STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

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, 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.

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VOLUME II

JOE SERNA JR./CALIFPA BUILDING
1001 I STREET
COASTAL HEARING ROOM
SACRAMENTO, CALIFORNIA
TUESDAY, APRIL 28, 2009
8:37 A.M.

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PETERS SHORTHAND REPORTING CORPORATION  (916) 362-2345
CO-HEARING OFFICER BAGGETT: Let's go on the record for closing statements. We'll start out with CalSPA, Mr. Jackson with closing statements.

MR. JACKSON: Yes, sir.

In terms of the California Sportfishing Alliance closing statement, we would like to ask you to deny the petition.

We understand that it's a time in which the Governor has asked to expedite various drought programs, but there's nothing in the emergency order that indicates you need to make a decision in a particular way.

As far as I can tell, you have carried out the request or order, or whatever it is, of the drought declaration in that you have expedited the petition, given everybody an opportunity within a short time period to lay out their position, and have carried out your duties under the drought declaration.

First, the petition itself relies upon relatively stale information which was updated in the hearing and shows it's probably a little bit late to gain a whole lot in the way of water supply for this year.

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We would ask that, whatever you do, you don't grant this petition for two years. The reason behind that, of course, was explained in the testimony, that we can't tell, nor can anybody else, where water would be coming from, where it would be going, and what purpose it would be serving.

And consequently, to evaluate the 2010 Drought Water Bank to determine whether or not you're going to need -- first of all, whether we're going to need the Drought Water Bank in 2010, is an important item.

If it turns out to be the biggest water year of the 21st century so far, people would be using this joint place of use to transfer water in areas where we haven't seen transfers before from areas that we haven't seen transfers before.

Our main objection to the consolidated place of use is basically the fear that it opens up the federal system to begin to serve urban southern California, and so there's no real top limit that we can discern from what could happen next year.

I mean, the description of what was available this year was very small. But for next year, they could be geared up with this approval already in hand.

CO-HEARING OFFICER BAGGETT: Let me ask a couple questions related to that.
MR. JACKSON: Sure.

CO-HEARING OFFICER BAGGETT: I think we all are all trying to grapple with some of the vagueness issues here. And I think that was clear yesterday with the questioning from ourselves and from many of the cross.

And these are probably similar questions everybody else can maybe contemplate.

I guess, one: What if there was -- even in the petition, they talked about reporting, accounting process, and approval process. What if there was some specific plan required and there was Hearing Officers, we actually conducted an open process to hear that plan, a more detailed plan? Would that --

MR. JACKSON: It would certainly be a step forward, sir.

CO-HEARING OFFICER BAGGETT: Would be helpful?

I guess the other thing I'm really struggling with is: Why does it matter if they have a coterminous place of use since water is being imported, exported, and moved to those places by one party to the other. Why does it matter that it be the same for both projects?

MR. JACKSON: Sure.

CO-HEARING OFFICER BAGGETT: I understand the
drainage issue, and I think they've addressed that in
the petition, saying it will not result in increased
flows, but -- and that we'll ask the Bureau and DWR
about, what they meant by that statement.

But assuming that, why does it matter?

MR. JACKSON: Well, it matters substantially
to the -- potentially to the environment and
potentially to the Sacramento Valley groundwater users.

If there was a large substitution program that
was relying on this change in place of use, the federal
areas within the Sacramento Valley could supply water
to the urban areas within the State Water Project's
place of use.

That's never happened before, to my knowledge,
and is a major change in the amount of demand on the
federal system.

And so it seems to me that it's solely the
question of the increased demand and what would be
possible in terms of trying to serve that demand from
various places within the federal system.

As you saw from the testimony yesterday, the
area in which there is the least amount of water in
storage is in the Trinity system.

We are not sure that -- nor was the Bureau
sure -- that they were going to be able to meet the
fish and wildlife requirements on the Sacramento system.

So it would seem that if water is not preserved for that, if it becomes capable -- if you're farming within the Glenn-Colusa Irrigation District or somewhere else and the Met wants to buy your water, it's not clear at all that the sale price would not be high enough that it would cause folks to move water right on by.

CO-HEARING OFFICER BAGGETT: Okay. That's helpful. Sorry to interrupt.

MR. JACKSON: The second conditions that we would -- that we would like to see, other than the time limit, would be that you do order a drought program.

Now, as a condition, if you give this permit, this could either be a -- next year, like every year in the future, could be a large water year or could be the fourth year of the drought.

And if we are setting up conditions in which people can move water without knowing how much is going to be available, we're basically setting up a condition in which all of those people in the Sacramento Valley who are dependent upon groundwater are basically competing with the end users, either in southern California municipalities or in the San Joaquin Valley,
to pump groundwater out of the Sacramento Valley.

And there are a number of laws which are set up to favor the area of origin and to keep water in a drainage if in fact there are people in the drainage who need the water. And we're not going to know that until next year.

So consequently, seems there ought to be some sort of drought program designed by the Bureau and DWR that if conditions are this, this is what we're going to do. If conditions are that, then we're going to do something else.

CO-HEARING OFFICER BAGGETT: I guess you would be requiring 1641 to be amended to incorporate that as part of the water right?

MR. JACKSON: Well, if the water right is going to be amended to allow the consolidated place of use, yes; we'd like those to be conditions of such temporary --

CO-HEARING OFFICER BAGGETT: But another critical year alternative, I guess it would be. Okay. Got it.

MR. JACKSON: Yes, sir.

And the last -- as long as we're talking about conditions, the last condition we would like to see is that there be some preference for use of fallowed land
or groundwater substitution for the people within the neighborhood from which the water is taken.

I mean it's an incredible sight to see, for instance, in this case the Tehama Colusa Canal Authority short of water in the Sacramento valley and have the neighbor's water at Glen-Colusa pumped right on past some of them to the highest bidder.

So it seems that if you were attempting to solve problems, there would be a preference for the drainage that the water comes from that needed to be satisfied first if there is water available rather than simply allowing it to go to the highest bidder.

Thank you for the opportunity.

CO-HEARING OFFICER BAGGETT: Okay. Thank you. With that, Defenders? And we'll follow that with the California Water Impact Network.

MR. BASOFIN: Good morning, Board Members. Joshua Basofin representing Defenders of Wildlife.

First of all, thank you for the opportunity to participate in this proceeding.

Defenders recognizes the current climatic conditions prevailing in the State of California. Although we believe the water shortages facing agriculture and municipal areas south of the Delta would be ameliorated by more thoughtful long-term water
planning, including conservation, recycled water, and
less water-intensive crops, we understand the situation
that we're facing in the state at the moment with
regards to water supplies.

Therefore, we don't necessarily oppose the
Drought Water Bank or the granting of this petition;
however, the Board ought not allow prevailing drought
conditions to be a smokescreen for cursory
environmental analysis.

Several wildlife impacts may result from the
implementation of the Drought Water Bank and its
proposed transfers as planned.

You heard representatives from the Bureau and
DWR yesterday tell you that the purpose of the two-year
program is to allow for water exchanges enabling return
water to go back to the transfers in the Sacramento
Valley in 2010.

However, as came out in cross-examination,
this rationale was not stated in the petition, and
neither the Bureau nor DWR could tell you why that
rationale was not in the petition, that rationale for
the two-year period for the petition to be in effect.

One thing we do know from the giant garter
snake Biological Opinion on the Drought Water Bank is
that the Bureau has consulted with Fish and Wildlife,
US Department of Fish and Wildlife, approximately one
half dozen times over the past eight years on
crop-idling transfers of water for delivery south of
the Delta and its effect on giant garter snakes.

For that reason, the Fish and Wildlife Service
has stated that the need to consult with such frequency
suggests the need for a programmatic Biological
Opinion.

If transfers south of the Delta are to occur
in 2010 or 2011 or any time thereafter, a programmatic
Biological Opinion is crucial, particularly if those
transfers will involve crop idling.

We can't just go on having a year-to-year
drought program without some sort of umbrella
programmatic planning.

Although the giant garter snake has had extant
populations in the San Joaquin Valley and the
Sacramento Valley, the population in the San Joaquin
Valley has been extirpated due to the reduction and
modification of its native vernal pools, so the snake
now primarily relies on flooded rice fields for
foraging and breeding habitat.

The scale at which this Drought Water Bank has
been proposed could have disastrous implications for
the giant garter snake.
The Bureau has told you that, despite having done a Biological Assessment, an Environmental Assessment, a Finding of No Significant Impact, and initiated formal consultation on the giant garter snake, they decline to include any information whatsoever on impacts to the giant garter snake from crop-idling water transfers in their petition to you. Although they have claimed this information wasn't available until recently, in fact their Biological Assessment was released in March.

The fact is you don't have to make any inferences from the testimony available to you to determine that there will be impacts on the giant garter snake.

You don't have to listen to the Bureau or to DWR or to Defenders of Wildlife. It's right there in the Biological Assessment and the Biological Opinion for the giant garter snake.

According to the Biological Assessment, the proposed project may reduce foraging habitat by as much as 20 percent, forcing individual snakes to relocate and subjecting them to greater risk of predation as they move to find a new suitable foraging area.

