

HEARING
STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

IN THE MATTER OF:)
)
CONSIDERATION OF A)
PETITION BY YUBA COUNTY)
REQUESTING CHANGE IN THE)
EFFECTIVE DATE OF THE LONG-)
TERM INSTREAM FLOW)
REQUIREMENTS ESTABLISHED IN)
REVISED DECISION 1644.)
)
_____)

JOE SERNA, JR., CAL-EPA BUILDING
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SACRAMENTO, CALIFORNIA

TUESDAY, JANUARY 10, 2006

10:00 A.M.

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CERTIFIED SHORTHAND REPORTER
LICENSE NUMBER 10063

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES

BOARD MEMBERS

Mr. Arthur Baggett

Mr. Richard Katz

STAFF

Ms. Jane Farwell, Environmental Scientist

Mr. Dan Frink, Senior Staff Counsel

Mr. Ernest Mona, Water Resources Control Engineer

Mr. Greg Wilson, Water Resources Control Engineer

ALSO PRESENT

Mr. Gary Bobker, The Bay Institute

Mr. Paul Bratovich, Yuba County Water Agency

Mr. Ryan Broddrick, Department of Fish and Game

Mr. Robert Colella, United States Bureau of Reclamation

Ms. Cathy Crothers, Department of Water Resources

Ms. Teresa Geimer, Department of Water Resources

Mr. Stephen Grinnell, Yuba County Water Agency

Mr. David Guy, Northern California Water Association

Mr. Michael Jackson, California Sportfishing Protection Alliance

Mr. Bill Jennings, California Sportfishing Protection Alliance

Mr. Thomas Johnson, Yuba County Water Agency

Mr. Alan Lily, Yuba County Water Agency

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APPEARANCES CONTINUED

ALSO PRESENT

Mr. Jerry Mensch, California Sportfishing Protection Alliance

Ms. Nancy Murray, Department of Fish and Game

Mr. Dan Odenweller, California Sportfishing Protection Alliance

Mr. Don Schrader, Yuba County Water Agency

Mr. Michael Tucker, National Marine Fisheries Service

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1 PROCEEDINGS

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BOARD MEMBER KATZ: This is the time and place for the hearing to receive evidence relevant to determining whether to defer the effective date of the long-term instream flow requirements for the lower Yuba river.

The long-term flow requirements established in Revised Decision 1644 (RD-1644) are scheduled to go into effect April 21st of this year. Yuba County Water Agency has filed a petition to defer the long-term flow requirements and maintain the interim flow requirements until March 1st of 2007.

The hearing will provide an opportunity for the petitioner, interested parties, and protestants to the petition to introduce evidence relevant to the State Board's consideration of the petition.

This hearing is being held in accordance with the Notice of Public Hearings dated November 22nd, 2005. I'm Richard Katz, a member of the State Water Board. And with me as a co-hearing officer is my colleague, Art Baggett. Also present are the staff assigned to assist with this hearing: Staff Engineers, Ernie Mona and Greg Wilson; Staff Environmental Scientist, Jane Farwell; and Staff Attorney, Dan Frink.

This hearing provides parties who have filed a

1 notice of intent to appear an opportunity to present
2 relevant testimony and other evidence that addresses the
3 following issues:

4 Would approval of the petition to change the
5 effective date of the long-term instream flow requirements
6 established in RD-1644 result in injury to any legal user
7 of water?

8 Would approval of the petition to change the
9 effective date of the long-term instream flow requirements
10 established in RD-1644 unreasonably affect fish, wildlife
11 or other instream beneficial uses?

12 Would the public interest be served by changing
13 the effective date of the long-term flow requirements
14 established in RD-1644 as requested in the petition?

15 Should the State Water Board approve the petition
16 to change the effective date of the long-term flow
17 requirements established in RD-1644? If so, what
18 conditions should be included in an order approving the
19 petition?

20 After the hearing record is closed Board staff
21 will prepare a proposed order for consideration by the
22 Board. After the Board adopts the order any person who
23 believes that the order is in error will have 30 days
24 within which to submit a written petition for
25 reconsideration by the Board.

1 At this time I'll ask Dan Frink to cover
2 procedural items and introduce staff exhibits.

3 SENIOR STAFF COUNSEL FRINK: Yes, Mr. Katz.

4 The only procedural items that I wanted to
5 mention is that the court reporter is present and will
6 prepare a transcript to the proceedings. Anyone who wants
7 a copy of the transcript should make separate arrangements
8 with the court reporter.

9 Secondly, the items that are listed as staff
10 exhibits in the hearing notice are offered into evidence
11 by reference as staff exhibits.

12 As mentioned, I don't have any other procedural
13 items. So if there are no objections, I'll dispense with
14 reading the list of exhibits and ask that those exhibits
15 be accepted into evidence at this time.

16 MR. LILLY: Mr. Baggett, it's Alan Lilly for the
17 Yuba County Water Agency.

18 We don't object to the staff exhibits coming into
19 evidence for informational purposes. Obviously there may
20 be statements in them, the truth of which has not been
21 proven. So to the extent that they're hearsay and not
22 subject to exceptions, we ask that the Board treat them in
23 accordance with its normal rules for hearsay.

24 BOARD MEMBER BAGGETT: Okay.

25 SENIOR STAFF COUNSEL FRINK: I would note all of

1 the exhibits aren't hearsay. But, yes, to the extent that
2 they are hearsay and not subject to an exception, that's
3 the way we would expect they would be treated.

4 BOARD MEMBER KATZ: Which is what we normally do
5 with those.

6 Before we begin the evidentiary presentations we
7 will hear from any speakers who wish to make
8 non-evidentiary policy statements. If you wish to make a
9 policy statement, please fill out a blue card and hand it
10 to the staff if you have not already done so. If there's
11 anyone else out there -- not to worry, I have plenty up
12 here already. But if there's someone else who wants to,
13 please give us the blue card.

14 The Board will also accept -- the Board will also
15 accept written policy statements. A policy statement is a
16 non-evidentiary statement. It is subject to limitations
17 listed in the hearing notice. Persons making policy
18 statements must not attempt to use their statements to
19 present factual evidence, either or orally or by
20 introduction of written exhibits. Policy statements
21 should be limited to ten minutes or less.

22 We will begin with the participants who submitted
23 a notice of intent to appear, indicating that they wish to
24 present policy statement only, and in the following order:
25 Fish and Game, National Marine Fisheries, Bureau of

1 Reclamation, Trout Unlimited, The Bay Institute, and then
2 the other blue cards that we have.

3 We will then move to the evidentiary portion of
4 the hearing for presentation of evidence and related cross
5 examination of parties who have submitted notices intent
6 to appear. We will hear the parties' cases in chief in
7 the following order: Yuba County Water Agency, Department
8 of Water Resources, California Sportsfishing Protection
9 Alliance.

10 At the beginning of each case in chief, a
11 representative of the party may make an opening statement,
12 briefly summarizing the objectives of the case, the major
13 points, the proposed evidences intended to establish, and
14 the relationship between the major points and the key
15 issues. After any opening statement we will hear
16 testimony from the party's witnesses.

17 Before testifying the witness should identify
18 their written testimony as their own and affirm that it's
19 true and correct. Witnesses should summarize the key
20 points in their written testimony and should not read
21 their written testimony into the record. At the
22 prehearing conference on January 4th, 2006, the
23 participants agreed to keep the oral summaries of written
24 testimony short.

25 Direct testimony will be followed by cross

1 examination by the other parties, Board staff, myself or
2 Mr. Baggett. Redirect testimony is permitted, followed by
3 recross. Recross is limited to the scope of the redirect.
4 After all the cases in chief are completed, the parties
5 may present rebuttal evidence.

6 Parties are encouraged to be efficient in
7 presenting their case and their cross examination. Except
8 where either Art or I approve a variation, we will follow
9 the procedures set forth in the Board's regulations in the
10 hearing notice.

11 The parties' presentations are subject to the
12 following time limits: Opening statements are limited to
13 20 minutes per party. Oral presentations of direct
14 testimony for each witness will be limited to a maximum of
15 20 minutes, not to exceed a total of two hour for all
16 witnesses presented by a party. Cross-exam will limited
17 to one hour per witness or panel of witnesses. Additional
18 time may be allowed upon a showing of good cause. But
19 I'll remind everyone, at the prehearing conference last
20 week the parties agreed that redirect and recross should
21 not take more than one hour, and all parties were
22 confident that this hearing should not run more than a
23 day.

24 We do not anticipate having closing oral
25 arguments, but parties may submit written closing briefs.

1 All briefs are due two weeks from the close of the hearing
2 and are limited to a maximum of ten pages.

3 And at this point we'll take policy statements,
4 starting with Department of Fish and Game.

5 Mr. Broddrick.

6 By the way, before the Director starts, I should
7 note, sort of on a personal note, it's somewhat ironic and
8 interesting that five years ago the first vote I had as a
9 Water Board member was on reconsideration of the Yuba
10 Order. And as I approach my last days or weeks on the
11 Board, we're back doing Yuba.

12 So with that, Ryan, we'll start off with your
13 policy statement.

14 DEPARTMENT OF FISH & GAME DIRECTOR BRODDRICK:

15 Board Member Katz, Board Member Baggett, thank
16 you very much. And I guess life is a circle. You just
17 hope they get smaller.

18 (Laughter.)

19 DEPARTMENT OF FISH & GAME DIRECTOR BRODDRICK: I

20 appreciate the opportunity to testify before the Board,
21 members of the staff.

22 The Department of Fish and Game supports the
23 petition filed by the Yuba County Water Agency. I'm not
24 going to go into the details with the letter that's before
25 you.

1 We believe that the flow requirements -- the
2 long-term instream flow requirements in RD 644 from April
3 21st of 2006 to March 1st of 2007, that that petition is
4 appropriate.

5 I want to hit the issues in terms of our
6 participation. We understand this is a critical component
7 of a long negotiated and delicate and often times
8 contentious, as you referenced, Board Member Katz,
9 agreement. But we think the lower -- the proposed lower
10 river -- Yuba River Accord provides the type of balance
11 and benefits to aquatic resources of the state that is
12 necessary.

13 We certainly have participated long and hard in
14 this. I have personal involvement from this from the
15 mid-nineties.

16 What the letter does not capture I think is the
17 incredible amount of effort that the Board members as well
18 as the community as well as the non-governmental
19 organizations and the combination of state and local
20 leadership decision making that's brought us to this point
21 It has been a huge and to be noted and complimented
22 effort.

23 We believe the extension is necessary for the
24 Yuba County Water Agency to implement the 2006 pilot
25 program. This discussion -- this extension was discussed

1 among the parties as a necessary step in the overall
2 proposed Yuba Accord process in order to allow time to
3 develop an adequate CEQA/NEPA document. I want to assure
4 you that we underscored "proposed," and we think the
5 CEQA/NEPA document is a critical component, but it is
6 certainly linked to the pilot project.

7 You have noted in prior testimony provided by the
8 Department that the component related to the long-term
9 water supply of the California environment -- CALFED
10 Environmental Water Account is incorporated into this
11 transaction to try to balance the requirements within the
12 river and, without compromising anything in the river,
13 complement the Delta tools.

14 And I apologize for stuttering through this. I
15 tore my left contact lens, which is my reading lens. So
16 these \$3 Rite-Aid glasses are my attempt to look learned,
17 and all I'm doing is getting cross-eyed trying to use
18 them.

19 (Laughter.)

20 DEPARTMENT OF FISH & GAME DIRECTOR BRODDRICK: My
21 apologies.

22 We would also request the Board, as referenced in
23 the letter, approve the petition filed by the Yuba County
24 Water Agency in November 2005 for the implementation of
25 the pilot program. Once again, as a package it's

1 important to maintain the fidelity and the diligence of
2 the CEQA/NEPA process. But all of these components kind
3 of work like a -- in an integrated gear fashion. And to
4 maintain the consensus building and the consensus point
5 we've reached and the ability to do the river management
6 team to benefit the aquatic resources of the lower Yuba
7 River, I think that it's important to maintain the context
8 of all the elements of the accord package.

9 Thank you for your time. I appreciate your due
10 diligence. And, Board Member Katz, I hope I don't see you
11 here five years from now, but I'm willing to do that.

12 BOARD MEMBER KATZ: I appreciate it. If you do,
13 I might be standing where you -- you know, on that side of
14 it, but certainly not up here.

15 DEPARTMENT OF FISH & GAME DIRECTOR BRODDRICK:

16 I'd like to clarify that that was no reference to
17 your tenure on the Board --

18 (Laughter.)

19 DEPARTMENT OF FISH & GAME DIRECTOR BRODDRICK:

20 -- but rather to the issue.

21 BOARD MEMBER KATZ: I was going to ask you if you
22 knew something I didn't know because -- but that's fine.

23 Director, I appreciate the comments. Thank you
24 very much.

25 We will next hear from --

1 MR. JACKSON: Mr. Katz, before we go forward, I'd
2 like a little bit of clarification.

3 BOARD MEMBER BAGGETT: Do me a favor. For the
4 court reporter, please --

5 MR. JACKSON: I'm Mike Jackson representing CSPA.

6 This hearing we indicated would be very short
7 because it deals as far as I understand only with
8 deferring the RD-1644 long-term flow schedule.

9 This is a policy statement that was just made by
10 Fish and Game. But we've talked about the Yuba Accord and
11 we've talked about another hearing we're not in at this
12 point, which is the transfer hearing.

13 I would like some idea of what the ground rules
14 are going to be about whether or not we're supposed to be
15 approving the flaws of the Yuba Accord today. Because if
16 everyone's going to talk about what a great thing it is
17 and how this is part of the Yuba Accord, how do we go
18 after the underlying thing when it's not part of the
19 hearing?

20 BOARD MEMBER KATZ: Well, first of all, the
21 policy statements are just that. They're non-evidentiary
22 policy statements. And we provide some latitude in the
23 policy statements. The hearing itself and evidence for
24 the hearing and the decision in the hearing will be
25 dealing with the deferral only.

1 Does that help?

2 MR. JACKSON: Yeah, I guess.

3 BOARD MEMBER KATZ: I mean the policy --

4 MR. JACKSON: The relevance then of all of this
5 Yuba Accord sort of talk about what things will be like
6 down the road?

7 BOARD MEMBER KATZ: Well, keep in mind, you know,
8 the decision that this Board will -- the Hearing Board
9 will make and recommend to the full Board is going to be
10 based on the evidence that's presented. Policy statements
11 are non-evidentiary policy statements and will be treated
12 accordingly in terms of, you know, how we reach our
13 decision. We will reach our decision based on the
14 evidence that's presented, and we will be narrow in the
15 evidence that's presented to deal with the date issue and
16 the delay issue only.

17 BOARD MEMBER BAGGETT: And I think we tend to
18 have a lot of latitude in policy statements, as I think
19 Mr. Jennings is well aware. Some people like to wax a
20 little bit when they --

21 BOARD MEMBER KATZ: And particularly, you know,
22 given the extra effort the Director made by going to
23 Rite-Aid and struggling through, I think we --

24 (Laughter.)

25 BOARD MEMBER KATZ: -- I think he deserves the

1 latitude to make a broader policy statement.

2 MR. JACKSON: I certainly do not want to
3 interfere with the Rite-Aid visit or the enthusiasm that
4 the Director has for a project that will be studied later.
5 But I just wanted to get straight what it was we were
6 supposed to be doing here.

7 BOARD MEMBER KATZ: No, I understand. We're
8 going to be doing the -- we're dealing with the date and
9 that question and that question only. And in the
10 evidentiary part of the hearing we will be very narrow in
11 testimony and in exhibits, et cetera.

12 MR. JACKSON: Thank you, sir.

13 BOARD MEMBER KATZ: All right. Next up is NOAA.

14 MR. TUCKER: Here comes another policy statement
15 that discusses the accord.

16 BOARD MEMBER KATZ: That's okay. We're giving
17 you latitude and treating it appropriately.

18 MR. TUCKER: Thank you.

19 Members of the Board, thank you very much for the
20 opportunity to provide this statement regarding the
21 petition requesting change in the effective date of the
22 long-term flow requirement of RD-1644.

23 My name --

24 BOARD MEMBER KATZ: Sir, two things: One,
25 identify yourself for the court reporter. Second, if

1 you're going to just read the statement, you can submit it
2 to us also. We'd rather you present it or summarize it
3 than read something you could submit in writing.

4 MR. TUCKER: I'll do a little bit of both.

5 BOARD MEMBER KATZ: Okay. Appreciate it.

6 MR. TUCKER: I'll try to make some eye contact
7 with you.

8 I wasn't actually intending to give this today.
9 My supervisor was, and he got pulled away to a different
10 important issue. And so it's a little bit of a short-term
11 knowledge on this. Although I have very long-term
12 knowledge on the issue.

13 My name is Michael Tucker. And I am the
14 principal fishery biologist for the Yuba River out of the
15 Sacramento Area Office for the National Marine Fisheries
16 Service. I'm here today to express inn NMFS's support for
17 the petition filed by Yuba County Water Agency to change
18 the effective date of the long-term instream flow
19 requirement specified in RD-1644 from April 21, 2006, to
20 March 1st, 2007.

21 NMFS understands that this change really is
22 necessary to allow the implementation of the 2006 pilot
23 program and that the pilot program is an important and
24 necessary step in evaluating and implementing the longer
25 term Yuba Accord.

1 NMFS has statutory obligations under the Federal
2 Endangered Species Act and the Magnuson Stevenson Fishery
3 Conservation Act to ensure the protection of federally --
4 of Pacific Salmon and federally listed threatened and
5 endangered anadromous fish, including Central Valley
6 Spring Chinook Salmon and Central Valley steelhead, both
7 of which occur in the lower Yuba River. And for this
8 reason NMFS has been an active participant part in the
9 process that led to the Yuba Accord, including the Lower
10 Yuba River Fisheries Agreement and all of the elements of
11 that process. NMFS was, you know, actively engaged in
12 development of the flow schedules and the Yuba river
13 management team provisions and the biological studies
14 program that are all very key elements to this package.

15 We believe the cumulative provisions of the
16 fishery agreement will provide a level of protection for
17 salmonids in the lower Yuba River that is equal or greater
18 than the provisions under RD-1644. And that key elements
19 of the accord, such as the initiation of the flow
20 schedules and funding of the biological studies on the
21 lower Yuba River, which are expected to begin as early as
22 this coming April with the implementation of a 2006 pilot
23 program, are really important steps in the protection of
24 Pacific Salmon and the recovery of listed anadromous fish
25 which occupy the lower Yuba River.

1 NMFS fully intends and we will continue to
2 participate in the EIR/EIS analysis of the Yuba Accord to
3 ensure that the perceived benefits will in fact be
4 realized by the fishery's resources.

5 We also intend to conduct formal Endangered
6 Species Act consultation on the federal actions involved
7 with implementation of Yuba Accord. And through that
8 process, through that action, we'll ensure that any
9 potential adverse effects of the accord to listed salmon
10 and steelhead are fully analyzed and avoided or minimized.

11 NMFS also will be an active participant in the
12 river management team for the 2006 pilot program, which
13 really we believe is going to serve as an important first
14 step in implementation of the Yuba Accord as well as an
15 opportunity to evaluate several aspects of the accord
16 agreements and prior to full implementation.

17 In addition to specific benefits of the Yuba
18 Accord to the Yuba River fisheries, NMFS believes that the
19 basic concepts underlying the accord and the cooperative
20 process through which the accord has been developed
21 represents really a unique and important breakthrough in
22 the critical interface of fisheries protection and water
23 management in the State of California.

24 BOARD MEMBER KATZ: Michael, I'm going to stop
25 you there and ask you to --

1 MR. TUCKER: Okay. That was just about it.

2 BOARD MEMBER KATZ: Okay. Well, again, while
3 we're trying to allow some latitude with the policy
4 statements, I'd like them to somehow relate to what we're
5 actually doing here today. I'm willing to give latitude.
6 But I'd like it to tie, not to the broad picture of the
7 Yuba Accord, but specifically looking at what this
8 determination is about. I'm not just saying this to you,
9 but to everyone in the audience.

10 So would the people who are making policy
11 statements after Michael please keep that in mind. I mean
12 we're going to try and be flexible and give latitude. But
13 it should try and bring it back to what we're talking
14 about.

15 MR. TUCKER: Okay. And --

16 BOARD MEMBER KATZ: And I understand you just got
17 thrown into this today, so --

18 MR. TUCKER: Right.

19 And the tieback in, in my opinion, is that, you
20 know, we really see this as step-by-step process. And
21 it's really very likely the way this has been developed
22 and put together that if we lose this step of the process,
23 that it really could derail the whole thing. So I really
24 feel they are all tied together.

25 BOARD MEMBER KATZ: I appreciate that very much.

1 And if you want to give that to the staff, we'll
2 take it as the written statement also. So thank you for
3 that.

4 Okay. Next up, U.S. Bureau of Reclamation.

5 MR. COLELLA: Good morning, Board members. My
6 name is Robert Colella, Water Rights Specialist for the
7 Mid-Pacific Regional Office of the United States Bureau of
8 Reclamation.

9 And with your indulgence, my policy statement too
10 does address the Yuba Accord and the benefits thereof.
11 And that was basically -- it'd be my summary based upon
12 the policy statement I did submit.

13 BOARD MEMBER KATZ: Okay. Now, do we already
14 have a copy of the statement?

15 MR. COLELLA: Yes.

16 BOARD MEMBER KATZ: We already have a copy.

17 Do you want to go through it again, or just leave
18 us the written piece?

19 MR. COLELLA: If I could briefly --

20 BOARD MEMBER KATZ: Briefly. Okay.

21 MR. COLELLA: -- very briefly.

22 BOARD MEMBER KATZ: Okay. Thank you.

23 MR. COLELLA: I have a very short statement.

24 The Yuba County Water Agency, Petitioner,
25 requests that the State Water Resources Control Board

1 defer the effective date of the long-term flow
2 requirements established in Revised Water Right Decision
3 1644. The petitioner's purpose for seeking this change is
4 to facilitate implementation of the Pilot Transfer Program
5 in 2006 to be conducted prior to requesting revisions to
6 the long-term flow requirements and approve of a long-term
7 transfer of water as part of the proposed Yuba Accord.

