

HEARING

STATE OF CALIFORNIA

WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

IN THE MATTER OF: )  
 )  
Hearing to Consider a Petition )  
to Change the Place of Use involving )  
Water Right Permits 16478, 16479, )  
16481, 16482, and 16483 )  
(applications 5630, 14443, 14445A, )  
17512, and 17514A) of the California )  
Department of Water Resources and )  
Water Right Permits 11315, 11316, )  
11885, 11886, 11887, 11967, 11968, )  
11969, 11970, 11971, 11972, 11973, )  
12364, 12721, 12722, 12723, 12725, )  
12726, 12727, 12860, and 15735 )  
(Applications 13370, 13371, 234, )  
1465, 5638, 5628, 15374, 15375, )  
15376, 16767, 16768, 17374, 17376, )  
5626, 9363, 9366, 9367, 9368, 15764 )  
22316) and License 1986(Application) )  
000023) of the United States Bureau )  
of Reclamation. )  
\_\_\_\_\_ )

VOLUME I

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LICENSE NUMBER 10063

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## 1 PROCEEDINGS

2 CO-HEARING OFFICER BAGGETT: Good morning.

3 Welcome to this hearing regarding the Department of Water  
4 Resources and Bureau of Reclamation's petition to  
5 consolidate the places of use of the State Water Project  
6 and the Central Valley Project by amending certain water  
7 rights held by the two petitioners.

8 I'm Art Baggett, member of the Board. With me is  
9 our Chair, Charles Hoppin. Also present today are Dana --  
10 our Staff Counsel Dana Heinrich, Staff Engineer Ernie  
11 Mona, and Environmental Scientist Jane Farwell.

12 I think you all know the evacuation procedures.  
13 It looks like we have an audience of well accomplished  
14 experts at evacuation in the State Water Board. If  
15 there's an emergency, follow the exit signs, across the  
16 street to the park. And take your valuable.

17 This hearing is being held in accordance with a  
18 public notice dated March 30th, 2009 and the pre-hearing  
19 conference we held on April 16th.

20 This hearing will afford participants who have  
21 filed a notice of intent to appear an opportunity to  
22 present relevant oral testimony and other evidence that  
23 address the following key issues:

24 First, should the subject petition to change the  
25 place of use under the specified licenses and permits of

1 Reclamation and the Department be approved?

2           Second, if the subject petition is approved,  
3 what, if any, terms and conditions of the approval should  
4 be imposed?

5           Third, would approval of the subject petition be  
6 subject to any appropriate terms and conditions, initiate  
7 a new right or injure other legal users of water?

8           Fourth, would approval of the subject petition  
9 unreasonably affect water quality for fish, wildlife, or  
10 other in-stream beneficial uses?

11           Fifth, are the proposed changes in the public  
12 interest?

13           Sixth, what would be the effects or impacts to  
14 the State of California if the proposed changes are not  
15 approved?

16           This hearing is being webcast to the public and  
17 some parties are participating by teleconference. It's  
18 also being recorded on both audio and video -- on audio  
19 and video.

20           A court reporter is present to prepare a  
21 transcript of the proceedings. If you'd like a copy, you  
22 can make separate arrangements.

23           So when you speak, if you could speak clearly  
24 into the mike so everyone can hear, that would be helpful.

25           And, likewise, if you have a card to present the

1 court reporter, it would be helpful also.

2 Before we begin the evidentiary portion, we will  
3 hear from any speaker who wishes to make a policy  
4 statement in these proceedings. If you wish to make a  
5 policy statement, please fill out a blue card and hand it  
6 to the staff if you have not done so.

7 The board also accepts written policy statements,  
8 and we have a number of those. If you have written  
9 copies, please give them to our staff.

10 If you have cell phones, could you please turn  
11 them off. This will be the last warning.

12 (Laughter.)

13 CO-HEARING OFFICER BAGGETT: Speaking of cell  
14 phones, I should probably do the same.

15 A policy statement is a non-evidentiary  
16 statement. It's subject to the limitations listed in our  
17 hearing notice. A person making policy statements must  
18 not attempt to use their statements to present factual  
19 evidence, either orally or by introducing a written  
20 exhibit. They should be limited to five minutes or less.  
21 So when we call your name, if you could come up to the  
22 microphone and proceed, that would be helpful.

23 With that, we'll begin with the policy  
24 statements.

25 I think we have the Assemblyman. You're up



1 first.

2 Good morning. Good morning.

3 ASSEMBLY MEMBER ARAMBULA: Good morning. Good  
4 morning to all of you. My name is Juan Arambula. I have  
5 the pleasure of representing the 31st District in the  
6 State Assembly. Basically it's the Fresno and surrounding  
7 areas. And I'm here today to share a few words regarding  
8 what's going on in my district, and hoping that you are  
9 able to take it into account in terms of your work and  
10 your deliberations.

11 You know, when I was in grad school, I studied  
12 statistics and I always found them a little boring and  
13 dry. But I'd like to share some statistics with you today  
14 and try to bring them to light in terms of what is  
15 currently going on in the Central Valley.

16 We hear about zero allocation for the west side  
17 of the San Joaquin Valley in terms of water from the  
18 Federal Project. We hear about unemployment rates of 40  
19 percent or greater in several communities on the west  
20 side. And more recently we've heard that there may be an  
21 increase from zero allocation to 10 percent allocation of  
22 water for this region of central California.

23 What I'm here to do is to share with you what  
24 this means in terms of people. I represent communities  
25 such as Mendota and Firebaugh, San Joaquin, Tranquility,

1 and other unincorporated communities that have been  
2 devastated, that have unemployment rates approaching twice  
3 what the unemployment rate was during the Great  
4 Depression. Back in the thirties we mobilized our nation  
5 to deal with an unemployment rate of approximately 25  
6 percent. And yet in many of these communities the  
7 unemployment rate is nearly double that amount. It is  
8 having a devastating impact on the workers, on the local  
9 merchants, on the ability of cities to provide services to  
10 their residents.

11           And I am one of the individuals in the State  
12 Assembly who has been tasked with trying to find a  
13 long-term solution to the problems facing the State in  
14 terms of its water delivery. But that is in the long  
15 term. And as was said during the 1930s, during the Great  
16 Depression, people lead in the short-term, and they cannot  
17 wait to have us in the Legislature find a long-term  
18 solution. They need some help right now.

19           It seems to me that there may be some  
20 consideration that you can give to short-term solutions  
21 that will help our people survive until we find a more  
22 permanent long-term solution. And I would encourage you  
23 to give every possible consideration to what can be done  
24 to help people now. My folks are suffering. They are  
25 going through some very, very difficult times.

1           There was one lady, a farmworker, who said  
2 recently at a public meeting, "I don't want charity. I  
3 don't want to be a burden on anybody." And while we have  
4 been able to provide some emergency food to her and to  
5 other thousands of families on the west side, her comment  
6 was, "I appreciate the food and it does help my family.  
7 But it doesn't allow me to buy Pampers for my children.  
8 It doesn't allow me to buy medicine for my children. It  
9 doesn't allow me to have the income that I need to pay the  
10 rent and to take care of other necessities.

11           So on her behalf and on behalf of the literally  
12 tens of thousands of farm workers that have been impacted,  
13 not only by the drought, but also because of recent  
14 federal court decisions, I urge you to please give  
15 consideration to what you can do in the short term to  
16 provide relief to these very hard working and very  
17 deserving individuals.

18           So thank you again for allowing me this time to  
19 share with you a personal perspective on what is going on  
20 in the Central Valley. And we certainly encourage you to  
21 give every consideration to realistic practical proposals  
22 that can be of help to them.

23           Thank you very much.

24           CO-HEARING OFFICER BAGGETT: Thank you.

25           I have a couple other policy statements.

1 Michael from the Public Trust Alliance.

2 MR. WARBURTON: Good morning. I'm Michael  
3 Warburton, the Executive Director of the Public Trust  
4 Alliance, a project of the nonprofit Resource Renewal  
5 Institute.

6 I'm here to say that the consolidated place of  
7 use changes to water project permits and licenses are not  
8 in the public interest at this time. It might make sense  
9 at some future time if we knew anything about the scale of  
10 the project and could design believable protections for  
11 public rights. But rushed through without consideration,  
12 this will almost undoubtedly result in continued high  
13 levels of Delta exports that will place public trust  
14 resources at risk.

15 The new place of use, while attractive to  
16 upstream right-holders and newly enabled purchases, will  
17 almost certainly result in greater pressure on source  
18 water supplies.

19 If you think of the projects as a straw reaching  
20 into the State's water, these changes will have the legal  
21 impact of increasing the force of suction in a system  
22 already overappropriated upstream where substantially more  
23 rights to water are recognized than there is actual water  
24 in nature.

25 The changes will enable a few more years of

1 sketchy math that always seems to cheat the environment.

2 We can do a lot better than this.

3           Since our founding in 2001, the Public Trust  
4 Alliance has been calling attention to the Public Trust  
5 Doctrine as a valuable tool to defend our most valuable  
6 heritage and give signposts for a reasonable path forward  
7 from crisis. The doctrine reflects fundamental public  
8 interests inherent in the property that will be affected.  
9 It can't be ignored.

10           While more specific laws should be enough to  
11 guide responsible action, my organization is gravely  
12 concerned that emergency-inspired overreaching for the  
13 benefit of private right-holders will be substituted for  
14 deliberate debate and defense of public interests in this  
15 proceeding.

16           Neither the State Water Project nor the  
17 Reclamation Act were intended to create a dynasty of water  
18 marketers. But that could be the result of the changes in  
19 rights being considered here.

20           From our perspective, insuring responsible action  
21 is what this hearing is about. The legal obligation of  
22 the State Water Resources Control Board is to oversee not  
23 only an efficient allocation of public water, but a  
24 responsible one as well.

25           The very capacity of our land to support life is

1 at stake in public decisions like this. And we don't want  
2 to see transparency or accountability diminished for  
3 short-term convenience. We want to make sure that future  
4 generations of Californians will live in an ecologically  
5 viable California. In a time of economic and climatic  
6 crisis, it becomes more important to concentrate on the  
7 contours of long-term responsibility than to grasp for  
8 fleeting short-term indicators or maximizing current  
9 market gains which bear little relation to long-term  
10 public value.

11           Unfortunately, there's a lot of political  
12 pressure and a seeming willingness to abandon deliberate  
13 negotiation in favor of adopting, under the pressure of a  
14 perceived emergency, new legal conditions that have been  
15 sought by water contractors for a long time.

16           We're being told that the merged place of use  
17 definitions will only affect water already in the project.  
18 But what it will probably do is open the projects to new  
19 water that would never come in without relaxed standards.  
20 Without other institutional supports, merged place of use  
21 makes accounting and transparency of transfers far more  
22 difficult. Past experience with the petitioners showed  
23 the costs will most likely be borne by our environment.

24           In other planning processes our organization has  
25 tried to articulate enduring public interests, both

1 designated legal trustees and public beneficiaries.

2           We see the continuing jurisdiction of the State  
3 Board not as a meaningless recitation included in all  
4 State licenses but as a concrete legal responsibility.  
5 Our Supreme Court has made it clear many times over that  
6 no matter how much some people might wish that public  
7 obligations would just disappear, there's a required  
8 public inquiry when trust resources are involved. And  
9 there is an affirmative obligation to protect trust values  
10 whenever feasible.

11           These resources are at extreme risk at the  
12 historically high levels of water exports that California  
13 has maintained in the last several years.

14           A few points to think about in the case coming  
15 up:

16           The status of the emergency, which is being  
17 relied upon to justify accelerated action, is very much in  
18 the hands of the petitioners themselves and their own  
19 definitions and enforcement actions. That's not a recipe  
20 for public credibility or anything approaching responsible  
21 public regulation. Now is not the time to respond to  
22 calls for more flexibility by relaxing boundaries for  
23 accountability without fundamental protections for public  
24 rights.

25           The financial industry wanted a little

1 flexibility when they told us it was just common sense to  
2 allow the merger of banking, investment bank, and insures  
3 businesses when strict separation had been required in the  
4 past. Now we're beginning to find out what it means to  
5 lose public accountability in financial markets. And it's  
6 going to get a lot worse before it gets better.

7           We can't afford to do the same thing with our  
8 water and the ecological systems that ultimately support  
9 us. You can't just declare bankruptcy and reorganize when  
10 you're playing with species extinction.

11           In California water, the separation between the  
12 operations of federal and State projects have generated  
13 different standards of accountability, benefit and  
14 repayment in addition to the simple geographic district  
15 boundaries. Federal regulators and contractors have  
16 ignored State responsibilities. And even the application  
17 of science has been suspended to the extent that it was  
18 even very recently difficult to get judicial notice of  
19 reality.

20           The public has good reasons not to trust these  
21 regulators, who've gotten cozy with their contractors. We  
22 all know about the revolving doors which find  
23 professionals negotiating on behalf of the public one  
24 minute and just a few minutes later walking into executive  
25 positions on contractors' staffs.



1           There's a tremendous need for transparency and  
2 clear boundaries for accountability. Regulatory energy  
3 would be far better applied solving these fundamental  
4 problems rather than creating zones of uncertainty and  
5 accounting difficulty. We're now grappling with an  
6 economic crisis where people don't even know the value of  
7 the homes they lived in for many years, and many of lost  
8 any hope of a protected retirement.

9           But we're not just in an economic crisis. As a  
10 society, we're just beginning to see the scale of the  
11 damage to our legal institutions and our public  
12 understanding of the rule of law.

13           The former president of a major stock exchange  
14 has pleaded guilty to running the biggest Ponzi scheme in  
15 history.

16           Last week a television news commentator described  
17 different official legal approaches to State-sanctioned  
18 torture as a policy difference between the Bush and Obama  
19 administrations. There's very real risks that people in  
20 our State will take those words at face value and think  
21 that's the extent of what's going on.

22           If the legal profession itself gets too lax on  
23 the concept of rule of law, everybody loses. I just read  
24 a tentative ruling by a San Diego judge in a CEQA case  
25 that reminded me in that town the developer always wins

1 when public assets are being given away.

2           The rhetoric that people are hearing from public  
3 authorities is becoming less and less believable in nearly  
4 every forum. The only cure for this situation is  
5 increased transparency so people can see for themselves  
6 how closely the rhetoric matches the reality that they  
7 lived with.

8           A trumped-up emergency should not be used to  
9 avoid environmental analysis of long-term water transfers.  
10 Yet that seems to be the direction that this is going.

11           If this relaxation of institutional boundaries of  
12 accountability is accomplished under the guise of this  
13 year's drought emergency, it will be done at the cost of  
14 adopting the legal standard of a banana republic and to  
15 deliberately place in California's most precious assets a  
16 completely foreseeable risk. We don't need to do that.  
17 It's not in the public interest.

18           I hope that the evidence presented and examined  
19 here will lead to a responsible decision that supports the  
20 health of Californians in the long term. We owe that to  
21 our children and grandchildren.

22           CO-HEARING OFFICER BAGGETT: Thank you.

23           With that, I have four written policy statements.  
24 But you could have an opportunity to give a summary, if  
25 you'd like.

1 Friant Water Authority.

2 MR. OTTEMOELLER: Good morning, Board Member  
3 Baggett, Chairman Hoppin. Thank you for the opportunity  
4 to address the Board this morning on the hearing before  
5 you to temporarily consolidate the places of use of the  
6 Friant -- of the federal and State project service areas.

7 My name is Steve Ottemoeller. I'm the Water  
8 Resources Manager for the Friant Water Authority and the  
9 Friant Water Users Authority. I'll summarize our policy  
10 statement here briefly.

11 We are in full support of this consolidated  
12 change in the place of use for the two projects. We  
13 believe it will provide some necessary and very important  
14 flexibility within the next year to two years to allow the  
15 projects and the managers to deal a little bit better with  
16 the situation that they're facing.

17 The Friant Water Authority, as you know, is  
18 located on the east side of the San Joaquin Valley, and  
19 for the most part -- well, entirely our ability to use the  
20 water on the San Joaquin River and distribute it to the  
21 north and south of the San Joaquin River along the east  
22 side is dependent on an exchange of water rights that the  
23 United States Bureau of Reclamation undertook in the  
24 1930s.

25 Although we are sometimes considered

1 hydrologically separate from the rest of the Central  
2 Valley Project, we received a strong warning this year as  
3 we were looking at the water supply situation, and seeing  
4 that there was a strong potential that the United States  
5 would have to use San Joaquin River water to serve some of  
6 the west side farmers, the exchange contractors, on whose  
7 rights are supplies is based.

8           As it turns out, there has been just enough rain  
9 and precipitation that that's not an issue. But as we  
10 were preparing for that, one of the things we were trying  
11 to figure out how we could do would be find ways to move  
12 water from the east side to the west side without enduring  
13 some of the high losses that would occur in the San  
14 Joaquin River.

15           One of the mechanisms that we envisioned was  
16 moving the water down south through the Friant Kern Canal  
17 into Kern County and exchanging that water with State  
18 Project water that would be sitting in San Luis Reservoir.  
19 That would have required a change in place of use, and we  
20 initially supported this largely on that basis.

21           Since that time, as I noted, we don't need that  
22 particular tool for our own water supply. But we do have  
23 neighbors on the west side who still only have a 10  
24 percent water supply, 10 percent of their contract supply.

25           This change in place of use would allow an

1 exchange, which I think you will hear in more detail in  
2 testimony, but we want to highlight it here, whereby  
3 districts on the Friant side would send some of their  
4 water down to the Friant Kern Canal through the Cross  
5 Valley Canal and into the aqueduct. That water would be  
6 delivered to State water contractors, who would then  
7 exchange that water back up into San Luis. The primary  
8 purpose for that exchange mechanism is to facilitate some  
9 groundwater pumping within Westlands to enhance their  
10 supply. And it's a mitigation for water quality.

11           There would be no net loss of water to the Friant  
12 system because the water would be brought back either  
13 later this year or next year. So particularly with  
14 respect to that transfer we're talking a short-term  
15 exchange, no impact to the environment, nobody's losing  
16 any water, and we're helping the folks on the west side.

17           I would emphasize and hope that you would make  
18 sure you don't I guess overstate what's happening here.  
19 Again, this is a temporary change in the place of use for  
20 the projects. It will facilitate doing things on a timely  
21 basis to take advantage of whatever opportunities are  
22 available.

23           In my 20 years' experience in dealing with  
24 California water issues, I sincerely doubt that there  
25 would be any significant increase, if at all, in terms of

1 total water certainly not moving from north to south. It  
2 will facilitate water being moved to places it's normally  
3 moved, but just done on an expedited basis. And we would  
4 encourage you to approve the petition.

5 CO-HEARING OFFICER HOPPIN: If you could clarify  
6 one point for me. You mentioned a moment ago that the  
7 water you would send to the west side would be returned  
8 later in the year. Would you give us just a brief  
9 overview of that mechanism.

10 MR. OTTEMOELLER: A couple of mechanisms are  
11 available. One would be that the water would be sent down  
12 the California Aqueduct back into the Cross Valley Canal,  
13 moved east to the Friant Kern Canal where there is a 500  
14 cubic foot per second inter-tie. It'd basically be moving  
15 water back the same way it went there. And then water  
16 would be delivered back to Friant districts at the  
17 southern end of the Friant Kern Canal.

18 Water could also be returned to the east side  
19 through an exchange with the Tulare Lake Basin Water  
20 Storage District, who has some water rights on the Kings  
21 River through multiple exchanges involving Fresno ID and  
22 the City of Fresno. Some of that water could be brought  
23 back and delivered back to the Friant districts. So  
24 those -- we're working on those arrangements right now.  
25 We think they're both feasible and likely.

1 CO-HEARING OFFICER HOPPIN: Thank you.

2 CO-HEARING OFFICER BAGGETT: Thank you.

3 With that, I have three parties who are parties  
4 for purpose of cross-examination who'd like to make policy  
5 statements as opposed to opening statements. So as long  
6 as you realize you won't get an opening statement also,  
7 well, you can do it now.

8 We have the County of San Joaquin and then Mr.  
9 Herrick after that

10 MS. GILLICK: Good morning. DeeAnne Gillick on  
11 behalf of the County of San Joaquin and the San Joaquin  
12 County Flood Control and Water Conservation District. I  
13 did submit a written policy statement on behalf of the  
14 county and will do a summary this morning.

15 Due to the unique water conditions and shortages  
16 that the State is currently experiencing, the county does  
17 not object to the temporary petition to consolidate the  
18 places of use.

19 The county is concerned about everyone who is  
20 suffering through water shortages during this drought  
21 year, including the areas within the County of San  
22 Joaquin.

23 However, the county is gravely concerned about  
24 the CVP and State Water Project's continuing failure to  
25 observe the State -- and the State Water Board's failure

1 to enforce the permit conditions applicable to DWR and the  
2 USBR relative to the CVP and the State Water Project,  
3 particularly those regarding salinity control.

4 The petition that's before you today must be  
5 conditioned, and they must be meaningful conditions placed  
6 upon the Bureau and the DWR to meet those water quality  
7 control standards.

8 You know, this year, in 2009, there have been  
9 repeated violations of the water quality control standards  
10 in January, February, March, and April. DWR represents  
11 that there's no violations or have represented that  
12 there's no violations, when, you know, the readings are to  
13 the contrary.

14 In addition, the county has not received any  
15 reports from the Bureau or DWR indicating that there's  
16 been violations of standards. And that's a direct  
17 inconsistency with the CDO order from 2004, in which the  
18 county, the State Board and the other parties to the CDO  
19 hearing were to receive reports.

20 This is just evidence of DWR's and the Bureau's  
21 attitude that it's not important to meet the salinity  
22 standards and it's not important to comply with the State  
23 Board Order's simple reporting. That's not even  
24 occurring.

25 The initial modeling indicates that even in these



1 years of droughts the salinity standards within the Delta  
2 can be met with modifications to the barrier systems and  
3 other things. The South Delta Water Agency and the  
4 Central Delta Water Agency have presented and been in  
5 dialogue attempting to get these implementation changes  
6 made. We encourage the State Board to require these  
7 changes so that the salinity standards can actually be met  
8 even in these times of droughts, consistent with the  
9 initial modeling. And it's just important that, you know,  
10 even if these transfers occur, that the salinity standards  
11 and the conditions on the CVP and the State Water Project  
12 continue.

13 As you know, two-thirds of the legal Delta's been  
14 located within San Joaquin County. San Joaquin County has  
15 a vested interest in the important and critical water  
16 issues that are facing this state.

17 And we encourage the State Board to place  
18 meaningful conditions and to enforce those conditions so  
19 that the water system within the State can operate and  
20 operate properly.

21 Thank you.

22 CO-HEARING OFFICER BAGGETT: Thank you.

23 Mr. Herrick.

24 MR. HERRICK: Thank you, Mr. Chairman, Board  
25 member. My name is John Herrick. I'm representing the

1 South Delta Water Agency, the Central Delta Water Agency,  
2 and then Lafayette Ranch.

3 As a representative of farmers, we certainly  
4 understand the problems going on in the State and the  
5 horrible impacts that are resulting from the shortage of  
6 water.

7 However, we can't agree to the urgency process as  
8 a method by which we constantly change the rules, either  
9 temporarily or now they're sought for two years.

10 You'll recall that in D-1641, we spent many days  
11 over a consolidated place of use which included lands that  
12 had been receiving water. That process included an EIR  
13 functionally equivalent document, I think it was. But it  
14 had a big large analysis of the effects that happens when  
15 you change the place of use for the projects.

16 And instead, we're going through this chain of  
17 urgency petitions. And we saw last year that the need to  
18 comply with standards in order to do joint point was  
19 waived. This year the projects sought to waive the -- be  
20 relieved from the obligation to meet the outflow  
21 standard's protection for fish.

22 And these are all emergency actions. Emergency  
23 means that it's an expedited process, it means that  
24 there's very little environmental review, if at all. And  
25 it leads to a very, very poor policy for the State.

1           The foundation of the projects has to be planning  
2 ahead. And it should not be excused that there is no  
3 planning ahead. After two years of drought last summer,  
4 if the projects thought that transfers were needed to ease  
5 some of the problems for a third drought year, if it  
6 occurred, they could have gone through the normal process,  
7 which would have required full environmental review,  
8 rather than this process, which as far as I can tell, has  
9 virtually no environmental review.

10           The policy underlying this consolidated point of  
11 use is directly contrary to the area of origin statutes of  
12 the State. The projects are seeking to facilitate a  
13 shortage -- excuse me. The projects are seeking to  
14 fulfill a shortage of supply through purchases from other  
15 areas. That's not what's supposed to happen here. The  
16 projected supplies of the projects are intermittent -  
17 they're not firm supplies - so that they have to provide  
18 for long-term problems that occur repeatedly. And that's  
19 not what they're doing.

20           I will note that the CVPIA encourages transfers  
21 among federal project operators. But CVPIA says transfers  
22 shall only occur if the water is that which was previously  
23 lost or previously consumed. So there's not supposed to  
24 be a net increase in use from the transfer. And that's  
25 exactly what's proposed here, that people will shift to

1 groundwater, they'll exchange, they'll get water back.  
2 That's the wrong policy. That's increasing use on a short  
3 supply.

4 I would also note that D-1641 requires that the  
5 projects be in compliance with both State and Federal  
6 Endangered Species Act as part of their permit terms.

7 We know right now that the State Project still  
8 doesn't have a tape permit under State Environmental --  
9 excuse me -- Endangered Species Act. So when the  
10 documents presented indicate that they promise to abide by  
11 the rules of D-1641, they can't.

12 As DeeAnne Gillick just said about -- on behalf  
13 of the county, none of this action has anything to do with  
14 meeting the current obligations of the projects, because  
15 they're not planning to do that. They're not seeking  
16 relief from environmental review in order to do emergency  
17 actions in order to meet south Delta water quality  
18 standards. They didn't seek emergency actions in order to  
19 meet fishery standards. What the projects would like to  
20 do is to get transfer water for certain CVP SWP  
21 contractors. They're not planning on meeting the water  
22 quality standards, which are conditions to their permits  
23 including San Luis and their export pumps.

24 I would like to note that the baseline for this  
25 two-year change should not be the fact that water has been

1 delivered to various areas, as is pointed out and it will  
2 be seen in later testimony.

3 Water's been delivered to lots of areas in  
4 various quantities during wet times, flood times. That's  
5 not the baseline against which to judge changing the rules  
6 right now in order to supply water to areas.

7 And the reason that's important is, we're in the  
8 process of reviewing the Bay-Delta standards. So as we go  
9 forward on that, we will have a consolidated place of use  
10 for both projects with no environmental review, and that  
11 will be the baseline for changes to the water quality  
12 control plan for the Bay-Delta. That doesn't seem  
13 appropriate.

14 This is very unique, this request for two-year  
15 approval. Temporary changes are for one year in duration,  
16 I believe, not two years.

17 So we're going to escape environmental review for  
18 transfers a year from now even if it's not a drought year.  
19 I don't see the basis for that request.

20 I would like to note a couple things which I  
21 believe we'll find out when the testimony comes. And,  
22 that is, first, the Governor's drought proclamation  
23 apparently waived Water Code Section 13247 with regards to  
24 State agencies complying with water quality control plans.  
25 I don't see how that will affect somebody's permit terms

1 and conditions even though those are part of a water  
2 quality control plan. But we'll see as the  
3 cross-examination.

4           And, secondly, it remains to be seen how this  
5 proposal affects joint point of diversion. I don't know,  
6 but I hope we'll find out, because joint point of  
7 diversion requires the standards be met. There was a  
8 petition last year, as you petitioned. There's been no  
9 similar petition this year even though he know the  
10 standards will not be met in the south Delta. So we'll  
11 have to wait and see what the project's position is on  
12 that.

13           I would also note that the cease and desist  
14 order, I believe 2004, specifically said, if you want to  
15 pump additional water and not be in compliance with water  
16 quality control standards, you need to go through an  
17 environmental review. That is wholly missing from this  
18 process.

19           Thank you very much.

20           CO-HEARING OFFICER BAGGETT: Thank you.

21           Does defenders wish to make a policy statement at  
22 this point?

23           We have your written policy statements. So if  
24 you could summarize, that would be appreciated.

25           MR. BASOFIN: Just to clarify. Is it my

1 understanding that we won't be able to make an opening  
2 statement?

3 CO-HEARING OFFICER BAGGETT: You can have your  
4 choice. You can't do both.

5 MR. BASOFIN: Okay. I think I'd prefer to rely  
6 on written statements and make an opening statement later.

7 CO-HEARING OFFICER BAGGETT: Okay. Would you  
8 identify yourself for the record.

9 MR. BASOFIN: Sorry. Joshua Basofin, Defenders  
10 of Wildlife.

11 CO-HEARING OFFICER BAGGETT: Very good.

12 The last one we have a policy statement which  
13 we'll enter into the record from Mr. Baiocchi. And he's  
14 notified us he won't be participating today, but he has  
15 submitted a written policy statement for the record.

16 Mr. Rubin.

17 MR. RUBIN: Hearing Officer Baggett. I would  
18 like to raise a couple of issues before we turn to the  
19 evidentiary portion of the proceeding. Is now the right  
20 time?

21 CO-HEARING OFFICER BAGGETT: Sure. You might as  
22 well. I was going to wait till later, but this is fine.

23 MR. RUBIN: Well, there's one that I think I need  
24 to raise now. And then depending on how you want to  
25 handle it, we could raise it as testimony is presented.

1           But I would like to move the hearing officers to  
2 cancel a number of protests that were filed. And  
3 specifically the protest filed by the Salmon and Steelhead  
4 Association, the Defenders of Wildlife, the Public Trust  
5 Alliance, and South Delta Water Agency, and Central Delta  
6 Water Agency.

7           And I'll explain -- I should have indicated for  
8 the record that my name is Jon Rubin. I'm an attorney for  
9 the San Luis & Delta-Mendota Water Authority and Westlands  
10 Water District.

11           The reason I move the hearing officers to cancel  
12 the protests is because the protests essentially have been  
13 abandoned, as I look at it. Those protests were filed.  
14 No cases-in-chief have been proposed and will be presented  
15 to you to support the bases for the protest. And so in --  
16 I don't believe that there will be evidence presented by  
17 the protestant to support the protest; and, therefore,  
18 pursuant to the Water Code and the California Code of  
19 Regulations, you are required to cancel the protests.

20           I have another issue. But if anyone else wants  
21 to respond --

22           CO-HEARING OFFICER BAGGETT: Well, Let's resolve  
23 that one first.

24           Do any of the parties have -- I mean you're all  
25 parties to the proceedings, so is the protest -- it's a



1 good point.

2 MR. HERRICK: John Herrick for South Delta,  
3 Central Delta, Lafayette Ranch.

4 I don't know why we have to go through this every  
5 time.

6 We're not required to put on a case-in-chief.  
7 This was an expedited proceeding. We looked into doing  
8 certain things. We tried to get rebuttal witnesses,  
9 which, well, let's just say, were uncooperative.

10 If the other parties putting on evidence put on  
11 sufficient evidence that either supports or contradicts  
12 our case, that is the evidence supporting our case. So I  
13 don't think it's appropriate to dismiss them.

14 Thank you.

15 CO-HEARING OFFICER BAGGETT: Let's let the other  
16 parties respond. Then you can respond all at once, Mr.  
17 Rubin.

18 MR. BASOFIN: Joshua Basofin, Defenders of  
19 Wildlife.

20 It's my understanding that a party is not  
21 required to put on a case-in-chief in order to retain its  
22 protest. It may be that the Board may decide in its  
23 discretion that the weight of the protest is not as great  
24 if witnesses or testimony is not submitted. But I have  
25 seen nothing in the Water Code to indicate that a protest

1 is abandoned if a case-in-chief is not presented.

2 MR. WARBURTON: Well, Public Trust Alliance is  
3 not abandoning its protest. And counsel for this charade  
4 has actually come forth to the Board in other proceedings  
5 and with due process objections. And the Board has  
6 sometimes a conflict of interest between its representing  
7 of the public and its prosecution of certain water-related  
8 matters.

9 And I think that there's a real danger in the  
10 representations here that the public is well represented  
11 at times. And the roots of our protest on the Public  
12 Trust Alliance are for public rights. And this counsel  
13 has in the past talked to -- he cited a case, the Morongo  
14 Band, while -- you know, as evidence of this conflict of  
15 interest.

16 CO-HEARING OFFICER BAGGETT: And that's been  
17 resolved.

18 MR. WARBURTON: And we protest the legal  
19 representations here. And we have no intention of  
20 abandoning any protest.

21 CO-HEARING OFFICER BAGGETT: Great. Understand.

22 CO-HEARING OFFICER BAGGETT: Last comment, Mr.  
23 Rubin?

24 MR. RUBIN: I would like to note that the  
25 protests that were filed to which I'm moving for

1 cancellation address issues that are beyond what any of  
2 the other protests raise. And so for me as somebody that  
3 supports the petitions, it makes it impossible to know  
4 what are the ripe issues, and particularly if there's no  
5 testimony to support the claims.

6 One thing I would like to add is that South Delta  
7 Water Agency, Central Delta Water Agency filed their  
8 protest based upon injury to vested rights. And  
9 presumably they would need to come in and explain which  
10 vested rights are being injured and how. And they're not.

11 CO-HEARING OFFICER BAGGETT: I appreciate that.

12 We'll be ruling on the protest issue as part of  
13 the final order. So I think we'll take that into  
14 submission. Because there's no requirement for a  
15 case-in-chief to be presented, as I think defenders  
16 pointed out, that's correct.

17 But many of these issues raised in the protest  
18 will be addressed in the final order. And I think that  
19 will provide a resolution to it at that point.

20 So they will not be withdrawn.

21 You had a second issue?

22 MR. RUBIN: Yes. And I do also want to move the  
23 hearing officers to strike all of the protests as well the  
24 testimony that was submitted in opposition of the  
25 petitions. Reading through the testimony that was

1 submitted in opposition of the petitions, I couldn't find  
2 any evidence that's relevant to this proceeding with the  
3 focus where it should be; and, that is, what is the  
4 potential impact to legal users of water, whether the  
5 petition will cause unreasonable impacts to fish and  
6 wildlife, and whether the petition is in the public  
7 interest.

8 Yes, there are complaints that are raised. But  
9 none of them are focused on whether the change -- or the  
10 changes that are being requested will cause any issues  
11 that would bar you from approving the petition. There are  
12 gross complaints. There are complaints about the Drought  
13 Water Bank, which is outside of the scope of this  
14 proceeding. There are complaints about general operations  
15 of the Central Valley Project, State Water Project.  
16 Again, those are outside of the scope of this proceeding.  
17 There are complaints about how water might be used,  
18 whether it might be used reasonably or unreasonably.  
19 Again, that's outside the scope of this proceeding.

20 The question that you are faced with is whether  
21 the change, adding to the Central Valley Project and State  
22 Water Project additional places of use, will cause injury  
23 to a legal user of water, cause unreasonable impact to  
24 fish and wildlife, or cause -- or be contrary to the  
25 public interest.

1           I would like to raise along the lines of the last  
2 issue, public interest, one other argument. And, that is,  
3 there are some witnesses that are proposing testimony that  
4 attempts to address the public interest issue. I believe  
5 that too at least to a large degree is outside of the  
6 scope of this proceeding. You have a Declaration of  
7 Drought from the Governor. I think the declaration has a  
8 legal effect.

9           And to the extent you challenge the declaration  
10 of the Governor, this is not the forum. There may be  
11 another forum, but this is not it. And there's specific  
12 findings that the Governor makes and direction that he  
13 provides. And I think that those have the effect of law.

14           Thank you.

15           CO-HEARING OFFICER BAGGETT: Thank you.

16           Let's save some time here. We likewise will not  
17 rule on these now. I think we'll have to rule on this  
18 evidence point by point when it comes up for whether it's  
19 relevant or not.

20           Whether the Drought Water Bank in particular is  
21 relevant, I would argue it might not be. But I think  
22 general operations I think clearly can be relevant, and  
23 we're going to have to hear it on a case by case because  
24 that's a baseline to which all this is reacting.

25           Mr. Jackson.

1           MR. JACKSON: Yeah, Michael Jackson representing  
2 the California Sportfishing Protection Alliance.

3           I just want to make sure that I get my say on  
4 this if you're going to take it under submission. Because  
5 if you did that at the end of the hearing, I wouldn't be  
6 able to tell you this at any point.

7           First, the testimony of both CSPA and the  
8 California Water Impact Network are relevant to the six  
9 questions which you asked.

10          Secondly, it's the vagueness of the petition that  
11 makes it a little hard to connect up what's going on here.  
12 It's a temporary petition out of order. It's an urgency  
13 petition for something that's no longer urgent. It's a  
14 petition that is so vague that it's impossible to tell  
15 where the water's coming from, where it's going, how it's  
16 going to be used. And it anticipates that there will be a  
17 ton of other water coming into this process after you do  
18 the approval.

19          And that certainly makes it difficult to provide  
20 evidence of individual effects to fish wildlife,  
21 individual effects to the public interest, or individual  
22 effects to somebody's water right when the vagueness of  
23 the petition and the falsity of the information in it,  
24 given the fact that it's now rained for about a month and  
25 a half, lead us to believe that this is basically a

1 request for you to rubber stamp whatever they want to do.

2           And so to make it a ruling on relevance seems to  
3 me to be impossible, because the petition and the  
4 information in it is no longer relevant to the situation.

5           CO-HEARING OFFICER BAGGETT: No, I appreciate  
6 that. And I think we do need to hear historical  
7 information, we do need to hear about general operations.  
8 I think that is extremely relevant and important to this  
9 proceeding.

10           I'd like to restate, we're going to have to deal  
11 with this, as painful as it is, as the individual  
12 testimony is presented. I don't see how we can make  
13 blanket rulings at this early venture in the proceedings.

14           So with that, anything else?

15           MR. RUBIN: This should be easier to deal with  
16 the -- Jon Rubin for San Luis & Delta-Mendota Water  
17 Authority and Westlands Water District.

18           Based upon the testimony that has been submitted,  
19 the San Luis Delta-Mendota Water Authority will not be  
20 presenting a case-in-chief, nor will Westlands or Santa  
21 Clara Valley Water District. We've coordinated. I will  
22 be asking questions on behalf of the San Luis &  
23 Delta-Mendota Water Authority and Westlands Water  
24 District. Santa Clara will be participating through the  
25 San Luis & Delta-Mendota Water Authority, which it is a

1 member.

2 CO-HEARING OFFICER BAGGETT: Thank you.

3 MR. RUBIN: I do have a statement. But we'll  
4 make it as an opening statement, if you would prefer.

5 CO-HEARING OFFICER BAGGETT: That would be fine.

6 So let's move to the evidentiary portion. Before  
7 hearing the cases-in-chief, we'll hear the opening  
8 statements. Then we'll hear the case-in-chief by the  
9 various participants.

10 With that, they'll present their case-in-chief  
11 and cross-examination in the following order. We'll begin  
12 with the Department of Water Resources, followed by the  
13 Bureau, then San Luis & Delta-Mendota Water Authority,  
14 Santa Clara Valley Water District, Westlands Water  
15 District, CSPA, California Water Impact Network. Mr.  
16 Baiocchi's no longer presenting. And then South Delta  
17 Water Agency and Central Delta and Lafayette Ranch,  
18 followed by the County of San Joaquin, and then lastly  
19 Defenders of wildlife.

20 Is there anyone else? I think that's all the  
21 participants I have at this point.

22 At the beginning of each case-in-chief the  
23 participant may make an opening statement, as we talked  
24 about earlier. And please -- and summarizing the  
25 participant's position and what evidence they intend to



1 establish.

2           After the opening statements we'll hear from the  
3 participants' witnesses. And the witnesses should  
4 identify their written testimony as their own and affirm  
5 that it's true and correct; also note that they've taken  
6 the oath.

7           The direct testimony will be followed by  
8 cross-examination by other participants, Board staff and  
9 the hearing officers. And the redirect testimony and  
10 recross, limited to the scope, as always, of the redirect  
11 testimony. After all the cases-in-chief, the participants  
12 may present rebuttal evidence.

13           Participants are encouraged to be efficient, as  
14 always. And we will be limited to the times as noted in  
15 the pre-hearing, unless there is cause to grant an  
16 exception.

17           Participants' presentations will be subject to  
18 the following limits:

19           Five minutes for the opening.

20           Oral presentation of direct testimony at 20  
21 minutes per witness.

22           Cross-examination, one hour per witness or panel.

23           And, again, additional time may be allowed with a  
24 showing of good cause.

25           Each participant will be permitted five minutes

1 for a closing oral argument, as we agreed to in the  
2 pre-hearing.

3 If you wish to submit a written closing brief or  
4 statement, we would ask that those will be due Tuesday,  
5 April 28th, following the hearing.

6 After the hearing record is closed, we'll prepare  
7 a proposed order for consideration by the Board. If the  
8 Board adopts an order, any person who believes the order's  
9 in error will have 30 days within which to submit a  
10 written petition for reconsideration.

11 So with that, I will now invite appearances by  
12 the parties in the evidentiary portion.

13 Will those making appearances please state your  
14 name, address, and whom you represent so the court  
15 reporter can enter that information.

16 The Department of Water Resources.

17 MR. SODERLUND: Good morning. Erick Soderlund  
18 S-o-d-e-r-l-u-n-d for Department of Water Resources. My  
19 address is 1416 9th Street, Room 1104, Sacramento,  
20 California 95814.

21 And what else?

22 CO-HEARING OFFICER BAGGETT: That's all.

23 MR. SODERLUND: Thank you.

24 CO-HEARING OFFICER BAGGETT: Bureau of  
25 Reclamation.

1 MS. AUFDEMBERGE: Amy Aufdemberge representing  
2 the United States Bureau of Reclamation. We will actually  
3 be presenting with a panel with DWR.

4 CO-HEARING OFFICER BAGGETT: Do you -- oh, you  
5 got a card? Okay. Card's fine.

6 San Luis/Delta-Mendota.

7 MR. RUBIN: John Rubin, the Law Firm of  
8 Diepenbrock - Harrison, for the San Luis & Delta-Mendota  
9 Water Authority and the Westlands Water District; address  
10 is 400 Capitol Mall, 18th floor, Sacramento, California.  
11 Santa Clara, as I indicated before, will not be presenting  
12 a case. And I don't believe there's anyone here  
13 representing Santa Clara directly. I will be representing  
14 Santa Clara as a member of the San Luis & Delta-Mendota  
15 Water Authority.

16 CO-HEARING OFFICER BAGGETT: Thank you.  
17 California Sports Protection Alliance.

18 MR. JACKSON: It's actually the fishing part of  
19 the sports we're trying protect.

20 Michael Jackson representing the California  
21 Sportfishing Protection Alliance. The mailing address is  
22 Box 207, Quincy, California 95971. Thank you.

23 CO-HEARING OFFICER BAGGETT: Thank you.  
24 California Water Impact Network.

25 MS. JACKSON: Julia Jackson representing the

1 California Water Impact Network; 326 Main Street, Box 207,  
2 Quincy, California 95971.

3 CO-HEARING OFFICER BAGGETT: Thank you.  
4 South Delta.

5 MR. HERRICK: John Herrick representing South  
6 Delta Water Agency, Central Delta Water Agency, and  
7 Lafayette Ranch, 4255 Pacific Avenue, Suite 2, Stockton,  
8 95207.