Some individuals are likely to be displaced and will need to relocate to elsewhere. Of these, it
is expected that some will successfully relocate and
that some may be lost through predation or other forms
of mortality caused by loss of foraging opportunities
either through competition with the other individuals
or loss of body condition and failure to thrive,
particularly the young snakes.

Although the Bureau is certain that some
snakes will face mortality or that take will occur, to
use the Endangered Species Act nomenclature, they have
proposed no mitigation to reduce these mortalities or
to prevent the project from jeopardizing the snake
through all or part of its range.

In addition, you heard testimony from CSPA and
C-WIN concerning the potential for adverse effects on
Central Valley Chinook salmon and steelhead trout.

According to a DWR report, groundwater
extraction in the Sacramento Valley may reduce stream
flow and essential habitat condition for these
fisheries.

The Bureau during this proceeding has at times
said there would be groundwater substitutions occurring
from the Drought Water Bank and at times said that
hypothetically there may not be groundwater
substitutions.

Clearly, there has not been an appropriate
project description informing us as to what types of transfers will take place.

Despite the possibility of groundwater substitutions, however, and the possibility that groundwater extraction may affect stream flow in the Sacramento Valley and its tributaries, the Bureau has failed to initiate consultation with the National Marine Fisheries Service on potential take of Central Valley Chinook and steelhead trout.

As I said at the beginning of my closing argument, Defenders does not necessarily oppose this petition or the need for a Drought Water Bank; however, we do submit to the Board that several conditions must be imposed on the affected permits for the protection of fish and wildlife.

The Board has ample authority to impose such conditions on petitions for change. You have done so in the past.

In Order No. WR 2009-003-DWR, the State Water Board imposed conditions on DWR's plan to fallow agricultural land in the Delta. Some of those conditions were imposed in order to protect riparian wildlife and aquatic species.

I would also direct your attention to Order 2008-0012-DWR in which the State Water Board approved a
water right application with conditions for
conservation of giant garter snake, stating in section
22 of the Order that:

Compliance with the ESA and CESA will be
required for affected giant garter
snakes and additional habitat
compensation or species protection
measures may be developed in
consultation with Fish and Wildlife and
DFG.

In light of the potential impacts to giant
garter snakes from crop-idling water transfers, and in
light of the potential impacts to Central Valley
Chinook salmon and steelhead trout, Defenders believes
the following conditions are appropriate, and I will
reiterate them from our submission:

Condition number one, including a compensatory
mitigation program with land acquisition to compensate
for adverse effects to giant garter snake as a result
of crop-idling transfers involving fallowing of rice
fields where giant garter snake is present.

Condition two, a comprehensive environmental
assessment including a monitoring program analyzing
potential impacts to salmonids resulting from
groundwater pumping in the Sacramento Valley.
Condition number three, a description of the changes to Central Valley Project and State Water Project operations as a result of the place of use consolidation and Drought Water Bank implementation including a proposal for complying with the current Biological Opinion for smelt and the forthcoming Biological Opinion for salmon.

Thank you.

CO-HEARING OFFICER BAGGETT: Questions?

BOARD MEMBER HOPPIN: Mr. Basofin, I have a question for you. And Mr. Jackson, you can feel free to chime in if you like.

I appreciate most of your comments, Mr. Basofin, but one of them confuses me in particular; and that has to do with the impacts of fallowing land for any potential transfer as it pertains to the giant garter snake.

And it would seem that you're taking the approach -- and please correct me if you don't agree with me; I don't think you do -- that the rice land that would potentially be fallowed would be a permanent wetland, and I would look at it more in the perspective that a landowner would have the ability to rotate his crops however he saw fit.

And given one of two scenarios, it would seem
to me that the fallowing of land would be much less
intrusive to the giant garter snake, given the
considerations that I think you are correct in, that
they would more susceptible to predation and moving
from one area to another which is, quite frankly, a
natural process.

The other alternative would be if the same
person, absent an opportunity to put water into a water
bank, decided to rotate his crops, went out and tilled
the soil, cultivated it -- and to me, that would be
much more detrimental, intrusive to the habitat of the
giant garter snake than actually fallowing land.

If you could explain to me, any of you, the
difference between my opinion and your opinion, it
would be helpful.

MR. BASOFIN: Sure. Thank you for your
question, Mr. Hoppin.

My understanding from staff of the US Fish and
Wildlife Service is that the water deliveries that are
used for rice agriculture are earmarked for that.

BOARD MEMBER HOPPIN: No. That is not the
case.

MR. BASOFIN: Okay.

BOARD MEMBER HOPPIN: Not even close to the
case.
MR. BASOFIN: There is something that triggers the need to consult with US Fish and Wildlife for giant garter snake when fallowing of flooded rice fields occurs; and whether it's an earmark for delivery of water or some other mechanism, there is a trigger to consult.

And as I said in my remarks, that consultation has occurred at least six times over the past eight years. And crop idling transfers, as far as I know, have not occurred on a large scale pursuant to those consultations.

BOARD MEMBER HOPPIN: I know there is a Biological Opinion that deals with the effects of multiple-year fallowing. But I think what you're talking about here is potentially a single-year fallowing.

And I'm -- Mr. Jackson, am I missing something here that you're informed on? Because obviously at this point, Mr. Basofin and I are both confused to a degree potentially.

MR. JACKSON: Well, I'm not sure how much of it is that you have different information. It may just be a different view. And I'll give you mine from what I know.

The giant garter snake would be in substantial
trouble without the rice fields. Rice turns out to be
a crop that is absolutely consistent with the survival
of the garter snake as it is consistent in terms of
producing area for the flyway.

The key here is that the size of the
fallowing -- the snake moves mostly through the canals
and waterways that provide the water to the rice
fields, and that's a very good mechanism for the snake.

The problem is that when the fallowing takes
place, if the area that's fallowed is too large -- and
we believe that 320 acres is too large.

BOARD MEMBER HOPPIN: You believe how much is
too large?

MR. JACKSON: 320, which is the minimum -- or
the maximum that's allowed to be fallowed in this
program. If it was 160, we probably wouldn't be here.

That's what the rule had always been.

And so we don't know what the environmental
criteria were that changed from 320 to 160 for this
program nor how necessary it was in order to get the
water. That's one of the environmental aspects we'd
like to have looked at.

But basically, the snake needs water on a
seasonal basis, and the season just happens to fit with
rice. So I guess for the rice farmers, it's not only
those beautiful white heron that turn out to be
protection for their industry but the snake as well,
operated in the appropriate fashion.

MR. BASOFIN: Let me see if I can just follow
up on that a little bit.

The Bureau consulted with US Fish and Wildlife
regarding some crop-idling transfers that had been
anticipated for the environmental water account in the
early 2000s.

And there was a Biological Opinion issued to
the Bureau on crop-idling transfers for the EWA.
However, those transfers never manifested, never came
into being.

There has not been crop-idling transfers from
this area of this scale, whether it's for one year or
several years, I don't think ever. And so what we're
looking at is something totally new.

There have been different approximations for
acreage. I've seen 67,000 acres in some documents;
I've seen 55,000 acres in other documents.

But the fact is that this is a major portion
of the snake's range in the Sacramento Valley.

And although there are mitigation techniques
that are being used to minimize -- I will concede -- to
minimize the effect on the snakes, some of those being
retaining a certain water level in drainage canals that
the snake uses for mobility, creating a patchwork of
crop fallowing so that you have parcels abutting each
other, some of which are fallowed and some of which are
flooded, however, as Mr. Jackson alluded to, we don't
feel that the block sizes of 320 acres are appropriate.

In fact, if you go back and look at the
Biological Opinion in the documents from the
consultation in the environmental water account,
limitation on block sizes to 160 acres was included as
one of the mitigation measures.

And when the Bureau and DWR raised that block
size to 320, they gave very little substantiation for
it. It was really an arbitrary change, especially
considering that the limitation to 160 acres was a
mitigation measure.

So that raises the potential for adverse
effects to the snake to a greater degree.

BOARD MEMBER HOPPIN: Thank you.

CO-HEARING OFFICER BAGGETT: Thank you.

California Water Impact followed by County of
San Joaquin.

MS. JACKSON: Julia Jackson, California Water
Impact Network. Mr. Baggett, Mr. Hoppin, thank you so
much for allowing us to participate in your hearings.
I just have some very short closing comments. After participating in the hearing yesterday, reading all the information, and having the testimony of the witnesses, California Water Impact Network is left with as many questions today as we had coming into the hearing.

The lack of the project description still leaves questions about specificity of the timing of transfers, the amount of transfers, the sources for the transfers, and who the end users will be.

We believe that this is information that should be before the Board before you make a decision, and testimony was given yesterday that petitions are still being filed, that they won't know who all the end users are, where all the water is coming from, until June, obviously after you have made your decision on this permit.

There has been no environmental review. It's almost impossible to ensure protection of the environment and wildlife or to know how it will be substantially affected if that information is not before you.

