MR. STEVEN MARQUEZ AND MR. RICHARD SATKOWSKI
11 BY MR. MATTHEW BULLOCK, STAFF COUNSEL, representing the
12 State Water Board prosecution team:

13 The 114 days, again, the rate was presumed to be
14 how much? The rate of diversion for the 114 days?

15 MR. SATKOWSKI: The pumping rate?

16 STAFF COUNSEL BULLOCK: Yeah.

17 MR. SATKOWSKI: The pumping rate was 40 cubic
18 feet per second.

19 STAFF COUNSEL BULLOCK: Twenty-four hours a day?

20 MR. SATKOWSKI: Twenty-four hours a day, that's
21 correct

22 STAFF COUNSEL BULLOCK: So is that the
23 height -- has there ever been a date on which there's
24 evidence that the District was actually pumping at that
25 rate at any point of 40 cubic feet per second?

1 MR. SATKOWSKI: Not that I'm aware of.

2 STAFF COUNSEL BULLOCK: And then the 150 days
3 versus the 114 days. Which is a more probable estimate of
4 the actual usage?

5 MR. SATKOWSKI: We believe that it's more
6 -- while each of those is a possible estimate -- possible
7 scenario, the most probably scenario would be the maximum
8 recommended. So it would be 150 days of pumping for each
9 of the 3 years.

10 STAFF COUNSEL BULLOCK: So and based on your
11 calculations, is it correct that 114 was the absolute
12 minimum that they possibly could have pumped that amount
13 of water in?

14 MR. SATKOWSKI: No, not necessarily. It is a
15 very low number. It's on the low end, but it is a
16 possible scenario. Like I guess they could have pumped
17 possibly more than 40 cubic feet per second at one time.
18 Like I said, we're not aware of time when they did pump
19 more than 40 cubic feet per second.

20 STAFF COUNSEL BULLOCK: And also on the -- a
21 different question. There was discussion about whether
22 State Water and Central Valley Project water are available
23 in the area and you said no. The fact that that water
24 isn't available and despite the fact that you used those
25 numbers for determining the avoided costs, the fact that

1 those numbers -- or that that water is not available,
2 would that increase or decrease the cost of replacing that
3 water?

4 MR. SATKOWSKI: It would increase the cost.

5 STAFF COUNSEL BULLOCK: And then, Mr. Marquez,
6 there was some question about whether there was evidence
7 in the record of diversions in 2007. I just wanted to
8 clarify, there is no progress report for 2005, but is
9 there evidence elsewhere in the record of diversions in
10 2005?

11 MR. MARQUEZ: Yes. We obtained records from East
12 Bay Municipal Utility District.

13 STAFF COUNSEL BULLOCK: And is that the
14 information that's in that table on WR-8 page 19?

15 MR. MARQUEZ: Yes, it is.

16 STAFF COUNSEL BULLOCK: Thank you.

17 BOARD MEMBER BAGGETT: Any recross from any
18 parties?

19 State Board, any questions?

20 MR. GODWIN: Yeah, I have a question.

21 BOARD MEMBER BAGGETT: Mr. Godwin.

22 RE CROSS EXAMINATION

23 OF MR. STEVEN MARQUEZ AND MR. RICHARD SATKOWSKI
24 BY MR. ARTHUR GODWIN, ESQ., representing the City of
25 Stockton:

1 Mr. Satkowski, you said -- earlier you testified
2 that in the absence of CVP water and SWP water the likely
3 source of water for the district would be groundwater; is
4 that correct?

5 MR. SATKOWSKI: I said that that was a possible
6 source of water.

7 MR. GODWIN: Okay. And on recross you just
8 testified that the likely sources would be -- of
9 replacement water would be more expensive than the \$50 per
10 acre foot that you have in your testimony; is that
11 correct?

12 STAFF COUNSEL BULLOCK: Objection. That
13 misstates what Mr. Satkowski said.

14 BOARD MEMBER BAGGETT: Sustained.

15 STAFF COUNSEL BULLOCK: His statement was that
16 the fact that there is no State water would increase the
17 value of the water. That was all he said.

18 BOARD MEMBER BAGGETT: Sustained. Can you
19 rephrase.

20 MR. GODWIN: You testified that in the absence of
21 State Water Project water the replacement costs would
22 likely be more; is that correct? More expensive?

23 MR. SATKOWSKI: What I testified was that even
24 assuming a \$50 per acre foot cost of water from one or
25 both of the projects, if the District were to want to get

1 that water to the District for use, they would have to
2 probably put in facilities and other items, and that would
3 raise the cost of the water.

4 MR. GODWIN: All right. In your opinion, how
5 likely is that to happen?

6 MR. SATKOWSKI: I don't know. I don't have an
7 answer to that.

8 MR. GODWIN: On a scale of 1 to 10, with 10 being
9 most --

10 MS. MURRAY: I object. It calls for speculation.
11 He answered the question.

12 MR. GODWIN: All right.

13 BOARD MEMBER BAGGETT: I would sustain.

14 MR. GODWIN: That's fine. You testified earlier
15 that their most likely source of water would be
16 groundwater; is that correct?

17 MR. SATKOWSKI: I mentioned that the one source
18 of water may be groundwater.

19 MR. GODWIN: Right. And do you know if the
20 District itself has any wells?

21 MR. SATKOWSKI: No, I don't.

22 MR. GODWIN: Do you know -- well, that's fine.
23 Thank you.

24 BOARD MEMBER BAGGETT: Okay. Any other
25 questions?

1 If not, would you like to submit --

2 STAFF COUNSEL BULLOCK: Please, yes. I would
3 like to submit our exhibits.

4 BOARD MEMBER BAGGETT: Any objection?

5 If not, they're submitted.

6 (Thereupon the above-referenced exhibits
7 WR-1 through WR-12 were received in evidence.)

8 BOARD MEMBER BAGGETT: Thank you.

9 Before we -- we can go off the record. We're
10 going to take a break in a second.

11 (Thereupon a recess was taken.)

12 MS. HARRIGFELD: I'll start with my opening
13 statement and then seat the witnesses.

14 BOARD MEMBER BAGGETT: Very good. Proceed.

15 MS. HARRIGFELD: Good afternoon, Karna Harrigfeld
16 on behalf of North San Joaquin Water Conservation
17 District.

18 The State Board has identified 2 key issues as
19 part of the ACL/CDO proceedings. Key Issue number 1 is
20 should the State Board adopt CDO 262.31? If the draft CDO
21 should be adopted, should any modifications be made to the
22 measures in the draft order and what is the basis for such
23 modifications?

24 North San Joaquin does not believe that the CDO
25 should be issued. The State Board has not presented

1 sufficient evidence to make a finding that the District is
2 in violation of either permit Term 15 or permit Term 23.

3 Permit Term 15 reads as follows: "No water shall
4 be diverted under the permit until the permit has
5 constructed screening facilities adequate to prevent fish
6 life and/or has entered into an operating agreement with
7 the Department of Fish and Game."

8 I'll skip the second paragraph and hit the third
9 paragraph of permit Term, 15 which states, "In the event
10 the permittee and the Department of Fish and Game cannot
11 reach an agreement with respect to this condition, either
12 party may petition the State Water Resources Control Board
13 to hold a hearing to determine what the appropriate
14 condition should be."

15 As stated in our testimony -- or as stated in the
16 testimony of the State Board, there is nothing unclear --
17 or there is nothing unclear or confusing about the
18 language of this condition. It requires either a fish
19 screen or an operating agreement with the Department of
20 Fish and Game.

21 The language of the second -- or the third
22 paragraph -- the language of the second paragraph of the
23 condition clearly acknowledges that fish screens are only
24 one option specifying what actions would be taken should
25 the if -- actions the parties should take if fish screens

1 aren't constructed.

2 North San Joaquin has entered into an agreement
3 with the Department of Fish and Game in April 1993. The
4 agreement covered the installation of a temporary fish
5 screen for water year 1993. It also committed the
6 District and DFG to cooperate to quote "...attempt to
7 reach a permanent solution to adequately protect fish life
8 after resolution of the myriad of issues now before the
9 State Board in the Mokelumne River hearings, including,
10 but not limited to, fish screening responsibilities."

11 This agreement was signed by both of the parties
12 and the State Water Board has provided no evidence that
13 this agreement has been canceled or rescinded. Unlike the
14 requirement that the approved plans for a fish screen be
15 submitted to the State Board, there was no requirement
16 that this agreement between the District and the
17 Department of Fish and Game be submitted to the State
18 Board.

19 Since execution of the agreement from 1993 to
20 2006, the District did not hear from the Department of
21 Fish and Game regarding a need to deviate from the terms
22 of that agreement to screen the existing diversion. If
23 the Department did not believe that an agreement was in
24 place for 13 years, why didn't it exercise its right under
25 permit Term 15 and petition the State Water Board to hold

1 a hearing to determine the appropriate conditions
2 regarding fish screens. This inaction makes sense only if
3 you understand that an agreement was in place.

4 Now, moving to permit Term 23.

5 Permit Term 23 says, "No diversion
6 shall be made under the permit until an
7 agreement has been reached between the
8 permittee and the State Department of
9 Fish and Game with respect to flows to
10 be bypassed for aquatic life or failing
11 to reach such an agreement until a
12 further order of the Board is entered by
13 the State Water Resources Control Board
14 or its successor with respect to said
15 flows."

16 Despite the allegations of the State Board staff
17 that this permit condition has been violated, North San
18 Joaquin has been in compliance with this term since 1993.
19 One of the issues covered by that 1993 agreement entered
20 into in April was the commitment that we cooperate with
21 the Department of Fish and Game to quote, "...attempt to
22 reach a permanent solution to adequately protect fish life
23 after resolution of the myriad of issues now before the
24 State Board in the Mokelumne River hearings." The
25 agreement contemplated by Term 23 has been in place for 14

1 years.

2 There are 2 ways to meet the condition imposed by
3 Term 23. While the agreement that complied with the
4 requirements of the condition was in place, the State
5 Board actually entered a further order as to flows as a
6 result of the Mokelumne River hearings. At issue in the
7 1992 Mokelumne River hearings was what flows were needed
8 in the lower Mokelumne for fish resources East Bay MUD,
9 Woodbridge and North San Joaquin rights were all on the
10 table to be reduced, to be modified or appropriately
11 conditioned regarding the requirement for flows.

12 There is no evidence in the record that disputes
13 this fact. In Decision 1641 the State Board adopted a
14 flow regime in the Mokelumne River for the protection of
15 fish and wildlife through the joint settlement agreement.
16 And the State Board has concluded that this decision
17 resolved all issues as to flow and public trust resources
18 for the Mokelumne River. North San Joaquin is required to
19 bypass these flows by permit Term 22 in their water right
20 permit. Permit Term 23 was finally resolved by the
21 adoption of D-1641 implementing the Joint Settlement
22 Agreement flows.

23 State Board staff asserts that Term 23 can be
24 resolved only by a subsequent order of the Board specific
25 to permit term 10477. Permit Term 23 does not say that.

1 What permit Term 23 says is that until a further order is
2 issued by the State Board or its successor with respect to
3 flows to be bypassed by aquatic life. That order, D-1641,
4 was entered into the record -- was entered by the State
5 Board on March 20th 2000 in D-1641, where the State Board
6 did specifically address North San Joaquin water rights.

7 In D-1641, the State Board quotes, "...finds that
8 the fish should be protected but consumptive uses
9 nevertheless should be allowed to continue at a reasonable
10 level. The State Board finds that it would not be in the
11 public interest to require more water from the Mokelumne
12 River system than will be provide under the JSA.
13 Additional releases could exacerbate the shortages
14 experienced by North San Joaquin Water Conservation
15 District."

16 Decision-1641 goes on to state that quote,
17 "Consistent with Woodbridge Irrigation District's
18 resolution, this decision establishes WID's
19 responsibilities by amending WID's water right licenses to
20 require that WID bypass the expected flows below
21 Woodbridge as defined in the JSA."

22 Such an amendment was not needed for North San
23 Joaquin's permit, because it already had permit Term 22,
24 which does not allow North San Joaquin to divert water
25 being released for fish and wildlife purposes from East

1 Bay MUD. As such, we have requested in our petition for
2 extension of time that permit Term 13 be deleted as a
3 subsequent order of the Board, D-1641, has been approved
4 addressing public trust resource protections and the need
5 for fisheries on the Mokelumne River.

6 Key Issue number 2, should the State Board order
7 liability in response the ACL?

8 If the State Board orders liability, should the
9 amount be increased, decreased, and if so on what basis?

10 The clear answer to that is the ACL should not
11 issue. The State Water Board does not have the legal
12 authority to issue an ACL in this situation. The State
13 Water Board's authority for imposing cease and desist
14 orders and administrative civil liabilities is found in
15 Water Code sections 1052, 1055 and 1831.

16 While these provisions grant the Board with the
17 authority to issue cease and desist orders for violation
18 of permit terms, they do not allow the State Board to
19 impose civil liability.

20 The State Board is without authority to impose
21 civil liability. The State Board is without authority to
22 impose civil liability in the first instance for a
23 violation of a term or condition in a permit or license.
24 To do so is in excess of the State Board's jurisdiction,
25 contrary to the State Board's own regulations and

1 publications and is an abuse of discretion. Accordingly,
2 the District requests that the hearing officers dismiss
3 this complaint.

4 However, if the State Board orders liability, the
5 amount should be reduced substantially due to the lack of
6 evidence of the alleged violation, the lack of evidence of
7 any harm to any fish was caused by the alleged violation,
8 and the lack of financial resources of the District. The
9 District is small, financially strapped, with an existing
10 annual budget of \$225,000.

11 Lastly, it is not in the public interest to levy
12 the amount of the fine as the District in good faith
13 believed that they were in compliance with all of their
14 permit conditions. North San Joaquin asserts that the
15 State Board's prosecution staff lacked sufficient evidence
16 to substantiate that the district is violating permit Term
17 15 or 23.

18 Compliance with permit Term 15. The State Board
19 prosecution staff has presented insufficient evidence to
20 support its allegation that there was no operating
21 agreement in place with the Department of Fish and Game.
22 The District will establish that it was in full compliance
23 with permit Term 15 in 1994 and all subsequent years. The
24 District had an operating agreement with the Department of
25 Fish and Game and they were awaiting the interim and

1 long-term actions of the State Board would make regarding
2 new fish screens that would be decided as part of the 1992
3 Mokelumne River hearings.

4 In 2000 and 2001, the State Board confirmed that
5 all issues pertaining to the Mokelumne River were, in
6 fact, resolved, and this resolution occurred with the
7 adoption of the Decision 1641. The District is unaware of
8 any change in the status of the operating agreement until
9 this year, in 2007, when they began discussions with the
10 Department of Fish and Game. At no time since 1993 has
11 the Department of Fish and Game pursued a petition to the
12 State Water Resources Control Board because the parties
13 could not reach agreement, as specifically provided for in
14 permit 15. This is because an agreement was in place.

15 With respect to the ACL, the prosecution team has
16 not presented any evidence that the agreement between the
17 North San Joaquin and the Department of Fish and Game does
18 not meet the requirements of permit Term 15, therefore the
19 State Board cannot assess civil liability for violation of
20 that term.

21 With respect to permit Term 23, the State Board
22 prosecution staff has presented insufficient evidence to
23 support a violation of Term 23. Once again, the record
24 confirms that DFG and District entered into the agreement
25 in 1993 that contemplated a permanent solution to

1 adequately address fishery resources would be resolved as
2 part of the Mokelumne River hearings. There is no
3 evidence that disputes this fact.

4 Lastly, Term 23 states, "...until a further order
5 is entered by the State Board or its successor in interest
6 with respect to these flows." That order was March 20th
7 2000. In D-1641, the State Board specifically found that
8 fish could be protected and consumptive uses nevertheless
9 should be allowed at a reasonable level. The State Board
10 found that the public interest -- it would not be in the
11 public interest to require more flows from the Mokelumne
12 River system than were provided in the JSA. As such,
13 there is no legal basis to impose the ACL on the District
14 for failure to comply with permit Term 23 in 2003, 2004,
15 2005, because the subsequent order was, in fact, issued in
16 March of 2000.

17 Are you ready for witnesses?

18 BOARD MEMBER HOPPIN: I had one question. Mr.
19 Adams, you are the Bud Adams that owns the Tennessee
20 Titans and you just do this as a side line, is that right?

21 MR. ADAMS: Wait --

22 BOARD MEMBER HOPPIN: I know your hearing is bad
23 like mine. You're the Bud Adams that owns the Tennessee
24 Titans, right and you --

25 MS. HARRIGFELD: You own the Tennessee Titans.

1 (Laughter.)

2 MR. ADAMS: Yeah. Absolutely.

3 BOARD MEMBER HOPPIN: I just wanted to put all
4 this in perspective.

5 (Laughter.)

6 MR. ADAMS: He also owned the Dallas Cowboys.

7 Charlie, he also owned the Dallas Cowboys.

8 MS. HARRIGFELD: All right. Are you ready to
9 begin?

10 BOARD MEMBER BAGGETT: I'm ready.

11 MS. HARRIGFELD: I'd like to start with Pete.

12 DIRECT EXAMINATION

13 OF MR. STEWART ADAMS, MR. EDWARD STEFFANI,

14 MR. CONRAD WEINZHEIMER AND MR. FRED WEYBRET

15 BY MS. KARNA HARRIGFELD, ESQ., representing the North San

16 Joaquin Water Conservation District:

17 Could you, Mr. Weinzheimer, please state your
18 name for the record?

19 MR. WEINZHEIMER: I'm Conrad Weinzheimer.

20 MS. HARRIGFELD: Could you please look at North
21 San Joaquin Exhibit 103.

22 MR. WEINZHEIMER: Yes.

23 MS. HARRIGFELD: Is this a true and correct copy
24 of your testimony to the best of your knowledge?

25 MR. WEINZHEIMER: Yes, it is.

1 MS. HARRIGFELD: Contained in your written
2 testimony is a reference to Exhibit number North San
3 Joaquin 11, did you utilize that in preparing your
4 testimony?

5 MR. WEINZHEIMER: Yes, I did.

6 MS. HARRIGFELD: Please state your relationship
7 to the North San Joaquin Water Conservation District?

8 MR. WEINZHEIMER: I'm the Watermaster.

9 MS. HARRIGFELD: How long have you been employed
10 by the District?

11 MR. WEINZHEIMER: Thirty-one years.

12 MS. HARRIGFELD: What are your responsibilities?

13 MR. WEINZHEIMER: To maintain the District's
14 facilities and to distribute water.

15 MS. HARRIGFELD: Could you please take a look at
16 North San Joaquin Exhibit number 111?

17 MR. WEINZHEIMER: Yes.

18 MS. HARRIGFELD: And I would like to call the
19 Board's attention. They're photographs of our various
20 intake channels. I don't know if you folks have colored
21 copies. Do you have colored copies?

22 BOARD MEMBER BAGGETT: (Nods head.)

23 MS. HARRIGFELD: Okay, great. Thank you.

24 Could you please describe the pumping facilities?

25 MR. WEINZHEIMER: There are 2, one on each side

1 of the Mokelumne River. The Facility on the south side
2 has two 100-horsepower pumps, 1 75-horsepower pump and two
3 40-horsepower pumps.

4 MS. HARRIGFELD: How long is the channel on the
5 south side?

6 MR. WEINZHEIMER: About 1,000 feet.

7 MS. HARRIGFELD: And how long is the channel on
8 the north side?

9 MR. WEINZHEIMER: I think it's around 700 feet.

10 MS. HARRIGFELD: In taking a look at North San
11 Joaquin Exhibit number 111, during the irrigation season,
12 what is the typical velocity in the District's inlet
13 channels?

14 MR. WEINZHEIMER: It's very, very slow. It's
15 probably, oh, maybe less than a foot in 6 seconds, 7
16 seconds, maybe more. It's very, very slow.

17 MS. HARRIGFELD: What's the significance of these
18 low velocities?

19 MR. WEINZHEIMER: Well, I believe the water tends
20 to warm up as it travels down the channels.

21 MS. HARRIGFELD: Have you observed moss growing
22 in the inlet channels during your tenure?

23 MR. WEINZHEIMER: Yes, I have.

24 MS. HARRIGFELD: What's the significance of this
25 moss?

1 STAFF COUNSEL BULLOCK: Objection. The District
2 is currently getting into some rather objectionable
3 material, in our opinion, within Mr. Weinzheimer's
4 testimony. Mr. Weinzheimer is not a biologist, and --

5 MR. WEINZHEIMER: That's right.

6 STAFF COUNSEL BULLOCK: -- large parts of his
7 statements are biological in nature referring to growth of
8 moss and specifically effects of temperature on moss on
9 Salmon. And to the extent that his testimony relates to
10 that, we would ask that he not testify to it and that it
11 be stricken from his written testimony, specifically
12 paragraph 5, the second sentence and the entirety of
13 paragraph 6.

14 MS. MURRAY: I agree. He's not been qualified as
15 an expert witness. He's a factual witness.

16 BOARD MEMBER BAGGETT: Response?

17 MS. HARRIGFELD: The statements in 5 and 6 are
18 dealing with his direct observations of what occur in the
19 channels of North San Joaquin. And specific it says, "In
20 my knowledge, there would be no moss growing if the water
21 was cold as the water was in the main channel."