9 CO-HEARING OFFICER BAGGETT: Thank you.  
10 County of San Joaquin.

11 MS. GILLICK: DeeAnne Gillick representing the  
12 County of San Joaquin and the San Joaquin County Flood  
13 Control and Water Conservation District in Stockton. I  
14 have a card.

15 CO-HEARING OFFICER BAGGETT: And, lastly,  
16 Defenders of Wildlife.

17 MR. BASOFIN: Defenders of Wildlife, Joshua  
18 Basofin, 1303 J Street, Suite 270, Sacramento, 95814.

19 CO-HEARING OFFICER BAGGETT: Thank you.

20 With that, will all those who plan to testify  
21 please stand and raise your right hand for the oath.

22 (Thereupon the witnesses was sworn, by the  
23 Hearing Officer, to tell the truth, the whole  
24 truth and nothing but the truth.)

25 CO-HEARING OFFICER BAGGETT: Thank you.

1           With that, we'll begin with the testimony -- I  
2 think we'll allow you to do the opening statement before  
3 you present your panel. We'll just go in the order as  
4 we've noted earlier.

5           So with that, let's just start with the -- try to  
6 get the Department of Water Resources case-in-chief in and  
7 then we'll take a break after you've had your witnesses.

8           MR. SODERLUND: Chairman Hoppin, Board Member  
9 Baggett. Good morning. My name is Erick Soderlund, and  
10 I'll be representing the California Department of Water  
11 Resources during this proceeding.

12           Before I get into the substantive part of my  
13 opening statement, I did want to kind of provide a brief  
14 overview of the case-in-chief of the Department we'll be  
15 presenting this morning.

16           And, importantly, if it's okay with the Board and  
17 pleases the Board, the Department of Water Resources and  
18 the U.S. Bureau of Reclamation would like to present a  
19 consolidated and coordinated case-in-chief.

20           CO-HEARING OFFICER BAGGETT: And that's fine and  
21 appreciated.

22           MR. SODERLUND: So with that, we will have three  
23 witnesses testifying this morning. First we'll have John  
24 Leahigh, Chief of the State Water Projects Operations  
25 Branch. And he will testify -- or provide a brief

1 overview of the update -- a brief overview and update of  
2 the current hydrology and go into the operations as to any  
3 impacts that this petition may or may not have to project  
4 operations.

5           Second we will have Ron Milligan of the U.S.  
6 Bureau of Reclamation and Central Valley Operations  
7 Manager. And he will also provide an update of the  
8 current hydrology, but with a little bit more of a focus  
9 on CVP, Central Valley Project, and also go into some of  
10 the exchanges/transfers that are identified in the  
11 petition that are more focused or solely CVP operations.

12           And then last, but definitely not least, we have  
13 Maureen Sergent, who works in the Department's State Water  
14 Project Analysis Office, and will provide testimony on  
15 several other transfers/exchanges that were identified in  
16 the petition, including some aspects of the movement of  
17 water north to south and through the Delta.

18           Once the three witnesses have summarized their  
19 testimony, we expect the three to be cross-examined as a  
20 panel.

21           And with that, I would like now to move on to the  
22 more substantive part of my opening statement. And in  
23 this opening statement I'd like to briefly address four  
24 topics as a summary of our case-in-chief and the evidence  
25 we intend to offer.

1           The four topics are:

2           Why are we here?

3           What are we asking for?

4           What are the effects of approving the requested  
5 change?

6           And what are the benefits of approving the  
7 petition?

8           First, why are we here?

9           There's basically essentially two reasons why  
10 we're here. First, we are in a drought. We're still in a  
11 drought. The evidence offered today will demonstrate that  
12 California is still in its third year of drought.  
13 Essentially we have missed out -- over the last three  
14 years we've missed out on one normal year's worth of  
15 statewide runoff. We've averaged about 60 percent  
16 statewide runoff for the past three years. And in light  
17 of that lack of water, we've also had increased demand as  
18 compared to other drought periods. I believe 9 million  
19 was presented in the Governor's proclamation as the  
20 increase in population since the last drought.

21           We also have increased regulatory restraints --  
22 constraints that decrease the project's ability to move  
23 what water we have.

24           And as the testimony will demonstrate, all that  
25 combined leads to fairly dire circumstances for water

1 suppliers and water users this year, particularly south of  
2 the Delta.

3           Also, we are here because of the Governor's  
4 proclamation. On February 27th, 2009, the Governor  
5 declared a state of emergency -- or actually proclaimed a  
6 state of emergency and declared a drought.

7           In that proclamation he directed the Department  
8 of Water Resources to work with the Bureau of Reclamation,  
9 among other agencies, to help respond to the drought and  
10 mitigate its effects. And part of that specifically was  
11 to facilitate transfers.

12           The Governor's proclamation goes so far to even  
13 specifically identify this very petition. And the  
14 evidence offered today will demonstrate that this petition  
15 furthers the Governor's directives and is an important  
16 tool in responding to the current drought.

17           Second item is, what are we requesting?

18           We are requesting a consolidated place of use for  
19 two years. As the evidence will demonstrate, a  
20 consolidated place of use is more than just a simple  
21 transfer. It's more than just a change in place of use or  
22 a change in place of diversion. But at the same time, I  
23 think the evidence will also demonstrate that the focus of  
24 what the effects are are a little bit narrowed with this  
25 petition.



1           The effects of this petition are demonstrated by  
2 what is the difference between putting CVP water on SWP  
3 surface areas and vice versa.

4           Which goes into the third point, what are the  
5 effects of the requested change? And, first of all, the  
6 testimony will make a distinction between actions that are  
7 taken south of the Delta versus actions that are taken to  
8 facilitate movement of water through the Delta.

9           First of all, south of the Delta exchanges and  
10 transfers. It will be demonstrated that historical  
11 deliveries -- or delivers for this year are going to be  
12 well below historical deliveries. And, therefore, any  
13 water that is moved to a particular service areas or water  
14 district that is facilitated by this petition, that water  
15 that is delivered will still be well below historical  
16 deliveries. And therefore, any effects of water such as  
17 ag discharges or anything that goes along those lines, I  
18 think it will be demonstrated that those effects, as  
19 compared to historical averages, historical operations,  
20 will be minimal.

21           As far as north to south transfers, or transfers  
22 that move water through the Delta, evidence will  
23 demonstrate that the movement of water between State water  
24 contractors and CVP contractors will still likely occur  
25 absent approval of this petition. And, as such, the only

1 difference between granting or denying this petition is  
2 where the water goes; which is, just as explained, minimal  
3 effects south of the Delta. Whether the water is moved to  
4 Kern or whether the water is moved to Westlands, the  
5 difference in that is minimal and not likely to injure any  
6 legal user or cause unreasonable effects to fish and  
7 wildlife.

8           However, even if the Board chooses to take an  
9 approach that, but for this petition, contractors and  
10 south of Delta contractors -- or movement of water between  
11 settlement contractors north of the Delta to contractors  
12 south of the Delta would not happen, again but for this  
13 petition, the evidence is still sufficient to demonstrate  
14 that the effects of this petition are not likely to injure  
15 other legal users. That evidence will be demonstrated  
16 through the constraints that the operations are under  
17 currently.

18           D-1641, biological opinions - and those are the  
19 main sources of the objectives, of the standards, of the  
20 measures, of the alternatives that the Department and the  
21 Bureau of Reclamation must abide by when operating the  
22 projects - still apply. And the testimony will  
23 demonstrate that moving any water north to south under  
24 this petition will not cause the operations to go outside  
25 the constraints that were set up by D-1641 in the

1 biological opinions.

2           And, more importantly, were analyzed by the  
3 biological opinions in D-1641 -- those standards and  
4 objectives were analyzed and are intended to protect  
5 against injury to other legal users and fish and wildlife.  
6 And, therefore, the Department's position is this petition  
7 will not injure -- will not cause the projects, the  
8 operations to go outside the constraints that it is under  
9 and therefore will not likely injure other legal users.

10           And then, lastly, what are the benefits? The  
11 benefits of this petition are to facilitate transfers.  
12 It's low allocations. The testimony will demonstrate that  
13 there are historically low allocations for south of the  
14 Delta users. And so whatever water that can be moved,  
15 whatever water that can be put south of the Delta, it  
16 is -- this petition will remove one obstacle to get that  
17 water to its highest use, to where it is needed most.

18           And with that, we will start the panel.

19           CO-HEARING OFFICER BAGGETT: Would the Bureau  
20 like to make an opening statement?

21           MS. AUFDEMBERGE: No.

22           CO-HEARING OFFICER BAGGETT: So the Bureau is  
23 passing on the opening statement.

24           With that, let's proceed with the panel. Like I  
25 said, we'll get to your case-in-chief, then we'll take a

1 quick recess.

2 So proceed.

3 MR. SODERLUND: So again we will start with John  
4 Leahigh.

5 DIRECT EXAMINATION

6 OF MR. JOHN LEAHIGH

7 BY MR. ERICK SODERLUND, ESQ., representing the State  
8 Department of Water Resources:

9 Mr. Leahigh, will you state your full name for  
10 the record.

11 MR. LEAHIGH: Yes. John Leahigh. Last name is  
12 spelled L-e-a-h-i-g-h.

13 MR. SODERLUND: And will you state your current  
14 position.

15 MR. LEAHIGH: Yes, Chief of State Water Project  
16 Operations and Planning Office.

17 MR. SODERLUND: Thank you.

18 And have you reviewed DWR Exhibit 03, which is  
19 also identified as your testimony?

20 MR. LEAHIGH: Yes.

21 MR. SODERLUND: And does it accurately reflect  
22 your testimony?

23 MR. LEAHIGH: Yes.

24 MR. SODERLUND: At this time would you like to  
25 provide any updates or corrections to that testimony?

1 MR. LEAHIGH: No.

2 MR. SODERLUND: Thank you.

3 And at this time would you like to please  
4 summarize your testimony.

5 MR. LEAHIGH: Okay.

6 Good morning, Board Member Baggett, Chairman  
7 Hoppin, and board staff.

8 As counsel indicated, my role here is to give a  
9 summary of background of where we stand with regards to  
10 the hydrology and a little bit on how that may affect  
11 operations.

12 As you recall, back -- both the Sacramento and  
13 San Joaquin River basins are coming off two back-to-back  
14 critically dry or dry years. Unfortunately water year  
15 2009 has started out -- started out well below average,  
16 with the concern peaking in January, which is typically  
17 the biggest precip producer, came in only a third of  
18 normal precipitation. Fortunately in early February  
19 weather patterns did change and for about a 30-day period,  
20 until early March, precip was above average, with March  
21 coming in slightly above average.

22 Because of the increased precipitation on the  
23 latest April first snow survey, both the Sacramento and  
24 the San Joaquin River basins were upgraded from a  
25 critically dry year to a dry year.

1           However, precipitation to date is still well  
2 below average - 88 percent. In fact, snow pack is -- and  
3 this may be actually a slight difference from the  
4 testimony this is updated information - 65 percent of  
5 average snowpack.

6           Anticipated runoff for the remainder of the year  
7 is -- at the median conditions, based on the April 1st  
8 forecast, was 70 percent.

9           But more importantly, 2009 will be the third  
10 consecutive dry or critically dry year for both Sacramento  
11 and San Joaquin water basins.

12           One effect that this has had is record low  
13 storage in the major upstream reservoirs. Both Shasta and  
14 Oroville remain approximately 1.7 million acre-feet below  
15 average as of the end of March. Also, more significantly,  
16 San Luis Reservoir is only 53 percent of average to date.

17           Now, this is partly due to the fact that early  
18 on -- earlier in the winter we had a late start in filling  
19 San Luis because of the dry hydrology. We come into  
20 February and March, and the wetter period is when we also  
21 have the more restrictions on the pumping and we're not  
22 able to make any progress in filling San Luis.

23           All of these factors have resulted in very low  
24 water supply allocations for both projects. The State  
25 Water Project allocation of -- currently at 30 percent

1 matches the lowest M&I allocation on record, which is  
2 1991. And also CVP's allocation is very low.

3           Other droughts have been of longer duration -  
4 late eighties, early nineties - and some have been of  
5 greater single-year intensity - 1977, for instance. But  
6 this year remains severe in terms of fulfilling the needed  
7 supplies.

8           The largest contributing factor for this gap  
9 between the supply and demand is partially increasing  
10 demand, as was noted, increased population of estimated 9  
11 million residents since 1991. The other part contributing  
12 to this gap is increased restrictions that have been  
13 applied to the operations since 1991, including the  
14 Bay-Delta core -- the water quality control plan, the new  
15 biological opinions since 1991.

16           So these factors make the Governor's  
17 proclamation, the state of emergency, still highly  
18 relevant.

19           In order to deal with the shortages, water  
20 transfers and exchanges are a big part. Facilitating  
21 water transfers across the Delta will not affect the  
22 project's ability to meet all the terms and conditions of  
23 the water rights or any other new requirements related to  
24 the Delta smelt biological opinion or other future  
25 biological opinions.

1           Approval of this petition will provide  
2 operational flexibility to allow water agencies to quickly  
3 and efficiently get water supplies to the areas in  
4 critical needs -- with critical needs.

5           Thank you. That concludes my testimony.

6           CO-HEARING OFFICER BAGGETT: It might be better  
7 if the attorney move to this table who's asking the  
8 questions, whoever the -- I mean if you move over here,  
9 you can actually look at your witnesses. And then we'll  
10 do the cross, we'll do the same thing. Whoever's doing  
11 the cross can sit up there.

12           This room is a little awkward. I apologize.

13           MS. AUFDEMBERGE: Amy Aufdemberge for U.S. Bureau  
14 of Reclamation.

15           The next witness on this panel will be a witness  
16 from the Bureau of Reclamation - Ron Milligan.

17           And I have a little housekeeping issue to  
18 straighten up first. We identified the written testimony  
19 of Ron Milligan as BOR-1 in our witness and exhibit list.  
20 And that demarcation was inadvertently left off this  
21 testimony. So we'd just like to have this testimony  
22 marked as BOR-1.

23           CO-HEARING OFFICER BAGGETT: If there's no  
24 objection, so noted.

25        /////



1 DIRECT EXAMINATION  
2 OF MR. RON MILLIGAN  
3 BY MS. AMY L. AUFDEMBERGE, ESQ., representing the U.S.  
4 Bureau of Reclamation:

5 Ron, can you please state your name and your  
6 qualifications to testify at this hearing.

7 MR. MILLIGAN: My name is Ron Milligan. I am the  
8 operations manager for the Central Valley Project with the  
9 Bureau of Reclamation. I've had this position -- I've  
10 worked with Bureau of Reclamation since 1999 and have  
11 worked in this position since the year 2004. I've  
12 testified before the Board at other hearings.

13 MS. AUFDEMBERGE: Do you have before you a  
14 document that you've marked BOR-1?

15 MR. MILLIGAN: Yes, I do.

16 MS. AUFDEMBERGE: Is that a true and correct copy  
17 of your testimony?

18 MR. MILLIGAN: Yes, it is.

19 MS. AUFDEMBERGE: Can you please summarize your  
20 testimony.

21 MR. MILLIGAN: Sure. I will summarize it, and  
22 then I won't belabor any points that John has already made  
23 in his testimony.

24 Clearly, we are in the third year of dry  
25 conditions within both the Sacramento and San Joaquin

1 valleys. There has been -- there was significantly more  
2 concern back in January of this year, with -- in early  
3 February, with very, very dry conditions. We were  
4 entering about the 11th month of very low runoff and below  
5 normal precipitation. There was some improvement from  
6 mid-February into March that has provided some significant  
7 improvement in storage conditions in the reservoirs within  
8 the Sacramento and San Joaquin valleys.

9           Unfortunately given the current regulatory regime  
10 in protections for various species, San Luis Reservoir has  
11 been extremely low and is currently only about half full,  
12 which has led to just a 10 percent allocation for water  
13 surface contractors in the ag service sector for the CVP.

14           I think those and the accompanying 30 percent  
15 allocation on the State Water Project side is indicative  
16 of the difficulty in being able to move water from north  
17 to south through the winter months. And as we enter into  
18 the summer, where we typically have opportunities to  
19 export water and move water from north to south, those  
20 will not be enough under the current -- under typical  
21 operations to be able to up those allocations  
22 significantly.

23           So under these types of circumstances there are  
24 some opportunities that do arise that allow for some  
25 exchanges. I will characterize them mostly as that,

1 because a number of the parties would like to see their  
2 water returned in the other -- in the out-year, which  
3 would be covered by this petition.

4           But I will highlight a couple of those as they  
5 relate to the CVP. These are mostly or entirely south of  
6 the Delta. In summary, Kern County with an exchange to  
7 Westlands, there's some water currently within Kern County  
8 Water Agency's control that they could make available to  
9 move back to Westlands Water District. This could be  
10 expedited because of the low allocations by a consolidated  
11 place of use.

12           In addition to that, east side CVP contractors,  
13 i.e., the Friant Division, would have some ability to move  
14 some water from the Friant Division to the west side as an  
15 exchange, and possibly with the ability to enhance some  
16 groundwater pumping programs that are being discussed and  
17 facilitate that exchange with some State water  
18 contractors, and then bringing the water back to the  
19 Friant Division. Friant Division currently is at 100  
20 percent of its Class 1 supplies; 0 percent, Class 2.

21           So there are some opportunities to take some  
22 water from the east side and get it to the west side and  
23 then bring it back again later in the fall or next winter.

24           There's also some exchanges with some water  
25 districts that are actually adjacent to each other on the

1 west side, where one district happens to be a State water  
2 contractor, the other district a CVP contractor. In these  
3 cases there are a number of owners that actually have  
4 plans in both districts. This would facilitate some  
5 movement of water between the two districts in a way that  
6 would allow the limited supplies to be put on the most  
7 important or the most critical needs in terms of cropping  
8 for permanent crops.

9           An example of that is Del Puerto Water District  
10 with Oak Flat Water District, who happens to be a State  
11 Water Project contractor, as one example.

12           And then there's some other examples of being  
13 able to -- let's say, more readily be able to take some  
14 water out of the Semitropic water bank to provide it back  
15 to both the City of Tracy and to San Luis Water District.  
16 Again, with the low allocations, it's difficult to produce  
17 the exchanges that are necessary to get the water out of  
18 the bank in a manner that was envisioned when these  
19 proposals were put together.

20           Again, Reclamation is -- the circumstances are  
21 developing day by day and week by week. Since the time  
22 we've put this petition together, you know, some  
23 hydrologic conditions have changed. But I think the  
24 flexibility of a consolidated place of use certainly still  
25 has great value in allowing the different districts to be

1 creative and find ways to move the limited water supplies  
2 that are available.

3 And I encourage the Board to improve the  
4 petition. And we're certainly here to answer any  
5 questions about how this may work.

6 CO-HEARING OFFICER BAGGETT: Thank you.

7 MR. SODERLUND: If you don't mind, I'll just do  
8 it from right here.

9 Our last witness for this panel is Maureen  
10 Sergent with the Department of Water Resources.

11 DIRECT EXAMINATION

12 OF MS. MAUREEN SERGENT

13 BY MR. ERICK SODERLUND, ESQ., representing the State  
14 Department of Water Resources:

15 And, Maureen, could you state your name and your  
16 current position.

17 MS. SERGENT: Maureen Sergent. I am a senior  
18 engineer in the State Water Project Analysis Office at the  
19 Department of Water Resources headquarters building.

20 MR. SODERLUND: And, Ms. Sergent, have reviewed  
21 DWR Exhibit -04

22 MS. SERGENT: Yes, I have.

23 MR. SODERLUND: And does it accurately reflect  
24 your testimony?

25 MS. SERGENT: Yes, it does.

1           MR. SODERLUND: At this time do you have any  
2 updates or corrections?

3           MS. SERGENT: No, I don't.

4           MR. SODERLUND: And would you now please  
5 summarize your testimony.

6           Thank you.

7           MS. SERGENT: Good morning, Board members and  
8 Board staff.

9           Although the water supply conditions have  
10 improved from the time we filed the petition, there are  
11 still several areas of state that are really in critical  
12 need, including primarily the San Joaquin Valley and  
13 southern California.

14           They remain critically short with allocations  
15 from the Bureau at 10 percent and the project at 30  
16 percent.

17           And what the Department is attempting to do with  
18 this petition is allow movement of water between some of  
19 those areas to apply, as Ron mentioned, to certain  
20 portions of the valley that have crops that may not  
21 survive. Some areas have crops that are annual crops and  
22 can be fallowed. Other's are permanent crops. And so the  
23 districts are attempting to find creative ways to get  
24 through this next year.

25           One of those activities that the Department is

1 involved in and trying to help with that effort is the  
2 Drought Water Bank. It was created to facilitate  
3 acquisition of water supplies due to the current  
4 conditions coupled with the increased regulatory  
5 restrictions. DWR is currently negotiating contracts with  
6 willing sellers for transfer of water made available from  
7 agencies on the Sacramento the and Feather rivers through  
8 crop idling and ground water substitution.

9 Consolidation of the project's place of use will  
10 facilitate the implementation of the bank in the event  
11 that some of that water being transferred by the  
12 contractors will be done under the water rights of DWR or  
13 Reclamation, and only that portion that exceeds their  
14 individual water rights. In such occasions the transfer  
15 quantity, a portion of it could be project water. Likely  
16 the bulk of it will be done under their individual water  
17 rights.

18 As appropriate, these agencies are already  
19 filing -- have already filed or will soon file petitions  
20 for change in place of use with the Water -- with the  
21 Water Board as well.

22 The current petition for change will only affect  
23 that portion of the water -- of any transfer to the bank  
24 that includes project water. Water provided that is  
25 outside that available under the agency's individual

1 rights, the petition will allow the delivery of State  
2 Water Project or CVP supplies to the consolidated place of  
3 use downstream of Barker Slough banks or Jones pumping  
4 plants.

5           The existing proposals we have for transferable  
6 water to the water bank are approximately 80,000  
7 acre-feet. One thing I could update is it is now slightly  
8 over 80,000 acre-feet of transferable water. The total  
9 quantity provided to the bank is just under a hundred  
10 thousand acre-feet, but there is a depletion factor  
11 applied to any groundwater substitution which brings it  
12 down to 80,000. This number is soft, at best, right now,  
13 because we do not have any signed contracts at the moment.  
14 Some of those agreements -- one agreement was submitted  
15 the day we prepared this testimony. And the numbers  
16 change as we evaluate the proposals.

17           So at this time it looks like we have about  
18 somewhere just slightly over 80,000 thousand acre-feet.  
19 We don't anticipate that the amount of project water will  
20 be more than 10,000 acre-feet of that portion.

21           Some other transfers and exchanges that will be  
22 facilitated by this are exchanges between State Water  
23 Project and CVP contractors. The only water that will be  
24 facilitated -- only movement of water facilitated by this  
25 that comes from north of the Delta to the south is that



1 small portion of Drought Water Bank water. The rest of  
2 the water that will be facilitated -- or transfers and  
3 exchanges that will be facilitated by this will be between  
4 State Water Project and CVP contractors for water that is  
5 already exported south of the Delta and is within the  
6 current State Water Project and CVP allocations for this  
7 year. It will not affect the allocations of water for  
8 this year.

9 Ron mentioned a few of the transfers. I'd like  
10 to just talk about a few of the other ones that involve  
11 State Water Project contractors. One is Empire Westside  
12 Irrigation District. And a transfer from landowners that  
13 have land within Empire Westside, they also have land  
14 within Westlands Water District. And they would like to  
15 move up to a thousand acre-feet of their State Water  
16 Project's supply into Westlands Water District's. They  
17 have -- they grow annual crops in Empire Westside and they  
18 have permanent crops on their land within Westlands Water  
19 District. This will allow them to move water to that area  
20 which is only receiving a 10 percent supply in Westlands.

21 And if additional local supplies are not  
22 available from the Kings River to Empire Westside, then  
23 that land in Empire would be fallowed.

24 Santa Clara Water District is a State Water  
25 Project and CVP contractor. They receive their State

1 Water Project supply from the South Bay Aqueduct. They  
2 receive their CVP supply through San Luis Reservoir in the  
3 San Filipe Division.

4           Due to the pumping of stripes and the shortages  
5 that were discussed and San Luis Reservoir, the water  
6 levels are well below normal. At Santa Clara CVP supplies  
7 are typically conveyed through San Luis to the Pacheco  
8 pumping plant. As storage levels drop below 300,000  
9 acre-feet, capacity of the pumps is limited. In addition,  
10 there's an April algae problem that develops which affects  
11 the water quality for Santa Clara's supply.

12           As the reservoir level drops, it reaches the  
13 point of the plant's lower intake and they can no longer  
14 deliver water to Santa Clara through San Luis reservoir.

15           What DWR and Reclamation propose to do is that  
16 DWR would pump water at banks and deliver State Water  
17 Project water to Santa Clara through the South Bay  
18 Aqueduct. Bureau would still pump Santa Clara's water at  
19 Jones pumping plant and deliver that to O'Neill forebay.  
20 But that water would then be used within the State Water  
21 Project place of use. It would be an equal exchange of  
22 CVP and State Water Project water for Santa Clara.

23           Ron already mentioned the Del Puerto exchange.  
24 Those two districts are immediately adjacent and have  
25 similar property owners. They also have similar drainage

1 characteristics.

2           Arvin Edison Groundwater Storage District does a  
3 banking operation. Metropolitan Water District has water  
4 supplies that it has banked in years when it had a little  
5 additional water.

6           And in order -- typically the water is removed  
7 from groundwater storage by pumping and delivered to the  
8 aqueduct. This consolidated place of use would allow the  
9 return of some of that water with Arvin Edison's CVP  
10 supply in exchange for pumping the groundwater that  
11 currently exists that was previously banked.

12           The transfers and exchanges described above  
13 illustrate the type of exchanges to be facilitated by the  
14 consolidated place of use. DWR and Reclamation anticipate  
15 that more needs and opportunities for changing where SWP  
16 or CVP water is supplied may be developed, which could  
17 benefit from the consolidated place of use. In order for  
18 this petition to also cover any future transfers or  
19 exchanges, DWR and Reclamation propose the following  
20 parameters within which any projects for this petition  
21 would be conducted.

22           Any project involving a transfer of SWP or CVP  
23 water through the Delta, DWR and Reclamation will continue  
24 to operate the projects in accordance with the 2008 Delta  
25 smelt biological opinion, which analyzed the effects of up

1 to a maximum of 600,000 acre-feet of transfers exported  
2 only from July through September. The criteria and  
3 protective measures contained in D-1641 as well as the  
4 biological opinions for the protection of Sacramento River  
5 winter-run chinook salmon, spring-run chinook salmon, and  
6 steelhead.

7 Carriage loss will be deducted from any transfer  
8 through the Delta. The total quantity of water delivered  
9 to SWP or CVP contractors as a result of the change will  
10 not exceed historic averages. No transfer or exchange  
11 will take place that results in a net loss of San Joaquin  
12 River or Sacramento River flow. And no transfer or  
13 exchange will take place that results in the net loss of  
14 any east side CVP water from the San Joaquin Valley.

15 DWR and Reclamation will develop, in coordination  
16 with the Board staff, a reporting plan that will account  
17 for all water transferred or exchanged under the  
18 provisions of any order approving the consolidated place  
19 of use. The reporting plan will include the parties to  
20 the transfer or exchange, how much water is to be  
21 transferred, how the water will be made available, the  
22 facilities required to effect the transfer, any  
23 anticipated changes to stream flow or drainage resulting  
24 from the transfer, and how the transfer will affect the  
25 overall water supply of the agencies receiving transfer

1 water.

2 In summary, due to the critically dry supply  
3 conditions in '09, water agencies are actively pursuing  
4 supplemental water supplies to mitigate the impacts of the  
5 loss of project supplies, particularly in the San Joaquin  
6 Valley where some districts are receiving only 10 percent.

7 With the exception of the limited amount of  
8 project water to be delivered under the Drought Water  
9 Bank, anticipated to be less than 10,000 acre-feet, the  
10 proposals facilitated by the requested consolidation of  
11 the CVP and State Water Project use will not result in an  
12 increase in pumping from the Delta or the total quantity  
13 of project water delivered south of the Delta.

14 That concludes my testimony.

15 MR. SODERLUND: And that concludes the Department  
16 and Bureau's case-in-chief.

17 CO-HEARING OFFICER BAGGETT: Very good.

18 Let's take a ten-minute recess. And then we'll  
19 come back with cross-examination beginning with San Luis  
20 Delta.

21 (Thereupon a recess was taken.)

22 CO-HEARING OFFICER BAGGETT: Okay. Let's go back  
23 on the record. Cross-examination of Department of Water  
24 Resources and the U.S. Bureau of Reclamation's witnesses.

25 I think, Mr. Rubin, you're up first.

## 1 CROSS EXAMINATION

2 OF MR. JOHN LEAHIGH, MR. RON MILLIGAN,

3 AND MS. MAUREEN SERGENT

4 BY MR. JON D. RUBIN, ESQ., representing the San Luis &  
5 Delta-Mendota Water Authority and the Westlands Water  
6 District:7 Good morning. John Rubin for San Luis &  
8 Delta-Mendota Water Authority and Westlands Water  
9 District.10 I have a series of questions and I'll present  
11 them -- some of them are better if the witnesses for the  
12 Department of Water Resources could answer. I think it's  
13 more specific to your knowledge. And then there's others  
14 for Mr. Milligan.15 My first question to the Department of Water  
16 Resources. The Department has been presented with  
17 proposals for the sale of water appropriated pursuant to  
18 water rights held for operation of the State Water  
19 project?

20 MS. SERGENT: Yes.

21 MR. RUBIN: And those proposals are part of the  
22 Drought Water Bank; is that correct?

23 MS. SERGENT: Yes.

24 MR. RUBIN: For the purposes of my question I'll  
25 refer to that water as Drought Water Bank SWP water.

1 MS. SERGENT: Okay.

2 MR. RUBIN: The Department of Water Resources has  
3 also been presented with proposals for the sale of water  
4 appropriated pursuant to water rights held for operation  
5 of the Central Valley Project; is that correct?

6 MS. SERGENT: Yes, it is.

7 MR. RUBIN: And again that is for sale to the  
8 Drought Water Bank?

9 MS. SERGENT: Yes.

10 MR. RUBIN: For the purposes of my question I'll  
11 be referring to that water as Drought Water Bank CVP  
12 water.

13 MS. SERGENT: Okay.

14 MR. RUBIN: Of the water that the Department of  
15 Water Resources may purchase for the Drought Water Bank,  
16 what is the maximum amount that might be Drought Water  
17 Bank SWP water?

18 MS. SERGENT: It's currently estimated at about 5  
19 to 6,000 acre-feet.

20 MR. RUBIN: Do you believe that there is  
21 sufficient demand by those who hold State Water Project  
22 contracts that all of the Drought Water Bank SWP water  
23 could be purchased by those who hold the SWP contracts?

24 MS. SERGENT: Yes. Demand far exceeds supply.

25 MR. RUBIN: Is it your opinion that if the

1 Drought Water Bank SWP water were purchased by those who  
2 hold State Water Project contracts, it would not be  
3 necessary to change the place of use designated in the  
4 water rights held by the Department of Water Resources for  
5 operation of State Water Project?

6 MS. SERGENT: Yes.

7 MR. RUBIN: Of the water that the Department of  
8 Water Resources may purchase for the Drought Water Bank,  
9 what is the maximum quantity that might be Drought Water  
10 Bank CVP water?

11 MS. SERGENT: That estimate is still very soft.  
12 It could be from a thousand acre-feet to up to 10,000  
13 acre-feet possibly.

14 MR. RUBIN: Do you believe that there is  
15 sufficient demand by those that hold Central Valley  
16 Project contracts that all of the Drought Water Bank CVP  
17 water could be purchased by those that hold the Central  
18 Valley Project contracts?

19 MS. SERGENT: Yes, there is.

20 MR. RUBIN: Is it your opinion that if the  
21 Drought Water Bank CVP water were purchased by those that  
22 hold Central Valley Project contracts, it would not be  
23 necessary to change the place of use designated in the  
24 water rights held by the United States Bureau of  
25 Reclamation for operation of the Central Valley project?



1 MS. SERGENT: Yes.

2 MR. RUBIN: Based on your testimony today, you  
3 would agree then that if the State Water Resources Control  
4 Board were to deny the petitions that are the subject of  
5 this hearing, it is likely that there would be no change  
6 in the quantity of water the Department of Water Resources  
7 would purchase for the Drought Water Bank?

8 MS. SERGENT: Yes, that's correct. There might  
9 be a reallocation -- a difference in the way the water's  
10 allocated. But there would be no change in pumping.

11 MR. RUBIN: Would there be a change in the  
12 quantity of water that the Department might purchase?

13 MS. SERGENT: No.

14 MR. RUBIN: And based upon your testimony today,  
15 you would agree that if the State Water Resources Control  
16 Board were to deny the petitions that are the subject of  
17 the hearing, it is likely that there would no change in  
18 the quantity of water the Department of Water Resources  
19 may sell through the Drought Water Bank?

20 MS. SERGENT: That's correct.

21 MR. RUBIN: I'm going to ask you a few  
22 questions - and I apologize - it's going to require a  
23 little bit of assumptions on your part. And so I'll run  
24 through the assumptions and then ask my question.

25 MS. SERGENT: Okay. I'll do my best.

1 MR. RUBIN: Hopefully you can follow it.

2 I ask that you consider two circumstances. The  
3 first circumstance assumes that the State Water Resources  
4 Control Board denies the petitions that are the subject of  
5 the hearing.

6 MS. SERGENT: Okay.

7 MR. RUBIN: And the denial precludes all of the  
8 transfers that are described in the petitions that are the  
9 subject of this hearing.

10 MS. SERGENT: All right.

11 MR. RUBIN: The second circumstance. I ask that  
12 you assume that the State Water Resources Control Board  
13 approves the petitions that are the subject of this  
14 hearing.

15 MS. SERGENT: All right.

16 MR. RUBIN: And that all of the transfers  
17 described in the petition that are the subject of this  
18 hearing occur.

19 MS. SERGENT: Okay.

20 MR. RUBIN: Based upon those two circumstances,  
21 would the quantity of water the Department of Water  
22 Resources conveys through the Delta at its Harvey O. Banks  
23 pumping plant or any other State Water Project facility  
24 change under the second circumstance as compared to the  
25 first?

1 MS. SERGENT: No, it would not.

2 MR. RUBIN: Now, I have a second hypothetical.

3 My first hypothetical focused on the transfers.

4 If we assume all of the same circumstances except  
5 under the first the State Board denies the petition and  
6 the denial excludes the exchanges --

7 MS. SERGENT: Okay.

8 MR. RUBIN: -- and under the second circumstance  
9 the Board grants the petition that allows for all of the  
10 exchanges to occur.

11 MS. SERGENT: Now, are you talking about  
12 exchanges south of the -- the exchanges between the  
13 contractor or are we still talking about the Drought Water  
14 Bank?

15 MR. RUBIN: Exchanges that are contemplated in  
16 the petition.

17 MS. SERGENT: All right.

18 MR. RUBIN: So I'm asking under two  
19 circumstances. The first, the Board denies the petitions  
20 and the denial precludes the exchanges that are described  
21 in the petition.

22 MS. SERGENT: Okay.

23 MR. RUBIN: And under the second the State Board  
24 approves the petition and all of the exchanges occur.

25 MS. SERGENT: Okay.

1           MR. RUBIN: Based upon those circumstances, would  
2 the quantity of water that the California Department of  
3 Water Resources conveys through State Water Project  
4 facilities change under the second circumstance as  
5 compared to the first?

6           MS. SERGENT: No.

7           MR. RUBIN: Ms. Sergeant, I ask you to look to  
8 page 2 of your written testimony, which has been marked as  
9 Exhibit DWR-04, I believe.

10          MS. SERGENT: Okay.

11          MR. RUBIN: On page 2 of your written testimony  
12 you have a statement in the last paragraph of the page.  
13 It looks like an incomplete paragraph that continues on to  
14 page 3. There's a sentence -- the second sentence on  
15 page -- in the last paragraph on page 2 that reads, "The  
16 proposed exchanges and transfers among SWP and CVP  
17 contractors south of the Delta will not result in  
18 additional diversions by the projects."

19          Do you see that statement?

20          MS. SERGENT: Yes.

21          MR. RUBIN: By projects, you mean the State Water  
22 Project and the Central Valley Project?

23          MS. SERGENT: Yes, I do.

24          MR. RUBIN: And by diversions you mean conveyance  
25 of water from north of Delta to south of Delta?

1 MS. SERGENT: Yes.

2 MR. RUBIN: Thank you.

3 Okay. Ms. Sergeant, I have a few more questions  
4 for you. And I think that will conclude my questions to  
5 the Department of Water Resources.

6 You're familiar with the Drought Water Bank?

7 MS. SERGENT: Yes, I am.

8 MR. RUBIN: Are you familiar with the Drought  
9 Water Bank that occurred in 1994?

10 MS. SERGENT: Yes, I am.

11 MR. RUBIN: In 1994 did the Department of Water  
12 Resources purchase any water from any person or entity  
13 within Butte County?

14 MS. SERGENT: Yes, we did.

15 MR. RUBIN: And do you know the quantity of water  
16 that the Department purchased from a person or entity  
17 within Butte County?

18 MS. SERGENT: It was slightly over 80,000  
19 acre-feet.

20 MR. RUBIN: And do you know that if the 80,000  
21 acre-feet was surface water or groundwater?

22 MS. SERGENT: It was groundwater.

23 MR. RUBIN: And now turning back to the Drought  
24 Water Bank --

25 MS. SERGENT: It was groundwater exchange.

1 MR. RUBIN: Thank you.

2 Turning back to the Drought Water Bank in 2009,  
3 do you know if there's any water that's being proposed for  
4 purchase from Butte County?

5 MS. SERGENT: Yes.

6 MR. RUBIN: And what quantity of water is being  
7 proposed for purchase from Butte County?

8 MS. SERGENT: At this time it's approximately  
9 6,000 acre-feet of crop idling. There is no groundwater  
10 exchange water being purchased from Butte County.

11 MR. RUBIN: Thank you.

12 Mr. Leahigh or Ms. Sergent, I have a question for  
13 you. In the testimony the Department of Water Resources  
14 submitted there was an indication of the allocation for  
15 State Water Project contractors, is that correct?

16 MR. LEAHIGH: Yes.

17 MR. RUBIN: And that current allocation --  
18 projected allocation is what?

19 MR. LEAHIGH: Yes, I believe in the  
20 testimony -- yes, it had increased. The current State  
21 Water Project allocation's 30 percent.

22 MR. RUBIN: I'm sorry, 30 percent?

23 MR. LEAHIGH: 30 percent, 3-0.

24 MR. RUBIN: Under any circumstance is there a  
25 potential for that allocation to increase?

1           MR. LEAHIGH: There is -- we will reevaluate the  
2 water supply conditions once we get the May 1st update.  
3 At this time though we would not anticipate an increase,  
4 because of the amount of precip we've seen in April has  
5 been -- has actually been less than half of average. At  
6 this point, as I said, we don't anticipate an increase.  
7 Although one would be possible. If there is an increase,  
8 it would likely be a marginal amount, say, maybe 5  
9 percent.

10           MR. RUBIN: And, Mr. Leahigh or Ms. Sergent, if  
11 there were an increase, although -- well, if there were an  
12 increase, would any of your opinions or conclusions  
13 change?

14           MS. SERGENT: No.

15           MR. LEAHIGH: No, a 35 percent still represents a  
16 very low allocation.

17           MR. RUBIN: Thank you.

18           Mr. Milligan, I now turn to you. And my  
19 questions may seem very similar to the ones I've have  
20 previously asked. But I'm focusing on the Central Valley  
21 Project. And I would like for you to provide answers to  
22 the same set of hypotheticals that I asked Ms. Sergent but  
23 specific to the Central valley Project.

24           And my first question related to transfers, and  
25 ask that you consider two circumstances.

1           The first circumstance is that the State Water  
2 Resources Control Board denies the petitions that were the  
3 subject of this hearing and the denial precludes all  
4 transfers described in the petitions.

5           And then the second circumstance is that the  
6 State Water Resources Control Board approves the petitions  
7 that are the subject of this proceeding and that all  
8 transfers described in the petitions occur.

9           My question to you is based on those two  
10 circumstances. Would the quantity of water the United  
11 States Bureau of Reclamation conveys through its C.W.  
12 Jones pumping plant change under second circumstance as  
13 compared to the first circumstance?

14           MR. MILLIGAN: No, it would not.

15           MR. RUBIN: And second set of hypotheticals  
16 relate to the exchanges.

17           And like the questions I asked previously, the  
18 first circumstance involves a denial by the Board of the  
19 petitions and the denial precludes the exchanges.

20           The second circumstance is the State Water  
21 Resources Control Board approves the petitions and all of  
22 the exchanges described occur.

23           Based upon those the circumstances, would the  
24 quantity of water the United States Bureau of Reclamation  
25 conveys through its C.W. Jones pumping plant change under



1 the second circumstance as compared to the first?

2 MR. MILLIGAN: No, it would not.

3 MR. RUBIN: And, Mr. Milligan, is there a  
4 potential for an increase to the allocation for Central  
5 Valley Project agricultural water service contractors  
6 south of the Delta this year?

7 MR. MILLIGAN: Yes, there is.

8 MR. RUBIN: And what is the potential increase?

9 MR. MILLIGAN: In our allocation announcements  
10 for last week we indicated if we were to receive closer to  
11 normal precipitation through April -- the end of April  
12 into May, we could potentially see a 15 percent allocation  
13 for ag service south of the Delta.

14 MR. RUBIN: If that increase were to occur, would  
15 any of your testimony today change?

16 MR. MILLIGAN: No it would not.

17 MR. RUBIN: Mr. Milligan, I have one last  
18 question.

19 Are you familiar with the Central Valley Project  
20 water districts that are involved in -- excuse me. Strike  
21 that.

22 Mr. Milligan, are you familiar with the Central  
23 Valley Project districts that discharge to the San Joaquin  
24 River?

25 MR. MILLIGAN: Yes, I am.

1 MR. RUBIN: Do you know if those districts  
2 discharge pursuant to some sort of regulatory oversight?

3 MR. MILLIGAN: Yes, I do.

4 MR. RUBIN: Would anything in the petition before  
5 the Board in your opinion change the requirements of those  
6 districts to meet the regulatory oversight for drainage  
7 discharges?

8 MR. MILLIGAN: No, not that I'm aware of.

9 MR. RUBIN: I Just have one more question. And I  
10 will ask this of either the Bureau of Reclamation or the  
11 Department of Water Resources.

12 Did the -- well, let me ask it separately to  
13 avoid a compound question.

14 Did the United States Bureau of Reclamation file  
15 the petition that's the subject of this hearing pursuant  
16 to any urgency provisions in the Water Code?

17 MR. MILLIGAN: The Bureau of Reclamation did file  
18 this petition. Is that the question?

19 MR. RUBIN: Do you know if it was pursuant to an  
20 urgency -- any of the urgency provisions in the Water  
21 Code? And if you don't know, that's an acceptable answer.