Flexibility has been talked about quite a lot. And while flexibility can sound great on paper, it shouldn't come at the expense of environmental
protections and laws that have been in place for these systems.

Relevant new information was presented during testimony.

Since filing the petition, the hydrology has substantially improved.

Information about the giant garter snake has been released in the Biological Opinion. It states that the giant garter snake will be adversely impacted, as you just heard about.

There is also an increase in expected allocation because the hydrology has improved.

None of this information was updated. The petition wasn't amended, even though all of these three things have changed since the time the petition was first filed.

Testimony was also presented that indicated a two-year program may not be necessary; however, no specific dates could be given for how long parties would need to enable transfers to go back and forth.

The amount of questions that are still before you would indicate that the parties have not met their burden for a change of petition at this time, and we would ask that you have this information before you make a decision and that petitioner's request be
denied.

Thank you.

CO-HEARING OFFICER BAGGETT: Thank you.

San Joaquin and then South Delta.

MS. GILLICK: Good morning. DeeAnne Gillick on behalf of the County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District.

The County is not opposed to the petition for temporary consolidation of place of use. We recognize it is drought times, and that reasonable and flexible things need to occur.

However, the County requests the State Board make a specific condition on the petition that the water quality standards in the South Delta must be met in order for the water transfers to occur.

We heard from the testimony yesterday that JPODs would not be impacted by this transfer. However, we also heard that Joint Points of Diversion will be used this summer at the same -- and this summer the transfers will occur.

So obviously, there's being placed additional burden on the system and additional water to be transferred through the Delta and through the pumps.

So whether or not you label the water that's
going through the right pump as the transfer water and any additional which isn't the transfer water as other water that's being used by joint points, I think is an anomaly, and the joint points will obviously be impacted.

We heard a statement from both the Bureau and the DWR in their petition and their testimony and the witnesses yesterday that they will meet the requirements of D1641.

However, we also heard the testimony from the Bureau representative that they are considering an urgency petition regarding joint points.

Well, based upon our experience from last summer, the petition will most likely involve meeting the salinity objectives. So we heard that they are contemplating asking relief from meeting the salinity objectives.

Well then, that's not meeting the requirements of D1641; and we ask the State Board to make a specific condition on this transfer that the conditions of 1641, specifically the water quality conditions, are met.

DWR and the Bureau provide water to areas which would not naturally have that water. The transfers are allowing water to be delivered to areas which would not in the normal course have the water
without specific permission from the State Water Board. And DWR and the Bureau through the transfers is allowing for purchase of water to be applied to areas that don't normally have the water. However, at the same time, the Bureau and DWR has not considered purchases of water to meet the salinity requirements in the South Delta, and that's an obligation of their permit terms. DWR and the Bureau have made a determination not to meet its obligation regarding salinity control to protect the Delta farmers so the Delta farmers have the water supply and the water quality needed. That is an obligation of the Bureau. And it is an obligation in order to allow the Bureau and DWR to make the water available to the areas of the state that don't normally have the water.

CO-HEARING OFFICER BAGGETT: But they can already do that. All they're allowing is that they can have a coterminous. They can already move the water to areas of the state --

MS. GILLICK: Well, it's the County's position that their obligation, in order to be able to move the water, they must meet salinity requirements --

CO-HEARING OFFICER BAGGETT: Right.

MS. GILLICK: -- and they don't do that.
And so if the State Board can do something to impress upon the Bureau and DWR that that is an obligation, and they need to do that.

CO-HEARING OFFICER BAGGETT: Right. But that's a separate issue from the fact that they can already transfer water to areas that normally wouldn't have the water. I mean that's --

MS. GILICK: But a condition --

CO-HEARING OFFICER BAGGETT: -- been well established.

MS. GILICK: -- of doing that is meeting --

CO-HEARING OFFICER BAGGETT: Right.

MS. GILICK: -- salinity objectives.

CO-HEARING OFFICER BAGGETT: I understand.

MS. GILICK: That's the thing.

I mean they transfer water; the condition is to meet the salinity objectives. They're not doing that.

CO-HEARING OFFICER BAGGETT: Right.

MS. GILICK: So there is an opportunity before this Board to place a condition that places more responsibility or makes them more aware that that needs to occur; and if it doesn't occur, then these transfers which are at issue today can't occur.

CO-HEARING OFFICER BAGGETT: I understand
that. And the petition specifically says:

The petition will not result in a reduction in San Joaquin River flows or an increase in drainage of the San Joaquin River.

But then they have: Beyond that typically experienced.

So I guess what you're proposing is we put that sentence in there but put a period after "San Joaquin River."

MS. GILLICK: I'm sorry; I don't --

CO-HEARING OFFICER BAGGETT: So it says:

The petition will not result in a reduction in San Joaquin River flows or an increase in drainage of the San Joaquin River.

Period.

MS. GILLICK: Well, you know, an obligation -- they're stating that they're going to meet the requirements of D1641.

CO-HEARING OFFICER BAGGETT: Right.

MS. GILLICK: From past practices, we know they're not.

So similar to joint points, joint points is not to occur if they're specifically not meeting the
salinity obligations. So a similar condition that
these transfers at issue should not occur, cannot
occur, if the salinity obligations are not being met.
And just in conclusion, you know, when the
Projects were created, DWR and the Bureau agreed to
that. The State Board required it. The Legislature
required it, and the Delta protection statutes and the
other statutes.
But in reality, the -- it's not occurring. In
this time of drought, you know, transfers and water
things are occurring to meet critical needs of other
areas of the state.
But at the same time, the critical needs of
the Delta tend to be ignored. And those critical needs
require a water supply in an adequate quality for those
that naturally had water and naturally had that water
supply.
So thank you very much.
CO-HEARING OFFICER BAGGETT: Thank you.
MR. HERRICK: Thank you, Mr. Chairman, Board
Member. John Herrick for the South Delta Water Agency,
Let me just introduce this, my close, by
saying I fully understand the Board's position to try
to work things out in order to assist areas that are
suffering from the drought. And normally, I would say
that's a laudable position.

But I believe in hindsight we see that that's
the wrong position. You as the regulator need to
tighten the screws. You need to buckle down and to
enforce the various statutes and regulations with which
you are charged.

And that is because we are facing a crisis,
not just from the drought for water users south of us;
we're facing a crisis in the Delta.

Your legacy -- and this is not meant as a
bitter comment. Your legacy may be that during your
tenure on the Board a number of species became extinct,
and that extinction was used as a reason to not enforce
other water quality standards thereafter.

Now the petition before you today seeks to do
a couple things.

DWR said it's only a very small amount of
water, less than 10,000 acre feet, which will move from
north to south, and then there are a number of listed
exchanges or transfers in the materials talking about
whether it's Kern County and Westlands exchanging
water.

Then it talks about "and other" potential
projects or transfers that may come up later.
So your question today is: What am I going to approve? Am I going to approve a transfer of 10,000 acre feet of water under the Drought Water Bank? Well, I don't see any reason why you can't do that. It may need more evaluation. It may need approval. But that's okay.

The listed exchanges between the parties south of the Delta, well, you could do that if there's a proper showing and somebody shows you the impacts and there's no impacts to other users.

But the unknown ones? I don't know how you can approve unknowns.

Now let me just start out, let me just move on by saying there should be a few rules. And these are John Herrick's rules for the State Water Resources Control Board.

Rule No. 1. If the Bureau and DWR come before you with a petition, and the fishery agencies don't show up to comment, and not one biologist is in the room, the petition has to be denied.

Smelt are going extinct probably. The salmon runs are all at historic lows generally. We have other species of concern.

And there wasn't one biologist in the room to tell you whether or not consolidating the entire place
of use for the Bureau and DWR will have an effect on
fish. Not one biologist. Now, we didn't even have a
biologist from DWR or the Bureau. Now that's what's
known as a glaring absence of input.

Now that's not John Herrick being snide.

Well, it is John Herrick being snide.

(Laughter)

MR. HERRICK: But it doesn't change the fact
that one of your jobs in evaluating any petition like
this is to say okay, let's make sure -- this is the
law, now -- let's make sure it doesn't have an adverse
effect on fisheries.

Now, nobody cares if it's -- you know, one
tule falls down because of this. That's not the issue.

We're in the middle of a crisis for fisheries
in the Delta, and not one biologist was asked to come
here. Now my rebuttal case was going to be: I tried
to subpoena the biologists from the three fishery
agencies.

Now, I'm not blaming them, that the federal
government was, let's just say, less than willing
because it was at the last minute. And the state
government tried but was unable to get someone here.

But anyway, no fishery biologist --
biologists to come yourself, they wouldn't come?

MR. HERRICK: Yes.

Now, why is that important? Well, one of the environmental documents that was submitted by DWR was the Biological Opinion for Delta smelt. So, well, that anticipated 600,000 acres of transfers over some conditions.

Page 169 of DWR number 5 from that Biological Opinion, in the discussion of water transfers in that Biological Opinion, the Fish and Wildlife Service says:

All transfers up to that time have been in accordance with all existing regulations and requirements.

Well, that's wrong. Right?