8 The Yuba Accord when in effect will result in
9 improved water supply reliability for Reclamation as well
10 as for the California Department of Water Resources,
11 including a firm commitment of 60,000 acre/feet per year
12 for the Environmental Water Account and up to an
13 additional 140,000 acre/feet in dry years for the State
14 Water Project and the Central Valley Project, including
15 for fish and wildlife purposes.

16 A memorandum of understanding for the water
17 purchase agreement is now in place.

18 Under the proposed water purchase agreement
19 Reclamation along with the California Department of Water
20 Resources would enter into a long-term agreement to
21 purchase water from the petitioner to improve water supply
22 reliability for the projects, including for fish and
23 wildlife purposes, and they contribute toward a long-term
24 Environmental Water Account.

25 The proposed Yuba Accord is a collaborative

1 effort designed to benefit fisheries populations in the
2 lower Yuba river, while making available for purchase
3 60,000 acre/feet of water per year for multiple years for
4 the CALFED Bay Delta EWA as well as supplemental water
5 supplies for the projects.

6 Reclamation, as one of the parties to the
7 proposed Yuba Accord, supports the petitioner's request to
8 change to RD-1644 in order to implement the 2006 pilot
9 program.

10 Thank you very much.

11 BOARD MEMBER KATZ: Thank you very much.

12 Next up, Trout Unlimited for a policy statement.

13 THE BAY INSTITUTE PROGRAM DIRECTOR BOBKER: I'm
14 going to speak on their behalf.

15 BOARD MEMBER KATZ: Okay. In that case, the Bay
16 Institute.

17 Trout Unlimited had a great policy statement, by
18 the way. I really appreciated that.

19 By the way, for people in the audience that
20 haven't -- may not have been part of this for the last
21 five years or longer, ten years, we are not -- don't
22 misinterpret the fact that we're trying to keep parts of
23 this short and would like to get through in a day with
24 a -- and don't assume that means we're not going to give
25 this the consideration and deliberation that it deserves.

1 It just means that a lot of us in this room have been
2 through this for many, many years, and we're trying to
3 focus on the narrow issues.

4 So with that, Gary.

5 THE BAY INSTITUTE PROGRAM DIRECTOR BOBKER:

6 All right. Thank you, Mr. Katz. Gary Bobker
7 with The Bay Institute, speaking on behalf of The Bay
8 Institute, Trout Unlimited, Friends of the River, and the
9 South Yuba River Citizens League.

10 We are parties to the proposed Yuba Fisheries
11 Agreement, a component of the Yuba Accord, and have been
12 supportive of this petition. But I'll anticipate your
13 latitude, Mr. Hearing Officer, because you have to connect
14 the dots, at least at the policy level.

15 We support going ahead with the proposed Yuba
16 Fisheries Agreement. In order to do that as a pilot
17 program, Yuba is proposing to continue the interim RD-1644
18 requirements for a year and defer the long-term ones.

19 We support that contingent on moving forward with
20 the pilot program. The pilot program will, we believe,
21 provide equivalent or better protection than what's in
22 RD-1644. We believe that it will allow an adaptive
23 management process to begin so we can be in to sort of
24 test run what we think is an improved approach to managing
25 the river's resources. And we think it will actually

1 generate useful information for the State Water Board's
2 consideration of the proposed longer-term changes under
3 the Yuba -- proposed Yuba Fisheries Agreement and the
4 other agreements.

5 So, if the point of deferring compliance with the
6 long-term 1644 is to do those things, great. If it isn't,
7 well, then, no, then we'd have a problem. So you have to
8 connect the dots at the policy level.

9 The second comment that I'll make is that you
10 also need to make sure that any change in compliance with
11 the Yuba's requirements doesn't have an adverse impact on
12 the Delta in terms of reduced outflow or increased export
13 pumping. The fact is that our assumption in -- we're
14 not -- we are parties to the Yuba Fisheries Agreement.
15 We're not parties to the proposed transfer agreements.

16 Our assumption has been that Yuba's been
17 transferring water for a while. We seem to have
18 improvements in management and stable populations in the
19 Delta, so that it was kind of a wash obviously with the
20 status of pelagic organisms in the Delta right now.
21 That's a lot more questionable. So we need to be looking
22 at -- whether it's in the context of this hearing or
23 you're proceeding to look at the transfer petition, I mean
24 it's all connected. And we would encourage you to, number
25 one, take a look at the material being developed by the

1 pelagic organism decline research.

2 We've done some work which we've submitted to you
3 in the separate proceeding on what we think are
4 relationships between export pumping and the pelagic fish
5 situation, which may not -- at least we think that given
6 the evidence that winter exports probably are more
7 important, may not really have any implication for this
8 process.

9 But, in general, for any transfer, the Yuba
10 transfer, any other transfer, you ought to be looking at
11 whether it's going to have an impact on the pelagic fish
12 situation, and asking the entities that are involved in
13 those transactions to have criteria for how they're going
14 to make sure that Delta smelt, long fin smelt and other
15 species aren't going to be impacted by it.

16 So with those words again, connect the dots.

17 Thank you.

18 BOARD MEMBER KATZ: Thank you, Gary.

19 Next we'll hear from Mr. Jennings.

20 MR. JENNINGS: Good morning, Mr. Katz.

21 BOARD MEMBER KATZ: Mr. Jennings, good to see
22 you.

23 MR. JENNINGS: It's good to see you.

24 Bill Jennings representing California
25 Sportsfishing Protection Alliance, and it's been a policy

1 statement.

2 Policy statements are right up there with a warm
3 bucket of spit. And I do appreciate the latitude offered.

4 First, a historical perspective. I mean we filed
5 our original complaint in 1988 -- my beard was red, and
6 there are people in college that weren't born yet --
7 following preparation of DFG's Yuba management plan. And
8 keep that in mind. I mean that is in the record. I mean
9 that is the formal study by the Department of Fish and
10 Game that has gone unrebutted through all this time. I
11 mean it's -- It hasn't evaporated. But, anyway, the State
12 Board held a 14-day evidentiary hearing in 1992 and
13 prepared a draft decision in '96, but failed to circulate
14 it publicly until '99.

15 And then again in 2000 we had another 13 days of
16 evidentiary hearing of additional evidence and a revised
17 draft. And then following two additional days of hearing
18 D-1644 was issued in March of 2001. And 1644 was again
19 amended in May of that year and subsequently revised
20 following a court-directed supplemental three-day hearing
21 in June of 2003.

22 I mean, you know, over a 11-year period I think
23 we've had 31 days of evidentiary hearing on this issue.

24 The effective date for the implementation of the
25 long-term instream flow requirements is scheduled for

1 April of this year.

2 1644 flow requirements resulted, as I said, from
3 actually 32 days of evidentiary hearing over 11 years,
4 including the recommendations of fishery experts from
5 NMFS, from Fish and Wildlife, from DFG, following a
6 settlement process between Yuba County Water Agency,
7 Resource Agency managers and some NGOs, signed an
8 agreement that essentially repudiated sworn testimony of
9 agency biologists. And I hope it -- interestingly none of
10 the fishery agency signatories are offering direct
11 testimony in this hearing. I mean I hope that hasn't gone
12 unnoticed. In fact, Department of Fish and Wildlife
13 Service has no show. We were looking forward to being
14 able to cross-examine their biologists in light of their
15 previous testimony.

16 And we trust it has not gone unnoticed that DFG's
17 Regional 2 Environmental Services Manager, Jerry Mensch,
18 who developed the DFG Yuba River Plan, and Dan Odenweller,
19 who testified during multiple -- those hearings, are
20 representing CSPA today.

21 And, in fact, Alice Rich -- Dr. Rich, who was
22 DFG's temperature expert during the hearings, would have
23 been here if not for a previous commitment.

24 The policy statements offered today by DFG and
25 NMFS are at odds with the sworn testimony presented by the

1 biologists. You know, essentially political science has
2 been enthroned and biological science has been assigned to
3 the scaffold.

4 Regardless of policy statements, the long-term
5 instream flow requirements in RD-1644 are significantly
6 better than either of the interim of the accord flows.
7 The documents submitted by Yuba County Water Agency assume
8 a baseline predicated on interim rather than long-term
9 flows, using carefully crafted assumptions. They assume
10 conditions that are not likely to materialize, and
11 contrary to proponents' claims and their policy
12 statements. This is not a one-year program. That clearly
13 demonstrates that the effects of this scheme reverberate
14 over a number of years. Spring flows are critical for
15 salmonid rearing. And out-migration water moved from the
16 spring to late summer results in less protection for fish
17 in the spring. Water moved from spring to late fall --
18 late summer and fall reduces attraction flows for American
19 shad. Additional exports will likely exacerbate the
20 ongoing crash of pelagic species in the Delta. I mean
21 certainly smelt are at their lowest level this year. The
22 fall mid-water trawl was a third of last year and last
23 year was the lowest on record.

24 And we do note that recently the CALFED expert
25 evaluation of the OCAP biological opinion concluded that

1 National Marine Fisheries failed to use the best available
2 science. And this is on top of the Inspector General's
3 findings that they violated their own policy in issuing
4 the biological opinion. And you can't deal with this
5 problem without understanding what's happening in the
6 Delta today.

7 With respect to the Environmental Water Account,
8 we note that the District Court of -- Third District Court
9 of Appeals recently concluded that there's no way to
10 determine the flow design of EWA, whether or it actually
11 mitigates damage to fisheries in the Delta. I think it's
12 becoming clear that the Environmental Water Account is a
13 money maker that provides some protection for some life
14 stages of some fish at the expense of redirected impacts
15 affecting other life stages of other fish. If you export
16 water through the Delta, it means that it pushes water
17 somewhere. I mean it is a zero sum equation there.

18 The proposed transfer is part of a long-term
19 program requiring conditions that haven't been met. I
20 mean there's going to be a new flow regime with the PG&E
21 contracts that hasn't been negotiated. The revised
22 agreement with Hallwood Cordura, I mean that hasn't
23 materialized. The proposed plan includes a groundwater
24 substitution scheme that hasn't been quantified. The
25 sources and potential impacts have not been identified.

1 The negative dec that was submitted to this Board
2 yesterday -- was passed by Yuba County Water Agency
3 yesterday, submitted to this Board, and made it to your
4 website in one day, which is -- must set a record of some
5 sort, claims that there can be no significant
6 environmental impacts from discarding RD-1644, I mean a
7 State Board order -- repeated State Board order, and from
8 changing the timing and the quality of flows in the Yuba
9 are increasing exports from the Delta. Now, that's
10 rubbish. And if anybody thinks that neg dec is going to
11 go through unchallenged, you know, has lost touch with
12 reality.

13 And let's be candid here. The only purpose of
14 the proposal before you is to make a buck, to take
15 water -- needed for instream flow in the spring when it
16 cannot be sold and to transfer it to late summer and fall
17 when it can be sold. In order to further Yuba County
18 Agency's profiteering, Resources Agency managers, and I'm
19 sorry to say, some misguided NGOs have inexplicably
20 rejected the sworn expert testimony of agency scientists
21 over multiple hearings and embraced a backroom deal that
22 evidences no regard for the health of fisheries in the
23 Yuba River or the Delta.

24 And let's be clear, that this is a dangerous
25 precedent. If the State Board rejects an evidentiary

1 record developed in three separate hearings over an
2 11-year period, it essentially invites water agencies to
3 persist in contesting every issue this Board -- order this
4 Board issues.

5 It's been 18 years since CSPA filed the initial
6 Yuba River complaint. In response DFG developed a
7 management plan. We went through hearings, we had all
8 this sworn testimony that has now been repudiated by the
9 managers of the agencies.

10 The State Board, as I said, have had three
11 evidentiary hearings. It's time to implement the
12 long-term instream flow schedule in RD-1644. Justice
13 delayed is justice denied. And 18 years, frankly, is
14 enough.

15 Thank you.

16 BOARD MEMBER KATZ: Thank you, Mr. Jennings.

17 All right, next -- and I have Cathy Crothers --
18 Ms. Crothers on behalf of the Department.

19 Please clarify for me, because I think you're
20 also presenting evidentiary testimony.

21 MS. CROTHERS: Yes. I'm Cathy Crothers, attorney
22 for the Department of Water Resources.

23 Yes, that's correct. We're one of the parties to
24 present some direct testimony. And as part of that case
25 in chief we'd like to have Jerry Johns present his policy

1 statement kind of in substitution of any opening
2 statement. So if we could just have that all at one time.

3 And the other difficulty is is that Deputy
4 Director Johns is at the Governor's Office right now and
5 he won't be done with his meeting there till 11.

6 BOARD MEMBER KATZ: Well, I'll tell you what.
7 We'll deal with it all then when we start direct
8 testimony. And when it comes time, he's either here or
9 he's not.

10 MS. CROTHERS: That's fine.

11 We also have a written policy statement.

12 BOARD MEMBER KATZ: Even better.

13 MS. CROTHERS: So in lieu of that, we could just
14 submit that.

15 BOARD MEMBER KATZ: You could submit that and ask
16 him to stay in the Governor's Office. That would be okay
17 too.

18 MS. CROTHERS: Well, when I see him, I'll ask
19 him.

20 BOARD MEMBER KATZ: Okay. Thanks.

21 BOARD MEMBER BAGGETT: It's probably safer over
22 there.

23 BOARD MEMBER KATZ: It's much safer, yeah.

24 Has he written any letters lately?

25 All right. Mr. Guy.

1 MR. GUY: Thank you, Board Members Katz and
2 Baggett. My name is David Guy, Executive Director with
3 the Northern California Water Association. We did submit
4 the policy statement, and I'll also leave copies up here
5 for anybody who has not received those.

6 I'm going to summarize, because I know, Mr. Katz,
7 you love long policy statements. So I'm going to make it
8 fairly quick.

9 BOARD MEMBER KATZ: David, I was looking forward
10 to yours though.

11 MR. GUY: Yeah, thank you. Well, only because
12 you know it's going to be short.

13 I think the -- obviously what you have before you
14 today is just the beginning of really a
15 once-in-a-generation opportunity. And I think, Mr. Katz,
16 you alluded to the fact at a hearing several years ago, as
17 you recall, at that time the parties weren't all singing
18 off the same sheet, and they largely are today. There are
19 some detractors. But the large majority of folks are
20 saying that this process should move forward. And this
21 really is a once-in-a-generation opportunity that I hope
22 the Water Board seizes upon and really sends a strong
23 signal across the state that this is a good way to resolve
24 complex disputes like they have here.

25 I think the other thing that I would really just

1 emphasize is that a lot of people I think are going to be
2 watching this pilot program, and hopefully you'll be able
3 to create some real positive momentum to move the larger
4 agreement forward. I think that's going to be real
5 critical this year, just to get this off on the right foot
6 and the right momentum.

7 So, anyway, in the NCWA we strongly support the
8 petition and strongly moving forward with the Yuba Accord.
9 And we do hope that you will, as I think Director
10 Broddrick said, maintain the fidelity of the agreement. I
11 think that is really important. It's a delicate
12 agreement. And hopefully that can move forward so that we
13 can get this program implemented here over the next
14 several years.

15 And we thank you for your expediency in getting
16 this hearing forward. And hopefully -- I'm looking
17 forward to seeing the order and moving this forward.

18 Thank you.

19 BOARD MEMBER KATZ: Mr. Guy, thank you very much.

20 I have -- my apologies -- Don -- and I can't read
21 your last name, but Chair of Yuba County Water. And
22 you're presenting a policy statement, but you're not going
23 to be presenting direct testimony, is that what I
24 understand?

25 MR: SCHRADER: Correct.

1 My name's Don Schrader. I'm Chair of the Yuba
2 County Water Agency. I have a policy statement I'll give
3 you, but I'll just summarize it.

4 Basically I've been Chair of the Yuba County
5 Water Agency for the past two years. I think this process
6 has epitomized the term "shuttle diplomacy". We started
7 out with a three-legged stool. And if I ever see another
8 three-legged stool, I'm going to burn it.

9 But we've tried our best to try to get everybody
10 to agree. Not everybody's going to agree on this process.
11 Not everybody agreed on 1644. And the results would be a
12 legal case that nobody would agree on. I think we've done
13 an excellent job. I think our staff's done an excellent
14 job. I've seen most of these people on Saturdays and
15 Sundays. And I appreciate the Fish and Game offer of
16 using their facility out in Yolo County.

17 We've tried our best to negotiate an agreement
18 that is fair for everybody. While not everybody agrees, I
19 think we need to go forward with this process and allow
20 the process to continue. I think the fish in the Yuba
21 River are as in good a shape as they've been for years.
22 I've only been involved in the Yuba River since 1955, so
23 I'm a fairly newcomer to the process. But I think the
24 salmon and steelhead in that river are in as good a shape
25 right now as they've ever been and getting better every

1 year.

2 I appreciate the Board's consideration. And I'll
3 give you -- leave this here and you can make copies of it.

4 Thank you.

5 BOARD MEMBER KATZ: Thank you very much.

6 Now, I also have a card for Mr. Lilly. But I
7 assume that's not a policy statement but just reminding me
8 that you're here?

9 MR. LILLY: Yes. Mr. Mona told me to file it, so
10 I did as I was told.

11 BOARD MEMBER KATZ: Okay. I appreciate that, Mr.
12 Lilly.

13 With that in mind, I will invite appearances by
14 the parties -- before I do that, anybody who had not
15 filled out a blue card who wanted to make a policy
16 statement?

17 Okay. With that in mind, I will invite
18 appearances by the parties who are participating in the
19 evidentiary portion of the hearing.

20 Will those making appearances please state your
21 name, address and whom you represent so the court reporter
22 can enter this information into the record.

23 And we'll start with Mr. Lilly.

24 MR. LILLY: Yes. Thank you, Mr. Katz. Alan
25 Lilly of Bartkiewicz, Kronick & Shanahan, 1011 22nd

1 Street, Sacramento, California 95816. And I represent the
2 Yuba County Water Agency.

3 BOARD MEMBER KATZ: Okay. Mr. Jackson.

4 MR. JACKSON: Michael Jackson representing the
5 California Sportsfishing Protection Alliance, Box 207,
6 Quincy, California, 95971.

7 BOARD MEMBER KATZ: Ms. Crothers.

8 MS. CROTHERS: I'm Cathy Crothers with the
9 Department of Water Resources at 1416 9th Street,
10 Sacramento, California, 95814.

11 BOARD MEMBER KATZ: And Ms. Murray.

12 MS. MURRAY: The Department isn't presenting a
13 case in chief.

14 BOARD MEMBER KATZ: Okay. Thank you.

15 I'll now administer the oath. Will those persons
16 who may testify during this proceeding please stand and
17 raise your right hand.

18 Do you promise to tell the truth in this hearing
19 proceeding?

20 PROSPECTIVE WITNESSES: I do.

21 BOARD MEMBER KATZ: Thank you. You may be
22 seated. And you're considered sworn for the duration of
23 this hearing.

24 We will now start presentation on the case in
25 chief. And we'll start with Yuba County Water Agency.

1 Mr. Lilly.

2 MR. LILLY: Thank you, Mr. Katz. As I just said
3 a couple minutes ago, my name is Alan Lilly, and I
4 represent the Yuba County Water Agency.

5 You've heard from Don Schrader, the Chairman of
6 the Board of Directors of the Agency. Also present today
7 are three of the Agency's directors: Mary Jane Griego,
8 Sid Muck, and John Nicoletti. And I just wanted to make
9 sure that you are aware that they were here.

10 BOARD MEMBER KATZ: Another hand's being raised
11 over there.

12 MR. LILLY: Oh, excuse me.

13 And Hal snuck in after I noticed earlier. But
14 Hal Stocker also is here.

15 And also in the front row is Curt Aikens, the
16 Agency's General Manager.

17 Just by way of background, this Board did hold --
18 excuse me.

19 First of all, by way of background, as Mr. Katz
20 has noted in his opening statement, the interim flow
21 schedules in RD-1644 are scheduled to go through April
22 20th, 2006, and the long-term requirements are scheduled
23 to go into effect on April 21st. As the Board undoubtedly
24 is aware, RD-1644 presently is the subject of five
25 consolidated lawsuits which are pending in the San Joaquin

1 County Superior Court. And as an alternative to pursuing
2 that litigation, most, but not all, of the parties to the
3 litigation have had discussions that have led to the
4 proposed Yuba Accord.

5 The Yuba Accord was discussed in some detail at
6 the State Board's June 1, 2005, workshop and, as discussed
7 there, was what I believe is an unprecedented coming
8 together of consensus of 17 different parties from diverse
9 interests, including both resource agencies, water users
10 and conservation organizations, and that would settle most
11 of the RD-1644 litigation.

12 Keeping in mind the hearing officer's
13 admonitions, I won't talk further about the accord. And
14 the Board obviously heard about that back in June.

15 Formal approval of the accord can only occur
16 after an EIR/EIS is completed. And while Yuba County
17 Water Agency and the Bureau of Reclamation, who are
18 respectively the CEQA and NEPA lead agencies, are working
19 diligently to complete this document, it is a complex
20 document and completion will not happen until 2007. And
21 that's why we have the pilot program before the Board now
22 in 2006.

23 The pilot program itself, while not nearly as
24 complicated as the accord, is still a relatively complex
25 package of three interrelated elements. And even though

1 only one of them is directly before the Board today, I am
2 going to mention all three because of the
3 interrelationship.

4 First of all, and we submitted it as exhibit YCWA
5 7, is the 2006 Pilot Program Fisheries Agreement, which
6 was signed by Yuba County Water Agency, California
7 Department of Fish and Game and four conservation
8 organizations.

9 And if this agreement becomes effective, then
10 Yuba County Water Agency has committed in that agreement
11 contractually to implement the flow schedules that are
12 presented in Exhibit 1 of that agreement, which are
13 basically the Yuba Accord instream flows, during the term
14 of the pilot program. The agreement also contains
15 provisions for starting a river management fund and for
16 river management team.