22 MR. MILLIGAN: There was some discussion whether  
23 to do this as an urgency change petition or otherwise. So  
24 I do not recall.

25 MR. RUBIN: Ms. Sergent or Mr. Leahigh, do you

1 know if the Department of Water Resources filed the  
2 petition pursuant to any urgency provisions in the Water  
3 Code?

4 MS. SERGENT: We did not. The petition was  
5 filed -- it's a 1700 petition for change. It is not an  
6 urgency change.

7 MR. RUBIN: Thank you.

8 I have no further questions.

9 CO-HEARING OFFICER BAGGETT: Thank you.

10 Next, Mr. Jackson, CSPA.

11 MR. JACKSON: As a housekeeping matter, I'd like  
12 to confirm that the testimony of Frances Mizuno, Cindy  
13 Kao, and Tom Glover is no longer submitted? Is that what  
14 happened?

15 MR. RUBIN: John Rubin for the San Luis &  
16 Delta-Mendota Water Authority.

17 While the testimony in written form was filed as  
18 part of this proceeding, I indicated earlier that we will  
19 not be presenting the witnesses or offering any of their  
20 testimony into evidence.

21 CO-HEARING OFFICER BAGGETT: Very good. Thank  
22 you.

23 If you'd like to go over to the desk, Mr.  
24 Jackson.

25 MR. JACKSON: Yes.

1 MR. SODERLUND: Real quick. This is Erick  
2 Soderlund For the Department of Water Resources. And I  
3 have another housekeeping question.

4 The petition and its exhibits were submitted as  
5 an exhibit to the hearing. And I was wondering if the  
6 Board would prefer some verification by the witnesses to  
7 that petition as it's accurate or to get it into the  
8 record, just to ensure that if there's any  
9 cross-examination on the petition, that it's relied on. I  
10 leave it up to your discretion or other parties. I don't  
11 even know -- if it's a confusing question, then I'll --

12 CO-HEARING OFFICER BAGGETT: The petition speaks  
13 for itself. It's been filed with us, you know.

14 MR. SODERLUND: Thank you.

15 CO-HEARING OFFICER BAGGETT: Verification on  
16 that.

17 Mr. Jackson, proceed.

18 MR. JACKSON: Thank you, sir.

19 CROSS EXAMINATION

20 OF MR. JOHN LEAHIGH, MR. RON MILLIGAN,

21 AND MS. MAUREEN SERGENT

22 BY MR. MICHAEL JACKSON, ESQ., representing the California  
23 Sportfishing Protection Alliance:

24 Mr. Milligan, as the operations officer for the  
25 Mid-Pacific Region of the Bureau of Reclamation, you have

1 access to all of the models and records that are in  
2 custody of the Bureau?

3 MR. MILLIGAN: I'm not sure that I have access to  
4 all records and models of the Bureau. But I probably  
5 could get access to ones that are germane to my position,  
6 yes.

7 MR. JACKSON: All right. In your testimony on  
8 page 1 under the heading "Need For Consolidation of CVP  
9 and SWP Places of Use" you indicate that 2009 has the  
10 potential to be one of the most severe drought years in  
11 California's recorded history. What do you mean by that,  
12 sir?

13 MR. MILLIGAN: In terms of this, I would  
14 characterize that as in terms of the allocation to water  
15 service contractors south of the Delta.

16 MR. JACKSON: So it's certainly not one of the  
17 more severe drought years in California recorded history  
18 at the present time, correct?

19 MR. MILLIGAN: I think in terms of a third dry or  
20 critically dry year I think it could be characterized as a  
21 drought. The severity is somewhat magnified by the timing  
22 of inflows, particularly this year, into the Delta and  
23 current regulatory regime.

24 MR. JACKSON: Speaking about this current  
25 regulatory regime, you've used that term a couple of times

1 in your testimony, as do the other witnesses. Are you  
2 talking about the fact that Judge Wanger told you you had  
3 to slow pumping and obey the law?

4 MR. MILLIGAN: No, I'm not.

5 MR. JACKSON: What are you talking about?

6 MR. MILLIGAN: In an historic perspective to,  
7 let's say, 1977 or the 1988 to 1992 drought, the current  
8 biological opinion terms and conditions, terms and  
9 conditions as they relate to D-1641, have a set of  
10 regulatory requirements on the projects that don't allow  
11 the projects to, let's say, respond as quickly as we might  
12 have to other drought circumstances. So the tests of  
13 whether you're in a drought situation in terms of, let's  
14 say, upstream reservoir storages, snow pack or runoff, may  
15 not be readily applicable to our situation right now as  
16 compared to the past droughts that folks usually point to.

17 MR. JACKSON: But that's not caused by the  
18 drought, I take it; that's caused by changes in the laws  
19 and regulations that help you operate your project?

20 MR. MILLIGAN: That they guide our operations.  
21 And then also the demands have changed in a number of ways  
22 since 1992, for example.

23 MR. JACKSON: Yes. But as far as the drought is  
24 concerned, in terms of the testimony, are you still  
25 standing by the testimony that 2009 has the potential to

1 be one of the most severe drought years in California's  
2 recorded history?

3 MR. MILLIGAN: I think in terms of delivery to  
4 major area south of the Delta, that is true.

5 MR. JACKSON: All right. Now, let's talk about  
6 the major areas south of the Delta.

7 You operate the Friant system as well?

8 MR. MILLIGAN: The Friant system is primarily  
9 operated out of our Fresno office. But clearly I have  
10 interactions with the operators there.

11 MR. JACKSON: And they're receiving 85 percent of  
12 their water this year?

13 MR. MILLIGAN: They are receiving 100 percent of  
14 their Class 1 supply.

15 MR. JACKSON: All right. So it's not then you're  
16 talking about -- when you're talking about drought impacts  
17 in the San Joaquin, the east side's okay?

18 MR. MILLIGAN: The east side has a vastly  
19 improved water supply situation this year. But I am  
20 talking about the west side Delta-Mendota --

21 MR. JACKSON: The San Luis unit?

22 MR. MILLIGAN: The San Luis unit and the  
23 Delta-Mendota Canal folks.

24 MR. JACKSON: Okay. Now, the exchange  
25 contractors are getting a hundred percent of their water?

1           MR. MILLIGAN: They are getting a hundred percent  
2 of their contract supply, yes.

3           MR. JACKSON: Why do they get a hundred percent  
4 of their water and Westlands only gets 10?

5           MR. MILLIGAN: The contract for the exchange  
6 contractors is linked to the unimpaired Shasta inflow.  
7 For this particular year, if that inflow was above  
8 approximately 3.3 million acre-feet, that would trigger  
9 the full supply under their settlement contract.

10          MR. JACKSON: And so that would -- the inflow did  
11 trigger the full supply --

12          MR. MILLIGAN: It did.

13          MR. JACKSON: -- under their settlement contract?

14                 Do you have a duty to operate according to your  
15 contracts in terms of priority?

16          MR. MILLIGAN: We have, I would say --

17          MR. RUBIN: I'm going to object to the question.  
18 I apologize, Mr. Milligan, for interrupting you. But the  
19 question assumes facts that are not in evidence.

20          CO-HEARING OFFICER BAGGETT: Mr. Jackson.

21          MR. JACKSON: He indicates he operates according  
22 to contracts. And as identified, one place in the San  
23 Joaquin -- two places in the San Joaquin Valley that are  
24 getting a hundred percent of water, and yet there's an  
25 area in the San Joaquin that is only getting 10 percent of



1 the water. And I want to know why.

2 MR. RUBIN: That doesn't address the objection  
3 that I raised. Again, the question had assumed a fact  
4 that was not presented into evidence. And the response  
5 doesn't explain where that fact comes from.

6 CO-HEARING OFFICER BAGGETT: Okay. I understand.

7 Mr. Jackson, do you want to rephrase your  
8 question.

9 MR. JACKSON: Sure.

10 Is the Bureau simply picking on the west side by  
11 giving them no water when everybody else is getting all  
12 their water?

13 MR. RUBIN: I'm going to object to the question.  
14 Again, there's no fact that everyone else is getting their  
15 water.

16 MR. JACKSON: I'm sorry, sir. I established the  
17 fact that the exchange contractors are getting a hundred  
18 percent of their water. And the Friant water contractors  
19 are getting a hundred percent of their Class 1 water. And  
20 now I'm wondering why it was divided up in that fashion to  
21 leave the west side with only 10 percent.

22 CO-HEARING OFFICER BAGGETT: Could you rephrase  
23 the question to state that, instead of everyone is  
24 getting -- I will sustain the objection because it was  
25 sort of broad and vague. If you could be more specific

1 with who everyone is, that would be I think helpful.

2 MR. JACKSON: Sure.

3 Is there a contractual reason that Friant's  
4 getting more water than the San Luis & Mendota water  
5 users?

6 MR. MILLIGAN: The current allocations are based  
7 on a number of set of obligations. But currently the  
8 contractual obligations to the settlement contractors  
9 clearly chose them at the hundred percent. There's a  
10 number of precedents and past practices, along with  
11 obligations under the contracts, that bring us to the  
12 current allocation of a hundred percent Class 1 versus a  
13 10 percent of the contract quantities on the west side.

14 MR. JACKSON: All right. So the situation on the  
15 west side in the federal Central Valley system is caused  
16 by a combination of lack of available water and the  
17 contract provisions themselves, is that right?

18 MR. MILLIGAN: Some would also say to some degree  
19 the place of use as it's outlined in the -- by the Board,  
20 which has some -- could also come into play, because it  
21 relates to the Friant division versus the west side.

22 MR. JACKSON: All right. Now, Mr. Leahigh, you  
23 indicated in your testimony that southern California is  
24 receiving the lowest amount of M&I water delivery in  
25 history. Is that what you said?

1           MR. LEAHIGH: What I said was that the current 30  
2 percent allocation matches the lowest historical  
3 allocation for the M&I contractors. And that's in terms  
4 of percent of their requests.

5           MR. JACKSON: All right. Is that caused by the  
6 severity of this drought or the changes in the contracts  
7 in the Monterey agreement in which urban California gave  
8 away a drought water preference?

9           MR. LEAHIGH: Well, it's -- I mean it's a  
10 combination of factors. It's the dry hydrology. As you  
11 noted, there was a change in the mid-nineties as far as  
12 the allocation between M&I and agricultural contractors  
13 for the State Water Project.

14          MR. JACKSON: So it shouldn't be a surprise that  
15 this is a low delivery since that's what the Metropolitan  
16 bargained for in Monterey, that they would forgo drought  
17 deliveries in exchange for something else in wet years?

18          MR. RUBIN: I'm going to object to the question.  
19 Calls for speculation, at a minimum.

20          MR. JACKSON: I don't think it calls for  
21 speculation. He indicated that was one of the reasons.

22          MR. RUBIN: Well, what -- well, one part of the  
23 question that clearly calls for speculation is the  
24 negotiation position of the Metropolitan Water District of  
25 Southern California. And I don't think that Mr. Leahigh

1 is in a position to testify to that.

2 CO-HEARING OFFICER BAGGETT: I would sustain  
3 that.

4 Could you rephrase the question to --

5 MR. JACKSON: Sure.

6 Is the lowered M&I delivery in this dry cycle  
7 accentuated for the Metropolitan service area by the fact  
8 that they gave up Section 18A in the preexisting State  
9 contracts?

10 MR. LEAHIGH: Well, again, there's a number of  
11 factors why that allocation is so low. It is the  
12 hydrology. It is the increased regulatory requirements on  
13 the exports. And to a certain extent the reallocation  
14 between urban and ag has an effect as well.

15 MR. JACKSON: Did you make any attempt to tease  
16 out which of those effects was the cause for the 30  
17 percent delivery?

18 MR. LEAHIGH: They are all causes for the 30  
19 percent delivery.

20 MR. JACKSON: How much of --

21 MR. LEAHIGH: I couldn't tell you.

22 MR. JACKSON: Now, you indicated in your -- Mr.  
23 Milligan, you indicate in your testimony that the change  
24 that's asked for here will not result in the delivery of  
25 more water to any water supplier than would have been

1 delivered historically.

2 Do you mean historically in droughts? Or do you  
3 mean historically as an average of wet years and dry years  
4 and normal years?

5 MR. MILLIGAN: That would be as an average of  
6 both -- average of all years and probably from the few  
7 places that I've looked at as it relates to past drought  
8 years.

9 MR. JACKSON: Did you check before you filed this  
10 to -- or as part of the filing of this petition to  
11 consolidate the place of use of the two projects to  
12 determine what the delivery was to the San  
13 Luis/Delta-Mendota unit in the '76-'77 drought cycle?

14 MR. MILLIGAN: Not as it relates to this filing,  
15 no.

16 MR. JACKSON: Do you know whether or not they  
17 received any water in the '76-'77 drought?

18 MR. MILLIGAN: Some of those were very low.

19 MR. JACKSON: So that it's not a surprise to have  
20 a low delivery to that area this year?

21 MR. MILLIGAN: Surprise is probably not the right  
22 word. But clearly it was -- the severity of, let's say,  
23 leading into the year, my thoughts were that we would be  
24 at a higher allocation than we are currently.

25 If we had received the hydrology similar to a '77

1 type of year, then I would say we're probably at or about  
2 where I would have anticipated that. But given we'd had  
3 some wetter conditions, this would -- the low allocation  
4 is out of the norm.

5 MR. JACKSON: What is the norm that you're  
6 talking about?

7 MR. MILLIGAN: What I would have -- set of  
8 circumstances given, this particular set of snowpack,  
9 hydrologic conditions, I would have anticipated a  
10 higher -- a higher allocation to the west side.

11 MR. JACKSON: And what is -- is there anything  
12 other than the D-1641 and the Wanger decision that is  
13 causing it to be less? Or is it all this regulatory  
14 situation?

15 MR. RUBIN: I'm going to object to the question  
16 on grounds that it misstates facts or facts that are not  
17 in evidence or is ambiguous. The reference to Judge  
18 Wanger's opinion, it's not clear what opinion. I'm not  
19 sure if the testimony has elicited whether it's in  
20 effect --

21 CO-HEARING OFFICER BAGGETT: I appreciate that.  
22 Sustained.

23 Can you rephrase the question with more  
24 specificity.

25 MR. JACKSON: Would you lay out what this

1 regulatory -- change regulatory circumstance is that you  
2 believe is causing there to be less water available to  
3 people on the west side of the San Joaquin.

4 MR. MILLIGAN: The runoff that we have seen this  
5 particular year with the very dry fall, coming off of a  
6 very, very dry spring of last year, below normal December,  
7 very low precipitation and runoff in January, limited the  
8 ability under D-1641 to make deliveries of water. And  
9 that scenario looked very much like a 1977-type of  
10 circumstance if that were to continue on through February  
11 and March of this year.

12 And those conditions didn't continue. We did get  
13 some wet weather, particularly though in the Sacramento  
14 River basin. The thing that limited, let's say, the  
15 project's ability to take advantage of some very high  
16 flows -- inflows to the Delta as represented by some very  
17 high Freeport flows, up in the 40, 50,000 cfs range, was  
18 the continued low flows on the San Joaquin River at  
19 Vernalis. And at that time concerns about Old and Middle  
20 River criteria as it relates, not to Judge Wanger's  
21 decision but the current biological opinion to protect  
22 Delta smelt, did constrain exports during that time. And  
23 there was a window there of about four weeks to five weeks  
24 where, let's say, under D-1641 circumstances some  
25 additional exports could have been achieved, but it would

1 have resulted in some very high Old and Middle River  
2 negative flows. And those were modulated so that we could  
3 have some lasting protections for some adult Delta smelt  
4 particularly during that period.

5           So those are the types of things that, because  
6 the year was so compressed I think in terms of its runoff,  
7 this one opportunity that I think the projects probably  
8 had to make up some ground, we weren't able to do that in  
9 its fullest extent because of that Old and Middle River  
10 constraint.

11           MR. JACKSON: And so you didn't take as much  
12 water as you maybe theoretically could have, because you  
13 were attempting to obey the law?

14           MR. MILLIGAN: We were complying with the  
15 biological opinion. And we were in consultation with Fish  
16 and Wildlife Service through this period as to what would  
17 be a protective set of actions.

18           MR. JACKSON: And there's nothing unusual about  
19 that, you normally operate in coordination with the folks  
20 who have influence on your permits?

21           MR. MILLIGAN: We -- it is not unusual for us to  
22 work very closely with Fish and Wildlife Service and NOAA  
23 Fisheries and Fish and Game, particularly in our winter  
24 and spring operations.

25           The unusual -- the extremely unusual factor this



1 period of time was how low the San Joaquin River flows  
2 were in comparison to the Sac River flows.

3 MR. JACKSON: Now, the San Joaquin River flows  
4 are controlled by, among others, the Bureau of  
5 Reclamation, correct, at both Friant and New Melones?

6 MR. MILLIGAN: We have -- we are making releases  
7 at New Melones that influence flows at Vernalis, as well  
8 as there's the other tributaries. And then there's the  
9 unimpaired flow.

10 MR. JACKSON: So basically this low San Joaquin  
11 situation was not a surprise to the Bureau, given this  
12 water year and its obligations at both New Melones and  
13 Friant?

14 MR. MILLIGAN: I would say that the word  
15 "surprise" is probably not appropriate. But I did find it  
16 somewhat unusual the low San Joaquin River flows that we  
17 were seeing. Clearly, all the reservoirs on the San  
18 Joaquin system were trying to recover storage from the  
19 last two dry years. And although we were seeing a little  
20 bit of weather in the basin, clearly minimal reservoir  
21 releases from all the reservoirs, coupled with a very dry  
22 basin led to some very low Vernalis flows for this time of  
23 year.

24 MR. JACKSON: You indicate in your testimony on  
25 page 2 that the CV projects that require this coordinated

1 place of use include the Drought Water Bank; is that  
2 correct?

3 MR. MILLIGAN: Yes, the Drought Water Bank would  
4 be an action that would benefit from the consolidated  
5 place of use.

6 MR. JACKSON: Well, I was interested in the word  
7 "that would benefit," because your testimony was that it  
8 would require it. Is that right? You could not do the  
9 Drought Water Bank if you didn't have the coordinated  
10 place of use?

11 MR. MILLIGAN: I don't believe that we could  
12 transfer water from a CVP user to a State Water Project  
13 user. That provision of the bank would not be able to  
14 happen.

15 MR. JACKSON: Now, you indicated that there are  
16 CVP contractors who could use the same amount of water  
17 within their regular -- within their regular contractual  
18 relationship, in response to Mr. Rubin's  
19 cross-examination, is that --

20 MR. MILLIGAN: Yes.

21 MR. JACKSON: So at this point, you don't need  
22 the coordinated place of use to make use of the water;  
23 it's simply to pick and choose where it goes?

24 MR. MILLIGAN: It's to be consistent with the  
25 tenants of the Drought Water Bank in terms of that set of

1 priorities.

2 MR. JACKSON: All right. Does the Governor's  
3 drought emergency control the Bureau of Reclamation's  
4 water distribution in any fashion?

5 MR. MILLIGAN: The drought proclamation as a  
6 layman's read of it does not.

7 MR. JACKSON: Now, calling your attention to  
8 the -- and, Ms. Sergeant, jump in if you'd like to answer  
9 these questions -- to the exchange to facilitate  
10 conveyance of water to Santa Clara Valley. Why do you  
11 need a consolidation of the place of use of the two  
12 projects when you could probably do that with a change in  
13 the point of diversion from San Filipe to the South Bay  
14 Aqueduct?

15 MS. SERGENT: The consolidated place of use will  
16 facilitate the transfer, because we can deliver State  
17 Water Project water an equivalent amount through banks and  
18 the South Bay Aqueduct. The Bureau can deliver that same  
19 quantity of water to O'Neill. And that amount of water  
20 can be used in the State Water Project place of use south  
21 of O'Neill.

22 MR. JACKSON: All right. But in terms of taking  
23 care of Santa Clara Valley, the water, no matter what  
24 system may go through, goes to the same place?

25 MS. SERGENT: If San Luis gets low enough, the

1 Bureau cannot deliver that water through San Luis.

2 MR. JACKSON: All right. But when it delivers  
3 the water -- when the water is delivered either slough San  
4 Luis by the federal government or by the state government,  
5 it goes to Santa Clara Valley Water District's place of  
6 use?

7 MS. SERGENT: Yes.

8 MR. JACKSON: All right. So it's a question of  
9 which spigot you use to go to the same place of use?

10 MS. SERGENT: The same amount of water will  
11 be a --

12 MR. RUBIN: I'm sorry. I'm going to object to  
13 the question. I don't believe any witness has testified  
14 that Santa Clara Valley Water District -- excuse me -- the  
15 place of use under the United States Bureau of  
16 Reclamation's permits for the area within Santa Clara is  
17 the same as the place of use under the Department of Water  
18 Resources' permits within Santa Clara's area. Maybe not  
19 so artfully stated. But no witness has testified that  
20 within the Santa Clara area the place of use is the same  
21 under the Bureau's permits as the Department of Water  
22 Resources' permits.

23 CO-HEARING OFFICER BAGGETT: Okay. We'll note  
24 that. But can the witness answer within your knowledge?

25 MS. SERGENT: I'm just trying to emphasize that

1 the same amount of water is going to Santa Clara. But the  
2 need for this petition is because the Bureau cannot  
3 deliver that water through San Luis. So the project will  
4 be able to pump that water and deliver it to Santa Clara  
5 instead of delivering that same quantity to southern  
6 California. The Bureau would pump the same amount of  
7 water it would deliver to Santa Clara through San Luis,  
8 deliver that to the Department at O'Neill. And that water  
9 would be delivered to the State Water Project place of use  
10 south of O'Neill, a portion of which is not within the  
11 current CVP place of use.

12 MR. MILLIGAN: I might add that although San Luis  
13 Reservoir may or may not get low enough where we would not  
14 be able to make the delivery. Clearly there may be some  
15 concerns of the potential for some algae content within  
16 that water. And then given the combination of a low CVP  
17 allocation and a low State Water Project allocation, this  
18 may allow Santa Clara Valley some additional flexibility  
19 to move water within their system by having the delivery  
20 through south bay.

21 MR. JACKSON: Did you do any environmental review  
22 of the extent of the algae problem for this change of  
23 place of use?

24 MR. MILLIGAN: No.

25 MR. JACKSON: Calling your attention to another

1 proposed transfer, which I guess is to transfer water  
2 into -- I guess this is Westlands groundwater into the  
3 State aqueduct, Mr. Leahigh. Was there any review done of  
4 the quality of the Westlands water that would be entering  
5 the State aqueduct?

6 MR. LEAHIGH: Actually I do not know.

7 MR. JACKSON: Does anyone from the Bureau know  
8 whether or not there was any environmental review of the  
9 groundwater that is going to be pumped out and put into  
10 the State aqueduct?

11 MR. MILLIGAN: I do know that in a similar  
12 program that they had last year, they had very significant  
13 monitoring of the quality of the water that went into the  
14 aqueduct. And my assumption is that that would occur  
15 again this year.

16 MR. JACKSON: Do you know whether it did?

17 MR. MILLIGAN: I don't think that they've begun  
18 the pumping yet.

19 MR. JACKSON: Do you know whether there's been  
20 any environmental analysis of that pumping and its effects  
21 on the water quality in the aqueduct?

22 MR. MILLIGAN: I think that the information that  
23 I have from both Westlands and the State water contractors  
24 that are as equally as concerned about the overall quality  
25 and impact have set up a monitoring program so they can

1 monitor that. And in addition, I think one of the  
2 proposals was to include some quantity of water that could  
3 be made available from the Friant system to help also  
4 compensate for those quality concerns.

5 MR. JACKSON: That's an outline of what one could  
6 do. Do you know whether or not there's been an  
7 environmental analysis of the problem that you just  
8 identified?

9 MR. MILLIGAN: If you're specifically saying a --  
10 let's say, a CEQA level analysis?

11 MR. JACKSON: Yes.

12 MR. MILLIGAN: I don't believe so.

13 MR. JACKSON: Or a NEPA analysis if -- since  
14 there are federal contractors involved in the exchange.

15 MR. MILLIGAN: I am not aware of a completed NEPA  
16 analysis.

17 MR. JACKSON: You indicate that in the  
18 required -- and I think, Mr. Milligan, you're the person  
19 who attempted to identify whether there would be injury to  
20 legal users, water quality, or fish and wildlife in your  
21 testimony.

22 This change in place of use, sort of a merger of  
23 the places of use of the two projects, has it ever been  
24 done before?

25 MR. MILLIGAN: I'm not aware on the scale that --

1 as it relates to this petition.

2 MR. JACKSON: Okay. Normally, changes would  
3 require NEPA analysis in regard to the effects on other  
4 water users, water quality, or fish and wildlife. Has it  
5 been done in this -- in this circumstance?

6 MR. RUBIN: I'm going to object to the question.  
7 It's Compound or it assumes facts that are not in  
8 evidence.

9 CO-HEARING OFFICER BAGGETT: It's sustained on  
10 the compound.

11 Could you break the question down please.

12 MR. JACKSON: Sure.

13 Have you done any NEPA analysis of the effects on  
14 water quality in the Delta of this change of place of use?

15 MR. MILLIGAN: No. But based on my understanding  
16 of the proposals and the volumes of water, that these  
17 would fall within the, let's say, existing NEPA coverage  
18 that we have to operate the project, and I believe that we  
19 would also be in compliance with their existing biological  
20 opinions.

21 MR. JACKSON: Now, biological opinion is a  
22 different thing than a NEPA analysis.

23 MR. MILLIGAN: Yes, it is.

24 MR. JACKSON: And so I'd like to keep -- I don't  
25 conflate the two.



1 MR. MILLIGAN: Sure.

2 MR. JACKSON: So question was, have you done any  
3 NEPA analysis in regard to water quality and the effects  
4 that could potentially happen from this change in place of  
5 use petition?

6 MR. MILLIGAN: We have not done any specific  
7 analysis. Again, from my understanding of how we would  
8 operate under these proposals, I do not see something  
9 that's outside the existing realm of our operations for  
10 the project.

11 MR. JACKSON: Well, let's talk about a little  
12 about the existing realm of the operations of your  
13 project.

14 Have you met all D-1641 water quality standards  
15 this year?

16 MR. MILLIGAN: We've met our permit terms and  
17 conditions. There have been some exceedances of south  
18 Delta salinity. There was Tracy Road -- Old River at  
19 Tracy Road from a period of time in December into March  
20 that had an exceeded, and we provided a report to the  
21 Board. We are currently envisioning that several of the  
22 stations for south Delta salinity would have exceedances  
23 that we feel are outside the -- outside the control of the  
24 projects beginning of April.

25 MR. JACKSON: Let me ask it I guess in a

1 different way then to see that I understand your answer.

2           You violated D-1641 standards from December until  
3 March; is that correct?

4           MS. AUFDEMBERGE: Objection. He did not testify  
5 about any violation.

6           CO-HEARING OFFICER BAGGETT: Sustained.

7           MR. RUBIN: I'm going to object on a different  
8 grounds. I'm trying to be patient here. But I don't  
9 think Mr. Jackson has laid the foundation for the  
10 relevancy of his questions.

11           MR. JACKSON: The foundation for the relevancy is  
12 what is the baseline environmental condition by which this  
13 man's coming to the conclusion that there will be no  
14 difference with or without this project.

15           CO-HEARING OFFICER BAGGETT: Overrule that  
16 objection.

17           But sustain the first objection by the Bureau.

18           MR. JACKSON: So --

19           CO-HEARING OFFICER BAGGETT: There was no --

20           MR. JACKSON: D-1641 has a set of standards in  
21 it?

22           MR. MILLIGAN: Yes, it does.

23           MR. JACKSON: And one of those standards is a  
24 provision in regard to salinity?

25           MR. MILLIGAN: It has a number of provisions with

1 regard to salinity.

2 MR. JACKSON: Have any of -- has the Bureau and  
3 DWR's operations in the Delta in the months of December  
4 through March been higher at any time than the salinity  
5 standard of 1 EC?

6 MR. MILLIGAN: There have been some stations that  
7 had have an exceedance of 1.0 EC. It is the -- and then  
8 the analysis of the two projects collectively that those  
9 were outside of the ability of the projects to bring into  
10 compliance.

11 MR. JACKSON: Now, you indicated that during that  
12 time period everyone was -- the dam owners were attempting  
13 to rebuild their storage, weren't they?

14 MR. MILLIGAN: I testified that during this time  
15 period on the San Joaquin River and probably at some flows  
16 on some areas of the Sacramento were trying to build  
17 storage from two years of below normal conditions.

18 MR. JACKSON: And one of the ways that you could  
19 have met the EC standard in the Delta would be to release  
20 more of that storage to do so, correct?

21 MR. MILLIGAN: I --

22 MS. AUFDEMBERGE: Objection.

23 MR. MILLIGAN: -- disagree.

24 MS. AUFDEMBERGE: Let's see if I -- he didn't  
25 testify that he felt that it was an obligation to meet the

1 standard.

2 CO-HEARING OFFICER BAGGETT: Answer the question.

3 I think -- so overrule the objection. You've already  
4 answered, unless you want to strike the answer. But I --

5 MR. JACKSON: No, I don't want to strike the  
6 answer. I'll follow up the answer.

7 It is the Bureau's position that they don't have  
8 to meet the 1.0 EC standard under D-1641?

9 MR. MILLIGAN: Specifically --

10 MR. RUBIN: I'm going to object to the question  
11 as to location. I mean there's no indication what  
12 standard --

13 CO-HEARING OFFICER BAGGETT: I would sustain.  
14 Mr. Jackson, it's a little broad. I mean you've got to be  
15 specific.

16 And, secondly, before the objection's raised, I  
17 don't know if this witness is the one who's going to make  
18 the legal opinion that they violated an order of this  
19 Board.

20 But proceed -- just rephrase your question.

21 MR. JACKSON: Is it the Bureau's position that  
22 they do not have to stop collecting water in their  
23 reservoirs in situations in which they cannot meet the  
24 Vernalis standard?

25 MR. MILLIGAN: The Vernalis standard was met

1 during this time. The Old River at Tracy Bridge is a very  
2 difficult station. It's been shown in some evidence to  
3 this Board and some evaluation by my staff and DWR staff  
4 that increased flows beyond meeting the standard at  
5 Vernalis would have limited utility in reducing the  
6 salinity at that particular station. And it appeared that  
7 the primary cause of that exceedance was the fact that our  
8 pumping was constrained significantly during this  
9 timeframe. Typically when pumping's a little bit higher,  
10 better quality water from the Sacramento River is drawn  
11 further to the south and actually improves the quality  
12 there. So our curtailment to meet other D-1641 EI ratio  
13 type requirements plus protection for Delta smelt probably  
14 contributed more to the exceedance.

15 MR. JACKSON: And so this is a problem  
16 that -- let me withdraw that.

17 Do you know whether or not that problem will be  
18 increased by the additional pumping caused by the maximum  
19 potential of the Drought Water Bank and the coordinated  
20 consolidated place of use?

21 MR. MILLIGAN: Actually, I would anticipate that  
22 if -- to the extent that there was any increased pumping  
23 associated with this proposal, that it would probably  
24 improve the quality in this part of the Delta.

25 MR. JACKSON: You indicate in your no-injury

1 finding that all water exported at the State and Central  
2 Valley pumping plants will be pumped consistent with the  
3 criteria contained in D-1641. Does that mean that you  
4 will not pump at any time in which you are not meeting the  
5 Brandt Bridge standard?

6 MR. MILLIGAN: It means that we will comply with  
7 our permit terms and conditions.

8 MR. JACKSON: When you say that you will pump the  
9 water consistent with the criteria contained in D-1641,  
10 which criteria are you considering in that conclusion?

11 MR. MILLIGAN: The ones outlined -- it's the  
12 collective of what's required within our permit terms and  
13 conditions.

14 MR. JACKSON: The outflow requirement?

15 MR. MILLIGAN: That would be one.

16 MR. JACKSON: Water quality at Brandt Bridge?

17 MR. MILLIGAN: To the extent controllable by our  
18 project, yes.

19 MR. JACKSON: Why is it that in response to that  
20 question, it sounds like you're getting ready for  
21 something that's uncontrollable?

22 MR. SODERLUND: I'll object to that question as  
23 vague.

24 CO-HEARING OFFICER BAGGETT: Sustained.

25 MR. JACKSON: Do you expect that you will be able

1 to meet the standard for the rest of the summer?

2 MR. MILLIGAN: We are preparing a document for  
3 the Board that would indicate that we expect that there  
4 are going to be some exceedances of these particular  
5 standards. The report's consistent with the requirements  
6 of the cease and desist order. And we feel that those  
7 exceedances will be outside of the control of the two  
8 projects.

9 MR. JACKSON: Now, the Drought Water Bank talks  
10 about the potential for transferring 600,000 acre-feet of  
11 water, does it not?

12 MS. SERGENT: The 600,000 acre-feet is what we  
13 would be within, the quantity that was analyzed in the  
14 biological opinion. So we would not exceed that quantity.  
15 We did not say that 600,000 acre-feet would be transferred  
16 by the Drought Water Bank.

17 MR. JACKSON: Do you know how much water will be  
18 transferred under this petition for a consolidated place  
19 of use?

20 MR. RUBIN: I'm going to object to the question  
21 as asked and answered.

22 CO-HEARING OFFICER BAGGETT: I would sustain.  
23 She just answered that question.

24 MR. JACKSON: I don't believe she did. But I'll  
25 ask it differently.

1           Have you identified all of the potential  
2 transfers that will be part of the Drought Water Bank and  
3 this consolidated place of use?

4           MS. SERGENT: We are still getting proposals as  
5 we speak. So I can't say that we have all of the  
6 transfers that might possibly go through the Drought Water  
7 Bank. Again, this petition only covers that portion of  
8 the water transferred under the bank that would be  
9 considered project water. It does not cover all the other  
10 water, the bulk of which is being provided to the bank,  
11 that is going to go under individual water rights of the  
12 agencies making the water available.

13          MR. JACKSON: Including your agency?

14          MS. SERGENT: This petition would cover any water  
15 that would be considered project water.

16          MR. JACKSON: Do you have, Mr. Milligan, any way  
17 of knowing what the effect will be that's caused by the  
18 consolidated -- the consolidated place of use in the event  
19 that this is the third year of a five-year drought?

20          MR. RUBIN: I'm going to object to the question.  
21 It's vague and ambiguous. The question began, "Do you  
22 have any way of knowing..."

23          CO-HEARING OFFICER BAGGETT: I would sustain.

24          Can you rephrase with a little more specificity  
25 or at least foundation.



1           MR. JACKSON: Do you know what will happen next  
2 year in regard to the amount of water that will be  
3 available?

4           MR. MILLIGAN: No.

5           MR. JACKSON: Do you know whether or not this  
6 program will take water that would be useful next year for  
7 fish and wildlife?

8           MR. MILLIGAN: My understanding of the types of  
9 proposals that are being contemplated, the answer to that  
10 would be no. I don't believe there are any.

11          MR. JACKSON: You don't believe that there's any  
12 water that would be useful next year?

13          MR. MILLIGAN: I don't believe that there's any  
14 water in play here that would be a lost resource that may  
15 be useful for fisheries next year.

16          MR. JACKSON: Do you know whether or not there is  
17 any water that is being taken this year that would be  
18 available for legal water users next year -- other legal  
19 water users?

20          MR. MILLIGAN: I don't believe so.

21          MR. JACKSON: Is there any water that's going to  
22 be taken out of the Central Valley Project storage that  
23 would not be taken out of storage but for this program?

24          MR. MILLIGAN: Certainly not at Shasta. I would  
25 say I don't believe that -- I would be able to say that

1 there would not be any from Folsom or New Melones. I'd  
2 have to think a little bit about the San Luis Reservoir  
3 potentially the timing of someone using their water this  
4 year or carrying it over into the next.

5 MR. JACKSON: And Friant?

6 MR. MILLIGAN: I don't believe that there would  
7 be water that would damage a water user from Friant's  
8 system, no.

9 MR. JACKSON: All right. What is the purpose for  
10 having a two-year program? Why did you request two years  
11 instead of just one?

12 MR. MILLIGAN: The advantage of two years was  
13 that there were a number of these that are not -- they're  
14 probably more an exchange category, that would benefit  
15 from -- it may take it -- it will go into next year before  
16 the water could be returned through the system. So if it  
17 went into the fall of 2010, that this -- that this would  
18 allow for the return of the water under an exchange. I  
19 would envision the transfers would occur in this  
20 particular year.

21 MR. JACKSON: So you're not anticipating using  
22 this consolidated place of use for a second year of  
23 transfer?

24 MR. MILLIGAN: I am not.

25 MR. JACKSON: How about the State?

1 MS. SERGENT: The purpose of the two year, as he  
2 said, was sometimes there's a transfer in one year and a  
3 return of that same quantity in the next year. At this  
4 point, today, we're not anticipating -- we have no idea  
5 what next year looks like. But the purpose of having the  
6 two-year transfer was so that some of these returns could  
7 be accommodated by the one petition.

8 MR. JACKSON: I have no further questions of this  
9 panel.

10 CO-HEARING OFFICER BAGGETT: Thank you.

11 CWIN.

12 CROSS EXAMINATION

13 OF MR. JOHN LEAHIGH, MR. RON MILLIGAN,

14 AND MS. MAUREEN SERGENT

15 BY MS. JULIA JACKSON, ESQ., representing California Water

16 Impact Network:

17 Sorry. I'm getting my notes together.

18 And I apologize if some of these questions are a  
19 little bit repetitive.

20 We wanted to be begin with asking about the  
21 future projects that are identified in the petition.  
22 There now have been some questions regarding upcoming  
23 requests for water. At this time before the Board, is  
24 there any way to identify the full scope of where the  
25 transfers will be coming from and who they'll be going to?

1 MS. SERGENT: Any future transfers, we  
2 anticipate -- there's no way to identify them now, but  
3 they would all be similar to the ones that are described  
4 here, that we'd be between State Water Project and CVP  
5 contractors south of the Delta.

6 MS. JACKSON: And where would the water be coming  
7 from exactly, what facilities?

8 MS. SERGENT: Similar to the ones that are  
9 described here, they would be diverted through probably  
10 Jones or Banks or coming from the Friant system.

11 MS. JACKSON: Would any water be coming out of  
12 the Shasta or Oroville reservoirs?

13 MR. MILLIGAN: Most of these would be some form  
14 of forbearance or conversion to some groundwater pumping.  
15 Where the source of the water that would have been  
16 delivered may have been from Shasta or from Oroville, the  
17 water that's actually being made available to the bank is  
18 the product of that farming decision within those  
19 particular areas. It all happens downstream of the  
20 reservoirs.

21 MS. JACKSON: But it would not increase any  
22 deliveries from Shasta or Oroville?

23 MR. MILLIGAN: I can speak for Shasta, that these  
24 would not increase or, let's say, lower the storage in  
25 Shasta carried into next year.

1 MS. JACKSON: Would it lower the storage in the  
2 next two years?

3 MR. MILLIGAN: No.

4 MS. JACKSON: No. Okay.

5 MR. LEAHIGH: And that would be the same case for  
6 Oroville. There'd be -- these transfers would not affect  
7 that storage in Lake Oroville.

8 MS. JACKSON: Okay. Thank you.

9 And when do you anticipate knowing who the end  
10 users of this water will be?

11 MS. SERGENT: Which water are you talking about?

12 MS. JACKSON: Project water under this petition,  
13 who the water will be going to.

14 MS. SERGENT: It depends on the individual  
15 transfer. We have water going to Empire Westside --  
16 Empire Westside to Westlands. Each transfer is different.  
17 But it would be to individuals, State Water Project or CVP  
18 contractors.

19 MS. JACKSON: Do you know how many transfers are  
20 possible over the next two years?

21 MS. SERGENT: We don't at this time. We don't  
22 have any new transfers other than the ones that are  
23 identified here. But we cannot guaranty that there won't  
24 be another proposal.

25 MS. JACKSON: Okay. Do you know whether

1 nonproject water transferred under a drought water bank  
2 will use CVP and/or SWP facilities that will require State  
3 Water Resources Control Board permit approval?

4 MS. SERGENT: Any transfers that are happening  
5 that are not State Water Project or CVP are going under  
6 their own water rights. So that is not a subject of this  
7 petition.

8 MS. JACKSON: Okay. This question's for  
9 Milligan.

10 If there is a fourth dry winter, will you likely  
11 be able to meet the temperature objectives like in the  
12 Trinity?

13 MS. AUFDEMBERGE: I'll object. That calls for  
14 speculation.

15 MR. RUBIN: I would also object on relevancy  
16 grounds. Mr. Milligan has already testified that none of  
17 the programs that are being contemplated this year will  
18 affect Shasta storage.

19 CO-HEARING OFFICER BAGGETT: Both are sustained.  
20 I think we've had that question.

21 So please refrain. If you want to be more  
22 specific beyond what the witness has already answered.

23 MS. JACKSON: At the risk of asking the same  
24 question again, do you know if you'll meet -- there's a 56  
25 degree temperature compliance on the Sacramento River. Do

1 you know at this time whether you'll meet that compliance  
2 this year?

3 MR. RUBIN: I'm going to object to --

4 MS. AUFDEMBERGE: Objection.

5 MR. RUBIN: I'm going to object to the question.

6 I'm sorry, Ms. Aufdemberge.

7 MS. AUFDEMBERGE: Speculation and vague.

8 CO-HEARING OFFICER BAGGETT: Well, I'll overrule  
9 it. I don't think it's vague.

10 MS. AUFDEMBERGE: Well --

11 MR. RUBIN: I'm going to object on relevancy  
12 grounds.

13 CO-HEARING OFFICER BAGGETT: I would overrule. I  
14 think it's relevant, I mean since the issue of whether  
15 they're going to comply with a water right. Whether this  
16 witness knows the answer I guess is another issue and it  
17 might require some speculation. But I think the  
18 question's clearly relevant.

19 Why doesn't counsel try to maybe rephrase the  
20 question. I think we've asked -- it's been asked before.  
21 But if you want to rephrase it with more specificity, that  
22 would be helpful.

23 MS. JACKSON: Well, if this is outside of the  
24 panel's area of knowledge, then please feel free to say  
25 that.

1 CO-HEARING OFFICER BAGGETT: So you can answer  
2 within your knowledge.

3 MR. MILLIGAN: Would you please repeat the  
4 question? And I will answer it.

5 MS. JACKSON: Yes. Okay.

6 Do you know currently whether you will be able to  
7 meet the 56 degree temperature compliance on the  
8 Sacramento River?

9 MR. MILLIGAN: We are currently working with the  
10 Sac River Temperature Task Group. We have a set of runs  
11 and anticipated temperature regime, that we should be able  
12 to meet a temperature compliance point set in the river  
13 consistent with that. The exact compliance point for the  
14 available temperature -- cold water pool at Shasta is yet  
15 to be finalized by the task group. We'll probably wait  
16 until next month's both runoff forecasts and also  
17 temperature profile at Shasta to set the compliance point.

18 MS. JACKSON: Okay. And then in consideration of  
19 acreage limitations under the Central Valley Project, has  
20 there been any analysis under this petition for compliance  
21 with acreage limitations contained in reclamation water?