2007, we had joint point of diversion transfers while standards were being exceeded. I'll use their term; not violated.

And under the cease and desist order, it doesn't matter whose fault it is. If those standards aren't being met, those diversions, those transfers, were illegal.

Now, that's what the Executive Director of the State Board said in a letter after it happened. You guys didn't take any action on that.

So the Biological Opinion examining transfers
assumed that everything was going okay. But it wasn't. It wasn't going according to the rules.

Now the most recent example of that was the last hearing we had in February. And there you saw that, rather than have 4,000 additional cfs of outflow in the Delta, the Projects exported that 4,000 cfs. It wasn't storage water. It was unregulated flow. But that 4,000 was needed to meet the Delta outflow.

So we know --

BOARD MEMBER HOPPIN: My recollection was that it was 2,000.

MR. HERRICK: It went from 2,000 to 4,000 on February 12th or 14th, so it was 4,000 cfs by the time we came into the hearing.

Anyway, so the Projects chose -- it wasn't a mistake. They chose to not meet the fishery standard.

So that leads to John Herrick's rule No. 2 for the Board. When a petitioner comes in before you and says I would like you to approve this because I'm promising that I will meet the standards under which I am obligated -- the standards which I am obligated to meet under D1641, and then they tell you that they are contemplating new petitions to change some of those obligations in the short-term, you must deny it.

Because they told you: Approve this because
we're going to protect fisheries, but then they were
forced to tell you but by the way, we may ask you to
not make us protect fisheries later, and they wrung
their hands a little bit.

Now again, that sounds really snide, but
that's exactly what they told us. They told us they
would ask, maybe, for change in Delta outflow
requirements.

And I'm not sure what the answer was for joint
point, but I think Mr. Milligan said yes, we're
contemplating perhaps some petition on joint point too.

So none of that adds up to a reason to approve
a project based upon a promise to meet standards under
D1641.

Now the most important thing today is that
there is no analysis of the impacts on third parties.
One of the things you're supposed to do is to determine
whether or not a legal user of water will be adversely
impacted.

Now we did hear some testimony that the
parties concluded -- the witnesses; excuse me --
concluded no impacts. However, the materials presented
don't even have an analysis of the impacts of the
specified exchanges.

Whether it's the Westlands, Kern County, the
Santa Clara -- whatever those were, there is no information that says this is what we're doing and this is our conclusion about other legal users. There's none of that.

Now, when you get a petition where somebody doesn't give you an analysis of the impacts on third parties but just says there are no impacts, you know, seriously, you just have to say that's a good try, but try again because you haven't done what you're supposed to do. There isn't any of that.

Now we also heard on cross-examination that that promise that nobody would be hurt applied to all of the CVP service area except New Melones. I mean, I hope you all remember that. They cut that out of the picture.

So I don't know how it will affect New Melones. They are not promising it won't affect New Melones, and there isn't any analysis of how it might affect New Melones.

Now this is important because the base case issue which was raised by other people's testimony has simply not been addressed.

In the absence of the petition, X amount of water would be delivered to the CVP service area south of us. That amount of water would generate some level
of either surface or subsurface drainage into the
river. I don't know what is because there's no
analysis.

But that's the base case: In the absence of
the petition, a certain amount of water would go there
and generate a certain amount of drainage.

With the petition, we don't know if the
unknown transfers -- and we actually don't know if the
specified exchanges, but with those, with the petition,
then some additional amount of water could, may, might,
will, be delivered to areas that generate drainage.

So there's a difference there. There's Y
amount of drainage with -- excuse me. There's Y amount
of drainage without the petition, and then there's Y
plus something with the petition.

It may even be Y minus something, but we're
not told that.

So there isn't any analysis on which you can
conclude that the petition won't harm any legal user.

If you add more salt. If you have a different flow.
If New Melones is taxed.

That's what you have to have before you, and
you don't have that before you. That's not our fault.

Now let me move on to the issue of joint
point. Although I tried, and I'm not the most
qualified attorney, I really am not sure still what the joint point -- how joint point relates to this petition.

And if you should stumble and make a horrible decision and actually approve this, there has to be some clarification that says this applies to what? The 10,000 acre feet of transfer from north to south? Whatever. And that either does or does not affect joint point rules.

Because if you are going to change joint point rules, you'll probably hear from me that that wasn't really a topic of this hearing.

But please, if you do approve this, you need to specify whether or not and under what conditions joint point applies with this approval because it is not clear.

Now, with that, a lot of people have given you good suggestions. The County, I believe, did a very nice job in defending South Delta salinity issues.

I think it's absolutely imperative that the Board take a stand on salinity.

Every time we have one of these issues, there are tangential discussions. Maybe they're not directly germane, but we always go through the discussion: Is it an exceedance or is it a violation? Is it an...
obligation or is it not an obligation under certain
conditions?

My answer to that is that's a whole lot of
bunk.

And I encourage the Board Members to go back
and read the cease and desist order. Because I think,

once you read that, everything becomes very clear.

And the cease and desist order does not say if
you haven't done anything and you haven't been able to
build permanent barriers, you don't have an obligation
to meet water quality standards.

It doesn't say that.

It says you've got until July 1st of 2009 to
get rid of the threatened violations at all four of the
southern -- three of the southern Delta stations.

Now 2009, July 1st is a very short time away.

It also says, whether or not you think it's
your fault, if the standards are violated or exceeded,
you can't do joint point.

It doesn't say if you think you have an excuse
for not meeting a standard, you can still pump. It
doesn't say that. It says the exact opposite. Because
that issue was directly dealt with in the CDO.

So what you have been told is that we're
probably going to have violations. We haven't examined
the impacts on third parties. We have no fishery
biologists available. But we want you to combine the
entire service areas of the CVP and State Water Project
because we want to move 10,000 acre feet of water from
north to south.

Now, come on. That's nuts.

If you don't think a consolidated point of use
next year will result in a slew of transfers from
districts north of the Delta to water-hungry districts
south of the Delta, then you're not paying attention.

And I would say that, if they get this passed,
next year there will be hundreds of thousands of acres
of transfers that will be argued at that time: Well,
they don't need any review because the consolidated
point of use allows us to just move it from one end of
the system to the other.

That's exactly what will happen.

And when DWR witnesses say I don't see any
incentive that this creates, that's nuts. That's just
plain nuts.

So my suggestion is you turn the petition back
to the parties and say once you do an analysis of
impacts, we will consider it.

If you're thinking of approving it, which I
hope you don't, I think you should add stringent
conditions along the lines of what has already been
talked about, that, you know, if you make an effort to
comply with the requirements of your permits, we might
help you; but if you don't make an effort, we're not
going to help you.

Now let me leave you with the highlight of
this whole thing. And I'm currently in discussions
with your staff about this disagreement, but: There is
no VAMP pulse flow this year. We're in the middle of
the 30-day pulse flow; there's no pulse flow.

You heard the Bureau witness say, I think,
under the terms and conditions of D1641 that the 30-day
pulse flow goes away under certain circumstances.

If this Board's position is that an adopted
water quality standard for fish and wildlife's
beneficial use goes away under drought condition, then
we all need to start over because that ain't the law.

And with that, I thank you very much.

CO-HEARING OFFICER BAGGETT: Thank you.

Mr. Rubin? And then the Bureau and DWR in whatever
order you all decide you want to go.

MR. RUBIN: Good morning. Jon Rubin for San
Luis and Delta-Mendota Water Authority and Westlands
Water District.

I apologize if I'm a little bit disorganized.
I did prepare something in writing, and I will get to that. I did want to respond to a couple of the issues up front that were raised by comments, closing remarks.

CO-HEARING OFFICER BAGGETT: We have a few questions too.

MR. RUBIN: I imagine.

First I wanted to respond to a statement that CalSPA made suggesting that this process is intended to be a process to gain water.

I think that's an incorrect view. This is not the intent of the process. I'll get into my perspective of what the intent, but this is not to increase the overall water supply south of the Delta. That's not the goal.

Second, this is not a process that should be used to leverage participants' positions that are unrelated to the petition, and I think it's being used for that purpose.

I think CalSPA is doing it. I think C-WIN is doing it, South Central Delta, San Joaquin County, all trying to advance issues, agendas that are unrelated to the petition.

You hear issues about South Delta salinity. You hear issues about impacts in the Sacramento Valley. They may be legitimate concerns. I don't pass judgment
on those here.

But the process that we're talking about, the change petitions before you, are unrelated to that.

You have -- and let me get a little bit to my prepared statement to address the issue.

The petitions before you are intended to facilitate the movement of water that is conveyed south of the Delta. It's already moved south of the Delta.

Regardless of the action you take, that water will move south. You have testimony before you that says the Drought Water Bank will buy water, move it south.

What this petition will do is allow for the opening up of that water to people that may not otherwise receive it, but it will be purchased.

You had testimony from the Department of Water Resources that said if there is State Water Project water that is being sold to the Drought Water Bank, that will be purchased by State Water Project contractors if you don't authorize the change.

What the change will do is open up the ability for critical needs of Central Valley Project contractors to get that water.