17 As we discussed back in June, it's necessary --
18 this is a complex package, and it's necessary for these
19 instream flow requirements to be addressed in this
20 agreement format rather than it's simply in a State Water
21 Resources Control Board order, so that the water can do
22 double duty. After going down the lower Yuba River and
23 benefiting the fisheries' habitat there, to the extent
24 it's available for transfer in the Delta, it can be
25 transferred there and generate revenues that in turn can

1 come back to Yuba County for fisheries' measures, for
2 groundwater pumping to make up for shortages caused from
3 the delivery of the surface water, and also for other
4 critical things like flood control in Yuba County.

5 Now, to obtain the approval of the pilot program,
6 the necessary approvals from the State Water Resources
7 Control Board, the agency has filed two petitions with the
8 Board. The first petition I think was briefly alluded to
9 in the Hearing Officer's opening statement. That's a
10 petition for a transfer of the water during 2006. That
11 under the Water Code is being processed by the Division of
12 Water Rights and is not directly before the Board today,
13 although it's obviously part of the interrelated action.

14 The second petition to extend the date on --
15 the effective date of the long-term requirements from
16 April 21st, 2006, to March 1, 2007, is in fact what is
17 before the Board for consideration during this proceeding.

18 This petition is necessary so that the agency can
19 go forward and implement the accord flow requirements,
20 which in some critical aspects are inconsistent with the
21 long-term requirements. So basically we're asking for a
22 deferral of the effective date of the long-term
23 requirements so we can instead adopt the accord flow
24 requirements, which we believe -- very strongly believe
25 will provide an equivalent or better level of protection

1 for the fish and will allow for implementation of the
2 first year of this consensus process and agreement that
3 we've talked about.

4 The transfer petition under the Water Code is
5 exempt from the California Environmental Quality Act, but
6 the extension petition is not. And the Yuba County Water
7 Agency prepared an initial study and a proposed mitigated
8 negative declaration for the extension petition, and we
9 filed that last week with our exhibits as Exhibit YCWA 9.

10 Just yesterday the Yuba County Water -- and,
11 believe me, we've been working on a tight time frame with
12 the time allowed and the CEQA statutory requirements for
13 notice and opportunities for comment. But just yesterday
14 morning the Yuba County Water Agency Board of Directors
15 formally adopted the mitigated negative declaration. It
16 was proposed in Exhibit 9, and now it has formally been
17 adopted. So when we are presenting our actual exhibits,
18 we will offer two new exhibits: One, the resolution
19 approving that agreement; and, second, the actual document
20 itself. I submitted copies of those to Mr. Mona and to
21 the interested parties yesterday, basically two hours
22 after it was adopted. I did it as fast as I could. And
23 we'll talk about that when we get to the exhibits.

24 So with that, we have submitted written testimony
25 for three witnesses. And we'll call those witnesses

1 today. They are Steve Grinnell, who will talk about his
2 hydrological analysis for the 2006 pilot program; Paul
3 Bratovich, who will discuss his analysis of the potential
4 environmental impacts, including in particular the
5 potential fisheries impacts of the 2006 program; and Tom
6 Johnson, who will discuss the overall provisions of the
7 pilot program.

8 Following the discussion and pretty darn clear
9 directions or recommendations, anyway, from the hearing
10 officers, we will just ask these witnesses to summarize
11 their written testimony briefly rather than go into more
12 detail.

13 We believe that this evidence will show after the
14 hearing is done that the pilot program will not cause
15 injury to any legal user of water, will not unreasonably
16 affect fish, wildlife or any other instream beneficial
17 uses, and will be in the public interest. And, therefore,
18 at the end of the hearing we will ask the State Board to
19 approve Yuba's petition.

20 Thank you.

21 BOARD MEMBER KATZ: All right. Thank you, Mr.
22 Lilly.

23 Your witnesses, and we'll do it as a panel.

24 MR. LILLY: That would be fine. And we've got
25 their -- and we wanted to put some of their slides from

1 their testimony into the PowerPoint. So we'll ask them to
2 come forward.

3 Where should they sit when they're testifying?

4 BOARD MEMBER KATZ: We can use these here if that
5 works for you.

6 MR. LILLY: That's fine.

7 BOARD MEMBER KATZ: Okay. Are there -- actually
8 are there mikes there?

9 Okay. Good.

10 MR. LILLY: Okay. Is it okay if I sit over here
11 so I can look at them?

12 BOARD MEMBER KATZ: Sure, yeah.

13 (Thereupon an overhead presentation was
14 Presented as follows.)

15 BOARD MEMBER KATZ: If you push the button -- if
16 the little green light comes on that thing, it's on.

17 DIRECT EXAMINATION

18 OF THE YUBA COUNTY WATER AGENCY PANEL

19 BY MR. ALAN B. LILLY, ESQ., representing the Yuba County
20 Water Agency as follows:

21 MR. LILLY: Do you have a copy of your stuff
22 there?

23 MR. GRINNELL: No.

24 MR. LILLY: I'll give it to you.

25 Let's start with you, Mr. Grinnell.

1 Please state your name and spell your last name
2 for the record.

3 MR. GRINNELL: My name is Stephen Grinnell
4 G-r-i-n-n-e-l-l. I'm a professional registered engineer
5 in the State of California. I've submitted my statement
6 of qualifications.

7 I have a couple of PowerPoint slides that I'd
8 like to show.

9 (Thereupon an overhead presentation was
10 Presented as follows.)

11 MR. LILLY: Just, wait, wait, wait. We have to
12 take care of a little housework first.

13 First of all, did you take the oath this morning?

14 MR. GRINNELL: Yes, I did.

15 MR. LILLY: Okay. And then I just want to
16 identify your two exhibits, and then you --

17 BOARD MEMBER KATZ: That would be great. Thank
18 you.

19 MR. LILLY: -- can summarize them.

20 First of all, is Exhibit YCWA 2 an accurate
21 statement of your experience and professional
22 qualifications?

23 MR. GRINNELL: Yes, it is.

24 MR. LILLY: And is Exhibit YCWA 1 an accurate
25 statement of your written testimony for today?

1 MR. GRINNELL: Yes, it is.

2 MR. LILLY: All right. Now, if you can please go
3 forward and summarize -- briefly summarize your testimony.

4 MR. GRINNELL: Well, since that's the operative
5 word today, I have five slides, and --

6 BOARD MEMBER KATZ: It's the operative -- it's
7 briefly but thoroughly. So just so we're clear.

8 (Laughter.)

9 MR. GRINNELL: Always thoroughly.

10 BOARD MEMBER KATZ: Thank you.

11 MR. GRINNELL: As I said, my name is Stephen
12 Grinnell. I am testifying on the hydrology of the Yuba
13 River.

14 And my testimony -- my written testimony provided
15 really information on two main items: The expected range
16 of flows and temperatures of the lower Yuba River, with
17 the various operational and flow requirement scenarios;
18 and an assessment of the risk of shortages in irrigation
19 diversion deliveries to the member units of Yuba County
20 Water Agency that could result in 2007 from these
21 operations.

22 If we could go to the next slide.

23 --o0o--

24 MR. GRINNELL: The work that I did for -- and the
25 result of the analysis were summarized using exceedance

1 probability plots for lower Yuba river flow and
2 temperature. The work was simulating 83 two-year pairs
3 since from 1922, '23 -- '23 and '24, all the way till
4 2004. We actually did use some portions of the 2005
5 hydrology as well.

6 We simulated the Yuba River Development Project
7 operations for two scenarios. In the attachment to my
8 written testimony, which were the plots, those two
9 scenarios were operations to the RD-1644 long-term flows
10 with no pilot program and a pilot program that included
11 operations to the lower Yuba River Accord flows and with
12 compliance to the RD-1644 interim flows. Actually also
13 provided an additional analysis and results for operations
14 to the RD-1644 interim flows without a pilot. And that
15 was used in the initial study and negative declaration and
16 used in Mr. Bratovich's work.

17 All of this analysis and simulation was done
18 using existing operational conditions other than these
19 items. And the results are ranked plotted as exceedance
20 probability in the attached plots to my written testimony.

21 Go to the next slide.

22 --o0o--

23 MR. GRINNELL: This is Figure 1 from my written
24 testimony as an example of the information that was
25 provided. It's an exceedance probability plot of the Yuba

1 shown here on the screen, and is the water temperature at
2 Marysville for September 2006 for both of the two
3 scenarios -- for the two scenarios that were analyzed.
4 And, again, plots could be read just as I talked about;
5 only this time on the Y axis we have temperature in
6 degrees Fahrenheit and still on the X axis exceedance
7 probability. All of these what we've simulated this work
8 and provided exceedance plots of this type for the April
9 2006 to March 2007 -- I'm sorry -- till February 2007 time
10 frame.

11 Next slide.

12 --o0o--

13 MR. GRINNELL: The second part of my work was to
14 look at the effects of these scenarios on the risk of
15 potential shortages in irrigation diversion deliveries in
16 2007. And really that is looked at in two aspects of
17 irrigation diversion deliveries. The first one is the
18 effect of the various flow requirements on carry-over
19 storage in New Bullards Bar at the end of 2006 -- at the
20 end of September, specifically, 2006. And the second
21 aspect of that is the actual occurrence of shortages in
22 2007.

23 The figure on the screen is Figure 6 from my
24 written testimony, which is the difference in New Bullards
25 Bar end of September 2006 storage that results from

1 operations to RD-1644 long term, subtracting out the
2 resulting storage from operations to the low river accord
3 or the pilot program in compliance to RD-1644 interim flow
4 requirements.

5 So what we see here is a plot that shows the
6 storage difference between operations of those two
7 scenarios in the storage difference in New Bullards Bar at
8 the end of September 2006.

9 The plot is a plot of storage difference on the Y
10 axis, where it is negative at the top of the screen moving
11 down, and along the X axis it's ranked from least to
12 difference.

13 As you can see, the plot shows that in all but
14 one year the storage at the end of 2000 -- at the water
15 year 2006 is going to be lower under the pilot program
16 than it would be with just compliance to 1644 long term.

17 This demonstrates really the brunt of the accord,
18 which is to provide additional flows from storage. As you
19 can see in the plot, that on the right-hand side the bars
20 are rather large. Those tend to be the drier years. And
21 those are the years in which storage is used in those
22 years to meet higher flows than would be otherwise under
23 1644 long term.

24 The final point I would like to make on this
25 figure is really what -- it demonstrates how the accord

1 works, how the accord flows. And, that is, that -- and
2 that the use of storage is maximized under the construct
3 of the accord. We have an index that applies storage or
4 the use -- or the amount of storage at the start of the
5 water year as part of the determination of a flow
6 schedule. And if there is substantial storage, as there
7 was at the start of this year, then that tends to increase
8 the index and, therefore, end up with a higher flow
9 schedule than otherwise would occur.

10 And that's the result of my summarization.

11 BOARD MEMBER KATZ: Okay.

12 MR. LILLY: Thank you.

13 We'll next turn to Mr. Bratovich.

14 First of all, Mr. Bratovich, have you taken the
15 oath this morning?

16 MR. BRATOVICH: Yes, I have.

17 MR. LILLY: And please state your name for the
18 record.

19 MR. BRATOVICH: Paul Bratovich B-r-a-t-o-v-i-c-h.

20 MR. LILLY: Do you have copies of Exhibits YCWA 3
21 and 4 in front of you?

22 If you don't I can give you my copies.

23 MR. BRATOVICH: I have a copy of Exhibit 3 in
24 front of me.

25 MR. LILLY: Okay. Let me just hand you 4.

1 Is Exhibit YCWA 4 an accurate statement of your
2 experience and qualifications as an expert for this
3 hearing?

4 MR. BRATOVICH: Yes, it is.

5 MR. LILLY: And is Exhibit 3 -- Exhibit YCWA 3 a
6 statement -- an accurate statement of your testimony for
7 this hearing?

8 MR. BRATOVICH: Yes, it is. My testimony which
9 summarizes the analyses conducted in the initial study,
10 yes.

11 MR. LILLY: Yes. Please then summarize briefly
12 Exhibit YCWA 3, your testimony.

13 MR. BRATOVICH: Again, I'll try to briefly
14 summarize.

15 Can we go to the first slide please, Brian.

16 (Thereupon an overhead presentation was
17 Presented as follows.)

18 MR. BRATOVICH: We conducted the environmental
19 effects analysis associated with implementation of the
20 proposed project relative to the flow and temperature
21 conditions that might be expected to occur with interim
22 1644 over the long-term 1644. We evaluated numerous
23 species or runs of fishes, as indicated in this slide, and
24 for each of the life stages that occur or would be
25 expected to occur in the lower Yuba River throughout the

1 course of the duration of this project.

2 We examined the cumulative flow exceedance plots
3 Mr. Grinnell described from April 2006 through February
4 2007, the duration of the proposed project, as well as
5 water temperature exceedance plots from May through
6 October, the period considered to be potentially stressful
7 for water temperatures to the aquatic resources of the
8 lower Yuba River.

9 We did this on a species run by life stage basis
10 over the course of the entire duration of the proposed
11 project.

12 --o0o--

13 MR. BRATOVICH: I mentioned that we examined on a
14 monthly basis as it reflects to each of the species' runs
15 or life stages that might be in occurrence in the lower
16 Yuba River during any given month. And this is a simple
17 and quick example of one of those months, although we did
18 include in as attachments to Exhibit 3 exceedance plots of
19 each of the months considered in the evaluation.

20 MR. LILLY: Just for the record, you're referring
21 to slide 2?

22 MR. BRATOVICH: Yes.

23 Slide 3 is a representation of the types of
24 comparisons that were included for the water temperature
25 analysis.

1 --o0o--

2 MR. BRATOVICH: Slide 3 represents the water
3 temperatures that would be -- probability of water
4 temperatures that might be expected to occur at
5 Marysville. And again it is a cumulative probability
6 distribution illustrating those probabilities for the
7 proposed project long-term 1644 and the water temperatures
8 that might be expected to occur under interim 1644 as
9 well.

10 --o0o--

11 MR. BRATOVICH: In addition to evaluating flows
12 and temperatures for each of the life stages during the
13 appropriate months, we specifically also examined spawning
14 habitat availability in one instance during the month of
15 September. Spawning habitat availability during the month
16 of September was examined as a -- specifically regarding
17 the spring-run Chinook Salmon, which are believed to spawn
18 somewhat earlier than fall-run Chinook Salmon in the lower
19 Yuba River. And we did -- we utilized the habitat
20 discharge relationships provided in the 1991 Fish and Game
21 management plan for the lower Yuba river, transformed
22 estimates of spawning habitat availability associated with
23 a specific flow utilizing those habitat discharge
24 relationships, and developed a cumulative distribution of
25 spawning habitat availability expected with any of the

1 flows that might occur during the month of September under
2 the three scenarios.

3 The probabilities here, there's 83 Septembers
4 included under each of these scenarios to develop this
5 cumulative probability distribution function.

6 --o0o--

7 MR. BRATOVICH: We did a similar analysis
8 examining a spawning habitat availability that might be
9 expected to occur, in an exceedance basis again, for the
10 October through December period, which specifically
11 encompasses the duration of the fall-run Chinook Salmon
12 spawning peered in the lower Yuba River.

13 --o0o--

14 MR. BRATOVICH: To very briefly summarize, we
15 again examined this on a life-stage-by-life-stage basis,
16 examining flows and water temperatures during the
17 appropriate months associated with those life stages,
18 described those and came up with a conclusion for each of
19 the individual species and runs.

20 --o0o--

21 MR. BRATOVICH: We did it for steelhead. We did
22 it for spring-run Chinook Salmon, evaluating flows and
23 temperature conditions, and as we did it for fall-run
24 Chinook Salmon as well.

25 --o0o--

1 with implementation of the proposed project relative to
2 either long-term or 1644 flows -- long-term or interim
3 1644 flows that would be expected to occur.

4 --o0o--

5 MR. BRATOVICH: In conclusion, our evaluations
6 indicate that the proposed project is not expected to
7 result in significant impacts or unreasonable impacts on
8 lower Yuba River fish relative to either 1644 or long-term
9 flows that would be expected to occur. And the proposed
10 project is expected to provide an equivalent or a better
11 level -- or higher level of protection for lower Yuba
12 River fish relative to either RD-1644 interim or long
13 term.

14 And that concludes my summary.

15 MR. LILLY: All right. Thank you, Mr. Bratovich.

16 We'll now proceed to you, Mr. Johnson.

17 Have you taken the oath for the hearing this
18 morning?

19 MR. JOHNSON: I have.

20 MR. LILLY: Do you have Exhibits YCWA 5 and 6
21 handy?

22 MR. JOHNSON: I assume those would be a resume
23 and testimony?

24 I do now. Thank you.

25 MR. LILLY: Now that you have copies of them in

1 front of you -- first of all, is Exhibit YCWA 6 an
2 accurate statement of your qualifications and experience
3 for this hearing?

4 MR. JOHNSON: Yes, it is.

5 MR. LILLY: And is Exhibit 5 an accurate
6 statement of your testimony for this hearing?

7 MR. JOHNSON: Yes, it is.

8 MR. LILLY: Please summarize your testimony.

9 MR. JOHNSON: I will do so. Thank you.

10 (Thereupon an overhead presentation was
11 Presented as follows.)

12 MR. JOHNSON: My names is Tom Johnson
13 J-O-H-N-S-O-N. I'm a registered civil engineer and policy
14 analyst project manager for Yuba County Water Agency.
15 I've been working on the Yuba Accord Project for -- not
16 nearly as long as everyone else in the room, but for at
17 least four years and have been involved in the development
18 of the accord agreements and the pilot program as well.

19 I would like to speak briefly about the Yuba
20 Accord. I am going to attempt to connect some of the dots
21 and describe why the extension that we've requested today
22 is important for the pilot program and for the accord.

23 --o0o--

24 MR. JOHNSON: I think everyone is familiar with,
25 and we have briefed the State Board, that the proposed

1 Yuba Accord is three agreements. These three agreements
2 are the result of a collaborative settlement with a couple
3 of key points: Biologically-based flows and common
4 incentives for performance. And I think those two things
5 run throughout the three agreements that have been struck.

6 --o0o--

7 MR. JOHNSON: Briefly on the Yuba Accord. This
8 does represent a new water use paradigm, transferable
9 water that is derived from a biologically based flow
10 regime.

11 One thing I would like to offer, staff and Board
12 members, is I sat through a total of about three and a
13 half years of meetings and discussions, every single one,
14 when these agreements were put together. And I can
15 honestly --

16 BOARD MEMBER BAGGETT: Mr. Jackson.

17 MR. JACKSON: Yes. We are into the Yuba Accord
18 and the negotiations in this testimony. And so I would
19 move to strike the testimony that's been given so far by
20 Mr. Johnson. This is not a -- this is not the policy
21 statement. This is the evidence. And I'm looking at a
22 screen that starts with proposed Yuba Accord and proceeds
23 to put in evidence about the new water use paradigm in the
24 Yuba Accord. And I think it should be stricken.

25 BOARD MEMBER BAGGETT: Mr. Lilly, do you have

1 any --

2 MR. LILLY: Yes. First of all, as the Board
3 members are well aware, the strict rules of evidence that
4 apply in court proceedings do not apply to State Board
5 proceedings. The Board has some leeway here on what is
6 allowed.

7 Second of all, this is relevant. We are not
8 spending a lot of time on it. But there is no way
9 prohibition on providing evidence of the big picture of
10 the context of the action for today. And we think it is
11 completely appropriate and relevant to summarize the big
12 picture in which the accord -- excuse me -- in which the
13 pilot program and, in fact, the extension petition that's
14 before the Board today fits in.

15 This isn't going to take long and it's
16 appropriate testimony.

17 BOARD MEMBER BAGGETT: Mr. Jackson.

18 MR. JACKSON: Yes. The point here is that this
19 is evidence submitted in a hearing that relates to a
20 project that will come later. And this evidence being
21 introduced in this particular hearing basically is the
22 start of the hearing on the Yuba accord without the
23 environmental document, without the opportunity to present
24 contrasting evidence, and basically puts us at a real
25 disadvantage because of the narrowness of the issue

1 described in the hearing notice and where this seems to be
2 going.

3 MR. LILLY: Can I respond to that please?

4 BOARD MEMBER KATZ: Hang on one second.

5 Mr. Frink.

6 SENIOR STAFF COUNSEL FRINK: Yes, Mr. Katz.

7 I would agree that the focus of the hearing is on
8 the extension of the interim flows. And certainly the
9 focus of the Board decision under the hearing notice has
10 to be on the extension of the interim flow requirements.

11 But I also believe that you have to consider the
12 context within that request that's being made. And
13 although the Board won't be making findings in this
14 proceeding regarding the overall merits of the lower Yuba
15 River Accord and if that should or should not be
16 implemented, I think it is relevant that the Board hear
17 and consider the context within which the petition it is
18 acting on in this proceeding is being made.

19 MR. LILLY: I was going to say basically the same
20 thing. Obviously the Board isn't going to take action on
21 the accord, but it still can consider the context here.

22 And as far as the no opportunity to present
23 contrary evidence, the CSPA has had a full opportunity to
24 present any contrary evidence that it wants, and it's in
25 fact done so.

1 MR. JACKSON: Excuse me. We had a filing
2 deadline in which both parties filed at the same time. We
3 had no idea that there was going to be accord evidence
4 filed in this hearing.

5 BOARD MEMBER BAGGETT: I guess I would like to
6 hear what's your -- how is it relevant to a decision based
7 on the very -- it's an extension for one year of the
8 existing flow requirements. How is -- we're going to be
9 back here in another year if the accord, you know,
10 continues to happen with a full-on hearing on this matter.
11 So why is this necessary?

12 MR. JOHNSON: Alan, may I --

13 BOARD MEMBER BAGGETT: Why is it relevant?

14 MR. LILLY: May I go ahead and let Mr. Johnson
15 explain?

16 MR. JOHNSON: Begging the Board member's pardon.
17 I believe within just two slides I will rapidly tie this
18 to -- I intend to tie the accord to the pilot program and
19 how one is necessary for the other and the extension. And
20 rather than working in back order -- I'm sorry. The
21 accord is background for why the pilot program is
22 necessary. The pilot program requires the extension on
23 trying to tie that together.