22 STAFF COUNSEL BULLOCK: That's speculation based
23 on scientific facts, unless they want to present evidence
24 that he's an expert on moss growth and the effects of
25 temperature on moss growth and the effects of that on

1 Salmon. I don't see how he can speculate on what
2 temperature is going to do to moss. He is simply not
3 qualified.

4 MS. HARRIGFELD: Well, could I rephrase --

5 BOARD MEMBER BAGGETT: Rephrase the question. I
6 think counsel makes an appropriate point that in terms of
7 the effect on Salmon. That's recalls -- would require a
8 fishery biologist, but in terms of moss growth, I think --
9 rephrase the question. I mean someone who operates
10 canals, I think, probably has a pretty good idea when moss
11 and algae grow and clog up filters. So I think rephrase
12 the question.

13 MS. HARRIGFELD: Certainly. Does the District
14 experience moss growth in the summertime?

15 MR. WEINZHEIMER: Yes, it does.

16 MS. HARRIGFELD: In your 31 year experience, have
17 you ever observed Salmon or Steelhead in the District
18 channels or near the pumping facilities?

19 MR. WEINZHEIMER: No, I haven't.

20 MS. HARRIGFELD: What was your reaction when the
21 Department of Fish and Game demanded fish screens to be
22 installed in 1992?

23 MR. WEINZHEIMER: I didn't really understand why
24 they wanted them, since I'd never seen a problem there.
25 And the fact that Fish and Game had earlier installed a

1 fish screen, and I think after a year or so of observing
2 it decided it wasn't necessary and they were going to take
3 it out and haul it away. And my predecessor suggested
4 that they sell it to the District for a dollar and we
5 would continue to use it as a debris screen, which we did.

6 MS. MURRAY: I object. It's hearsay. He's not
7 testifying that he saw the fish screen or that he
8 purchased it for a dollar.

9 MS. HARRIGFELD: I think the hearsay rules are
10 very liberal.

11 BOARD MEMBER BAGGETT: I'll allow it to the
12 extent we will rely on it to the extent of the credibility
13 of the hearsay.

14 MS. HARRIGFELD: From 1976 to 1992 do you recall
15 anyone from the Department of Fish and Game discussing the
16 necessity of a fish screen on either the north or south
17 pumping station?

18 MR. WEINZHEIMER: Never, never.

19 MS. HARRIGFELD: Once the fish screen condition
20 was imposed on the District water rights' permits, did you
21 James Sorensen construct these screens?

22 MR. WEINZHEIMER: Yes, we did.

23 MS. HARRIGFELD: Where were the fish screens
24 located and how were they constructed?

25 MR. WEINZHEIMER: They were located at the mouth

1 of the channel and they were constructed of 2 power polls
2 laid parallel with a deck between or across the poles and
3 4-inch heavy-walled steel pipe slanted from the platform
4 down to the bottom of the channel. And then we made
5 frames to hold the perforated sheets, and we inserted
6 them.

7 MS. HARRIGFELD: Were representatives of the
8 Department of Fish and Game involved in installing the
9 screens?

10 MR. WEINZHEIMER: Yes, they were. They helped to
11 seal the bottom.

12 MS. HARRIGFELD: What was your understanding
13 about the temporary fish screen that you borrowed from the
14 Department of Fish and Game?

15 MR. WEINZHEIMER: That it was temporary and had
16 to be returned at the end of the season.

17 MS. HARRIGFELD: When did you return the screens
18 to the Department of Fish and Game?

19 MR. WEINZHEIMER: Probably some time in October.

20 MS. HARRIGFELD: Do you recall hearing any
21 discussion with Department of Fish and Game regarding a
22 long-term plan for fish screening at the 2 diversions?

23 MR. WEINZHEIMER: Not really.

24 MS. HARRIGFELD: Thank you.

25 Mr. Adams, could you please state your name for

1 the record?

2 MR. ADAMS: Stewart C. Adams, Junior.

3 MS. HARRIGFELD: Please identify Exhibit NSJ-101,
4 is that your testimony?

5 MR. ADAMS: That's correct.

6 MS. HARRIGFELD: Is this a true and correct copy
7 of your testimony to the best of your recollection?

8 MR. ADAMS: Yes, it is.

9 MS. HARRIGFELD: Containing your written
10 testimony are a number of exhibits, Exhibit 114, 115, 105,
11 116, 108 and 131. Did you review those exhibits as part
12 of preparation of your testimony?

13 MR. ADAMS: Yes, I do.

14 MS. HARRIGFELD: Is there any correction that you
15 would like to make to your testimony?

16 MR. ADAMS: Yes. On page 4 there's an incorrect
17 reference to an exhibit. The last reference to the
18 exhibit should be NSJ-13 page 63 instead of NSJ-108 page
19 63.

20 MS. HARRIGFELD: I would just like to correct
21 that for the record and not NSJ-13, NSJ-131.

22 MR. ADAMS: Oh.

23 MS. HARRIGFELD: Page 63. Please state your
24 relationship with North San Joaquin Water Conservation
25 District?

1 MR. ADAMS: Well, I was the attorney for the
2 District for approaching 40 years. And now on piecemeal
3 matters where I had some knowledge, they call and I do
4 what I can to help them.

5 MS. HARRIGFELD: Did the District file a petition
6 for extension of time in January 1991?

7 MR. ADAMS: Yes, it did.

8 MS. HARRIGFELD: Were there protests filed on
9 this petition?

10 MR. ADAMS: Yes, there were. California
11 Sportfishing Alliance, California Department of Fish and
12 Gamed, and I think the Mokelumne River Association was
13 also tied in.

14 MS. HARRIGFELD: What was the basis of the
15 Department of Fish and Games' protest?

16 MR. ADAMS: Well, they opposed the District
17 application for extension of time until the District
18 installed fish screens at points where the Mokelumne River
19 was diverted into the District pumps along the river.

20 MS. HARRIGFELD: What was the District's reaction
21 to the filing of the protest by DFG?

22 MR. ADAMS: There were absolutely shocked,
23 because I do not recall the DFG ever communicating with
24 the District concerning the necessity of fish screens at
25 the point of diversion on the Mokelumne River prior to the

1 protest.

2 MS. HARRIGFELD: Prior to filing the protest, did
3 the Department of Fish and Game ever inspect the District
4 facilities?

5 MR. ADAMS: In my recollection between 1963 and
6 1972 the DFG officials upon their own investigation of the
7 facilities determined in one of their reports, it's NSJ
8 14, "...to date little information is available to
9 document the loss of juvenile salmonids on the diversion."

10 MS. HARRIGFELD: Could you please take a look at
11 North San Joaquin Exhibit number 114.

12 MR. ADAMS: Yes.

13 MS. HARRIGFELD: Could you tell me on page 146
14 what this plan says with respect to the North San Joaquin
15 Water District's pumping plant?

16 MR. ADAMS: Okay. It says, "North
17 San Joaquin Water Conservation District
18 operated the second largest diversion
19 downstream of the Camanche Dam with a
20 maximum entitlement of 20,000 acre feet
21 annually. To date, little information
22 is available to document the loss of
23 juvenile salmonids to this diversion.
24 The north pump is unscreened while the
25 south pump was screened by DFG in about

1 1959. In about 1972, after maintaining
2 the screen over the years, the DFG
3 determined there were few small Salmon
4 losses observed in this screen and
5 turned the facility over to North San
6 Joaquin for use as a debris screen.
7 Currently, the debris screen is in
8 disrepair and not used."

9 And this was on the Lower Mokelumne River
10 fisheries management plan which was issued November 1991
11 by DFG.

12 MS. HARRIGFELD: Why did the District consent to
13 the fish screen condition in the petition for extension of
14 time in 1992?

15 MR. ADAMS: Well, we were in a position where we
16 were short on time in order to continue to provide water
17 for our customers and the District was forced to install
18 fish screens or alternatively enter into an operating
19 agreement with DFG. And the District engineer, our
20 brilliant engineer James F. Sorensen communicated with
21 Ryan Broddrick of DFG and they would both agree that it
22 would be appropriate we could put in a temporary screen in
23 1993. And that was it, so we did.

24 MS. HARRIGFELD: Can you please take a look at
25 North San Joaquin Exhibit number 115.

1 MR. ADAMS: Yes.

2 MS. HARRIGFELD: Can you describe your
3 understanding as to when the District would reach a
4 permanent solution for fish screening with DFG?

5 MR. ADAMS: Yes. Well, due to the District's
6 financial condition, I would be restating some of what
7 Pete said.

8 MS. HARRIGFELD: That's fine.

9 MR. ADAMS: It borrowed 7 sheets of perforated
10 plate to cover the structures --

11 MS. HARRIGFELD: No, I'm sorry. You're looking
12 at the wrong exhibit.

13 MR. ADAMS: Oh, pardon me.

14 MS. HARRIGFELD: You're looking at Exhibit 115?

15 MR. ADAMS: Oh, pardon me.

16 MS. HARRIGFELD: Which is the letter from James
17 Sorensen.

18 MR. ADAMS: Oh, that was the Jim Sorensen letter.
19 Pardon me

20 MS. HARRIGFELD: From Jim Sorensen to Ryan
21 Broddrick.

22 MR. ADAMS: My understanding that Jim
23 communicated with Ryan Broddrick in a letter. "The
24 District would cooperate with DFG to attempt to reach a
25 permanent solution, after the resolution of the myriad

1 issues now before the State Water Resources Control
2 Board." And that was in his letter dated April 15th,
3 1993, which is Item 115.

4 MS. HARRIGFELD: Do you recall what issues were
5 to be resolved in the 1992 Mokelumne River hearings?

6 MR. ADAMS: Well, basically "...water entitlement
7 and fish screening responsibilities under the provisions
8 of the Fish and Game Code and the obligation of the
9 District, if any, to bear responsibility for the same."

10 MS. HARRIGFELD: Do you know if the Mokelumne
11 River hearings were ever resolved?

12 MR. ADAMS: No. It is important to note that
13 during my time as the District's attorney, I never
14 received anything from the State Water Board rendering a
15 decision as part of the 1992 Mokelumne River hearings.

16 MS. HARRIGFELD: Okay. I'd like to -- the next
17 exhibit is North San Joaquin Exhibit number 105. Are you
18 familiar with that exhibit?

19 MR. ADAMS: Hang on. Yes.

20 MS. HARRIGFELD: After Jim Sorensen gave his
21 report to the Board at this meeting, do you recall ever
22 hearing from the Department of Fish and Game about
23 installing permanent fish screens?

24 MR. ADAMS: No. Let's see --

25 MS. HARRIGFELD: Let's move --

1 MR. ADAMS: Let's se. Wait a minute. After
2 con -- "...after consultation the Board has determined no
3 fish screen would be needed after..." -- this was in our
4 part -- "...after June 15th of each year."

5 MS. HARRIGFELD: Now, did you trust Jim Sorensen
6 to communicate exclusively with the Department of Fish and
7 Game.

8 MR. ADAMS: Yes. He had a very warm relationship
9 with the members of the DFG and worked back and forth with
10 them. He was a brilliant engineer and they held him in
11 high regard. And as a consequence, he was the direct
12 liaison with DFG.

13 MR. HARRIGFELD: Now, I'd like to move on to the
14 District's application for time extension and the
15 requirement that DFG requested in the 1992 stipulated
16 agreement regarding bypass flows. What recollection do
17 you have regarding the inclusion of the bypass flow
18 requirement in the permit?

19 MR. ADAMS: Is this 23, permit 23?

20 MS. HARRIGFELD: Yeah, Term 23.

21 MR. ADAMS: I have that. My understanding was
22 that the purpose of the Mokelumne River hearings was to
23 evaluate both interim --

24 MS. HARRIGFELD: Actually, no, the question that
25 I was asking you was pertaining to in 1992 the District

1 entered into a stipulated agreement which added the
2 condition for permit Term 15 and it also added permit Term
3 23. And permit Term 23 dealt with the bypass flows.

4 MR. ADAMS: Yes.

5 MS. HARRIGFELD: What was your recollection
6 regarding the requirement to put the bypass flow condition
7 in?

8 MR. ADAMS: Well, it was, "No diversion shall be
9 made under this permit until agreement has been reached
10 between the permittee and the Fish and Game with respect
11 to the flows to be bypassed or failing such agreement
12 until a further order was entered by the State Water
13 Resources Control Board or its successor with respect to
14 those flows." That's the condition.

15 MS. HARRIGFELD: Okay. What was your
16 recollection concerning permit Term 23 as it related to
17 the Mokelumne River hearings that began in 1992?

18 MR. ADAMS: Well, it was the understanding --
19 that's what I was --

20 MS. HARRIGFELD: Would it help if I showed you a
21 copy of Exhibit 116 that describes the purposes for
22 which --

23 MR. ADAMS: Yes, it would. That's where we had
24 both of those things, and they either had to go to hearing
25 or they could appeal it.

1 MS. HARRIGFELD: Do you recall what the
2 District's position was in 1992 regarding the District's
3 water rights and decision -- and the Mokelumne River
4 hearings?

5 MR. ADAMS: Yeah. We were waiting for a response
6 from the District -- I mean, from the Board as to what a
7 resolution of our matter, but that's when they had
8 the -- when FERC came in with East Bay MUD and they
9 superceded having the decision on ours, they said we'll
10 let FERC handle it. FERC did it, made a decision and then
11 they had the Joint Settlement Agreement that said it was
12 basically resolved and that all the issues were taken care
13 of. So at that time, there was still never a closing
14 decision on our petition. And there's never been a
15 response that we received from the State Water Resources
16 Control Board on the matter.

17 MS. HARRIGFELD: Was it the District's position
18 that the 1992 Mokelumne River hearings on the District's
19 water right permit superceded or stayed the need to enter
20 into an agreement with the Department of Fish and Game on
21 bypass flows?

22 MR. ADAMS: That's what our understanding was,
23 yeah.

24 MS. HARRIGFELD: Could you please take a look at
25 North San Joaquin Exhibit number 108, which is the JSA and

1 also Exhibit number 131. Exhibit 131 is the State Water
2 Resources Control Board Decision in D-1641. I will be
3 referring to 1 page on it. I have copied out the single
4 page and was going to give it to you.

5 MR. ADAMS: Have you got that one, 108? I don't
6 have 108.

7 MS. HARRIGFELD: Well, I had copies here.

8 MR. ADAMS: Which one are you looking for, the
9 joint settlement?

10 MS. HARRIGFELD: No, we'll just -- I was going to
11 hand some to the State Board, but --

12 MR. ADAMS: Yeah, I don't have the JSA. It's in
13 my briefcase.

14 MS. HARRIGFELD: When the State Board entered its
15 order in 2000, adopting Decision 1641 in the settlement
16 agreement, what was the Board's understanding of the
17 affect of D-1641 in the JSA?

18 MS. MURRAY: Objection. Are you asking -- you're
19 asking the Board's understanding?

20 MS. HARRIGFELD: The Board of Directors.

21 MS. MURRAY: Okay, of the District.

22 MR. ADAMS: Shall I respond to that?

23 MS. HARRIGFELD: Yes.

24 MR. ADAMS: As set forth in that revised Water
25 Rights Decision, the result was, "The State Water

1 Resources Board finds that fish should be protected, but
2 consumptive uses nevertheless should be allowed to
3 continue at a reasonable level. Excessive releases for
4 fish some times could release..." -- "...and release the
5 water that is too farm for fish at other times. The State
6 Water Resources Control Board finds that it would not be
7 in the public interest to require more water from the
8 Mokelumne River system than would be provided under the
9 JSA. Additional releases could exacerbate the shortages
10 experienced by North San Joaquin. Further, any
11 requirement imposed by the State Water Resources Control
12 Board could be added to the JSA flows when the JSA flows
13 are lower, but flows may not be subtracted from the JSA
14 when the flows are higher than the alternatives."

15 MS. HARRIGFELD: Thank you. That is all the
16 questions.

17 MR. ADAMS: That's it?

18 MS. HARRIGFELD: Yes, thank you.

19 Actually, I have 2 more questions for you.

20 When the Department of Fish and Game protested
21 the District's application for time extension, unless the
22 District reached an agreement with the Department of Fish
23 and Game regarding bypass flows or alternatively until the
24 State Board entered an order regarding those flows, what
25 was your recollection regarding this permit term?

1 MR. ADAMS: Well, my recollection was that we
2 could go ahead and proceed and they found no objection
3 whatsoever, because they saw no fish loss on this
4 transaction. I mean, when we withdraw from the water and
5 everything laid in limbo. And if they did have a problem,
6 all they had -- under the authority of the provisions,
7 they could petition to the State Board to have a hearing
8 and defer us from taking any further action. And over
9 that entire period of time, we never had one. They took
10 no action, because they were clearly aware as was
11 evidenced in their reports and statements that there was
12 no fish loss because the water level was higher. It was
13 warm. Fish weren't in there, so there was a non-issue.

14 MS. HARRIGFELD: What is your -- I'd like to show
15 you North San Joaquin Exhibit number 116. What was your
16 recollection concerning permit Term 23 as it related to
17 the Mokelumne River hearings? Did the Mokelumne River
18 hearings intend to address interim and long-term actions
19 regarding stream flow temperature, minimum flow and fish
20 screens?

21 MS. MURRAY: Objection. "Did The Mokelumne River
22 hearings intend..."? They did what they did. It's a
23 public record. I object as vague and ambiguous.

24 BOARD MEMBER BAGGETT: I'd sustain. Can you
25 phrase.

1 MS. HARRIGFELD: Certainly. Could you turn your
2 attention to North San Joaquin 116. On page 1 there is
3 Key Issues 1 and 2.

4 MR. ADAMS: 115?

5 MS. HARRIGFELD: No, 116. And on page 2 of that
6 document it talks about Key Issues 3 and 4. Could you
7 tell me what key issue number 4 states?

8 MR. ADAMS: Now, at the top in the subject of the
9 hearing -- well, that was the question there right here.

10 MS. HARRIGFELD: Yes.

11 MR. ADAMS: What interim and long-term actions
12 should the State Board take regarding stream flow,
13 temperature, minimum flow, fish screens, water quality --

14 MS. HARRIGFELD: You know what, I'm sorry, I
15 forgot to make that correction. I noticed in the 116
16 there were odd -- even pages missing.

17 BOARD MEMBER BAGGETT: There are. You are
18 correct.

19 MS. HARRIGFELD: So that was -- I forgot that I
20 made copies.

21 BOARD MEMBER BAGGETT: Yes, there are only 2 key
22 issues.

23 MR. ADAMS: Okay. You want me to repeat? One of
24 the key issues is setup --

25 STAFF COUNSEL BULLOCK: Sorry to interrupt. Can

1 the prosecution get a copy as well? Can the prosecution
2 team get a copy. Now, if you only have one for the board
3 member that's fine, we can make due, but if there's an
4 extra added okay.

5 MR. ADAMS: Okay. That recites in the notice
6 hearing, key issues. The one we're looking at is
7 subsection 4. "What interim and long-term action should
8 the State Water Board take regarding stream flow,
9 temperatures, minimum pools, fish screens, water quality,
10 the operation to Camanche and Pardee Reservoirs or other
11 measures to protect fish and other public trust uses and
12 resources in the Camanche and Pardee Reservoirs and in the
13 Lower Mokelumne River?"

14 MS. HARRIGFELD: Was it your understanding that
15 the purpose of the Mokelumne River hearings was to
16 evaluate the interim and long-term measures and determine
17 whether additional conditions were required in the Water
18 Right permits of East Bay MUD, Woodbridge and North San
19 Joaquin?

20 MR. ADAMS: That's correct.

21 MS. HARRIGFELD: Thank you. I'd like to move on
22 to Mr. Steffani.

23 Ed, could you please state your name for the
24 record?

25 MR. STEFFANI: Ed Steffani.

1 MS. HARRIGFELD: Could you please take a look at
2 North San Joaquin Exhibit 100?

3 MR. STEFFANI: Yes.

4 MS. HARRIGFELD: Is that a true and correct copy
5 of your written testimony to the best of your knowledge?

6 MR. STEFFANI: Yes.

7 MS. HARRIGFELD: Are there any corrections that
8 you would like to make to your testimony at this time?

9 MR. STEFFANI: No.

10 MS. HARRIGFELD: Contained in your written
11 testimony are a number of exhibits, 104, 105, 106, 107,
12 108, 109, 110, 111, 112 and 113. Did you utilize those in
13 preparing your written testimony?

14 MR. STEFFANI: Yes.

15 MS. HARRIGFELD: What is your position at North
16 San Joaquin.

17 MR. STEFFANI: I'm the manager.

18 MS. HARRIGFELD: How long have you been employed?

19 MR. STEFFANI: Since '99.

20 MS. HARRIGFELD: Could you turn to Exhibit 104?

21 MR. STEFFANI: Yes.

22 MS. HARRIGFELD: Is this the District's water
23 right permit?

24 MR. STEFFANI: Yes.

25 MS. HARRIGFELD: Could you please describe for me

1 what permit Term 15 states?

2 MR. STEFFANI: Do you want me to read it?

3 MS. HARRIGFELD: Yes.

4 MR. STEFFANI: "No water shall be diverted under
5 this permit during the '92 or subsequent water years until
6 the permittee has constructed screening facilities
7 adequate to protect fish life and/or has entered into an
8 operating agreement with the Department of Fish and Game
9 that will protect fish life."