It doesn't mean that it won't move south. It just means instead of a State Water Project contractor
receiving that water, a Central Valley Project contractor may receive that water.

And that's the testimony before you that's undisputed. And the other transfers and exchanges that are discussed are with water that's already moved south of the Delta or water from the Friant Division that would not otherwise be released to the San Joaquin River.

CO-HEARING OFFICER BAGGETT: But one of the questions I think I've got goes to that. From the testimony, it was less than 10,000 acre feet that we're talking about from north to south. I mean that's what I understood.

MR. RUBIN: The testimony as I heard it, and -- and I do believe it's captured in writing on Exhibit DWR 04, is that the Drought Water Bank is contemplating a purchase -- or purchases; excuse me -- of far in excess of that but the amount of project water, Central Valley Project water --

CO-HEARING OFFICER BAGGETT: Right.

MR. RUBIN: -- State Water Project is much more limited.

The testimony indicates approximately 10,000 acre feet. Through questioning, I asked DWR and Reclamation, the maximum I think was 16,000 acre feet,
absolute maximum.

CO-HEARING OFFICER BAGGETT: Right.

MR. RUBIN: So there may be a little bit of a discrepancy but we're still talking about, you know, less than 20,000 acre feet of Project water that's the subject of --

CO-HEARING OFFICER BAGGETT: The drought.

MR. RUBIN: -- of the issue -- well, not the Drought Water Bank, but of water that might be purchased by the Drought Water Bank and that could benefit from an action by you, an action that would allow for, once that water is moved south of the Delta, to be used by those areas that are in most critical need, whether it was in the CVP or SWP.

And so I -- maybe your question gets to an issue that I have again, and I'm taking my presentation a little bit out of order, but you had the Defenders of Wildlife stand up here and raise concerns about analysis in environmental documents that considered a Drought Water Bank that's much greater than what will occur in reality.

CO-HEARING OFFICER BAGGETT: Right.

MR. RUBIN: The environmental documents, as I understand it, contemplated a potential purchase of up to, I think it was, 600,000 acre feet. And that was
for planning purposes to give flexibility.

But in reality, what we're talking about, and
the testimony reflects this, is a Drought Water Bank
that might purchase up to 100,000.

Again, this gets to my point. This whole
discussion about impacts from the Drought Water Bank is
irrelevant for this proceeding. Whether 100,000 acre
feet are purchased and whether there's going to be
impacts has nothing to do with the action before you.

That -- if you take no action, the Drought
Water Bank will purchase the water, and it will be
sold.

The question is whether you're going to allow,
once that water is purchased, moved to be used within
areas that have -- that, you know, critical needs, more
critical needs. That's the question.

And it's not the hundred thousand acre feet.

It's 10, 20,000 acre feet.

And there's a lot of criticism about the
vagueness of the petition. Uncertainty. I agree that
there is some uncertainty, but it's not to the extent
that it's been presented to you.

If you look at the petition, there's clear
description of the Drought Water Bank, the amount of
water, particularly when you read it in context with
the testimony, of the amount of water that would
benefit from your action. There's a fairly clear
description of the transfers and exchanges that are
being proposed.

The vagueness may come in in terms of future
transfers and exchanges that may benefit and the term,
but I think a lot of that has been addressed through
the testimony that's been presented.

Just to highlight a couple of points. The
testimony, I think, is very clear that a granting of
the petition will not change the amount of groundwater
pumped out of the Sacramento Valley and will not
increase the amount of water conveyed south of the
Delta.

The evidence shows that the approval of the
petition will not affect water quality in the Delta,
that the action before you will not affect water
quality in the Delta, and there is no evidence that
even if there were a change in water quality that that
would injure a legal user of water.

It's the same thing with drainage. There is
no evidence that any change in water quality will cause
an impact.

The fact that salinity may change -- if you
accept the position, you -- the fact that salinity may
change, the fact that there's more drainage discharged
into the San Joaquin does not mean that there's going
to be an injury, whether it's to a legal user of water
or to fish and wildlife.

CO-HEARING OFFICER BAGGETT: But the petition
itself stated on its face:

The petition will not result in a
reduction in San Joaquin River flow or
an increase in drainage of the San
Joaquin River.

So that's an acceptable condition?

MR. RUBIN: I frankly don't have any
information to tell you whether that's acceptable or
not.

CO-HEARING OFFICER BAGGETT: Well, it's going
to affect your clients.

MR. RUBIN: Well -- no; whether -- I don't
know --

CO-HEARING OFFICER BAGGETT: That's in the
petition language.

MR. RUBIN: Frankly, I don't know -- I thought
the language in the petition had a caveat there in
terms of the --

CO-HEARING OFFICER BAGGETT: Beyond the
typical -- that typically experienced.
MR. RUBIN: Right.

CO-HEARING OFFICER BAGGETT: Which is, you know.

MR. RUBIN: And I don't know whether there might be or might not be an increase in the amount of drainage water that's released into the San Joaquin. What I do know is that -- if there -- any discharges into the San Joaquin are done pursuant to regulations that are intended to protect the San Joaquin River.

CO-HEARING OFFICER BAGGETT: And that's acceptable?

MR. RUBIN: They're in place now. There's no discharges that are coming from any of these lands. Grassland Bypass Project is discharging, and it's discharging pursuant to a permit. There's a program in place to address the discharges. And -- but I don't want you to ignore my prior statement.

If there is a change in the amount of drainage water that's discharged, if there is an increase, that does not mean there is going to be an impact to a legal user of water or to fish and wildlife.

There's been no evidence to that effect.

There's been people that have postured and presented you with rhetoric that there's going to be these
impacts, and there's no evidence to support that.

There is one area that we need to highlight that I think -- that's been overlooked to some degree.

There has been evidence presented to you of potential harm caused by pumping in the Sacramento Valley. And I again reiterate my position that your action will not change the amount of groundwater that's been pumped or that will be pumped. But if you get past that --

CO-HEARING OFFICER BAGGETT: This is in the San Joaquin Valley.

MR. RUBIN: No, no. In the Sacramento Valley.

You had a witness here who presented testimony to you indicating that in Butte County there may be injury to legal users of water because of the pumping of groundwater.

And I get past my first kind of threshold comment that your action will not change the amount of groundwater that's pumped.

Again, whether the water is pumped and sold to the Drought Water Bank will occur whether you take your action or not. But putting that aside --

CO-HEARING OFFICER BAGGETT: So under that theory then, transferring 16,000 acre feet doesn't matter one way or the other because it will occur with
or without.

MR. RUBIN: Well, no. It's -- the transfer is going to occur. It's going to be moved south of the Delta and purchased.

The importance of your action is to provide the Drought Water Bank with the flexibility to -- if that 16,000 acre feet, for argument's sake, is purely State Water Project water, that that 16,000 acre feet can be used within the Central Valley Project place of use if there is a critical demand there. It gives the Drought Water Bank the flexibility to move that water to the areas of critical need.

Right now, there would be --

CO-HEARING OFFICER BAGGETT: And further, what appears, it will also cause a change in the joint point policy.

MR. RUBIN: There is conflicting testimony there, and I was just as confused as you were.

I think there was testimony that said that joint point is not necessary to move that water, that the State Water Project has the capacity to move it if it's State Water Project water, and Central Valley Project has capacity to move it if it's Central Valley Project water.

CO-HEARING OFFICER BAGGETT: But that's a
question for the Projects. Okay.

MR. RUBIN: But getting back to the issue of
the testimony by the grower from Butte County: Her
testimony alleged harm, and it was based upon the 1994
Drought Water Bank.

And again, I think it's outside the scope of
this proceeding. That type of harm, it's not
something -- the type of activities that occurred in
the '94 Drought Bank are not what's being contemplated
today in Butte County.

Testimony clearly drew a distinction. A
significant amount of groundwater was sold from Butte
County into the Drought Water Bank in '94. That's not
what's being proposed now.

In fact, there's no in lieu groundwater sales
proposed within Butte County, and therefore I don't
think it's relevant to your considerations.

CO-HEARING OFFICER BAGGETT: So a condition so
stating would not be a problem for the transferee, I
guess.

MR. RUBIN: Well, I don't know.

At this point, the testimony is that there is
none. I would still question why would you condition
that? It's not a -- even if there were that harm, it's
not a result of your action.
There is sufficient demand for the water regardless of whether you approve the change. I might not be explaining myself --

CO-HEARING OFFICER BAGGETT: No, I understand.

MR. RUBIN: If -- whether or not --

CO-HEARING OFFICER BAGGETT: Why would you --

MR. RUBIN: -- the place of use is consolidated, some -- DWR is going to be out there as part of the Drought Water Bank.

If there is an issue with that, if there is a concern that the Drought Water Bank is going to cause impacts, then the challenge is not to your action; it's to the Drought Water Bank.

And in fact, from what I understand, there is a suit pending on that claim. And so again, it's using this process as leverage.

CO-HEARING OFFICER BAGGETT: I understand.

Okay. Continue.