24 MR. LILLY: Basically, Mr. Baggett, if -- it's
25 our position and -- well, after we have the evidence in,

1 we'll be able to show that -- that without the pilot
2 program the long-term accord would be very seriously
3 jeopardized. The long-term accord we believe is a very
4 positive thing. Obviously the Board is not deciding that
5 today. The --

6 BOARD MEMBER KATZ: Mr. Lilly, the long-term
7 accord is not before us, is not relevant. And whether
8 it's good or bad is a determination other people will make
9 at another time. I mean it seems to me that if you want
10 to show that the pilot project needs this to go forward,
11 you know, talk about the pilot project and why this change
12 is necessary in order for it to go forward, how the pilot
13 project fits into the accord and the value of the accord
14 is not what we're discussing here today.

15 MR. LILLY: And we certainly will focus on the
16 benefits of the pilot program itself. But one of the
17 hearing issues was: Is this -- would granting the
18 petition be in the public interest? -- which is a very
19 broad term. And part of the public interest is whether
20 this will support something in the future or if,
21 conversely, whether denying this will derail something if
22 it's positive in the future.

23 BOARD MEMBER BAGGETT: Do you have a response to
24 the public interest argument? I think that's --

25 MR. JACKSON: Yes, I certainly have a response to

1 the public interest argument. It's not in the public
2 interest to bifurcate projects. We're going to be --
3 we're going to be offered at some point a negative
4 declaration on a CEQA document while they are preparing a
5 CEQA document on the accord, in which all of this
6 information that they have about the accord will be
7 released to the public.

8 At this point, what I'm hearing is, that they
9 propose to put on testimony indicating that they have --
10 for the purposes of your CEQA review, whatever level
11 that's going to be, that basically they have bifurcated
12 their program. This is the first year of the accord.
13 This is not a pilot program. This is not a temporary
14 transfer. This is the first year of a long-term transfer,
15 by their own testimony.

16 BOARD MEMBER KATZ: All right. Ms. Crothers --

17 MR. JACKSON: If this doesn't go forward, the
18 accord won't go forward.

19 BOARD MEMBER KATZ: Ms. Crothers now wants to
20 weigh in on behalf of DWR.

21 MS. CROTHERS: Yes. Thank you. This is Kathy
22 Crothers for the Department of Water Resources. I have a
23 comment.

24 That I think this information is relevant as
25 background. It is not offered for the purposes of anybody

1 making any decisions on this proposed program. I think
2 Mr. Jackson's getting everybody off track here and he's
3 making a bigger issue of the simple fact that, as Mr.
4 Frink said, it is background and relevant to the context
5 of why we're going to have a pilot program. And DWR's
6 evidence is about the pilot program and the needs that
7 this year of change of the petition to maintain regulatory
8 status here. So I kind of think we're getting a little
9 off track here.

10 BOARD MEMBER BAGGETT: I would concur. We would
11 allow the next two slides to come in.

12 I think, Mr. Jackson, you made an argument
13 actually which -- since you were arguing this is critical
14 to the long term of the chicken and egg argument of the
15 accord, I think that to me made it clear that this is
16 relevant to these proceedings.

17 BOARD MEMBER KATZ: What I'd like to do is let's
18 go to the slides that are relevant to the pilot and this
19 and skip the rest of the history lesson.

20 MR. JOHNSON: By all means.

21 BOARD MEMBER KATZ: All right. Thank you.

22 MR. JOHNSON: If we were to strike the term
23 "accord" on this slide and replace it with "pilot
24 program," it would be 100 percent correct. That's how
25 closely the agreements are.

1 BOARD MEMBER KATZ: I understand.

2 MR. JOHNSON: Next slide please.

3 MR. LILLY: We'll go on to the next slide.

4 BOARD MEMBER KATZ: All right. Thanks.

5 --o0o--

6 MR. JOHNSON: This is a schematic that offers
7 that the pilot program is proceeding in parallel with the
8 EIR/EIS process that's underway for the Yuba Accord, the
9 continued collaborative participation. The reason that I
10 believe that this is germane and important is that the
11 EIR/EIS will be necessary for the hearing that the Board
12 will undertake with regards to the accord. The parties
13 that worked to develop the accord and the subsequent pilot
14 program understood from the outset that the EIR/EIS
15 process and Board hearings would take quite a bit of time.
16 So from the very earliest development of the accord and
17 these collaborative proceedings, it was envisioned that
18 there would be a pilot program and an extension of 1644
19 interim flow requirements.

20 --o0o--

21 MR. JOHNSON: Just quickly, the accord. The key
22 dates here are basically the ESA compliance, the final
23 EIR/EIS in February 2007; and hopefully Board ability to
24 take action on the accord in February to August of 2007.

25 Once again, the relevance here is that the

1 parties understood that from the execution of a settlement
2 agreement we needed a bridge to somehow keep the momentum
3 going to move the accord process forward and to undertake
4 a transfer that made some more sense rather than -- made
5 sense in the context of the long-term goals.

6 The pilot program has been -- in my testimony
7 there is considerable discussion about the importance of
8 the pilot program and its attempt to mirror as closely as
9 possible the accord. As I believe Mike Tucker mentioned
10 in his policy statement, and I do mention in my testimony,
11 the concept behind the pilot program was to mirror as
12 closely as possible the accord and provide all of the
13 participating collaborating agencies the ability to
14 undertake a real-world test of several key elements.

15 --o0o--

16 MR. JOHNSON: For that pilot program to go
17 forward, an extension of RD-1644 interim is vital. In
18 Steve Grinnell's testimony -- in his very detailed
19 testimony which was filed in written form, he provides an
20 analysis I believe that there is the potential that
21 implementation of RD-1644 long-term flow requirements has
22 the potential to provide very severe shortages in Yuba
23 County in 2007 under certain sets of hydrologic
24 conditions. While we recognize that the potential for
25 those shortages is very small, the impacts would be

1 tremendous.

2 Faced with that, the Yuba County Water Agency
3 Board of Directors would be in a very difficult position
4 to contemplate undertaking a pilot program in '06 that had
5 even the potential to lead to dramatic shortages in the
6 county in '07. Small chance, very large negative
7 consequences.

8 The other point that I would like to make with
9 regards to the import of the extension of RD-1644 interim
10 is when the flow schedules that were developed for the
11 pilot program and also for the accord were developed, they
12 were developed in a manner that sought to balance the
13 flows in the river to achieve the best overall
14 environmental benefit, in the perspective of the opinions
15 of the biologists who worked on those flows.

16 One of the key things that underlied that flow
17 schedule development was the assumption that RD-1644
18 interim would be the basis of flows for the pilot program.
19 All of the careful balancing was done including RD-1644
20 interim as a regulatory base line. A change of regulatory
21 base line to something else, in this case 1644 long term,
22 has the potential to substantially disrupt the flow
23 schedules that were developed for the pilot program.

24 While, again, the pilot program fisheries
25 agreement anticipates that there may be factors that may

1 come into play, there could indeed even be Board decisions
2 that would cause renegotiation of those flow schedules to
3 need to occur, it is very much in the interests of moving
4 the pilot program forward and not having to reopen the
5 negotiations that led to those pilot program flow
6 schedules by leaving 1644 interim in place.

7 Finally, I'd like to say that several of the
8 parties to the pilot program, the various agreements,
9 believe that not extending the flow provisions of 1644
10 interim would send a negative message to the collaboration
11 that has tried to put this together, and have concerns
12 that long-term 1644 flow requirements will make it more
13 difficult when the board does meet to consider the accord
14 flow schedules in about six to eight months.

15 Just in closing, I think my testimony is clear
16 that continuing collaboration and support of the pilot
17 program is a goal that everyone who has spoken here in
18 favor of the accord has come out for. We are making good
19 progress and we are having continued participation by all
20 of the jurisdictional entities in completion of a detailed
21 EIR/EIS. And we would ask that the State Board grant the
22 extension petition so we can go ahead and move forward
23 with the pilot program.

24 BOARD MEMBER KATZ: Thank you.

25 MR. LILLY: That completes our direct

1 testimony -- or summary of our direct testimony.

2 BOARD MEMBER KATZ: I appreciate that, Mr. Lilly.
3 If your witnesses will hold, we'll just -- we're going to
4 do the cross and let people come up, and we'll treat it as
5 a panel. So the witnesses, stay where you are.

6 And do me a favor. When talking, please talk
7 directly into the microphones. It's been hard to hear.
8 It sort of goes up and down.

9 First on cross, Ms. Crothers.

10 MS. CROTHERS: The Department has no cross
11 examination.

12 BOARD MEMBER KATZ: Beautiful cross. Appreciate
13 that.

14 Fish and Game. Ms. Murray.

15 MS. MURRAY: Department has no cross examination
16 at this time.

17 BOARD MEMBER KATZ: Okay. We're on a roll here.
18 Mr. Jackson.

19 MR. JACKSON: I guess the roll just ended.

20 BOARD MEMBER KATZ: I thought it might.
21 Please, Mr. Jackson.

22 CROSS EXAMINATION

23 OF THE YUBA COUNTY WATER AGENCY PANEL

24 BY MR. MICHAEL JACKSON, ESQ., representing the California
25 Sportfishing Protection Alliance as follows:

1 MR. JACKSON: The first series of questions will
2 be for Mr. Johnson.

3 Mr. Johnson, you indicated that if the State
4 Board's order in regard to the long-term flows goes into
5 effect April 1st, there will be damage done to your pilot
6 program; is that correct?

7 MR. JOHNSON: Sure. We can go ahead and
8 characterize it as damage.

9 MR. JACKSON: What damage?

10 MR. JOHNSON: Do we want to address that as a --

11 MR. LILLY: Go ahead, and then they can -- just
12 refer to them if you think they have additional things to
13 say.

14 MR. JOHNSON: All right. Is this going to be
15 based on the shortage?

16 MR. GRINNELL: Well, I can start if you'd like.

17 BOARD MEMBER KATZ: Is this testimony?

18 And whatever we're doing, could we do it into a
19 microphone please.

20 Mr. Lilly, you want to organize your guys here.

21 MR. LILLY: Mr. Johnson, if you believe Mr.
22 Grinnell or Mr. Bratovich is more qualified to respond to
23 a particular element of this question, please say so. And
24 then the Hearing Officer can ask them to follow up.

25 MR. JACKSON: So that I get some clarity. The

1 way this is going to work is I'm going to ask questions of
2 the witness who said something and then somebody else is
3 going to change the testimony?

4 BOARD MEMBER KATZ: No, what will happen is, if
5 the witness -- the witness will answer either they -- they
6 have an answer or they don't have an answer. And then if
7 you want to ask somebody else a question, you have to ask
8 a question. We're not going to go back and substitute at
9 this point. But --

10 MR. JACKSON: Thanks.

11 BOARD MEMBER KATZ: -- you know, you get to ask
12 your questions. And other people in redirect if -- or
13 recross rather, Mr. Lilly can deal with it there.

14 MR. JOHNSON: Great.

15 I'd be happy to answer that one.

16 MR. JACKSON: Thank you, sir.

17 MR. JOHNSON: There are two ways that imposition
18 of 1644 long-term flows would have a negative effect on
19 the pilot program. The first of those is that the pilot
20 program flow schedules numbered 1 through 6 were developed
21 in part based on the assumption of a certain regulatory
22 minimum flow. Changing that regulatory minimum flow would
23 result in higher flows at different times of the year. In
24 drier year classes, 1644 long term has slightly higher
25 flows than the accord flow schedules for a similar year.

1 Not in all years, but in some subset of years.

2 If that is the case, additional water would be
3 released from the river down the river to meet those 1644
4 flow requirements. If that was the case, then the
5 percentage chance that the various flow schedules would be
6 released is slightly different.

7 MR. JACKSON: So at the time that you were
8 negotiating your flow schedule, were you aware that
9 D-1644 -- RD-1644 required higher flows in dry years than
10 the flows that you were proposing?

11 MR. JOHNSON: Yes, that's always been -- that's
12 always been quite clear. When these flow schedules were
13 initially developed, it was the hope and intent of all the
14 parties who were working on them that we would be able to
15 enact a pilot program in 2005 prior to 1644 long term
16 going into effect. We would have been able to implement
17 that pilot program without asking for an extension and
18 would have done so. Unfortunately we were not able to
19 reach conclusion on all the agreements in time and so had
20 to bring this pilot program before the Board for 2006.

21 MR. JACKSON: But at the time you were developing
22 the pilot program, you were aware that D-1644 flow
23 schedule would go into effect on April 1st, 2006, were you
24 not?

25 MR. JOHNSON: That has been the Board's order

1 since 2000, I believe. So, yes, we were all well aware of
2 that.

3 MR. JACKSON: Why did you not develop a pilot
4 program that would be consistent with the Board's order in
5 RD-1644?

6 MR. JOHNSON: As I mentioned, we were working
7 towards a goal of having a pilot program that we could
8 implement in 2005. We spent approximately three years
9 developing the flow schedules and the subsequent
10 agreements that went into putting the accord and its pilot
11 program together. We could indeed attempt to go back and
12 craft a new set of flow schedules using any regulatory
13 baseline and using any other set of circumstances. I have
14 no idea how long that would take. It took us three years
15 to go the first round. It's entirely possible it could
16 take considerable period of time to go back and
17 renegotiate those.

18 MR. JACKSON: In the differences that you've
19 identified as the problems with RD-1644 long term, you
20 identified the fact that under RD-1644 there would be more
21 water in the river for fisheries in dry years; is that
22 correct?

23 MR. JOHNSON: The flow schedules under RD-1644
24 long term and under the accord do not synch up perfectly.
25 And so there are -- in any certain water year you could

1 have one 1644 long-term flow schedule and one of two
2 different cord flow schedules because they are measured on
3 different indices.

4 Secondly, 1644 -- the accord flow schedules
5 provide more water in all years and all classes than do
6 the 1644 long-term flow schedules, with the exception of a
7 couple of very wet months in wet year classes. In dry
8 year types, the accord flow schedules provide more water
9 down the river over the course of the year. The temporal
10 shift in flows is different. In other words, there are
11 different flows potentially in spring and in summer under
12 the accord than there are under 1644 long term. If you
13 had both of those flow requirements in place, you would
14 need to provide the greater of whichever of those two flow
15 schedules controlled at that time.

16 MR. JACKSON: All right. So it's fair to say
17 that one of the differences between the present Board
18 order long-term 1644 and your pilot program flows is that
19 you have shifted water from some times of the year to
20 other times of the year?

21 MR. JOHNSON: That is correct.

22 MR. JACKSON: It is not additional water; it is
23 shifted water?

24 MR. JOHNSON: There is more water that goes down
25 in the course of the year under the accord than under

1 1644.

2 MR. JACKSON: Can you quantify the number?

3 MR. JOHNSON: I can.

4 If I may, I have some slides that show flow
5 comparisons of 1644 long term and the accord.

6 MR. JACKSON: Yes. I mean I asked him the
7 question. I'd --

8 BOARD MEMBER BAGGETT: Please proceed.

9 MR. JOHNSON: The charts that Brian's pulling up
10 now show several different comparisons of flows, accord
11 versus 1644 interim and 1644 long term. These -- most of
12 these charts were developed by MWH and/or Steve Grinnell.
13 So if there are specific technical questions, I'm going to
14 defer to Steve.

15 We're going to have to scroll down. I'm not sure
16 which of these will be most valuable.

17 We'll start with this one.

18 We calculated in the same manner that the flow
19 exceedances were calculated by Steve for -- on a monthly
20 time step for the entire year. What this shows is a
21 comparison of the likelihood of flows under the accord,
22 which is the green line, 1644 long term and 1644 interim.

23 Now, remember, that this is flows at Smartville,
24 which is at the upper end of the lower Yuba River. This
25 is also the flow requirements only. This does not include

1 the total potential volume in the river, flood flows,
2 whatever.

3 --o0o--

4 MR. JACKSON: Now, calling your attention to this
5 particular slide, is it -- is it fair to say that the
6 long-term flow schedule releases more water than the
7 interim flow schedule?

8 MR. JOHNSON: Yes.

9 MR. JACKSON: And is it fair to say that
10 according to this slide the interim/Accord releases more
11 water than the long-term flow schedule?

12 MR. JOHNSON: I'm not -- yes, that is correct.

13 MR. JACKSON: All right. So would you tell me
14 what the difference is between the interim and the
15 interim/Accord that makes the interim flows, which were
16 less water, better than the RD-1644 flows? What
17 operational changes do you make to cause that graph to
18 happen?

19 MR. JOHNSON: I believe you asked me two things.
20 One is: What makes the interim better? And the other is:
21 How did the green line, the interim/Accord, how was that
22 calculated? Are those the questions that you've asked?

23 MR. JACKSON: Yeah, the first question is: You
24 have an interim and you have an interim/Accord?

25 MR. JOHNSON: Yes.

1 MR. JACKSON: Okay. RD-1644 is an interim
2 ordered by the Board to a certain time period?

3 MR. JOHNSON: Yes.

4 MR. JACKSON: What do you mean then by an
5 interim/accord?

6 MR. JOHNSON: The interim/accord anticipates the
7 accord flow schedules. And if at any point in time the
8 interim flow schedule is greater than the accord schedule,
9 then the interim flow schedule would be in place.

10 Does that make sense?

11 MR. JACKSON: Does that happen?

12 MR. JOHNSON: That has the potential to happen in
13 a below normal year that would also correspond to an
14 accord schedule to year. And it's a fairly unique set of
15 hydrologic circumstances. Probably it only has the
16 potential to occur a few percent of year classes.

17 MR. JACKSON: So when we're looking at your
18 graphs and you have three lines, the interim line, the
19 long-term line and the interim/accord line, basically the
20 difference between the interim line, which the less water
21 than long term, and the interim/accord line is placing the
22 accord flows into operation prior to the accord going into
23 effect?

24 MR. JOHNSON: The pilot program attempts to mimic
25 as closely as possible the accord flows. So to the extent

1 that we take the liberty to use accord and pilot program
2 flow schedules and use those terms interchangeably, then,
3 yes, we would be putting the accord or pilot program flow
4 schedules into place in April of 2006.

5 MR. JACKSON: Is there -- you did a negative
6 declaration. Did you take part in the negative
7 declaration?

8 MR. JOHNSON: I took minimal part, but I did
9 review the document.

10 MR. JACKSON: All right. And it uses as baseline
11 which flow schedule?

12 MR. JOHNSON: It uses --

13 MR. LILLY: Mr. Johnson, if you don't know the
14 answer and Mr. Bratovich is more qualified, just say so.

15 MR. JOHNSON: Yep. Paul, I'm going to let you
16 speak to that one.

17 MR. JACKSON: Okay. Well, how about if I --

18 BOARD MEMBER KATZ: If you don't -- now, hold on.
19 If you don't know the answer, just say you don't. And
20 then Mr. Jackson will decide if he wants to have somebody
21 else or just take that.

22 MR. JOHNSON: Excellent.

23 I would answer it this way then, sir: Paul
24 Bratovich was the lead scientist in preparation for the
25 ISND, and I think he could best answer the question of

1 baseline.

2 MR. JACKSON: Thank you.

3 Mr. Johnson, you indicated that it is your belief
4 that, I guess you said, the accord is better for
5 fisheries. Did you mean the interim -- did you mean the
6 pilot project flow schedule is better for fisheries or did
7 you actually mean the accord?

8 MR. JOHNSON: Let me answer that in two parts.

9 Firstly, it is -- I believe it is the collective belief of
10 the parties that were involved in development of the flow
11 schedules that those flow schedules will prove to be more
12 beneficial for fisheries. However, all of the parties
13 have cautioned me to note that we need to complete the
14 EIR/EIS process before we can say that with certainty.

15 That being said, the pilot program fisheries --
16 the pilot program flow schedules were shown in the ISND
17 and in the Water Code EA to be -- let's see if I can find
18 the actual terminology for you -- an equivalent or higher
19 level of protection for fisheries resources, the increased
20 flows under the prior -- as compared to the baseline of
21 analysis --

22 MR. JACKSON: And that was the interim flows, not
23 the long-term flows?

24 MR. JOHNSON: That is the Accord/interim flows,
25 which is the green line on our chart.

1 MR. JACKSON: That's your baseline?

2 MR. JOHNSON: No, that is the proposed project.

3 MR. JACKSON: All right. You used the term
4 "baseline for analysis". What I'm trying to find out is
5 which -- did you use the interim flows as the baseline for
6 analysis or did you use the flows due to take effect in
7 April --

8 MR. LILLY: Excuse me, Mr. Katz.

9 Mr. Johnson has already said Mr. Bratovich is the
10 person to answer this question the last time it was asked.
11 We have a panel here so the most qualified person can
12 answer the question.

13 BOARD MEMBER KATZ: I appreciate that. Then
14 just -- if he asks the question again, just say you don't
15 know and let's move on.

16 MR. JOHNSON: I'd be happy to look it up for you,
17 but I'd like --

18 MR. JACKSON: But you don't --

19 MR. JOHNSON: -- to defer that.

20 MR. JACKSON: -- you don't know. Okay.

21 You indicated that there would be some risk --
22 and I think you determined it substantial risk -- to water
23 purveyors from the pilot program if this turns out to be a
24 dry year.

25 Would you indicate to me what those risks are in

1 your mind?

2 MR. JOHNSON: There was a very comprehensive
3 analysis of that that was done by Steve Grinnell and
4 prepared and included in his written testimony. I would
5 defer to him to provide as much detail as you'd like with
6 regards to those risks specifically quantified.

7 MR. JACKSON: Okay. Now, you indicated in your
8 testimony that YCWA and the Bureau of Reclamation are
9 preparing a comprehensive EIS/EIR for the Yuba Accord. In
10 your testimony, on page 2 -- this is No. 7 -- it says,
11 "Before satisfying the legal requirements of CEQA and NEPA
12 this decisional document will contain a scientific
13 analysis that will test whether the intuition of the
14 biologists who crafted the accord flow schedules is
15 correct."

16 Do you have anything other than intuition of a
17 group of biologists to indicate that the accord flow
18 schedules will be equivalent to or better than conditions
19 in RD-1644 long term?