10 Do you want more?

11 MS. HARRIGFELD: Yeah, read the third paragraph.

12 MR. STEFFANI: "In the event the permittee and
13 the Department of Fish and Game cannot reach agreement
14 with respect to this condition, either party may petition
15 the State Water Resources Control Board to hold a hearing
16 to determine the appropriate conditions."

17 BOARD MEMBER HOPPIN: Ms. Harrigfeld, why are you
18 consistently leaving out the second paragraph?

19 MS. HARRIGFELD: Oh, just for brevity. If you --

20 BOARD MEMBER HOPPIN: Why don't you read it that
21 though.

22 MS. HARRIGFELD: Okay. You can read the second
23 paragraph.

24 MR. STEFFANI: "If fish screens are constructed
25 to meet the requirements of this permit condition, the

1 Department of Fish and Game shall review the construction
2 plans and determine whether the facilities are adequate to
3 protect fish life. The Department of Fish and Game shall
4 notify the Division of Water Rights of its approval of the
5 plans in writing. Construction, operation and maintenance
6 costs of any required facilities are the responsibility of
7 the permittee."

8 MS. HARRIGFELD: In preparing for your written
9 testimony, did you review the records of the District?

10 MR. STEFFANI: Yes.

11 MS. HARRIGFELD: Did the District file a petition
12 for extension of time in 1991 to put the water to
13 beneficial use in Permit 10477?

14 MR. STEFFANI: Yes.

15 MS. HARRIGFELD: Did the Department of Fish and
16 Game file a protest to this time extension?

17 MR. STEFFANI: Yes.

18 MS. HARRIGFELD: What were the conditions that
19 DFG wanted to dismiss their protests?

20 MR. STEFFANI: Because Fish and Game wanted fish
21 screens.

22 MS. HARRIGFELD: Anything else?

23 MR. STEFFANI: Well, either install the fish
24 screens or enter into an agreement addressing the needs
25 for fish.

1 MS. HARRIGFELD: Did the District agree to
2 install the fish screens?

3 MR. STEFFANI: Yes.

4 MS. HARRIGFELD: Well, I'm -- let me rephrase
5 that question. Did the District agree to that condition
6 as part of settlement of the protest in the -- for the
7 1991 petition for extension of time?

8 MR. STEFFANI: Yes.

9 MS. HARRIGFELD: Could you take a look at Exhibit
10 number 105.

11 MR. STEFFANI: Yes.

12 MS. HARRIGFELD: Who is James Sorensen?

13 MR. STEFFANI: Jim Sorensen was the District
14 engineer for many years.

15 MS. HARRIGFELD: What did he report at the March
16 10th 1993 meeting?

17 MR. STEFFANI: Mr. Sorensen advised that after
18 consultation with representatives of the Department, it
19 was determined that no fish screens would be needed after
20 June 15 of each year. He further stated that the
21 Department was in a transitional period and that perhaps
22 Jerry Mensch, the leading proponent of fish screens may be
23 transferred. He was informed that Roger Ganaye previously
24 with the Department and the representative who inspected
25 the sites at the District pumps has left the Department

1 and is now in the employ of the U.S. Fish and Wildlife
2 Service.

3 You want me to keep going?

4 MS. HARRIGFELD: What did the District authorize
5 Mr. Sorensen and Mr. Adams to do? Did they --

6 MR. STEFFANI: They were authorized to negotiate
7 and execute on behalf of the District an interim agreement
8 with the Department of Fish and Game to enable the
9 District to secure water deliveries during this calendar
10 year, keeping in mind that at this late date resort to the
11 State Water Resources Control Board for a further hearing
12 would be costly to the District and too late to render a
13 timely decision for the District to properly make water
14 deliveries.

15 MS. HARRIGFELD: Could you take a look at North
16 San Joaquin Exhibit number 106.

17 MR. STEFFANI: I have it.

18 MS. HARRIGFELD: What are these letters? Are
19 these letters from the Department of Fish and Game to and
20 Friday Jim Sorensen?

21 MR. STEFFANI: Well, the April 8th is from Ryan
22 Brodrick to the Water District.

23 MS. HARRIGFELD: And the April 15th letter from
24 Jim Sorensen is that to Ryan Brodrick?

25 MR. STEFFANI: That is to Ryan Brodrick.

1 MS. HARRIGFELD: Could you tell me at the bottom
2 of the page of the April 15th letter, could you tell me
3 what the District is proposing with respect to a permanent
4 solution on the fish screen and fish issues?

5 MS. MURRAY: Could you repeat the question. It
6 was vague for me. I'm not -- I don't understand.

7 MS. HARRIGFELD: Certainly. Could you look at
8 the April 15th 1993 letter. What does that letter state
9 with respect to a permanent solution regarding fishery
10 issues?

11 MS. MURRAY: I object. It's speculative. The
12 letter says what it is, permanent, interim -- I mean,
13 whatever -- we're hearing interim. We're hearing
14 permanent. She's asking for an interpretation of this
15 letter.

16 BOARD MEMBER BAGGETT: Could you just rephrase
17 it. I think I know where you're going now.

18 MS. MURRAY: What does the letter say?

19 MS. HARRIGFELD: What does the letter say?

20 MR. STEFFANI: I will read the -- at
21 the beginning of -- at the last
22 paragraph on the first page, "The
23 District will cooperate with the
24 Department of Fish and Game to attempt
25 to reach a permanent solution to

1 adequately protect fish life after the
2 resolution of the myriad of issues now
3 before the State Water Resources Control
4 Board in the Mokelumne River hearings,
5 including, but not limited, to water
6 entitlements of this district, fish
7 screening and responsibilities under the
8 provisions of the Fish and Game Code and
9 the obligation of the District, if any,
10 to bear financial responsibility for
11 same. If the foregoing properly
12 memorializes our understanding, please
13 acknowledge approval and acceptance on a
14 copy of this transmission and return."

15 This was from Jim Sorensen to Ryan Broddrick and
16 Ryan Broddrick did sign it and sent it back dated April
17 19th.

18 MS. HARRIGFELD: So was it your understanding
19 that this agreement constituted the agreement required --

20 MR. STEFFANI: Exactly, yes.

21 MS. HARRIGFELD: -- under permit Term 15.

22 Thank you.

23 After the fish screens were removed in 1993, did
24 the District have any further communication with the
25 Department of Fish and Game?

1 MR. STEFFANI: No.

2 MS. HARRIGFELD: How many years passed before the
3 District heard again from the Department of Fish and Game
4 concerning the fish screens?

5 MR. STEFFANI: Well, I don't know if the District
6 heard from Fish and Game between '93 and '99. I did not
7 hear from them Fish and Game starting from '99.

8 MS. HARRIGFELD: So Fish and Game never contacted
9 you regarding the need for a fish screen --

10 MR. STEFFANI: No.

11 MS. HARRIGFELD: -- or that the operating
12 agreement was not in place?

13 MR. STEFFANI: No. My only contact with Fish and
14 Game was I believe in 2001 when we had to install a diesel
15 powered pump because our old pump wasn't working and I had
16 to get a stream alteration permit. So I met with the Fish
17 and Game people who came out and blessed what we were
18 doing and gave us the go ahead, but that's the only time I
19 saw anyone.

20 MS. HARRIGFELD: Now, I'd like to move to the
21 issue of bypass flows. What was the District's
22 understanding regarding the purpose of the Mokelumne River
23 hearings if you'd like to refer to that NSJ-116.

24 MR. STEFFANI: Is it 106?

25 MS. HARRIGFELD: 116 which is the notice of

1 public hearing.

2 MR. STEFFANI: 116.

3 MS. MURRAY: Objection, asked and answered. Is
4 she going to ask this of every witness. The same question
5 has been asked and answered at least by 2 other witnesses.
6 Do we need to go through this one more time with every
7 witness?

8 MS. HARRIGFELD: Was it your understanding
9 that --

10 BOARD MEMBER BAGGETT: Continue.

11 MS. HARRIGFELD: -- additional -- I was going to
12 rephrase just to --

13 MS. MURRAY: Okay.

14 MS. HARRIGFELD: Was it your understanding that
15 additional conditions may be imposed on East Bay MUD,
16 Woodbridge and the District's water right permits as a
17 result of the 1992 hearings?

18 MR. STEFFANI: Yes.

19 MS. HARRIGFELD: What is your understanding
20 regarding the Mokelumne River hearings and the necessity
21 of entering into an agreement with DFG concerning the
22 bypass flows?

23 MR. STEFFANI: Well, it was my understanding --
24 it was and is still my understanding that the bypass flow
25 issue was put to bed with the JSA that resulted from the

1 Mokelumne hearings.

2 MS. HARRIGFELD: Were the Mokelumne River
3 hearings -- was a key issue identified what fish flows
4 were needed in the Mokelumne River?

5 MR. STEFFANI: Yes.

6 MS. HARRIGFELD: How long did the district wait
7 for a decision on the Mokelumne River hearings.

8 MR. STEFFANI: We're still waiting.

9 MS. HARRIGFELD: Could you please take a look at
10 North San Joaquin Exhibit 108, 109 and 110.

11 MR. STEFFANI: Okay. I have 108. I can't look at
12 of them at once.

13 MS. HARRIGFELD: 108 is the JSA?

14 MR. STEFFANI: Yes.

15 MS. HARRIGFELD: Could you pull out 109 and 110.

16 MR. STEFFANI: Yes.

17 MS. HARRIGFELD: What is Exhibit 109?

18 MR. STEFFANI: It's a State Water Resources Board
19 notice entitled, Final Action Regarding the Lower
20 Mokelumne River Hearing East Bay MUD Water Right
21 Applications, blah, blah, blah, blah, blah. The primary
22 purpose of the hearing was to determine what action should
23 be taken by the State Board to protect fish resources of
24 the Lower Mokelumne River.

25 MS. HARRIGFELD: Does this letter describe the

1 process between 1992 and the D-1641 what the intention of
2 the State Board is, in particular can you look at
3 paragraph 3?

4 MR. STEFFANI: Yes.

5 MS. HARRIGFELD: Did the State Board in order to
6 avoid a duplication of efforts, did they effectively stay
7 the 1992 proceedings in an effort to let the FERC process
8 go forward?

9 MR. STEFFANI: Yes.

10 MS. MURRAY: Excuse me, that calls for a
11 conclusion, "Did they effectively stay..."

12 MS. HARRIGFELD: Okay. Could you read for me --

13 BOARD MEMBER BAGGETT: Sustained. Rephrase.

14 MS. HARRIGFELD: Could you read the last sentence
15 in the third paragraph?

16 MR. STEFFANI: "In order..."? Starting with, "In
17 order..."?

18 MS. HARRIGFELD: Yes, "In order..."

19 MR. STEFFANI: "In order to avoid a duplication
20 of the efforts, the State Board held its hearing in
21 abeyance until after the FERC process was completed."

22 MS. HARRIGFELD: And what does this letter say
23 with respect to Decision 1641 and the resolution of the
24 1992 hearings?

25 MR. STEFFANI: Give me a hint, where is it?

1 MS. HARRIGFELD: The second to last paragraph.

2 MR. STEFFANI: "If you believe that an issue
3 considered...?"

4 MS. HARRIGFELD: No. "The State Water Resources
5 Control Board..."

6 MR. STEFFANI: "The State Board believes that the
7 issues considered by the State Board during the lower
8 Mokelumne River hearing have been resolved. The State
9 Board does not intend to take any further action on these
10 issues unless the parties identify issues considered
11 during the hearing that are not resolved."

12 MS. HARRIGFELD: Now turning to North San Joaquin
13 Exhibit 110.

14 MR. STEFFANI: Yes.

15 MS. HARRIGFELD: This is a letter from the State
16 Water Resources Control Board regarding the final action
17 on the lower Mokelumne River hearing?

18 MR. STEFFANI: Yes.

19 MS. HARRIGFELD: Could you indicate to -- could
20 you please read for us the third paragraph regarding fish
21 and wildlife and Department of Fish and Game, that begins
22 with.

23 MR. STEFFANI: Yes. "The Fish and Wild Life and
24 Fish and Game reviewed the fisheries habitat restoration
25 and enhancement measures proposed by East Bay MUD and

1 Woodbridge. Both agencies determined that these non-flow
2 measures, along with the flows specified in the JSA, are
3 adequate to protect the public trust resources. In
4 addition, the U.S. Bureau has undertaken significant
5 fisheries enhancement measures at the Woodbridge diversion
6 dam. I believe that the actions currently being taken to
7 protect the public trust resources are appropriate and
8 that no further action need be taken at this time."

9 MS. HARRIGFELD: So is it your understanding with
10 implementation of the JSA flows in Decision 1641 that the
11 public trust resources were taken care of?

12 MR. STEFFANI: Yes.

13 MS. HARRIGFELD: Is it your understanding that
14 Decision 1641 is a subsequent order of the Board?

15 MR. STEFFANI: Yes.

16 MS. HARRIGFELD: I'd like to move now to some of
17 the issues raised in the ACL. The District is proposed to
18 be fined \$66,400 in violation of permit terms -- oh. Do
19 you know how this fine was calculated?

20 MR. STEFFANI: I heard how the State board people
21 described it earlier today.

22 MS. HARRIGFELD: Based on your review of the
23 District files, including all of your communication with
24 the Department of Fish and Game, is there any evidence of
25 fish kills as a result of the surface water pumps?

1 MR. STEFFANI: There is absolutely no evidence of
2 fish kill at the pumps.

3 MS. HARRIGFELD: Is there any evidence of
4 Steelhead or Salmon in the District channels?

5 MR. STEFFANI: There is no evidence of Steelhead
6 or Salmon in the District channels.

7 MS. HARRIGFELD: What is your opinion regarding
8 the allegation that we violated permit Term 15?

9 MR. STEFFANI: Well, I -- based on what I've seen
10 in the file -- since I wasn't there in '93, based on what
11 I see in the files, the District did have an agreement
12 with Fish and Game. No question about it.

13 MS. HARRIGFELD: What is your basis that the
14 District entered into the operating agreement with the
15 Department of Fish and Game?

16 MR. STEFFANI: What is the basis for my saying
17 that?

18 MS. HARRIGFELD: Yeah. Is that the April 15th,
19 1993 letter?

20 MR. STEFFANI: Yeah. The April from Sorensen to
21 Broddrick and Broddrick back to -- what was that, April
22 something?

23 STAFF COUNSEL BULLOCK: Objection. Mr. Steffani
24 is referencing NSJ-15 as the basis for his opinion. He
25 never referenced NSJ-15 in his written testimony, so it's

1 outside the scope of his written testimony.

2 MS. HARRIGFELD: No, we were referring to --

3 MR. ADAMS: Could he step to the --

4 BOARD MEMBER BAGGETT: Yeah, if you could come to
5 the mike, I'm having trouble hearing you over there too.

6 STAFF COUNSEL BULLOCK: Mr. Steffani referenced
7 NSJ-15 -- sorry 115 as a basis for his understanding.
8 NSJ-115 is not referenced anywhere in his written
9 testimony and is therefore outside the scope of his
10 written testimony and he should not be allowed to base his
11 interpretation on that at this point, considering it's
12 again outside the scope of his written testimony.

13 MS. HARRIGFELD: Well, if you turn to --

14 STAFF COUNSEL BULLOCK: I also note that Ms.
15 Harrigfeld when she was going through with him what his
16 opinion was based on, listed all of the documents in their
17 exhibits which his opinion was based on and she did not
18 mention 115.

19 MS. HARRIGFELD: Well, I was asking him with
20 respect to NSJ-106.

21 STAFF COUNSEL BULLOCK: But you also referred
22 though to the letter back, which is I believe 115.

23 MS. HARRIGFELD: Well, no, if you'd look at 106,
24 it's also contained in 106.

25 BOARD MEMBER BAGGETT: 106 does contain all 3

1 letters.

2 MS. HARRIGFELD: Yes.

3 MR. STEFFANI: Yes, it was April 15 in Exhibit
4 106.

5 BOARD MEMBER BAGGETT: And I would overrule,
6 because I mean you could bring it back in in rebuttal,
7 redirect. And I know you will, so let's just save some
8 time. And the letter is in evidence. There's no dispute
9 about that, by both parties, probably by a third party
10 before we're done.

11 So proceed.

12 MS. HARRIGFELD: So during your tenure with the
13 District, has the Department of Fish and Game ever
14 approached you regarding the need for a fish screen on the
15 existing facilities?

16 MR. STEFFANI: No.

17 MS. HARRIGFELD: Did they contact you in 2007
18 regarding fish screens?

19 MR. STEFFANI: The first I was aware of a problem
20 was the cease and desist, November 30th of 2006, a big
21 surprise, a big shock.

22 MS. HARRIGFELD: In your review of the District
23 records from 1993 to present, were you aware of any
24 contact with from the Department of Fish and Game? You
25 indicated previously in your testimony that they had not

1 contacted you since 1999, but from a review of the
2 District records, did you find any information in the
3 District records that the Department of Fish and Game
4 contacted the District regarding fish screens, to the best
5 of your recollection?

6 MR. STEFFANI: I don't think so. No. No. I'm
7 not aware of any.

8 I am getting older and I don't remember
9 everything, but I think I would have remembered Fish and
10 Game.

11 MS. HARRIGFELD: Turning back to NSJ-131, which
12 is Decision 1641, what did you believe -- why did you
13 believe that the fishery concerns were addressed in
14 Decision 1641?

15 MS. MURRAY: Can I just ask -- she estimated the
16 time of direct testimony at 30 minutes. We're well past
17 that -- for a time check on how much longer we're going to
18 go over these questions again and again?

19 BOARD MEMBER BAGGETT: Is that an objection?

20 MS. MURRAY: Time check. How much longer do you
21 anticipate your direct testimony to take?

22 MS. HARRIGFELD: Probably 10 minutes. In the
23 notice of intent we have an hour plus, so I was trying --

24 BOARD MEMBER BAGGETT: You're well within your
25 time. Continue.

1 MS. HARRIGFELD: Could I just have a minute, I
2 lost my place?

3 BOARD MEMBER BAGGETT: Please. Go off the
4 record.

5 (Thereupon a recess was taken.)

6 BOARD MEMBER BAGGETT: Continue.

7 MS. HARRIGFELD: Mr. Steffani, I'd like to turn
8 to North San Joaquin Exhibits 112 and 113. Exhibit number
9 112, is this the -- did a report regarding the financial
10 condition of the District --

11 MR. STEFFANI: Yes.

12 MS. HARRIGFELD: What does the budget report
13 indicate how much revenues are available to the District?

14 MR. STEFFANI: \$237,500 was the amount budgeted
15 last year and we spent 287.

16 MS. HARRIGFELD: Since your assumption of the
17 role as General Manager, have you been in the practice of
18 developing budgets?

19 MR. STEFFANI: Yes.

20 MS. HARRIGFELD: Do revenues to the District
21 depend on water availability and water sales?

22 MR. STEFFANI: Yes.

23 MS. HARRIGFELD: In taking a look at the
24 financial statement, does the District have substantial
25 assets?

1 MR. STEFFANI: No.

2 MS. HARRIGFELD: In your opinion, why is the
3 large penalty proposed by -- or proposed in the ACL
4 unfair?

5 MR. STEFFANI: Do you really want to get me
6 started?

7 Well, first of all, it's about a third of our
8 normal operating budget. We're a small district. And you
9 don't have to look around very far to notice that this
10 doesn't seem to be fair. We've got the State and federal
11 pumps that are killing fish everyday. Everybody in the
12 world knows it. We shut them down for awhile, but we've
13 started them up again. The fish kills are documented, but
14 there are no fines. We have no documented fish kills and
15 we're fined. And we're fined for doing something that we
16 thought was acceptable was agreed upon with Fish and Game.
17 It just seems awfully heavy handed by the State to come
18 after this district that thought it was doing the right
19 thing.

20 MS. HARRIGFELD: What do you request that the
21 State Board do with respect to the ACL?

22 MR. STEFFANI: It would be wonderful if we could
23 use that money to do some productive things, like help pay
24 for the fish screens that we are agreeing to install.

25 MS. HARRIGFELD: Thank you.

1 All right. I'd like to turn to Mr. Weybret.

2 Could you please state your name for the record?

3 MR. WEYBRET: Fred Weybret.

4 MS. HARRIGFELD: I'm sorry, Fred. I've
5 mispronounced your name twice today.

6 MR. WEYBRET: Fred Weybret.

7 MS. HARRIGFELD: Could you take a look at Exhibit
8 NSJ-102?

9 MR. WEYBRET: Yes.

10 MS. HARRIGFELD: Are there any corrections that
11 you wish to make to this testimony, in particular there
12 were -- there was a blank on page 2.

13 MR. WEYBRET: Yeah. And my testimony included
14 reference to NS Exhibits 112 and 113, which were the
15 District financial items. And that was what we left out.

16 MS. HARRIGFELD: Great. Is this a true and
17 correct copy of your testimony to the best of your
18 knowledge.

19 MR. WEYBRET: Yes, it is.

20 MS. HARRIGFELD: What is your relationship to
21 North San Joaquin?

22 MR. WEYBRET: I'm the president of the District
23 now.

24 MS. HARRIGFELD: How long have you been on the
25 Board?

1 MR. WEYBRET: Thirty-one years.

2 MS. HARRIGFELD: I'm going to focus the questions
3 for you on the financial condition of the District. What
4 was your reaction when you learned that the State Board
5 wanted to impose a \$66,400 penalty against the District
6 for violating permit conditions?