22 MR. MILLIGAN: The same requirements for acreage  
23 limitation under reclamation law would still be in effect.

24 MS. JACKSON: Under the joint system?

25 MR. MILLIGAN: Yes, under these particular



1 transfers, those would still be under effect.

2 MS. JACKSON: Okay. If increased deliveries did  
3 go to the Westlands Water Agency, would those increased  
4 deliveries increase the contaminated agricultural drain of  
5 water?

6 MR. RUBIN: I'm going to object to the question  
7 as ambiguous, assumes facts that are not in evidence.  
8 Also an incomplete hypothetical.

9 CO-HEARING OFFICER BAGGETT: I would sustain on  
10 the latter.

11 Would you please maybe rephrase the hypothetical  
12 and state that that's what it is if that's the intent.

13 MS. JACKSON: Yes. This is a hypothetical.

14 If Westlands was to receive more water under this  
15 petition than they were going to receive without it, would  
16 that increase of water, to the best of your knowledge,  
17 increase the amount of contaminated ag water runoff?

18 MR. RUBIN: I'm going to object again. Assumes  
19 facts that are not in evidence. I mean --

20 CO-HEARING OFFICER BAGGETT: I'd overrule.  
21 Just -- it's a hypothetical. This expert may or may not  
22 be able to answer it.

23 Answer it to the best of your knowledge and  
24 ability.

25 MR. MILLIGAN: I do not know if the additional --

1 any additional water, be a transfer or otherwise, or an  
2 increase in allocation, from 10 to 15 percent, would be  
3 applied to drainage impacted lands within Westlands. My  
4 assumption is, given the time of the year and the low  
5 allocation, that these waters will probably be applied to  
6 permit crops, probably trees in orchards, probably have  
7 very limited impact on drainage impacted lands.

8 And none of those, to my knowledge, are draining  
9 to the San Joaquin River.

10 MS. JACKSON: Okay. I believe that's all my  
11 questions.

12 Thank you.

13 CO-HEARING OFFICER BAGGETT: Thank you.

14 South Delta. Mr. Herrick.

15 MR. HERRICK: Thank you, Mr. Chairman, Board  
16 members. John Herrick for South Delta, Central Delta, and  
17 Lafayette Ranch.

18 This should be a little briefer since there were  
19 many questions already asked.

20 CROSS EXAMINATION

21 OF MR. JOHN LEAHIGH, MR. RON MILLIGAN,

22 AND MS. MAUREEN SERGENT

23 BY MR. JOHN HERRICK, ESQ., representing South Delta Water  
24 Agency, Central Delta Water Agency, and Lafayette Ranch:

25 Mr. Milligan, let me start with you based on the

1 last questions that were made.

2 Has the Bureau done any analysis which would  
3 indicate if the petition is granted, there will be  
4 additional drainage to the San Joaquin River?

5 MR. MILLIGAN: No.

6 MR. HERRICK: And same question for the  
7 Department.

8 Has anybody in the Department done any analysis  
9 that if the petition is granted, whether or not there will  
10 be additional drainage into the San Joaquin River?

11 MS. SERGENT: No.

12 MR. HERRICK: Mr. Milligan, has the Bureau  
13 consulted with Fish and Wildlife Service with regards to  
14 this petition?

15 MR. MILLIGAN: I've had informal conversations  
16 with Fish and Wildlife Service. They have indicated that  
17 if the program stays within the limitations that were  
18 outlined in the biological opinion, that they would feel  
19 that we are -- we would not be endangering Delta smelt.

20 MR. HERRICK: And did they issue any sort of  
21 documentation or opinion or something that is being  
22 presented here today supporting that?

23 MR. MILLIGAN: No, they have not.

24 MR. HERRICK: Okay. Do you know if they were  
25 asked by the Bureau to appear today in support of this

1 petition?

2 MR. MILLIGAN: I don't believe they were.

3 MR. HERRICK: Okay. And then the same questions

4 with regard to NOAA fisheries. Did the Bureau do any

5 consultation with NOAA Fisheries -- I guess it's NMFS?

6 Sorry.

7 MR. MILLIGAN: I say usually -- I go either way

8 with that too. It depends on --

9 MR. HERRICK: I don't know which is correct

10 anymore.

11 MR. MILLIGAN: Neither do they, from my

12 conversations with them.

13 CO-HEARING OFFICER BAGGETT: Strike that answer.

14 Please answer the question.

15 MR. MILLIGAN: Yes.

16 MR. HERRICK: Sorry.

17 MR. MILLIGAN: Again, they have indicated that as

18 long -- to be very cautious, to stay within the

19 limitations as outlined in their existing biological

20 opinion.

21 But, no, they have not provided any additional

22 documentation about this particular proposal.

23 MR. HERRICK: Thank you.

24 For the Department, did they ask -- excuse me.

25 Do you know if the Department asked Department of

1 Fish and Game to appear and make any comments with regards  
2 to the petition pending before the Board?

3 MR. LEAHIGH: As far as I know, they were not  
4 asked.

5 MR. HERRICK: There were some questions with  
6 regard to the water quality standards in the south Delta.  
7 And the reason I bring these up is I believe both in Mr.  
8 Leahigh's testimony and Mr. Milligan's testimony, you  
9 generally state - and I'm not trying to misstate it - that  
10 you intend to comply with all regulatory restrictions  
11 during the time if the petition is granted; is that  
12 correct?

13 MR. MILLIGAN: Yes.

14 MR. HERRICK: And, Mr. Leahigh, is that the same  
15 answer for you?

16 MR. LEAHIGH: Yes, that is our answer as well.

17 MR. HERRICK: Is one of those permit conditions  
18 the water quality objectives for fish and wildlife  
19 beneficial uses during the, I'll say, pulse flow period  
20 this spring?

21 MR. MILLIGAN: Yes.

22 MR. HERRICK: And could you explain to us your  
23 understanding of what pulse flow is required this spring?

24 MR. MILLIGAN: My understanding of the -- that  
25 this is a VAMP offramp year, and that in fact that there

1 is not identified a pulse flow -- a 31-day pulse flow this  
2 particular year.

3 MR. HERRICK: And, Mr. Milligan, when you say  
4 offramp, that refers to one of the terms in the San  
5 Joaquin River agreement; is that correct?

6 MR. MILLIGAN: It does.

7 MR. HERRICK: And that term generally states that  
8 depending on current and prior years' hydrology, that the  
9 contributory agencies may be relieved of the burden of  
10 providing water towards a pulse flow?

11 MR. MILLIGAN: That is one use of the term.  
12 There's also some indication of that within the text of  
13 D-1641.

14 MR. HERRICK: So it's your position that D-1641  
15 has a provision that, when applicable, results in no pulse  
16 flow being required?

17 MR. MILLIGAN: Yes.

18 MR. HERRICK: Could you just generally reference  
19 what portion of D-1641 you're referring to?

20 MR. MILLIGAN: I don't have my document in front  
21 of me with some tabs. But in the discussion about the  
22 pulse flow period, I do believe that there is reference  
23 made to years that are cumulative dry or critically dry  
24 years in a fashion that's very similar to what's in the  
25 San Joaquin River agreement, that there's a period of time

1 where the exports are at -- they're limited to one-to-one  
2 Vernalis flows and that there really is no indication of a  
3 required pulse during this period.

4 MR. HERRICK: Is that consistent with the 2006  
5 Water Quality Control Plan for the Bay-Delta?

6 MR. MILLIGAN: I believe it is.

7 MR. HERRICK: Do you believe it's consistent with  
8 the implementation plan in the 2006 Water Quality Control  
9 Plan?

10 MR. MILLIGAN: I believe that it is. But I can't  
11 say that I have more recent -- as recently as I've read  
12 the text within D-1641 on this issue.

13 MR. HERRICK: Mr. Leahigh, does the Department  
14 have any different position with regards to pulse flows  
15 this spring than were just stated by Mr. Milligan on  
16 behalf of the Bureau?

17 MR. LEAHIGH: No.

18 MR. HERRICK: I'll avoid going over the same  
19 ground. We talked about the water quality standards.  
20 This is for both the Department and the Bureau.

21 Didn't the water quality standard at Vernalis and  
22 the three interior Delta stations switch to .7 as of April  
23 1st this year?

24 MR. MILLIGAN: Yes, they did.

25 MR. HERRICK: And the 30-day running average is

1 well above that -- is the 30-day running average well  
2 above that for both the Tracy Old River Station and the  
3 Brandt Bridge Station?

4 MR. MILLIGAN: Yes, it is. I will defer to John  
5 if he -- I believe the -- I'm uncertain on the Brandt  
6 Bridge.

7 MR. LEAHIGH: Well, yeah, I think that's correct,  
8 that the -- the 30-day running averages are -- well, okay.  
9 I think there's one station where the 30 day running  
10 average is currently over the .7. Although, for that  
11 particular standard there's a transitional period that's  
12 recognized under D-1641 in which a running day average  
13 would not apply until you get those many days within the  
14 new period.

15 So what I'm saying is technically the 30-day  
16 running average would not be required to be .7 until the  
17 30th of April.

18 MR. HERRICK: Do you have any anticipation that  
19 the 30-day running average for the Brandt Bridge Station  
20 will be met as of the 30th of April?

21 MR. LEAHIGH: I think it's going to be close.  
22 Actually that particular station was freshening up quite a  
23 bit and may actually meet the .7.

24 MR. HERRICK: How is it freshening up with  
25 limited exports and low San Joaquin River flows?



1 MR. LEAHIGH: Well, San Joaquin flows are low.  
2 Although there has been a slight increase as of recent --  
3 recently. Also probably depends on where we are in the  
4 tidal -- spring neap tidal cycle.

5 MR. HERRICK: Let's move over to the Tracy Old  
6 River Bridge standard.

7 Do you anticipate that on the 30th of April, the  
8 Tracy Old River Bridge standard will be met on the 30-day  
9 running average?

10 MR. LEAHIGH: Of all the stations in the south  
11 Delta, that one is probably least likely to be less than  
12 the .7.

13 MR. HERRICK: Is that a yes or a no?

14 MR. LEAHIGH: We -- we currently -- we've been  
15 evaluating exactly where that standard will be as of the  
16 30th of April.

17 MR. HERRICK: Are you aware, Mr. Leahigh, that  
18 the 2006 Water Quality Control Plan clarifies that the  
19 standards are to apply throughout the channels, not just  
20 at the monitoring stations?

21 MR. LEAHIGH: I believe there's some language to  
22 that effect in D-1641. I don't know the exact language.

23 MR. HERRICK: What actions are the Department  
24 taking to -- if any, in an attempt to meet the Brandt  
25 Bridge Station?

1           MR. LEAHIGH: We're limited in what actions we  
2 can take due to the constraints that we currently have on  
3 our exports due to -- earlier it was due to the new Old  
4 and Middle River flow requirements due to the biological  
5 opinion. And more recently it's due to the one-to-one  
6 Vernalis export constraint that we're currently operating  
7 under.

8           MR. HERRICK: Well, if you exported less,  
9 wouldn't more water flow through the south Delta?

10          MR. LEAHIGH: Actually some of -- well, some of  
11 the modeling that we've actually produced for other  
12 workshops and hearings for the Board have shown that  
13 increased exports actually improve the water -- the  
14 circulation, water quality conditions in the south Delta.  
15 And as I noted, we are restricted on our exports at the  
16 current time.

17          MR. HERRICK: But that wouldn't be the case if  
18 there was a pulse flow at the -- excuse me. That wouldn't  
19 be the case if there were a pulse flow on the San Joaquin  
20 River and exports were at zero, would it?

21           Let me phrase that.

22           Wouldn't the pulse flow waters then move through  
23 the south Delta rather than stay there?

24          MR. LEAHIGH: Well, it's hard to say which  
25 scenario would actually be of more benefit to the

1 conditions in the south Delta, whether it be increase in  
2 the exports or higher flows on the San Joaquin with zero  
3 exports. That would be speculative as far as which would  
4 be better for water quality.

5 MR. HERRICK: Is the Department undertaking any  
6 actions in order to attempt to meet the Tracy Old River  
7 standard this summer?

8 MR. LEAHIGH: I think one thing that the  
9 Department is planning on doing is to, as we have in past  
10 years, look at different gate openings on the temporary  
11 barriers in the south Delta, and in an attempt to balance  
12 the needs for water levels with water quality, taking  
13 advantage of certain tidal cycles, keep some of those flap  
14 gates tied open in order to provide a little bit better  
15 circulation patterns to improve water quality when those  
16 opportunities present themselves.

17 MR. HERRICK: Isn't DWR planning on raising the  
18 Middle River barrier in order to improve flows in the  
19 south Delta in an attempt to control salinity levels?

20 MR. LEAHIGH: Yes. And I know we have been  
21 working with South Delta Water Agency as far as looking at  
22 what may be a more efficient design for the temporary  
23 barriers in the south Delta in order to improve the  
24 circulation and therefore the water quality.

25 MR. HERRICK: Those changes to the barriers

1 though require additional or supplemental permitting from  
2 the fisher agencies, is that correct?

3 MR. RUBIN: I'm going to object to the question.  
4 I've been trying to be patient here. But, again, I don't  
5 see the relevance here of the questions. The witnesses  
6 has testified in terms of the position of the United  
7 States Bureau of Reclamation/Department of Water Resources  
8 to compliance with terms and conditions in their water  
9 rights. If there's an issue that Mr. Herrick has, it  
10 seems to me that it's not related to the scope of this  
11 proceeding, but issues that may be raised outside of this  
12 proceeding.

13 MR. HERRICK: Mr. Chairman, the testimony  
14 specifically discusses that the Department and the Bureau  
15 intend to meet their regulatory requirements.

16 CO-HEARING OFFICER BAGGETT: I understand.

17 MR. HERRICK: And so questions along those lines  
18 would appear to be directly relevant.

19 CO-HEARING OFFICER BAGGETT: I would overrule in  
20 terms of the issue. I would sustain in terms of the  
21 specific question. I think the witnesses have answered  
22 many of these questions. So if you've got additional or  
23 relevant -- you know, additional questions, you know,  
24 proceed. But I think there's already been a lot of  
25 discussions on whether they intend or can or the history

1 of complying with the water right and water quality  
2 standards in the permit terms to their knowledge.

3 So if you've got something additional to what's  
4 already been asked, you know, proceed.

5 MR. HERRICK: I will, Mr. Chairman. The point  
6 I'm getting at, which I'll be there briefly, deals with  
7 the preference of actions by the Department and the Bureau  
8 to either help exports or to meet permit conditions.

9 CO-HEARING OFFICER BAGGETT: I think I  
10 understand. So if you could just proceed and maybe just  
11 get there.

12 MR. HERRICK: Mr. Leahigh -- well, if I get there  
13 quickly, then the objection will be lack of foundation.

14 CO-HEARING OFFICER BAGGETT: I understand. And  
15 let's assume the foundation was laid by the two previous  
16 lines of questions and then what you asked already.

17 MR. HERRICK: Mr. Leahigh, has DWR asked for a  
18 reconsultation on its permits dealing with the barriers in  
19 order to raise the Middle River barrier yet?

20 MR. LEAHIGH: Actually I'm not aware if we have  
21 or not as far as -- I'm not sure if that analysis has been  
22 completed as far as what would be the most efficient  
23 configuration for the barriers.

24 MR. HERRICK: Well, how did DWR decide to  
25 petition for a consolidated place of use before it decided

1 to petition for a permit change to change the barriers'  
2 operations?

3 MR. LEAHIGH: Well, as I stated, DWR staff has  
4 been working with South Delta water agency in trying to  
5 improve those -- that temporary barrier program to provide  
6 better circulation. That's been ongoing for some time. I  
7 think we would -- when that's finalized, we'll make the  
8 attempt to put that into place as soon as we can.

9 MR. HERRICK: Would DWR be agreeable to the  
10 approval of this condition based upon getting authority to  
11 raise the Middle River barrier?

12 MR. LEAHIGH: I don't see the connection between  
13 the two.

14 MR. HERRICK: Well, if raising the Middle River  
15 barrier allowed you to meet the Tracy Old River Road  
16 standard, then that would allow the Bureau and DWR to meet  
17 their permit conditions.

18 MR. RUBIN: I'm going to object to the question.  
19 I think it assumes facts that are not in evidence,  
20 misstates the testimony that's been provided.

21 MR. HERRICK: Well, that's not correct. He asked  
22 me -- he wasn't sure, so I clarified what I was meaning.  
23 So it wasn't stating facts not in evidence.

24 MR. RUBIN: Mr. Herrick's question kind of gets  
25 to the issue that we're all dancing around, and that's the

1 difference of opinion in terms of responsibility. And  
2 that's the basis for my objection.

3 CO-HEARING OFFICER BAGGETT: I understand. I  
4 think it's an appropriate line of question. If the  
5 witness can answer within the scope or just say they don't  
6 know the answer, I mean that's -- I think it's an  
7 appropriate question to ask. If it's not something that  
8 any of the witnesses are familiar with, then they can so  
9 state.

10 MR. LEAHIGH: I don't think that that should be a  
11 condition upon which approval of this petition should be  
12 granted.

13 MR. HERRICK: Mr. Milligan, would you have a  
14 similar -- would you have the same answer?

15 MR. MILLIGAN: John, would you repeat your  
16 question.

17 MR. HERRICK: Would you be agreeable to having  
18 the approval of the petition before the Board conditioned  
19 upon the installation of an additional foot on the Middle  
20 River barrier?

21 MR. MILLIGAN: I don't think I'd make that  
22 connection. But I am probably one who's looked at the  
23 particular information and I'm not entirely sure that the  
24 additional foot that's been discussed in the past, John,  
25 isn't currently within the -- what was analyzed as part of

1 the biological opinion. So we may be -- I don't know that  
2 there really is a -- what needs to be done there or if  
3 there actually has to be something done. Clearly I think  
4 that there is some improvement that we have seen over the  
5 last couple of years with operating -- so called operating  
6 the temporary the flap gates to improve the circulation in  
7 the south Delta.

8 MR. HERRICK: Mr. Milligan, are you familiar with  
9 the cease and desist order issued against DWR and the  
10 Bureau?

11 MR. MILLIGAN: Yes, I am.

12 MR. HERRICK: Would you agree that one of the  
13 provisions there says that the Department and the Bureau  
14 are required to I think it's mitigate the effect -- excuse  
15 me -- the threatened violations of the south Delta  
16 standards by July 1st, 2009?

17 MR. RUBIN: I'm going to object to the question.  
18 I think the document speaks for itself. If Mr. Herrick  
19 has some questions that --

20 MR. HERRICK: You know, we can take all day if we  
21 want to. But, you know, introducing the next line of  
22 questioning, asking if he's familiar, it seems perfectly  
23 appropriate to me.

24 I know we're playing a game --

25 MR. RUBIN: Well, no, no, no. It's one thing to



1 ask a witness if he's familiar with a document. But Mr.  
2 Herrick makes a statement about is he familiar with a  
3 statement that's in the document. And, frankly, I don't  
4 have the document in front of me to know whether he's  
5 assuming a statement, if he's stating it correctly. And  
6 so --

7 CO-HEARING OFFICER BAGGETT: Okay. I  
8 appreciate --

9 MR. RUBIN: He would have to ask the witness if  
10 it includes that statement or if he knows if there's a  
11 statement to the --

12 CO-HEARING OFFICER BAGGETT: I would sustain.  
13 Could you rephrase the question, since the document is not  
14 before us, as either a hypothetical or assuming the  
15 statement, and then phrase it that way, Mr. Herrick.

16 MR. HERRICK: Mr. Milligan, these next questions  
17 are trying to elicit your understanding of the effects of  
18 the petition, because I'm not clear from the documents  
19 themselves.

20 Is it your understanding that if the petition is  
21 granted, then transfers or exchanges among CVP and SWP  
22 contractors would not require any further petitions before  
23 this Board?

24 MR. MILLIGAN: That would -- I would not a  
25 hundred percent assume that. I would look very closely as

1 to how the -- in the Board's approval of this petition if  
2 they were to provide a similar guidance about would there  
3 need to be further approval on specific transfers or a  
4 collective of transfers as they relate to CVP north to  
5 south or the cross of CVP to State water contractors or  
6 vice versa.

7 MR. HERRICK: Who would that decision be left up  
8 to, I mean filing that additional petition? Would the  
9 Bureau be making a decision if someone comes to them and  
10 asks to transfer water to a CVP or SWP contractor?

11 MR. MILLIGAN: I guess that  
12 depends -- hypothetically speaking, I don't know exactly  
13 how the wording from the Board would be on that. We'd  
14 probably have to look at that and evaluate that as we got  
15 it.

16 MR. HERRICK: Would it be your -- do you have an  
17 understanding to whether or not a transfer or exchange  
18 between CVP and SWP contractors under this petition would  
19 require compliance with joint point-of-operation rules and  
20 restrictions if the export pumps were being used?

21 MR. MILLIGAN: I guess that would depend on the  
22 water being moved and probably the origin of the water. I  
23 could -- I'd probably have to think that one through a  
24 little bit, John.

25 MR. HERRICK: Okay. Mr. Leahigh -- It's Leahigh,

1 isn't it? I'm sorry.

2 MR. LEAHIGH: Yes, Leahigh.

3 MR. HERRICK: Everybody on earth calls you  
4 Leahigh. I apologize.

5 Same question I had to Mr. Milligan. Is it  
6 your -- do you have an understanding as to whether or not  
7 joint point-of-diversion restrictions would apply to any  
8 exchange or transfer between CVP and SWP under this  
9 petition?

10 MR. LEAHIGH: My understanding is that the  
11 exchanges of project water that would be subject to this  
12 petition would not require any joint point of diversion.

13 MR. HERRICK: And let me rephrase this pending  
14 objection that will come up.

15 So it's your understanding then that if the  
16 petition would be granted, that joint point could occur --  
17 excuse me -- that that water could be transferred via the  
18 export pumps even if southern Delta standards were being  
19 violated; is that correct?

20 Let me rephrase that.

21 One of the conditions of joint point is  
22 compliance with permit terms and conditions; is that  
23 correct?

24 MR. LEAHIGH: There are terms and conditions in  
25 D-1641 that cover joint point of diversion, correct.

1           MR. HERRICK: And last summer the Bureau and DWR  
2 had an urgency petition to allow joint point  
3 notwithstanding violations or exceedances of water quality  
4 standards in the south Delta which are permit conditions  
5 of the two parties here; is that correct?

6           MR. RUBIN: I'm going to object to the question  
7 on grounds of it's compound and ambiguous. I think that  
8 if Mr. Herrick restates it characterizing the issue as an  
9 exceedance or a violation, it might resolve my objection.

10          CO-HEARING OFFICER BAGGETT: I would agree it's  
11 compound.

12          Can you rephrase it please.

13          MR. HERRICK: Mr. Leahigh, do you have an  
14 understanding of whether or not joint point restrictions  
15 will apply this summer to transfers of water through the  
16 export pumps if the petition is granted?

17          MR. LEAHIGH: Well, as was stated, some of the  
18 transfers involve project water. And my understanding is  
19 that the transfer -- the pumping of project water -- State  
20 Water Project project water would be pumped at Banks  
21 pumping plant, project water of the CVP would be pumped at  
22 Jones pumping plant, and therefore no joint point of  
23 diversion would be required.

24          MR. HERRICK: So is it your conclusion then that  
25 if there are exceedances of southern Delta salinity

1 standards, the transfers contemplated by this petition  
2 could move forward?

3 MR. LEAHIGH: Yes.

4 MR. HERRICK: Same question with regard to  
5 exchanges.

6 MR. LEAHIGH: Yes.

7 MR. HERRICK: Same question with regard to  
8 non-CVP or SWP water north of the Delta which might be  
9 then transferred under this petition.

10 MR. LEAHIGH: Yeah, I believe that that is  
11 outside the scope of this petition, does not deal with  
12 nonproject water under individual water rights holders.

13 MR. HERRICK: And of course project water for  
14 both projects includes large amounts of people downstream  
15 whose water is either stored or controlled by the CVP or  
16 SWP dams upstream; is that correct?

17 MR. LEAHIGH: I am not sure I understand the  
18 question.

19 MR. HERRICK: Well, let's say a contractor --  
20 excuse me. Let's say a district along the Sacramento  
21 River which has its own water right but the Bureau  
22 provides that water through releases from Shasta Dam.  
23 Maybe this is better for Mr. Milligan.

24 Is it your understanding that that district would  
25 then -- would that district's water be considered CVP

1 water for the purposes of this petition?

2 MR. MILLIGAN: That has been how we've looked at  
3 it, John.

4 MR. HERRICK: Mr. Milligan, do you contemplate  
5 any -- does the Bureau contemplate any other urgency  
6 petitions this year with regard to existing permit  
7 conditions of the Bureau?

8 MR. MILLIGAN: The --

9 MS. AUFDEMBERGE: I object. I mean if it's -- if  
10 those urgency petitions are related to this petition, then  
11 it would be relevant. But if they're not, how -- I object  
12 on relevancy.

13 MR. HERRICK: Well, the relevancy is the  
14 Department and the Bureau are telling the Board that  
15 they're going to comply with all their permit terms and  
16 conditions. And if they're planning on filing an urgency  
17 petition next week for one of those, that would be  
18 misleading.

19 CO-HEARING OFFICER BAGGETT: I would overrule.

20 Please answer.

21 It's incredibly relevant. Please answer, to the  
22 best of your ability or if you know.

23 MR. MILLIGAN: There is possibility that,  
24 depending on how circumstances develop, that the projects  
25 may ask for some relief via an urgency change petition.

1 MR. HERRICK: Relief from what?

2 MR. MILLIGAN: Potentially, depending on how X-2  
3 requirements may fall out, if that required a great deal  
4 of water to be taken out of storage upstream reservoirs  
5 that may relate to cold water pool, I could easily see  
6 that being something that we may contemplate a change  
7 petition for.

8 MR. HERRICK: And, Mr. Leahigh, the same  
9 question. Are there any other -- besides what Mr.  
10 Milligan said, are there any other topics about which an  
11 urgency petition is being contemplated by DWR?

12 MR. LEAHIGH: At this point I don't foresee any  
13 from DWR's perspective.

14 MR. MILLIGAN: We are sorting out - I might add  
15 just for full disclosure - sorting out the need for  
16 potentially a joint point petition.

17 MR. HERRICK: Thank for your honesty.

18 Ms. Sergeant, part of your testimony and answer to  
19 questions also was that you don't anticipate any increased  
20 exports resulting from this petition; is that correct?

21 MS. SERGENT: Yes, it is.

22 MR. HERRICK: I'm not sure I understand that, in  
23 that if the petition is granted, isn't there a possibility  
24 that other parties who would have had to file their own  
25 petition for transfers now might be able to do it more

1 expeditiously under the umbrella of this petition's  
2 authorization?

3 MS. SERGENT: No.

4 MR. HERRICK: No?

5 MS. SERGENT: The other parties who are providing  
6 water to the water bank are -- many of them have already  
7 filed with the Water Board. This only covers project  
8 water. It does not cover anyone else's water rights.  
9 Those parties are going individually to the Water Board.

10 MR. HERRICK: So you're sure that no State water  
11 contractor upstream of the Delta might want to transfer or  
12 sell water either later this year or next year?

13 MS. SERGENT: State water contractor?

14 MR. HERRICK: Yes. Doesn't --

15 MS. SERGENT: State Water Project contractors are  
16 not providing water for sell to the water bank.

17 MR. HERRICK: No, I wasn't talking about the  
18 water bank. I said you're confident then that no upstream  
19 user of State Water Project water might want to sell water  
20 either this year or next year?

21 MS. SERGENT: I don't anticipate it. There's no  
22 way to say 100 percent that that wouldn't happen. But  
23 with allocations this low, our State Water Project  
24 contractors are in a situation where they don't have much  
25 project water to move south. And it would be within the



1 State Water Project's existing water rights. It would not  
2 be a subject of this petition.

3 MR. HERRICK: Well, if somebody receives State  
4 Water Project from -- somebody receives water from  
5 Oroville Dam, isn't it possible that if the drought  
6 continues that there's some financial incentive for them  
7 to transfer/exchange their allocation rather than put it  
8 to use themselves?

9 MS. SERGENT: I'm sorry. I'm not understanding  
10 your question. Are you saying that a State Water Project  
11 contractor would be selling its Table A supply to a CVP  
12 contractor?

13 MR. HERRICK: Well, I'm suggesting that the  
14 blanket authority of this petition creates the incentive  
15 for somebody upstream of the Delta who's not receiving all  
16 their water to sell that limited amount to somebody  
17 downstream of the Delta because there's a large profit to  
18 be had. You don't agree with that incentive?

19 MS. SERGENT: No, I don't.

20 (Laughter.)

21 MR. HERRICK: And just quick follow-on from other  
22 questions.

23 Mr. Milligan, there's been no analysis then of --  
24 excuse me -- there's been no NEPA analysis of any of the  
25 potential actions under this petition?

1           MR. MILLIGAN: No independent NEPA analysis or,  
2 I'd say, any NEPA analysis of this movement of water. As  
3 I understand, these particular exchanges or transfers,  
4 that they would fall within the -- well, let's say, the  
5 historical operations of the CVP.

6           MR. HERRICK: Has the Bureau done any analysis of  
7 the transfers under this petition when compared against  
8 what would happen in the absence of the petition, not  
9 historical transfers but what would happen in the absence  
10 of the petition?

11           MR. MILLIGAN: Well, we aren't quite sure what  
12 all the -- the fullest extent of the potential transfers,  
13 particularly as they relate to CVP contractors. I believe  
14 they fall within the analysis that we did for the  
15 biological opinions. So our analysis that we did recently  
16 in our biological assessment I think would cover the Delta  
17 operations as they relate to this. Clearly we've done  
18 some analysis as it relates to the amount of acres that  
19 may be idled and how that may affect something like a  
20 giant garter snake perhaps.

21           MR. HERRICK: Mr. Leahigh, the same question to  
22 you. Has the Department -- or maybe it's for Ms. Sergent.  
23 I'm sorry. Has the Department done any analysis comparing  
24 the effects of the petition being granted with the state  
25 of affairs this year if the petition is not granted?

1 MS. SERGENT: I'm sorry. I'm still not  
2 understanding the question. Did we analyze what would  
3 happen where?

4 MR. HERRICK: Well, let me back up then.

5 The purpose of an analysis would be to compare  
6 the effects of one action as against a nonaction -- not  
7 taking that action.

8 I'm asking if the Department has done an analysis  
9 of the effects resulting from granting the petition when  
10 compared to the condition this year, not granting the  
11 petition?

12 MS. SERGENT: We did not do an individual  
13 analysis.

14 MR. HERRICK: And, lastly, the -- I guess this is  
15 for the Department.

16 Do you recall the -- maybe it's for Mr. Milligan.  
17 I'm sorry. Do you recall the issues from D-1641 regarding  
18 Santa Clara Valley -- Santa Clara Water District's area of  
19 use issues?

20 MR. MILLIGAN: No, I don't, John.

21 MR. HERRICK: Okay. Does the Department recall  
22 that?

23 MR. LEAHIGH: No.

24 MR. HERRICK: Okay. That's all I have.

25 Thank you, Mr. Chairman.

1 CO-HEARING OFFICER BAGGETT: Thank you.

2 San Joaquin have any questions? Or how many  
3 minutes before you --

4 MS. GILLICK: I don't know --

5 CO-HEARING OFFICER BAGGETT: I'm just trying to  
6 determine when to break for lunch. If it's going to --  
7 well, continue. While you're walking up, if we can get  
8 done with this series, maybe I should ask defenders how  
9 long they anticipate.

10 MR. BASOFIN: Fifteen minutes.

11 MS. GILLICK: I mean I'd say 5, 10, 15 minutes.

12 CO-HEARING OFFICER BAGGETT: 5, 10, 15. Well,  
13 let's proceed with San Joaquin and see how it goes, and  
14 then -- because I'd like to break by 1 at the latest.

15 MS. GILLICK: Okay. Thank you.

16 DeeAnne Gillick on behalf of the County of San  
17 Joaquin.

18 CROSS EXAMINATION

19 OF MR. JOHN LEAHIGH, MR. RON MILLIGAN,

20 AND MS. MAUREEN SERGENT

21 BY MS. DeeAnne GILLICK, ESQ., representing County of San  
22 Joaquin, San Joaquin County Flood Control and Water  
23 Conservation District:

24 Ms. Sergent, in your testimony I believe on page  
25 7 you refer to CVP Eastside Contractors. Does the CVP

1 Eastside Contractors include the New Melones unit, if you  
2 know?

3 MS. SERGENT: No.

4 MS. GILLICK: It does not?

5 MS. SERGENT: It does not.

6 MS. GILLICK: Mr. Milligan, on behalf of the  
7 Bureau, does the CVP Eastside unit include the New Melones  
8 contractors?

9 MR. MILLIGAN: The Eastside Division as it's  
10 described in the CVP does include that. But as it's  
11 described in the petition is really the Friant Division.

12 MS. GILLICK: So you're limiting the statements  
13 in the petition in your testimony regarding the Eastside  
14 CVP as the Friant --

15 MR. MILLIGAN: -- the Friant Division, yes.

16 MS. GILLICK: And so those references in your  
17 testimony in the petition do not refer to any implications  
18 to the New Melones contractors?

19 MR. MILLIGAN: That is correct.

20 MS. GILLICK: And, Ms. Sergeant, do you concur or  
21 agree with those statements?

22 MS. SERGENT: Yes.

23 MS. GILLICK: In both Ms. Sergeant's testimony  
24 and Mr. Milligan's, you make a statement that this  
25 petition will not increase net flows to the San Joaquin

1 River and the Sacramento River; is that correct?

2 MS. SERGENT: Say will not increase?

3 MS. GILLICK: The flows within the San Joaquin  
4 River.

5 MR. MILLIGAN: I don't recall that necessarily in  
6 the testimony. But the answer is, no, it would not  
7 increase San Joaquin River flows.

8 MS. GILLICK: Okay. How are you going to ensure  
9 that the increase -- there will not be any increases to  
10 the San Joaquin River flows?

11 MS. SERGENT: Are you referring to increased  
12 drainage?

13 MS. GILLICK: That's the reference to -- I assume  
14 that flows means the increased drainage, correct.

15 MS. SERGENT: I think what we stated in the  
16 petition and in our testimony that it would not increase  
17 above average historic averages.

18 MS. GILLICK: So has the Department or the Bureau  
19 done any modeling to determine whether or not this  
20 petition will increase any drainage -- typical drainage to  
21 the San Joaquin River?

22 MS. SERGENT: We did not specifically analyze  
23 that, because it was so far below historic average  
24 deliveries to this area.

25 MS. GILLICK: Mr. Milligan, is that correct?

1 MR. MILLIGAN: I don't -- I concur with that. I  
2 don't believe any of these particular deliveries were  
3 targeted for folks that would have drainage to the San  
4 Joaquin within the grasslands area.

5 MS. GILLICK: And, Mr. Milligan, do you know if  
6 any of -- as a result of this petition, whether there will  
7 be any increased obligation on New Melones for water  
8 quality releases?

9 MR. MILLIGAN: I don't believe there would be.  
10 Again, I don't believe that any -- I'm not aware of any of  
11 these deliveries that were going to be made to a district  
12 but then ultimately drained to the San Joaquin River.

13 MS. GILLICK: For again both parties, DWR and the  
14 Bureau, and I believe, Mr. Leahigh, there was testimony  
15 you provided previously. To your knowledge, are DWR  
16 and -- strike that.

17 To your knowledge, have the water quality  
18 standards been met or been violated in 2009?

19 MS. AUFDEMBERGE: Objection. Clarify. Violated  
20 by whom?

21 MS. GILLICK: Well, have they been met --

22 CO-HEARING OFFICER BAGGETT: Right, I would  
23 sustain that, but -- I mean we've already been through  
24 this I don't know how many times. So if you've got some  
25 new questions related to this, I would like that.

1 MS. GILLICK: Well, I'm not certain how detailed  
2 we went to. So if I repeat, I will try to circumvent  
3 that.

4 CO-HEARING OFFICER BAGGETT: If you could do it  
5 quickly please. We've discussed this at length already.

6 MS. GILLICK: Have the standards been violated in  
7 2009? Both -- the salinity standards? Foundational  
8 questions for both parties.

9 MR. LEAHIGH: Well, as was stated earlier, one of  
10 the salinity standards has been exceeded in the south  
11 Delta starting back in December of 2008. But the projects  
12 have met the terms and conditions of D-1641.

13 MS. GILLICK: And I believe there was a  
14 discussion that on January 1st the salinity standards at  
15 all measuring locations and throughout the Delta goes to  
16 .7, is that correct -- throughout the southern Delta?

17 MR. LEAHIGH: Standard changes to .7 south Delta,  
18 yes.

19 MS. GILLICK: And does either the Bureau or  
20 DWR - and I believe there's testimony on behalf of DWR -  
21 whether or not those standards are going to be expected to  
22 be met at the 30-day running average of that .7 standard?

23 MR. RUBIN: I'm going to object.

24 MR. SODERLUND: I'm going the object.

25 MR. RUBIN: Sorry, Erick.



1 MR. SODERLUND: Well, go for it.

2 MR. RUBIN: I think the question was ambiguous.  
3 It was worded in the passive, questioning whether they  
4 would be met. It's not clear whether they --

5 CO-HEARING OFFICER BAGGETT: I understand. And  
6 we've already been through these a lot.

7 Could you please restate the question. And if  
8 there's new information on these standards that hasn't  
9 already been asked at least twice today, that would be  
10 appreciated.

11 MS. GILLICK: I believe there was testimony  
12 earlier -- and I don't want to --

13 CO-HEARING OFFICER BAGGETT: There was, and  
14 that's why saying if you've got new information --

15 MS. GILLICK: Well, I could try not to restate  
16 what was said or I'm trying to have the witnesses do that  
17 as my foundation questions.

18 That it is anticipated that at least one or some  
19 of the standards as anticipated may not be met in the  
20 southern Delta this year. I believe that was the previous  
21 testimony. Am I correct, Mr. Leahigh? Is that a correct  
22 recitation?

23 MR. LEAHIGH: Well, the previous -- I think the  
24 previous testimony was that, yes, the standard goes to .7  
25 on a 30-day running average, which would begin the end of

1 April. And I think testimony was that conditions are  
2 improving rapidly, and whether or not we will be able  
3 to -- whether or not those standards will be met is being  
4 evaluated even as we speak.

5 MS. GILLICK: In the evaluation on whether or not  
6 you're going to be able to meet those standards, is either  
7 the Department or USBR considering any purchase of water  
8 for the purposes of meeting water quality standards?

9 MR. RUBIN: I'm going to object to the question.  
10 It misstates the testimony.

11 The question again that was asked previously was  
12 passive. The question was whether the objectives would be  
13 met. The question that I'm objecting to now turns the  
14 testimony and characterizes the testimony as whether the  
15 Department or the Bureau will meet the objectives. And  
16 it's not clear in my mind whether --

17 CO-HEARING OFFICER BAGGETT: Okay. I understand.

18 I will sustain that. If council wants to ask,  
19 assuming or if conditions state or as a hypothetical that  
20 the standards will be violated, how do they intend to  
21 address their portion of those standards, that would be  
22 appropriate.

23 MS. GILLICK: Yeah, I believe Mr. Leahigh just  
24 indicated that -- you know, I don't know the exact  
25 language he said. I can't recite that right now. But

1 there was an indication that it may be problematic to meet  
2 one of the standards. So based upon that, and I'll use  
3 that as hypothetical, has the Department or DWR considered  
4 any water purchases in order to meet the water quality  
5 standards for the upcoming year?

6 MR. LEAHIGH: The Department has not considered  
7 any water purchases for meeting the standard.

8 MS. GILLICK: Mr. Milligan?

9 MR. MILLIGAN: No.

10 MS. GILLICK: Has the Department or -- first of  
11 all, has the Department considered any modifications of  
12 the barrier problem -- of barriers in order to meet  
13 southern Delta salinity standards this year?

14 MR. LEAHIGH: Well, as I stated earlier, there is  
15 a process in place where Department staff are working with  
16 South Delta Water Agency and looking at what could be a  
17 more efficient configuration of the temporary barrier  
18 program in the south Delta, which may not necessarily --  
19 still may not necessarily allow those standards to be met  
20 but could possibly improve salinity conditions in the  
21 south Delta. We also, as I stated earlier, plan to do as  
22 we have in past years, reoperate the flap gates in ways  
23 that balance the needs for stage and circulation for water  
24 quality in the south Delta.

25 MS. GILLICK: Has there been modeling done

1 that -- you know, some modifications to the barriers might  
2 improve water quality standards in the south Delta?

3 MR. LEAHIGH: Yes, that is part of that process.  
4 There's ongoing modeling efforts.

5 MS. GILLICK: And has the modeling indicated that  
6 modifications with the barrier programs would improve  
7 water quality standard in the south Delta?

8 MR. LEAHIGH: Well, also as I stated earlier, I'm  
9 not sure that there -- that that process has come to a  
10 conclusion yet as far as what the best configuration would  
11 be for those. I think it's ongoing at this time.

12 MS. GILLICK: Has some of the modeling results  
13 indicated that it could improve water quality?

14 MR. LEAHIGH: I have not been personally involved  
15 in that modeling effort. But I imagine that there are  
16 different configurations where you will have trade-offs  
17 between benefits to water quality versus stage. And those  
18 trade-offs are part of what's being evaluated.

19 MS. GILLICK: And, Mr. Milligan, has the Bureau  
20 been involved in any of those analyses to improve salinity  
21 in the south Delta based on the barrier program?

22 MR. MILLIGAN: We have been. Clearly it seems to  
23 improve the circulation of water and flows in the south  
24 Delta. The actual 30-day running average as it relates to  
25 the gauging stations probably hasn't shown a high

1 significance in improvement there. But clearly the  
2 circulation does seem to be much better with actually  
3 managing the flap gates.

4 MS. GILLICK: And does the Bureau have any plans  
5 to implement the modifications -- any modifications of  
6 those barrier flap gates?

7 MR. MILLIGAN: That is a DWR program. But we  
8 stand ready to assist them in any way we can.

9 MS. GILLICK: Are joint -- Mr. Milligan, are  
10 joint points of diversion currently occurring?

11 MR. MILLIGAN: No.

12 MS. GILLICK: Is it anticipated that joint points  
13 of diversion will occur this year?

14 MR. MILLIGAN: It is possible that the CVP could  
15 have some water that we could take advantage of moving via  
16 joint point, yes.

17 MS. GILLICK: That completes my questioning.

18 CO-HEARING OFFICER BAGGETT: Thank you.

19 Let's try to do defenders, so then when we come  
20 back, it could be moved to redirect. So why don't  
21 defenders come on up.

22 See if we can get it done in ten minutes.

23 MR. BASOFIN: Josh Basofin on behalf defendant  
24 errs of wildlife.

25 /////

## 1 CROSS EXAMINATION

2 OF MR. JOHN LEAHIGH, MR. RON MILLIGAN,

3 AND MS. MAUREEN SERGENT

4 BY MR. JOSHUA BASOFIN, ESQ., representing the Defenders of  
5 Wildlife:

6 I just have a few brief questions for Mr.

7 Milligan.

8 Good afternoon, Mr. Milligan.

9 MR. MILLIGAN: Good afternoon.

10 MR. BASOFIN: First, you stated earlier the  
11 rationale for the request to have this petition for  
12 consolidating places of use in effect for two years is to  
13 allow for return water to go back in 2010; is that  
14 correct?