20 MR. JOHNSON: Again, let me answer that in two
21 parts. Firstly, during the development of the accord flow
22 schedules, the group of biologists that participated in
23 that development undertook a very extensive and
24 comprehensive process. The --

25 MR. JACKSON: Was that process written down?

1 MR. JOHNSON: Yes, it is.

2 MR. JACKSON: And is it part of the evidence
3 here?

4 MR. JOHNSON: It is not. It is part of the
5 basis -- or it will be part of the basis of the EIS/EIR
6 that will be conducted for the accord itself. And it --

7 MR. JACKSON: But it is not presently ready?

8 MR. JOHNSON: That is correct.

9 MR. JACKSON: Thank you.

10 In No. 9 of your testimony you indicate that the
11 2006 pilot program is an integral and vital element of the
12 Yuba Accord.

13 Why is it an integral -- why is it a vital
14 element of the Yuba Accord since you haven't approved the
15 Yuba Accord yet?

16 MR. JOHNSON: It was the desire of all of the
17 participants and resource agencies who worked on the Yuba
18 Accord that we put the pilot program in place, at least in
19 part, so we could commence empirical studies on the flow
20 impacts of the flow schedules under the pilot program,
21 which would be very similar to those under the accord.

22 And, number two, so we could test the other
23 elements of the accord, which include the river management
24 team; provisions for funding; and creation of study
25 programs, accounting rules that would be used to document

1 how much water was actually transferred.

2 MR. JACKSON: Mr. Johnson, are you basically
3 saying that the pilot program came up in the course of the
4 negotiations of the Yuba Accord and is a part of the Yuba
5 Accord?

6 MR. JOHNSON: What I stated earlier, and I
7 believe twice, was that from the outset, those who were
8 involved in the negotiation of the accord recognized that
9 a comprehensive EIR/EIS would be necessary before the
10 accord could go into place, and that a pilot program that
11 could be implemented while that EIR was -- EIR/EIS was in
12 preparation would be beneficial.

13 MR. JACKSON: But this particular pilot program
14 is exactly the fisheries flows from the accord prior to
15 the environmental document, is that correct?

16 MR. JOHNSON: It is -- it mimics the accord as
17 closely as possible.

18 MR. JACKSON: Do you know of any differences?

19 MR. JOHNSON: Yes.

20 MR. JACKSON: What are they?

21 MR. JOHNSON: As we spoke about just a couple of
22 minutes ago, there is the possibility in certain year
23 classes that 1644 interim would require slightly higher
24 flows in the river than the accord flow schedules. So in
25 a below normal year that's also a Schedule 2 pilot program

1 year, we would have slightly higher flows in the system
2 than we would under just accord flow schedules.

3 MR. JACKSON: Calling your attention to your
4 testimony at -- well -- in your testimony in No. 10 you
5 indicate that the Yuba Accord and the 2006 pilot program
6 will represent a paradigm shift in how the lower Yuba
7 River instreams flows are determined and managed; and then
8 you talk about a whole new index; is that correct?

9 MR. JOHNSON: That is correct. That is what's in
10 the written testimony.

11 MR. JACKSON: So this is the first exercise of
12 your new index?

13 MR. JOHNSON: If the pilot program goes ahead in
14 2006 it will be the first exercise of a new index, yes.

15 MR. JACKSON: How does your index differ from
16 your old index?

17 MR. JOHNSON: I'm going -- I'm going to defer to
18 Mr. Grinnell to answer that, because I think that he's
19 more qualified.

20 BOARD MEMBER KATZ: You're actually not going to
21 defer Mr. Grinnell. You're either going to answer it or
22 not answer it.

23 MR. JOHNSON: Okay. I'm not going to answer
24 that. I would suggest that you ask Mr. Grinnell for a
25 more detailed explanation.

1 MR. JACKSON: Well, what did you mean in your
2 testimony then?

3 MR. JOHNSON: In the whole in the 6 pages or --

4 MR. JACKSON: Well, you said -- the first
5 sentence of your testimony is: "The Yuba Accord and the
6 2006 pilot program will represent a paradigm shift in how
7 the lower Yuba river instream flows are determined and
8 managed."

9 What do you mean by a paradigm shift?

10 MR. JOHNSON: The Yuba Accord makes use of a
11 different index that is more closely tied to the north
12 Yuba River -- both the north Yuba River's hydrology and
13 the carry-over storage that's available in the New
14 Bullards Bar reservoir. It is used to dispatch the flow
15 schedules on an annual basis using both combination of
16 carry-over storage and current year hydrology, utilizing
17 hydrologic forecasts going forward from February and
18 culminating in June or July, whenever the last forecast is
19 available.

20 The six flow schedules in the Yuba Accord -- in
21 the pilot program, I'm sorry -- do provide more water and
22 at a different temporal timing than the flow schedules
23 under 1644 interim or long term.

24 And, finally, the water transfer that is included
25 in the petition that we've filed -- which is not before

1 the Board today -- that would be included in the pilot
2 program, will be part of the pilot program flow schedules
3 as opposed to an additional block of water on top of
4 regulatory flows.

5 Those things in total are very different flow
6 regime structure than has been utilized on the lower Yuba
7 River previously; and, therefore, in my words, represents
8 a paradigm shift in how the instream flows are determined
9 and managed.

10 MR. JACKSON: All right. So let's examine this
11 paradigm shift.

12 Are you saying that the paradigm shift is, that
13 instead of a water transfer being on top of the fish
14 flows, the paradigm shift is the fish flows are the water
15 transfer; in other words you can sell the fish flows
16 ordered for fisheries purposes?

17 MR. JOHNSON: That's part of what I just outlined
18 as what I consider the paradigm shift, yes.

19 MR. JACKSON: To your knowledge, has any water
20 transfer in California ever sold fish flows?

21 MR. JOHNSON: No, there has been no water
22 transfer of regulatory mandated fisheries requirements, to
23 my knowledge.

24 MR. JACKSON: But if pilot program is approved by
25 the Board, this will be the first time?

1 MR. JOHNSON: That's not quite correct. The
2 pilot program is a contractual agreement. It is -- which
3 includes a fisheries agreement that is executed by CDF&G,
4 Yuba County Water Agency, and a group of NGOs. It would
5 also include a transfer agreement that is executed by YCWA
6 and the Department of Water Resources acting on behalf of
7 Environmental Water Account. Those contractual agreements
8 will cause certain waters to be released down the river.
9 The regulatory minimum -- the regulatory standard in the
10 lower Yuba River, if our petitions are both granted, would
11 be RD-1644 interim.

12 MR. JACKSON: Calling your attention to your
13 testimony at Item 16. You indicate that if RD-1644 long
14 term were to go into effect on April 21st, there would be
15 potential for delivery shortages under certain hydrologic
16 conditions.

17 Do you mean by that, that the combination of the
18 release of the -- or of the operation of pilot program and
19 dry water years will cause these delivery shortages?

20 MR. JOHNSON: The combination of a regulatory
21 flow standard of 1644 long term, and if that flow standard
22 were in place if the Yuba County Board was to go ahead
23 with the pilot program and the pilot program flow
24 schedules, and in the occasion of certain sets of
25 hydrologic conditions in Yuba County in 2007, in total

1 those three things happening together could result in very
2 substantial shortages.

3 MR. JACKSON: And who would bear the brunt of
4 those shortages?

5 MR. JOHNSON: The recipients of water delivered
6 within Yuba County, basically the irrigators within Yuba
7 County.

8 MR. JACKSON: Do you have -- for your pilot
9 program for this year, do you have all the permits and
10 agreements in place that would be necessary to implement
11 the pilot project?

12 MR. JOHNSON: We believe that we do, short of
13 State Board.

14 MR. JACKSON: Do you have agreement with PG&E?

15 MR. JOHNSON: We have an informal agreement with
16 PG&E that will allow us to operate in a manner consistent
17 with the pilot program.

18 MR. JACKSON: Is the informal agreement in
19 writing?

20 MR. JOHNSON: It is not.

21 MR. JACKSON: What is your informal agreement?
22 How do you change your FERC license in order to be able to
23 do this project?

24 MR. LILLY: Wait. I'm going to object. I'm
25 sorry, but that -- that's a blatant misstatement of his

1 testimony. I've got to object.

2 Mr. Johnson was talking about the PG&E agreement.
3 All of a sudden Mr. Jackson talked about the FERC license.
4 I mean they're two different things.

5 MR. JACKSON: All right. Let's start with -- I
6 think that's right. Let's start with the PG&E agreement.

7 MR. JOHNSON: By all means. If you'd like, I
8 would be happy to explain where we stand with PG&E and
9 with regards to a long-term agreement that is
10 contemplated.

11 MR. JACKSON: Well --

12 MR. JOHNSON: Would you like me to explain?

13 MR. JACKSON: -- I'm actually talking about this
14 year's short-term agreement to do your pilot project.

15 MR. JOHNSON: Right. Once again, there's context
16 that needs to be provided here.

17 MR. JACKSON: In other words, PG&E will only
18 agree to the long term?

19 MR. JOHNSON: No. Allow me to explain.

20 MR. JACKSON: Yeah, why don't you.

21 MR. JOHNSON: To implement the Yuba Accord we
22 will -- we have asked that PG&E modify the long-term power
23 purchase agreement between YCWA and PG&E. They have
24 agreed to do this. And they have provided us with a
25 letter that essentially states their agreement to do this.

1 However, to undertake such a modification is
2 non-trivial. It will require a filing before the
3 California Public Utilities Commission at considerable
4 cost and effort to both PG&E and YCWA. Neither of the
5 parties has chosen to undertake this until we get a little
6 further along in the EIR/EIS and we have some assurance
7 that those funds and efforts would not be for not.

8 In the interim, as I mentioned, we do have a
9 letter of agreement with PG&E that they will undertake
10 that process and that they stand in support of the Yuba
11 Accord. And we are willing to proceed with them in good
12 faith that they will accommodate our reservoir operations
13 to move forward with the pilot program this year.

14 MR. JACKSON: Calling your attention now to your
15 agreements with your contractors.

16 Do you have agreements in place with all of the
17 contractors that would be necessary to carry out the pilot
18 project?

19 MR. JOHNSON: I'll answer this to the extent that
20 I know. And then we can ask Curt Aikens or someone else
21 if -- you can ask him if you'd like further elaboration.

22 At this point in time, YCWA has a history of
23 working with its member units to provide conjunctive use
24 water or to allow conjunctive use sales.

25 We've had a very productive relationship for

1 several years with most of the member units within the
2 county. And we feel a high degree of certainty that we
3 can stand behind the conjunctive use commitments, which
4 are 30,000 acre/feet in a Schedule 6 year. Should a
5 Schedule 6 year occur, that water will be available from
6 groundwater sources to support the accord.

7 MR. JACKSON: Calling your attention specifically
8 to Hallwood. Do you have a conjunctive use agreement with
9 Hallwood?

10 MR. JOHNSON: I couldn't answer that. I would
11 ask that one of the Yuba folks answer that one.

12 MR. JACKSON: Sure. You don't work for Yuba?

13 MR. JOHNSON: I do not.

14 MR. JACKSON: Okay. The conjunctive use part of
15 this program, how much water comes out of conjunctive use
16 that's necessary for the pilot project?

17 MR. JOHNSON: It depends on the year class.

18 MR. JACKSON: Now, these year classes are part of
19 the accord index?

20 MR. JOHNSON: Yes.

21 MR. JACKSON: Not something that's presently in
22 use on the river?

23 MR. JOHNSON: That is correct. We -- well, the
24 question that you asked me is how much would come out
25 under the accord. And I assumed by that you meant in the

1 pilot program. And that would be determined based on all
2 of the parameters of the pilot program, which is the north
3 Yuba index and the accord flow schedules. So when you say
4 it's not currently in use on the river, that is correct.
5 The pilot program has not been approved by the Board and
6 it is not in place prior to April of 2006.

7 MR. JACKSON: Thank you.

8 Mr. Grinnell.

9 Mr. Grinnell, did you have anything to do with
10 the preparation of the environmental document in this
11 case?

12 MR. GRINNELL: Yes, I did. I provided analysis
13 of hydrology.

14 MR. JACKSON: In your analysis of hydrology, what
15 was your baseline condition?

16 MR. GRINNELL: There is no baseline in doing the
17 analysis. I analyzed various scenarios. Those scenarios
18 stand alone. And then I provide plots that show those
19 various results from the various scenarios together. But
20 there is no -- I don't determine a baseline.

21 MR. JACKSON: Okay. Well I'm -- I guess I'll
22 call your attention to your Item 4 discussion where you
23 indicate that you conducted an analysis that would result
24 under two flow scenarios, scenario A and B.

25 MR. GRINNELL: Correct.

1 MR. JACKSON: Under scenario A you've got a --
2 you've got RD-1644 long-term flows with no pilot project?

3 MR. GRINNELL: That's correct.

4 MR. JACKSON: And under B you've got RD-1644
5 interim flows with a pilot project?

6 MR. GRINNELL: Correct.

7 MR. JACKSON: Okay. So did you consider at all
8 doing the pilot program with the RD-1644 long-term flow
9 agreement in effect?

10 MR. GRINNELL: Yes. And in fact I state that in
11 my testimony, that I used that for a portion of my work.

12 MR. JACKSON: What did you find were the
13 differences between using RD-1644 long term and RD-1644
14 interim?

15 MR. GRINNELL: The difference in using RD-1644
16 long term with the accord flows versus using 1644 interim
17 with the accord flows is that in drier years --
18 specifically dry, critical -- and under 1644 long term
19 there's also an extreme critical -- there are required
20 additional flows to the accord flows in those years. And
21 those additional flows would require additional releases,
22 which then result in lower storage in New Bullards Bar at
23 the end of 2006.

24 MR. JACKSON: So it would be -- is it fair to say
25 then that the D-1644 long-term flows under conditions

1 of -- dry conditions, critically dry years, would put more
2 water in the river out of storage than would the pilot
3 project or the accord flows or --

4 MR. GRINNELL: The 1644 long-term flows in
5 addition to the accord flows in the spring time of dry and
6 critical years will require more water in greater releases
7 at that time.

8 MR. JACKSON: How much more?

9 MR. GRINNELL: It ranges from -- and this is a
10 generalization, because there's many years of 40, as much
11 as 70,000 acre/feet.

12 MR. JACKSON: Okay. So in calling your attention
13 to the dry years, and the situation in which it's 40 to
14 70,000 acre/feet less under this pilot program, or under
15 the accord flows, and I guess they're the same, that water
16 comes out of storage?

17 MR. GRINNELL: That's correct.

18 MR. JACKSON: And is that what you mean about the
19 storage impact, that the storage impact is D-1644?

20 MR. GRINNELL: I guess I don't quite understand
21 what you said. If you're asking -- when I'm relating the
22 two, yes, I'm specifically relating in my analysis the
23 imposition of 1644 long-term flows, full requirements,
24 with the accord require additional releases in the spring
25 time, which would impact a reduced storage in New Bullards

1 Bar at the end of the 2006 water year.

2 MR. JACKSON: Calling your attention to your
3 testimony in Table 2. The 40 to 70,000 acre/feet would be
4 different flows in which of these month?

5 MR. GRINNELL: I mean we'd have to go to specific
6 year combinations of accord schedules and occurrence of
7 1644 long-term year types to determine the specific
8 amounts in timing.

9 MR. JACKSON: To your knowledge, have these
10 accord flows ever been subject to a CEQA document --

11 MR. GRINNELL: That's not --

12 MR. JACKSON: -- to analyze the differences?

13 MR. GRINNELL: That's not my area of expertise.

14 MR. JACKSON: Okay. Do you have any expertise as
15 to what the -- well, let me step back.

16 You're the hydrologist.

17 MR. GRINNELL: Correct.

18 MR. JACKSON: It's 40 to 70,000 acre/feet --
19 these changes would be 40 to 70,000 acre/feet less than
20 D-16 -- RD-1644 long term. Do they come out of the months
21 of March, April and may, is that fair to say?

22 MR. LILLY: And I'm going to object because he's
23 misstated the testimony again. I don't know whether it
24 was on purpose or not, but he said less than 1644 long
25 term. What Mr. Grinnell said was less than the

1 combination of 1644 long term plus the accord. And this
2 is a very important distinction.

3 BOARD MEMBER KATZ: Mr. Jackson, do you want to
4 restate the question or what?

5 MR. JACKSON: I'll try to segregate out the two.

6 BOARD MEMBER KATZ: Okay.

7 MR. JACKSON: How much of the 40 to 70,000
8 acre/feet in differences is caused by RD-1644 and how much
9 of it is caused by your new schedules in terms of the
10 accord?

11 MR. GRINNELL: The question you've asked I, quite
12 frankly, can't answer because you've premised that that's
13 the comparison. It's not. The 40 -- the 40 to 60, 70,000
14 is a generalization of the amount of water that would be
15 required to be released in -- with 1644 long term imposed
16 with the accord flow schedules over the amount of water
17 that would be required to be released with the 1644
18 interim flow schedules with the pilot program or the
19 accord flows.

20 MR. JACKSON: So you hold -- on these things,
21 the -- I'm having trouble segregating the RD-1644 flows
22 from the pilot program accord flows.

23 And if you did not do the transfer project this
24 year, would there be more water required to be released or
25 less?

1 MR. GRINNELL: If you're asking me to compare the
2 releases under the pilot project, which is a combination
3 as proposed of the accord flow schedules with also
4 complying to 1644 interim, compare those releases with
5 just the releases of 1644 long term, I have done that, and
6 I provided a chart in my summary which showed that in all
7 years the storage in Bullards Bar at the end of the 2006
8 water year under the pilot program storage would be lower
9 because there would be more releases from the pilot
10 project than there would be under just complying with 1644
11 long term with no pilot project.

12 MR. JACKSON: All right. Now, the more releases
13 would be your water transfer? That's what you're selling?

14 MR. GRINNELL: No, that is not how I would
15 characterize it. The differences in storage and the
16 amounts of releases and whether or not they are
17 transferable depend upon a number of conditions, including
18 Delta conditions. And so there are not specific times and
19 quantities of water that are identified as transferable.
20 Those remain to be seen based upon specific Delta
21 conditions.

22 MR. JACKSON: Okay. Let's take another run at
23 this in a different way.

24 Your testimony at the top of page 2 states what
25 we've been talking about here, that there would be the 40

1 to 70,000 acre/foot if you did both RD-1644 and the Yuba
2 Accord flows, and that that would reduce carry-over
3 storage in the driest 20 percent of years in the 30,000
4 acre/foot range and in the driest 10 percent, 40 to 70.
5 Are we --

6 MR. GRINNELL: Well, let's be very clear. What I
7 am comparing there is the impact of complying with 1644
8 long term with the accord flows as compared to the
9 releases of the accord pilot project with 1644 interim.

10 MR. JACKSON: All right. So -- I mean I'm having
11 a little trouble with the apples and oranges here.

12 MR. GRINNELL: Well, I'm trying to keep them all
13 apples.

14 MR. JACKSON: Okay. Let's try to keep them all
15 apples.

16 Do you have a scenario -- you indicated you had a
17 scenario in which you obeyed RD-1644 long term and did a
18 transfer, right? You did that --

19 MR. GRINNELL: You have to be specific on what
20 you mean by "did a transfer".

21 MR. JACKSON: Did your new pilot program.

22 MR. GRINNELL: Correct, I did a scenario that
23 looked at the combination of meeting both of those.

24 MR. JACKSON: And that's the combination that you
25 ended up finding in dry years was 40 to 60,000 acre/feet

1 light in storage?

2 MR. GRINNELL: Correct, compared to also
3 complying with the pilot project at 1644 interim.

4 MR. JACKSON: So the key here to avoid this
5 impact that you talk about for next year's water supply
6 for all the good folks in Yuba County is the difference
7 between RD-1644 long term and RD-1644 interim?

8 MR. GRINNELL: It is the difference between those
9 two and specific years and specific time periods --
10 specific months of the year.

11 MR. JACKSON: Okay. And it is not attributable
12 in these two scenarios that -- comparable to the -- to the
13 accord flows schedule? The difference is the interim
14 flows of RD-1644 and the ones that are to take effect
15 April 21st?

16 MR. GRINNELL: Correct.

17 MR. JACKSON: Thank you.

18 Okay. Calling your attention to those
19 simulations. Where in the water years simulated would the
20 system break even without the water transfer?

21 MR. GRINNELL: You'll have to define "break even"
22 for me.

23 MR. JACKSON: Where in the water years simulated
24 would there be as much water in the difference between
25 RD-1644 interim flows and RD-1644 long-term flows?

1 MR. GRINNELL: I guess I'm still not
2 understanding the question, what I'm trying to answer
3 here.

4 MR. JACKSON: All right. Well, let me step back
5 then and see if I can do it a little differently.

6 What water year type were 2006 and 2007 assumed
7 to be for the purposes of you're analysis?

8 MR. GRINNELL: As I said in my testimony, I
9 simulated the 83 years of historical hydrology that is
10 available. And that ranges all water year classes and
11 types.

12 MR. JACKSON: So for how many of your -- I
13 believe that's your Monte Carlo simulation that you talk
14 about in testimony?

15 MR. GRINNELL: Correct.

16 MR. JACKSON: How many of your 83-year pair cases
17 in the record are preceded by a 708,000 acre/foot starting
18 storage condition?

19 MR. GRINNELL: All of them.

20 MR. JACKSON: Okay. So you --

21 MR. GRINNELL: Excuse me. Just to be very clear.
22 All of them for the start of 2006.

23 MR. JACKSON: All of them for the start of 2006.

24 Can you describe your north Yuba index for the --
25 that's used for the accord in your pilot program?

1 MR. GRINNELL: Certainly. Simply, the north Yuba
2 index takes the amount of active carry-over storage -- and
3 what I mean by active carry-over storage is the actual
4 storage at the end of September or the start of the water
5 year -- minus the FERC minimum pool of 240,000 acre/feet.
6 That is the first component of the index, which is a
7 storage component.