7 MR. WEYBRET: Well, I was just like Ed, I was
8 pretty shocked. Not only was I shocked at the amount, but
9 I was shocked at the fact, because we had no indication
10 whatsoever from any agency that we were doing anything
11 improper. We'd never heard from the State Board. We'd
12 never heard from Fish and Game. And we thought we were
13 operating properly.

14 And I was also surprised, I should say, that they
15 issued these 2 orders without ever contacting us to ask
16 for our input. You know, usually if you are going to do a
17 story in the newspaper, we ask our reporters to talk to
18 both sides. And it surprised me very much that they
19 issued these orders without -- they weren't asking for any
20 comment or any information from us.

21 MS. HARRIGFELD: From the Board?

22 MR. WEYBRET: From North San Joaquin. They just
23 did it in a vacuum from their own information, but without
24 any input from us.

25 MS. HARRIGFELD: Can you look at North San

1 Joaquin Exhibit 112 and 113, what is the status of the
2 District's financial condition?

3 MR. WEYBRET: The status of our financial
4 condition?

5 MS. HARRIGFELD: Yes.

6 MR. WEYBRET: Well, right now we're under
7 deficit. We had to borrow from last year's budget. We
8 had to borrow \$25,000 from the County against this year's
9 taxes. Last year was a particularly disastrous area for
10 us on maintenance and repair. We spent over \$80,000
11 trying to keep that old thing from -- in running, so we
12 could deliver what we were able to deliver. So we're --
13 this year our tax revenue, which will be significantly the
14 same is going to be impacted by the \$25,000 that we had to
15 get an advance from the County to keep going last year.

16 MS. HARRIGFELD: How would a penalty of this size
17 affect the District?

18 MR. WEYBRET: I'm sorry I didn't understand it?

19 MS. HARRIGFELD: How would a penalty as proposed
20 in the ACL affect the District?

21 MR. WEYBRET: Well, it's going to have a
22 significant negative impact on our ability to do our job.
23 I guess you could best describe the bottom line as it's
24 going to be \$66,000 worth of water that's going to go out
25 to Golden Gate that we would otherwise be able to put

1 into the eastern San Joaquin groundwater basin.

2 MS. HARRIGFELD: Great. Thank you. That's it.

3 BOARD MEMBER BAGGETT: Cross examination?

4 STAFF COUNSEL BULLOCK: Could I ask for a short
5 break, 5 minutes tops?

6 BOARD MEMBER BAGGETT: Yeah. Let's take a break
7 until quarter till.

8 STAFF COUNSEL BULLOCK: Thank you.

9 (Thereupon a recess was taken.)

10 BOARD MEMBER BAGGETT: Okay. Let's have cross
11 examination of North San Joaquin's witnesses.

12 Okay, proceed.

13 STAFF COUNSEL BULLOCK: Should we wait for their
14 conversation?

15 BOARD MEMBER BAGGETT: No I don't think that they
16 can hear some of what we're --

17 CROSS EXAMINATION

18 OF MR. STEWART ADAMS, MR. EDWARD STEFFANI,

19 MR. CONRAD WEINZHEIMER AND MR. FRED WEYBRET

20 BY MR. MATTHEW BULLOCK, STAFF COUNSEL, representing the
21 State Water Board prosecution team:

22 Mr. Steffani. Were you at the inspection when
23 Mr. Marquez and Mr. Satkowski went out and took a look at
24 your facilities?

25 MR. STEFFANI: I was at the meeting at our office

1 and I went out in the field for only a portion of the
2 inspection. And then Mr. I Weinzheimer went with them the
3 rest of the way.

4 STAFF COUNSEL BULLOCK: Okay. And so one of the
5 other of you were there when Mr. Marquez discussed the
6 terms in your permit?

7 MR. STEFFANI: What other?

8 STAFF COUNSEL BULLOCK: Discussed the terms --
9 went through your permit and discussed the terms?

10 MR. STEFFANI: I don't remember that. What I
11 remember is --

12 STAFF COUNSEL BULLOCK: You are familiar with the
13 terms in your permit, let's just go with that how about?

14 MR. STEFFANI: Yes.

15 STAFF COUNSEL BULLOCK: Okay.

16 MR. STEFFANI: But they came down. They wanted
17 to know where our facilities were, wanted to know where
18 Camanche Dam was.

19 STAFF COUNSEL BULLOCK: You've answered the
20 questions. I appreciate it. Thank you.

21 You're also familiar then with the fact that both
22 Terms 15 and 23 require you to -- state right up front on
23 each of them that not water shall be diverted unless
24 you're in compliance? You're familiar with that language
25 in the permit?

1 MR. STEFFANI: Yes.

2 STAFF COUNSEL BULLOCK: We talked a little
3 earlier about NSJ-115, which was the letter back -- the
4 letters back and forth between Mr. Sorensen and Mr.
5 Broddrick.

6 MR. STEFFANI: Yes.

7 STAFF COUNSEL BULLOCK: Could you just clarify
8 when was that supposedly signed by Fish and Game, the fax
9 back? What's the date on that?

10 MR. STEFFANI: April 19th of '93.

11 STAFF COUNSEL BULLOCK: Could you look at North
12 San Joaquin's Exhibit 107, which discusses the requirement
13 to have the temporary fish screens. Let me know when
14 you're there.

15 MR. STEFFANI: Yes. I see 107.

16 STAFF COUNSEL BULLOCK: That's an agreement
17 regarding fish screens that fish screens need to be put in
18 place, correct?

19 MS. HARRIGFELD: I'm sorry, NSJ-107 is streambed
20 alteration permit?

21 STAFF COUNSEL BULLOCK: Yes. Are you there?

22 MR. STEFFANI: It's very difficult to read.

23 STAFF COUNSEL BULLOCK: If it's unclear, you can
24 borrow my copy if that would be helpful. This one is
25 pretty clear.

1 MR. STEFFANI: All right. Yours isn't much
2 better.

3 STAFF COUNSEL BULLOCK: The next page actually is
4 what we're going to talk about.

5 MR. STEFFANI: Yeah, I can read mine.

6 STAFF COUNSEL BULLOCK: Thanks. So this an
7 agreement between the District and Fish and Game; is that
8 correct?

9 MR. STEFFANI: Yes.

10 STAFF COUNSEL BULLOCK: And it's requiring fish
11 screens to be put in?

12 MR. STEFFANI: Yes.

13 STAFF COUNSEL BULLOCK: When was this signed?

14 MR. STEFFANI: April 30th, '93.

15 STAFF COUNSEL BULLOCK: When does that compare to
16 the letter referenced in where we were just talking about
17 North San Joaquin 115?

18 MR. STEFFANI: Yeah. It's 2 weeks later.

19 STAFF COUNSEL BULLOCK: Two weeks later. Okay,
20 thank you.

21 MR. STEFFANI: But it's a different matter.

22 STAFF COUNSEL BULLOCK: Has the District
23 installed fish screens at any time since 1993?

24 MR. STEFFANI: No.

25 STAFF COUNSEL BULLOCK: Has the District reached

1 an agreement with Fish and Game on bypass flows since
2 resolution of the Mokelumne River hearing?

3 MR. STEFFANI: We believe there is an agreement
4 in place and that is the JSA.

5 STAFF COUNSEL BULLOCK: There have not been any
6 discussions though since, I guess, 2000 when the Mokelumne
7 River hearings were closed; is that correct?

8 MR. STEFFANI: We have heard nothing from Fish
9 and Game with respect to bypass flows.

10 STAFF COUNSEL BULLOCK: Okay. I'd like you to
11 take a look at paragraphs 5 and 6 of your testimony. I
12 read those paragraphs to mean that you determined fish
13 screens were not necessary based on 2 things: Mr.
14 Sorensen's report to the Board and 14 years of silence by
15 DFG. Is that a correct reading of your testimony?

16 MR. STEFFANI: You're in number 5 of my written
17 testimony?

18 STAFF COUNSEL BULLOCK: Yes, paragraphs 5 and 6.
19 It kind of spills over.

20 MR. STEFFANI: Okay. I've read number 5. Yeah,
21 that's -- we've been talking about that. Number 6 after
22 fish screens were removed no further communication was
23 made. District believed that it had entered into an
24 operating agreement with Fish and Game based upon
25 Sorensen's report and the 14-year silence from Fish and

1 Game on the issue of fish screens.

2 STAFF COUNSEL BULLOCK: So is it your testimony
3 that Fish and Game's silence for 14 years validates
4 neglecting the permit terms for those same 14 years?

5 MR. STEFFANI: It validates that we had an
6 agreement.

7 STAFF COUNSEL BULLOCK: Their failure to enforce
8 it validates a violation?

9 MR. STEFFANI: No, that we had an agreement where
10 there weren't any fish screens required. And hearing
11 nothing from them validated our belief that we had an
12 agreement that fish screens were not required.

13 STAFF COUNSEL BULLOCK: Whose responsibility do
14 you feel it is to ensure that the District is in
15 compliance with its permit, you or Fish and Game?

16 Take your time to consider it if you'd like.

17 MR. STEFFANI: Who's responsible?

18 STAFF COUNSEL BULLOCK: Who's responsible for
19 being in compliance with your permit, is it your
20 responsibility or is it Fish and Game's responsibility to
21 make sure that you're in compliance?

22 MR. STEFFANI: Well, we believed we were in
23 compliance, and --

24 STAFF COUNSEL BULLOCK: That's not the question.
25 My question was whose responsibility is it?

1 MR. STEFFANI: It's both of our responsibilities.

2 STAFF COUNSEL BULLOCK: It's Fish and Game's
3 responsibility to make sure that you follow the law?

4 MR. STEFFANI: I guess so, yeah.

5 STAFF COUNSEL BULLOCK: Is it more your
6 responsibility or their responsibility, let's put it that
7 way?

8 MR. STEFFANI: Oh, man. Look, if we didn't
9 believe we had an agreement, that's a completely different
10 story. But it's very clear from the exhibits and the
11 letters, et cetera that there was an agreement. As far as
12 we were concerned that was the end of it. Why go beyond
13 that? Are you saying we should call Fish and Game every
14 month and say hey, are you still in agreement?

15 STAFF COUNSEL BULLOCK: I think you've answered
16 the question. Thank you.

17 You refer to a report to the Board by Mr.
18 Sorensen in paragraph 6. Is that the report referenced in
19 paragraph 3? I realize that's going to take a minute to
20 take a look at it, so take your time.

21 MR. STEFFANI: Do you want me to look at number
22 6?

23 STAFF COUNSEL BULLOCK: Yeah.

24 MR. STEFFANI: "After fish screens were removed
25 and the 14-year silence, I have no knowledge of Fish and

1 Game coming and requesting fish screens until the State
2 Board began its..." --

3 STAFF COUNSEL BULLOCK: No, I'm talking about
4 where you discuss the report by Mr. Sorensen, paragraph 6,
5 about halfway down.

6 MR. STEFFANI: "Based upon Jim Sorensen's report
7 to the Board..."?

8 STAFF COUNSEL BULLOCK: Right. Correct. Yes,
9 that's where I'm looking at. Is that the report in
10 paragraph 3 that you're talking about? "It was determined
11 that no fish screens would be needed after June 15th of
12 each year." NSJ 105. That's the only report that I found
13 in your testimony, correct me if I'm wrong.

14 Was there another report to the Board by Mr.
15 Sorensen that's not in the exhibits?

16 MR. STEFFANI: I thought his April 15th letter
17 was also reported to the Board.

18 STAFF COUNSEL BULLOCK: Is that in your testimony
19 anywhere or in the exhibits, to your knowledge?

20 MR. STEFFANI: Is that in my testimony? I don't
21 know.

22 STAFF COUNSEL BULLOCK: The reason I'm asking is
23 because you say that your understanding of what was
24 required was based on Mr. Sorensen's report to the Board
25 and the 14 years of silence. Now, the only report I see

1 is the report saying no screens after June 15th. I don't
2 see any other report to the Board. So I'm just trying to
3 clarify what your understanding was based on, that's all.

4 MR. STEFFANI: Okay.

5 STAFF COUNSEL BULLOCK: If there are things not
6 in your testimony that you relied upon, then, you know,
7 feel free to say that.

8 MR. STEFFANI: All I can do is go to paragraph 4
9 where I talk about between April 8 and April 19, Sorensen
10 and Broddrick corresponded detailing and so on.

11 STAFF COUNSEL BULLOCK: So do you want to amend
12 paragraph 6 then to say that you were also considering
13 that, because it looks like -- and I don't want to belabor
14 this, I know we're trying to get finished here, but I'm
15 just trying to figure out what your opinion was based on,
16 because you talk about this report to the Board. Are you
17 saying that it was also based on the letters back and
18 forth as well?

19 MR. STEFFANI: Yes, I am. I'm saying based
20 upon --

21 STAFF COUNSEL BULLOCK: That's fine.

22 MR. STEFFANI: -- Jim Sorensen's report to the
23 Board. It's not just the April 10th. It's --

24 STAFF COUNSEL BULLOCK: We can agree that there
25 was a little bit left out there. That's fine. We'll move

1 on.

2 Are you aware of an order by the Board with
3 respect to flows be bypassed for aquatic life in the
4 Mokelumne River?

5 MR. STEFFANI: Are you talking about 23?

6 STAFF COUNSEL BULLOCK: Twenty-three?

7 MR. STEFFANI: Section 23.

8 STAFF COUNSEL BULLOCK: Yes. Are you aware of an
9 order by the Board that covers Term 23, which is about
10 flows to be bypassed for aquatic life in the Mokelumne
11 River?

12 MR. STEFFANI: Yes, I am.

13 STAFF COUNSEL BULLOCK: And what would that be?

14 MR. STEFFANI: What would that be?

15 STAFF COUNSEL BULLOCK: What would that agreement
16 be?

17 MR. STEFFANI: Oh, it's the JSA.

18 STAFF COUNSEL BULLOCK: Okay. So the JSA is an
19 order by the Board; is that correct?

20 MS. HARRIGFELD: Objection.

21 STAFF COUNSEL BULLOCK: Sure. Based on?

22 That was your job. I'm sorry.

23 (Laughter.)

24 MS. HARRIGFELD: He seems to be badgering the
25 witness. The JSA was implemented as part of Decision

1 1641. And he previously testified that Decision 1641 is
2 the order that he was referring to.

3 MR. STEFFANI: Correct.

4 BOARD MEMBER BAGGETT: It's been answered. Can
5 you proceed.

6 STAFF COUNSEL BULLOCK: I'd like to talk about
7 Decision 1641 then for a minute. Are you aware, as I'm
8 sure the hearing officers are, that Decision 1641
9 addresses water quality in the Bay Delta, that that was
10 the primary purpose of Decision 1641?

11 MR. STEFFANI: I don't know that it was the
12 primary purpose.

13 STAFF COUNSEL BULLOCK: Is your point of
14 diversion within the legal Bay Delta?

15 MR. STEFFANI: No.

16 STAFF COUNSEL BULLOCK: Do you have a copy of
17 Decision 1641 anywhere?

18 MR. STEFFANI: I had here earlier. What exhibit
19 number is it?

20 STAFF COUNSEL BULLOCK: It's your exhibit number
21 131.

22 MR. STEFFANI: You've got it. I don't think I
23 have it here.

24 MS. HARRIGFELD: He doesn't have a copy of the
25 full decision. Would like me to get a copy of the full

1 decision?

2 MR. STEFFANI: It's 113 is the JSA.

3 MS. HARRIGFELD: No, he was asking for is 131.

4 MR. STEFFANI: I don't have that.

5 MR. ADAMS: I do. Wait a minute. I think I do.

6 STAFF COUNSEL BULLOCK: You got it okay.

7 MR. ADAMS: Is that it?

8 STAFF COUNSEL BULLOCK: Yeah, that's it.

9 MR. STEFFANI: All right.

10 STAFF COUNSEL BULLOCK: I'd like to direct your
11 attention to page 1 of that, the very first sentence under
12 introduction.

13 MR. ADAMS: We've got page 63.

14 MS. MURRAY: Why don't you give him your NSJ-131.

15 MR. STEFFANI: Thank you. Wow, it's awful thick.

16 Page 1.

17 STAFF COUNSEL BULLOCK: That very first sentence
18 where it says, "In this decision, the State Water
19 Resources Control Board takes action on the following
20 matters:"

21 Are you there?

22 MR. STEFFANI: Yes, I'm there. I'm reading it.

23 STAFF COUNSEL BULLOCK: Can you show me where in
24 that section it discusses North San Joaquin's rights?

25 I help you out. It's paragraph 5.

1 MR. STEFFANI: All right. "This decision
2 approves the schedule of flows attached to the 1996 MOU as
3 the limit of the responsibility of..." --

4 STAFF COUNSEL BULLOCK: Where are you at? Where
5 are you at?

6 Oh, sorry, yeah.

7 MR. STEFFANI: Paragraph 5.

8 STAFF COUNSEL BULLOCK: We have a different
9 paragraph 5. "This decision recognizes the memorandum of
10 understanding..." on page 2?

11 MR. STEFFANI: Yes.

12 MS. HARRIGFELD: Right. He was reading the
13 reference to North San Joaquin.

14 STAFF COUNSEL BULLOCK: Could you read the second
15 sentence of that, the part where it actually talks about
16 North San Joaquin?

17 MR. STEFFANI: That's what I was reading.

18 STAFF COUNSEL BULLOCK: Okay. Oh, I'm sorry.
19 That's why I was confused. I thought you were starting
20 with the first sentence.

21 MR. STEFFANI: "This decision approves the
22 schedule of flows attached to the '96 MOU as the limit of
23 responsibility of East Bay MUD, Woodbridge and North San
24 Joaquin to meet the objectives in the 1995 Bay Delta
25 plan."

1 STAFF COUNSEL BULLOCK: Does that discuss
2 anything about aquatic life bypasses in the Mokelumne
3 River?

4 MR. STEFFANI: Well, I don't know without reading
5 more of this.

6 STAFF COUNSEL BULLOCK: If you'd like to take --
7 I mean, I'll vouch that it's not there, but if you'd like
8 to take time and see if there's anything else in what the
9 Board is taking action on regarding North San Joaquin, we
10 can take time. I don't think anyone would mind.

11 MR. STEFFANI: Yeah. What I'm reminded of is the
12 Schueller's letter.

13 STAFF COUNSEL BULLOCK: No, I'm asking. You were
14 saying that 1641 is your basis for having an order by the
15 Board on bypass flows for aquatic life in the Mokelumne
16 River.

17 MR. STEFFANI: Right.

18 STAFF COUNSEL BULLOCK: I'm asking for you to
19 point out where in 1641 that's addressed.

20 MR. STEFFANI: Well, do you want me to read --

21 STAFF COUNSEL BULLOCK: Or Mr. Adams as the
22 attorney if you'd like to answer that question that would
23 be fine, too.

24 MR. ADAMS: What's this decision. I haven't seen
25 this.

1 STAFF COUNSEL BULLOCK: You haven't seen 1641
2 before?

3 MR. ADAMS: No, I haven't.

4 MS. HARRIGFELD: You need to turn your mike on,
5 Bud.

6 MR. ADAMS: Pardon?

7 MR. ADAMS: Here was in the JSA --

8 STAFF COUNSEL BULLOCK: I'm not asking about the
9 JSA right now. We'll get to that in a minute. I'm asking
10 about Decision 1641.

11 (Thereupon Mr. Steffani and Mr. Adams
12 read through the exhibit.)

13 MR. ADAMS: May I ask you a question to ease the
14 time on this.

15 STAFF COUNSEL BULLOCK: Sure.

16 MR. ADAMS: It's quite thick.

17 STAFF COUNSEL BULLOCK: I agree.

18 MR. ADAMS: You've got some of this stuff
19 highlighted in green. Is there a particular page and a
20 paragraph you want us to refer to and see?

21 STAFF COUNSEL BULLOCK: No. That is actually the
22 point of what I'm stating is that there is nothing there.
23 There is nothing in 1641 relating to flows in the
24 Mokelumne River for the benefit of aquatic life, which is
25 what Term 23 is about. I'm asking if -- considering the

1 fact that you're basing --

2 MS. HARRIGFELD: Objection, your Honor. Your
3 Honor?

4 Objection. The purpose of the JSA was to provide
5 flows for aquatic resources. This is badgering of the
6 witnesses. I mean, everyone knows the JSA --

7 BOARD MEMBER BAGGETT: Sustained.

8 MS. HARRIGFELD: -- established flows for aquatic
9 life.

10 BOARD MEMBER BAGGETT: Sustained. I'd ask you to
11 move on. I think you made your point. You're going to
12 get a chance in a brief if we want to brief this stuff.
13 And you can make your legal arguments there and your
14 conclusions, but this isn't the place to make those.

15 STAFF COUNSEL BULLOCK: Absolutely.

16 Could you turn to page 4 of 1641, just very
17 quickly.

18 MR. STEFFANI: Page 4.

19 STAFF COUNSEL BULLOCK: There's a big long table
20 there.

21 MR. STEFFANI: Okay.

22 STAFF COUNSEL BULLOCK: And that -- the title of
23 that table, can you read what that is?

24 MR. STEFFANI: "Permits and licenses affected by
25 this decision."

1 STAFF COUNSEL BULLOCK: Do you see North San
2 Joaquin anywhere in that table?

3 MR. STEFFANI: No.

4 STAFF COUNSEL BULLOCK: Thank you.

5 Turning now to the Joint Settlement Agreement,
6 when was the JSA signed? It's 180 is the exhibit number.

7 MS. HARRIGFELD: 108?

8 STAFF COUNSEL BULLOCK: I'm sorry 108. My
9 apologies

10 MR. STEFFANI: Yeah, I've got 108 here.

11 STAFF COUNSEL BULLOCK: If you'll turn to page
12 16, that's where the signatures are.

13 MR. STEFFANI: Yeah, '98.

14 STAFF COUNSEL BULLOCK: And when did Term 23 come
15 into effect?

16 MR. STEFFANI: '93, I believe.

17 MR. ADAMS: The JSA?

18 MR. STEFFANI: No. Term 23.

19 STAFF COUNSEL BULLOCK: Now, turning back to page
20 16 of the JSA where all the signatures are. Can you show
21 me where North San Joaquin signed that?