MR. RUBIN: I believe the evidence also supports a finding by the Board that granting the petition will not cause unreasonable impact to fish and wildlife.

The evidence is clear that there will be no change in pumping of groundwater or conveyance of water south of the Delta.
Approval of the petition will not affect the ability of the United States Bureau of Reclamation or the Department of Water Resources to meet those terms and conditions that are intended to protect beneficial uses.

And they will -- they have an obligation to comply with the Endangered Species Act.

I reiterate the opponents to the petition raise general concerns with the Central Valley Project and State Water Project operations; however, those general concerns are oftentimes presented by lay people that have no evidence to support their claims, and they can't be relied upon by the State Board for its decision.

They point to nothing which would even suggest that granting the petition would harm fish or wildlife, the specific action before you.

And I reiterate my point again that nothing indicates that even if there were a change in water quality, amount of water that's conveyed, that those actions would cause an impact, either to a legal user of water or an unreasonable impact to fish and wildlife.

And let me get to this last point, unreasonable impact. That's clearly a balancing that
the Board must undertake. It's not no impact to fish
and wildlife. It's an unreasonable impact.

    And again, maybe in the -- as a secondary
argument here, I think that even if there were a
demonstrated impact -- and again, I don't think there
has been one -- but even if there were, I think that
impact is reasonable under the circumstances.

    Your action must be taken in context with the
Governor's proclamation of an emergency and
specifically important findings that he made in the
proclamation, that the Governor made in his
proclamation, which have not been subject to real
disagreement in this proceeding.

    And I want to go through a few of the findings
that the Governor made.

    The Governor identified or recognized that:

    The state is in the third consecutive
year of a drought;
And that in each year of the current
drought, annual rainfall and the water
content in the Sierra snow pack have
been significantly below the amount
needed to fill California's reservoir
system;
That despite recent rains and snow, the
three-year cumulative water deficit is so large that there's only a 15 percent chance that California will replenish its water supply this year; That because there is no way of knowing whether the drought will end, further urgency action is needed to address the water shortages and protect the people and property of California; That the lack of water has forced California farmers to abandon or leave unplanted more than 100,000 acres of agricultural land; And that California farmers provide nearly half of the fresh fruit, nuts, and vegetables consumed by Americans; And that the crop losses caused by the drought will increase food prices which will further adversely impact families and the economy throughout California and beyond our borders. I believe that the proclamation and the Governor's findings have legal effect. I think the proclamation and the findings are supported by the evidence that have been presented in this hearing.
Most simply put, Central Valley Project agricultural water service contractors south of the Delta will receive less water this year than they received in 1977, the driest year on record.

There were some statements today that the hydrology has not been substantially impaired this year. I think C-WIN indicated that there is -- that there has not been a substantial impairment in terms of hydrology, the amount of water that's available.

There was suggestion that recent rainfall has alleviated the need. And again, putting aside whether that's true or not -- I don't think it is -- but putting it aside, it doesn't change the fact that agricultural water service contractors south of the Delta have a significant shortage in water supply, that Central Valley Project agricultural water service contractors will receive ten, at the most 15, percent of their contract, maximum contract.

There was also a suggestion that the data that's in the petitions is not current.

I think that the data was current when it was filed; and to the extent it's changed, the testimony revised it. I don't think that you should place blame on the Department or the Bureau for not submitting a revised petition. We're working under a quick time
frame, and I think they did a good job to try to be up
front with any changes that occurred.
Then just to conclude, the flexibility
provided by approval of the petition will help
facilitate the delivery of water to those areas most in
need.
It will permit movement of water to those
areas that have critical interests. Again, it's adding
flexibility to water that is south of the Delta. And I
believe, for the reasons I've articulated, approval of
the petition to allow for that to happen is in the
public interest.
And therefore, I believe that there's
substantial evidence presented during this proceeding
to support the petition.
CO-HEARING OFFICER BAGGETT: Couple additional
questions.
The discussion yesterday was the term. We are
being asked to approve a two-year condition. I think
it was pretty clear that 24 months is not necessary for
the payback.
I assume your clients are going to be
significantly involved in some of these negotiations
and purchases of water. What -- I guess what is a
reasonable term? 12 months, 13 months?
MR. RUBIN: There's --

CO-HEARING OFFICER BAGGETT: Let me finish.

That's one question: What's a reasonable term to allow that payback.

And two: If there was -- after this year's season, in the fall, if there was a proceeding or reporting prior to determine what amount of water is necessary for the payback so that there can actually be a plan presented to the Hearing Officers, is that something that's reasonable within the negotiation of those contracts?

Because I realize we have got a contractual issue separate from a water rights issue, and I think we understand that.

Does that interfere with the ability to do those contracts so this body understands exactly what is being proposed, how many acre feet, what are the terms of those, I guess, pay back transfers?

I could ask DWR and the Bureau these questions, but I assume that you will be much more involved in the negotiation, or your clients will, and the details of these transfers.

I'm trying to understand that mechanism, what's the time frame required? The proposal in the petition was that staff and the Bureau and DWR staff
approves.

Quite frankly, I think this is a little bigger than having staff approve. I think this body has to approve that. And I'm trying to understand how to make that mechanism work so that it allows for the private marketing that has to happen but allows also for oversight that I think this body is obligated to perform.

MR. RUBIN: From my client's perspective, the intent for the -- underlying the petitions that are before you is to alleviate the impacts that are caused this year by the water shortage. And part of that goal is achieved through these exchanges.

It's very complicated. It's something that I think a lot of people that have spoken before you fail to understand how complicated the system is, and how much analysis is required to determine when kind of some of the second part of the exchanges can be complete.

There is capacity and canal issues, and a lot of that I don't believe can be resolved today. And so I think that there's clearly conditions that could be imposed that provide some level of assurance for those that have raised concerns for next
year.

The intent is to include a two-year term in
order to complete those exchanges that have been
started this year.

In terms of the reporting, it seems to me that
the petition has already offered a condition that
should satisfy your second comment. On page ten --

CO-HEARING OFFICER BAGGETT: I've got it in
front of me.

MR. RUBIN: -- indicates that DWR and
Reclamation will develop a reporting plan that provides
you, as far as I can tell, with the assurance that the
second part of the exchange that may occur into next
year is related to activities this year.

Today, I can't tell you whether it should be a
year from approval, 18 months from approval, 24 months,
you know, from approval as the term for the reasons I
articulated.

I think that there's a lot of operational
issues that make that decision a lot more complicated
and frankly that may not allow for a definitive term
determination today.

CO-HEARING OFFICER BAGGETT: Okay. That's
fair.

MR. RUBIN: Any further questions?
CO-HEARING OFFICER BAGGETT: Not at this point.

The Projects in whatever order you want to go.

MS. AUFDEMBERGE: Good morning. My name is Amy Aufdemberge for Department of Interior, Bureau of Reclamation.

First of all, I want to apologize for being late this morning. I appreciate the accommodation, although it wouldn't have broken my heart if I had inadvertently waived my right to closing. But here we are.

I guess the main point that we have to say at this juncture is that the focus of the petition is to facilitate exchanges or transfers south of the Delta. The Water Bank issues are forecasted to be a very minor part of this -- of the consolidated place of use.

The impacts of the Drought Water Bank have been analyzed in connection with that program.

The remaining exchanges and transfers are all actions -- the remaining actions of the petition, including the Drought Water Bank, would be within the historical averages of use, and therefore the impacts fall within the existing Biological Opinions and NEPA analysis.
With respect to water quality standards, as you know, Interior has a serious disagreement with South Delta and San Joaquin County on the extent of federal obligation to meet South Delta salinity standards.

Provisions in D1641 clearly state that Reclamation's responsibility is to the extent that Reclamation can control the salinity below Vernalis. I can go on and on about that debate. In fact, I did; I scratched it out.

Suffice it to say that we have an outstanding lawsuit against the Board on that issue, and I suppose the Board can, if it wants to, wrap that morass into every petition it grants the Projects. But that debate will be there irrespective of what happens with this petition.

It is not clear whether another JPOD petition will be filed this year. If it is filed, we intend to reserve our legal arguments under that petition.

Other than that, nothing in this petition would affect Reclamation's ability to meet the terms and conditions of its water right.

And that's all I have to say.

CO-HEARING OFFICER BAGGETT: I don't know who to ask these questions. Maybe DWR wants to -- whoever
wants to go for it, I have a few related.

Why don't you go for your closing, then we'll
ask questions and you can decide who wants to answer
them.

MR. SODERLUND: Thank you. Good morning,
Board Chair Hoppin, Board Member Baggett, Board staff.
My name is Erick Soderlund, and I'm here on behalf of
the Department of Water Resources.

In some ways, it's tough to go last because
you take what you were planning on doing in a closing
argument, and it gets kind of convoluted as other
people bring up points. So I will try to stay on task
and not get sidetracked too much.

I will also say that, being a newbie at this
process, it's kind of hard. It's hard to know what to
address.

CO-HEARING OFFICER BAGGETT: We'll help you.

MR. SODERLUND: Thank you.