8 The second component is the inflow to New
9 Bullards Bar during the current water year. And that is
10 calculated by using the actual inflow to Bullards Bar to
11 date of calculation of the index plus the predicted inflow
12 based on the forecast.

13 MR. JACKSON: And so what predicted inflow are
14 you using for this year?

15 MR. GRINNELL: We have not started calculating.
16 The first set of calculations for the north Yuba index
17 will be done for the beginning of February. So we still
18 need the January inflow in order to start that
19 calculation.

20 MR. JACKSON: So we have no idea what kind of
21 year it will be or --

22 MR. GRINNELL: Actually we have -- I have done as
23 of last week some work to look at what the potential north
24 Yuba index and resulting water year class might be, even
25 though it's quite early, just based on actual inflow to

1 date.

2 MR. JACKSON: Does it change your worry about
3 carry-over storage in 2007?

4 MR. GRINNELL: Change my worry? Could you be
5 more specific?

6 MR. JACKSON: Sure. You indicated that -- or I
7 believe you and some of the other witnesses indicated that
8 there was a -- in dry years there was going to be less
9 carry-over storage.

10 MR. GRINNELL: Yeah, actually it doesn't
11 alleviate my worry. Because the impact is not with --
12 solely with the north Yuba index. It also has to do with
13 what the resulting Yuba River index year classification
14 would be under 1644, interim or long term. So the
15 combination of those two is what would have the impact.

16 So it's not just the north Yuba index.

17 MR. JACKSON: Calling your attention -- you put
18 up some slides. Mostly your slides deal -- that you put
19 up dealt with September. I'm interested in June.

20 MR. GRINNELL: Sure.

21 MR. JACKSON: And I don't suppose that surprises
22 you a lot.

23 MR. GRINNELL: I happen to have it in my
24 testimony.

25 MR. JACKSON: Yes, you do.

1 Calling your attention to Figure X-5, Figure X-6.

2 MR. GRINNELL: Yes.

3 MR. JACKSON: Mine are not in color, so it is
4 possible that I will misread. And please correct. But it
5 seems to me that for June we are in a situation in which
6 the interim/Accord has less water in it for flow during
7 June than the long term.

8 MR. GRINNELL: No, that's not correct. Well, you
9 have to identify -- I'm sorry. I misstated. You have to
10 identify what portion of the exceedance probability,
11 because it's --

12 MR. JACKSON: Well, I'm looking at the portion
13 from 20 to 65.

14 MR. GRINNELL: Yeah, actually that -- during that
15 segment, the interim/Accord or the pilot project flows are
16 significantly higher than the long-term flows.

17 MR. JACKSON: Okay. So I'm now calling your
18 attention to July, which is higher.

19 MR. GRINNELL: Well, they cross.

20 MR. JACKSON: And so for the percentages -- let
21 me make sure I have the right --

22 BOARD MEMBER KATZ: Mr. Jackson, just so you
23 know, you're down to about seven minutes.

24 MR. JACKSON: Yes.

25 Calling your attention to the long-term flow.

1 It's higher for a period from 30 to 60?

2 MR. GRINNELL: Generally, that's -- yes, that's
3 correct.

4 MR. JACKSON: And the question -- well, I guess I
5 should move to Mr. Bratovich at this point.

6 Mr. Bratovich, when you're looking at two
7 different scenarios in exceedance probabilities like this
8 in terms of fish, how do you identify the benefits of, for
9 instance, a 33.3 percent reduction in May flows between
10 the accord and the interim and long term and actually a
11 reduction in May of up to two-thirds in some water years?
12 How do you use that data in determining whether or not it
13 affects the fishery?

14 MR. BRATOVICH: Well, how we use that data are we
15 examine all of the relevant life stages throughout the
16 course of the duration of the proposed project, which
17 again is an 11-month period. And there are some months of
18 the year where flows could be higher under one alternative
19 versus another or temperatures lower under one alternative
20 scenario versus another. But it is absolutely necessary
21 in conducting an impact evaluation to consider all of the
22 potential effects on all of the various life stage for the
23 species under consideration.

24 So, the month of May would be included in the
25 evaluation of the overall effects to the species

1 throughout their in-river residence period depending upon
2 the species you're considering.

3 MR. JACKSON: All right. So let's take shad. Is
4 it important to have attraction flows for shad in May?

5 MR. BRATOVICH: Again, important for what respect
6 or what reason? If you are inferring that attraction
7 flows -- let me rephrase that, sir.

8 Attraction flows to bring American shad into the
9 lower Yuba river are important during April, May and June.
10 That is the period that shad could be -- a primary period
11 in which American shad could be attracted into the lower
12 Yuba River. So I would say that it is important during
13 each of those months, April, May and June.

14 And shad, by the way, is slightly different than
15 the other species that we evaluated, which have extended
16 year around life histories in the lower Yuba River. So it
17 is more appropriate to truncate the temporal analysis to
18 those three months.

19 MR. JACKSON: Yes. And the benefits that you
20 would balance with, I guess, in regard to shad for
21 increased flows in the late summer, they don't do much for
22 shad, do they?

23 MR. BRATOVICH: Again, the analysis that I
24 conducted for this testimony and in this CEQA process was
25 to compare the relative effects of the proposed project to

1 either long-term 1644 flows that might be expected to
2 occur using the probability distribution functions Mr.
3 Grinnell spoke to or to interim 1644.

4 So, again, it is a relative comparison among
5 alternative scenarios as required by this hearing process.

6 MR. JACKSON: Can the proposed September to
7 October flows from the pilot program be met in all years?

8 MR. BRATOVICH: I'm really not sure what you're
9 asking me.

10 MR. JACKSON: Do you have enough water to meet
11 the proposed September and October accord flows in all
12 years?

13 MR. BRATOVICH: I didn't testify, and I'm not
14 prepared to answer that question.

15 MR. JACKSON: Mr. Grinnell, can you answer that?

16 MR. GRINNELL: Yeah, could you restate the
17 question please?

18 MR. JACKSON: Yeah. Can the proposed September
19 and October accord or pilot project flows be met in all
20 years?

21 MR. GRINNELL: The flows that are proposed for
22 the pilot project are a series of schedules depending upon
23 what the index develops. So you'd have to be more
24 specific.

25 MR. JACKSON: In other words if it's dry under

1 this, there's less water?

2 MR. GRINNELL: That's correct. If the index is a
3 drier year index, then the flows are lower.

4 MR. JACKSON: And have you determined what the
5 impacts of the transfer would be if this turned out to be
6 a dry year?

7 MR. GRINNELL: I don't quite -- again don't quite
8 understand the question, what impacts you're --

9 MR. JACKSON: Well, maybe I should ask Mr.
10 Bratovich that.

11 Mr. Bratovich, have you determined what the
12 impacts would be in regard to steelhead and salmonids if
13 the transfer occurs and the year is critically dry?

14 MR. BRATOVICH: We evaluated the environmental
15 effects on steelhead, among other species, in accordance
16 with the probability of flows occurring in the lower Yuba
17 River as specified in the exceedance probability
18 distribution functions.

19 So, by nature, whether it's a wet year, a normal
20 year or a dry year, those were included in our
21 evaluations, yes.

22 And when you say "transfers," I would only simply
23 clarify for my own understanding, sir, that what I
24 evaluated was the proposed project and the model output
25 that I received.

1 MR. JACKSON: So you just took the model and went
2 from that?

3 MR. BRATOVICH: Yes, sir.

4 MR. JACKSON: All right. Referring to your
5 testimony on 4 -- on Table 4-2.

6 BOARD MEMBER KATZ: Last question, Mr. Jackson.

7 MR. BRATOVICH: I don't believe I have a Table
8 4-2 in my testimony.

9 MR. JACKSON: Excuse me. I'm looking at the
10 wrong piece of testimony.

11 I guess it would be slide 4.

12 Why are the reduction in flows during the
13 spawning period for Chinook Salmon better since there seem
14 to be reduction in flows in this period of time from
15 RD-1644?

16 MR. BRATOVICH: Let me try to restate your
17 comment and provide that in a question format for me.

18 Are you asking why is the cumulative distribution
19 of spawning habitat availability expected to occur with
20 the proposed project relative to long-term 1644 habitat
21 availability or interim habitat availability slightly
22 lower in part of the distribution, yet slightly higher in
23 the other part of the distribution?

24 MR. JACKSON: Yeah, the majority of the
25 distribution that you say it's lower.

1 MR. BRATOVICH: Actually, utilizing the September
2 again, as I testified, as an indicator of spring run
3 Chinook Salmon spawning habitat availability, the results
4 actually indicate that the proposed project would provide
5 99 to 100 percent of the maximum potential spawning
6 habitat availability about 43 percent of the time, whereas
7 the other alternative scenarios, interim 1644 or long-term
8 1644, don't exceed approximately, well, 95, 96 percent of
9 the maximum spawning habitat availability.

10 For the remainder of the distribution, as you
11 point out, Mr. Jackson, the proposed project is over the
12 range of flows associated -- that are expected to occur
13 associated with these range of spawning habitat
14 availabilities are approximately up to 10 percent lower
15 during those conditions. Those reflect the flow
16 probabilities that Mr. Grinnell testified to.

17 And was the second part of your question: Does
18 this constitute an unreasonable effect or a significant
19 effect?

20 MR. JACKSON: Actually that was not the second
21 part of my question.

22 BOARD MEMBER KATZ: Ask the second part of your
23 question. And your time has expired.

24 MR. JACKSON: Well, and that's one I'm not sure
25 that I want to ask the second part of the question,

1 because then I can't follow up.

2 BOARD MEMBER KATZ: I understand.

3 MR. JACKSON: So I will stop right there.

4 BOARD MEMBER KATZ: Okay. Thank you.

5 We have some comments -- some questions from
6 State Board staff?

7 SENIOR STAFF COUNSEL FRINK: Yes, we do.

8 I'll begin with Mr. Johnson.

9 In answer to a question from Mr. Jackson, I
10 believe you stated that the flow schedules in the pilot
11 project were developed on the basis of assumed interim
12 flows and that a change in those assumed flows could cause
13 problems for Yuba River -- or for Yuba County Water Agency
14 in meeting its water supply obligations in dry years. Is
15 that roughly correct?

16 MR. JOHNSON: I think you're actually mixing two
17 different responses. The pilot program flow schedules
18 were developed using -- assuming a regulatory baseline of
19 interim. And all of the discussions and development of
20 those flow schedules was consistent in using that
21 regulatory baseline and the calculations and analysis
22 built upon that.

23 The problem with the 1644 long term would have
24 two issues. First is that it potentially has impact on
25 the pilot program flow schedules. And then, secondly, it

1 has, potentially, impacts on in-county deliveries in '07.

2 SENIOR STAFF COUNSEL FRINK: Okay. Would those
3 impacts occur in all water year types or just in the drier
4 water year types?

5 MR. JOHNSON: My understanding is just in the
6 drier water year types. Although I believe Mr. Grinnell's
7 analysis goes into that in considerable detail.

8 SENIOR STAFF COUNSEL FRINK: Okay. This then is
9 a question for either you or Mr. Grinnell.

10 Would complying with the D-1644 long-term flow
11 requirements and the Yuba River Accord flows jointly cause
12 problems for Yuba County Water Agency in wet years?

13 MR. GRINNELL: Let me give that one a shot, if I
14 could, Mr. Frink.

15 For 2006 if the 1644 long-term flows were in
16 effect and the Yuba County Water Agency were to elect to
17 do the accord -- go forward with the accord or the pilot
18 project flows, those flows are identical to the 1644
19 interim flows for 2006, so from a physical standpoint
20 there would not be an impact to the carry-over storage at
21 the end of 2006. However, that would mean that the State
22 Board had not granted the extension petition. And what we
23 are concerned with is actually the shortages that would
24 occur in 2007.

25 SENIOR STAFF COUNSEL FRINK: Okay. Let me

1 interrupt.

2 You were referring to the interim flows in 2006.
3 What I was interested in. -- maybe I should break it down.

4 Would Yuba County Water Agency have a water
5 supply problem if it continued to have to comply with the
6 long-term flow requirements that are scheduled to go into
7 effect on April 21st, if it were in a wet year?

8 MR. GRINNELL: I guess the -- you know, the real
9 question becomes: Would Yuba County Water Agency be doing
10 the pilot project if --

11 SENIOR STAFF COUNSEL FRINK: Right. Forget about
12 the pilot project for purposes of this question.

13 If it were a wet year for 2006, could Yuba County
14 Water Agency meet its water supply obligations under the
15 long-term flow requirements?

16 MR. GRINNELL: In 2006, yes.

17 SENIOR STAFF COUNSEL FRINK: Okay. And would
18 they be able to meet their water supply obligations if
19 they met both the long-term flow requirements and also
20 operated to meet the higher Yuba River Accord flows if
21 those flows were higher at a given time?

22 MR. GRINNELL: For 2006?

23 SENIOR STAFF COUNSEL FRINK: Yes.

24 MR. GRINNELL: For 2006 their -- they would meet
25 their water supply requirements.

1 SENIOR STAFF COUNSEL FRINK: Okay.

2 MR. GRINNELL: But as I said, again, the issue
3 that I provided my testimony on and in the entire issue
4 was really about deliveries in 2007.

5 SENIOR STAFF COUNSEL FRINK: Okay. Now, if it
6 were a wet water year and Yuba County Water Agency
7 operated to meet both the long-term flow requirements and
8 the Yuba River Accord flows, how would that affect their
9 ability to meet their water supply obligations in 2007, if
10 it were a wet water year?

11 MR. GRINNELL: For --

12 MR. LILLY: Excuse me. You have to be clear. Do
13 you mean if it were a wet water year in '06 or in '07 or
14 both?

15 SENIOR STAFF COUNSEL FRINK: If it were a wet
16 water year in 2006 and Yuba operated to meet both the
17 long-term flow requirements and the accord flow
18 requirements, how would that affect its ability to meet
19 its water supply commitments in 2007?

20 MR. GRINNELL: It is -- it's a probability issue.
21 And I would have to understand what the probability of --
22 what would occur in 2007. If you're asking is there a
23 potential for shortages in 2007 if this turns out to be a
24 wet year in 2006 and the -- and the Yuba County Water
25 Agency was required to comply with 1644 long term, I don't

1 remember specifically. But I believe there is the
2 potential for some shortage in 2007 -- matter of fact I
3 know there is the potential for shortages in 2007 if they
4 are meeting both of those requirements, the pilot project
5 and the long-term flow requirements.

6 SENIOR STAFF COUNSEL FRINK: Okay. Have you made
7 a preliminary estimate on what classification of water
8 year type 2006 will be based on the information you have
9 available at the present time?

10 MR. GRINNELL: Yes. I looked at both the north
11 Yuba index and the Yuba River index under 1644, interim or
12 long term. As of last week the -- the probability is that
13 for under the pilot project or under the north Yuba index,
14 it would be a schedule one or two years. So quite high
15 flow requirements under those schedules.

16 For the 1644 index, which is the Yuba River
17 index, there is a chance of a drier critical year still,
18 although it's less than 10 percent. Actually I calculated
19 about -- a little over a 7 percent chance of a dry year
20 and about a 1 percent chance for a critical year.

21 SENIOR STAFF COUNSEL FRINK: All right. Mr.
22 Bratovich, I just had a short question.

23 I wondered, did you do any studies of the effects
24 of the transfer that is proposed as a part of the pilot
25 project on fishery resources in the Delta?

1 MR. BRATOVICH: For the potential effects on the
2 Delta we did no independent analyses on effects to
3 fisheries. We relied upon the impact assessment, the
4 EIS/EIR, and the action-specific implementation plan that
5 was conducted for the EWA program for the short-term --
6 short-term EWA program.

7 SENIOR STAFF COUNSEL FRINK: Okay. Yeah, I
8 believe Mr. Mona has a few questions.

9 WATER RESOURCES CONTROL ENGINEER MONA: Mr.
10 Grinnell, throughout your testimony you referred to
11 modeling results that you've relied on to present your
12 graphical representations of those results -- what those
13 results are. Yet you didn't supply the Board with the
14 actual model output data tables to support your testimony.

15 Is there any way we can get those tables?

16 MR. LILLY: That's fine with me.

17 MR. GRINNELL: Yeah, if it's fine with legal
18 counsel, it's fine with me. Yeah, I certainly can provide
19 the tables, if you could just identify what information
20 and what results you would like to have.

21 WATER RESOURCES CONTROL ENGINEER MONA: Well, the
22 tables -- the modeling output data that you used to
23 graphically represent your interpretation of those --

24 MR. GRINNELL: Certainly.

25 Flows and temperature by month for each of the

1 scenarios?

2 WATER RESOURCES CONTROL ENGINEER MONA: Correct.

3 MR. GRINNELL: Yes.

4 MR. LILLY: I would ask that Mr. Mona clarify why
5 he wants those. You know, the information is already in
6 the figures. I'm just not quite sure why the tables are
7 needed. But we'll provide them if there's a reason.

8 WATER RESOURCES CONTROL ENGINEER MONA: Well, the
9 testimony presented represents Mr. Grinnell's
10 interpretation of what that modeling output data is. And
11 it's not that I don't believe what he's saying. I would
12 just like the opportunity to actually look at the modeling
13 output data and verify his results.

14 BOARD MEMBER KATZ: I think it's a legitimate
15 request. And you've agreed to do it.

16 Any other -- Ernie, nothing?

17 WATER RESOURCES CONTROL ENGINEER MONA: That's
18 it.

19 BOARD MEMBER KATZ: All right. Let me ask --
20 that concludes this piece.

21 SENIOR STAFF COUNSEL FRINK: I was just asking if
22 Jane had any questions that she --

23 BOARD MEMBER KATZ: I'd asked Jane.

24 Any redirect, Mr. Lilly?

25 Give me an idea so I can get through scheduling

1 what you've got in terms of redirect.

2 MR. LILLY: Probably about five minutes max.

3 BOARD MEMBER KATZ: All right. And as everybody
4 knows, recross is going to be narrow and limited to the
5 redirect.

6 Also just if I might -- if you indulge me for a
7 second.

8 DWR, how long to put on your case in chief?

9 MS. CROTHERS: About -- less than ten minutes.

10 BOARD MEMBER KATZ: And how many witnesses?

11 MS. CROTHERS: One.

12 BOARD MEMBER KATZ: I like that.

13 And Mr. Jackson?

14 MR. JACKSON: Two witnesses.

15 BOARD MEMBER KATZ: About how long for the case
16 in chief?

17 MR. JACKSON: Fifteen minutes.

18 BOARD MEMBER KATZ: Okay. Appreciate that.

19 Mr. Lilly -- well, here's what we're going to do.
20 We're going to complete the Yuba case in chief and the
21 cross, the redirect and then if there's recross. We'll
22 break for lunch and then have the other two come on. And
23 we should wrap that up by the end of the day. So that's
24 the scheduling.

25 REDIRECT EXAMINATION

1 OF THE YUBA COUNTY WATER AGENCY PANEL
2 BY MR. ALAN B. LILLY, ESQ., representing the Yuba County
3 Water Agency as followso:

4 MR. LILLY: I'll start with you, Mr. Grinnell.

5 I don't think it was entirely clear in your cross
6 examination discussion. Was there a difference between
7 the hydrological analysis you did for the 2006 pilot
8 program versus the hydrological analysis that you will do
9 or would do for the Yuba Accord, for the long-term accord?

10 MR. GRINNELL: Yes. The hydrologic analysis I
11 did for the pilot project. I was provided with a starting
12 storage for New Bullards Bar Reservoir. So I knew what
13 the conditions would be starting into the water year that
14 we're looking at.

15 MR. LILLY: Okay. And does knowing that affect
16 the exceedance curves that you've described?

17 MR. GRINNELL: Yes. As I stated, because the
18 north Yuba index is partially dependent upon the amount of
19 storage -- carry-over storage, and because 2006 is
20 starting with a lot of carry-over storage, that is going
21 to skew the index upwards and, therefore, skew the
22 probability of the various flow schedules such that there
23 is much higher probability that there would be, you know,
24 the wetter flow schedules, or the schedules 1, 2, than the
25 dryer flow schedules.

1 MR. LILLY: So for the accord would you have to
2 do a different hydrological analysis?

3 MR. GRINNELL: Yes, I would.

4 MR. LILLY: Mr. Bratovich, you didn't get a
5 chance to answer this question. But Mr. Jackson in asking
6 some of the other witnesses made a suggestion that the
7 conclusions of "no unreasonable effects on fish and
8 wildlife" were just based on the intuition of fishery
9 biologists.

10 Were in fact your conclusions based on anything
11 besides simply the intuition of fishery biologists?

12 MR. BRATOVICH: Well, yes, absolutely. And I'm
13 not sure that first statement even correctly addresses the
14 process.

15 The conclusions based upon the proposed project
16 before us today, which is the extension of the date for
17 interim as well as implementation of the proposed project,
18 is fully described, quantified to the extent possible,
19 discussed in the initial study.

20 MR. LILLY: So is that analysis in the initial
21 study more than simply intuition?

22 MR. BRATOVICH: Oh, it is a detailed analysis of
23 the accumulative probability distribution functions of
24 flow and temperatures as well as reliance upon other
25 documents and information developed over the years for the

1 lower Yuba River and the other surrounding environs.

2 MR. LILLY: Shifting back to you, Mr. Grinnell.

3 I think there's some question or confusion
4 regarding the overlap between instream water -- for
5 instream flows in the lower Yuba River under the 2006
6 pilot program and water that could be transferred under
7 the 2006 pilot program.

8 Are in fact those two volumes of water equal or
9 not?

10 MR. GRINNELL: See if I can understand the way
11 you've asked this. The water that is the regulatory
12 requirement for instream flows at the time is not the
13 water that is being transferred.

14 MR. LILLY: Okay. I wasn't clear then.

15 Will all of the water -- the additional water
16 over the regulatory baseline that is required to implement
17 the pilot program flow schedules be transferable?

18 MR. GRINNELL: No, and that -- it is not. In
19 fact, in certain years a large portion -- in many years a
20 large portion of the pilot project flows which are in
21 exceedance of the regulatory 1644 interim flows is not
22 transferable.