22 MR. STEFFANI: No, this is East Bay MUD's
23 Joint --

24 MS. HARRIGFELD: We stipulate North San Joaquin
25 was not a signatory to the JSA.

1 STAFF COUNSEL BULLOCK: Thank you.

2 I'd like to talk with you for a minute about the
3 amount of liability. You testified to the revenues of the
4 District over the past few years as being between 235,000
5 and 285,000, are those the right numbers?

6 MR. STEFFANI: It's round 220,000/230,000 a year.

7 STAFF COUNSEL BULLOCK: What do you expect
8 revenues to be in the upcoming years?

9 MR. STEFFANI: With the groundwater charge?

10 STAFF COUNSEL BULLOCK: Yes.

11 MR. STEFFANI: The groundwater charge could
12 generate as much as 900,000 a year.

13 STAFF COUNSEL BULLOCK: And what's going to be --
14 what is that money going to be used for?

15 MR. STEFFANI: For facilities, for spreading
16 basins, pipelines, pumping stations.

17 STAFF COUNSEL BULLOCK: For new projects then?

18 MR. STEFFANI: And repair of the existing
19 distribution system.

20 STAFF COUNSEL BULLOCK: So is it your testimony
21 today that the District does not have enough money to pay
22 for past violations of their permit, but should be granted
23 a time extension, because it has plenty of money to expand
24 its use under that same permit?

25 MS. HARRIGFELD: Objection. Argumentative.

1 STAFF COUNSEL BULLOCK: I'll withdraw the
2 question.

3 MS. MURRAY: Wait.

4 BOARD MEMBER BAGGETT: Sustained.

5 STAFF COUNSEL BULLOCK: That's fine.

6 MS. MURRAY: It's a valid question.

7 BOARD MEMBER BAGGETT: I will sustain the
8 objection as argumentative.

9 STAFF COUNSEL BULLOCK: Mr. Weybret, paragraphs 5
10 and 6 of your testimony you say that the District is too
11 poor to pay the ACL. How do you foresee the District
12 having money for new projects under the time extension,
13 but not money to pay for a past violation if the Board
14 were to determine that there was a violation?

15 MR. WEYBRET: Did you ask me that question?

16 STAFF COUNSEL BULLOCK: Mr. Weybret.

17 MR. WEYBRET: I though you were talking to
18 somebody else.

19 STAFF COUNSEL BULLOCK: Sorry. I apologize.

20 MR. WEYBRET: I couldn't hear you very well.

21 STAFF COUNSEL BULLOCK: That's okay. I can speak
22 closer if that will help. And we need you to turn your
23 microphone on if you wouldn't mind.

24 MR. WEYBRET: If we collect the money, we would
25 be able to pay it, but to what purpose? What do you

1 accomplish by taking money that we could make better use
2 of?

3 STAFF COUNSEL BULLOCK: No, I'm not allowed to
4 answer questions. I'd be happy to if the Board would
5 permit me to, but I don't think I'm allowed, so we'll just
6 go on.

7 MR. WEYBRET: The answer is yes, we would have
8 the money.

9 STAFF COUNSEL BULLOCK: Thank you.

10 In paragraph 2 of your written testimony, you
11 state that the District agreed to install fish screens at
12 the District's diversion points along the river. Were you
13 as a member of the board of directors familiar with the
14 District's finances at that time in '92?

15 MR. WEYBRET: Yes, I was.

16 STAFF COUNSEL BULLOCK: Did the District ever
17 actually intend to install permanent fish screens as
18 required by Term 15?

19 MS. HARRIGFELD: Objection, that misstates the
20 permit term. Permit Term 15 states that you can either
21 install fish screens or enter into an operating agreement.
22 It does not mandate installation of fish screens.

23 BOARD MEMBER BAGGETT: Why don't you rephrase.

24 STAFF COUNSEL BULLOCK: Sure. Did the District
25 ever actually intend to install a permanent fish screen?

1 MS. HARRIGFELD: Objection. That was the same
2 question.

3 STAFF COUNSEL BULLOCK: I didn't mention Term 15.
4 I'm just asking if they ever had the intention --

5 BOARD MEMBER BAGGETT: I don't accept counsel's
6 argument that that's what the permit term actually says,
7 but you will have an opportunity to brief that when we're
8 done. But I would also like counsel to rephrase the
9 question. Just rephrase the question.

10 I'm not drawing a conclusion that I accept --
11 that's not why I will accept -- sustain the -- I'm not
12 sustaining the objection for the reason stated, but I
13 think it's valid.

14 STAFF COUNSEL BULLOCK: When the District
15 accepted the permit in 1992, did they plan to install fish
16 screens?

17 MS. HARRIGFELD: Objection. Same objection.
18 When we accepted the permit term, I mean we can read from
19 permit Term 15. They were to either install a fish screen
20 or enter into an operating agreement.

21 STAFF COUNSEL BULLOCK: And I'm asking whether
22 they intended to install the screen.

23 BOARD MEMBER BAGGETT: I think that's a legal
24 issue, which I will ask parties to brief.

25 MS. HARRIGFELD: Okay.

1 STAFF COUNSEL BULLOCK: So my questions is was
2 there an intent to install a fish screen?

3 MR. WEYBRET: I have no recollection of just
4 where we were. We talked about the cost of fish screens.
5 Recognize the fact that if we did have to put them in,
6 they would severely curtail some of our other activities,
7 but I don't think our discussion went much beyond that.

8 STAFF COUNSEL BULLOCK: Could you take a quick
9 look at Mr. Adams' testimony, paragraph 10.

10 MR. WEYBRET: I don't have it.

11 BOARD MEMBER BAGGETT: Do you have much more
12 cross. I mean because we still have one other direct
13 here. I think one more cross.

14 STAFF COUNSEL BULLOCK: I'm sorry.

15 BOARD MEMBER BAGGETT: Do you have much more?

16 STAFF COUNSEL BULLOCK: Probably a half an hour,
17 perhaps 20 minutes.

18 BOARD MEMBER BAGGETT: Looks like we'll be here
19 tomorrow, but continue. Have looked at paragraph --

20 MR. WEYBRET: Now what do you want me to do?

21 STAFF COUNSEL BULLOCK: Look at paragraph 10.

22 MR. WEYBRET: Paragraph 9?

23 STAFF COUNSEL BULLOCK: If you could read -- or
24 maybe Mr. Adams could read his testimony, paragraph 10.

25 MR. ADAMS: I'll read it.

1 "It is my recollection based on my conversation
2 with James Sorensen is that DFG knew that it would cost us
3 4 years of tax revenues, approximately \$400,000 to
4 \$500,000, towards put in permanent fish screens in which
5 we could clearly not afford. Thus, because there was
6 never any data...", whatsoever, "...supporting fish kills
7 or even salmon or steelhead ever traveling through our
8 channels, a temporary fish screen would be sufficient for
9 one year and no fish screens were required thereafter."

10 The issue was cut the wheat from the chaff and
11 look at the practical considerations.

12 STAFF COUNSEL BULLOCK: Thank you. So there was
13 never, based on that --

14 MR. ADAMS: Don't spend a buck for something that
15 wasn't needed.

16 STAFF COUNSEL BULLOCK: So, Mr. Adams then, there
17 was never any intent to put in fish screens?

18 MS. HARRIGFELD: Objection.

19 BOARD MEMBER BAGGETT: Sustained.

20 STAFF COUNSEL BULLOCK: It was in his testimony.
21 That's not what he said. Sustained.

22 Continue.

23 STAFF COUNSEL BULLOCK: So, Mr. Adams, the
24 District was aware of the fact that it was fiscally
25 impossible to install fish screens in 1992?

1 MR. ADAMS: Not physically impossible --

2 STAFF COUNSEL BULLOCK: Fiscally.

3 MR. ADAMS: -- it was economically.

4 STAFF COUNSEL BULLOCK: Economically, yes.

5 There were going to be unable to do it?

6 MR. ADAMS: Yes, that's correct, but the question
7 was the need or utilization for them and DFG knew as well
8 as we did, and their report so stated, there's no loss of
9 fish. So why would we --

10 STAFF COUNSEL BULLOCK: In your opinion, if Fish
11 and Game knew that, why did they protest and require that
12 term, if there were --

13 MR. ADAMS: Why did not they file a petition with
14 the State Board to force screens over 17 years and they
15 never did, because that was a non-issue.

16 STAFF COUNSEL BULLOCK: That's not the question.
17 I think we've had it. Can I get back my binder.

18 Mr. Weybret, paragraph 2 of your statement says
19 that, "The District agreed to work with Fish and Game on
20 bypass flows for fish." Did the District ever work with
21 Fish and Game to agree on bypass flows?

22 MR. WEYBRET: Our only -- my only recollection of
23 bypass flows was some conversations and some reports from
24 Mr. Sorensen that those were being taken care of in these
25 Mokelumne hearings, that he would stay in touch with them

1 and keep us advised as what needed to be done.

2 STAFF COUNSEL BULLOCK: So is that a "no" or a
3 "yes"?

4 MR. WEYBRET: That was an answer.

5 STAFF COUNSEL BULLOCK: You state in paragraph 3
6 that you understood there was no need for fish screens
7 after 1993 and that was based on the Sorensen report to
8 the Board. Have you read the minutes of that meeting?

9 MR. WEYBRET: I'm sorry, when you talk to your
10 book, I can't hear you.

11 STAFF COUNSEL BULLOCK: Sorry. I apologize.

12 You stated in your testimony in paragraph 3 that
13 you understood there was no need for fish screens, and
14 that that was based on Mr. Sorensen's report to the Board.

15 MR. WEYBRET: That's correct.

16 STAFF COUNSEL BULLOCK: Have you read the minutes
17 from that meeting?

18 MR. WEYBRET: Have I what?

19 STAFF COUNSEL BULLOCK: Are you familiar with the
20 minutes of that meeting?

21 MR. WEYBRET: The minutes of that meeting?

22 STAFF COUNSEL BULLOCK: Yes.

23 MR. WEYBRET: No, I haven't looked at them. No,
24 I'm not.

25 STAFF COUNSEL BULLOCK: It's NSJ-105.

1 MR. WEYBRET: I'm not familiar with that either.

2 STAFF COUNSEL BULLOCK: Okay. So you're not
3 familiar with the fact that that had nothing to do with
4 not needing fish screens, that those statements to the
5 Board in that --

6 MS. HARRIGFELD: Objection. That's not what he
7 stated. He's not familiar with the minutes.

8 BOARD MEMBER BAGGETT: I would sustain.

9 STAFF COUNSEL BULLOCK: Mr. Weybret has stated in
10 his testimony that his testimony is based on that meeting.

11 MS. HARRIGFELD: It was sustained. Is there a
12 question here?

13 BOARD MEMBER BAGGETT: He's trying to --

14 STAFF COUNSEL BULLOCK: I would argue the
15 objection perhaps to maintain it for the record, that it's
16 a basis for his testimony.

17 Okay, thank you.

18 MS. HARRIGFELD: He does not refer to that
19 exhibit in his testimony.

20 BOARD MEMBER BAGGETT: Please continue.

21 Sustained.

22 STAFF COUNSEL BULLOCK: You state in paragraph 4
23 that throughout the 1990s the District had fully complied
24 with bypass requirements and was waiting for a decision on
25 the Mokelumne River hearings. How was the District fully

1 complying with the bypass flows?

2 MR. WEYBRET: How were we complying?

3 STAFF COUNSEL BULLOCK: How were you complying
4 with the bypass flows during the period when you were
5 waiting for the Mokelumne River hearings?

6 MR. WEYBRET: That's a different question.

7 Again, I was relying on Mr. Sorensen's
8 communications to us that the question of bypass flows was
9 being dealt with there and that he would keep us advised
10 of what we should do.

11 STAFF COUNSEL BULLOCK: Was there ever an order
12 issued on the Mokelumne River hearings to your knowledge?

13 MR. WEYBRET: An issue?

14 STAFF COUNSEL BULLOCK: Was there ever an order
15 issued? Did the State Board ever issue an order on the
16 Mokelumne River hearings?

17 MR. WEYBRET: My understanding is they have not.

18 STAFF COUNSEL BULLOCK: Okay. Could you explain
19 to me then how you believe that from the point when that
20 hearing ended until today that you're in compliance with
21 Term 23?

22 MS. HARRIGFELD: Objection. He does not testify
23 to that in his --

24 STAFF COUNSEL BULLOCK: Can anyone on the panel
25 testify to that?

1 BOARD MEMBER BAGGETT: Sustained. You can go
2 ahead and answer. Anybody can answer the question?

3 STAFF COUNSEL BULLOCK: Perhaps Mr. Adams.

4 MS. HARRIGFELD: Could you please restate the
5 question.

6 STAFF COUNSEL BULLOCK: Can anyone on the panel,
7 perhaps Mr. Adams, explain how since the ending of the
8 Mokelumne River hearings that you have been in compliance
9 with Term 23 of your permit?

10 MR. ADAMS: As a consequence of the JSA, they
11 indicated that that matter was resolved. They would make
12 no further action on it. And that was handled in the JSA
13 decision. And as -- isn't that correct? And as a
14 consequence, the Board said they would take no further
15 action.

16 STAFF COUNSEL BULLOCK: And you're not a
17 signatory to that just so we're clear? The JSA, you're
18 not a signatory to the JSA?

19 MR. ADAMS: No, we were not, but they made
20 reference to --

21 STAFF COUNSEL BULLOCK: In 1641, yes? Which does
22 not, in any way, relate to and it no where states that it
23 has anything to do with aquatic life in the Mokelumne
24 River; is that correct?

25 MS. HARRIGFELD: Objection. We've already been

1 through this series of questions.

2 BOARD MEMBER BAGGETT: I would sustain the
3 objection. We've been through it. I think there's an
4 ample amount here.

5 STAFF COUNSEL BULLOCK: Fair enough. The Board
6 is fully briefed and knows what its own decision said, so
7 I'll move on.

8 Can you just give me one minute. I understand
9 that we're running late on time, so I'm going to try and
10 delete out some of these questions to save some time so if
11 I can just have one minute. Thank you.

12 MR. STEFFANI: While you're doing that, may I --
13 I finished my studying that you asked me to do a few
14 minutes ago. I'm on page --

15 MS. HARRIGFELD: It's off the record.

16 MR. STEFFANI: -- page 63 of Decision 1641.

17 STAFF COUNSEL BULLOCK: Yeah. We've moved on I
18 think.

19 BOARD MEMBER BAGGETT: We don't need to go back
20 there, I don't think, at this point. We've got ample
21 information there, so I would -- okay.

22 STAFF COUNSEL BULLOCK: Mr. Adams, paragraph 7 of
23 your testimony says that, and I'm quoting here, "The
24 Mokelumne River hearings were never resolved as related to
25 the District's pleading for a permanent water supply or

1 with respect to the District's obligation for fish
2 screening."

3 So are you suggesting that the only thing that it
4 resolved was bypass flows, nothing else, just that?

5 MR. ADAMS: The bypass flows was resolved. And
6 as a consequence on the other one, we have had no decision
7 other than to proceed which the Fish and Game was well
8 aware of.

9 STAFF COUNSEL BULLOCK: If you could answer the
10 question, I would appreciate it.

11 MR. ADAMS: They made no demand --

12 STAFF COUNSEL BULLOCK: If you could answer the
13 question.

14 MR. ADAMS: The answer to the question is that
15 they did not appeal because they were dissatisfied with
16 the --

17 STAFF COUNSEL BULLOCK: What does the Mokelumne
18 River hearing resolve in your opinion?

19 MR. ADAMS: That gave us the alternative either
20 come to an agreement with the screens in. If we did not
21 come to an agreement, we could turn around and -- but we
22 did come to an agreement as referenced to the
23 correspondence between the State Water -- the --

24 STAFF COUNSEL BULLOCK: If you could answer the
25 question, please. What did the hearing resolve?

1 MR. ADAMS: The hearing gave us 3 alternatives --

2 MS. HARRIGFELD: Objection. No one has testified
3 that the 1992 hearing was resolved.

4 MR. ADAMS: It gave us 3 alternatives.

5 STAFF COUNSEL BULLOCK: Numerous times stated
6 that -- sorry, Mr. Baggett.

7 BOARD MEMBER BAGGETT: I think we've answered
8 this question. It's been asked ad nauseam. I think
9 there's ample -- we don't need to keep asking the same
10 questions. It's been answered. I'll object, if no one
11 else will, on that ground.

12 (Laughter.)

13 BOARD MEMBER BAGGETT: I think the information is
14 in the record. The State Board did issue 1641. At least
15 one of us up here is very familiar with that order. So
16 just move on, please.

17 STAFF COUNSEL BULLOCK: Mr. Adams, you say
18 Sorensen reported to the Board that no screens were needed
19 after June 15th. Do you know who told him that?

20 MR. ADAMS: That was originally --

21 BOARD MEMBER BAGGETT: Will you use the mike.

22 MR. ADAMS: When they put that together, that's
23 when we had to have --

24 MS. HARRIGFELD: Can you use your microphone,
25 please.

1 MR. ADAMS: Pardon me. I'm sorry. Which exhibit
2 were we on? Mine?

3 STAFF COUNSEL BULLOCK: I'm referring to
4 paragraph 8 of your testimony.

5 MR. ADAMS: Paragraph 8, okay, hang on. Wait a
6 minute.

7 STAFF COUNSEL BULLOCK: You make reference to his
8 statements to the Board.

9 MR. ADAMS: Good God. Wait a minute. Okay, let
10 me get to 8. Here it is.

11 MS. HARRIGFELD: Could you ask the question again
12 now that he's at the proper place.

13 STAFF COUNSEL BULLOCK: Sure.

14 MR. ADAMS: That was -- okay, restate your
15 question, please.

16 STAFF COUNSEL BULLOCK: You stated in your
17 testimony in paragraph 7 that the -- I'm sorry.

18 MR. ADAMS: Seven or eight?

19 STAFF COUNSEL BULLOCK: Eight. My apologies.
20 That Mr. Sorensen reported to the Board that no screens
21 were needed after June 15th. Now, the only report to the
22 Board in your exhibits is the report -- and I'm sorry,
23 it's going to take me a second to find it.

24 MS. HARRIGFELD: It's NSJ-105. It's in his
25 statement. It's referenced there. It's the 3/10/93

1 minutes.

2 STAFF COUNSEL BULLOCK: Sorry 105? I'm talking
3 about the Board minutes.

4 MS. HARRIGFELD: Yes, 105.

5 STAFF COUNSEL BULLOCK: Oh, I'm sorry, yes, yes.
6 Yeah, on 105 I'm asking about that, NSJ-105. I'm asking
7 if you know who told him any of the information in
8 NSJ-105?

9 MR. ADAMS: Jim Sorensen was the one that dealt
10 directly with DFG on this thing. At the time we entered
11 into that supplement -- that transaction further on in my
12 testimony is the idea we had to have an authorization. We
13 did not withdraw --

14 STAFF COUNSEL BULLOCK: Do you know who told him
15 that?

16 MR. ADAMS: -- water that year.

17 STAFF COUNSEL BULLOCK: Do you know who told him
18 that?

19 MR. ADAMS: Pardon?

20 STAFF COUNSEL BULLOCK: Do you know who told him
21 that?

22 MR. ADAMS: No, Jim worked directly with them.

23 STAFF COUNSEL BULLOCK: Was it your general
24 practice in important affairs of business as the attorney
25 for the District to rely upon secondhand reports of oral

1 statements by unnamed third parties?

2 MS. HARRIGFELD: Objection. Argumentative.

3 STAFF COUNSEL BULLOCK: It's a very important
4 question, if I may, just very quickly.

5 BOARD MEMBER BAGGETT: I will sustain the
6 objection, but I think you can rephrase it.

7 STAFF COUNSEL BULLOCK: I specifically used the
8 language of what is and is not admissible in a hearing.
9 It's what is normally used in the course of business
10 practices by reasonable people. And correct me if I'm
11 wrong, but I believe that's the measure of admissibility
12 in these hearings. And so I'm going towards whether his
13 statement are admissible.

14 BOARD MEMBER BAGGETT: It's whether we can make a
15 finding on his statements under our hearsay rule?

16 STAFF COUNSEL BULLOCK: Correct.

17 BOARD MEMBER BAGGETT: And I think it's obviously
18 hearsay.

19 STAFF COUNSEL BULLOCK: But beyond that, because
20 I understand that we --

21 BOARD MEMBER BAGGETT: So we can't make a finding
22 anyway, if you understand our rules so well. So I guess
23 what's the point?