(Laughter)

MR. SODERLUND: In my opening statement, I
presented kind of four questions and what the testimony
would, you know, provide or what evidence we would
present to answer those questions.

And they were why are we here? What are we
asking for? What are the effects? And why are we
asking for it? What are the benefits of this?

So I still kind of wanted to follow that track.

The why are we here: We presented evidence that we are still in a third year of drought. We have a drought proclamation, an emergency declaration, that directs the Department to look for ways to respond to the drought and to mitigate its effects and, more importantly, or more specifically for this hearing, to facilitate transfers.

And in that proclamation, the Governor directed the Department of Water Resources to essentially file a consolidated place of use.

We're not pointing fingers at the Governor. We believe that, you know, we support the position. DWR supports the petition and believes that it does facility transfers.

So now I'll move more into what are we asking for. That seems to be a major concern of many of the parties and maybe even with the Board as far as what is DWR asking for.

And I thought Mr. Rubin did a good job of talking through that, but I'll add kind of my thoughts to it.

In some ways, the best way to present what
we're asking for is to talk about what would happen in
the absence of this petition.

In the absence of this petition, there would
still be a Drought Water Bank. The Department has two
hats, so to speak, in this hearing.

One hat is somewhat relevant, and that's the
hat of maintaining and furthering the Drought Water
Bank; and the other hat is as the petitioner for a
consolidated place of use.

We'll try to keep those separate and distinct
and to clarify where those differences are.

Like I said, without this petition, the
Drought Water Bank would still go forward. We have put
out a request for potential sellers, and those
potential sellers have come forward with the amounts of
water that they would like to sell to the Drought Water
Bank.

Under that Drought Water Bank, there was an
environmental review process, a Biological Opinion that
analyzed the effects of doing the Drought Water Bank,
and there was some environmental -- there was an NOE
filed, before that an addendum, and again like the
Biological Opinion looked at those effects. And again,
that is separate from this petition.

Without this petition, what would happen is if
a settlement contractor, an SWP or CVP settlement contractor, wanted to sell some of their project supply, either we would ensure under the Drought Water Bank that that project supply would go to -- if it was SWP Project supply, it would go to an SWP contractor, and that water would still be moved.

If it was a CVP settlement contractor, we would make sure that water went to a CVP contractor south of the Delta, and that water would still be moved.

If for some reason, a settlement contractor -- if we felt like it was absolutely necessary to move CVP water to an SWP contractor under the umbrella of the Drought Water Bank, then a petition would be filed.

All other water rights outside of the Projects are in the process of filing petitions, and many of those are before the Board, or at least the Board staff, right now.

So again, this petition does not make water available. It doesn't -- it isn't needed to move that water. The only difference that this petition means is that SWP water that is made available under the Drought Water Bank can now go to a CVP contractor.

In my opening statement, you know, I said this petition is much more than just a normal transfer of
water, a petition for a transfer of water. There's several reasons for that.

One is the Projects are different than a normal seller of water in a transfer. Some of those main differences are, one, we are, for lack of a better term, on the hook for many flow requirements and many Delta water quality requirements and objectives no matter what.

Many of these other water right users who may be in the Sacramento Valley, when they're selling their water, analyzing the effects of, you know, pulling that water, moving it to a different place are applicable because without the transfer of water they don't have to make sure that flow requirements are met no matter what.

So to analyze the fact whether that injury would occur in that transfer of water is appropriate because it's not the normal business.

For us, if we move -- I hope I'm not being too convoluted. For the Projects, as I said, we are held to the standards and objectives of flow requirements in the Sacramento and Feather River and the Delta.

Moving this water would not affect, as our testimony went to, would not affect our ability to meet those requirements.
And I apologize; I've lost my train of thought.

CO-HEARING OFFICER BAGGETT: I can give you some questions.

MR. SODERLUND: Please do. Save me.

CO-HEARING OFFICER BAGGETT: One is: I understand from reading the Executive Order that you are submitting CEQA information to Cal/EPA and to the Resource Agency; and I think it would be helpful if you provided whatever CEQA documentation to the Board also.

MR. SODERLUND: Yes.

CO-HEARING OFFICER BAGGETT: We could keep the record open. I don't know how long you would need it open for, a day or two or three, to provide that information. I assume it's developed already.

MR. SODERLUND: It is developed, and it is before both Secretaries. And I see no issue as far as my understanding of getting all the record of our CEQA compliance before the Board.

CO-HEARING OFFICER BAGGETT: How quickly can that be conveyed to us?

MR. HERRICK: I don't know how we ask the petitioners to submit environmental review information at the close of the hearing for the Hearing Officers and Board Members to consider and nobody else to look
at or cross-examine on.

I mean, I guess you could take public notice of anything.

CO-HEARING OFFICER BAGGETT: We can take public notice of it.

MR. HERRICK: I hate to have a large environmental review be shoved into the record when nobody else had the chance to cross-examine witnesses on it.

CO-HEARING OFFICER BAGGETT: No, we could take it under official notice.

MR. HERRICK: You can. It seems unfair is what I'm saying.

CO-HEARING OFFICER BAGGETT: Mr. Rubin?

MR. HERRICK: A large part of the discussion was the lack of evaluation.

CO-HEARING OFFICER BAGGETT: I appreciate that.

MR. HERRICK: Thank you.

MR. RUBIN: Just two thoughts.

One is to reiterate the point that I think was just conveyed, and that is the environmental documents are documents that you could take official notice of. And second, if I understand the process correct, and maybe I don't, but this forum is not the
forum to raise challenges to the environmental
documents, that they are what they are for this
process.

And so I don't think we want to get in a
pattern -- I don't think it has been the Board's
pattern -- to use this process as another opportunity
for the public to comment on the environmental
documents.

To the extent there's comment periods, those
are provided by law under CEQA, and that's the time and
place to raise your comments and concerns.

CO-HEARING OFFICER BAGGETT: Mr. Herrick.

MR. HERRICK: I'm sorry; that's just wrong.

This process is under 1701 et seq. Okay? So
there has to be a showing of whether or not there is
adverse impacts to other legal users -- and I'll just
generally say the environmental under the fishery
provisions.

To say that the documents that relate to the
effects of this project aren't relevant is nonsense.

Whether or not there is a CEQA process for something
else going on doesn't have anything to do with whether
or not the evaluation has been done.

There are orders of burden of proof --

CO-HEARING OFFICER BAGGETT: Okay.

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MR. HERRICK: And it's the petitioners' burden to show whether or not there's adverse impacts, not to say we haven't studied it and, by the way, there's other documents we forgot to present you.

CO-HEARING OFFICER BAGGETT: When will -- the order requires the Secretaries to act. They haven't acted, as we understand it.

MR. SODERLUND: Just a point of clarification. We filed an NOE yesterday afternoon. We are getting the package together to submit it to the Board as far as the Secretaries' concurrence.

And that's the issue, is under the order or under the proclamation -- and again, the parties can disagree about this in another forum.

But under the proclamation, DWR feels that this project falls under the exemptions. We believe that the proclamation stated that the exemptions, specifically 2180(b)(3), is applicable and can be applied to this project, and in light of that, we filed an NOE.

The environmental documents that we provided to -- it wasn't even an environmental document. We provided the NOE to the Secretaries along with the description of the project and stating why we felt that the emergency exemption should apply.
There was not environmental analysis that was missing from this proceeding. That was included in that.

CO-HEARING OFFICER BAGGETT: We could take notice of the NOE once it's adopted. Do you have a time frame?

MR. SODERLUND: The NOE was filed, and we should be getting the Secretaries' signature -- the actual signatures today, tomorrow. I mean soon. When I go back to the office, those are the phone calls I'll make, make sure we have it in our hand so we can submit. The only reason why we didn't submit the NOE yet is because we wanted everything together.

CO-HEARING OFFICER BAGGETT: Okay. And I understand there's other forums to deal with the challenge to the NOE. We have enough challenges.

Okay. Couple other questions I have. The timing issue, again, that we asked Mr. Rubin, so some of these questions I think are the same and see if you've got any thoughts.

The Sac Valley water, it appears we've heard everything from 6,000 to 16,000 acre feet. Do you have any idea, since the time has passed, we are -- the urgency to some extent has changed as the water type as changed since you filed this petition.
I don't know -- I mean I'm not saying it's not an urgency, but I guess the magnitude has clearly changed with the water type change in the last month and a half.

What do you anticipate to be the amount, 10,000 acre feet? 16? 12? Do you have any --

MR. SODERLUND: The latest information I have is 10,000. That's what I have to go on. If it ends up being more, it would be because someone put in an offer or, so to speak, a package yesterday or today.

That's the only reason why.

But we don't anticipate any more, if at all, because of the late notice.

CO-HEARING OFFICER BAGGETT: How many acre feet at this point do you have, I guess, approved? 100,000 for your total?

MR. SODERLUND: It is around 100,000.

CO-HEARING OFFICER BAGGETT: 100,000 now. But you would -- what's the maximum amount? It is fairly open-ended.

MR. SODERLUND: Maximum amount of Drought Water Bank total? In the Biological Opinion it was analyzed at 340,000 and some-odd -- 370,000, sorry. Almost 371,000. I can read the number now.