23 MR. LILLY: Another question for you, Mr.
24 Grinnell.

25 There was some discussion regarding potential

1 conjunctive use in 2006. Based on what you know today
2 regarding hydrological conditions, which you briefly
3 discussed in response to a question from Mr. Frink, could
4 you please describe what the potential is for -- let me
5 try that again.

6 Based on what you know of the 2006 hydrology,
7 please describe the potential for the need for a
8 conjunctive use program in Yuba County in 2006.

9 MR. GRINNELL: Although the year types could be
10 dry or critical as determined at this time, conditions are
11 such that storage is high and, therefore, there is water
12 available in the system. So from a Yuba County
13 perspective, conjunctive use for shortages is not needed.
14 And groundwater substitution is unlikely, because that is
15 a market condition under which there would be a need
16 outside of Yuba County, and it appears that that is
17 unlikely at this time as well.

18 MR. LILLY: Okay. Thank you.

19 I don't have any further questions.

20 BOARD MEMBER KATZ: Thank you, Mr. Lilly.

21 DWR.

22 MS. CROTHERS: No questions.

23 BOARD MEMBER KATZ: No questions.

24 Fish and Game?

25 MS. MURRAY: No questions.

1 BOARD MEMBER KATZ: Mr. Jackson.

2 RE CROSS EXAMINATION

3 OF THE YUBA COUNTY WATER AGENCY PANEL

4 BY MR. MICHAEL JACKSON, ESQ., representing the California
5 Sportfishing Protection Alliance as follows:

6 MR. JACKSON: I believe that it would be Mr.
7 Johnson who would -- well, let's try Mr. Grinnell, because
8 that's who the direct was to.

9 So it is very likely that folks could do the
10 RD-1644 long term and the accord this year without having
11 any undo effects on people's water supply?

12 MR. GRINNELL: Let me answer it this way: There
13 is the -- if it is a wetter year -- specifically if it is
14 above normal or below normal year, then there is no
15 difference in the flows between 1644 long term and
16 interim, and therefore would not have a physical effect.
17 However, as I stated before, the true risk to shortages is
18 in 2007. If the extension petition were not granted, then
19 Yuba County Water Agency would be faced with greater
20 uncertainty, and that uncertainty would be folded into
21 their risk assessment of whether or not they could go
22 forward with the accord of pilot project flows which
23 would, as I showed in my testimony, reduce storage
24 regardless of the -- regardless of the water year at the
25 end of 2006 and pose potential significant risk to

1 shortages in 2007. And Yuba County Water Agency would be
2 faced with greater uncertainty on whether or not in 2007
3 there would be the ability to get relief from 1644 long
4 term or to implement an accord.

5 It would also be difficult for them to move
6 forward, as Mr. Johnson said, with implementing
7 conjunctive use agreements and other agreements. And the
8 issue is risk in '07, not in '06.

9 MR. JACKSON: So, basically 1644 standing as it
10 is presently designed to go into effect on April 21st,
11 2006, would have no impact on your pilot program this
12 year, but it might change your analysis of whether or not
13 you wanted to do the pilot program --

14 MR. GRINNELL: No, that's not what I --

15 MR. JACKSON: -- this year?

16 MR. GRINNELL: That is not what I said. I
17 answered Mr. Frink's question by stating that there is the
18 probability that -- even though it's a small one, as I
19 said, 7 percent for a dry year or 1 percent for a critical
20 year -- that there would be a difference. What I just
21 answered to the question was if it was a wetter year, then
22 there would not be a physical different but there would be
23 a water supply planning and implementation issue still to
24 be dealt with.

25 MR. JACKSON: When would you know -- I mean

1 February 1st, March 1st, when would you know whether or
2 not there would be such a risk -- elevated risk?

3 MR. GRINNELL: If you tell me what the water year
4 is and how it's going to develop, then I can tell you --
5 then I can answer that question. But since I cannot --

6 MR. JACKSON: Well, is there a time that you
7 would know?

8 MR. GRINNELL: We would certainly know by June.

9 MR. JACKSON: Would you know by March?

10 MR. GRINNELL: Possibly, but -- possibly.

11 MR. JACKSON: No further questions.

12 BOARD MEMBER KATZ: All right. Thank you, Mr.
13 Jackson.

14 State, anybody?

15 SENIOR STAFF COUNSEL FRINK: Yes, just a couple.

16 I'm still a little unclear, Mr. Grinnell, on the
17 effect of deferring the long-term flow requirements on the
18 water supply available in Yuba County. Now, it's my
19 understanding that the flow requirements for wet and above
20 normal years are identical under Revised Decision 1644
21 whether you're speaking of the long-term flow requirements
22 that would go into effect later in April of this year or
23 whether you're speaking of the interim flow requirements.
24 Is that your understanding?

25 MR. GRINNELL: Correct, they are -- the flow

1 schedules are identical.

2 SENIOR STAFF COUNSEL FRINK: Okay. And the water
3 year classification for 2006, it will remain in effect
4 until February 1 of 2007; is that correct?

5 MR. GRINNELL: No, the water year
6 classification -- well, there is a recalculation starting
7 in February, but it may or may not change.

8 SENIOR STAFF COUNSEL FRINK: But it wouldn't
9 change before February 1 of 1007, would it?

10 MR. GRINNELL: Once it's finally established at
11 whatever time through -- you know, possibly through June,
12 once it's established at that time, then it would not
13 change until February.

14 SENIOR STAFF COUNSEL FRINK: Okay. And just
15 looking briefly at the flow requirements in Revised
16 Decision 1644, I believe that both the interim and the
17 long-term flow requirements for the month of February are
18 the same; is that correct?

19 MR. GRINNELL: I would have to take your word for
20 it. But that does sound like it is correct.

21 SENIOR STAFF COUNSEL FRINK: Okay. So if we're
22 dealing with an above-normal or wet year, if that actually
23 turns out to be the case, then the flow requirements that
24 Yuba County would have to meet, whether they're the
25 interim flow requirements or the long-term flow

1 requirements, from now until the end of February in 2007
2 would be the same, isn't that right?

3 MR. GRINNELL: That's correct.

4 SENIOR STAFF COUNSEL FRINK: And --

5 MR. LILLY: Excuse me, Mr. Frink. I assume you
6 want him to continue your assumption that it's a wet or
7 above-normal year, because obviously that's not the case
8 if it's a dry or critical year. You'd asked him to assume
9 that before. But I just wanted to make sure it was clear
10 that that assumption was in this line of questions as
11 well.

12 SENIOR STAFF COUNSEL FRINK: I believe that
13 assumption is stated. But I will state it. If we assume
14 that 2006 is a wet or above-normal year, then it doesn't
15 make any difference whether or not the Board revises the
16 long-term flow requirements and authorizes Yuba to operate
17 in accordance with the interim flow requirements through
18 the end of February of 2007; is that correct?

19 MR. LILLY: And I'm going to just say, "make any
20 difference," are you talking just hydrologically or beyond
21 that? Because I think there's an important distinction
22 there.

23 SENIOR STAFF COUNSEL FRINK: I'll answer Mr.
24 Lilly's second request for clarification.

25 Speaking with regard to water supply impacts on

1 Yuba County Water Agency, I would repeat my question: If
2 2006 is a wet or above-normal year, changing the long-term
3 flow requirements that are scheduled to go into effect in
4 April of this year to an extension of the interim flow
5 requirements isn't going to make a difference regard to
6 water supply -- with regard to water supply impacts in
7 Yuba County; is that correct?

8 MR. GRINNELL: I would answer it two parts:

9 First, from a purely physical release schedule and water
10 supply for 2006 and the resulting storage in Bullards Bar,
11 that is correct, there would not be a difference in the
12 release patterns and, therefore, the hydrology in the
13 resulting storage in New Bullards Bar.

14 However, if the extension petition is not
15 granted, then again, as I said, Yuba County Water Agency
16 is faced with doing a risk assessment that has 1644 long
17 term being implemented. And as 2007 is truly the concern,
18 the concern then in their risk assessment is: Should they
19 move forward with a pilot program with uncertainty with
20 the Board not providing the extension petition and,
21 therefore, not supporting their petition for moving
22 forward with the pilot program?

23 SENIOR STAFF COUNSEL FRINK: So your concern
24 addresses what might happen after March 1 of 2007; is that
25 correct?

1 MR. GRINNELL: That's correct.

2 SENIOR STAFF COUNSEL FRINK: But all that Yuba
3 County is being -- has asked the Board to do at this point
4 is to extend the interim flows through February of 2007,
5 correct?

6 MR. GRINNELL: That's correct.

7 SENIOR STAFF COUNSEL FRINK: Okay.

8 MR. JOHNSON: Mr. Frink, you originally asked me
9 part of that question. So if I can ask forbearance to
10 elaborate just a little teeny bit?

11 SENIOR STAFF COUNSEL FRINK: If it's with regard
12 to the water supply impacts, yes. That's the focus of my
13 question.

14 MR. JOHNSON: Yes. In direct relation to the
15 question, I think it's clear to us all that the flow
16 requirements for 1644 long term and interim are identical
17 in wet and above normal years and almost identical, within
18 a thousand acre/feet or so, in below normal years. And so
19 if it were to pass, if we had perfect foresight for the
20 hydrologic year, then, as Steve mentioned, physically it
21 would make no difference.

22 And the reverse of that argument is: Then to
23 what benefit is imposition of 1644 long term versus
24 leaving interim in place since there is no additional
25 protection offered under 1644 interim or long term in the

1 wetter year classes and there is the concern for risk --
2 as I mentioned in my testimony, very small but very
3 significant if it were to occur -- of dry year impacts in
4 2007?

5 SENIOR STAFF COUNSEL FRINK: I think we need to
6 clarify that again.

7 If all we're dealing with is what flow
8 requirements apply from now until March 1 of 2007, then
9 there's no difference with respect to the risk of adverse
10 impacts on water supply. Would you agree with that?

11 MR. JOHNSON: In a wet year, and if it indeed
12 turns out to be a wet year, which we won't know
13 unfortunately until after decisions need to be taken on
14 moving ahead with the pilot program.

15 SENIOR STAFF COUNSEL FRINK: Is that also the
16 case with regard to an above-normal year?

17 MR. JOHNSON: That is correct.

18 SENIOR STAFF COUNSEL FRINK: And within a
19 thousand acre/feet or so it's the case with respect to a
20 below-normal year, is that correct?

21 MR. JOHNSON: Yes, sir.

22 SENIOR STAFF COUNSEL FRINK: Okay. Mr. Grinnell,
23 I think you indicated that you had made some preliminary
24 estimates on what you believe the water year type is going
25 to be for 2006; is that correct?

1 MR. GRINNELL: Yes.

2 SENIOR STAFF COUNSEL FRINK: Okay. And what was
3 your conclusion on what the likely water year
4 classification will be for 2006?

5 MR. GRINNELL: I'll give you the numbers rather
6 than generalizing.

7 SENIOR STAFF COUNSEL FRINK: Okay. Great.

8 MR. GRINNELL: And from my recollection, I know
9 that the critical year is about 1 percent for under the
10 Yuba River index. A dry year percentage is a little over
11 7 percent.

12 For below normal, above normal and wet I did not
13 specifically look at the spread since they are so close in
14 the -- almost identical in flow requirements. I was
15 mostly interested in dry and critical.

16 SENIOR STAFF COUNSEL FRINK: Okay. So based on
17 your preliminary estimate, there's a 93 percent chance
18 that it will be below normal, above normal or wet for
19 2006; is that correct?

20 MR. GRINNELL: Actually 92 percent.

21 SENIOR STAFF COUNSEL FRINK: I'm sorry.
22 Ninety-two percent. Excuse me. Extremely sloppy math.

23 Okay. When is the final year type classification
24 reached under Decision 1644, do you recall?

25 MR. GRINNELL: Yes. It's actually not specific.

1 What it is is a monthly review or recalculation. And then
2 whenever the final forecast of unimpaired flow by the
3 Department of Water Resources as an update to Bulletin 120
4 occurs, then the final calculation of the Yuba River index
5 also occurs. That tends to happen, depending upon the
6 year type, anywhere from May to June.

7 SENIOR STAFF COUNSEL FRINK: Okay. Okay. I
8 believe that's all of staff's questions.

9 BOARD MEMBER KATZ: All right. Then in that
10 case -- let's see. You have exhibits you want to enter
11 that we'd accept at this point, or testimony, other than
12 what we've heard?

13 MR. LILLY: Yes. Well -- and the ones we have
14 heard I'd like to offer into the record.

15 BOARD MEMBER KATZ: No, I understand.

16 MR. LILLY: Yeah. I'd like to offer into the
17 record the Exhibits YCWA 1 through 9 that were submitted
18 last Thursday and that have been discussed today. As I
19 mentioned in my opening statement, yesterday we submitted
20 Exhibits YCWA 10 and 11, which were the resolution
21 approving the mitigated neg declaration and then the
22 actual mitigated negative declaration. These obviously
23 are based on Exhibit YCWA 9; and, in fact, Exhibit 9 has
24 the proposed mitigated negative declaration in it. The
25 signed one is basically in 11.

1 Normally the State Board's process is to even
2 leave hearing records open after the end of the hearing
3 for CEQA documents. Here we got a little bit ahead of
4 time. Obviously the State Board needs to have the final
5 CEQA documents so that it can know whether or not it can
6 act as a responsible agency under CEQA. So that's our
7 main purpose for offering those last two exhibits.

8 BOARD MEMBER KATZ: All right. Mr. Jackson, some
9 objection?

10 MR. JACKSON: Yes. The introduction of the
11 resolution and the final document come after the date in
12 which exhibits were supposed to be present. We have filed
13 comments on the inadequacies of the negative declaration.
14 And we do believe that we would like to repeat that
15 information to the Board if they're going to use that CEQA
16 document as a responsible agency.

17 However, because of the nature of the document
18 coming in yesterday, we do not know whether there were
19 changes between drafts and final. We've had no chance to
20 review that. We've had no chance to review responses to
21 our comments. And so we basically are in a -- kind of a
22 jam here in that we can't determine and don't see how you
23 can determine whether or not this negative declaration is
24 going to be adequate for CEQA coverage in this hearing.

25 MR. LILLY: Just so we're clear. The CSPA

1 comments to the proposed mitigated negative declaration
2 are included in Exhibit 11, along with Yuba County Water
3 Agency's responses to those comments. This is following
4 the normal CEQA process. I think what Mr. Jackson is
5 proposing is something beyond what CEQA provides for.

6 BOARD MEMBER BAGGETT: So, Mr. Jackson, does that
7 cure your objection, in fact your comments and the
8 responses to those comments are part of their exhibits?

9 MR. JACKSON: No, I fully understand that the
10 negative declaration by Yuba County Water Agency starts a
11 30-day window, which we will take care of. But the point
12 I'm trying to make is that I don't know how the Board can
13 use the CEQA document in this circumstance in which
14 there's been no opportunity to examine the CEQA document
15 in this hearing in terms of its coverage of the issues in
16 regard to fish and wildlife, public interest that are
17 before the Board.

18 BOARD MEMBER BAGGETT: We are not certifying that
19 CEQA document.

20 But, Mr. Frink, do you have some additional?

21 SENIOR STAFF COUNSEL FRINK: Yes. I believe the
22 draft initially study and negative declaration were
23 submitted in advance of the hearing. They were -- and if
24 anybody wanted an opportunity to introduce evidence
25 regarding those documents, they could do so.

1 Now, the Board can take official notice of Yuba's
2 adoption of the negative declaration. So I don't believe
3 there's any harm in admitting that as an exhibit.

4 The final negative declaration or -- final
5 initial study includes Yuba's response to your comments as
6 well as your comments. So I think the only thing that no
7 one had an opportunity to comment on within the period of
8 time allowed in the hearing notice was Yuba's response to
9 your comments on their negative declaration.

10 And I wonder if it would be agreeable for
11 everyone to allow Mr. Jackson to include any comments on
12 Yuba's response to CSPA's negative declaration as an
13 attachment to his closing brief if he chooses to do so.

14 MR. JACKSON: I actually would accept that if I
15 could get another five pages on the brief.

16 BOARD MEMBER BAGGETT: Mr. Lilly.

17 MR. LILLY: Yeah, I don't -- you can do that if
18 that's what you conclude you need to do. But I disagree
19 with that. I do not think that's appropriate. Normally
20 under CEQA, there's a document -- a draft document, people
21 make comments on it, and the lead agency provides
22 responses. That's exactly the process we've done here.

23 If there's something different for the purposes
24 of this hearing separate from CEQA, this hearing has a
25 process for submission of rebuttal evidence, and I suggest

1 that we follow that. It would be appropriate.

2 BOARD MEMBER BAGGETT: Mr. Frink, do you have
3 any --

4 SENIOR STAFF COUNSEL FRINK: Yeah. The only
5 problem was that the submission of rebuttal evidence
6 assumes that the direct evidence is ahead in advance of
7 the hearing. And in this instance in that limited
8 respect, Yuba's response to CSPA's comments on the
9 negative declaration, that evidence was only available
10 yesterday.

11 Now, the suggestion I had had nothing to do with
12 compliance of the CEQA process itself. It simply had to
13 do with giving CSPA an opportunity to comply with -- or to
14 respond to evidence that only became available yesterday.

15 BOARD MEMBER BAGGETT: Let me make another
16 suggestion then.

17 I think it might be -- I hate to tie it to the
18 closing brief. If you want to submit something separate
19 from that, that seems to me to be cleaner, if we gave you
20 a week after today to comment on that very narrow issue
21 separate, so that Mr. Lilly will then have that
22 opportunity. Since, in essence, we're doing evidence, so
23 he'll have an opportunity before he finishes his closing
24 brief to at least review what your comment was.

25 MR. JACKSON: We're all attempting to get this

1 thing done as fast as possible. And that's a relatively
2 good suggestion. So perhaps we could do this by giving
3 Mr. Lilly and I -- you know, if you'd give me --

4 BOARD MEMBER KATZ: Well, let me -- I think
5 rather than get way more complicated, because while we're
6 trying to be expeditious, we're also trying to be thorough
7 at the same time.

8 And based on everything we're hearing, I think
9 Mr. Baggett makes a reasonable suggestion. And what I
10 would say is leave it out of the closing briefs, just
11 leave the closing briefs the way they are. You can
12 take -- you can take five working days to respond to Mr.
13 Lilly's response to your response. And Mr. Lilly then
14 will have additional -- we'll have that final week to
15 incorporate that if he wants to in whatever closing brief
16 he files with us.

17 Does that --

18 MR. LILLY: Yeah, Mr. Katz, we will accept that
19 procedure, just so that we're clear that the new submittal
20 by CSPA is limited just to the Yuba County Water Agency's
21 responses to CSPA's comments on the negative declaration.

22 BOARD MEMBER KATZ: Exactly. That is all that --
23 that is all that it will include. It's limited as Mr.
24 Lilly just stated.

25 MR. LILLY: Does that work for CSPA?

1 MR. JACKSON: Five days --

2 BOARD MEMBER KATZ: Five days.

3 MR. JACKSON: -- after --

4 BOARD MEMBER KATZ: -- after we close here.

5 BOARD MEMBER BAGGETT: -- after we close.

6 MR. JACKSON: Right.

7 BOARD MEMBER BAGGETT: Five working days.

8 BOARD MEMBER KATZ: Five working days from close
9 of business today.

10 MR. JACKSON: Okay.

11 BOARD MEMBER BAGGETT: And I think that works.

12 And I think -- we understand this isn't purely a CEQA.

13 We're trying to get information in the record to make a
14 decision. And I think --

15 WATER RESOURCES CONTROL ENGINEER MONA: The --
16 oh, I'm sorry.

17 BOARD MEMBER BAGGETT: What?

18 WATER RESOURCES CONTROL ENGINEER MONA: And with
19 regards to modeling output data, should we treat that as
20 just part of the Yuba County Water Agency Exhibits 1 or --

21 MR. LILLY: Excuse me. I didn't hear what Mr.
22 Mona --

23 BOARD MEMBER KATZ: I didn't either.

24 WATER RESOURCES CONTROL ENGINEER MONA: With
25 regard to the requested modeling output data --

1 BOARD MEMBER KATZ: Oh, I'm sorry. Whether the
2 data that Mr. Frink requested should tie to Yuba County
3 Exhibit 1. Was that your question?

4 WATER RESOURCES CONTROL ENGINEER MONA: Yes, sir.

5 BOARD MEMBER KATZ: Mr. Lilly, does that work
6 with you?

7 MR. LILLY: We can number it however you want as
8 long as the record's clear. You want us to call it 1A?

9 BOARD MEMBER KATZ: One A would be fine.

10 MR. LILLY: We'll do that for you.

11 BOARD MEMBER KATZ: And so then, without
12 objection, testimony and exhibits are accepted into
13 evidence.

14 We will come back here at 1:45, at which point --
15 and we get to take a 30-minute break, at which point we'll
16 go to DWR and then CSPA and go through the rest of the
17 hearing.

18 Everyone's still under oath. So behave
19 appropriately at lunch.

20 (Thereupon a lunch break was taken.)

21

22

23

24

25

1 AFTERNOON SESSION

2 BOARD MEMBER KATZ: Let's get started.

3 All right. I'm looking for DWR.

4 MR. LILLY: Mr. Katz, can I take care of a
5 housekeeping item while we're waiting for DWR?

6 BOARD MEMBER KATZ: Or are you just stalling for
7 DWR?

8 (Laughter.)

9 MR. LILLY: I'll filibuster.

10 (Laughter.)

11 MR. LILLY: Mr. Frink just pointed out to me that
12 during Mr. Johnson's cross examination he put one slide up
13 on the screen. We don't have -- we have a CD that that
14 came from. But what we will do, if the Board thinks it's
15 appropriate, is we can just get paper copies of that and
16 submit them. As soon as we get back to the offers we can
17 submit them any way you'd like so it becomes part of the
18 record.

19 BOARD MEMBER KATZ: That'd be fine. You know, I
20 would guess if you E-mail them up, that might be the best
21 way to do it. And then they can add it into the record.