24 STAFF COUNSEL BULLOCK: Thank you.

25 MR. ADAMS: Let me give you --

1 MS. HARRIGFELD: Bud, he doesn't have a question.

2 He sustained the objection.

3 MR. ADAMS: Okay. I'll give you an analytical
4 answer to that one.

5 STAFF COUNSEL BULLOCK: The next statement in
6 those Board minutes says that, "He further stated the
7 Department was in a transitional period and that perhaps
8 Jerry Mensch, the leading proponent of fish screens may be
9 transferred." Do you see where that is?

10 MR. ADAMS: That's Mr. Sorensen's letter.

11 STAFF COUNSEL BULLOCK: It's the Board minutes
12 discussing Mr. Sorensen's report to the Board.

13 MR. ADAMS: Okay, the Board minutes.

14 What paragraph?

15 STAFF COUNSEL BULLOCK: There are no paragraphs.
16 It's NSJ-105. It's, I think, the third sentence. It's 4
17 lines down.

18 Are you there?

19 MR. ADAMS: Okay. Would you restate your
20 question. I'm looking at now.

21 STAFF COUNSEL BULLOCK: Okay. Do you have any
22 insight as to why that line was included in the Board
23 minutes?

24 MS. HARRIGFELD: Objection. Insight into why it
25 was put in the Board minutes. Mr. Sorensen --

1 BOARD MEMBER BAGGETT: I will sustain it. Can
2 you rephrase the question.

3 STAFF COUNSEL BULLOCK: Can I have a ruling on
4 why the objection was sustained, so I can rephrase the
5 question.

6 BOARD MEMBER BAGGETT: Let me find the minutes
7 first.

8 I think you've asked the question again. We're
9 back to where we were a half lower ago. I fail to see
10 where you were going with this line of questioning. If
11 you could explain that to me, then maybe we'll go
12 somewhere.

13 STAFF COUNSEL BULLOCK: The purpose of this line
14 of questioning is to show that there was never any
15 intention on the part of North San Joaquin to install fish
16 screens and come into compliance with their permit terms
17 and that they were looking for excuses to delay until the
18 Fish and Game employees changed such that they would not
19 be required -- no one would be watching them. And a large
20 part of their argument today has been Fish and Game has
21 not enforced, so we shouldn't have to do anything. And so
22 I'm trying to show that they didn't enforce because they
23 delayed until the people that were interested in enforcing
24 left Fish and Game.

25 BOARD MEMBER BAGGETT: Since you're doing this,

1 relying on a lot of hearsay with people who aren't even
2 the room, I fail to see how you're going to get there. If
3 you can explain to me how this line of questioning is
4 going to get to where you want to go.

5 STAFF COUNSEL BULLOCK: In the interests of time,
6 it's really not that important. We'll just move on. And
7 I think that's all the questions that I have.

8 BOARD MEMBER BAGGETT: Thank you.

9 MS. MURRAY: Hello. My name is Nancee Murray for
10 the Department of Fish and Game.

11 Sorry. I'll say that louder. I have first a few
12 questions for Conrad Weinzheimer.

13 CROSS EXAMINATION

14 OF MR. STEWART ADAMS, MR. EDWARD STEFFANI,

15 MR. CONRAD WEINZHEIMER AND MR. FRED WEYBRET

16 BY MS. NANCEE MURRAY, SENIOR STAFF COUNSEL, representing
17 the Department of Fish and Game:

18 In your testimony at paragraph 9 you state that
19 you removed the temporary screens that were put in place
20 in May 1993 and returned them to the DFG offices in Elk
21 Grove thereafter. Do you recall that?

22 MR. WHITE: Yes, I did.

23 MS. MURRAY: By DFG offices, are you referring to
24 the DFG screen shop in Elk Grove?

25 MR. WHITE: Yes, that's it.

1 MS. MURRAY: Do you recall personally delivering
2 the perforated plates borrowed by the North San Joaquin
3 Water Conservation District to the Elk Grove screen shop?

4 MR. WEINZHEIMER: I personally delivered them
5 there.

6 MS. MURRAY: And do you recall delivering those
7 perforated plates to Dave Rose?

8 MR. WEINZHEIMER: I don't know if Dave was there
9 at the time, but they do know I was bringing them back.

10 MS. MURRAY: Okay. I have a few questions for
11 Mr. Steffani. Please turn to North San Joaquin District
12 Exhibit 108, that's the Joint Settlement Agreement, page
13 9, paragraph 8.

14 MR. STEFFANI: Page 9, 8 okay.

15 MS. MURRAY: If you could just read that
16 paragraph.

17 MR. STEFFANI: "The parties agree
18 that implementation of the full
19 requirements and non-flow measures set
20 forth in this agreement constitutes a
21 reasonable contribution by East Bay MUD
22 to provide reasonable protection and
23 enhancement from current conditions for
24 the anadromous fishery and ecosystem of
25 the Lower Mokelumne River and

1 constitutes a reasonable contribution on
2 the part of East Bay MUD toward State
3 and federal fishery restoration goals
4 for the River set forth in the
5 California Salmon Steelhead Trout and
6 Anadromous Fisheries Program Act and the
7 CVPIA."

8 MS. MURRAY: And I think we have stipulated --
9 you've stipulated that you are not a party to the JSA.
10 And is it your understanding of this paragraph that this
11 constitutes a reasonable contribution by East Bay MUD?

12 MS. HARRIGFELD: Objection. He's calling to
13 interpret the provisions of a contract that he is not a
14 signatory to?

15 MS. MURRAY: I'll withdraw. I'll let the
16 contract speak very strongly for itself.

17 Okay. And one other question, Mr. Steffani.
18 Earlier you stated that your opinion that in looking
19 through district files, there had been no fish kills. I
20 want to make sure that's the North San Joaquin Water
21 District files, you looked in those files?

22 MR. STEFFANI: That's correct

23 MS. MURRAY: Okay. Turning to your testimony
24 paragraph 6. In paragraph 6 on the second line you say,
25 "...the District believed that it had entered into an oral

1 operating agreement with DFG..." Do you recall that
2 testimony?

3 MR. STEFFANI: Yes.

4 MS. MURRAY: In paragraph 4, second line, you say
5 that, "...corresponded detailing the installation of
6 temporary fish screens on the channels leading to the
7 North and South pumping facilities." And there you refer
8 to North San Joaquin 106, do you recall that testimony?

9 MR. STEFFANI: Yes.

10 MS. MURRAY: So is it your understanding that
11 there was an oral agreement for temporary fish screens?

12 MS. HARRIGFELD: Objection. That misstates the
13 testimony. The agreement with respect to temporary fish
14 screens is called out in the temporary installation in the
15 April 15th 1993 -- I'm having an unclear time trying to
16 follow what she's saying.

17 MS. MURRAY: Okay.

18 BOARD MEMBER BAGGETT: Could you rephrase the
19 question.

20 MS. MURRAY: Okay. Is it your understanding that
21 NSJ-106 -- and if you say the April 8th and April 19th
22 letters refer to a temporary fish screen?

23 MS. HARRIGFELD: Objection. There is no
24 reference, I believe, in the April 15th letter regarding
25 "temporary".

1 MS. MURRAY: Well, he refers, in his testimony,
2 to April the 8th and April 19th letters.

3 MR. STEFFANI: So what's the question again?

4 BOARD MEMBER BAGGETT: Why don't you restate it.

5 MS. MURRAY: And these 2 letters -- it's your
6 understanding that these 2 letters represent temporary
7 fish screens?

8 MS. HARRIGFELD: Objection. He has further
9 testified as to what the meaning of the bottom paragraph
10 is. And the bottom paragraph expressly relates to a
11 permanent solution not temporary.

12 MS. MURRAY: That's your theory brought, once
13 again, at the last minute. His written testimony has
14 nothing about the legal theory conjured by the attorney at
15 the last minute as we see is a very much of a pattern.
16 This, in their written testimony, is an oral agreement and
17 temporary fish screens.

18 BOARD MEMBER BAGGETT: And he asked you to repeat
19 the question, so please repeat the question. The witness
20 asked for a repeat.

21 MR. STEFFANI: We're talking about 2 matters, the
22 temporary screens that were installed in '93 and what
23 would be the permanent solution. The permanent solution
24 was addressed in the April 15th letter that was later
25 signed on April 19th by Broddrick.

1 So if you go to paragraph 5 of my testimony,
2 Sorensen also told Ryan Broddrick during those exchanges
3 that the District would cooperate with Fish and Game to
4 attempt to reach a permanent solution after the resolution
5 of the myriad of issues now before the State Board, blah,
6 blah, blah. See Sorensen's letter of April 19th.

7 MS. MURRAY: Also, there is another April 19th
8 letter from Ryan Broddrick to James Sorensen that's part
9 of NSJ-106.

10 MR. STEFFANI: That's when Broddrick signed and
11 returned.

12 MS. MURRAY: There's another one.

13 MS. HARRIGFELD: The following page to 106. Do
14 you have that, 106, the last page?

15 BOARD MEMBER BAGGETT: SO what is the question?

16 MS. MURRAY: The question is, is it your
17 understanding that here Ryan Broddrick refers to a
18 temporary loan of a temporary screen?

19 MS. HARRIGFELD: I'd object to that. That's not
20 what the letter states. The letters is stating a
21 clarification to paragraph 3.

22 BOARD MEMBER BAGGETT: I will -- can you
23 re-ask -- I'm still unclear as to what your -- that
24 wasn't a -- what is the question?

25 MS. MURRAY: Okay. The question is, is it your

1 understanding that Fish and Game in the last April 19th
2 letter is loaning the District a temporary fish screen?

3 MR. STEFFANI: The April 15th letter --

4 MS. MURRAY: I'm on the April 19th letter.

5 MS. HARRIGFELD: He's looking at the April, 19th
6 letter.

7 MR. STEFFANI: Well, it was signed by and
8 returned by Broddrick.

9 MS. MURRAY: There's another one that you --

10 MR. STEFFANI: All right. I'm sorry.

11 MS. MURRAY: -- conveniently continue to ignore.

12 MR. STEFFANI: The next page, April 19th from
13 Broddrick to Sorensen. "This is to clarify item 3 of your
14 letter dated April 15th. We agree to loan North San
15 Joaquin..." and so on. "I believe that framing was a
16 suggestion to the District by Dave Rose..." This is on
17 details of the temporary installation.

18 MS. MURRAY: Thank you.

19 MR. STEFFANI: It has nothing to do with the
20 letter that preceded it.

21 BOARD MEMBER BAGGETT: Any other -- continue,
22 counsel.

23 MR. STEFFANI: And while you've got me, I've got
24 to say this --

25 MS. MURRAY: Oh, excuse me. I do not have a

1 question.

2 BOARD MEMBER BAGGETT: No, a question, please.

3 MR. STEFFANI: All right. I'll shut up

4 BOARD MEMBER BAGGETT: No editorial comments. Do
5 you have any other questions?

6 (Laughter.)

7 MS. MURRAY: I think we've been over it before.

8 No further questions.

9 BOARD MEMBER BAGGETT: Does Stockton have any
10 questions?

11 MR. GODWIN: No, sir.

12 BOARD MEMBER BAGGETT: Any staff have any
13 questions?

14 Okay, Fish and Game is not up yet. We'll get
15 Fish and Game up next. Any other questions for the San
16 Joaquin witnesses.

17 MS. HARRIGFELD: I have just a couple real quick
18 ones on redirect.

19 Very quick.

20 BOARD MEMBER BAGGETT: Okay.

21 REDIRECT EXAMINATION

22 OF MR. STEWART ADAMS, MR. EDWARD STEFFANI,

23 MR. CONRAD WEINZHEIMER AND MR. FRED WEYBRET

24 BY MS. KARNA HARRIGFELD, ESQ., representing the North San
25 Joaquin Water Conservation District:

1 MS. HARRIGFELD: Mr. Steffani, is it your
2 understanding that the April 15th 1993 letter agreement
3 that was signed by both North San Joaquin and Ryan
4 Broddrick of the Department of Fish and Game satisfied
5 permit Terms 15 and 23?

6 MR. STEFFANI: Yes.

7 MS. HARRIGFELD: Is it your opinion or
8 understanding that implementation of the JSA through
9 D-1641 satisfies the order requirement of Term 28?

10 MR. STEFFANI: Yes, because -- I'm going to get
11 it in here yet -- page 63 of Decision 1641 says, "The
12 State Board finds that it would not be in the public
13 interest to require more water from the Mokelumne River
14 system than will be provided under the JSA." So there's
15 the connection.

16 MS. HARRIGFELD: Thank you. That's all I have.

17 MR. STEFFANI: It's clean and simple.

18 BOARD MEMBER BAGGETT: Okay. Any recross from
19 any of the parties?

20 Any other questions?

21 Okay, exhibits?

22 MS. HARRIGFELD: Yes, I would like to enter
23 Exhibits 100 through 116 and then the rest of them are all
24 subject to notice, because they're all public records, the
25 Water Right decisions.

1 STAFF COUNSEL BULLOCK: I need the renew my
2 objection on Mr. Weinzheimer's testimony to paragraph 5,
3 the second sentence and also to the entirety of paragraph
4 6, to the extent that it offers an expert opinion as we
5 discussed earlier. I would ask that it be not admitted
6 into the record.

7 BOARD MEMBER BAGGETT: This was the issue of the
8 Salmon. And I would --

9 MS. HARRIGFELD: He said to the extent that he
10 was objecting on it on the basis that it was offering and
11 expert opinion. I will submit that Mr. Weinzheimer is not
12 a fisher biologist or an expert. It was his opinion
13 regarding the fisheries.

14 STAFF COUNSEL BULLOCK: He doesn't have the
15 expert credentials to offer and opinion on that. And I
16 would ask that paragraph 5, second sentence --

17 MS. HARRIGFELD: It was with respect to his
18 observations.

19 STAFF COUNSEL BULLOCK: It was not. If you'll
20 read paragraph 5.

21 BOARD MEMBER BAGGETT: He clarified very clearly
22 on the record under his direct that to the issue of moss
23 growing, and I think that would be an irrigation canal
24 operator probably is an expert as well as any ecologist in
25 terms of observing how moss grows, in terms of whether it

1 affects Salmon population. I think that was paragraph 6.
2 I don't have it before me. I should probably try to find
3 it.

4 STAFF COUNSEL BULLOCK: I can read paragraph 6,
5 if that would be helpful.

6 BOARD MEMBER BAGGETT: That would be helpful.

7 STAFF COUNSEL BULLOCK:

8 "Accordingly, I believe that this warmer
9 water is an inhospitable environment for
10 Salmon or Steelhead and discourages them
11 from entering into the channels. In
12 fact, during my 31 year tenure as
13 Watermaster, I have never observed
14 Salmon or Steelhead in either of the
15 District's channel or pump facilities,
16 much less and fish kills. In fact, the
17 channels are angled in such a way that
18 any fish would have swim upstream in
19 order to reach them. Not to mention any
20 fish would have to swim for 1,000 feet
21 in shallow warm water to reach the South
22 pumping station from the mouth of the
23 channel."

24 All of this relates to actions by fish. And as
25 far as I know, he doesn't know anything about this.

1 MS. HARRIGFELD: Objection.

2 BOARD MEMBER BAGGETT: I will allow this into
3 evidence. I think it's clear, he's not drawing a
4 conclusion as to why or how. These are observations of
5 how a canal operates, the depth of the water, whether it's
6 warm or not. He's not testifying as a fishery biologist.
7 And I think they're observations from anybody who's been
8 out there. None of us have.

9 STAFF COUNSEL BULLOCK: Thank you

10 BOARD MEMBER BAGGETT: I'll allow those in.

11 So with that, they're admitted -- the exhibits
12 are admitted.

13 (Thereupon Exhibits NSJ-100 through
14 NSJ-116 were admitted.)

15 BOARD MEMBER BAGGETT: Well, one more.

16 Let's go off the record for a minute and we'll
17 allow Ms. Murray.

18 (Thereupon a brief recess was taken.)

19 BOARD MEMBER BAGGETT: Back on the record. Fish
20 and Game's case in chief.

21 MS. MURRAY: Okay. This is -- actually, I'm
22 going to make a brief opening statement.

23 The Department's testimony in this matter
24 addresses Key Hearing Issue Number 1, should the State
25 Water Board adopt CDO number 262.31? And if the Draft CDO

1 should be adopted, should any modifications be made to the
2 measures in the draft order and what's the basis for such
3 modification?

4 The Department answers the first question with a
5 resounding yes. The Department supports not allowing
6 further diversion by the District until it has screened
7 each diversion. The District has diverted under permit
8 10477 with many years without incurring the expense of
9 screening its diversions. It is time -- and with species
10 listed as threatened under the federal Endangered Species
11 Act in the Mokelumne River, it is arguably past time for
12 the North San Joaquin Water District to screen its
13 diversions and not be allowed to divert until a screen
14 acceptable to the Department has been installed and is
15 operating properly.

16 The Department will present testimony suggesting
17 a relatively minor change to the language of ordering
18 paragraph 1 of the Draft CDO. The basis of the
19 modification is to conclude consultation with the
20 Department during the development of the design. The
21 Department believes that required early consultation could
22 alleviate problems later on in the construction phase.

23 The facts of this case, I believe, are clear.
24 Term 15 of Permit 1044 provides, in part, no water shall
25 be diverted under this permit, during 1992 or subsequent

1 water years, until the permittee has constructed screening
2 facilities adequate to protect fish life and/or has
3 entered an operating agreement with the Department Fish
4 and Game that will protect fish life.

5 There is no written or oral operating agreement.
6 In the written testimony, the District was all about oral
7 operating agreement. And once we could very clearly
8 dispel that, they backed up and went to the patchwork idea
9 of April 1993 letters. Patchwork theory is right out of
10 the playbook of DWR. It's working for them real well
11 right now. And I'm just saying don't be sucked into the
12 patchwork theory.

13 In April of 1993, we sent a letter early on
14 saying, we absolutely understand these are permanent -- we
15 want permanent fish screens. The 15th, they sent a
16 letter, sign this. It's been clear from us we want
17 permanent fish screens on an anadromous fish river.

18 Term 23 states in part, "No
19 diversion shall be made until the
20 permit -- under this permit until an
21 agreement has been reached between the
22 permittee and the State Department of
23 Fish and Game with respect to flows to
24 be bypassed for aquatic life or failing
25 to reach such agreement until a further

1 order is entered by the State Water
2 Resources Control Board or its successor
3 with respect to said flows."

4 The evidence will show there is no agreement with
5 the State Department of Fish and Game with respect to
6 bypass flows. I think that they've pretty much not tried
7 to establish that. They're going for the subsequent
8 order.

9 DFG's Exhibit 7 is the 1996 Joint Settlement
10 Agreement. That Joint Settlement Agreement binds only
11 East Bay MUD, Fish and Game and the Forest Service. The
12 Joint Settlement Agreement is regarding a FERC project,
13 owned and operated by East Bay MUD and specifically
14 provides that the parties agree that the flow and non-flow
15 measures represent a reasonable contribution by East Bay
16 MUD to provide reasonable protection and enhancement from
17 current conditions for the anadromous fishery and
18 ecosystem of the Lower Mokelumne River.

19 There is no finding regarding public trust
20 protection. It's a reasonable contribution. And that
21 language was very heavily negotiated, very narrowly
22 written, so that no one else could piggy-back onto East
23 Bay MUD's flow and say take -- my neighbor is giving up
24 water, therefore I don't have to provide anything, which
25 is essentially what North San Joaquin is doing today.

1 Reasonable contribution by East Bay MUD. That's not a
2 subsequent order of the Water Board relative to permit
3 Term 23 for North San Joaquin.

4 Term 22 of the permit requires North San Joaquin
5 not to divert water released by East Bay MUD. Term 23 is
6 in addition. They knew at the time in 1992 don't steal
7 East Bay MUD's fish water. Don't steal Fish and a Game's
8 fish water. And, in addition, we know there's anadromous
9 fish. We know that river needs more. That's why there
10 are 2 permit terms, 22 and 23.

11 North San Joaquin is asking you to delete 23,
12 because it doesn't go with their theory that 22 is all
13 that's necessary. In a perfect world, the Department
14 would have teams of biologists located around the State
15 assessing the health of the fishery and public trust
16 resources of every river. The Department would be ready
17 on any given day to use its vast scientific database to
18 determine stream-flow recommendations for every diverter
19 that applied for a permit to the State Board.

20 This is not a perfect world, and it is not the
21 Department's responsibility to collect and analyze data
22 and develop stream-flow recommendations for every diverter
23 in the State. It is the obligation of the diverter. The
24 North San Joaquin Water Conservation District is diverting
25 water from the lower Mokelumne River. That, in essence,

1 is a public resource that belongs to the people of the
2 State of California.

3 Permit 10477 grants the district the privilege of
4 using some of that precious public resource and requires
5 the District to do what it needs to do to comply with the
6 terms of the permit. The North San Joaquin Water
7 Conservation District takes the water, presumably puts it
8 to beneficial use and makes a profit. The District needs
9 to use some of its resources to comply with all of the
10 requirements of Permit 10477. It is time for the District
11 to step up and comply with the terms of its permit.

12 We do need one witness sworn in too.

13 Yes. Stand. Raise your right hand.

14 Thereupon the witness was sworn, by
15 Board Member Baggett, to tell the truth.)

16 DIRECT EXAMINATION

17 OF MR. MICHAEL HEALEY, MR. GEORGE HEISE

18 AND MR. DAVE ROSE

19 BY MS. NANCEE MURRAY, SENIOR STAFF COUNSEL, representing
20 the Department of Fish and Game:

21 Dave, would you please state and spell your name
22 and a brief history of your employment with the California
23 Department of Fish and Game.