15 MR. MILLIGAN: Yes.

16 MR. BASOFIN: Okay. Is that rationale stated in  
17 the petition itself?

18 MR. MILLIGAN: I don't believe it is.

19 MR. BASOFIN: Okay. Is there a reason why you  
20 didn't include that?21 MR. MILLIGAN: Well, at the time the petition was  
22 being drafted, it was -- there was -- we were trying to  
23 decide whether to do this under the current form or  
24 whether to do it as an urgency change petition. But the  
25 idea of the -- but clearly one of the advantages of a

1 little longer length of time was to allow for the return  
2 of water as it related to these exchanges south of the  
3 Delta. If we had gone in another way, we probably could  
4 have accommodated those exchanges in a way that we  
5 wouldn't have to do it, but it would make it much more  
6 complicated.

7 MR. BASOFIN: Okay. Is there any other potential  
8 reason that would necessitate the two-year period of time?

9 MR. MILLIGAN: No. I could ask Maureen. But I  
10 don't believe that there's any anticipated transfers from  
11 north to south that are contemplated within this petition  
12 for next year.

13 MS. SERGENT: No.

14 MR. BASOFIN: Okay. Turning to a fishery issue.

15 Will there be any cold water of 56 degrees  
16 Fahrenheit left in the Shasta reservoir for this year's  
17 Sacramento River fall-run chinook salmon to spawn in the  
18 fall?

19 MR. MILLIGAN: Again, as I stated before, the Sac  
20 River Temperature Task Group is evaluating what the  
21 proper -- or the most appropriate temperature compliance  
22 point is for the summer. That is one of the  
23 considerations that they're taking into account.

24 I believe that there will be. We certainly have  
25 seen improvement in both the volume at Shasta Lake and

1 then also the cold water pool. So I believe that there  
2 will be.

3 MR. BASOFIN: Okay. Are you aware that this  
4 petition was filed under Section 1700 of the California  
5 Water Code?

6 MR. MILLIGAN: Yes.

7 MR. BASOFIN: Okay. Are you also aware that that  
8 section requires the petitioner to include all information  
9 reasonably available to the petitioner that can be  
10 obtained from Department of Fish and Game concerning the  
11 extent, if any, to which fish and wildlife would be  
12 affected?

13 MR. MILLIGAN: I believe that's a general  
14 requirement of the petitions that we file.

15 MR. BASOFIN: Mr. Milligan, has the Bureau of  
16 Reclamation -- is it true that the petition will  
17 facilitate transfers of water from crop idling projects in  
18 the Sacramento Valley in part?

19 MR. MILLIGAN: That's my understanding, yes.

20 MR. BASOFIN: And has the Bureau of Reclamation  
21 issued a biological assessment regarding the impact of  
22 those crop idling practices on giant garter snake?

23 MR. MILLIGAN: Yes, we have.

24 MR. BASOFIN: And has the Bureau of Reclamation  
25 released environmental assessment in finding no



1 significant impact that concerns in part those crop idling  
2 practices and their effect on giant garter snake?

3 MR. MILLIGAN: I believe we have.

4 MR. BASOFIN: Okay. And has the Bureau of  
5 Reclamation initiated consultation with the U.S. Fish and  
6 Wildlife Service regarding those crop idling practices and  
7 their effect on giant garter snake?

8 MR. MILLIGAN: We did that prior to issuing the  
9 EA FONSI and --

10 MR. BASOFIN: Okay. So is it accurate to say  
11 that information on crop -- from crop idling practices on  
12 giant garter snake is readily available to you?

13 MR. MILLIGAN: Well, yes, because Bureau of  
14 Reclamation provided the analysis.

15 MR. BASOFIN: Okay. And so why is it that that  
16 analysis was not included in the petition?

17 MR. MILLIGAN: Because that wasn't finalized till  
18 last week. I'm afraid it was conducted and completed  
19 after the petition was filed.

20 MR. BASOFIN: I have no further questions.

21 CO-HEARING OFFICER BAGGETT: Thank you.

22 With that, I know I have a number of questions.  
23 I think counsel and some of our staff do, and I think  
24 probably my co-hearing officer. So why don't we take  
25 lunch and then we'll ask those, and then come back for any

1 redirect if you anticipate redirect -- a small redirect.

2           Okay so let's take -- can we do a short lunch?

3 How about come back -- let's come back at a quarter to; 45

4 minutes we'll meet back and start promptly at a quarter

5 till 2.

6           (Thereupon a lunch break was taken.)

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1                                   AFTERNOON SESSION

2                   CO-HEARING OFFICER BAGGETT:  Okay.  Let's go back  
3 on the record.  We're with I think questions from the  
4 hearing officers and our staff is where we left off.  So  
5 with that, I guess we can start down with Ernie and Dana.

6                   WATER RESOURCES CONTROL ENGINEER MONA:  I'll  
7 start.

8                   CO-HEARING OFFICER BAGGETT:  Dana.

9                                   QUESTIONS OF

10                   MR. JOHN LEAHIGH, MR. RON MILLIGAN,

11                                   AND MS. MAUREEN SERGENT

12                                   BY BOARD AND STAFF

13                   SENIOR STAFF COUNSEL HEINRICH:  I have one  
14 question.  This is for either Ms. Sergent or Mr. Milligan.

15                   I'm confused and I'm hoping you can clarify  
16 something.  You testified on direct that with respect to  
17 the Drought Water Bank there would be somewhere around 5  
18 to 6,000 acre-feet of State Water Project water that is  
19 likely to be sold to the Drought Water Bank and  
20 approximately 10,000 acre-feet of CVP water.  But then in  
21 response to questions from Mr. Herrick, you seem to be  
22 saying that there wouldn't be any State Water Project or  
23 CVP allocation sold to the Drought Water Bank.

24                   So can you clear that up for me?

25                   MS. SERGENT:  Yes, that was one area where the

1 questioning got a little confusing, and I thought it could  
2 use some clarification.

3           What I believe Mr. Herrick was asking was, would  
4 this consolidated place of use create a market for more  
5 State Water Project water to be sold that isn't described  
6 in this petition? And that's why I answered no.

7           There's -- project water is delivered north of  
8 the Delta under two groups of agreements. One is a water  
9 rights settlement agreement that we have with a number of  
10 parties along the Feather River. And then we have  
11 long-term State Water Project water supply contracts with  
12 a group of several contractors north of the Delta.

13           The water supply contracts -- the water  
14 settlement agreements provide that those districts can  
15 transfer water under those agreements with our approval.  
16 And the settlement contractors who have any interest in  
17 transferring water have already approached the Department  
18 and are doing so under the Drought Water Bank. The  
19 long-term State Water Project contractors cannot sell  
20 State Water Project water to a CVP contractor.

21           SENIOR STAFF COUNSEL HEINRICH: Okay. And the  
22 same with the 10,000 acre-feet of CVP water, that is, CVP  
23 contract water that's going from one CVP contractor to the  
24 Drought Water Bank and potentially to an SWP customer?

25           MS. SERGENT: And those settlement agreements,

1 Ron can explain, have both a base and a project supply.  
2 And that's the project portion of that water that is  
3 anticipated to go into the Drought Water Bank. And we  
4 don't have firm numbers on those yet because we don't have  
5 signed agreements and we're still in discussions with  
6 those districts.

7 SENIOR STAFF COUNSEL HEINRICH: Okay. Thank you.  
8 That helps.

9 CO-HEARING OFFICER BAGGETT: Any other questions?  
10 I've got a few.

11 What I'm trying to unravel, in your petition you  
12 ask -- you stated that you were going to calculate the  
13 carriage water loss because you -- but yet you don't  
14 anticipate a change in the Delta or any Sac Valley water.  
15 So why is carriage water even relevant?

16 MS. SERGENT: What that was trying to show is  
17 that if we have -- we acquire 10,000 acre-feet of water  
18 north of the Delta, we are not going to export 10,000  
19 acre-feet. We are going to account for the water that it  
20 takes to move it across the Delta. And we're not going to  
21 be exporting more water than we anticipate we would be  
22 able to deliver to the --

23 CO-HEARING OFFICER BAGGETT: Right. But doesn't  
24 that trigger new carriage water calculations?

25 MS. SERGENT: There is a carriage water component

1 to each --

2 CO-HEARING OFFICER BAGGETT: But only if it's  
3 coming across the Delta, right?

4 MS. SERGENT: Yes, that's right.

5 CO-HEARING OFFICER BAGGETT: And I thought all  
6 these were below Delta transfers in the San Joaquin side.

7 MS. SERGENT: That may be where the confusion  
8 comes. That applies only to those transfers that are  
9 moving across the Delta.

10 CO-HEARING OFFICER BAGGETT: But I thought we  
11 heard earlier that there weren't any, for this was all San  
12 Joaquin River place-of-use changes.

13 MS. SERGENT: There is a small component of the  
14 Drought Water Bank water that would be project supply.

15 CO-HEARING OFFICER BAGGETT: Oh. And how much is  
16 that?

17 MS. SERGENT: It's anticipated to be under 10,000  
18 acre-feet of water.

19 CO-HEARING OFFICER BAGGETT: Okay. Well, that's  
20 new information.

21 So it's under 10,000 acre-feet. Okay.

22 MS. SERGENT: We expect it to be under 10,000  
23 acre-feet of water.

24 CO-HEARING OFFICER BAGGETT: Well, I mean that's  
25 a whole different petition, it seems to me. So we've

1 definitely got to -- maybe you can clarify this at some  
2 point, because I think --

3 MS. SERGENT: That was the Drought Water --  
4 that's the Drought Water Bank portion that's described in  
5 the petition.

6 CO-HEARING OFFICER BAGGETT: Okay. Second  
7 question.

8 It appears this is really only an 18-month  
9 transfer, not a two-year transfer. I'm trying to  
10 understand why it's two years from now when -- I  
11 understand the payback issue, which is raised in the  
12 petition and your testimony this morning. And that's why  
13 it needs to be more than an urgency petition.

14 What time period does it really have to be? Is  
15 it 18 months, 12, 13 months, 24 months exactly? I mean it  
16 appears to me it's really not a two-full-year change  
17 you're asking for. You're asking -- you really need less  
18 than 24 months. And that's what I'm trying to figure out.  
19 I mean you can see the point. We don't want this vague  
20 petition that's sort of open-ended all over the place.  
21 And we want as specific as possible.

22 MR. MILLIGAN: Maybe for clarity, I believe that  
23 for the exchanges, particularly the ones that are south of  
24 the Delta, I could envision where we may need to go to the  
25 fall of 2010 to actually get the water delivered back,

1 particularly as it relates to the Friant Division.  
2 Because they will probably send some water over. But for  
3 the capacity to clear up with a cross valley canal, it may  
4 become the fall of the next year.

5 CO-HEARING OFFICER BAGGETT: So that's 17 months.

6 MR. MILLIGAN: Thereabouts.

7 CO-HEARING OFFICER BAGGETT: Okay. Anyway, I  
8 think that's something that's worth nailing down exact --  
9 with more specificity.

10 The third question, that came to up in my mind  
11 was, it appears that there is a change in joint point  
12 anticipated. So, one, I think you've clarified to some  
13 extent for me the Sac Valley transfer issue is less than  
14 10,000 acre-feet. So is that -- I guess, one, if there's  
15 a change in joint point anticipated, is it limited to less  
16 than 10,000 acre-feet?

17 MS. SERGENT: The joint point use is not  
18 contemplated as part of this --

19 CO-HEARING OFFICER BAGGETT: I understand that.  
20 But it came up that you -- it appeared to me the testimony  
21 was that you're contemplating possibly coming back. And  
22 so I guess that brings up two questions: Is why would  
23 that be necessary to come back if you weren't transfer Sac  
24 Valley water? It sounds like there is that anticipation  
25 up to 10,000 acre-feet, one.



1           Two, is that an urgency or a long-term change in  
2 joint point you're contemplating?

3           And I guess third, while we're at it, are there  
4 any other changed petitions you're contemplating because  
5 of this?

6           MS. SERGENT: Okay. The 10,000 acre-feet is not  
7 a joint point issue. The reason the we're requesting --  
8 or including that 10,000 in this petition is that without  
9 it, we'd have to designate. Okay, if this portion of the  
10 water bank water comes from -- is project supply from a  
11 CVP contractor, it would have to be delivered to a CVP  
12 user.

13           And then the same would go for State Water  
14 Project contractor. If any water is acquired that has a  
15 project component, say, water project, it would go to the  
16 other contractor -- to a State Water Project contractor.  
17 So he --

18           CO-HEARING OFFICER BAGGETT: So joint point's not  
19 necessary for this petition.

20           MS. SERGENT: Joint point is not necessary for  
21 this petition. None of these have anything to do with any  
22 capacity constraint at Jones and therefore needing to pump  
23 CVP water at the State Water Project facilities. This is  
24 delivering water that -- the project will deliver its  
25 water at Banks and CVP will -- or the Bureau will deliver

1 that water at Jones. And joint point is not included as  
2 part of this action.

3 CO-HEARING OFFICER BAGGETT: I guess it was the  
4 Bureau that brought up the joint point issue anyway, it  
5 wasn't DWR.

6 MR. MILLIGAN: It is. And it is possible that  
7 Reclamation may have some CVP water to -- that it may find  
8 it useful to have joint point capacity to move it as part  
9 of a CVP supply. But that's again independent of the  
10 Drought Water Bank.

11 CO-HEARING OFFICER BAGGETT: So let me see if I  
12 understand this then. The testimony as I recall was that  
13 there were no Shasta or Oroville water or levels affected  
14 by this petition before us now, correct?

15 MR. MILLIGAN: That's correct.

16 CO-HEARING OFFICER BAGGETT: So that water may be  
17 anticipated to be used to transfer from the Bureau to  
18 DWR -- I'm trying to understand how this joint point --

19 MR. MILLIGAN: Well, the joint point --

20 CO-HEARING OFFICER BAGGETT: -- came about if  
21 it's not related to this. If this petition has absolutely  
22 nothing to do with --

23 MS. SERGENT: One thing that might help clarify  
24 this. The water that would be moved under this petition  
25 for the Drought Water Bank that would be either project or

1 CVP water -- State Water Project or CVP water, that's  
2 water that's being made available by districts upstream  
3 that are doing some action this year --

4 CO-HEARING OFFICER BAGGETT: I understand.

5 MS. SERGENT: -- to make the water available. So  
6 the water would have been delivered to those districts and  
7 used within that district if not for this. So it won't  
8 have any additional draw on either State Water Project or  
9 CVP facilities, because that water would have been used  
10 within the Sac Valley. So --

11 CO-HEARING OFFICER BAGGETT: I understand that.

12 MS. SERGENT: -- it's not an additional.

13 CO-HEARING OFFICER BAGGETT: And it will also be  
14 limited to less than 10,000 acre-feet and you will do  
15 carriage water calculations for that amount.

16 MS. SERGENT: Right. And then again we  
17 anticipate less than 10,000 acre-feet. We don't have the  
18 final numbers for that just yet.

19 CO-HEARING OFFICER BAGGETT: So then why is  
20 joint -- joint point came up from the Bureau's  
21 perspective, and I'm trying to --

22 MR. MILLIGAN: It came up only from in response  
23 to Mr. Herrick, which asked, do you have anything else out  
24 that you're going to ask the Board for?

25 CO-HEARING OFFICER BAGGETT: Right.

1           MR. MILLIGAN: Not related to this but that might  
2 be out there. And there was the possibility of maybe,  
3 depending on how X-2 requirements may stack up in May or  
4 potentially June, that we would probably need to do due  
5 diligence to see if that was going to make a big draw on  
6 cold water pool as an example. But that's certainly not a  
7 decision that's been made yet from the project's  
8 perspective.

9           Another one was the potential of anything related  
10 to joint point. Because Reclamation may have some water  
11 in storage at Folsom that we may have utilized our full  
12 capacity at Jones and there may be some additional  
13 capacity available at Banks, completely independent of the  
14 Drought Water Bank.

15           CO-HEARING OFFICER BAGGETT: In which case you  
16 wouldn't be filing for a change of place of use because it  
17 would go to your contractor south of the Delta --

18           MR. MILLIGAN: That's correct

19           CO-HEARING OFFICER BAGGETT: -- one would assume.

20           MR. MILLIGAN: Yes.

21           CO-HEARING OFFICER BAGGETT: But you would need  
22 to be able to convey it through --

23           MR. MILLIGAN: Yeah. We would benefit from the  
24 use of joint point in that circumstance.

25           CO-HEARING OFFICER BAGGETT: Okay.

1 CO-HEARING OFFICER HOPPIN: Ms. Sergeant, when  
2 would you anticipate having your final numbers on the  
3 Drought Water Bank? I mean it's almost the 1st of May.

4 MS. SERGENT: That's true. We have most likely  
5 all the water that we are going to acquire from districts  
6 proposing to idle farmland. We may still get additional  
7 proposals from individuals that will potentially idle  
8 fourth year alfalfa starting on July 1st. We can't move  
9 water through the Delta until July. So the groundwater  
10 substitution agreements, we may continue to get a few of  
11 those, because they wouldn't start pumping until July 1st.  
12 But within the next month or so we should know the full  
13 scope of any proposals that we're going to get.

14 CO-HEARING OFFICER HOPPIN: That's a fair enough  
15 answer.

16 Thank you.

17 CO-HEARING OFFICER BAGGETT: I have no other  
18 questions at this point.

19 Does anybody else?

20 Okay. With that, do you have any redirect, the  
21 Bureau or DWR?

22 MR. SODERLUND: After some of the clarifications  
23 from the Board and Board staff, Department of Water  
24 Resources doesn't have redirect on its own, but invites  
25 Ms. Aufdemberge, as she does a couple questions for

1 redirect, to open it up to DWR staff as well.

2 CO-HEARING OFFICER BAGGETT: Proceed.

3 MS. AUFDEMBERGE: I just have a couple questions  
4 for Ron Milligan.

5 And I'm going to need CSPA Exhibit 1H.

6 Actually it's 2H.

7 REDIRECT EXAMINATION

8 OF MR. RON MILLIGAN

9 BY MS. AMY L. AUFDEMBERGE, ESQ., representing the U.S.

10 Bureau of Reclamation:

11 Mr. Milligan, do you recognize Exhibit 2H?

12 MR. MILLIGAN: Yes, I do.

13 MS. AUFDEMBERGE: What is it?

14 MR. MILLIGAN: This is a printout of some  
15 information that's available on Reclamation's CVO website.

16 It is a summary of water allocations for the CVP for a  
17 number of years back. It has 1977 and then includes  
18 information about the allocations each year after that.

19 MS. AUFDEMBERGE: So does 1H reflect a true and  
20 correct allocation of water to those that receive CVP  
21 water pursuant to long-term contracts?

22 MR. MILLIGAN: It does. It's -- there may be  
23 some unique spots in some of the years as they relate to  
24 some of the contract provisions. But overall this was the  
25 allocation as it was announced each of the years.

1 MS. AUFDEMBERGE: Does it include 1977?

2 MR. MILLIGAN: It does.

3 MS. AUFDEMBERGE: Can you tell me about the  
4 allocation for 1977?

5 MR. MILLIGAN: The allocation in 1977 from the  
6 project was a 25 percent allocation to ag service  
7 contractors. And M&I contractors that year got a range of  
8 25 to 50 percent. It was depending on their historic use.  
9 The exchange contractors were shorted to -- in the Sac  
10 River settlement contractors were shorted to 75 percent.  
11 And Friant Class 1 was 25.

12 MS. AUFDEMBERGE: So with the CVP agricultural  
13 water service contractors south of the Delta was their  
14 allocation higher in 1977 than it will be this year?

15 MR. MILLIGAN: Actually it will be. Currently we  
16 have a 10 percent allocation for ag service contractors  
17 south of the Delta.

18 MS. AUFDEMBERGE: You were asked several  
19 questions regarding allocations of contractors in  
20 different CVP units or divisions; is that correct?

21 MR. MILLIGAN: Yes

22 MS. AUFDEMBERGE: Is the Friant Division  
23 allocation based on the same hydrologic condition as the  
24 San Luis unit?

25 MR. MILLIGAN: No, the San Luis unit is based on

1 a combination of storage at San Luis reservoir and  
2 anticipated pumping rates that we'll see in the Delta.

3           The allocation to the Friant Division is based on  
4 hydrologic conditions primarily in the upper San Joaquin  
5 River watershed and storages in Millerton Lake.

6           So typically barring a circumstance where we may  
7 need to call on the San Joaquin River system to make up  
8 the allocation to the exchange contractors, the two will  
9 be kept separate, until you get into the very wet years  
10 where Millerton may have to spill. And then those waters  
11 are captured quite often at Mendota Pool.

12           MS. AUFDEMBERGE: Does the Friant Division  
13 receive more water than Class 1 water?

14           MR. MILLIGAN: They do. Typically the Friant  
15 Division will receive their Class 1 water allocation and  
16 some allocation that's characterized as Class 2. That's  
17 roughly about 35 to 40 percent.

18           MS. AUFDEMBERGE: So do you know what percent of  
19 average will the Friant contractors receive this year?

20           MR. MILLIGAN: If the allocation ends at 100  
21 percent Class 1 and no Class 2, that's roughly 60 percent  
22 of what they historically would receive.

23           MS. AUFDEMBERGE: Are you familiar with the water  
24 quality at Vernalis for salinity?

25           MR. MILLIGAN: Yes.



1 MS. AUFDEMBERGE: Have the water quality salinity  
2 standards at Vernalis been exceeded this year?

3 MR. MILLIGAN: No, they have not.

4 MS. AUFDEMBERGE: Do you anticipate any  
5 exceedances is 2009?

6 MR. MILLIGAN: We do not anticipate an exceedance  
7 at Vernalis water quality, no.

8 MS. AUFDEMBERGE: And that's salinity --

9 MR. MILLIGAN: Salinity.

10 MS. AUFDEMBERGE: What sort of factors or causes  
11 are out there that might cause degradation of salinity  
12 standards below Vernalis?

13 MR. MILLIGAN: From Vernalis downstream to the  
14 other three south Delta salinity stations, a combination  
15 of return flows either from ag use, some return flows from  
16 M&I treatments, and some -- sometimes related to the  
17 tides.

18 MS. AUFDEMBERGE: Can you identify anything in  
19 the petition that would affect Reclamation's ability to  
20 meet the terms and conditions of its water rights?

21 MR. MILLIGAN: No, I have not seen anything.

22 MS. AUFDEMBERGE: Finally, there's been testimony  
23 regarding an EA FONSI for -- and the BO for land following  
24 north of the Delta. And Reclamation would offer to make  
25 those available for this hearing. And we believe that the

1 Board could take judicial notice of those two documents.

2 CO-HEARING OFFICER BAGGETT: Is there any  
3 objections from -- without seeing the document, it's hard  
4 to --

5 MR. HERRICK: John Herrick from South Delta. I  
6 would just say when -- you're going to make a decision  
7 tomorrow, aren't you?

8 CO-HEARING OFFICER BAGGETT: Make a decision?  
9 No, we won't have a draft order for at least two weeks.

10 MR. RUBIN: I have no objection to the State  
11 Board taking official notice of the documents. I would  
12 object if it would delay your consideration. And so they  
13 are public documents, they've been subject to whatever,  
14 you know, public review requirements exist in law. And  
15 therefore if the Board's inclined to take official notice,  
16 I have no objections. But, again, if it would delay your  
17 consideration, I would raise an objection.

18 CO-HEARING OFFICER BAGGETT: We'll decide before  
19 we're done tomorrow. If you could give us a copy of the  
20 documents, it would be helpful, and make them available to  
21 parties.

22 Any other...

23 Is that all? Okay.

24 With that, recross.

25 Mr. Rubin

1 MR. RUBIN: I have none.

2 CO-HEARING OFFICER BAGGETT: All right. CSPA.

3 Only got one witness. This is fair game, I  
4 guess.

5 MR. JACKSON: These questions are addressed to  
6 the person who testified that there's only 10,000  
7 acre-feet of water that's in the Drought Water Bank  
8 program that's going to be transferred across the Delta.

9 MR. RUBIN: I'm going to object to the question.  
10 I think it's outside of the redirect.

11 CO-HEARING OFFICER BAGGETT: I would sustain.  
12 That wasn't what Mr. -- we've only got one witness who  
13 testified on redirect. And I don't think he --

14 MR. JACKSON: Actually this in response to  
15 questions that you asked --

16 CO-HEARING OFFICER BAGGETT: Right.

17 MR. JACKSON: -- which seemed to me to elicit an  
18 answer that isn't true factually. And I wanted to try to  
19 straighten that out before you --

20 CO-HEARING OFFICER BAGGETT: Redirect is their  
21 opportunity. If you've got information for your rebuttal,  
22 I guess you could bring it in then, Mr. Jackson. But that  
23 wasn't a question --

24 MR. JACKSON: Okay.

25 CO-HEARING OFFICER BAGGETT: -- under their

1 redirect. So you can straighten those out then.

2 Try to keep some semblance of a record here.

3 CalWIN, do you have any questions of Mr.

4 Milligan?

5 MS. JACKSON: No.

6 CO-HEARING OFFICER BAGGETT: South Delta?

7 MR. HERRICK: No questions.

8 CO-HEARING OFFICER BAGGETT: Okay. San Joaquin?

9 MS. GILLICK: No questions.

10 CO-HEARING OFFICER BAGGETT: No questions.

11 Defenders?

12 MR. BASOFIN: No questions.

13 CO-HEARING OFFICER BAGGETT: Okay. Any questions

14 on the redirect?

15 None.

16 With that, exhibits to enter into the record?

17 MR. SODERLUND: Yeah, the Department of Water

18 Resources would like to move Exhibits DWR-01 through 08

19 into the record.

20 I do want to note that the biological opinion for

21 the land fallowing was included in our exhibit list, but

22 the FONSI or EA was not.

23 CO-HEARING OFFICER BAGGETT: So we've got a

24 biological opinion already in the record. Then I'll leave

25 that up to the Bureau whether they think it's necessary to

1 put anything else in.

2 Okay. Any objection to DWR's exhibits?

3 If not, they're admitted.

4 (Thereupon the above-referenced exhibits  
5 were admitted.)

6 CO-HEARING OFFICER BAGGETT: Bureau.

7 MS. AUFDEMBERGE: We just submit BOR-1 into  
8 evidence.

9 CO-HEARING OFFICER BAGGETT: Okay. Any  
10 objection?

11 MR. RUBIN: No. But I was going to suggest, if I  
12 could, that we -- either CalSPA move for 2H, move that  
13 into evidence or have it renumbered for the record to make  
14 sure it's clear that it's in at this point since it was  
15 referred to and proper foundation was laid.

16 CO-HEARING OFFICER BAGGETT: Very good.

17 Okay. Does CalSPA want to enter it now?

18 MR. JACKSON: We'll move 2H.

19 CO-HEARING OFFICER BAGGETT: Okay. And is there  
20 any objection to CalSPA admitting their Exhibit 2H into  
21 the record as long as the -- along with the Bureau's  
22 exhibits?

23 If not they're all admitted.

24 (Thereupon the above-referenced exhibits  
25 were admitted.)

1 CO-HEARING OFFICER BAGGETT: And in terms of the  
2 FONSI, it sounds like that's the only thing. Is that  
3 worth us still considering?

4 MS. AUFDEMBERGE: Yeah, I think so.

5 CO-HEARING OFFICER BAGGETT: Okay. So if you  
6 could get us a copy and distribute to the parties, we'll  
7 decide by tomorrow before we close.

8 Thank you.

9 With that, Mr. Jackson is up, I believe. Or --  
10 you have no case-in-chief, correct, Mr. Rubin?

11 MR. RUBIN: I don't. But as I indicated earlier,  
12 I --

13 CO-HEARING OFFICER BAGGETT: You want to do an  
14 opening statement?

15 MR. RUBIN: -- an opening statement, policy -- I  
16 could wait. I mean however you'd prefer. It really is a  
17 kind of a policy statement, and therefore I could have  
18 made it earlier. I can make it at any time during the  
19 proceeding.

20 MR. JACKSON: He can make it now. I mean he's  
21 up.

22 CO-HEARING OFFICER BAGGETT: Okay. You're on for  
23 an opening/policy statement.

24 Mr. Rubin, continue.

25 MR. RUBIN: Jon Rubin for San Luis &

1 Delta-Mendota Water Authority and Westlands Water  
2 District.

3           And I ask the hearing officers to keep this  
4 proceeding focused on a single overriding issue. And the  
5 issue is, should the State Water Resources Control Board  
6 grant the subject petition to change the places of use  
7 designated in the water rights for the Central Valley  
8 Project and the State Water Project?

9           The critical low water allocation to Central  
10 Valley Project and State Water Project contractors  
11 warrants approval of the petition. Opponents seek to  
12 cloud this proceeding with complaints about how people  
13 characterize the current hydrologic conditions, complaints  
14 about the Drought Water Bank, by reiterating their  
15 long-standing objections to the State Water Project and  
16 the Central Valley Project; and with claims water may be  
17 used unreasonably.

18           The opponents of the subject petition ignore two  
19 principal points that have been elicited through testimony  
20 by the United States Bureau of Reclamation and the  
21 California Department of Water Resources.

22           The two points are:

23           1) Action by the State Water Resources Control  
24 Board whether it grants or denies the petition will not  
25 change the quantity of water purchased or sold by the

1 Drought Water Bank; and

2           2) Action by the State Water Board again whether  
3 it grants or denies the petition will not change the  
4 quantity of water conveyed through the Delta by the United  
5 States Bureau of Reclamation or the California Department  
6 of Water Resources.

7           The opponents of the subject petition also ignore  
8 the undisputed fact that there's simply insufficient water  
9 supply south of the Delta to meet critical core demands.

10           Once those points are made, the complaints and  
11 the objections raised by the opponents and, hence, the  
12 testimony they will present becomes irrelevant. They will  
13 fail to present any evidence that undermines the testimony  
14 of the United States Bureau of Reclamation and the  
15 California Department of Water Resources. Substantial  
16 evidence that they've presented supports the State Water  
17 Resources Control Board's finding that the petition, if  
18 granted, will not injure any legal user of water, will not  
19 have an unreasonable impact on fish and wildlife, and is  
20 in the public interest. And for these reasons the San  
21 Luis & Delta-Mendota Water Authority and Westlands Water  
22 District respectfully request that the State Board grant  
23 the petition.

24           I would like to take this opportunity, if you  
25 don't mind, to address a question that Mr. Baggett raised



1 to the panel for the Department of Water Resources and the  
2 Bureau of Reclamation. And that is a timing issue.

3 The San Luis & Delta-Mendota Water Authority and  
4 Westlands Water District could accept a modification in  
5 the petition to reduce the time. I think the issue that  
6 was raised is the issue that we're faced with. And, that  
7 is, the need for additional time beyond this water year to  
8 complete any exchanges.

9 It appears as though a one-year period from the  
10 time that an order is issued may be sufficient. But I  
11 think the issue that Ron Milligan raised is something that  
12 we still haven't been able to work through. And,  
13 therefore, it sounds like if this is of concern to the  
14 Board, the hearing officers, that there's a way to  
15 accommodate the issue.

16 But there's definitely an ability to refine the  
17 petition in terms of its length. But the most important  
18 factor that we need to deal with is ensuring that the  
19 exchanges can be completed, the ones that start this year.

20 Thank you.

21 CO-HEARING OFFICER BAGGETT: Thank you.

22 Mr. Jackson.

23 Continue.

24 MR. JACKSON: Yes, sir. My name is Mike Jackson  
25 and I'm appearing on behalf of the California Sportfishing

1 protection Alliance.

2 We will have two witnesses. I will begin by  
3 making a short opening statement. And then the two  
4 witnesses will testify in the order of Lynn Barris and  
5 then Mr. Jennings.

6 The purpose of the testimony will be to point out  
7 that it is not necessary to do a consolidation of the  
8 places of use of the Central Valley Project and the State  
9 Water Project in this particular year.

10 First of all, there has been no such  
11 consolidation ever granted by this Board in its history.  
12 This is a very large request, even if it deals, as we have  
13 heard today, with a small amount of water.

14 The purpose of the consolidation in the petition  
15 is extremely vague, and there is no supporting data that  
16 we can find that makes it necessary to do the  
17 consolidation. And so our testimony will go toward  
18 convincing the Board members that the consolidation is an  
19 unnecessary act and that it really doesn't accomplish much  
20 of anything.

21 The testimony of the witnesses will also  
22 highlight the vague nature of this particular approval and  
23 will suggest various conditions, if in fact you decide to  
24 go through with this approval, that will keep it from  
25 being as potentially dangerous as it seems to be from the

1 first reading.

2           The evidence will indicate that it really doesn't  
3 make any difference whether or not the consolidation  
4 happens, because all of the acts that are described in the  
5 petition and, in fact, in the evidence put forward by the  
6 projects this morning indicates that they can do these  
7 projects without having to consolidate the places of use.

8           There is no environmental review. I think that's  
9 fair to say, both from what our testimony will say and  
10 also from the testimony this morning. There has been no  
11 identification of exactly where the water's going to come  
12 from, where the water's going to go. And therefore it's  
13 almost impossible to tell you what the effects are going  
14 to be in regard to fish and wildlife, other water rights  
15 holders.

16           But we do intend to tell you what's happened in  
17 the past. Because since this petition for consolidation  
18 is so open-ended, other water transfers within the time  
19 period can be effectuated this year under this petition  
20 for consolidation and actually could be effectuated next  
21 year if the full term were to be granted.

22           The first witness will be Lynn Barris, who will  
23 describe what happened to her and her water right the last  
24 time there was a Drought Water Bank.

25           The second witness, Mr. Jennings, will describe

1 the existing conditions and the fact that the petition  
2 requests that we rely on the existing standards of D-1641  
3 to deal with any problems for fish and wildlife. Those  
4 standards were in effect when the Delta died and don't  
5 seem to be very protective.

6 Those standards are regularly violated and don't  
7 seem to be enforced. Those standards were not designed  
8 with this kind of consolidated place of use in mind. And,  
9 consequently, we believe that it would be arbitrary and  
10 capricious for this Board on the basis of this record to  
11 approve this project.

12 And that said, I'll turn it over now to the  
13 witnesses.

14 Mrs. Barris, were you sworn earlier today?

15 MS. BARRIS: No.

16 MR. JACKSON: Would you please.

17 (Thereupon Ms. Lynn Barris was sworn, by the  
18 Hearing Officer to tell the truth, the whole  
19 truth and nothing but the truth.)

20 DIRECT EXAMINATION

21 OF MS. LYNN BARRIS

22 BY MR. MICHAEL JACKSON, ESQ., representing the California  
23 Sportfishing Protection Alliance:

24 MR. JACKSON: Ms. Barris did you help prepare  
25 your testimony which is CSPA I believe No. 4?

1 MS. BARRIS: Yes, I did.

2 MR. JACKSON: And is that true and correct to the  
3 best of your knowledge?

4 MS. BARRIS: Yes. Yes, it is. Although I was a  
5 little taken back by Ms. Sergent this morning when she  
6 indicated that there was only 85,000 acre-feet of  
7 groundwater pumped during the '94 bank, because my  
8 neighbors across the road from my orchards pumped 85,000  
9 acre-feet of groundwater. That would be the Western Canal  
10 Water District. My neighbors to the south, Richvale  
11 Irrigation District, pumped 20,000 acre-feet. And I don't  
12 really have the totals of the rest of the water bank that  
13 occurred in Butte County. But since my neighbors across  
14 the road pumped 85,000 themselves - Western Canal - I  
15 thought I should bring that up.

16 MR. JACKSON: Would you please summarize your  
17 testimony for the Board members and staff please.

18 MS. BARRIS: Shorter than this?

19 MR. JACKSON: No.

20 MS. BARRIS: Oh, okay. Well, actually I'm going  
21 to read this, because I've been advised that I could just  
22 run on if I don't read what is in this short amount.

23 MS. BARRIS: Hello. And thank you for having me  
24 here today.

25 My name is Lynn Barris. My husband and I own

1 land on which we grow almonds in two locations in Butte  
2 County. Like most of my neighbors, I get my water from  
3 groundwater -- from the groundwater table beneath my land.

4 One piece of my land is 42 acres of almond -- one  
5 of my farms is 42 acres of almonds on Gage Road near the  
6 town of Nelson, commonly referred as to Cherokee Strip.  
7 The land on the other side of the road is rice land within  
8 the Western Canal Water District.

9 The purpose of my testimony is to tell the State  
10 Board members what happened no my neighbors and me in  
11 1994, the last time DWR attempted a large-scale drought  
12 water transfer program.

13 There had been small drought -- there had been a  
14 small water bank in 1991 and '92, very small ones. In  
15 1992 I was called to the Butte County Grand Jury to serve  
16 on the Grand Jury. And you're probably aware that when  
17 your on a grand jury, you get to choose the subjects that  
18 you'd like to investigate. And my husband suggested that  
19 we investigate water sales out of our county.

20 This was the first time that, you know, we'd been  
21 aware of the possibility that we would be impacted in  
22 drought years because large scale water transfer programs  
23 would be going south into the western San Joaquin Valley.

24 Because of the new fears of the local people  
25 about the drought water transfer programs, the Grand Jury

1 formed a committee to interview water districts, water  
2 attorneys, and landowners about the water transfers.

3           The Grand Jury was assured by the water experts  
4 that there would be no effects to the groundwater table  
5 and that no one's right to use water on their land would  
6 be affected by such programs.

7           The Grand Jury report was released in May of 1994  
8 by June of 1994, I got up one morning and turned on my  
9 water faucet -- my water in my house and I had no water to  
10 brush my teeth with, to make coffee with, or anything  
11 else, because my neighbors had started pumping groundwater  
12 because they sold their surface water.

13           I could not count on the water for my crops. And  
14 the same thing was happening to my neighbors and the  
15 adjacent area known as the Cherokee Strip. We attempted  
16 to get the irrigation districts in the neighborhood - they  
17 are in my neighborhood - to stop the groundwater  
18 substitution for the surface water they had sold for big  
19 bucks. But we were told we should just get lawyers and  
20 sue them.

21           During this time, I do have to mention there was  
22 one fourth generation farmer that lost his farm during the  
23 water bank because he couldn't flood up his fields and  
24 water his crops.

25           Lawyers were hired by the groundwater users. The

1 lawyers had meetings with DWR, explained the damage. And  
2 in fact DWR came in and shut down the irrigation  
3 districts' wells for two days - only two days.

4           The groundwater didn't immediately come back.  
5 And so DWR declared that it wasn't them that had caused  
6 the problem, because it didn't bounce back when they quit  
7 pumping.

8           The rest of the summer in 1994 created turmoil in  
9 Butte County that still divides the community today.  
10 Essentially the divide is between those who get money for  
11 these transfers and everyone else who rely on groundwater  
12 for their water supply, which includes the almond, walnut,  
13 and pistachios farmers that make up the majority of Butte  
14 County agricultural income.

15           People helped their neighbors during this time  
16 and we all worked hard to stay on our land. At my house  
17 the water table would be fluctuating from all this pumping  
18 of groundwater. And so there would be days when I  
19 wouldn't have water in my home and we would run garden  
20 hose a quarter mile away to some other farm that actually  
21 had groundwater -- whose well was working, and we'd be  
22 able to take water in to our home tank have water at our  
23 house.

24           And this went on through the pumping program for  
25 the drought -- state drought water bank.



1           The town of Durham, of which I live in -- I live  
2 in the country and have a domestic well. But the town  
3 that is two miles away, they have three municipal wells.  
4 And one of their wells became so contaminated by the  
5 lowering -- by the precipitous lowering of the water  
6 table, that that whole town had to ration their water.

7           Since 1994, we have not experienced other  
8 declines in our groundwater level. And if hydrographs are  
9 steadied from DWR throughout the history of my area, we  
10 have been able to weather through all of the droughts.  
11 And we live in a very sustainable area where our streams  
12 and our aquifers work together and we can -- we support  
13 our municipalities and our agriculture and our  
14 environment.

15           Today DWR is proposing another water transfer  
16 program. There are no environmental documents for this  
17 water bank since the Governor declared a drought emergency  
18 and suspended CEQA review of the project.

19           The 2009 water bank is much bigger than the 1994  
20 water bank. And quite honestly, I do know that up till  
21 last Tuesday my neighboring water district that I've  
22 mentioned here were still deciding if they were going to  
23 sell water and pump groundwater or not.

24           So, you know, the facts aren't in about how much  
25 of this water is going to flow.

1           The 2009 water bank is much bigger than the 1994  
2 water bank. And this petition for change in place of use  
3 of water in the state and federal projects will enable  
4 many more people to contract to take water from the  
5 Sacramento Valley.

6           The underground water also provides water from  
7 most of the cities on the east side of the Sacramento  
8 Valley. Butte Bouny has an estimated 17,000 domestic  
9 wells. It is absolutely impossible to get drinking water  
10 to all these households that are scattered through these  
11 rural areas.

12           DWR does not even have correct records for the  
13 amount of wells, because up until the eighties people  
14 didn't have to register their wells. At one time my  
15 husband and I managed some other orchards in our area and  
16 during the '96 -- during the '96 period I was associated  
17 with about 11 wells. And out of the 11 wells, not one of  
18 them had been registered at DWR. They were all pre this  
19 law going in.

20           And so the reason I can come up with 17,000  
21 domestic wells is because we did -- those of us that cared  
22 about groundwater went to the Public Health Department and  
23 worked with the manager there, who kind of could figure  
24 out how many of these homes are actually on domestic  
25 wells. To this day, DWR will use the number of there's

1 about 10,000 people. But I firmly believe that the 17,000  
2 number was correct.

3 After reviewing the notices of hearing for -- the  
4 notice of hearing for this hearing, it is clear to me that  
5 anyone using groundwater in Sacramento Valley is at risk  
6 of having the Drought Water Bank program cause damage to  
7 their ability to use groundwater on their land.

8 I am informed and believe that the State Board  
9 has a no-injury rule for changes in place of use and  
10 therefore this petition should not be approved.

11 Thank you. And I kept it really short, if you  
12 know me.

13 CO-HEARING OFFICER BAGGETT: Thank you.

14 DIRECT EXAMINATION

15 OF MR. BILL JENNINGS

16 BY MR. MICHAEL JACKSON, ESQ., representing the California  
17 Sportfishing Protection Alliance:

18 MR. JACKSON: Mr. Jennings, were you sworn  
19 earlier today?

20 MR. JENNINGS: Yes, I was.

21 MR. JACKSON: Is your testimony a true and  
22 correct recitation of the facts as you know them?

23 MR. JENNINGS: As I know them.

24 MR. JACKSON: Would you summarize your testimony,  
25 sir.

1           MR. JENNINGS: Yes. In summary, the petition is  
2 vague. It's largely a concept, containing little specific  
3 details. There's no environmental review. There's no  
4 real project description. I mean certain transfers are  
5 identified, others are left open-ended, anticipated. It's  
6 claimed that no Shasta/Oroville water will be used. But I  
7 mean there's no prohibition against that. I mean, you  
8 know, there's -- it's claimed that stream flow will not be  
9 affected. But we don't know that.