370,935 acre feet of water was the maximum
amount of water that was analyzed in the Biological
Opinion. Of that, 120,000 involves idling, 69,000 from
CVP contractors from substituting pumped groundwater.

CO-HEARING OFFICER BAGGETT: Where is this in
the record, just to save --

MR. SODERLUND: This is on page 3 of the
Biological Opinion of Exhibit I believe 6 of DWR.

CO-HEARING OFFICER BAGGETT: That's helpful.

BOARD MEMBER HOPPIN: Amy, if you could come
up, I've got a question for both you and Erick, if you
could tag-team on this.

Obviously, we're in a position where we need
to give a degree of deference certainly to the
emergency declaration.

But I think we would be very naive if we
didn't assume that by granting this petition, or a
portion of it, certainly, that we wouldn't be
developing a template for a more permanent change of
some sort, whether in drought conditions under
permanent conditions, and that gets me back to the
paragraph F, page 10 of the petition where we talk
about a reporting plan.

And will the words "will" and "would" and --
the time frame kind of eludes me on that.

If you could address, number one, what portion
of this reporting plan would be complete prior to
definition, what portion of it would be complete after
definition, and I can tell both of you if we were ever to
consider any permanent change, certainly with the
environmental rigors, that would go without saying,
that the thoroughness of this reporting plan and how we
could reflect on a temporary urgency as it would deal
with needs in some type of a permanent change would be
critical to me.

So if the two of you could develop on that, I
would really appreciate it.

MR. SODERLUND: I could take a quick crack at
it.

As far as developing the plan, we could
develop what we know right now, which includes pretty
much what's in the petition, and then firming up the
numbers of the groundwater Drought Water Bank project
water that would be moved.

And we could do that -- it would not be me, so
I'm putting it on other people to do the work -- but I
would say within the week, or two weeks?

I mean we would have, of what we know,
identified and to the Board by any decision or the day
of approval or whatever the proper time would be.

And then as far as how we would identify new
transfers or exchanges, that is something that we would
definitely work with the Board, any -- I don't know if
I'm going to get in trouble for saying this -- but
other parties as far as timing issue, you know.

How far in advance would we need to notify the
Board of a potential or proposed project or transfer?
I mean these things don't happen just like
that. So there is planning involved in the first
place. So once we get -- identify a project, I'm sure
we could put it before the Board in enough time to have
the Board have -- analyze it and ensure that it falls
within any order approving this petition and is
supported or has the proper information before that
project goes forward.

We're not planning on doing after-the-fact.
That's my understanding.

BOARD MEMBER HOPPIN: And after the fact, you
wouldn't be willing to provide us with the summation of
the efficacy of the petition and what you felt you
accomplished by having that latitude?

MR. SODERLUND: I am sure the Department would
be very interested in doing that, in providing kind of
a final report on how this helped out.
Because again, I agree with other parties that
there are other ways and other means to help out with
the drought. And in the report to the Governor, those
other ways and means were identified.

So this is just one tool. How effective is
the tool, we believe that it is going to be effective
in facilitating transfers in getting water to where
it's needed most. We do believe that.

How effective will it be? That is something
that we would be very interested in finalizing a report
and providing it to the Board and the public.

BOARD MEMBER HOPPIN: Thank you.

One other comment I'll make while I have both
of you up here. I will agree with Mr. Rubin, and it's
probably typical, a lot of issues like this.

Many of the objections were, although related,
were on the periphery of this petition.

One issue that was raised certainly by
Mr. Herrick has to do with JPOD and requirements as far
as July 1st. I want you all to be mindful of the fact
that that deadline is looming, and sometimes we're
making our best efforts, don't have an awful lot of
teeth in them.

So while this doesn't have to do with the
specifics of this petition, I think you need to be
mindful, as I'm sure you are, that we do have a statute
ahead of us that can't be ignored.
Thank you.

CO-HEARING OFFICER BAGGETT: That's all the questions I have. Do you have any closing thoughts?

MR. SODERLUND: Yeah.

I would just like to conclude that again, going back to the standard, we needed to provide evidence that demonstrated that there would not be a reasonable likelihood of injury to other legal users and obviously with the environment.

And the way we demonstrated that was by providing the parameters that have already been set, that have already been identified, in D1641 and the Biological Opinion for Delta, and the Biological Opinion for the Drought Water Bank, and opened up the door for the Biological Opinion that will soon be issued by NMFS. We will comply with those.

And if we can't do that, we'll comply with the Biological Opinion.

I'm sure there's other parties who may agree with that. I can't say, you know, you can't -- that disagreement is a disagreement.

But the testimony provided was saying that any water or any water that is moved under this petition will be done so in accordance with the provisions that have been provided to help protect other legal users.

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and the environment.

Then just lastly with -- because where I think the focus needs to be is on where does this water go? That's essentially what this petition will grant.

It will grant water, instead of going to an SWP contractor south of the Delta, now it will open up the door for SWP water to go to CVP service area lands. That's where the effect is. What is that effect?

And it may be an increase in drainage without the Project. And this is something that was identified, the baseline should be no Project, or the baseline should be identified as without.

And in CEQA, that's true. If we did a CEQA document -- and I know the parties, other parties, believe that we needed to do a CEQA document; that's a disagreement that will be addressed in another forum.

But if this was a CEQA document, then a no Project or a baseline would maybe be without this, what would the reason have been, you know, absent this petition.

However, it's not a CEQA document. It's an unreasonable effect on -- or a reasonable likelihood that this will not injure another user or reasonable likelihood that this will not affect the fish and
wildlife.

So what we provided to that was historical deliveries. What water will get to these individual districts -- what might get to these individual districts will be significantly less than what has been in the past.

And the argument is any drainage that may increase because of it for this year will not be anywhere near what it has been in the past.

With that, I'll leave it, and thank you for your time. It was a learning experience to do my first hearing before the Board. That was exciting. Have a good day.

Thank you.

CO-HEARING OFFICER BAGGETT: Thank you.

With that, that ends the closing comments.

We'll leave the record open today for any written closing comments by close of business, if you want to send us a list of proposed conditions or nonconditions or -- we'll just leave it open with no limit.

I don't expect tomes, but I know many of you have conditions already written. That would be helpful if you've got them and want to submit them to us by end of day electronically, or any closing thoughts.
So we'll keep the record open for that to close of business.

MR. SODERLUND: Could I add one more thought? I just wanted to address it.

The time, the time period. That was in a sense of not describing why we asked for two years, or why that rationale was not described, was not the fault of our witnesses. It was the fault of the drafter. And I do want to make clear, and as our witnesses testified, the purpose of this petition was to facilitate transfers for this year, and the only extension of time was to move the exchanges back in the following ag season or the following season to allow that to happen.

So I just want to make that clear. The rationale was not left out to keep it open-ended. It was left out --

CO-HEARING OFFICER BAGGETT: I understand. Like I said, you have to close of business if you want to be more specific. That's an opportunity to do so.

With that, the Board will take this matter under submission, and all persons who participated will be sent a notice of the Board's proposed order and the Board meeting at which the matter will be considered.
That will likely not be considered till the middle of May because this will take an action of the Board. The isn't an urgency order that can be granted by the Hearing Officers. This will take a full Board meeting, and we'll get the draft out and bring it back to the Board.

Mr. Rubin?

MR. RUBIN: Just while we're on the record, I raised this at the prehearing conference, and I just want to reiterate the -- my clients, San Luis and Delta-Mendota Water Authority and Westlands Water District, hope that and assume that you'll be looking at this as expeditiously as possible.

Almost as soon as you act, particularly if it's mid May, there's benefits that could be received. Santa Clara --

CO-HEARING OFFICER BAGGETT: We appreciate that. And there's a mid May Board meeting. But if one looks at the legal requirements for scheduling agenda items and public notice, that's about as expeditiously -- and that will be a strong push, but that is our intent, to resolve this, resolution to all parties by middle of May.

MR. RUBIN: I appreciate that. I didn't want to suggest that you didn't appreciate that.
I understand it may be already agendaized for closed session discussion at the Board meeting on I think it's the 5th.

That may not allow you to act on an order, but I do understand that and I think that does reflect your desire to kind of further the discussion so that we could be in a position where the Board decides at its mid May meeting.

CO-HEARING OFFICER BAGGETT: Right.

MR. RUBIN: Thank you.

CO-HEARING OFFICER BAGGETT: So we'll take this under submission.

Thank you for your interest and for, I think, working to make this process happen in a timely manner.

Thank you.

* * *

(Thereupon the STATE WATER RESOURCES CONTROL BOARD hearing adjourned at 10:27 a.m.)
CERTIFICATE OF REPORTER

I, LINDA KAY RIGEL, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing STATE WATER RESOURCES CONTROL BOARD hearing was reported in shorthand by me, Linda Kay Rigel, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said meeting nor in any way interested in the outcome of said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand this May 5, 2009.

LINDA KAY RIGEL, CSR
Certified Shorthand Reporter
License No. 13196