24 MR. ROSE: Okay. My name is David L. Rose.

25 That's R-o-s-e. I work for Fish and Game for a little

1 over 32 years, 28 of that was at the screen shop in Elk
2 Grove, the Elk Grove Screen Shop, which later became the
3 Yolo Screen Shop. And I was the last -- from 1990 till
4 last December, I was the supervisor of the shop.

5 MS. MURRAY: Okay. And is CDFG Exhibit 1 a true
6 and correct copy of your testimony?

7 MR. ROSE: I don't have that with me.

8 MS. MURRAY: Okay.

9 MR. ROSE: Yes.

10 MS. MURRAY: Are you a fishery biologist?

11 MR. ROSE: No.

12 MS. MURRAY: Please describe the duties of --
13 your duties as an employee of the DFG Screen Shop?

14 MR. ROSE: Well, we're basically a metal
15 fabrication shop, all types of metal, aluminum, and other
16 ways. We operate equipment and basically work off of the
17 plans that come to us to fabricate things, repair things
18 and anything to do with multiple types of construction in
19 Fish and Game

20 MS. MURRAY: Is it staffed with fishery
21 biologists?

22 MR. ROSE: No.

23 MS. MURRAY: Do you recall going to the diversion
24 site for North San Joaquin Water Conservation District in
25 1993 to investigate the installation of a temporary fish

1 screen.

2 MR. ROSE: I went to the site, from my memory --
3 now, this is a 1-day thing 14 years ago. I do remember
4 diving on the site and ensuring that a temporary screen --
5 that the bottom of the panels were being sealed,
6 basically, in the mud. That is very temporary the fact
7 that they were sealed in the mud. And I was snorkeling, I
8 don't know, 2 or 3 foot of water maximum. It couldn't
9 have been over 2 foot of water because these panels were 3
10 foot high.

11 MS. MURRAY: And is CDFG Exhibit 2 a true and
12 correct copy of a page out of your screen shop log?

13 MR. ROSE: Yes.

14 MS. MURRAY: Do you recall if the temporary
15 screen was intended to be a permanent screen?

16 MR. ROSE: No, not at all. That is nowhere a
17 permanent screen.

18 MS. MURRAY: Do you recall ever telling the North
19 San Joaquin Water Conservation District that they did not
20 need to install a permanent fish screen at the location of
21 the temporary screen?

22 MR. ROSE: No.

23 MS. MURRAY: Do you know anyone else at Fish and
24 Game that has told the North San Joaquin Water
25 Conservation District that a permanent fish screen is not

1 necessary at their diversion points on the Mokelumne
2 River?

3 MR. ROSE: No.

4 MS. MURRAY: Okay, Thank you.

5 George, please state and spell your name and
6 briefly describe your professional qualifications.

7 MR. HEISE: Okay. My name is George Heise. The
8 last name is spelled H-e-i-s-e. I'm a senior hydraulic
9 engineer with the California Department of Fish and Game.
10 I'm also a licensed civil engineer in the State of
11 California. I've been employed in this capacity for 18
12 years with the Department of Fish and Game and I'm the
13 manager of the Fisheries Engineering Program. As such,
14 I've been involved in most aspects of fish screening
15 projects throughout the State, including the design,
16 review and permitting.

17 MS. MURRAY: And is CDFG Exhibit 3 a true and
18 correct copy of your testimony?

19 MR. HEISE: Yes, it is.

20 MS. MURRAY: Have you ever visited the existing
21 points of diversion on the north -- of the North San
22 Joaquin Water Conservation District on the Mokelumne
23 River?

24 MR. HEISE: Yes, I have. I went to the site on
25 April 26th, 2007, where I was accompanied by Ian Drury at

1 the site. We met with Mr. Steffani of the Water District,
2 and he was accompanied by their Watermaster and 2
3 representatives of a company called ISI or Intake Screens
4 Incorporated.

5 MS. MURRAY: In your professional opinion, is it
6 possible to construct a permanent fish screen in the
7 Mokelumne River at each of the North San Joaquin District
8 diversion sites?

9 MR. HEISE: Yes, it is possible.

10 MS. MURRAY: In your professional opinion, is it
11 possible to construct a permanent fish screen at the head
12 of the diversion canal rather than at the end where the
13 pumps are located?

14 MR. HEISE: Yes, that would be possible.

15 MS. MURRAY: And is there a type of fish screen
16 that you would, in your opinion, recommend be constructed
17 at the site?

18 MR. HEISE: I prefer not to recommend a specific
19 type of screen, but rather evaluate the proposals of an
20 individual diverter based on the merits of that screen and
21 whether or not it meets the Department's of Fish and Game
22 screening criteria.

23 MS. MURRAY: And in your experience, does a
24 self-cleaning screen perform better over the long run than
25 a screen that must be manually cleaned?

1 MR. HEISE: Generally, yes. It boils down to a
2 suitable level of maintenance for a screen regardless of
3 whether it's a self-cleaning screen or a manually cleaned
4 screen, but some amount of maintenance is essential to
5 keep them operating properly.

6 MS. MURRAY: And in your professional opinion,
7 could a permanent fish screen be constructed at the
8 entrance of the diversion canal during the lower flow
9 summer months of a single year?

10 MR. HEISE: Yes. In fact, it's very common for
11 fish screens of this size to be constructed in a single
12 construction season.

13 MS. MURRAY: And have you read draft Cease and
14 Desist Order 262.31?

15 MR. HEISE: Yes, I have.

16 MS. MURRAY: Do you have any recommended changes?

17 MR. HEISE: Yes, I do. I would recommend that it
18 be changed as follows: that the North San Joaquin Water
19 Conservation District shall construct a fish screen at
20 each diversion authorized under permit number 101477; That
21 the NSJWCD fish screen plans for such fish screens shall
22 be developed in consultation with the Department of Fish
23 and Game; That the final fish screen plans be submitted to
24 the Department of Fish and Game prior to construction to
25 determine if the plans comply with the Department of Fish

1 and Game's screening criteria and are acceptable to The
2 Department of Fish and Game; that the District shall
3 provide the Division with a copy of such plan of such
4 determination by the Department of Fish and Game within 30
5 days of such determination.

6 MS. MURRAY: And does that conclude your
7 testimony today?

8 MR. HEISE: That does.

9 MS. MURRAY: Okay. Moving right along, Michael.
10 Would you please state and spell your name and
11 briefly describe your qualifications.

12 MR. HEALEY: Yeah. I'm Michael Healey is
13 M-i-c-h-a-e-l, H-e-a-l-e-Y. I'm a graduate from Humboldt
14 State University since 1987. As seasonal jobs, I've
15 conducted many fisheries sampling and fish population
16 analysis with respect to hydroelectric power plants on
17 small scale to larger scale. I'm currently working with
18 the Department of Fish and Game and have been for 15 years
19 now.

20 For 9 years I was involved with the South Delta
21 fisheries research as they relate to large diversions.
22 And the last -- well, since 2001, I've been the District
23 Fisheries Biologist for Sacramento and San Joaquin
24 counties. I have multiple assignments that relate to
25 fisheries management. The representative for Fish and

1 Game and several river groups, such as the Mokelumne River
2 Technical Advisory Committee, American River Operations
3 Group, American River Task Force and a little bit with the
4 Calaveras Fish Group. I also belong to plenty of project
5 work teams to develop new ideas and to better manage data
6 for some of the projects that would relate to.

7 MS. MURRAY: Is CDFG Exhibit 5 a true and correct
8 copy of your testimony?

9 MR. HEALEY: Yes, it is.

10 MS. MURRAY: And did you rely on CDFG Exhibit 7
11 and 8 when developing your testimony?

12 MR. HEALEY: Yes, I did.

13 MS. MURRAY: Okay. And if you could, briefly
14 describe what aquatic species, to your knowledge, are
15 present within the Mokelumne?

16 MR. HEALEY: The Mokelumne River has
17 approximately 38 aquatic fish species that I'm aware of, 5
18 of which are anadromous Chinook Salmon, striped bass,
19 Pacific lamprey, American shad and threatened central
20 valley Steelhead.

21 MS. MURRAY: And are there certain life stages of
22 those species present in the Mokelumne River today in
23 which are more vulnerable, and if so, when is that?

24 MR. HEALEY: Which one is that? Yes, there are.
25 All life stages of Salmon and Steelhead can be vulnerable

1 to increased flows, high temperatures.

2 MS. MURRAY: Do you mean decreases in flow?

3 MR. HEALEY: Decreases in flow. Did I say
4 increase?

5 MS. MURRAY: Yeah.

6 MR. HEALEY: Yeah an increase in water
7 temperatures, water diversions and impeded passage. Such
8 impeded passage has caused a decline in the anadromous
9 resources of the Mokelumne River based on some of the
10 literature that I've read.

11 MS. MURRAY: Assuming that North San Joaquin
12 Water District is not able to immediately install fish
13 screens at their 2 existing diversions and their proposed
14 diversion, do you have any recommendations based on your
15 knowledge of the above listed -- about the species you
16 described and their life stages for interim diversion
17 operations?

18 MR. HEALEY: Well, fry and juvenile Chinook
19 Salmon will be rearing and taking place from December
20 through June, so pumping should not be permitted without
21 screening diversions during that period.

22 Regardless, if they are screened permanently or
23 temporarily screened, there should be some kind of fish
24 monitoring or salvage program to test the efficiency of
25 the screening.

1 MS. MURRAY: And to your knowledge, has the San
2 Joaquin Water District -- North San Joaquin Water District
3 asked CDFG to review and comment on study plans prepared
4 by that District for the purpose of determining an
5 inadequate bypass flow requirement?

6 MR. HEALEY: No.

7 MS. MURRAY: And to your knowledge, have they
8 begun performing any studies that would be necessary to
9 determine an adequate bypass flow requirement?

10 MR. HEALEY: No, they haven't.

11 MS. MURRAY: And because they've stipulated
12 regarding they're not a party to the JSA, I will skip the
13 whole JSA.

14 BOARD MEMBER BAGGETT: Okay.

15 MS. MURRAY: I will ask question 14, to your
16 knowledge, does this North San Joaquin Water Conservation
17 District contribute financially or other wise contribute
18 to the Partnership Coordinating Committee that's part of
19 the JSA?

20 MS. HARRIGFELD: Objection. We've already
21 stipulated we're not a party to the JSA. So I wouldn't
22 imagine that we're contributing financially.

23 MS. MURRAY: Okay.

24 BOARD MEMBER BAGGETT: So the stipulation is so
25 noted.

1 MS. MURRAY: Okay. Do you recall ever telling
2 North San Joaquin Water Conservation District that they do
3 not need to install a permanent fish screen at any of
4 their diversions on the Mokelumne River?

5 MR. HEALEY: No, I never told North San Joaquin
6 Water Conservation District that they do not need to
7 screen -- or install permanent fish screens --

8 MS. MURRAY: And does that --

9 MR. HEALEY: -- at any of their diversions.

10 MR. MURRAY: And does that conclude your
11 testimony?

12 MR. HEALEY: Yes.

13 MS. MURRAY: Okay.

14 BOARD MEMBER BAGGETT: Cross?

15 MS. HARRIGFELD: Yes. Mr. Rose, I don't have any
16 questions for you.

17 CROSS EXAMINATION

18 OF MR. MICHAEL HEALEY, MR. GEORGE HEISE

19 BY MS. KARNA HARRIGFELD, ESQ., representing the North San
20 Joaquin Water Conservation District:

21 Mr. Heise, I have one question for you. Are you
22 familiar with permit Term 15 in North San Joaquin's water
23 right permit 10477?

24 MR. HEISE: No, I'm not.

25 MS. HARRIGFELD: Can I provide you with a copy or

1 do you have the --

2 MS. MURRAY: I have a copy here.

3 MS. HARRIGFELD: It's NSJ-104. Could you take
4 just a few seconds to review permit Term 15.

5 MR. HEISE: Okay.

6 MS. HARRIGFELD: Does permit Term 15 require
7 installation of a fish screen?

8 MR. HEISE: No, not explicitly.

9 MS. HARRIGFELD: Thank you.

10 Mr. Healey, I have a couple questions for you.

11 Did the State Water Resources Control Board hold
12 a hearing on public trust resources on the Mokelumne
13 River?

14 MR. HEALEY: When I was working for the
15 Department?

16 MS. HARRIGFELD: No. In 1992, did the State
17 Water Resources Control Board hold a hearing on public
18 trust resources of the Mokelumne River?

19 MS. MURRAY: I object. It's a leading question.
20 We've established they held a hearing. There are notices
21 in -- as one of your --

22 MS. HARRIGFELD: Okay. I would like to question
23 him about that. I was just asking if he was familiar.

24 MR. HEALEY: I'm not familiar with it.

25 MS. HARRIGFELD: You're not familiar with the

1 hearing?

2 MR. HEALEY: No, I'm familiar with the hearing.
3 I wasn't familiar -- I wasn't around at that time.

4 MS. HARRIGFELD: Okay. So you did not
5 participate in the 1992 Mokelumne River hearing?

6 MR. HEALEY: No, I did not.

7 MS. HARRIGFELD: Are you aware that the JSA
8 provided for settlement of the 1992 --

9 MS. MURRAY: Oh, I object. That is not true and
10 that is a leading question. Well, I object.

11 BOARD MEMBER BAGGETT: Can you re --

12 MS. HARRIGFELD: Well, I would like to point
13 to --

14 BOARD MEMBER BAGGETT: I thought we've already
15 stipulated to the fact that you weren't signators to the
16 JSA.

17 MS. MURRAY: The JSA had a very limited purpose
18 that was heavily negotiated.

19 BOARD MEMBER BAGGETT: We don't need argument.
20 That's not a part of this. Counsel, that wasn't the
21 question.

22 MS. HARRIGFELD: Could you please take a look at
23 North San Joaquin -- oh, actually it might even be in your
24 testimony. Is the JSA in your testimony?

25 MS. MURRAY: It is.

1 MS. HARRIGFELD: Okay.

2 MS. MURRAY: Mike, do you have it in front of
3 you?

4 MR. HEALEY: I don't. You know, actually I think
5 I do.

6 MS. MURRAY: It's Exhibit 7.

7 MS. HARRIGFELD: Could you please take a look at
8 page 2.

9 MR. HEALEY: Of the Joint Settlement Agreement?

10 MS. HARRIGFELD: Of the Joint Settlement
11 Agreement, Section A, where it describes purpose and
12 scope.

13 MR. HEALEY: Yes.

14 MS. HARRIGFELD: The very first sentence, could
15 read that for us.

16 MR. HEALEY: "The parties intend this agreement
17 to resolve, 1, pending FERC proceeding number 296..." --
18 sorry "...2916-004, and 2, the pending Mokelumne River
19 Water Rights proceedings before the California State Water
20 Resources Control Board.

21 MS. HARRIGFELD: Thank you. So it's your
22 understanding that the purpose of the JSA was to resolve
23 the 1992 Mokelumne River hearings as specified in Section
24 A?

25 MS. MURRAY: I object. This is to --

1 BOARD MEMBER BAGGETT: Calm down.

2 MS. MURRAY: We argued over this a lot. And the
3 idea was it was for East Bay MUD. And that's --

4 BOARD MEMBER BAGGETT: That's not the question.
5 Just rephrase the question and answer the question. And
6 if it goes beyond his expertise, if it's asking for a
7 legal conclusion, he doesn't have to answer.

8 MS. MURRAY: Right.

9 BOARD MEMBER BAGGETT: Rephrase the question.

10 MS. HARRIGFELD: Certainly. Was the purpose and
11 scope of the JSA to resolve the pending Mokelumne River
12 water rights' proceeding before the California State
13 Board?

14 MS. MURRAY: I object. It calls for a legal
15 conclusion and calls for -- this is not his expertise.

16 BOARD MEMBER BAGGETT: I would sustain that. I
17 mean he wasn't here as part of the JSA. He already said
18 he wasn't here as part of the hearing. He wasn't apart of
19 that.

20 MS. HARRIGFELD: But he has been the person at
21 the Department of Fish and Game who has been implementing
22 the provisions of this JSA, since I believe you said 1996?

23 MR. HEALEY: 2001.

24 MS. HARRIGFELD: 2001.

25 BOARD MEMBER BAGGETT: So to the extent as the

1 person is implementing it, answer -- rephrase the
2 question, and I think you can answer to that scope. If
3 you, in fact, responsible for implementing it, I would
4 trust that he has some familiarity with the JSA.

5 MS. MURRAY: As to the Parties that are --

6 BOARD MEMBER BAGGETT: So I ask that you rephrase
7 question and try again

8 MS. HARRIGFELD: Is it your understanding from a
9 review of the JSA that one of the purposes of entering
10 into the JSA was to resolve the 1992 Mokelumne River
11 hearings?

12 MR. HEALEY: It was more to resolve the issues
13 with the East Bay MUD and with Fish and Wildlife Service
14 and Fish and Game that the water rights, from what I'm
15 reading, the Water Board decisions were for water quality
16 in the Delta and Delta smelt.

17 MS. HARRIGFELD: Okay. Let's go onto that. So
18 let me provide you -- do you have NSJ-116?

19 MS. MURRAY: No, not handy.

20 MS. HARRIGFELD: Can you take a look at that
21 please.

22 MS. MURRAY: Now that you've taken my copy, can I
23 take one of your copies?

24 MS. HARRIGFELD: I only -- I didn't have the
25 second page and I wanted to walk through the second page.

1 STAFF COUNSEL BULLOCK: I actually don't have it.

2 MS. MURRAY: Well, I need a copy. If you're
3 going to ask my witness a question, I need a copy.

4 BOARD MEMBER BAGGETT: What is the question, and
5 then we can determine --

6 MS. HARRIGFELD: My question is I wanted to go
7 over what the purposes of the 1992 hearing were as defined
8 in the notice

9 BOARD MEMBER BAGGETT: I think counsel probably
10 needs --

11 MS. MURRAY: I'm going to object to the question.
12 He has told you he was not a Department witness in 1992 or
13 he wasn't not employed. He began with the Department in
14 1993.

15 MS. HARRIGFELD: But he certainly can -- well, he
16 testified that one of the purposes of the JSA was to
17 settle the issues with respect to the East Bay MUD as you
18 phrase it.

19 BOARD MEMBER BAGGETT: I will overrule, but I
20 would ask the witness to answer in terms of his current
21 position. If he is implementing these water right orders,
22 the Fish and Game fish flow, whatever requirements from
23 these permits and terms and various agreements, then I
24 would hope you would have some understanding. To the
25 extent of your understanding of these agreements, answer

1 the question.

2 MS. MURRAY: And if you don't know, that's a
3 valid answer.

4 BOARD MEMBER BAGGETT: Counsel.

5 MS. HARRIGFELD: Alrighty.

6 MR. HEALEY: What do you want me to read with
7 this?

8 MS. HARRIGFELD: I just want you to take a look
9 at paragraph 1. Paragraph 1 states that the purpose of
10 the hearing is to discuss public trust resources on the
11 lower Mokelumne. In specific what water levels, flows,
12 temperature and water quality or other measures are needed
13 to enhance the uses; is that correct?

14 MR. HEALEY: Yes.

15 MS. HARRIGFELD: Okay. Additionally, number 4
16 indicates that one of the key hearing issues was to
17 develop interim and long-term actions that the State Board
18 could take regarding stream flow, temperature, minimum
19 pool, fish screens and water quality; is that correct?

20 MR. HEALEY: From what I'm reading, yes.

21 MS. HARRIGFELD: Did the State Board ever issue a
22 order with respect to decision -- with respect to the 1992
23 Mokelumne River hearings?

24 MR. HEALEY: I'm sorry, what was the question?

25 MS. HARRIGFELD: Pursuant to this notice of

1 intent, there was hearings held on public trust resources
2 and what interim measures and long-term measures would be
3 needed to protect the fishery. Are you aware of an order
4 that was issued with respect to the 1992 hearing?

5 MR. HEALEY: No.

6 MS. HARRIGFELD: Are you familiar with Decision
7 1641?

8 MR. HEALEY: Not fully, but a little bit, yes.

9 MS. HARRIGFELD: I'd like for you to take a look
10 at the State Board's findings on the Mokelumne River
11 fisheries.

12 MS. MURRAY: Sorry, just for the record, what
13 page?

14 MS. HARRIGFELD: Page 63.

15 MS. MURRAY: Again page 63.

16 MR. HEALEY: Okay, go ahead.

17 MS. HARRIGFELD: Could you report for me the
18 discussion regarding the protections for fish? It begins
19 on the line 4, "The State Board finds that the fish..."

20 MR. HEALEY: "... finds that the fish should be
21 protected..."

22 MS. HARRIGFELD: Yeah. Could read for me what
23 that says.

24 MR. HEALEY: "The State Water
25 Resources Control Board finds that the

1 fish should be protected, but
2 consumptive uses nevertheless should be
3 allowed to continue at a reasonable
4 level. Excessive releases for fish at
5 some times could result in releases of
6 water that is too warm for fish at other
7 times. The State Water Resources
8 Control Board finds that it would not be
9 in the public interest to require more
10 water from the Mokelumne River system
11 than will be provided under the Joint
12 Settlement Agreement. Additional
13 releases could exacerbate the shortages
14 experienced by North San Joaquin Water
15 Conservation District."