10           I mean, you know, I'm astonished that we're  
11 dealing with a vague phantom, I mean without a corporal  
12 body. I mean a concept without the details. Now, if you  
13 put the limitations on there and define them, that's one  
14 thing. But right now, it's -- and we're responding to it  
15 as an amorphous open-ended concept. And certainly the  
16 uncertainty increases in the potential second year. I  
17 mean will transfers beyond payback occur?

18           You know, if it's not prohibited, I mean we could  
19 expect it. I mean, after all, next year could turn out to  
20 be the wettest year on record.

21           Certainly this year is a below normal but it's  
22 not a critical year. Precipitation statewide is 80  
23 percent of average. Snow water equivalent at least as of  
24 the writing of this was 83 percent of average. Major  
25 reservoir storages ranged from 73 to 112 percent of

1 average.

2           And certainly drought cannot be considered an  
3 unforeseen emergency, because it's a common and expected  
4 occurrence in California.

5           It's preposterous to claim that environmental  
6 water quality laws should be suspended to address  
7 conditions that occur a quarter to a third of the time.

8           Water rights far exceed unimpaired runoff or  
9 available supplies. The projects have promised to -- are  
10 contracted for water they know they can't reliably  
11 deliver. You know, cynically they've pedaled water  
12 contracts like Wall Street mortgage brokers have hawked  
13 subprime and variable rate mortgages. Average CVP and  
14 State Water Project exports between 2000 and 2008  
15 significantly increased over the 1980s and 1990s. State  
16 Water Projects in 2009 compare favorably to previous  
17 drought years when it wasn't necessary to consolidate  
18 place of use or dispense CEQA or Bay-Delta plan  
19 requirements.

20           CVP exports in '09 also compare rather favorably  
21 to previous drought years. Although I acknowledge that  
22 south of Delta ag contractors --

23           CO-HEARING OFFICER HOPPIN: Bill, I don't mean to  
24 interrupt.

25           Would you define "favorably".

1 MR. JENNINGS: Well, when you go through -- and  
2 in my testimony I broke down and compared what deliveries  
3 to Westlands and others were. In fact, let me break down  
4 out of my formal testimony. But I mean, you know, when  
5 you're looking at --

6 CO-HEARING OFFICER BAGGETT: Point us to an  
7 exhibit.

8 MR. JENNINGS: You know, for example, deliveries  
9 to Kern Water Agency in the dry critical year of '07 where  
10 it's 96 percent of the average. I mean, you know --

11 CO-HEARING OFFICER BAGGETT: Which exhibit --

12 MR. JENNINGS: Yeah, I've got -- which --

13 CO-HEARING OFFICER BAGGETT: You said --

14 MR. JACKSON: This is the testimony itself.

15 MR. JENNINGS: I left my exhibits back there.

16 And I probably should go get them.

17 CO-HEARING OFFICER BAGGETT: Okay.

18 MR. JENNINGS: As I was going to say, I certainly  
19 understand that south of Delta agricultural contractors  
20 are receiving proportionately less perhaps because the  
21 Sacramento River rights and exchange and Friant  
22 contractors are receiving proportionately more than they  
23 did in some previous low water years. And 1992 would be  
24 an example.

25 And I think you can find that on -- reference our

1 Exhibit 4H, which was already just brought into the record  
2 by the Bureau.

3 Drought impacts have been exacerbated by the  
4 project's failure to learn and profit from lessons of the  
5 past. They've offered the projects without considering  
6 the possibility subsequent dry years.

7 I mean State water runoff was only -- statewide  
8 runoff was only 53 percent of average in '07, yet exports  
9 were over 99 percent of the 2000-2006 average exports.  
10 And indeed exceeded the averages in the 1980s and 1990s.

11 Indeed, exports to southern California in 2007  
12 were 105 percent of the average between 2000 and 2006.  
13 The blunder was again repeated in 2008 when statewide  
14 runoff was only 58 percent of averages, but State Water  
15 Project deliveries were 95 percent, 90 percent, and 67  
16 percent of the average deliveries in the eighties,  
17 nineties, and the 2000-2007 period respectively.

18 I mean from this I mean it's just clear that  
19 water's been promised that can never be reliably  
20 delivered. And the burden of water shortages falls most  
21 heavily on contracts predicated on junior water rights, as  
22 it should be under our seniority system. The State lacks  
23 a functioning drought management system that anticipates  
24 inevitable drought sequences, acts to minimize impacts to  
25 the environment or the public, and that specifies how

1 impacts will be distributed in these inevitable drought  
2 years.

3           The proposed emergency transfers run the risk of  
4 reducing or eliminating the safety margin in the event  
5 next year, 2010, is a critically dry year. It's this kind  
6 of disregard for the future that got us into the present  
7 situation. Drought impacts have been exacerbated by the  
8 enormous increase in the planting of perennial crops that  
9 required assured sources of water in lands that are 100  
10 percent subjected to interruptible sources of water. If  
11 you are interested, I could certainly go into the amount  
12 of almonds and perennial crops planted south of Delta.  
13 It's a wake-up call.

14           I don't believe I need to reiterate the sorry  
15 state of Central Valley fisheries except to observe that  
16 the biological tapestry of this estuary and its  
17 tributaries is hemorrhaging. Salmonid and pelagic  
18 fisheries that God nurtured over millennia are being  
19 destroyed in mere decades. We're witnessing the most  
20 rapid disintegration of a large estuary in modern history.

21           It's beyond dispute that State and federal  
22 actions, including D-1641 and the Bay-Delta Plan and the  
23 various biological opinions, have been ineffective and  
24 woefully inadequate in addressing this catastrophe. The  
25 decline has persisted. Despite any absence of an adequate



1 project description, based upon my experience and in the  
2 record, and based upon the amorphous nature of this  
3 process, I believe that the petition if approved has  
4 enormous potential to accelerate the further decline of  
5 these seriously degraded fisheries.

6           If reservoir storage -- transfer of reservoir  
7 storage will inevitably increase cold water pools and  
8 increase the likelihood of adverse impacts from excessive  
9 temperatures, especially where reservoirs are below  
10 carry-over storage targets. Now, if this isn't within it,  
11 you can prevent that, you can restrict that. But it's not  
12 restricted in the proposal now.

13           Transfer of pumped groundwater from areas  
14 adjacent to east side streams containing critical habitat  
15 will potentially lower in-stream flow during sensitive  
16 life stages. Now, if that's not going to happen this  
17 year, then you can prevent that, I mean to the extreme.  
18 But in the way the project's described now, it's  
19 open-ended.

20           There's no existing or biological opinion for  
21 salmonids that hasn't been reputed by the courts. You  
22 understand, we don't have a Salmon biological opinion.  
23 It's due in June and we have no idea how they're going to  
24 comply with it or whether they're going to appeal it or  
25 contest it or what. There's no existing biological

1 opinion for green sturgeon. Neither DWR or the Bureau  
2 have secured an incidental take permit or consistency  
3 determination pursuant to the California Endangered  
4 Species Act for Salmon or Delta smelt or long-fin smelt.  
5 And compliance with CESA is a pre-condition -- a condition  
6 of the water rights permits. CESA goes quite beyond the  
7 federal Clean Water Act. It requires full mitigation.  
8 You can easily condition this on the Bureau or the DWR  
9 securing a take permit. They have to have it. Their  
10 water rights already require it.

11 I don't believe it's necessary to relate ad  
12 nauseam the massing existing pollution of Central Valley  
13 waterways. I mean most of these projects have been  
14 identified, exhaustively documented over the last 10 to 30  
15 years. Hundreds of additional pollutant water body  
16 impairments are proposed to be included on the updated  
17 303(d) list.

18 It's undeniable that the best efforts of the  
19 water boards have utterly failed to prevent or restore or  
20 resolve the pervasive pollution of Central Valley  
21 waterways. And so, again, despite the absence of an  
22 adequate project description, which we don't have, just  
23 based upon experience and review of the record, I have to  
24 believe that the petition has the potential to exacerbate  
25 impacts to water quality.

1           Changes in hydrology, I mean inescapably alter --  
2 and transport contaminants. Water transfer is causing  
3 alteration of timing and quantity of in-stream flow. I  
4 mean we have no idea on this timing when it's going to go  
5 or anything. Will it potentially alter the assemblative  
6 capacity of downstream waters?

7           And does the reductions of these assemblative  
8 capacity increases pollutant concentration and  
9 consequently pollutant concentration increases and  
10 temperature reduction, you know, and temperature and  
11 pollutants or reductions in dissolved oxygen during  
12 critical life stages of sensitive species could adversely  
13 affect fisheries of the beneficial uses.

14           Transfers will likely diminish storage that would  
15 otherwise be available to mitigate water quality impact.  
16 I mean again if we're not going to transfer any storage, I  
17 mean let's say so. Increased exports or water over levels  
18 that would occur in the absence of petition approval, you  
19 know, could very well increase salinity in south Delta  
20 channels. I mean we don't have -- we have not -- the  
21 Board has reluctantly failed to enforce the cease and  
22 desist order over salinity violations in the -- in the  
23 south Delta.

24           And certainly increases in water deliveries  
25 below -- beyond levels that would occur in the absence of

1 the petition. And that's got to be the baseline, what  
2 would occur, you know, if the petition is approved in the  
3 absence of petition, not what would occur with a normal or  
4 an average year. But what would occur this year with all  
5 of the other considerations of the drought in absence or  
6 approval of the condition?

7           And so if water is applied to agricultural lands,  
8 impaired soils, selenium-laced soils that would not be  
9 otherwise applied, there will be an increased loading to  
10 the environment, either loading to environment or tail  
11 order discharges to waterways. It could be either/or.  
12 And, you know, this could occur. And if you're going to  
13 prohibit that, I mean, you know, you could do so.

14           We do believe that approval is a de facto new  
15 water right. For the first time CVP storage will serve  
16 urban areas. It allows urban areas to acquire water from  
17 streams where they know storage or mitigation  
18 responsibilities. I mean there's no terms and conditions  
19 to protect in-stream resources. And it's going into a  
20 whole new world, and there needs to be a real  
21 justification for going here.

22           Based upon experience and review of the record, I  
23 just can't see how the petition can -- petition approval  
24 can be in the public interest. It's a two-year project.  
25 We certainly can't reliably predict the need for an

1 expedited -- for next year. If we want to limit it to  
2 payback, perhaps supplying scarce water in the midst of a  
3 multi-year drought. Although there's got to be a  
4 consequence to payback. I mean, you know, if there's  
5 going to be a transfer next year, what are the  
6 consequences there?

7           Supply and scout serious water in the midst of a  
8 multi-year dry cycle to irrigate perennial crops on  
9 drainage impaired lands subject to low priority contracts  
10 from low priority water rights holders can only accelerate  
11 efforts to plant permanent crops in these areas.

12           It's the creek future demands for assured water  
13 supplies to increase the economic consequences of the  
14 inevitable drought cycles. And we need to be -- you know,  
15 there's been a huge increase in the need for permanent  
16 supplies in areas that experience 100 percent and  
17 eruptible sources of water. And we need to be very  
18 careful about going past thresholds that are irreversible.

19           The merging of two massive water projects in an  
20 abbreviated hearing process without benefit of  
21 environmental review I think significantly risks --  
22 increases risk to the environment and the public. The  
23 suspension of rules by proclamation in a period of endemic  
24 water pollution and collapsing fisheries would be  
25 precedent setting and undermine the public's belief that

1 decision makers and regulators can be relied upon to  
2 enforce the law.

3           Certainly, it seeks to address the  
4 over-appropriation of this petition and it seeks to  
5 address the over-appropriation of water in California by  
6 suspending laws under the guise of an emergency. And that  
7 cannot be in the public interest.

8           It will encourage DWR and the Bureau to ignore  
9 real world drought planning and facilitate bad planning  
10 that relies upon suspension of crucial environmental laws  
11 like a half baked plan that's thrown before you, you know,  
12 without benefit of any economic analysis. You know, a  
13 little prudent planning would have eliminated -- would  
14 have prevented this. I mean we don't even know if there's  
15 going to be some emergency provision, you know, request  
16 coming later this year. They should know that by now.

17           It's certainly unfairly benefits one area of the  
18 State and redirect impacts to other areas. I mean and  
19 we're talking about benefiting the west side, the impacts  
20 could be the Sacramento Valley, the east side of the San  
21 Joaquin. I mean it reduces the margin of safety.  
22 Certainly should 2010 be a critically dry year, should we  
23 be trying to export every -- or to apply every last drop  
24 of water?

25           And so, you know, based upon, you know,

1 experience and review of the record, I would say that  
2 there should be some terms and conditions included, the  
3 first of all is a requirement to get an actual project  
4 description so that you know what to prohibit and approve.  
5 It certainly should be limited to one year. I think it  
6 should exclude lands with the most junior contract water  
7 rights subject to interruptible water supplies. Either it  
8 should recruit some sort of prohibition against loading to  
9 the environment or impaired lands receiving water. It  
10 should require the Bureau and DWR to evaluate and identify  
11 remaining reservoir storage and potential harm to  
12 fisheries from elevated temperatures and low in-stream  
13 flow during sensitive life stages of sensitive species.  
14 But, again, you can prohibit -- or a prohibition against  
15 any use of water that's stored in reservoirs.

16 I mean I was a little -- I was fascinated in the  
17 Bureau's response that for a Sacramento contractor that  
18 happens to store water in Shasta is considered CVP water.  
19 Well, I mean we need to clarify is that going -- which  
20 plan or proposal that comes under.

21 I think that none of the requirements of D-1641  
22 should be suspended. VAMP pulse flow, which apparently  
23 has been suspended this year, we're not meeting VAMP, and  
24 that's an impact. Interior Delta salinity standards  
25 certainly should be complied with as well as we'd have

1 serious concerns of any future limitation on X-2 or the IE  
2 ratio.

3           And certainly you can require the Bureau and DWR  
4 to obtain an incidental take permit, make a consistency  
5 determination. I was told that they did ask DFG to come,  
6 and DFG wouldn't -- refused. But, anyway -- and I think  
7 that to require DWR and the Bureau to bring any new  
8 application for water beyond that specifically identified  
9 back to the Board for consideration. And, you know, they  
10 really need to identify the timing and the quantity and  
11 the source of these waters.

12           I guess that I've talked enough, haven't I, Art?

13           CO-HEARING OFFICER BAGGETT: Yeah, you probably  
14 got your 25, 30 minutes in.

15           We should have given you a script.

16           No, it's helpful. We've got your written  
17 comments and are familiar with them.

18           Anything else, Mr. Jackson, or should we --

19           MR. JACKSON: Nothing else.

20           CO-HEARING OFFICER BAGGETT: Open up for  
21 cross-examination.

22           We'll start out with the DWR and then followed by  
23 USBR.

24           MR. SODERLUND: Erick Soderlund on behalf of the  
25 Department of Water Resources.



## 1 CROSS EXAMINATION

## 2 OF MS. LYNN BARRIS

3 BY MR. ERICK SODERLUND, ESQ., representing the State

4 Department of Water Resources:

5 Ms. Barris -- Mrs. Barris?

6 MS. BARRIS: Yes.

7 MR. SODERLUND: I just have a few questions for  
8 you.

9 MS. BARRIS: Oh, good.

10 MR. SODERLUND: In your testimony you claim that  
11 the 2009 Drought Water Bank is going to be much bigger  
12 than the 1994 Drought Water Bank.13 MS. BARRIS: Yes, I've seen the documents. And  
14 if you look at your documents at DWR, it indicates that  
15 the optimum would be 340,000 acre-feet of water -- of  
16 groundwater.

17 MR. SODERLUND: Of groundwater?

18 MS. BARRIS: Yes. I think it's 500,000 or  
19 600,000 acre-feet of water altogether. But 340,000 of  
20 that would be groundwater if you could do the whole thing.21 MR. SODERLUND: Are you familiar with what the  
22 numbers that are currently planned for groundwater  
23 substitution coming out of Butte County are for the 2009  
24 Drought Water Bank?

25 MS. BARRIS: I understand that the numbers are

1 low at this point. But I do know that as late as last  
2 Tuesday, Western Canal Water District was still meeting  
3 and deciding what they were going to do. So I don't think  
4 the numbers have been firmed up at all. Everything seems  
5 to be in flux not knowing what's going to happen with the  
6 drought proclamation, with different litigation and such.

7 MR. SODERLUND: And in comparing the 2009 Drought  
8 Water Bank with the 1994 Drought Water Bank, is it your  
9 opinion that the Department of Water Resources has not  
10 provided more protection for this particular Drought Water  
11 Bank?

12 MS. BARRIS: Oh, that is such a good question,  
13 because I feel that they have provided the exact same  
14 safety net that we had in 1994. I'm hearing the exact  
15 same language without the exact same CEQA documents. I  
16 mean it's really the same. It's lip service to the  
17 communities and -- it was a horrible experience in '94.  
18 It changed -- it changed that whole flavor of the area.  
19 And it's still that way today. And, no, 2009 does not  
20 shape up any better for us groundwater users. We honestly  
21 feel we have not one iota of protection more than we had  
22 in 1994.

23 MR. SODERLUND: So It is your belief that the  
24 groundwater substitution for the 2009 Drought Water Bank  
25 will be the same as or worse than 1994?

1           MS. BARRIS: I really don't know. I'm not -- I'm  
2 not privy to what numbers will come out this year. But I  
3 do know from following other speeches in the news that DWR  
4 is preparing for their 2010 water bank right now. And as  
5 I said, the 2009 one hasn't gone over, as far as I know,  
6 very well for DWR yet. But I do believe it is, because  
7 there are so many things changing. But the idea that the  
8 2010 water bank is going to be talked about and kind of  
9 then put in steps so it won't come down to the end of  
10 April in 2010 and they don't -- they don't have their  
11 water secured.

12           MR. SODERLUND: And hypothetically if there is  
13 zero acre-feet that come from a groundwater substitution  
14 that comes out of Butte County, would that satisfy your  
15 concerns for the 2009 Drought Water Bank in particular  
16 with your community?

17           MS. BARRIS: You mean -- I'm sorry, did you say  
18 there would be zero groundwater substitution?

19           MR. SODERLUND: Correct.

20           MS. BARRIS: No, not really, because we have --  
21 we're home to the giant garter snake up there. And it  
22 depends on -- land is fallowed to protect the giant garter  
23 snake. I can't talk for everyone else. I can only talk  
24 for my area in Butte County. But if the refuges and the  
25 garter snakes and all the rest of our critters are

1 protected and there's not groundwater substitution, then I  
2 would honestly think I had something to look at that might  
3 be proactive.

4 MR. SODERLUND: And again hypothetically  
5 speaking, if there was zero groundwater substitution  
6 coming out of Butte County, would the effects that you  
7 analyzed or talked about or discussed in your written  
8 testimony, would those be significantly lessened, maybe  
9 even be nonexistent?

10 MS. BARRIS: It would be less than 1994. But I  
11 have to say that between 1994 and now we have -- we have  
12 discerned that the aquifer that underlies Butte County  
13 goes just a small part over across the river into  
14 Glenn-Colusa Irrigation District, who are also working on  
15 the State Drought Water Bank and are ramping up pumping  
16 projects, which we know will affect us on the other side  
17 of the Sacramento River, because some of the tests that  
18 have been done, some isotopic tests that have been done  
19 have proven that the water that they were pulling up in  
20 the pumping tests at Glenn-Colusa were coming from the  
21 eastside foothills in Butte County. So as far as DWR  
22 goes, for the State Water Project, if there is no  
23 groundwater substitution and everything was taken care of,  
24 yeah, there would be less damage than in 1994. But with  
25 Glenn-Colusa Irrigation District added into the mix, it's

1 still very iffy for us.

2 MR. SODERLUND: Thank you. That's all the  
3 questions I have.

4 Thanks.

5 CO-HEARING OFFICER BAGGETT: Thank you.

6 The Bureau?

7 MS. AUFDEMBERGE: No questions.

8 CO-HEARING OFFICER BAGGETT: No. questions.

9 Mr. Rubin, do any of your clients have questions?

10 MR. RUBIN: Can't pass up the opportunity to talk  
11 to Mr. Jennings.

12 (Laughter.)

13 MR. JENNINGS: I'm glad. I was beginning to feel  
14 neglected.

15 (Laughter.)

16 CROSS EXAMINATION OF

17 MS. LYNN BARRIS AND MR. BILL JENNINGS

18 BY MR. JON D. RUBIN, ESQ., representing the San Luis &  
19 Delta-Mendota Water Authority and the Westlands Water  
20 District:

21 Ms. Barris, let me ask you a couple of questions  
22 first, if you don't mind.

23 MS. BARRIS: You're not going to make me cry, are  
24 you?

25 MR. RUBIN: I hope not.

1 (Laughter.)

2 MR. RUBIN: My name is --

3 CO-HEARING OFFICER HOPPIN: Let's make a deal  
4 here. You won't make him cry, will you?

5 (Laughter.)

6 MS. BARRIS: Okay. I'll try.

7 MR. RUBIN: That might be the more likely  
8 scenario.

9 (Laughter.)

10 MR. RUBIN: Good afternoon. My name is Jon  
11 Rubin. I'm an attorney with the San Luis & Delta-Mendota  
12 Water Authority and Westlands Water District.

13 I have just a couple of questions for you.

14 Were you here this morning when the panel for the  
15 Department of Water Resources and the Bureau of  
16 Reclamation testified?

17 MS. BARRIS: For part of it. I came about 10:30  
18 I believe.

19 MR. RUBIN: Were you here when I asked questions  
20 of the witnesses for the Department of Water Resources and  
21 the Bureau of Reclamation?

22 MS. BARRIS: Yes.

23 MR. RUBIN: Do you recall me asking several  
24 questions regarding the effect that action by the State  
25 Board might have on the transfers and exchanges that are

1 proposed in the petition that's at issue today?

2 MS. BARRIS: Yes. And I heard their answers.

3 And -- if that was the next question. Yes. And because I  
4 know that the amount of water that's going to be moved is  
5 still in flux and we have no idea, the answers didn't make  
6 any -- I mean they didn't ring true.

7 MR. RUBIN: Were you here when I asked the panel  
8 some questions about the Drought Water Bank?

9 MS. BARRIS: Um-hmm, yes.

10 MR. RUBIN: Are you familiar with the Drought  
11 Water Bank that's being proposed for 2009?

12 MS. BARRIS: Yes, I am.

13 MR. RUBIN: Have you provided the Department of  
14 Water Resources or the Bureau of Reclamation with any  
15 comments on the proposed Drought Water Bank?

16 MS. BARRIS: Substantial comments through Butte  
17 Environmental Council. And actually we have a meeting  
18 with Don Glaser at 5 o'clock if I'm out of here. But we  
19 have commented -- we have commented up the kazoo on the  
20 Drought Water Bank.

21 MR. RUBIN: And your concerns today are really  
22 with the Drought Water Bank, correct?

23 MS. BARRIS: They are. But it's also about this  
24 joint use. I actually understand what this will mean to  
25 us.

1           MR. RUBIN: Can you explain to me what you mean  
2 by joint use?

3           MS. BARRIS: Well, the CVP and the -- that the  
4 Bureau and DWR being able to exchange water and joint use  
5 of their water.

6           MR. RUBIN: And you're concerned with the joint  
7 use as you've described it for what reason?

8           MS. BARRIS: Because I believe it will allow more  
9 water to -- more needed water, that we need in northern  
10 California. Because contrary to popular belief, we're not  
11 sitting on all this surplus water up there that we're just  
12 holding on to and don't want it to go south. We're  
13 sitting on water that we're actually using. And my belief  
14 is that that will allow more water to head out of the Sac  
15 Valley where it's really needed also.

16          MR. RUBIN: And have you done any studies to  
17 determine why the change that's before the State Board  
18 will cause more water to be moved south of the Delta?

19          MS. BARRIS: It's just my intuition from being  
20 around water issues and CALFED and water buffaloes for the  
21 last -- since the water bank.

22          MR. RUBIN: Thank you very much.

23           I have no further questions. And I'm happy  
24 neither of us are crying.

25           (Laughter.)



1 Mr. Jennings, please don't make me cry.

2 (Laughter.)

3 MR. RUBIN:

4 MR. JACKSON: Oh, that'd be worth seeing, both of  
5 you.

6 (Laughter.)

7 MR. RUBIN: Mr. Jennings, If I understand your  
8 testimony today, you have concluded that between 2000 and  
9 2007 the amount of water conveyed through the Delta by the  
10 Central Valley Project and State Water Project increased  
11 dramatically?

12 MR. JENNINGS: Where on my testimony is that?  
13 What are we referring to?

14 If you mean the average annual exports between  
15 2000 and 2007, both CVP and SWP were -- the average was  
16 six million acre-feet I think between that period.

17 MR. RUBIN: Yeah, the statement that I was  
18 reading is on page 7 of your written testimony. And  
19 there's a heading: "There has been a significant increase  
20 in SWP and CVP export in recent decades." And I believe  
21 the last sentence reflects a conclusion on your part that  
22 exports dramatically increased between 2000 and 2007.

23 MR. JENNINGS: Yeah, I mean -- and I guess  
24 that -- between 2000-2007 what I was saying is that  
25 period, that wet cycle period, they've increased over

1 previous decades.

2 MR. RUBIN: And, Mr. Jennings, from where did you  
3 obtain data to support that statement?

4 MR. JENNINGS: Well, several places. But I  
5 was -- at this point I was using a chart that had been  
6 prepared by Spreck Rosekrans, a mathematician-hydrologist  
7 for environmental defense. I think I included that as an  
8 exhibit.

9 Should I -- I have my exhibits back at my chair.  
10 Can I go get those?

11 MR. RUBIN: If it would be helpful, I would  
12 recommend that.

13 MR. RUBIN: Mr. Jennings, there's a reference on  
14 page 5, to maybe provide some assistance, to Exhibit 2G.

15 MR. JENNINGS: 2G, yes.

16 MR. RUBIN: Which is a document that appears Mr.  
17 Rosekrans prepared.

18 MR. JENNINGS: Yes.

19 MR. RUBIN: Mr. Jennings, are you familiar with  
20 the data that's presented on Exhibit 2G?

21 MR. JENNINGS: Spreck presented it. It's been  
22 used in other hearings. I've talked to Spreck about it.  
23 But I didn't collect it.

24 MR. RUBIN: Would you be -- do you know if the  
25 data on this exhibit is true and correct?

1 MR. JENNINGS: And what data is that?

2 MR. RUBIN: The data that's reflected on CalSPA  
3 Exhibit 2G.

4 MR. JENNINGS: Well, do I have the exhibit table?

5 MR. RUBIN: It's the exhibit that's on the screen  
6 before you here in the hearing.

7 MR. JENNINGS: Oh, the exhibit's correct, yes.

8 MR. RUBIN: And how do you know that the data in  
9 Exhibit 2G is correct?

10 MR. JENNINGS: Well, Mr. Rosekrans in fact told  
11 me he had prepared it. And he had used it, also I think  
12 day flow data that he pulled off from DWR.

13 MR. RUBIN: Thank you.

14 Mr. Jennings, I now ask that you turn to Exhibit  
15 CalSPA 2H. This was an exhibit that I think Ron Milligan  
16 discussed to some degree.

17 MR. JENNINGS: Um-hmm.

18 MR. RUBIN: Do you have that before you?

19 MR. JENNINGS: Yes.

20 MR. RUBIN: In 1977 -- excuse me -- 1975, what  
21 was the allocation to Central Valley Project agricultural  
22 water service contractors who were located south of the  
23 Delta?

24 MR. JENNINGS: In '95.

25 MR. RUBIN: No, 1975

1           MR. JENNINGS: 1975. Well, I don't think that it  
2 states that.

3           MR. RUBIN: I ask you to draw your attention to a  
4 very small box on the left side I believe the first page  
5 of CalSPA Exhibit 2H. Is there a note there that says,  
6 "No deficiencies on water deliveries until 1990"?

7           MR. JENNINGS: Oh, yes, yes.

8           MR. RUBIN: Is it your understanding that except  
9 for 1977 there was no deficiencies on water deliveries  
10 until 1990 for the Central Valley Project?

11          MR. JENNINGS: Well, I don't have that  
12 information on which -- I mean the chart says it. But I  
13 don't -- I can't independently verify that of course. I  
14 mean is this deficiencies -- we're talking about  
15 deficiencies of requests or allocations based on requests?

16          MR. RUBIN: Well, it's --

17          MR. JENNINGS: I mean I'd have to know what the  
18 requests were to know whether there was a deficiency in  
19 the allocation.

20          MR. RUBIN: Mr. Jennings, maybe I could ask my  
21 question again.

22                 In 1975, was there any deficiencies in the  
23 allocation to Central Valley Project agricultural water  
24 service contractors located south of the Delta?

25          MR. JENNINGS: Well, this chart doesn't go to

1 1975. It just simply refers to -- it says no deficiencies  
2 on water deliveries until 1990.

3 I took it to mean that between '77 and 1990 there  
4 were no deficiencies. You said '75.

5 MR. RUBIN: Okay. So it's your understanding  
6 1978 there was a hundred percent allocation to  
7 agricultural water service contractors south of the Delta?

8 MR. JENNINGS: Based on what was on the Bureau's  
9 website that I took this from. This is what this says.  
10 And I can't go beyond that.

11 MR. RUBIN: You're not sure if the data is  
12 correct that's on Exhibit CalSPA 2H?

13 MR. JENNINGS: I'm presuming that this is what  
14 the Bureau claims they provided and delivered.

15 MR. RUBIN: And, Mr. Jennings, I apologize. I  
16 don't mean to be difficult here. Part of the reason I'm  
17 asking my questions is to understand some of the  
18 statements that you make in testimony. As an example, on  
19 page 8 of your written testimony, you indicate that  
20 exports to Westlands in 2007 were 94.5 percent of the wet  
21 cycle average between 2000 and 2006. Do you see that  
22 statement?

23 MR. JENNINGS: Um-hmm.

24 MR. RUBIN: What do you mean by exports to  
25 Westlands?

1 MR. JENNINGS: Well --

2 MR. RUBIN: Let me rephrase my question, Mr.  
3 Jennings.

4 By referencing exports to Westlands, do you mean  
5 allocations to Westlands?

6 MR. JENNINGS: What I was referring to is  
7 information I gathered from the -- in the petition for  
8 change submitted by DWR and the Bureau. They had their  
9 water deliveries. And you had State water deliveries --  
10 well, you had State Water Project and then you had the CVP  
11 project. And the deliveries --

12 MR. RUBIN: Mr. Jennings, just to make sure the  
13 record's clear, are you looking at Exhibit 2 to the  
14 petition that was filed by the Department of Water  
15 Resources and the Bureau of Reclamation?

16 MR. JENNINGS: Exhibit 2, yes.

17 And so I'm --

18 MR. RUBIN: So Mr. Jennings --

19 MR. JENNINGS: -- looking at Westlands Water  
20 District, in 2007, 928,571. And I think that I took the  
21 average of that 2,000 -- that period there, you know, it  
22 ran 944,862, 9/15, you know.

23 MR. RUBIN: That's very helpful.

24 Mr. Jennings, turning back to Exhibit 2H --  
25 CalSPA Exhibit 2H. There is some data on this exhibit

1 that indicates an allocation to agricultural contractors  
2 south of the Delta in 2007; is that correct?

3 MR. JENNINGS: Yes, that's correct.

4 MR. RUBIN: And the allocation to agricultural  
5 water contractors south of the Delta was 50 percent in  
6 2007?

7 MR. JENNINGS: South of Delta was 50 percent.

8 MR. RUBIN: And do you know what contract supply  
9 Westlands has, maximum contract supply?

10 MR. JENNINGS: No, I do not.

11 MR. RUBIN: Let me represent to you that the  
12 Westlands contract is 1.15 million acre-feet maximum  
13 allocation. Can you explain to me how Westlands received  
14 their 50 percent allocation in 2007, yet the Exhibit 2  
15 reflects a water supply of 928,571 acre-feet?

16 MR. JENNINGS: When you say Exhibit 2 --

17 MR. RUBIN: Excuse me. Exhibit 2 to the  
18 petition, referring back to the document that we were  
19 speaking to just before this question.

20 MR. JENNINGS: This is Exhibit 2 of the petition  
21 of -- I have no idea, I mean in the sense that --

22 MR. RUBIN: Is it possible that the difference is  
23 because Westlands was able to acquire additional supplies  
24 through transfers?

25 MR. JENNINGS: It's possible.

1 MR. RUBIN: Thank you.

2 And in fact if you look at Exhibit 2 to the  
3 petition, there's a number of footnotes at the top of the  
4 table where it says CVP south of Delta contractors, and  
5 then there's a 1, 2, and 3. Do you see that?

6 MR. JENNINGS: Yes.

7 MR. RUBIN: And if you turn to the last page of  
8 Exhibit 2, there's comments. One that reads, "Deliveries  
9 to contractors may include a variety of water supplies  
10 including water available under CVP contracts, water  
11 available through transfers," et cetera.

12 MR. JENNINGS: Yes.

13 MR. RUBIN: Thank you.

14 Mr. Jennings, if I understand again your  
15 testimony correctly, you believe California has  
16 overcommitted its supplies?

17 MR. JENNINGS: Well, I mean -- and that's based  
18 on a statewide unimpaired runoff of 77, 78 million  
19 acre-feet by half a billion acre-feet of the face value of  
20 water rights, a Delta watershed unimpaired runoff of 29  
21 million acre-feet, and I think there's some 240 -- a face  
22 value of some 245 million acre-feet of storage and  
23 diversion rights for that water.

24 MR. RUBIN: I appreciate that answer to my  
25 question. I tried to phrase it to allow you to answer yes



1 or no, because I did have some follow-up questions. And I  
2 think your answer may have answered questions that I  
3 intended to ask.

4 And so I beg your pardon if I'm going to ask you  
5 to repeats part of your answer.

6 But, again, you do believe California has  
7 overcommitted its water supplies?

8 MR. JENNINGS: Yes.

9 MR. RUBIN: And your belief is supported by a  
10 comparison of California's average unimpaired runoff with  
11 an amount of water under diversion and storage rights.

12 MR. JENNINGS: And the fact that -- and not even  
13 being able to meet full allocations of the requests for  
14 water, we're watching fields fallow and fish spiral  
15 towards extinction.

16 MR. RUBIN: I believe on page 9 of your written  
17 testimony you have some of this discussion; is that  
18 correct?

19 Page 9 on the last complete paragraph -- or last  
20 paragraph on page 9.

21 MR. JENNINGS: Yes.

22 MR. RUBIN: Now, again, part of your conclusion  
23 that California's overcommitted is based upon a comparison  
24 between the average unimpaired runoff with an amount of  
25 water under water rights?

1           MR. JENNINGS: Yeah. I mean but -- and that's  
2 not precise. I mean because even the identified face  
3 value of water rights isn't what actually exists there,  
4 because there's a lot of riparian and 314 rights that have  
5 never surfaced, they've never felt the need to identify  
6 them. And so I'm not sure the State even knows the full  
7 extent of the rights to water.

8           MR. RUBIN: Mr. Jennings, I wanted to get a  
9 little bit to this issue of -- there's an exhibit that's  
10 attached to your testimony. It's CalSPA Exhibit 2K. Do  
11 you have that before you?

12           There's a copy of it on the screen here in the  
13 hearing room.

14           MR. JENNINGS: Yes.

15           MR. RUBIN: Did you prepare CalSPA Exhibit 2K?

16           MR. JENNINGS: I took it off the website of Delta  
17 Vision as a letter that had been sent from the -- also  
18 there was a -- I think the previous month they had the  
19 request to the State Board and then there was the request  
20 from the State Board. And this was in fact the response  
21 from the State Board to Delta Vision.

22           MR. RUBIN: So either -- I assume that a State  
23 Board staff person prepared this document?

24           MR. JENNINGS: I would assume.

25           MR. RUBIN: And in this document there is a

1 discussion between annual unimpaired or natural flow  
2 versus water rights; is that correct?

3 MR. JENNINGS: Yes.

4 MR. RUBIN: And in this document, there are three  
5 primary reasons given why the face value of water rights  
6 is greater than actual diversions; is that correct?

7 MR. JENNINGS: Which paragraph are you looking  
8 at?

9 MR. RUBIN: I was looking at page 2 to page 3 in  
10 your testimony. I don't know if there was a reference.  
11 So --

12 MR. JENNINGS: Yeah, I mean there's a general  
13 discussion.

14 MR. RUBIN: And I apologize for going back and  
15 forth but I would ask that you -- I have another question  
16 regarding your testimony. I believe part of your  
17 testimony is that the California fishery populations are  
18 collapsing. Is that your opinion?

19 MR. JENNINGS: Well, I mean just looking at the  
20 numbers of -- whether it's Salmonid or our pelagic  
21 fisheries. But I think one of my exhibits was the last --  
22 the summary of the fall mid-water trawl data that shows  
23 the indices that represent populations of pelagic species.

24 MR. RUBIN: Mr. Jennings, I'm not trying to make  
25 things more complicated. I'm just laying a little bit of

1 a foundation. I believe on page 11 you indicate that  
2 Central Valley fishery populations are collapsing, and I  
3 just wanted to lay the foundation.

4 Do you believe that to be true?

5 MR. JENNINGS: I believe that to be true.

6 MR. RUBIN: All right. And if I understand your  
7 written testimony, you believe that the California --  
8 excuse me -- Central Valley fishery populations are  
9 collapsing principally because there is a lack of high  
10 quality water, is that true?

11 MR. JENNINGS: I think certainly the POD  
12 workgroup of actually findings of the State Board, I mean  
13 there are three principal causes that are generally  
14 attributed. And I think that ample good, clean water  
15 affects virtually all three of them.

16 MR. RUBIN: Mr. Jennings, Let me ask that you'd  
17 turn to page 11 and 12 of your written testimony.

18 Page 11 there's a section that's headed "Central  
19 Valley fishery populations are collapsing."

20 MR. JENNINGS: Yes.

21 MR. RUBIN: And when I read that paragraph  
22 continuing on to page 12, I understood a conclusion on  
23 page 12 at the end of the first complete paragraph that  
24 said, "Lack of adequate flows of high quality water were  
25 identified as a principal cause." And reading earlier,

1 the principal cause relates to a collapse in fisheries?

2 MR. JENNINGS: Right.

3 MR. RUBIN: And the basis for your statement  
4 there is exclusively, if I understand --

5 MR. JENNINGS: Well, actually that was Dr.  
6 Moyle's statement.

7 MR. RUBIN: That's What I understand.

8 Do you agree with Dr. Moyle?

9 MR. JENNINGS: I think it's a principal cause.

10 MR. RUBIN: And you base that on Dr. Moyle's  
11 study that's referenced in footnote 15?

12 MR. JENNINGS: Well, no. I mean I've certainly  
13 taken issue with Peter before. But I mean just based on  
14 30 years of fishing, where we have clean ample flows of  
15 fresh water -- fresh, clean water, we have fish; where we  
16 don't have those, we don't have fish.

17 MR. RUBIN: And so your statement on page 12 is  
18 not based upon Dr. Moyle's report that's referenced in  
19 footnote 15?

20 MR. JENNINGS: It's partially based on Dr.  
21 Moyle's report, partially based on POD. I mean, you know,  
22 I've got book shelves of studies and reports that it was  
23 generically based upon.

24 MR. RUBIN: Mr. Jennings, are you familiar with  
25 Dr. Moyle's report that's referenced in footnote 15 of

1 your written testimony on page 12?

2 MR. JENNINGS: Well, I mean I've read it.

3 MR. RUBIN: And I believe it's an exhibit - it's  
4 2L?

5 MR. JENNINGS: Yes. Certain -- the conclusion as  
6 to -- and what I included on there was that 20 of the 31  
7 living taxa are expected to -- are in danger of extinction  
8 within the next 50 to 100 years.

9 MR. RUBIN: Did Dr. Moyle indicate that lack of  
10 adequate high quality flows were a principal cause of the  
11 decline of fish

12 MR. JENNINGS: Within the body of that report he  
13 did, and he certainly told me that personally.

14 MR. RUBIN: Did he conclude that anything else  
15 was affecting fish?

16 MR. JENNINGS: There are always multiple factors  
17 affecting fish?

18 MR. RUBIN: Mr. Jennings, if you don't mind, I'm  
19 going to approach and give you a copy of portions of Dr.  
20 Moyle's report. Is that okay?

21 MR. JENNINGS: Um-hmm.

22 MR. RUBIN: I have extra copies for the hearing  
23 officers. It includes sections of the report that were  
24 not included as part of the exhibits.

25 CO-HEARING OFFICER BAGGETT: If you intend to

1 offer them as evidence, it would probably be helpful.

2 MR. RUBIN: Mr. Jennings, before you do you have  
3 a document that I will mark as Exhibit SLDMWA 1, which is  
4 a report that Dr. Moyle prepared regarding salmon,  
5 steelhead, and trout in California?

6 MR. JENNINGS: Yes, commission by Cal --

7 MR. RUBIN: Is this the same report that is  
8 marked as exhibit -- CalSPA Exhibit 2L?

9 MR. JENNINGS: Yes. Yes, I think that 2L is part  
10 of the abstract of that.

11 MR. RUBIN: Mr. Jennings, I ask that you turn to  
12 page 68 of the report.

13 Do you see page 68?

14 MR. JENNINGS: Um-hmm.

15 MR. RUBIN: And there's a section that's entitled  
16 "Factors affecting status," is that correct?

17 MR. JENNINGS: Right.

18 MR. RUBIN: And if I understand the way that this  
19 report was prepared, this is factors that are affecting  
20 Central Valley Steelhead, correct?

21 MR. JENNINGS: That's what it says here.

22 MR. RUBIN: And according to this report, Dr.  
23 Moyle concludes that many stressors have contributed to  
24 the decline.

25 MR. JENNINGS: Dr. Moyle concludes that and I

1 conclude that. I mean that's -- yes.

2 MR. RUBIN: And so while adequate flows of high  
3 water quality may be a cause, it may not be the principal  
4 cause?

5 MR. JENNINGS: It was identified as a principal  
6 cause. I think there are a number of principal causes.

7 MR. RUBIN: Thank you.

8 And that applies not only for Central Valley  
9 Steelhead but all fish species that are dependent upon the  
10 Delta?

11 MR. JENNINGS: Yes.

12 MR. RUBIN: Thank you.

13 Mr. Jennings, on page 15 of your written  
14 testimony, you have a statement that's in the second  
15 complete paragraph that says, "Approval of the petition  
16 could exacerbate exceedances of salinity standards in the  
17 Delta." Do you see that statement?

18 MR. JENNINGS: Where is that now?

19 MR. RUBIN: It's on page 15 -- if I understand  
20 this correctly, page 15, the second complete paragraph of  
21 your written testimony, which is CalSPA Exhibit 2.