16 MS. HARRIGFELD: Okay, that's good. Thank you.
17 So is it your understanding that Decision 1641 implemented
18 the JSA flows?

19 MS. MURRAY: Objection. That calls for a legal
20 conclusion. This is a fishery biologist.

21 BOARD MEMBER BAGGETT: I'd sustain. Rephrase it.

22 MS. HARRIGFELD: Well, does the State Board make
23 the finding that flows in excess of the JSA would not be
24 in the public interest?

25 MR. HEALEY: Go ahead one more time your

1 question.

2 MS. HARRIGFELD: Does the State Board make the
3 finding in D-1641 that flows in excess of the JSA would
4 not be in the public interest?

5 MR. HEALEY: I hate those "would nots".

6 MS. HARRIGFELD: Well, take a look at line 5.

7 STAFF COUNSEL BULLOCK: Objection. This is so
8 far out of the scope of what this witness knows.

9 MS. HARRIGFELD: Absolutely not. This goes
10 directly to the fact that D-1641 was an order of this
11 Board that in fact implemented the JSA and that there was
12 no additional requirements for flows by any party, whether
13 it be Woodbridge or North San Joaquin.

14 MS. MURRAY: And I object, it's beyond the scope
15 of his testimony. He did not refer to D-1641.

16 MS. HARRIGFELD: But the JSA was implemented
17 through D-1641, so it's within the scope of his testimony
18 to talk about the JSA and its implementation.

19 BOARD MEMBER BAGGETT: I would continue -- the
20 witness is the one responsible in the field for
21 implementing these various agreements, like I stated
22 previously, and I would hope has some knowledge and he
23 could answer to the scope of that knowledge. If it
24 involves a legal conclusion or understanding of the Water
25 Code, maybe not. But to the extent that in his capacity

1 he's the one who's responsible for Fish and Game, as I
2 understand it from his testimony, of implementing these
3 agreements on the ground, you can answer within the scope
4 of your expertise. You don't have to understand all of
5 1641. I don't think that was the question. It was within
6 the role of your management jobs, if you could answer
7 whatever understanding you have. If you don't know, you
8 don't have to answer. Say I don't understand it, but
9 answer within the scope of what you do day to day.

10 MR. HEALEY: But what I'm going off the flows of
11 the Joint Settlement Agreement and those are what I
12 believe came out as reasonable for protection of fish.

13 MS. HARRIGFELD: Okay. Those JSA flows were
14 reasonable for protection of fish.

15 MS. MURRAY: I object. You're putting --

16 MS. HARRIGFELD: I'm just restating his
17 testimony.

18 MS. MURRAY: You're putting words in his mouth.
19 He's trying to be helpful.

20 BOARD MEMBER BAGGETT: I will overrule. I think
21 she restated I thought what I heard. So if you restate
22 it, I assumed you were trying -- attempting to ask the
23 witness if that's a correct rephrasing of what he just
24 said. So why don't you rephrase your understanding so he
25 can answer.

1 MS. HARRIGFELD: Could I just read -- could you
2 just read back my previous question.

3 (Thereupon the court read back the
4 previous question.)

5 MS. HARRIGFELD: So you just stated that the JSA
6 flows were for the reasonable protection of the fishery
7 resources; is that correct?

8 MR. HEALEY: I don't know. I guess I don't know
9 then.

10 MS. HARRIGFELD: Okay. I only have just a couple
11 more questions.

12 BOARD MEMBER BAGGETT: Okay.

13 MS. HARRIGFELD: Are you aware that Decision 1641
14 imposed flow requirements on the Mokelumne River in
15 accordance with the JSA?

16 MS. MURRAY. I object. It's beyond the scope of
17 his direct testimony.

18 MS. HARRIGFELD: I'm just trying to get at the
19 fact that the JSA flows are mandatory obligations.

20 MS. MURRAY: And this is a legal point you can
21 make in your brief. He's a biologist. This is not --
22 it's beyond the scope of his direct.

23 BOARD MEMBER BAGGETT: Rephrase it.

24 MS. HARRIGFELD: Did D-1641 impose flow
25 requirements on the Mokelumne River?

1 MR. HEALEY: I don't know.

2 MS. HARRIGFELD: Okay. Let's take a look at page
3 63 of D-1641.

4 BOARD MEMBER BAGGETT: Counsel, I think we can
5 save some time here. If the order speaks for itself --

6 MS. HARRIGFELD: Okay, that's fine.

7 BOARD MEMBER BAGGETT: It's already in the
8 record. I think we can read that. You can cite it in
9 your brief. We understand that. If he doesn't understand
10 it, then --

11 MS. HARRIGFELD: There's just a --

12 BOARD MEMBER BAGGETT: -- that's another issue.

13 MS. HARRIGFELD: -- couple more questions.

14 MR. HEALEY: Do they relate to fish?

15 (Laughter.)

16 MS. HARRIGFELD: Okay. Well, you're the
17 implementer of the JSA. I have 2 documents NSJ-109 and
18 NSJ 110. I was hoping that your counsel could let you
19 take a look at those.

20 MS. MURRAY: 109 and 110?

21 MS. HARRIGFELD: 109 and 110.

22 MS. MURRAY: So are you asking him to read both
23 those exhibits?

24 MS. HARRIGFELD: No, he doesn't need to read.
25 I'll just highlight a couple sections in there.

1 Are you aware that D-1641 resolved the issues of
2 the Mokelumne River hearings?

3 MR. MURRAY: I object. We've gone over this.
4 That's a legal conclusion that I disagree with.

5 MS. HARRIGFELD: I am going to point him to
6 sections in this letter, which specifically state that.

7 BOARD MEMBER BAGGETT: Well, then you can cite
8 those in your brief and save us a lot of time. I mean the
9 fact that he can read that, I don't think it has to go to
10 a legal conclusion. I mean he can read that. He should,
11 I would hope, have some understanding of these documents,
12 but can you just cut to the chase.

13 MS. HARRIGFELD: Sure.

14 BOARD MEMBER BAGGETT: If you just want him to
15 read a paragraph, you can enter the paragraph.

16 MS. MURRAY: It's in their Exhibit 109. Well,
17 that's my only copy.

18 BOARD MEMBER BAGGETT: You only have 1 copy.

19 MS. HARRIGFELD: Could you turn to NSJ-110 and
20 take a look at the third full paragraph. This is a letter
21 from the State Water Resources Control Board, Division of
22 Water Rights. Could you read the very last sentence of
23 that paragraph.

24 MR. HEALEY: "I believe...?"

25 MS. HARRIGFELD: Yes.

1 MR. HEALEY: "I believe that the actions
2 currently being taken to protect the public trust
3 resources are appropriate and that no further action need
4 be taken at this time."

5 MS. HARRIGFELD: Then referring back to page
6 109 -- or to Exhibit 109 on the top of page 2, it
7 expressly states that Decision 1641 amended East Bay MUD
8 and Woodbridge's license to include the stream flow
9 conditions described in the JSA. Is that what the letter
10 says?

11 MR. HEALEY: I'm sorry, what paragraph?

12 MS. HARRIGFELD: It's the top of page 2.

13 MR. HEALEY: Um-hmm. Page 2. Sorry.

14 MS. HARRIGFELD: Page 2, third line down, states
15 "Decision 1641 included stream flow conditions described
16 in the JSA..."

17 MR. HEALEY: "...which addressed water quality
18 objectives for the San Francisco/Sacramento Bay Delta
19 estuary."

20 MS. HARRIGFELD: Yeah. Can you read the next
21 paragraph beginning with "The State Water Resources
22 Control Board..."

23 MR. HEALEY: "In Decision 1641, the State Water
24 Resources Control --

25 MS. HARRIGFELD: No, the next paragraph down that

1 says, "The State Water Resources Control Board
2 believes..."

3 MR. HEALEY: "The State Water
4 Resources Control Board believes that
5 the issues considered by the State Water
6 Resources Control Board during the Lower
7 Mokelumne River hearings have been
8 resolved. The State Water Resources
9 Control Board does not intend to take
10 any further action on these issues
11 unless the parties identify issues
12 considered during the hearing that are
13 not resolved."

14 MS. HARRIGFELD: So it's your understanding that
15 the 1992 Mokelumne -- based on a reading of that letter
16 that that 1992 Mokelumne River hearings issues were
17 resolved?

18 MS. MURRAY: I object. The letter speaks for
19 itself.

20 BOARD MEMBER BAGGETT: Sustained.

21 MS. HARRIGFELD: Okay. Thank you. That's all I
22 have.

23 BOARD MEMBER BAGGETT: Cross?

24 STAFF COUNSEL BULLOCK: Nothing from us.

25 BOARD MEMBER BAGGETT: Staff any questions.

1 Do you have a question?

2 BOARD MEMBER HOPPIN: Mr. Healey. Mr. Healey.

3 As a biologist on the Mokelumne, I assume that
4 the initial order for this screen was based on concerns
5 from -- regarding take?

6 MS. HARRIGFELD: I object. I guess I can't
7 object at your question.

8 BOARD MEMBER BAGGETT: I mean you can try.

9 (Laughter.)

10 MS. HARRIGFELD: It's outside the scope. He
11 didn't testify to that nor was he around in 1992, but
12 you're a Board Member so.

13 BOARD MEMBER HOPPIN: I can make a decision
14 without complete knowledge of the situation, if you'd
15 like. I'll go ahead and do that.

16 BOARD MEMBER BAGGETT: Okay.

17 MS. HARRIGFELD: Feel free to answer the
18 question.

19 BOARD MEMBER HOPPIN: No. No. Go ahead. We'll
20 do it in a vacuum.

21 MR. GODWIN: Arthur Godwin for the City of
22 Stockton. If Ms. Murray will allow me to skip some of the
23 foundational questions, we can just get right to the heart
24 of the matter.

25 MS. MURRAY: Well, I don't know what the heart of

1 the matter is.

2 BOARD MEMBER BAGGETT: Try the question.

3 CROSS EXAMINATION

4 OF MR. MICHAEL HEALEY AND MR. GEORGE HEISE

5 BY MR. ARTHUR GODWIN, ESQ., representing the City of

6 Stockton:

7 Mr. Healey, on page 3 of your testimony, up in
8 the first paragraph you said, "...the JSA flow releases
9 and provide attraction and passage for upstream
10 migration."; is that correct?

11 MR. HEALEY: Where are you on page 3, question
12 number 6 or 7?

13 MR. GODWIN: Up at the top. It says, "...the JSA
14 flow releases would provide attraction and passage for
15 upstream migration."

16 MR. HEALEY: I'm lost here. I'm not at that.
17 Gotcha.

18 MR. GODWIN: Okay. That's referring to Chinook
19 Salmon; is that right? Fall run Chinook Salmon?

20 MR. HEALEY: No, it's fall-run and Steelhead.

21 MR. GODWIN: Okay. When do fall-run Chinook
22 Salmon migrate upstream?

23 MR. HEALEY: Typically, in the, I would say, late
24 summer early fall and that should last through about the
25 end of December or through mid-January.

1 MR. GODWIN: Okay. Do you know where the
2 spawning areas are on the Mokelumne River? The Salmon
3 spawning are?

4 MR. HEALEY: Most of them are upstream Mackville
5 Road, and there may be some below that.

6 MR. GODWIN: And where is Mackville Road in
7 relation to North San Joaquin's diversion?

8 MR. HEALEY: I don't know. I think it's
9 upstream.

10 MR. GODWIN: Okay. So how would bypass flows at
11 North San Joaquin's diversion site help migrating
12 upstream -- or spawning Salmon rather, if their spawning
13 areas are upstream of where the diversion is?

14 MR. HEALEY: Oh, bypass flows, you can attract
15 fish with bypass flows.

16 MR. GODWIN: No, I'm not talking about attraction
17 flows. I'm talking about spawning habitat. How can
18 bypass flows at North San Joaquin improve spawning habitat
19 upstream of their diversion?

20 MR. HEALEY: You're saying its spawning habitat.
21 I'm saying its rearing habitat.

22 MR. GODWIN: My question was about spawning
23 habitat.

24 MR. HEALEY: Your question again is what?

25 MS. MURRAY: And I want -- in his paragraph 6

1 he's talking about attraction and passage.

2 MR. GODWIN: Right. And I'm onto a new question.
3 I'm talking about spawning areas now.

4 MS. MURRAY: And where are you? You're not
5 referring to his testimony.

6 MR. GODWIN: I'm referring to his general
7 knowledge as a fishery biologist and Fish and Game expert
8 on the Mokelumne River. And I just asked where the
9 spawning areas were in the Mokelumne River, the fall-run
10 Chinook Salmon spawning areas. And I believe he testified
11 that it was upstream of Mackville Road, which he thought
12 was upstream of North San Joaquin's diversion, correct?

13 MS. MURRAY: Well, I'll allow that to divert from
14 his testimony for a little longer, but other wise you've
15 got to bring it back to his testimony.

16 MR. GODWIN: Okay. And my question was just
17 simply how can bypass flows at North San Joaquin's site
18 improve spawning habitat upstream of the diversion?

19 MR. HEALEY: So you're saying that the North San
20 Joaquin is downstream of Mackville Road?

21 MR. GODWIN: That's what you thought.

22 MR. HEALEY: And so you want -- the question you
23 want is why bypass flows are -- are they necessary for
24 spawning Salmon?

25 MR. GODWIN: Correct.

1 MR. HEALEY: Depending on -- yes, if they're
2 spawning in that area and for attraction flows for them to
3 make it upstream.

4 MR. GODWIN: All right. My understanding is that
5 Steelhead will summer over after emerging -- they'll
6 summer over in the river; is that correct?

7 MR. HEALEY: Yes.

8 MR. GODWIN: And where do these Steelhead summer
9 over in the Mokelumne River typically?

10 MR. HEALEY: From what I've gotten out of the
11 literature about 90 percent of the rearing habitat is
12 upstream of Highway 99, which is below North San Joaquin.

13 MR. GODWIN: Right. Okay. And just one other
14 question. You talked early about impeded passage ways.
15 You had referred to some reports that you had read that
16 discussed impeded passage for Salmon and Steelhead species
17 on the river, and I believe that's in paragraph 5 of your
18 testimony?

19 MR. HEALEY: Yes.

20 MR. GODWIN: And those all refer to construction
21 of dams on the Mokelumne River; is that correct?

22 MR. HEALEY: Proposed water projects, yeah, dams.
23 Sure.

24 MR. GODWIN: Thank you. No more questions.

25 BOARD MEMBER BAGGETT: Okay. Let's try again.

1 Any other parties?

2 All right.

3 BOARD MEMBER HOPPIN: No. I got all my
4 questions.

5 (Laughter.)

6 BOARD MEMBER BAGGETT: Anybody else?

7 MS. MURRAY: So I want to move our exhibits.

8 BOARD MEMBER BAGGETT: Unless you have redirect.
9 You just want to move your exhibits, okay.

10 MS. MURRAY: No, I don't. I'm not going to go
11 there. 1 through -- so Exhibits 1 through 8.

12 BOARD MEMBER BAGGETT: Any objection?

13 If not, they're so entered.

14 (Thereupon Exhibits DFG 1 through 8
15 were received into evidence.)

16 BOARD MEMBER BAGGETT: So we're done with Fish
17 and Game. We have housekeeping questions.

18 SENIOR STAFF COUNSEL MAHANEY: Yeah. Ms.
19 Harrigfeld, I just wan to clarify your admission of
20 exhibits. You offered into evidence Exhibits NSJ-100
21 through 116; is that correct?

22 MS. HARRIGFELD: That is correct.

23 SENIOR STAFF COUNSEL MAHANEY: And I just want to
24 clarify what you wanted to do with 117 through 131. Did
25 you intend to request the Board to take official notice of

1 them using those exhibits numbers or did you want to offer
2 them into evidence by reference using those --

3 MS. HARRIGFELD: I'd like to offer them in by
4 reference. In our closing briefs, we can cite -- as I
5 understand it, we can cite to previous decisions or orders
6 of the Board and I was just highlighting the ones that --

7 SENIOR STAFF COUNSEL MAHANEY: Okay. But for our
8 record keeping, it's helpful to know if you want to keep
9 those exhibit numbers and offer them?

10 MS. HARRIGFELD: In my closing brief, I will be
11 referring to them as the water -- water rights order
12 numbers, so we don't need to refer to the exhibits.

13 SENIOR STAFF COUNSEL MAHANEY: Okay.

14 BOARD MEMBER BAGGETT: Very good. Thank you.

15 I think we'll forego closing briefs. We'll have
16 closing briefs, though.

17 There's at least 5 areas I think are critical for
18 the parties to brief. I'll try to go over them quickly,
19 at least that are of interest to me and I don't know if my
20 colleague and any other staff have any other questions.

21 The ones I've got right are on Term 15, there's a
22 very pivotal word in there, which it would be interesting
23 to see how the parties interpret it. It says "and/or"
24 referring to fish screens "and/or" an agreement as I'm
25 paraphrasing with Fish and Game. And I think that's a

1 fairly pivotal word and how you think that was intended,
2 since none of us were involved in that.

3 I guess related to that, and why I think it's
4 critical, is if you look at that series of letters which
5 we discussed ad nauseam, and unfortunately none of the
6 people who signed or wrote or were involved in those
7 letters are here to examine, cross examine or ask what
8 they meant. But the various letters between the former
9 regional director and Mr. Sorensen -- is it Sorensen? The
10 engineer. There's a series of letters -- because it goes
11 directly back to 15, and I think what is the intent of
12 those. So I think to some extent these are really legal
13 issues, how you interpret a phrase in a permit.

14 The third one I've got is the 1641, which at
15 least I'm very familiar with, there were some subsequent
16 letters by former Division Chief Harry Schueller, which
17 have been referred to ad nauseam also. And I think that
18 goes clearly to the last issue and how -- I think how the
19 parties see that as relating back to these original
20 hearings and anything you can cite in the record would be
21 helpful.

22 I guess 4, the obvious one, if this Board finds
23 or in the draft order that there is damages due or an ACL
24 on either of these issues, what's a reasonable amount of
25 money and why. We've heard obviously the oral arguments.

1 We've got evidence in the record, but I think that's a
2 useful thing in a closing brief, is what you think is a
3 reasonable remedy for either of these issues with that
4 assumption.

5 And last, the issue of harm is pretty critical in
6 this. What was the harm for lack of -- assuming again,
7 I'm going from assuming we don't need these to assuming
8 these 2 terms were, in fact, valid and were both violated.
9 The issue harm is fairly critical and we've had a lot of
10 evidence back and forth even with this last panel. And
11 that clearly goes to the level of the violation or what
12 we're going to do about it.

13 So I think that's something I think would be
14 worth spending a little bit of time on for the parties is
15 to what level has the harm risen or is there any?

16 Anybody else have anything that they would --
17 they're particularly interested in?

18 So you at least aren't guessing. There's at
19 least 5 things that I've picked up today.

20 Anything else?

21 So 2 weeks after the -- I assume you want the
22 transcripts, so 2 weeks after. And do we have -- 10 days
23 2 weeks?

24 THE REPORTER: Yeah, 10 to 14 days.

25 BOARD MEMBER BAGGETT: And we will try to -- I

1 would like to get this enforcement order resolved before
2 we deal with the time extension.

3 MS. HARRIGFELD: I guess that was going to be my
4 question. If both of the -- both of the transcripts are
5 done in a couple weeks, could we potentially provide some
6 additional time on the closing brief for the petition?

7 BOARD MEMBER BAGGETT: The permit extension?

8 MS. HARRIGFELD: Yeah.

9 BOARD MEMBER BAGGETT: Yeah. Let's make that a
10 week later. Is that enough?

11 MS. HARRIGFELD: Okay.

12 BOARD MEMBER BAGGETT: Add an additional week for
13 the --

14 MS. HARRIGFELD: And when you say you'd like to
15 have the CDO/ACL resolved, are you then intending to
16 resolve that prior to your decision on the petition is
17 that what you meant?

18 BOARD MEMBER BAGGETT: It depends. We have
19 haven't talked. It depends on how fast we can get them
20 out, but I would like that -- that one will definitely --
21 if we can't do them simultaneously, we'll see what the
22 record is like. I mean, I can't commit.

23 MS. HARRIGFELD: Just a little workload
24 perspective.

25 BOARD MEMBER BAGGETT: But the first one we want

1 to resolve is the ACL enforcement action. I think we need
2 to resolve that one as quickly as we can.

3 Given the issues in the Delta these days, we
4 don't want to -- I don't want to languish.

5 MS. HARRIGFELD: I just wanted to take the
6 opportunity to thank you both and your staff. You were
7 very engaged and this was a very long day. And I really
8 appreciate it. It's very important issues for the
9 District.

10 Thank you.

11 BOARD MEMBER BAGGETT: I think they are for a lot
12 of people.

13 So thank you. We're done.

14 (Thereupon the Division of Water Rights hearing
15 adjourned at 5:38 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, JAMES F. PETERS, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing California State Water Resources Control Board,
7 Division of Water Rights hearing was reported in shorthand
8 by me, James F. Peters, a Certified Shorthand Reporter of
9 the State of California, and thereafter transcribed into
10 typewriting.

11 I further certify that I am not of counsel or
12 attorney for any of the parties to said hearing nor in any
13 way interested in the outcome of said hearing.

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 3rd day of July, 2007.

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23

JAMES F. PETERS, CSR, RPR

24

Certified Shorthand Reporter

25

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