22 MR. JENNINGS: Okay.

23 MR. RUBIN: It's highlighted up on the screen  
24 here in the hearing room.

25 MR. JENNINGS: Okay.



1           MR. RUBIN:  By "exacerbate," do you mean cause  
2 salinity levels to increase?

3           MR. JENNINGS:  Yes, in the sense that that  
4 depended upon -- again I'm qualifying that by depended  
5 upon where the transfers -- you know, where they're  
6 sourced, the quantity, the timing, and all of the factors  
7 that are not identified in the petition, it could  
8 exacerbate, yes.

9           MR. RUBIN:  Mr. Jennings, you heard today a  
10 description of a number of transfers and exchanges,  
11 correct?

12          MR. JENNINGS:  Yes.

13          MR. RUBIN:  And those transfers and exchanges  
14 were described in the petition that was submitted by the  
15 Department of Water Resources and the Bureau of  
16 Reclamation, correct?

17          MR. JENNINGS:  And that was also mentioned that  
18 it could include as other unidentified transfers.

19          MR. RUBIN:  Mr. Jennings, the transfers and  
20 exchanges including those involving the Drought Water  
21 Bank, do you believe any of those will cause salinity  
22 levels in the southern Delta to increase?

23          MR. JENNINGS:  Well, it would depend upon more  
24 information.  I mean if you were talking about water  
25 that's already in San Luis and would need to be refilled

1 in San Luis, being transferred somewhere, I mean I  
2 could -- you might build a hypothetical. But, again,  
3 without knowing the details of the quantities and the  
4 sources and the timings and all of that that you would  
5 find in a normal project description, you know, this is  
6 essentially kind of thrown up ad hoc. And I'm not trying  
7 to be, you know, clever here. I'm just simply saying I  
8 don't see enough information to assure me that that -- to  
9 allay my concerns that approval could exacerbate. And if  
10 you notice, I said it could exacerbate.

11 MR. RUBIN: Now, Mr. Jennings, I just have one  
12 more question for you.

13 On page 5 of your written testimony, you include  
14 a statement - and I'll paraphrase - and let me know if I'm  
15 characterizing your testimony correctly - that you believe  
16 that in past periods of water shortage consolidation of  
17 the place of use was not necessary?

18 MR. JENNINGS: Yes.

19 MR. RUBIN: Do you believe that in times of water  
20 shortage changes to the place of use were not necessary?

21 MR. JACKSON: If you know.

22 MR. JENNINGS: You know, I'm not sure that -- I  
23 mean I'm unaware of it having been employed in the past.

24 MR. RUBIN: I'm sorry. Can you repeat your  
25 answer.

1 MR. JENNINGS: The easy answer is I don't know.

2 I mean --

3 MR. RUBIN: And so it would be a surprise to hear  
4 that changes to place of use is a common tool to alleviate  
5 the impacts of water shortages?

6 MR. JENNINGS: Other than a temporary transfer,  
7 approved and that goes through a board process?

8 MR. RUBIN: If you don't understand my question,  
9 I could rephrase it.

10 MR. JENNINGS: Rephrase it, please.

11 MR. RUBIN: Would it be a surprise to you to  
12 learn that short-term changes in the place of use  
13 designated under the Department of water resources or the  
14 Bureau of Reclamation's water rights, it was used  
15 frequently to address water shortages in the San Joaquin  
16 valley.

17 MR. JENNINGS: By that, are you meaning a process  
18 that went through the State Board for approval or just a  
19 decision between agencies?

20 MR. RUBIN: My question to you is, would you be  
21 surprised to learn that the Department of Water Resources  
22 and the Bureau of Reclamation have petitioned the State  
23 Water Resources Control Board for changes in their water  
24 rights to modify the place of use in order to alleviate  
25 the effects of water shortages?

1 MR. JENNINGS: No, that would not surprise me.

2 MR. RUBIN: Thank you. I have no further  
3 questions.

4 CO-HEARING OFFICER BAGGETT: Does CWIN have any  
5 question?

6 MS. JACKSON: No, we don't.

7 CO-HEARING OFFICER BAGGETT: South Delta?

8 CROSS EXAMINATION

9 OF MR. BILL JENNINGS

10 BY MR. JOHN HERRICK, ESQ., counsel representing the South  
11 Delta Water Agency, Central Delta Water Agency and  
12 Lafayette Ranch as follows:

13 MR. HERRICK: Thank you, Mr. Chairman. John  
14 Herrick, South Delta Water Agency, Central Delta,  
15 Lafayette Ranch.

16 Just a couple. I'll be real brief.

17 Mr. Jennings, in your testimony, you discuss the  
18 baseline issues of comparing the project and the no  
19 project; is that correct?

20 MR. JENNINGS: Yes.

21 MR. HERRICK: And in your review of the petition,  
22 is there any analysis of the effects resulting from the  
23 project or the petition when compared to a no project or  
24 no petition?

25 MR. JENNINGS: Absolutely not. I mean, there's

1 virtually no analysis at all in the petition.

2 MR. HERRICK: Do you think it's inadequate  
3 analysis to say that the amount of water delivered under  
4 the petition should be compared against historic  
5 deliveries of water to various areas for various uses?

6 MR. JENNINGS: Certainly.

7 MR. HERRICK: Do we know from the -- I think  
8 you -- let me rephrase that.

9 Do we know from any of the materials submitted by  
10 the petitioners what the effects are of the petition when  
11 compared against no-project condition?

12 MR. JENNINGS: No.

13 MR. HERRICK: And why is that important when  
14 analyzing the proposed petition?

15 MR. JENNINGS: Well, I mean, you need to have a  
16 baseline to know if, in fact, the petition -- the project  
17 approved as a result of this petition would be beneficial,  
18 would be harmful. I mean, certainly given the highly  
19 degraded state of this estuary and its tributaries and the  
20 water quality problems that have been identified, every  
21 project that involves modifying the hydrology, modifying  
22 the flow patterns and storage patterns needs to be  
23 seriously examined in a thorough environmental review.  
24 Not to do so is simply foolish.

25 And I could find no environmental evasion

1 examination, no baseline data, no comparison against a  
2 baseline. Any evaluation of this project as to its  
3 probable or potential harm, environmental harm or for that  
4 mat harm to the public health and water quality impacts.

5 MR. HERRICK: So hypothetically, if one of the  
6 projects that DWR and Reclamation anticipate might follow  
7 from this petition actually does deliver water to lands  
8 that drain, either surface or subsurface to the San  
9 Joaquin River, that might affect San Joaquin River  
10 salinities; is that correct?

11 MR. JENNINGS: That could certainly affect San  
12 Joaquin River salinity, either immediately or through  
13 groundwater migration, but I mean it could affect it  
14 immediately. And given the low stream flows in the San  
15 Joaquin River this year, problems could be exacerbated.

16 MR. HERRICK: And those effects might include the  
17 amount of water released from New Melones to dilute the  
18 salt?

19 MR. JENNINGS: Certainly can include that.

20 MR. HERRICK: And those effects include the salt  
21 concentrations in the southern Delta?

22 MR. JENNINGS: It would almost certainly, I think  
23 could -- I mean, yes, it could certainly include that.

24 MR. HERRICK: And would either one of those  
25 effects potentially adversely affect the legal user of

1 water?

2 MR. JENNINGS: It would certainly affect them.  
3 You know, I almost daily was on the website watching the  
4 salinity at Tracy at Old River and watched it literally  
5 daily in violation, I mean, for almost three months.

6 MR. HERRICK: And although those are pop --

7 MR. JENNINGS: And anticipate it again this  
8 summer.

9 MR. HERRICK: And although those are possible  
10 effects, the petition does not tell us any specifics about  
11 whether those will or will not occur isn't that correct?

12 MR. JENNINGS: It provides no data, no analysis,  
13 not even conjecture. I mean, it just simply says that it  
14 will comply with D-1641.

15 MR. HERRICK: Would you conclude from that, that  
16 the Board would not have sufficient information to  
17 conclude whether or not granting the petition affects  
18 legal users?

19 MR. JENNINGS: I can't imagine how the Board  
20 could conclude that they have sufficient information to  
21 evaluate the environmental impacts of this proposal.

22 MR. HERRICK: Would you have that same conclusion  
23 with regards to impacts to fisheries?

24 MR. JENNINGS: Yes.

25 MR. HERRICK: Thank you.

1 CO-HEARING OFFICER BAGGETT: Thank you.

2 County of San Joaquin.

3 MS. GILLICK: No questions.

4 CO-HEARING OFFICER BAGGETT: Defenders of  
5 Wildlife?

6 MR. BASOFIN: Yes.

7 CROSS EXAMINATION

8 OF MR. BILL JENNINGS

9 BY MR. JOSHUA BASOFIN, representing the Defenders of  
10 Wildlife as follows:

11 MR. BASOFIN: Joshua Basofin Defenders of  
12 Wildlife.

13 I just have a few questions for Mr. Jennings.

14 Good afternoon, Mr. Jennings.

15 MR. JENNINGS: Good afternoon.

16 MR. BASOFIN: Mr. Jennings, you indicated in your  
17 testimony that you felt the project -- I'm sorry, you felt  
18 the petition and other materials have not adequately  
19 described the project; is that correct?

20 MR. JENNINGS: Yes, I do not believe we had an  
21 adequate project description.

22 MR. BASOFIN: Representatives of the Bureau today  
23 have, in turn, indicated that there might be groundwater  
24 pumping in the Sacramento valley. And that hypothetically  
25 there may not be groundwater pumping in the Sacramento



1 valley.

2           So I'm going to do the opposite and say  
3 hypothetically, assuming there is groundwater pumping in  
4 the Sacramento valley, is it your belief that such pumping  
5 would affect the stream flow in the Sacramento River and  
6 its tributaries due to hydrological connections with the  
7 aquifers?

8           MR. JENNINGS: Absolutely. And, in fact --

9           MR. RUBIN: I'm going to object to the question.  
10 I apologize. I'm trying to be respectful to Mr. Jennings.  
11 And I understand he has a long history in the Bay-Delta  
12 and dealing with water issues. But maybe Mr. Jackson  
13 needs to ask some more questions about Mr. Jennings'  
14 background to qualify him to answer a question like that.  
15 I mean, I have severe concerns, I raised them early on in  
16 terms of relevancy and the ability for some of these  
17 people to testify on such broad issues. And this is  
18 really pushing it.

19           MR. BASOFIN: My question directly related to Mr.  
20 Jackson's direct testimony in which he indicated that  
21 hydrological connections with Sacramento valley rivers  
22 would affect stream flow.

23           MR. JACKSON: I'm a little confused. I'm not a  
24 witness. And I didn't testify to anything.

25           CO-HEARING OFFICER BAGGETT: I agree. And I

1 don't recall -- I mean, the issue of this hearing hasn't  
2 been hydrological connectivity between the Sac and --  
3 Sacramento River and groundwater. I mean --

4 MR. JENNINGS: Actually, I think I had spoken  
5 about Butte Creek.

6 CO-HEARING OFFICER BAGGETT: If you want to  
7 relate it to Butte Creek, that would be acceptable. But  
8 we didn't get into this broad groundwater issues in this  
9 proceeding. I think that is beyond the scope of --

10 MR. JENNINGS: I mean one of the concerns that  
11 have been raised in environmental comments --

12 CO-HEARING OFFICER BAGGETT: So let me go back.  
13 Why don't rephrase the question related to his testimony  
14 regarding Butte Creek and then --

15 MR. BASOFIN: Mr. Jennings, is it your opinion  
16 that groundwater pumping from aquifers in the Sacramento  
17 valley may affect stream flow in Butte Creek?

18 MR. JENNINGS: It's my understanding that  
19 there -- it does.

20 MR. BASOFIN: And would that affect on-stream  
21 flow into Butte Creek adversely -- potentially adversely  
22 affect listed central valley Chinook Salmon and Steelhead  
23 Trout.

24 MR. JENNINGS: Well, certainly given the  
25 importance of Butte and these eastside tributaries towards

1 spring run, that it's something -- anything that has the  
2 potential to lower or modify stream flow in these  
3 tributaries, where so much of our critical habitat, our  
4 spawning habitat should be evaluated carefully.

5 MR. BASOFIN: Okay. And is it your opinion that  
6 such groundwater extraction has the potential to adversely  
7 affect central valley Chinook salmon and Steelhead trout  
8 throughout all or part of their range.

9 MR. JENNINGS: To that, I mean, I have some  
10 knowledge of Butte and the lower tributaries there.  
11 Obviously, any activity that lessens groundwater accretion  
12 has an impact, but I wouldn't begin to hazard a -- I mean,  
13 I think it's uncertain.

14 MR. BASOFIN: To your knowledge, has the Bureau  
15 of Reclamation initiated formal or informal consultation  
16 with the National Marine Fisheries Service regarding  
17 potential impacts to central valley salmonids?

18 MR. RUBIN: I'm going to object to the question.  
19 I believe -

20 MR. JENNINGS: I don't know.

21 MR. RUBIN: I believe -- I withdraw my objection.

22 CO-HEARING OFFICER BAGGETT: Strike the  
23 objection.

24 MR. BASOFIN: No further questions.

25 CO-HEARING OFFICER BAGGETT: Thank you.

1 Is there any redirect Mr. Jackson?

2 MR. JACKSON: No redirect, sir.

3 We would like to submit 1, 2, 3, and 4, and the  
4 attachments to 2. Bill, that's 2A through --

5 MR. JENNINGS: I don't have my exhibit list here.

6 Do you have it?

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

8 It's coming.

9 CO-HEARING OFFICER BAGGETT: We've got it 2-0.

10 MR. JENNINGS: Yes.

11 MR. JACKSON: Through 2-0.

12 CO-HEARING OFFICER BAGGETT: Are there any  
13 objections, seeing Mr. Rubin standing?

14 MR. RUBIN: Yes, I raised objections with the  
15 testimony that's been provided. I believe it's all  
16 irrelevant with the exception of complaints on vagueness  
17 or that the project description is inadequate. I don't  
18 believe any of the testimony raises issues that are  
19 specific to those before the Board. Reliance upon the  
20 emergency exemption has nothing to do, I think, with this  
21 proceeding. If there's an issue with the drought  
22 proclamation, then take it to another forum, but it's not  
23 here. I think the other elements of the testimony are not  
24 specific to the effects that the change might have.

25 In terms of the exhibits, I don't believe there's

1 an adequate foundation for any of them. It raises an  
2 issue with the testimony as well. But basically, as I  
3 understand it, Mr. Jennings pulled a bunch of documents,  
4 none of which he prepared, none of which he could attest  
5 to being true or accurate and relied upon that to support  
6 his statement in his testimony.

7           And I don't think Mr. Jackson has laid an  
8 adequate foundation for Mr. Jennings to make the  
9 statements in his testimony nor to allow for the entry of  
10 the exhibits into evidence.

11           I'm sorry, Michael, just to make sure that it's  
12 clear. I should have been more clear in terms of my  
13 objections.

14           I have no objections to CalSPA 3 and 4.

15           CO-HEARING OFFICER BAGGETT: Well, at this point,  
16 while we've had an opening, we'll accept 3 and 4 into the  
17 record. If there's no other objections. Now, let's go  
18 back to Mr. Jackson.

19           MR. JACKSON: Does he have a objections to CalSPA  
20 1, which is a CV?

21           CO-HEARING OFFICER BAGGETT: Well, let's just go  
22 1 through -- we'll accept Exhibit 1 okay. Now, we are  
23 down to and its attachments.

24           MR. JACKSON: Now we're down to 2 through 2-0.

25           CO-HEARING OFFICER BAGGETT: Correct.

1           MR. JACKSON: First of all, all of these  
2 documents are documents that the State Board could take  
3 judicial notice of under your rules. They're all  
4 government documents. They all come -- I mean, they all  
5 come from records that are kept in the normal course and  
6 scope of business. A number of them are documents which  
7 could become relevant because they were prepared by the  
8 petitioners in this case and are obviously responsive to  
9 the testimony of not only Mr. Jennings but of Mr. Milligan  
10 and everyone else who testified.

11           CO-HEARING OFFICER BAGGETT: I mean, some of the  
12 documents maybe are hearsay. We can -- this Board has  
13 very broad hearsay rules. We can take them, you know,  
14 under our hearsay restrictions, not being able to use them  
15 as a finding to cite in the order. A number of these are  
16 news articles. Again, it's hearsay. I'll allow --

17           MR. RUBIN: There's another --

18           CO-HEARING OFFICER BAGGETT: Wait.

19           Mr. Herrick, you were up first.

20           MR. HERRICK: Just briefly.

21           I believe Mr. Jennings' testimony, including his  
22 exhibits, tried to address and was ordered along the line  
23 of the questions the Board asked. And so I think it's  
24 appropriate under that.

25           Secondly, this is -- not sort of. This is an

1 expedited process. And so preparing witnesses' testimony  
2 is very difficult on the short-term. And I think the use  
3 of documents, which either are or are not hearsay, is  
4 appropriate given the Board's latitude in these matters,  
5 and the Board can certainly see that an article from say  
6 the San Francisco Chronicle is not submitted for the truth  
7 of the matter asserted that granting the petition does  
8 something, but it's just part of that public discourse and  
9 the public trust, which we're trying to protect, which Mr.  
10 Jennings is referring to. And I think they are  
11 appropriate.

12 Thank you.

13 CO-HEARING OFFICER BAGGETT: I mean, I would  
14 concur with many of those comments. This is an expedited  
15 proceeding. We could sit here and go through everyone of  
16 these line by line and delay this whole order by another  
17 month or 2. I mean, I'm not going to do a --

18 MR. RUBIN: I understand that

19 CO-HEARING OFFICER BAGGETT: -- blanket --

20 MR. RUBIN: But --

21 CO-HEARING OFFICER BAGGETT: -- dismissal of all  
22 these exhibits, without going through them line -- you  
23 know, page by page.

24 MR. RUBIN: The problem that we face is the issue  
25 that I tried to raise through cross examination. You have

1 partial documents. Mr. Jennings can't attest to the truth  
2 of the matter asserted. It leads to potentially  
3 misleading results from the Board itself. And that's my  
4 concern.

5 I mean, frankly a lot of these documents I think  
6 are helpful to my client. But you have a circumstance  
7 where you have a single page of a document. I'm doing to  
8 raise the same issue for CWIN. You have a single page of  
9 a document that may or may not have different  
10 explanations, might be able to provide different context,  
11 what it was prepared for. And if you want to take it with  
12 the idea that it's either -- that it's hearsay, and  
13 therefore can't be relied upon, and it's not being  
14 asserted for the truth of the matter, that's one thing.  
15 But to have it just purely admitted, we're going to -- if  
16 we're in front of a court, those are as if somebody  
17 testified. And without having the full document, and  
18 frankly, without having the time to go through the full  
19 document, it makes it very difficult for us as well.

20 CO-HEARING OFFICER BAGGETT: I think we will  
21 accept the testimony as evidence. It will be noted for  
22 the record and on the record that it will only be given  
23 the weight to which it is credible evidence. If it's one  
24 page of a multi -- a treatise, then, I think, the Board  
25 will treat it as such. Without the corroborating



1 information, I think many of you have practiced before us  
2 know that that's how we, in fact, do write our orders.

3           Secondly, hearsay will be treated as hearsay. I  
4 think Mr. Herrick did make -- he was on point. I mean,  
5 this is an expedited proceeding. We are trying to, you  
6 know, follow our own rules as tight as we can, yet  
7 understanding the need to get something -- some order  
8 written and crafted in a fairly short turn around on  
9 something of major significance like this.

10           These are great public policy issues that have  
11 been raised. And we will take those just as they are, as  
12 public policy issues. If that's what they are, we won't  
13 be using those for the truth of the matter or to support a  
14 factual statement in the record.

15           So with that, we'll accept all the exhibits into  
16 the record as noted.

17           (Thereupon the above-referenced documents were  
18 admitted.)

19           CO-HEARING OFFICER BAGGETT: And, Mr. Rubin, I  
20 think you had one other -- did you want to enter your  
21 exhibit that you used in cross?

22           MR. RUBIN: Mr. Jennings testified to the point  
23 that I was trying to use that document for, so we don't  
24 need to unless it will be helpful.

25           CO-HEARING OFFICER BAGGETT: Very good.

1 MR. JENNINGS: I would have put the full exhibit  
2 in. I was trying to spare everyone the paper of putting  
3 these full exhibits. I must say --

4 CO-HEARING OFFICER BAGGETT: I appreciate. We  
5 accepted them.

6 MR. JENNINGS: I Just want you to know that I  
7 could have put the whole documents in, but I didn't.

8 MR. JACKSON: Stop arguing. You won.

9 CO-HEARING OFFICER BAGGETT: He's going to have  
10 to have a seminar with his colleague in the hall to  
11 understand how to be brief.

12 Thank you, Mr. Jennings. It's appreciated.

13 With that, let's take a -- come back at 4 o'clock  
14 and we will do the last case in chief.

15 (Thereupon a recess was taken.)

16 CO-HEARING OFFICER BAGGETT: Okay. If we're  
17 ready, let's go back on the record. I don't know if you  
18 have an opening statement and then your 2 witnesses.

19 MS. JACKSON: Yes. Julia Jackson representing  
20 the California Water Impact Network.

21 I just have a very short opening statement. And  
22 then I'll turn it over to our witnesses Tom Stokely and  
23 Tim Stroshane.

24 The California Water Impact Network does not  
25 support the consolidation at this time. Consolidation is

1 not required in the current water year. Dams and  
2 reservoirs are below average, due to bad planning, which  
3 drew down reservoir levels significantly, resulting in a  
4 deficit that's only now recovering. 2009 is closer to an  
5 average rain year than rainfall levels in drought years.  
6 Tim Stroshane will testify today that 2009 precipitation  
7 levels for the Sacramento River basin are actually 86  
8 percent of average. With San Joaquin River Basin reaching  
9 89 percent of normal during the October to March period.

10 Critical data is missing from this petition,  
11 including specific times, transfers, amounts, sources and  
12 end users of water within the requested consolidated  
13 system.

14 Both DWR and the Bureau testified today they do  
15 not know what petitions will be made for this water to  
16 whom and to where this water will go. Witnesses today  
17 will testify about the practical problems of ensuring  
18 protection for fish and wildlife when so little is  
19 actually known about the proposed transfers. Evidence  
20 will show that a consolidated system is not necessary  
21 during this alleged drought, as no such system has ever  
22 before been operated during drought years that have been  
23 far more severe as this.

24 Further, the U.S. Fish and Wildlife Service  
25 biological opinion regarding the 2009 drought water bank

1 acknowledged that the giant garter snake will be adversely  
2 impacted by the transfers, which was not included or  
3 amended in the present petition.

4 To allow approval of the transfers not yet  
5 identified and quantities not yet determined, defies  
6 common sense and legal justification. After hearing the  
7 testimony today and evidence presented in this hearing,  
8 it's our hope that the Board will deny petitioner's  
9 request as not in the public interest.

10 And at this time we will turn to Mr. Tom Stokely.

11 Oh, sorry. Tim is going first. I apologize.

12 DIRECT EXAMINATION

13 OF MR. TOM STROSHANE

14 BY MS. JULIA JACKSON, ESQ., counsel representing the  
15 California Water Impact Network as follows:

16 MS. JACKSON: Mr. Stroshane, were you sworn  
17 earlier today?

18 MR. STROSHANE: Yes, I was.

19 MS. JACKSON: And have you reviewed your  
20 testimony marked as Exhibit 1?

21 MR. STROSHANE: Yes, I have.

22 MS. JACKSON: And when it was written, was that  
23 testimony true and correct to the best of your knowledge?

24 MR. STROSHANE: Yes, it is.

25 MS. JACKSON: Would you please summarize your

1 testimony.

2 CO-HEARING OFFICER BAGGETT: Okay. Mr. Rubin.

3 MR. RUBIN: Yeah, I'd like to step in here and  
4 ask, before I raise objections, for the witness to  
5 summarize his expertise. I read the exhibit with the  
6 witness's statement of qualifications. And I'm having  
7 difficulty understanding how the witness is qualified to  
8 testify on any of the subject matters within his  
9 testimony.

10 MR. STROSHANE: My qualifications lie in being a  
11 professional planner, capable of reading complex documents  
12 and interpreting them, both from the standpoint of policy  
13 and law. My qualifications also stem from my education,  
14 which was at UC Santa Cruz in Environmental Studies and in  
15 Earth Sciences, where I took 6 courses in the Earth  
16 Sciences Program dealing with groundwater, engineering,  
17 geology, stratigraphy and sedimentation, hydrology, and a  
18 couple of other courses, mineralogy among them. So I'm  
19 quite familiar with these subjects.

20 MR. RUBIN: With that, I raise my objection. I  
21 don't believe Mr. Stroshane -- if I'm pronouncing it  
22 correctly.

23 MR. STROSHANE: Stroshane.

24 MR. RUBIN: Stroshane, excuse me -- is qualified  
25 to testify to any of the issues that are in his testimony.

1 Particularly, as an expert witness in this proceeding.

2 CO-HEARING OFFICER BAGGETT: We'll allow for a  
3 response first.

4 MS. JACKSON: Mr. Stroshane has extensive  
5 knowledge and experience in water-related issues. He can,  
6 better than I, describe his involvement with SPILLWAY and  
7 his education in water rights and water policy in the  
8 State.

9 MR. RUBIN: Hearing Officer Baggett, I took a  
10 quick look SPILLWAY, I don't think anything in there can  
11 qualify him as an expert on the issues. And again, his  
12 resume identifies areas of his expertise, and it looks as  
13 though professionally he's been with the City of Berkeley  
14 Housing Department in their planning department. And I  
15 don't see how that qualifies him to provide any testimony  
16 to you on the issues that are the subject of this  
17 proceeding.

18 MS. JACKSON: A witness can be qualified as an  
19 expert, not only from their educational background, but  
20 from their depth of personal experience. Mr. Stroshane  
21 absolutely fits that requirement for an expert in this  
22 proceeding.

23 MR. STROSHANE: May I elaborate on that?

24 CO-HEARING OFFICER BAGGETT: Sure.

25 MR. STROSHANE: I'd like to.

1 I wrote my senior thesis for UC Santa Cruz  
2 Environmental Studies Program on Peripheral Canal and  
3 related issues in 1981. I have kept abreast of the  
4 State's water issues since that time. In 1997, I took  
5 interest in CALFED while I was working at the City of  
6 Berkeley. Beginning in 1998, I started attending CALFED  
7 meetings, observing the proceedings, writing articles for  
8 local magazines in the bay area about the subject of  
9 CALFED and what it meant for northern California.

10 Beginning in 2000, having tired of trying to  
11 pitch articles to editors, I started my own newsletter,  
12 the -- that I, in 2001, made available on line. It's  
13 called SPILLWAY.

14 The articles in SPILLWAY reflect the fact that I  
15 read government documents about water and try to  
16 understand them very carefully. I interview people who  
17 are knowledgeable about them for those articles. And the  
18 articles themselves are footnoted, each one of them  
19 pertaining to lawsuits or CALFED or any one of a number of  
20 other subjects are all footnoted my having read these  
21 documents.

22 CO-HEARING OFFICER BAGGETT: I think, at this  
23 point, he's not offering -- the witness is not offering  
24 original research projects that have been peer reviewed.  
25 I mean he's offering his interpretation of other's work.

1 MR. RUBIN: But again --

2 CO-HEARING OFFICER BAGGETT: I don't see the harm  
3 provided here. We're not relying on the factual basis of  
4 his research or his testimony.

5 MR. RUBIN: I think what you've heard from the  
6 witness is he an advocate and maybe he's developed good  
7 advocacy skills. And if you want to take his testimony as  
8 that, that's one thing. It's a brief, for lack of a  
9 better word. And if you want to take it for that, then  
10 that's one issue. But it's being offered as expert  
11 testimony in this proceeding, and not only, I don't think,  
12 can it be considered expert testimony, I question whether  
13 it can be considered testimony or whether it's just an  
14 advocacy piece. It's not presenting you with evidence.  
15 It's presenting you with an argument that he wants to  
16 advance.

17 MR. JACKSON: If I could, Mr. Baggett.

18 CO-HEARING OFFICER BAGGETT: Yes.

19 MR. JACKSON: The testimony of both witnesses -  
20 and I guess we're going to go through this on both of  
21 them - is in direct response to the following -- to the  
22 questions that were asked by the Board.

23 CWIN chose to bring forward people who work for  
24 them, in the same way that the general managers and  
25 resource managers of all of the water districts that



1 testify here come forward. They are not -- they're not  
2 all scientists who write independent peer-reviewed  
3 documents. But these folks have answered the questions  
4 that you asked, which was the purpose of the testimony.

5           And in that regard, since they're working for a  
6 recognized environmental group, they're not much different  
7 than the witnesses who testify on behalf of the Bureau or  
8 on behalf of the -- well, the Bureau testified, I guess,  
9 for U.S. Fish and Wildlife Service.

10           MR. RUBIN: I think that, just for the record,  
11 there is clearly a difference. You have a person from the  
12 Department of Water Resources who operates the State Water  
13 Project, explaining how they're going to operate the State  
14 Water Project. You have the same thing for the Bureau of  
15 Reclamation.

16           Here, you have 2 people -- and I'm not raising my  
17 objections because they might be employed by CWIN, either  
18 directly as a board member or staff member or as a  
19 consultant. The question is whether they have any  
20 particular knowledge, expertise that will help address the  
21 issues before you, help bring evidence to you that will  
22 help you decide this matter.

23           And I don't think that they do. I don't think  
24 their resume says it. I don't think their testimony says  
25 it. What their testimony says is we are advocates for a

1 position and we're advocating for it. And I respect that,  
2 but it doesn't bring you evidence. The evidence that they  
3 do bring is exhibits and it raises the same issue that I  
4 raised earlier today.

5 CO-HEARING OFFICER BAGGETT: And I think we can  
6 listen to the testimony presented. We can take the  
7 exhibits under the same conditions, which we did the prior  
8 testimony. And I think we can decipher, in fact, what is  
9 science and expert testimony offered versus what is policy  
10 or a summary of that.

11 MR. RUBIN: And rather than go through this  
12 again, I do have the same concerns --

13 CO-HEARING OFFICER BAGGETT: I understand.

14 MR. RUBIN: -- with Mr. Stokely. And so I assume  
15 your ruling here applies --

16 CO-HEARING OFFICER BAGGETT: It will apply to  
17 both of them so we can proceed. It will apply to all the  
18 evidence as submitted.

19 And I think the documents -- a numbers of these  
20 would be taken under official notice, if we so desire. So  
21 we'll proceed and we'll take them under those same  
22 admonitions.

23 With that, continue, Ms. Jackson.

24 MS. JACKSON: Mr. Stroshane, will you now please  
25 summarize your testimony.

1 MR. STROSHANE: Yes, I will.

2 My name is Tim Stroshane and good afternoon to  
3 Chairman Hoppin and Hearing Officer Baggett.

4 The California Water Impact Network believes that  
5 the petition should not be approved. We maintain that  
6 California is not in a drought considered by historical  
7 measures. Precipitation conditions are closer to  
8 historical averages rather than to drought conditions, as  
9 shown by evidence in one of our exhibits that was a report  
10 prepared by the Department of Water Resources for the  
11 Governor at the end of March.

12 Snowpack, as of March 27th, which is stated in  
13 that same report, was at 87 percent of average. Runoff  
14 conditions are now considered by the Department of Water  
15 Resources to be considered dry, instead of critical. And  
16 even in the 1987 to '91 runoff conditions were worse than  
17 current -- than current period.

18 Some federal reservoirs within the central valley  
19 project do exceed average conditions right now. And state  
20 terminal reservoirs, I'm speaking of Pyramid and Castaic  
21 Lake, as reported on DWR's website at the time my  
22 testimony was prepared, are either exceed or are close to  
23 historical average storage.

24 The petition has not been subjected to adequate  
25 environmental review. DWR, in our opinion, improperly

1 exempted the 2009 drought water bank environmental  
2 review -- rather the 2009 -- the description of the 2009  
3 water bank from environmental review, based on emergency  
4 claims.

5           Eight other projects are listed in the petition  
6 that have -- that are included in the petition have not  
7 been disclosed for environmental review purposes. And the  
8 merger of the projects place of use represent  
9 establishment of a water market without authorization of  
10 Congress for the California Legislature.

11           Further more, no assurance that water supplied  
12 through the drought water bank or through the petition  
13 will not be used wastefully or unreasonably. And this  
14 point is discussed more fully in Mr. Stokely's testimony.

15           The petition is avid to establish a 2-year  
16 timeframe, during which water marketing to facilitate  
17 water transfers and to more effectively utilize the  
18 operational flexibility of the combined facilities appears  
19 to be the purpose and less a justification for alleviating  
20 dry conditions and low water allocations.

21           It's alleged to be needed to alleviate lost  
22 supplies of lowest priority water right and water service  
23 contractors in the western San Joaquin valley.

24           Much agricultural land of intended recipients  
25 discharges impaired drainage that the 1985 State Water

1 Board considered a public nuisance. If the Bureau was to  
2 continue supplying water to these lands, which are  
3 included in the 2009 drought water bank, without supplying  
4 a drainage solution, this could be, in the State Board's  
5 own words in 1985, be considered an unreasonable use of  
6 water.

7           We feel that the petition should not be approved,  
8 also because dry and drought conditions should not be seen  
9 as disastrous and the subject of emergency declarations.  
10 Recurring dry periods -- recurring dry conditions require  
11 a long-term commitment to retrofit our cities and farms to  
12 increase water use efficiency dramatically.

13           I'm going to skip over my suggested conditions.  
14 I think Mr. Jennings and Mr. Stokely will have those  
15 covered for us.

16           Approval of -- in answer to question 3 of the  
17 State Board in the hearing notice, approval would initiate  
18 a new right and injure other legal users of water.  
19 Concerning the creation of a new right, we argue that the  
20 petition asks the State Water Board for approval to create  
21 a unified market for water transfers. This is  
22 unprecedented in size. And I believe one of the engineers  
23 for the Department of Water Resources also noted that in  
24 terms of the scale of what's being asked, this was  
25 unprecedented. The market would be among public water

1 agencies on behalf of low-priority water rights and  
2 contractors private interests.

3           As I said before, it's unauthorized by Congress  
4 or the State Legislature. The State Water Board must  
5 protect public trust resources and uphold the  
6 Constitutional prohibition on waste and unreasonable use.  
7 And we believe that this petition will complicate that --  
8 the ability of the State Water Board to ensure those  
9 things are upheld.

10           We also maintain that petition approval will make  
11 their -- yeah, I just said that. Sorry.

12           Secondly, in answer to the question about whether  
13 this would injure other legal users of water, we believe  
14 that injury is likely to Sacramento valley groundwater  
15 users. Willing sellers north of the Delta must agree to  
16 sell surface water, but have the option to substitute  
17 groundwater to bring their crops to harvest increasing  
18 pressure on aquifer resources.

19           Others reliant on subsurface supplies would be  
20 injured if increased groundwater pumping lowers their  
21 groundwater elevations. Existing groundwater elevations  
22 in both the Sacramento and San Joaquin valley are already  
23 at drought period lows, as indicated in the Department of  
24 Water Resources own report to the Governor on March 30th.  
25 This could potentially injure large numbers of groundwater

1 reliant farmers as Lynn Barris testified on behalf of the  
2 California Sportfishing Protection Alliance.

3           In answer to the State Board's 4th question, we  
4 believe that approval would unreasonably affect water  
5 quality, fish, wildlife or other instream beneficial uses.  
6 Bill Jennings has gone into great length about this. I  
7 will not repeat his concerns with Delta smelt and  
8 salmonids.

9           What I want to note that increased groundwater  
10 pumping could potentially deplete Sacramento tributary  
11 streams, warming water in those streams, and reducing  
12 critical habitat for anadromous fisheries, especially if  
13 sufficient groundwater pumping lowers groundwater  
14 elevations to a point where streams no longer receive  
15 water from aquifers.

16           Crop idling would dry out rice fields, as  
17 acknowledged in the Fish and Wildlife Service's biological  
18 opinions. And those are considered to be critical habitat  
19 for the giant garter snake, causing adverse significant  
20 impacts of unknown scale. Potentially -- the proposal --  
21 or crop idling could potentially fallow up to 55,000 acres  
22 under the drought water bank alone. The petition  
23 acreage -- the acreage under the petition, which would be  
24 fallowed as a result of actions under the petition, could  
25 be more.

1           There's no information according to the Fish and  
2 Wildlife Service on the size or age class of giant garter  
3 snake populations in the Sacramento valley. Yet Fish and  
4 Wildlife Service biological opinion finds no jeopardy from  
5 the drought water bank. Yet, greater impacts could be  
6 possible under petition's 8 additional other -- additional  
7 and other unspecified future projects.

8           The impacts of rice field idling could also have  
9 effects on reproduction, recruitment and survival of giant  
10 garter snake. And I quote from the Fish and Wildlife  
11 Service's biological opinion, "...well beyond the one year  
12 project timeframe."

13           My reading of the Fish and Wildlife Service's  
14 report is that they were dealing with the drought water  
15 bank. The petition's timeframe, which they didn't appear  
16 to be responding to directly, is, of course -- they ask --  
17 the petition asks for a 2-year timeframe on this. So  
18 impacts could be larger than the Fish and Wildlife Service  
19 has disclosed to this point.

20           The petition should, at a minimum, be delayed in  
21 our opinion. So that an Environmental Impact Statement  
22 and Report would be prepared to inform the State Water  
23 Board decision makers fully and properly.

24           In answer to question 5 in the hearing notice,  
25 the petition does not and will not serve the public



1 interest. We consider it to be an end-run around the  
2 existing water rights priority system that protects all  
3 legal water right holders and all users of water in  
4 California. In other words, all of us.

5           It would give DWR and U.S. Bureau of Reclamation  
6 and their water customers and suppliers an enlarged  
7 market, water market, that would reward poor water  
8 management. It would provide contractors holding lowest  
9 priority water rights and contracts to irrigate lands --  
10 with lowest priority water to irrigate lands that the  
11 State Water Board has found at least twice to be the  
12 primary cause of south Delta salinity problems and would  
13 be an unreasonable use of water. I'm referring to the  
14 State Board's water quality order 85-1 and Decision 1641.

15           Rewarding growers for planting permanent orchard  
16 and vineyard crops on lands with the lowest priority water  
17 contracts would represent -- that are 100 percent  
18 interruptible supplies could be a reward for unwarranted  
19 risky business decisions.

20           It would represent a bailout that poses the same  
21 moral hazard that the United States faces now with the  
22 bailout of large financial institutions and auto  
23 industries. Will we be here again in another year or 5  
24 years talking about the same issues?

25           The effects of not approving the petition.

1           We recommend that -- well, we would argue that  
2 not approving the petition would enable the State Board to  
3 maintain clear responsibility for the U.S. Bureau of  
4 Reclamation for compliance with southern Delta salinity  
5 objectives and other requirements of D-1641.

6           It would prevent Sacramento valley groundwater  
7 elevations from declining further under pressure from  
8 groundwater substitution transfers that are otherwise  
9 encouraged by the petition.

10           It would prevent injury to groundwater reliant  
11 farms and communities in the Sacramento valley. And it  
12 would prevent impacts to Sacramento River tributary  
13 streams and prevent the loss of cold water and critical  
14 habitat in those streams needed by anadromous fisheries.

15           It would prevent the loss of irrigated rice  
16 fields, to which giant garter snakes have adapted and  
17 depend on for habitat.

18           Finally, we want to point out that Department of  
19 Water Resources and UC Davis researchers confirm that the  
20 bulk of these impacts are confined to the western San  
21 Joaquin valley as described above. And that the national  
22 and international economic recession are having far larger  
23 impacts on unemployment and incomes in our statewide  
24 economy, including agriculture than is California's dry  
25 hydrologic conditions.

1           That's the conclusion of my testimony at this  
2 point.

3           CO-HEARING OFFICER BAGGETT: Thank you.

4           MR. STOKELY: Ready?

5           I'm Tom Stokely. I just wanted to --

6                           DIRECT EXAMINATION

7                           OF MR. TIM STOKELY

8 BY MS. JULIA JACKSON, ESQ., counsel representing the  
9 California Water Impact Network as follows:

10           MS. JACKSON: Mr. Stokely, were you previously  
11 sworn?

12           MR. STOKELY: Yes.

13           MS. JACKSON: And have you reviewed your  
14 testimony, Exhibit number 3?

15           MR. STOKELY: Yes.

16           MS. JACKSON: And, at the time, that you prepared  
17 it, was everything true and correct to the best of your  
18 knowledge?

19           MR. STOKELY: Yes.

20           MS. JACKSON: Can you please summarize your  
21 testimony?

22           MR. STOKELY: Sure. I'm Tom Stokely. I just  
23 wanted to be clear that I no longer work for Trinity  
24 County. So no one should hold the County of Trinity  
25 responsible for my statements here today. They do not pay

1 my salary.

2           Just a little clarification. I did work for 10  
3 years on the environmental documents for the Trinity  
4 Record of Decision. I was a witness in Water Right Order  
5 9005. I participated in Water Quality Order 8918. I  
6 participated in the hearings by the regional board and the  
7 State Board in development of the basin plan amendment for  
8 temperature objectives on the Trinity River. Back in the  
9 early nineties, I participated in the Sacramento River  
10 temperature task group that the Bureau convenes to look at  
11 temperatures for Salmon in the Sacramento and Trinity  
12 rivers. And I was also a witness in the D-1641 hearings.

13           Thank you.

14           I am going to talk some in my testimony about the  
15 Trinity River division and potential impacts that. And I  
16 wanted to clarify that the reason for that is because the  
17 permits that are being considered as part of this subject  
18 petition do include the Bureau's permits for the Trinity  
19 River.

20           CWIN does not believe that the drought is An  
21 emergency under CEQA, but it's, in fact, a case of bad  
22 planning and misleading water accounting. Our Exhibit 3A  
23 contains our arguments as to why we believe this project  
24 and the drought water bank are not -- do not qualify for  
25 an exemption under CEQA. DWR has a very nice little

1 description of a drought on their website and it's not a  
2 sudden unexpected occurrence, similar to the language in  
3 CEQA.

4           As far as over-allocation of water, I've  
5 certainly known for some time that the CVP water supply  
6 was over-allocated. In working on the Trinity Record of  
7 Decision back in 2000, I was kind of amazed when I saw the  
8 language that's in my testimony on page 3 that says that  
9 the Trinity Record of Decision was unknown at that time,  
10 and that it would not affect the promise of a 10 to 15  
11 percent increase to south Delta agricultural service  
12 contractors.

13           And that was, in fact, contradicted by my exhibit  
14 3C, which is a figure from the final Trinity environmental  
15 document that showed a 4 percent reduction in water  
16 deliveries to south of Delta agricultural service  
17 contractors. So right there between what CALFED promised  
18 and what Trinity indicated, there was a 19 percent  
19 deficiency in south of Delta CVP ag service water  
20 supplies.

21           Of course the over-allocation of water was  
22 discussed earlier by Mr. Jennings in his testimony when he  
23 talked about your strategic plan.

24           We are very concerned about impacts on upstream  
25 reservoirs. It was certainly news to me today, it was

1 never in the petition that there would be no change in  
2 storage in Shasta reservoir. But as I was researching  
3 this I did -- and I did not know that there would not be  
4 an impact, and I'm still not convinced. But I believe  
5 that all efforts should be made to conserve cold water in  
6 Shasta reservoir this year.

7           Past biological opinions on the winter run  
8 Chinook Salmon have required or targeted a 1.9 million  
9 acre foot carry-over storage in Shasta on September 30th.  
10 That is not going to be met this year. I talked to Paul  
11 Fujitani who's the chief of CVP operations, and at the  
12 time that I talked to him 2 weeks ago, he indicated to me  
13 that he did not think they were going to have adequate  
14 cold water resources to protect the fall run Chinook in  
15 the Sacramento River that begins to spawn around October.  
16 That they would -- he told they would basically meet the  
17 60 degree temperature objective for winter run in  
18 September and after their cold water resources would be  
19 exhausted.

20           So again CWIN is very concerned that if this  
21 petition were to cause additional reservoir depletion, it  
22 would impact the ability to meet temperatures on the  
23 Sacramento River pursuant to Water Right Order 9005.

24           And additionally, when I talked to Mr. Fujitani,  
25 I asked him if the temperature control device on Shasta

1 dam had some leakage and it didn't work as well as they  
2 had expected. And he indicated affirmatively that that  
3 was the case.

4 CO-HEARING OFFICER BAGGETT: Mr. Rubin.

5 MR. RUBIN: Can I ask the witness to identify  
6 where in the testimony he is -- the written testimony he's  
7 indicated the discussions he's had with Mr. Fujitani.

8 MR. STOKELY: Sure. 3F, Exhibit 3F, page 6,  
9 middle of the page.

10 And so when I talked to Mr. Fujitani, I asked him  
11 questions about the temperature control device. He said  
12 that it leaks and that the model temperature outputs were  
13 not the same as the actual, but they used some kind of  
14 professional judgement in determining how to operate. I  
15 also asked him if the Trinity Dam auxiliary outlet, which  
16 is the outlet on the bottom of Trinity Dam that's used to  
17 provide cold water for fish -- the regular outlet is about  
18 150 higher. When the reservoir gets cold, it pulls warm  
19 water from the bottom -- or from the upper thermocline  
20 into the river. In the past, they have opened that up to  
21 provide cold water for fish. When I asked him, he said  
22 that it maybe damaged and that it's use on a regular basis  
23 is questionable.

24 Therefore, we already have an existing problem  
25 for meeting temperatures on the Sacramento River, in that

1 carryover storage is low, the temperature control device  
2 doesn't work, so you already don't have all of the tools  
3 that have been used in the past to meet cold-water  
4 requirements.

5           So the recommendation would be that any approval  
6 of the petition should include a condition that the  
7 project not result in further depletion of cold-water  
8 supplies at Shasta or Trinity beyond what would have  
9 occurred in the absence of approval.

10           As far as the Trinity River goes, I have an  
11 Exhibit 3F that shows that it's likely that temperature  
12 objectives there will be met in 2009. Although, it's  
13 questionable whether they'll be able to provide auxiliary  
14 bypass releases. The Trinity River is a separate  
15 watershed. And I quote in here from my Exhibit 3N, a  
16 letter from the Department of Fish and Game, that quotes  
17 that a single-source of supply from the 2 basins requires  
18 needs for beneficial uses in the basin of origin to be met  
19 first. Then needs can be supplied to the other basin. My  
20 inference is that the water in the Trinity River would be  
21 a priority for Trinity River fish before Sacramento River  
22 fish.

23           That letter and other information has indicated  
24 that, in the past, the State Board had promised a Trinity  
25 River Water Right Order in Water Quality Order 8918 20



1 years ago. And there has not been one to this date. So  
2 even though Trinity River temperatures look like they may  
3 be met this year, according to my testimony on page 8, the  
4 existing protections for the Trinity River contained in  
5 Water Right Order 9005 only include Trinity exports to the  
6 Sacramento River for the purpose of temperature control.  
7 They do not include any other project purpose.

8           Also, the basin plan temperature objective for  
9 the Trinity River of 60 degrees from July 1st to September  
10 14th has never been implemented in a Water Right Order.

11           So what I'm saying is that the Trinity River is  
12 vulnerable. And if you're going to approve a petition, it  
13 would be a good idea to firm up the protections for the  
14 Trinity River before you might commit any other water.

15           So another recommendation would be that any  
16 approval of the project not result in any further  
17 depletion of cold water supplies in Trinity reservoir  
18 beyond what would have occurred in the absence of  
19 approval. And a Trinity Water Right specific -- and a  
20 Trinity-specific water-right hearing should be scheduled  
21 as promised 20 years ago.

22           As I was looking into the issues here, I wasn't  
23 aware of this, but it turns out there may be a potential  
24 for another large fish kill on the Lower Klamath River  
25 this year, similar to what we had in 2002. As I

1 identified in my testimony on page 11 and pulled out of  
2 Exhibit 3I, which was a letter by Doug Schleusner, who was  
3 the former executive director of the Trinity River  
4 Restoration Program.

5           In 2003, the restoration program developed 3  
6 criteria that would trigger a proposed late summer/fall  
7 flow release on the -- from Trinity Reservoir to the Lower  
8 Klamath River which it feeds into, in order to protect  
9 spawning Trinity fish from being killed in another similar  
10 episode.

11           And the 3 triggers were run size, larger than  
12 110,000 fish, as shown in one of my exhibits. The run  
13 projected this year is 130,000 fish at the mouth of the  
14 Klamath and Trinity River. Discharge would be less  
15 than 3,000 cfs at Terwer, which is on the Lower Klamath  
16 River. And this year the Trinity is a dry year and the  
17 Klamath is a below average year, I believe, is what I said  
18 in here.

19           Let's see. Below normal year. So Trinity is  
20 dry. Klamath is below normal. The run is a little larger  
21 than the average mentioned in that item. And, of course,  
22 cold-water storage is substantially lower than it was in  
23 2003, 2002 or 2004.

24           So there are these 3 triggers, run size, river  
25 discharge, water temperature. I do believe there is a

1 potential for it to occur this year. We don't know that  
2 it would happen for sure. But my recommendation to you  
3 would be a condition that, again, the project not deplete  
4 cold water in Trinity anymore than it is, and that you  
5 order Reclamation to reserve up to 36,000 acre feet, in  
6 the event that conditions to meet the Trinity River  
7 restoration program's 3 triggers for late summer/fall  
8 release would be necessary. Hopefully, it would not be  
9 necessary, but I believe that it would be prudent to do  
10 so. And again, this relates to the petition, if it were  
11 to further deplete cold-water storage in Trinity.

12           The final part of my testimony is that as Mr.  
13 Stroshane discussed a lot of the water under this petition  
14 that would be subject to these various transfers would go  
15 to agricultural service contractors in the western San  
16 Joaquin Valley who are contractors under the junior water  
17 rights of the Bureau of Reclamation and the Department of  
18 Water Resources.

19           On page 13 I have a nice quote from the Board in  
20 D-1641, where you found that the CVP was the principal  
21 cause of salinity exceeding the objectives at Vernalis.  
22 There's been a lot of discussion today about would this  
23 project create more drainage water. And I'm not going to  
24 tell you how much more drainage water it would create.  
25 But I did introduce into evidence Exhibit 3P, which is an

1 excerpt from the Broadview Water contract assignment  
2 environmental assessment that the Bureau of Reclamation  
3 did. And they estimated that by stopping irrigation of  
4 9,200 acres, that would result in a reduction of 1,500  
5 pounds of selenium, 17,000 tons of salt, and 52,000 pounds  
6 of boron, loading to the Grasslands Bypass Project.

7 That's not to say that those exact numbers would  
8 apply in this case. It would depend on irrigation rates,  
9 soils, the location of the project. And it may not even  
10 go into the San Joaquin River if it were somewhere such as  
11 Westlands, the drainage water may go into the deeper  
12 aquifers or perhaps just the semi-confined aquifer.

13 But it can be concluded that it would increase,  
14 by an undisclosed amount, additional contaminated drainage  
15 water. Since the San Joaquin River is already listed as a  
16 303(d) waterbody for boron, selenium and electrical  
17 conductivity, you might want to think twice before  
18 approving an action that would increase those constituents  
19 going into the San Joaquin River or its aquifers.

20 I introduced some other evidence. It was one  
21 page out of a National Economic Development Analysis for  
22 the Bureau of Reclamation San Luis Drainage; EIS; and  
23 basically I took some -- I put some other numbers on there  
24 because I multiplied the annual numbers by 50. But  
25 basically the preferred alternative that would retire

1 200,000 acres would have a negative cost-benefit ratio of  
2 \$780 million over a 50-year life of the project.

3           Whereas the alternative with the greatest amount  
4 of land retirement, which would retire roughly 300,000  
5 acres had a positive cost benefit of \$182 million over a  
6 50-year life of the project. I quote information from the  
7 U.S. Geological Survey, which indicates land retirement is  
8 a key strategy.

9           Again, what this petition would do would be to  
10 reward people who planted permanent crops and drainage  
11 impaired lands with a hundred percent uninterrupted  
12 water supply. CWIN does not believe that's good water  
13 policy for the state.

14           And I also included a feasibility report for the  
15 San Luis Drainage Feature Reevaluation. And basically it  
16 said to implement the action alternative that was chosen,  
17 it would require significant increases in subsidies for  
18 the San Luis unit contractors.

19           And a couple other items. Just to note that the  
20 USGS did a report, Professional Paper 1646, which is  
21 Exhibit 3U. And they estimated that if you finish the San  
22 Luis Drain, stop putting selenium in the aquifer, but dump  
23 43 and a half thousand pounds a year into the Bay-Delta  
24 with the completed San Luis Drain, it would still take 63  
25 to 304 years to drain the accumulated selenium out of the

1 aquifers of the western San Joaquin valley.

2           So there's a huge salt imbalance. Exhibit 3X  
3 shows that. Again, we believe the petition to deliver  
4 more water to any of these lands could increase salt  
5 loading in the river, San Joaquin River.

6           And finally, the Pacific Institute did do a  
7 report on agricultural water conservation, Exhibit 3V.  
8 And they estimated that if you retired about a million --  
9 I say 1.3 in here. I looked at again, I believe it was  
10 1.5 million acres. No, this is correct what they had.  
11 1.3 million acres of drainage problem lands would result  
12 in water savings of about 3.9 million acre feet while also  
13 reducing clean-up costs.

14           So we also recommend that you eliminate drainage  
15 problem areas from receiving water transfers in order to  
16 minimize salt, selenium and boron discharged to the San  
17 Joaquin River, its tributaries and aquifers.

18           And that is the end of my summary of my  
19 testimony.

20           Thank you.

21           CO-HEARING OFFICER BAGGETT: Does DWR, Bureau?

22           No.

23           Mr. Rubin, and with the understanding that, you  
24 know, the previous ruling stands in terms of relevancy.

25           MR. RUBIN: Yeah. Unfortunately, I'm faced with

1 the circumstance where I'm not sure how much weight you  
2 might be giving any of this testimony, so I have to --

3 CO-HEARING OFFICER BAGGETT: I was waiting for  
4 the objections, but...

5 MR. RUBIN: They're on the record. And that's  
6 why I -- rather than disrupt the proceeding --

7 CO-HEARING OFFICER BAGGETT: The relevancy  
8 objections.

9 But continue.

10 MR. RUBIN: Well, if I need to reiterate my  
11 objections, I can, but --

12 CO-HEARING OFFICER BAGGETT: No.

13 CROSS EXAMINATION

14 OF MR. TIM STROSHANE

15 BY MR. JON RUBIN, ESQ., counsel representing the San Luis  
16 & Delta-Mendota Water Authority, Santa Clara Valley Water  
17 District, and Westlands Water District as follows:

18 MR. RUBIN: Mr. Stroshane, I have some questions  
19 for you, first.

20 Am I correct to state that you believe  
21 California's experience -- is not experiencing a drought?

22 MR. STROSHANE: Yes, we are experiencing dry  
23 conditions.

24 MR. RUBIN: And you base that on 4 factors; is  
25 that correct?

1 MR. STROSHANE: Yes.

2 MR. RUBIN: And those 4 factors are presented in  
3 your written testimony on page 1, 2 and 3 and include  
4 precipitation, snowpack, runoff, reservoir storage; is  
5 that correct?

6 MR. STROSHANE: Yes.

7 MR. RUBIN: I'm sorry?

8 MR. STROSHANE: Yes.

9 MR. RUBIN: You do not base our belief on the  
10 current allocation of -- to Central Valley Project water  
11 service contractors that are located south of the Delta?

12 MR. STROSHANE: That's correct.

13 MR. RUBIN: Do you believe that the State Water  
14 Resources -- if the State Water Resources Control Board  
15 were to grant the petition, there would be an unreasonable  
16 effect to water quality?

17 MR. STROSHANE: Given testimony today from the  
18 Department of Water Resources and the State Water -- and  
19 the U.S. Bureau of Reclamation, I don't think we can  
20 really know.

21 MR. RUBIN: But in your testimony on page 9, I  
22 believe that you conclude that the -- if -- excuse me, I  
23 believe that you conclude that if the State Water  
24 Resources Control Board were to approve the petition,  
25 there would be an unreasonable effect on water quality.



1 MR. STROSHANE: That is my testimony.

2 MR. RUBIN: You also believe that there would be  
3 an unreasonable effect on fish and wildlife.

4 MR. STROSHANE: Yes.

5 MR. RUBIN: Is it my understanding that you  
6 maintain those beliefs because the petition is proposed at  
7 times when the population of Delta smelt and anadromous  
8 fish are near extinction?

9 MR. STROSHANE: Yes.

10 MR. RUBIN: And specifically, your concern with  
11 the movement of water through and south of the Delta?

12 MR. STROSHANE: Could you restate the question?

13 MR. RUBIN: And specifically, are you concerned  
14 with the movement of water through and south of the Delta?

15 MR. STROSHANE: Yes.

16 MR. RUBIN: And you also believe -- excuse me,  
17 let me restate that.

18 You also maintain your belief that the petition  
19 will unreasonably affect water quality, fish and wildlife,  
20 because it may deplete groundwater levels in the  
21 Sacramento valley?

22 MR. STROSHANE: Because of the connectivity  
23 between groundwater levels and stream flows.

24 MR. RUBIN: Were you present this morning when  
25 the United States Bureau of Reclamation testified?

1 MR. STROSHANE: Yes.

2 MR. RUBIN: And were you present this morning  
3 when the California Department of Water Resources  
4 testified?

5 MR. STROSHANE: Yes.

6 MR. RUBIN: Do you disagree with the testimony  
7 provided by the United States Bureau of Reclamation and  
8 the Department of Water Resources, that the transfers,  
9 exchanges -- excuse me, strike that.

10 Do you disagree with the testimony of the  
11 Department of Water Resources and the Bureau of  
12 Reclamation that the granting of the petition that's the  
13 subject of this proceeding will not affect the amount of  
14 water that's conveyed through and south of the Delta?

15 MR. STROSHANE: I neither agree nor disagrees,  
16 because the testimony I heard this morning also indicated  
17 that they didn't know for sure what exactly the total  
18 amount of water would be available through the drought  
19 water bank and so on and so forth. There was a lot of  
20 uncertainty left.

21 MR. RUBIN: Did you read the petition that the  
22 United States Bureau of Reclamation and the Department of  
23 Water Resources put out?

24 MR. STROSHANE: Yes, sir, I did.

25 MR. RUBIN: Are you aware of specific transfers

1 and exchanges that are described in that petition?

2 MR. STROSHANE: Yes, I am.

3 MR. RUBIN: And are you aware of the drought  
4 water bank that's also described in the petition?

5 MR. STROSHANE: Yes, I am, sir. I contributed to  
6 the comments that were made on the environmental review  
7 documents, such as they were, back in March.

8 MR. RUBIN: I believe that the testimony this  
9 morning by the Bureau of Reclamation, Department of Water  
10 Resources indicated that the drought water bank and the  
11 exchanges and transfers that are described -- let me  
12 rephrase that question.

13 Let me ask you specifically. Do you believe that  
14 the granting of this petition that's before the Board for  
15 the drought water bank for the transfers and exchanges  
16 that are described specifically will affect the amount of  
17 water that's moved through and south of the Delta?

18 MR. STROSHANE: I do believe that it could. And  
19 again, as I said before, I neither disagree nor agree with  
20 what I heard this morning, because everything is still  
21 quite uncertain, even at this late date.

22 MR. RUBIN: Is it your understanding that demands  
23 for water within the San Joaquin valley will go unmet this  
24 year?

25 MR. STROSHANE: Say that again, sir?

1           MR. RUBIN: Is it your understanding that demands  
2 for water within the San Joaquin valley will go unmet this  
3 year?

4           MR. STROSHANE: It's my understanding that  
5 requests for water from the San Joaquin valley will go  
6 unmet, yes.

7           MR. RUBIN: Is it your belief that unmet water  
8 demands can be met through conservation?

9           MR. STROSHANE: In specific circumstances, sure  
10 it can be.

11           MR. RUBIN: Well, I ask you to turn to page 11 of  
12 your written testimony. And specifically about halfway  
13 through the page on page 11, you indicate that while the  
14 beneficiaries of the 2009 drought water bank and other  
15 projects within the petition include urban water  
16 contractors with either the SWP or CVP, their needs can  
17 readily be met through more aggressive water conservation.  
18 Is that correct?

19           MR. STROSHANE: Yes. That's as I stated it.

20           MR. RUBIN: And therefore --

21           MR. STROSHANE: You did leave out the phrase,  
22 "within the framework of existing supplies."

23           MR. RUBIN: So it's your understanding with the  
24 existing supplies, aggressive water conservation can meet  
25 the needs of those that might be beneficiaries of the

1 drought water bank or the transfers or exchanges that are  
2 described in the petition?

3 MR. STROSHANE: That was a very long question,  
4 could you restate it, please.

5 MR. RUBIN: Can I ask the reporter to do so.

6 (Thereupon the court reporter read back  
7 the record.)

8 MR. STROSHANE: I'm sorry, since you had trouble  
9 could you repeat it?

10 MR. RUBIN: I'll restate my question. My  
11 question -- and again, I'm not trying to play any games  
12 here. I'm just trying to understand your statement.

13 MR. STROSHANE: And I'm trying to understand your  
14 question.

15 MR. RUBIN: If I understand your statement, what  
16 you say here in your written testimony on page 11, is that  
17 with more aggressive water conservation and the existing  
18 supplies, the beneficiaries of the 2009 drought water bank  
19 and other projects within the petition can have their  
20 needs met?

21 MR. STROSHANE: This is -- yes. And another way  
22 of stating this is that -- it's been stated in other ways  
23 today by other testifiers that with more effective  
24 planning for droughts and related dry conditions, that  
25 there are a number of strategies that have been pointed

1 out in a variety places, where within existing supplies,  
2 the needs of all -- perhaps, all of California's  
3 agricultural customers, as well as urban customers, could  
4 be met.

5 MR. RUBIN: And again, I'm trying to understand  
6 your testimony today. Are you saying on page 11 that in  
7 2009, those that are in need of additional water, can have  
8 those needs met with the existing supply and through  
9 conservation?

10 MR. STROSHANE: Yes, that's my opinion.

11 MR. RUBIN: Okay. And how much unmet needs are  
12 there for M&I water, Municipal Industry water, that are  
13 currently going unmet?

14 MR. STROSHANE: I'm not familiar with the exact  
15 allocation for this year. I know it's low for the San  
16 Joaquin valley.

17 MR. RUBIN: Well, let's just focus on urban water  
18 users. You're saying -- you recognize there's currently  
19 an unmet need, correct?

20 MR. STROSHANE: Um-hmm.

21 MR. RUBIN: You have to answer yes or no.

22 MR. STROSHANE: Oh, I'm sorry. Yes.

23 MR. RUBIN: And how much is that unmet need?

24 MR. STROSHANE: I don't know for certain.

25 MR. RUBIN: Therefore, how can you conclude that

1 conservation can meet that unmet demand?

2 MR. STROSHANE: I am relying on the research and  
3 work of others.

4 MR. RUBIN: And who's concluded that?

5 MR. STROSHANE: The Pacific Institute, other  
6 organizations --

7 MR. RUBIN: Is there a specific document that the  
8 Pacific Institute prepared that says in 2009, the unmet  
9 demands can be met through conservation?

10 MR. STROSHANE: They didn't refer specifically to  
11 2009, but their work called More with Less does urge a  
12 variety of agricultural conservation measures that could  
13 save quite a bit of water.

14 MR. RUBIN: Let's talk about that because you  
15 made a transition in your response from my questions that  
16 focused on municipal and industrial to agricultural water  
17 users, and specifically agricultural water users in the  
18 San Joaquin Valley.

19 So it's your understanding that there's currently  
20 unmet demand within the San Joaquin valley for  
21 agricultural purposes?

22 MR. STROSHANE: Yes.

23 MR. RUBIN: And what is the quantity of unmet  
24 demand?

25 MR. STROSHANE: The unmet requests I'm not sure

1 of. I'm aware that there have been numerous news reports  
2 and considerable testimony before Congress as well as this  
3 body, that there are needs there and that the Department  
4 of Water Resources included some estimate of that need in  
5 their report to the Governor.

6 MR. RUBIN: Now, putting aside the fact that you  
7 don't know a number, in terms of the unmet need or demand,  
8 do you still believe that water conservation can be  
9 implemented to satisfy the unmet need or demand in 2009?

10 MR. STROSHANE: No. I don't -- I'm not saying  
11 that at this time.

12 MR. RUBIN: Do you think water conservation is a  
13 tool that should be used in the San Joaquin valley?

14 MR. STROSHANE: Certainly. And I'm aware that it  
15 already is.

16 MR. RUBIN: Okay. And what level of irrigation  
17 efficiency exists within the San Joaquin valley?

18 MR. STROSHANE: I don't know the level. I know  
19 some of the techniques that are used.

20 MR. RUBIN: And what are some of those  
21 techniques?

22 MR. STROSHANE: Well, they use extensive drip  
23 irrigation, particularly in the Panoche Water District. I  
24 was on a field trip there earlier this year and saw  
25 numerous orchards utilizing that technology.



1           MR. RUBIN:  Would it surprise you to learn that  
2 the farmers within the San Joaquin valley have one of the  
3 highest seasonal application efficiency rates in the  
4 nation?

5           MR. STROSHANE:  No.

6           MR. RUBIN:  Now, I believe in your testimony you  
7 indicate that the San Joaquin River is an impaired body?

8           MR. STROSHANE:  Yes.

9           MR. RUBIN:  And you also believe that the western  
10 San Joaquin valley contributes much of the salts that make  
11 the San Joaquin River AN impaired water body?

12           MR. STROSHANE:  Yes.  My reference, I believe,  
13 was to an exhibit that I included, that was also in a  
14 report by the Department of Water Resources in an  
15 appendix.  The Department of Water Resources submitted a  
16 report to, I believe, the Legislature, I'm not positive of  
17 that.  But there was a map in there -- I can -- it was  
18 exhibit --

19           MR. RUBIN:  Is it Exhibit 1J to your written  
20 testimony?

21           MR. STROSHANE:  The excerpt from DWR's compliance  
22 report on D-1641.  Yes, sir.

23           MR. RUBIN:  And so you base your statement that  
24 much of the salts that make the San Joaquin River an  
25 impaired water body based upon Exhibit 1J?

1           MR. STROSHANE: Yes, but there are other sources  
2 of information that I'm aware of. I believe this was  
3 also -- well, I'll just say I'm aware that there were  
4 other sources of information?

5           MR. RUBIN: What other sources do you rely upon  
6 to support statement or your belief

7           MR. STROSHANE: I chose to use this D-1641  
8 compliance report.

9           MR. RUBIN: Is it your belief that in 2009, much  
10 of the salts that make the San Joaquin River an impaired  
11 water body will come from the western San Joaquin valley?

12          MR. STROSHANE: I have no knowledge of such a  
13 thing, because I have no idea - and I don't think anybody  
14 here knows - how much water will actually be allocated,  
15 whether through direct allocation or through transfers, if  
16 this petition is approved.

17          MR. RUBIN: Turning to --

18          CO-HEARING OFFICER BAGGETT: Mr. Rubin, let's do  
19 a time check.

20          We can go off the record for a second.

21          (Thereupon a discussion occurred off the record.)

22          MR. RUBIN: Mr. Stroshane, getting back to  
23 Exhibit 1J -- CWIN Exhibit 1J, you said that that was a  
24 document that the Department of Water Resources prepared;  
25 is that correct?

1 MR. STROSHANE: That's correct.

2 MR. RUBIN: And when did the Department of Water  
3 Resources prepare this document?

4 MR. STROSHANE: I don't remember the exact date.  
5 It was prepared in response to a legislative directive,  
6 but I don't remember the year, sir.

7 MR. RUBIN: It relates to D-1641, is that  
8 correct?

9 MR. STROSHANE: That's correct.

10 MR. RUBIN: And what year was D-1641 issued?

11 MR. STROSHANE: It was issued in 2000. The final  
12 version was issued in 2000.

13 MR. RUBIN: And I assume you're relying  
14 specifically on Table C-3 to support your position; is  
15 that correct?

16 MR. STROSHANE: Yes. As well as, the map, Figure  
17 C-4 on page 39, which is the second page of that exhibit.

18 MR. RUBIN: And do you know what data were used  
19 to develop tables C-3 and C-4 on CWIN Exhibit 1J.

20 MR. STROSHANE: No, sir. I placed my faith and  
21 trust in the Department of Water Resources that this was  
22 valid information on their part.

23 MR. RUBIN: Well, and I -- okay. You don't know  
24 if the data reflects any actions, investments that have  
25 been made to address salinity discharge the west side of

1 the San Joaquin valley since D-1641 was issued, do you?

2 MR. STROSHANE: The map is -- it includes the  
3 Grassland area -- on my version it's the lower -- I guess,  
4 it's the southwestern portion, section -- Area 7 of this  
5 map. As you're aware, the Grasslands Bypass Project has  
6 done much to divert selenium tainted -- saline-tainted  
7 drainage water around the Grasslands area. And those  
8 waters are treated and concentrated within the Grasslands  
9 drainage area.

10 MR. RUBIN: I appreciate your answer. But my --  
11 I think It didn't respond to the question I asked of you.  
12 And the question that I asked of you is, you don't know  
13 whether the data that's presented in Table C-3 and C-4 of  
14 CWIN Exhibit 1J, reflects current investment programs that  
15 may affect the amount of salt that's discharged through  
16 subsurface drainage water from the San Joaquin River?

17 MR. STROSHANE: No, I cannot be certain.

18 MR. RUBIN: Thank you.

19 Now, if I understand your testimony here today,  
20 you disagree with researchers from the University of  
21 California, Davis, who concluded that the impacts from  
22 water shortages this year will reach up to 1.15 billion  
23 dollars; is that correct?

24 MR. STROSHANE: That's correct.

25 MR. RUBIN: And the basis for your disagreement

1 is primarily a report that the Department of Water  
2 Resources prepared?

3 MR. STROSHANE: That's correct. And they did  
4 that revision of their analysis, I believe, in concert  
5 with the UC Davis researchers.

6 MR. RUBIN: Well, if I understand it correctly,  
7 the DWR report that you base your disagreement with the  
8 research from UC Davis has been marked as Exhibit CWIN 1A;  
9 is that correct?

10 MR. STROSHANE: That's correct.

11 MR. RUBIN: I believe that the basis for your  
12 decision -- disagreement with the research from the UC  
13 Davis staff is based upon -- strike that, let me make sure  
14 the record is clear.

15 You base your disagreement with the UC Davis  
16 researchers based upon information presented on page 17 of  
17 Exhibit CWIN-1A; is that correct?

18 MR. JACKSON: Yes, I'm going to object to the  
19 form of this question, on the grounds that you base your  
20 disagreement with. In fact, it states facts not in  
21 evidence. In fact, the use UC Davis investigators have  
22 changed their opinion based on later data, so it misstates  
23 the facts.

24 MR. RUBIN: Mr. Jackson is trying to testify  
25 here, I guess. I asked questions, the witness answered

1 them. And I'm using his answers to follow through. I  
2 mean, I asked specifically whether the witness disagrees  
3 with the research.

4 CO-HEARING OFFICER BAGGETT: Continue.

5 MR. RUBIN: He said he did. I asked him why. He  
6 said the report. Now, I'm asking him if the section in  
7 the report, page 17, is the reason he developed that  
8 disagreement.

9 CO-HEARING OFFICER BAGGETT: Continue.

10 MR. STROSHANE: Are you referring to the revenue  
11 loss part?

12 MR. RUBIN: Well, my question to you --

13 MR. STROSHANE: The section of the report, sir,  
14 that starts on page 17 and continues after jumping over a  
15 map on page 18 reflects significant reductions in the  
16 economic effects that were originally reported in January  
17 by the UC Davis researchers. So I wanted to make -- I  
18 wanted to include that information in my testimony so that  
19 the State Water Board would be aware of it.

20 MR. RUBIN: And again, that is the basis for your  
21 disagreement with the work that the UC Davis researchers  
22 did?

23 MR. STROSHANE: Yes, sir. I placed my faith and  
24 trust in this document.

25 MR. RUBIN: Now, I ask that you turn to page 19.

1 If I read this section correctly, there's a number of  
2 losses that are not reflected in CWIN Exhibit 1A, correct?

3 MR. STROSHANE: You're on page 19, sir?

4 MR. RUBIN: That's correct.

5 MR. STROSHANE: Just a moment.

6 Yes, go ahead.

7 MR. RUBIN: I asked you a question regarding the  
8 information in CWIN Exhibit 1A. The question was that  
9 there are a number of losses that are expected that are  
10 not incorporated into the specific dollar amounts that are  
11 identified; is that correct?

12 MR. STROSHANE: You're referring to the  
13 groundwater pumping costs?

14 MR. RUBIN: Well, let me go through this. If I  
15 read the report correctly on page 19, after the report  
16 identifies a specific dollar amount losses that may result  
17 from the water shortage this year, it identifies a number  
18 of impacts that are excluded from those losses, correct?

19 MR. STROSHANE: I'm sorry. Restate your question  
20 once more.

21 I'm sorry.

22 MR. RUBIN: Let's walk through this a little bit.  
23 Maybe I'm a bit tired this afternoon.

24 If I understand CWIN Exhibit 1A, on page 17, the  
25 report identifies economic impacts of the drought in 2009.

1 And those economic -- is that correct?

2 MR. STROSHANE: Yes.

3 MR. RUBIN: And those economic impacts are  
4 initially identified as dollar losses correct?

5 MR. STROSHANE: Yes. They come in the form of  
6 revenue loss on page 17. There's mention of income loss.  
7 Associated total employment loss, which is another way of  
8 stating unemployment, and groundwater pumping cost  
9 increases.

10 MR. RUBIN: After they go through all of those  
11 losses and provide a dollar -- a projected or estimated  
12 dollar amount from the losses, there's a narrative,  
13 correct?

14 MR. STROSHANE: Um-hmm.

15 MR. RUBIN: And in that narrative they identify  
16 additional impacts that are excluded from the analysis  
17 above, correct?

18 MR. STROSHANE: Correct.

19 MR. RUBIN: Now, turning back to the work that  
20 the UC Davis researchers performed. Do you know if their  
21 estimate of impacts included those excluded by the  
22 Department of Water Resources in Exhibit CWIN-1A?

23 MR. STROSHANE: You're referring to the final  
24 exhibited in my testimony?

25 MR. RUBIN: I'm referring to the work that the UC



1 Davis researchers conducted.

2 MR. STROSHANE: Okay. So this item? This  
3 exhibit? I have it as my 18th exhibit, but I don't know  
4 what the letter is for that.

5 MR. STROSHANE: CWIN-1R.

6 MR. RUBIN: Restate my question.

7 MR. STROSHANE: Yes, please. We were finding it  
8 and I lost it.

9 MR. RUBIN: Let's make sure the record is clear.  
10 Because on page 14 of your written testimony is where you  
11 discuss the work that the UC Davis researchers performed.  
12 I didn't see anything on page 14 or 15 that referred to  
13 1R, but maybe it's referred incorrectly as Exhibit 17, at  
14 the bottom of page 14?

15 MR. STROSHANE: That refers to material from the  
16 California Statistical Abstract, which would be CWIN-1Q.

17 MR. RUBIN: Well, let's make sure the record is  
18 clear. Again, there's research that UC Davis performed,  
19 correct?

20 MR. STROSHANE: Yes.

21 MR. RUBIN: Is there an exhibit that's attached  
22 to your written testimony that reflects that research?

23 MR. STROSHANE: Yes, it's CWIN-1R.

24 MR. RUBIN: Okay. So getting back to my question  
25 previously.

1           Do you know if the estimate of economic impacts  
2 rendered by the UC Davis researchers excluded those  
3 impacts that were also excluded by the Department of Water  
4 Resources in Exhibit CWIN-1A.

5           MR. STROSHANE: I do not know for sure, because I  
6 have not seen beyond the newsletter form of the report  
7 that was provided by the UC Davis researchers from -- that  
8 I directly requested the research. I was hoping for a  
9 study from them. I requested it. I was sent this  
10 newsletter. That's all I've seen.

11          MR. RUBIN: Thank you.

12          MR. STROSHANE: So I couldn't tell from what I  
13 was given.

14          MR. RUBIN: I have not further questions for this  
15 witness and presume we're going to break. And I can  
16 commence tomorrow for questions for Mr. Stokely.

17          CO-HEARING OFFICER HOPPIN: Well, you've got your  
18 teeth all sharpened up here this afternoon. Ms. Jackson,  
19 would you like to submit your second witness today and  
20 then we'll continue to tomorrow?

21          MS. JACKSON: Yes, please.

22          CO-HEARING OFFICER HOPPIN: Would everyone like  
23 to defer to Mr. Rubin or is there someone else that would  
24 like to cross Mr. Stokely?

25          Seeing none.

1 MR. RUBIN: I don't have very many questions, so  
2 this should work well in terms of timing.

3 CROSS EXAMINATION

4 OF MR. TOM STOKELY

5 BY MR. JON RUBIN, ESQ., counsel representing the San Luis  
6 & Delta-Mendota Water Authority, Santa Clara Valley Water  
7 District, and Westlands Water District as follows:

8 Now, Mr. Stokely, good afternoon almost evening.

9 After reading your testimony, am I correct to  
10 state that you believe granting the petition will cause an  
11 increase in drainage water containing selenium, salt and  
12 boron?

13 MR. STOKELY: Any application of water to  
14 drainage problem lands will create a certain amount -- a  
15 certain volume of drainage water that contains the  
16 constituents in the soil --

17 MR. RUBIN: But turning to page 13 of your  
18 written testimony.

19 MR. STOKELY: Yes.

20 MR. RUBIN: The last complete paragraph on page  
21 13 states that, "...it can be concluded that water  
22 transferred under the subject petition would increase by  
23 undisclosed amount, contaminated drainage water created by  
24 the western San Joaquin valley's drainage problem lands",  
25 correct?

1 MR. STOKELY: Yeah. I should point out that it  
2 could be concluded that water transferred to drainage  
3 problem lands not any lands.

4 MR. RUBIN: And you believe the drainage water  
5 will contain selenium, salt and boron, correct?

6 MR. STOKELY: Yes.

7 MR. RUBIN: And you base that belief, if I  
8 understand it correctly, on the information presented in a  
9 report, which was marked as Exhibit CWIN-3P.

10 MR. STOKELY: Let me double check and make sure  
11 that's correct.

12 Yes.

13 MR. RUBIN: As I read your testimony, I didn't  
14 see any other documents that you refer to or referenced to  
15 support the beliefs that we've just talked about, is that  
16 correct?

17 MR. STOKELY: That's correct.

18 MR. RUBIN: Now, if I understand Exhibit 3P, CWIN  
19 Exhibit 3P correctly, it's a draft Environmental  
20 Assessment for a contract assignment?

21 MR. STOKELY: Yes.

22 MR. RUBIN: And the draft Environmental  
23 Assessment was prepared in 2004?

24 MR. STOKELY: I don't recall offhand. I guess,  
25 yes, there it is, 2004.

1 MR. RUBIN: And specifically April 2004?

2 MR. STOKELY: Yes.

3 MR. RUBIN: And so if I'm doing my math  
4 correctly, the draft report that you relied upon for your  
5 statements is 5 years old?

6 MR. STOKELY: Yes.

7 MR. RUBIN: And the report deals again with a  
8 contract assignment, and assignment of a water service  
9 contract?

10 MR. STOKELY: Yes.

11 MR. RUBIN: The report does not address the  
12 petitions that are now before the State Water Resources  
13 Control Board?

14 MR. STOKELY: That is correct, yes.

15 MR. RUBIN: Now, Mr. Stokely, it's your position  
16 that some of the drainage water that you think will be  
17 produced if the petition is granted will reach the San  
18 Joaquin River?

19 MR. STOKELY: It depends on where the water is  
20 applied. It may not go into the San Joaquin River. It  
21 may go into a shallow or deep aquifer.

22 MR. RUBIN: Okay. So when I read this last  
23 paragraph -- last complete paragraph on page 13, you did  
24 not intend the reader to make an assumption when they read  
25 the first sentence with the second sentence? An

1 assumption being that some of the drainage water would be  
2 discharged into the San Joaquin River and therefore could  
3 be a significant undisclosed impact?

4 MR. STOKELY: It could be. We don't know that it  
5 is.

6 MR. RUBIN: That's my point. You don't know if  
7 there would be any discharges -- increased discharges to  
8 the San Joaquin River?

9 MR. STOKELY: That's correct, because there's  
10 been no analysis of that in this petition.

11 MR. RUBIN: And you didn't perform any analysis?

12 MR. STOKELY: No, I did not.

13 But I think the State Board ought to know before  
14 they approve it.

15 MR. RUBIN: If I understand your testimony, it's  
16 based primarily upon an inference, isn't that what you  
17 indicate in the second paragraph on page 13?

18 MR. STOKELY: Yes.

19 MR. RUBIN: Now, Mr. Stokely, I have one other  
20 question for you. If I understood your testimony here  
21 today, oral testimony and maybe part of your written  
22 testimony, but CWIN opposes the petition for public  
23 interest reasons. And one of those public interest  
24 reasons is it would reward farmers who planted permanent  
25 crops on drainage-impaired lands; is that correct?

1 MR. STOKELY: Yes.

2 MR. RUBIN: And how many permanent crops have  
3 been planted on drainage-impaired lands in the last 5  
4 years?

5 MR. STOKELY: I don't have the specific  
6 information. But I know as I've driven up and down I-5  
7 I've seen new orchards go in over the last 10 years.

8 MR. RUBIN: And what do you base a conclusion  
9 that those orchards are on lands that are drainage  
10 impaired?

11 MR. STOKELY: Because I'm familiar with the maps  
12 in the Rainbow Report of drainage problem areas in the  
13 western San Joaquin valley. And basically that goes from  
14 pretty much the northern end of the San Joaquin valley  
15 down to the southern end of the Tulare basin. They have  
16 different characteristics, but all those lands have some  
17 sort of drainage problem, some worse than others.

18 MR. RUBIN: Do you recall the scale of the maps  
19 that you are recalling that were the Rainbow Report?

20 MR. STOKELY: Yes.

21 MR. RUBIN: And just to give a sense to me,  
22 because I don't recall the maps.

23 MR. STOKELY: It would be similar to this map  
24 here, our Exhibit X, where it shows the San Joaquin valley  
25 and all the boxcar loads of salt being brought into the

1 basin through irrigation. It's approximately that scale.

2 MR. RUBIN: And the map that you're referring to  
3 Exhibit 1 -- CWIN Exhibit 1X, which has --

4 MR. STOKELY: 3X.

5 MR. RUBIN: Excuse me, 3X, which has a depiction  
6 of -- is that central California?

7 MR. STOKELY: Yeah, central California basically  
8 from the bay area down to the southern end of Kern and  
9 Tulare.

10 MR. RUBIN: And so, Mr. Stokely, based upon your  
11 testimony today, you would be surprised to learn that  
12 there has been no permanent crops planted on  
13 drainage-impaired lands within Westlands?

14 MR. STOKELY: I would be surprised if there were  
15 no permanent crops planted on drainage problem lands, not  
16 necessarily drainage-impaired lands. There is a  
17 difference in my mind.

18 MR. RUBIN: Thank you. I have no further  
19 questions.

20 CO-HEARING OFFICER HOPPIN: Thank you. Do you  
21 have a redirect?

22 MS. JACKSON: No thank you?

23 CO-HEARING OFFICER HOPPIN: Recross?

24 Okay. Pardon my legal faux pas there.

25 We will -- Mr. Baggett mentioned that we would



1 get together at 9 o'clock tomorrow morning. Is there  
2 anyone that would be inconvenienced by getting together at  
3 8:30 tomorrow morning?

4 MR. JACKSON: 8:30 would be better. I'm do in  
5 court in Yuba county at 11:30.

6 CO-HEARING OFFICER HOPPIN: So we have an end  
7 game.

8 MR. RUBIN: Are we on the record or off?

9 CO-HEARING OFFICER HOPPIN: We're off the record.

10 (Thereupon a discussion occurred off the record.)

11 CO-HEARING OFFICER HOPPIN: We're back on the  
12 record.

13 Just be thankful you don't have to deal with me  
14 all day on this or we'd be here for a week.

15 MS. JACKSON: CWIN would, at this time, like to  
16 submit Exhibits 1, 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 1J,  
17 1K -- I shouldn't have started this way. Sorry. 1M, 1N,  
18 through the end of the Exhibits at 3 -- 4.

19 CO-HEARING OFFICER HOPPIN: Any objections?

20 MR. RUBIN: Well, I would just want to reiterate  
21 my objections and highlight the problem that we're facing  
22 right now with the ruling by the Hearing Officers.

23 As an example, one of the exhibits, which has  
24 been marked as Exhibit 3F, it's apparently notes that have  
25 been taken by somebody of a conversation with Paul

1 Fujitani, arguably. It's hearsay. We have no way of  
2 testing the truth. It was testified as truth. And I  
3 understand the liberal rules that the Board has, but it  
4 highlights how difficult it is for us before the Board to  
5 deal with these types of exhibits and it highlights the  
6 basis for my objection.

7 MS. JACKSON: Mr. Stokely did testify to that  
8 today. I believe those could come in under the reported  
9 recollection exception, especially considering the  
10 relatively broad evidentiary rules that you have here.

11 Additionally, I think that the Board has already  
12 ruled on the relevance and admissibility. However,  
13 obviously, it's within the Board's discretion to decide  
14 what weight, if any, they are going to give to that  
15 section of the testimony. Therefore, I don't think that  
16 it's necessary to have it stricken from the record.

17 CO-HEARING OFFICER HOPPIN: Mr. Rubin, I'm not  
18 going to strike it from the record because my legal  
19 counsel to my right has jumped ship on me for the day, but  
20 we will take into consideration the weight of the evidence  
21 presented.

22 (Thereupon the above-referenced documents were  
23 admitted.)

24 CO-HEARING OFFICER HOPPIN: So thank you.

25 8:30 tomorrow morning.

1 MS. JACKSON: Thank you, sir.

2 (Thereupon the Water Rights Hearing recessed  
3 at 5:19 p.m. to reconvene at 8:30 on Tuesday,  
4 May 28, 2009.)

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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 6th day of May, 2009.

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JAMES F. PETERS, CSR, RPR

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