22 Dan, they're going to E-mail that slide up to
23 you -- the slides up.

24 SENIOR STAFF COUNSEL FRINK: Yes. And also
25 include the other parties to the hearing.

1 MR. LILLY: Absolutely.

2 And can we just call it -- our next number is
3 Exhibit YCWA 12, so we can just call it that as long as
4 the record's clear.

5 BOARD MEMBER KATZ: As opposed to 2C or
6 something -- that's fine. Twelve would be fine.

7 MR. LILLY: I'm kind of simple at just what comes
8 after 11.

9 Thank you.

10 BOARD MEMBER KATZ: Well, if it's a 10, you're in
11 luck.

12 DWR, second chance.

13 MS. CROTHERS: Good afternoon. My name's Cathy
14 Crothers, Staff Counsel with the Department of Water
15 Resources. And first I'll do a few housekeeping things
16 here.

17 Our policy statement I have in written format
18 here. I'd like to just submit it to the Board. I have
19 many copies. I can provide some here to --

20 BOARD MEMBER KATZ: That would be great.

21 MS. CROTHERS: The Department of Water Resources
22 is here today to support the Yuba County Water Agency
23 change petition. And I'd like to point out that, you
24 know, we believe it's important that the change petition
25 be approved by the Board for purposes of maintaining the

1 existing regulatory conditions under which Yuba will be
2 operating in the next year. And this is important for
3 purposes of implementing the pilot program and a water
4 purchase contract that the Department and Yuba have.

5 We'd like the Board to keep in mind that any
6 order that you do issue regarding this change petition the
7 importance of maintaining the existing regulatory
8 baseline, because of the effect it can have on the
9 transferability of water from the Yuba system; and that
10 this is a separate issue from whether storage in the Yuba
11 Reservoir is affected or impacted under the different
12 operating scenarios that you've heard in the prior
13 testimony.

14 With that, I'd like to go into our testimony
15 today. DWR Engineer Teresa Geimer is here to present
16 DWR's testimony.

17 DIRECT EXAMINATION

18 OF THE DEPARTMENT OF WATER RESOURCES PANEL
19 BY MS. CATHY CROTHERS, STAFF COUNSEL, representing the
20 Department of Water Resources as follows:

21 Ms. Geimer, could you please state your name and
22 spell it for the record.

23 MS. GEIMER: Certainly. It's Teresa Geimer.
24 Teresa's without an H. And it's spelled G-e-i-m-e-r.

25 MS. CROTHERS: Ms. Geimer, is DWR Exhibit 1 a

1 statement of your qualifications?

2 MS. GEIMER: Yes, Exhibit 1 is that.

3 MS. CROTHERS: Was it prepared by you or under
4 your direction?

5 MS. GEIMER: Yes.

6 MS. CROTHERS: Is DWR 2, the testimony provided
7 by you, was that prepared by you or under your direction?

8 MS. GEIMER: Yes.

9 MS. CROTHERS: Is that a true and correct copy
10 of -- do you have a true and correct copy of that
11 testimony in front of you now?

12 MS. GEIMER: Yes.

13 MS. CROTHERS: Could you please summarize your
14 testimony.

15 MS. GEIMER: Okay. To summarize, basically the
16 Department of Water Resources supports Yuba County Water
17 Agency's petition to change the affected date of the
18 long-term interim flows. And that this delay in the
19 implementation of the long-term flows would not harm any
20 legal users of water, including the Department.

21 As in past water transfers between DWR and Yuba,
22 DWR and Reclamation are under -- their water rights are
23 obligated to maintain water quality conditions in the
24 Delta to protect beneficial uses of water and, therefore,
25 there would be no harm to other water users if this

1 petition was approved.

2 That's it.

3 MS. CROTHERS: That concludes our summary of our
4 submitted testimony.

5 BOARD MEMBER KATZ: All right.

6 MS. CROTHERS: And we're prepared to answer any
7 questions.

8 BOARD MEMBER KATZ: Okay. Yuba County.

9 SENIOR STAFF COUNSEL FRINK: Excuse me, Mr. Katz.
10 I wonder if -- before Mr. Lilly starts, Mr. Wilson
11 apparently left a piece of paper with the court reporter
12 that had some information regarding questions he was going
13 to ask. It was mixed in with other papers.

14 I appreciate the interruption.

15 Sorry, Alan.

16 CROSS EXAMINATION

17 OF THE DEPARTMENT OF WATER RESOURCES PANEL

18 BY MR. ALAN B. LILLY, ESQ., representing the Yuba County
19 Water Agency as follows:

20 MR. LILLY: Good afternoon, Ms. Geimer. I just
21 have a couple of questions.

22 Under the proposed 2006 pilot program does the
23 Department of Water Resources contemplate that the State
24 Water Resources Control Board would impose the accord
25 instream flows as regulatory requirements in Yuba's water

1 right permits?

2 MS. GEIMER: No, we don't propose -- or assume
3 that would happen.

4 MR. LILLY: If the State Board were to impose the
5 accord instream flows as regulatory requirements, would
6 DWR still be willing to pay for any transfer water that is
7 produced by the accord instream flows?

8 MS. GEIMER: I don't see that as likely.

9 MR. LILLY: And why is that?

10 MS. GEIMER: Because transfer water has to be
11 above the regulatory baseline. So if the flows that were
12 coming into the Delta that could be pumped for transfer,
13 for the Environmental WATER Account, for instance, that
14 would have to be beyond -- or more flows above what
15 would have been coming under the regulatory baseline.
16 Otherwise it's not considered transferable water.

17 MR. LILLY: All right. Thank you.

18 I have no further questions.

19 BOARD MEMBER KATZ: Thank you, Mr. Lilly.

20 Mr. Jackson.

21 CROSS EXAMINATION

22 OF THE DEPARTMENT OF WATER RESOURCES PANEL

23 BY MR. MICHAEL JACKSON, ESQ., representing the California
24 Sportfishing Protection Alliance as follows:

25 MR. JACKSON: Ms. Geimer, what role did DWR play

1 in D-1644?

2 MS. GEIMER: I was not involved in that, so I
3 can't speak to it.

4 MR. JACKSON: Do you know -- you don't even know
5 whether or not you folks were parties in that hearing?

6 MS. GEIMER: It was before I became involved in
7 the Environmental Water Account as well as this part of my
8 job of transfers.

9 MR. JACKSON: All right. In regard to transfers,
10 are you familiar with the OCAP document?

11 MS. GEIMER: Not that much, no.

12 MR. JACKSON: Do you know what the maximum
13 cumulative impact of water transfers is expected to be
14 under your -- under the coordinated operating agreement?

15 MS. GEIMER: I don't know that number, no.

16 MR. JACKSON: To your knowledge has there been
17 any cumulative impact analysis of the affects of transfers
18 on the Delta?

19 MS. GEIMER: I believe there has been for like
20 the south -- in different environmental documents that we
21 have out for south Delta improvement, for instance. And
22 EWA short-term environmental document addresses that, but
23 it only goes to 2000 -- through the end of 2007. So, you
24 know, different documents that the Department has out has
25 definitely evaluated the --

1 MR. JACKSON: Have you submitted any of those
2 documents for the record here?

3 MS. GEIMER: No.

4 MR. JACKSON: Have you made any determination at
5 DWR as to what either the direct -- well, let's start with
6 the direct effects of the transfer will be at the pumps at
7 Clifton Court?

8 MR. LILLY: Excuse me, Mr. Baggett and Mr. Katz.

9 BOARD MEMBER KATZ: Yes.

10 MR. LILLY: These questions clearly relate to the
11 transfer petition, not the extension petition and Delta
12 impacts. And I don't know how you want to handle this.
13 Obviously there is some interrelationship. But we're way
14 beyond the issues for this hearing.

15 BOARD MEMBER KATZ: Mr. Jackson.

16 MR. JACKSON: Well, as I understand the issues
17 for this hearing, it's whether there will be any
18 unreasonable effect on fish and wildlife. And it does not
19 indicate where. The purpose of this delay in regard to
20 the D-1644 is to allow the pilot project, which is both
21 the release of water and the collection of water in the
22 Delta, as part of the project.

23 So I agree that there is a -- the way this is
24 bifurcated it's difficult. But I don't know how to deal
25 with the effects on fish and wildlife without talking

1 about potential effects on the Delta.

2 BOARD MEMBER KATZ: Yeah.

3 SENIOR STAFF COUNSEL FRINK: Yeah, I think we do
4 have a problem in that the Board is addressing separate
5 elements of a single project in two different context.
6 And unfortunately that problem was unavoidable. But the
7 effects -- or the reason that Yuba apparently is
8 requesting to defer the imposition of the long-term flow
9 requirements has to do with the proposed transfer of water
10 to the Department of Water Resources. And that was the
11 subject that was addressed in their CEQA document. So I
12 think the evidence is relevant. Obviously it isn't going
13 to be the focus of the Board decision here, but I think it
14 is relevant.

15 MR. JACKSON: Do you remember the question?

16 MS. GEIMER: No, not --

17 BOARD MEMBER BAGGETT: Let's see if Mr. Lilly --

18 BOARD MEMBER KATZ: Mr. Lilly, do you have any
19 response to that before we go on? But I mean that's -- I
20 mean you've heard our staff recommendation.

21 MR. LILLY: It is discussed in the CEQA document,
22 because under CEQA the agency had to consider the whole of
23 the action. We followed the law, as we all -- we always
24 do.

25 BOARD MEMBER KATZ: Which we appreciate.

1 MR. LILLY: In answer to Mr. Jackson's question,
2 there is clearly a very clear and available process for
3 him to address his arguments regarding Delta impacts, and
4 that is to file comments on the transfer petition. But,
5 you know, while they're interrelated, the transfer
6 petition is not part of this hearing, and these questions
7 clearly relate to the transfer, not the extension.
8 They're all part of the pilot program, but they're not
9 part of the -- what Delta impacts that he's alleging are
10 not part of the extension petition.

11 BOARD MEMBER KATZ: Okay. Go ahead.

12 MR. JACKSON: Well, I --

13 BOARD MEMBER KATZ: No, ask your question.

14 MR. JACKSON: Ask the question?

15 BOARD MEMBER KATZ: Yeah.

16 MR. JACKSON: Do you remember the question?

17 MS. GEIMER: I don't remember the question.

18 MR. JACKSON: Would you read the question back.

19 (Thereupon the court reporter read

20 back the last question.)

21 MS. GEIMER: I think the best way to answer that
22 question besides "I don't know" is that that was all
23 covered in the EWA, Environmental Water Account's
24 short-term EIR/EIS. And so I think -- you know, we
25 covered Yuba's transfers, and that it covers the amount

1 that could possibly be transferred --

2 MR. JACKSON: In your --

3 MS. GEIMER: -- in '06.

4 MR. JACKSON: And that is not part of the record
5 here?

6 MS. GEIMER: No. That's a document that was
7 finalized I believe in '04 -- March of '04.

8 MR. JACKSON: Was there any evaluation done of
9 whether there was any conflict between D-1644 long-term
10 flows and Delta export pumping?

11 MS. GEIMER: I don't know if that's covered in
12 the document or not.

13 MR. JACKSON: Was there -- do you know whether or
14 not there was any review made of D-1644 interim flows and
15 the Delta export pumping?

16 MS. GEIMER: I don't know those details.

17 MR. JACKSON: Was there any -- do you know
18 whether or not there was any analysis of whether there
19 was -- that the results of the pilot project and the
20 combination of D-1644 long term not going into effect on
21 April 21, 2006, as to whether or not there would be
22 increased pumping at Delta pumping facilities above levels
23 authorized in existing permits?

24 MS. GEIMER: I would doubt very much that that
25 was in the EWA document, because the pilot program at that

1 time wasn't even thought of.

2 MR. JACKSON: One more question that -- since
3 we're all atwitter. Has DWR had an opportunity to examine
4 the effects on any previous existing environmental
5 document of the recent peer review of the NMFS' biological
6 opinion on OCAP?

7 MS. GEIMER: That's not my area of expertise.

8 MR. JACKSON: All right. DWR's position -- well,
9 lets step back.

10 Is DWR a joint proponent of the pilot project?

11 MS. GEIMER: I'm not sure what joint proponent
12 means. We support it.

13 MR. JACKSON: Are you -- you support it. Is it
14 your project?

15 MS. GEIMER: No. I would say that it's not our
16 project. Otherwise we'd be the lead agency on it. But we
17 do have, you know, responsibility agency.

18 MR. JACKSON: Do you have a contract for this
19 water?

20 MS. GEIMER: We have for '06. We have a contract
21 that's not been executed yet that's being -- and in the
22 contract it is contingent on Board approval.

23 MR. JACKSON: Are there any other contingencies
24 in the contract?

25 MS. GEIMER: I don't think there are. I'd have

1 to check the document to be sure though.

2 MR. JACKSON: Now, I believe your testimony
3 indicates that you want the Board to be cognizant of the
4 importance of maintaining the existing regulatory
5 baseline; is that right?

6 MS. GEIMER: I don't think it is exactly in my
7 testimony, but that was in the policy statement.

8 MR. JACKSON: Are you assuming the regulatory
9 baseline being the long-term flows or the interim flows?

10 MS. GEIMER: The interim flows.

11 MR. JACKSON: And you don't know whether DWR made
12 argument against the long-term flows in D-1644 in the
13 hearing?

14 MS. GEIMER: I wasn't there.

15 MR. JACKSON: I have no more questions.

16 BOARD MEMBER KATZ: Thank you, Mr. Jackson.
17 Fish and Game.

18 MS. MURRAY: No questions.

19 BOARD MEMBER KATZ: No questions.

20 Redirect?

21 SENIOR STAFF COUNSEL FRINK: Staff has a few
22 questions on cross examination.

23 BOARD MEMBER KATZ: Sorry.

24 SENIOR STAFF COUNSEL FRINK: Yes, Ms. Geimer.

25 What is the minimum amount of water that DWR

1 expects to purchase from Yuba County Water Agency this
2 year?

3 MS. GEIMER: Well, we hope to purchase 62,000
4 acre/feet for the Environmental Water Account, as a
5 minimum. But depending on circumstances, it could be as
6 little as zero. If it's -- if we have a similar year to
7 2005, then the Delta conditions will be such that we won't
8 be able to transfer any of the water.

9 SENIOR STAFF COUNSEL FRINK: And when would you
10 know how much water DWR expects to purchase from Yuba
11 County?

12 MS. GEIMER: It basically -- it's after the fact
13 when we know how much we were able to pick up. And we do
14 an accounting with Yuba County Water Agency and our
15 Operations staff to kind of fine tune all the numbers, to
16 get the exact amount.

17 But it kind of depends -- we can get a feel for
18 it a little bit earlier on, you know, like in June
19 definitely, if we know what kind of year type it is and
20 when we think the Delta will go into balance.

21 SENIOR STAFF COUNSEL FRINK: So would you not
22 expect any transfer of water from Yuba County to the
23 Department of Water Resources before June of this year?

24 MS. GEIMER: Right. I -- we're doing this a
25 little bit differently than in the past years when we

1 purchased water under the pilot program. So if the water
2 comes down and the Department is able to pump it, then it
3 would become transferable water. And most of the time
4 there's not much opportunity for that to happen until in
5 June, the latter part of June usually. And usually
6 actually it doesn't happen until July.

7 SENIOR STAFF COUNSEL FRINK: Okay. It's my
8 understanding that DWR had an agreement to purchase water
9 from Yuba County Water Agency last year; is that correct?

10 MS. GEIMER: That's correct.

11 SENIOR STAFF COUNSEL FRINK: It's also my
12 understanding that no sale or transfer of water actually
13 occurred; is that also correct?

14 MS. GEIMER: Not quite. We did get a few days we
15 were able to transfer some water. I think -- I don't
16 think the numbers are finalized yet even on that because
17 it was very touch and go. But I think it was around 2,000
18 acre/feet. It was just a few days at the end of October,
19 I believe.

20 SENIOR STAFF COUNSEL FRINK: Okay. And do you
21 know the reason that more water was not involved in the
22 transfer last year?

23 MS. GEIMER: It was because the Delta wasn't out
24 of balance.

25 SENIOR STAFF COUNSEL FRINK: If it's in --

1 MS. GEIMER: It was -- I'm sorry. The Delta was
2 out of balance. That's why we weren't able to transfer
3 the water.

4 SENIOR STAFF COUNSEL FRINK: Is it more likely
5 that the Delta would be out of balance in a wet year than
6 in a dry year?

7 MS. GEIMER: Certainly.

8 SENIOR STAFF COUNSEL FRINK: I believe Yuba's
9 exhibits also mention that DWR may buy water -- and maybe
10 your own exhibit also mentioned -- that DWR will need to
11 buy water for its dry-year program. Is that a part of
12 this proposed transfer?

13 MS. GEIMER: It is part of it. It's pretty
14 unlikely that they'll be needed for the dry-year program.
15 I like to keep that in our contract with Yuba whenever
16 we're doing something with the Environmental Water
17 Account, because that's usually ahead of any dry-year
18 program we might have.

19 And so the Environmental Water Account of course
20 has the first priority to the water at least to the, you
21 know, 62,000 that I was speaking to. But if we do need it
22 for the dry-year program, I like to have the contract in
23 place because our process is kind of -- to get contracts
24 through.

25 SENIOR STAFF COUNSEL FRINK: Okay. So as of now,

1 in terms of the transfer that we would be looking at for
2 2006 to the Department of Water Resources, it's most
3 likely it would just involve the water going to the
4 Environmental Water Account?

5 MS. GEIMER: That's what it looks like right now,
6 yes.

7 SENIOR STAFF COUNSEL FRINK: Okay. I wonder if
8 you could explain very briefly how the Environmental Water
9 Account works and what the water's used for.

10 MS. GEIMER: Okay. I'll try briefly.

11 Basically -- I think it's easier for me to
12 explain kind of as an example situation. So in most cases
13 what occurs is there will be times that the fishery
14 agencies -- because the Environmental Water Account is
15 made up of five agencies, the fishery agencies and the
16 project agencies. Project agencies obviously are
17 Department and Reclamation. The fishery agencies are
18 Department of Fish and Game, U.S. Fish and wildlife
19 service, and NMFS.

20 So we meet twice a month at team meetings. And
21 these are the EWA team meetings. There's other meetings
22 going on to identify what's going on with the fish and
23 everything. But what I'm involved in, is in the team
24 meetings the fishery agencies will recommend that we, you
25 know, cut a different times management -- I'm getting more

1 detailed than I meant to. So let me back up a little bit.

2 There's a recommendation by the management
3 agencies that we should cut pumping at either Banks or
4 Tracy or both -- a combination of both before protection
5 of fish. And this is usually occurring in, you know, like
6 January through -- through June actually it could happen.
7 So far in the history of EWA it only has occurred through
8 the band period. So May is kind of when any cuts have --
9 that were requested have occurred. But they could occur
10 at any time. It's just whenever fish may -- and it's
11 fisheries of the Delta that are the main concern.

12 So at this time the projects will cut back
13 looking at what they can do operationally and what is
14 requested, and it will be agreed on how much they're going
15 to cut back or if at all.

16 And then whatever cutbacks are done, EWA will
17 make up that water to the projects -- to the Central
18 Valley Project and the State Water Project at times when
19 it's safer to move the water. And so this water -- like,
20 say, in January, if we made a cut in January to pumping to
21 the State Water Project -- to simplify at one project --
22 then if it was for a hundred thousand acre/feet, that
23 would be what EWA would owe back to the State Water
24 Project.

25 And we would be using part of the 62,000, for

1 instance, that we got from Yuba that we can move at a time
2 that's safer for fish. And, again, that's not my opinion.
3 That's what has been agreed to by the management agencies,
4 the fishery agencies. And so those transfers occur in the
5 summer months.

6 SENIOR STAFF COUNSEL FRINK: Okay. Let me
7 interrupt there.

8 How would the lack of availability of water in
9 the Environmental Water Account affect DWR's operations in
10 the Delta?

11 MS. GEIMER: It's -- what we try to do is --
12 Okay. It's supposed to have no effect to the water supply
13 to the contractors. But of course having a cut in
14 January, in my example there, would certainly -- you have
15 reduced pumping there. There would be this hole. And we
16 tend to see it as being in San Luis because that's easier
17 to visualize and to deal with. So deliveries would still
18 be made to the contractors. San Luis Reservoir would be
19 drawn down more. And so that vacant space in San Luis
20 that wouldn't have been there without that -- you know,
21 except for this cut that was agreed to, needs to be made
22 up by EWA.

23 If EWA didn't make up that cut, depending on, you
24 know, San Luis low point, which occurs usually in the
25 summer or early fall, could affect water quality, it could

1 affect like Santa Clara Valley Water District being able
2 to get water out of San Luis Reservoir because that's
3 where they get their CVP supplies. If it's too low, they
4 can't get the water out.

5 And so those kinds of effects could occur.

6 SENIOR STAFF COUNSEL FRINK: Okay. I realize
7 that Delta operations are tremendously involved. And I
8 don't want to get into it in any detail.

9 I did wonder, as a practical matter, if DWR
10 acquires water for the Environmental Water Account, does
11 that enable it to export additional water from the Delta?

12 MS. GEIMER: I don't think I've ever looked at
13 the numbers to see if it was actually any additional
14 water. In a sense, just theoretically, the way I
15 explained how the project -- or how EWA works in paying
16 back the projects, it would be just the same amount. It'd
17 just be a different time of year when it wasn't as harmful
18 to fish is the plan.

19 In reality also, we purchase a lot of water south
20 of the Delta. So that we'd actually -- making up water
21 that way to the projects actually prevents us from pumping
22 as much. So we wouldn't be really pumping as much,
23 because we were able to make it up from purchases we made
24 south of the Delta.

25 SENIOR STAFF COUNSEL FRINK: So if you had less

1 water in the Environmental Water Account, it wouldn't
2 necessarily reduce your deliveries; is that correct?

3 MS. GEIMER: You get to a point when you're
4 not -- what happens if, for instance, the Environmental
5 Water Account isn't able to purchase for whatever reason
6 the amount of water or, you know, pay it back the
7 project's amount that it owed for cuts that were
8 requested, okay, and implemented? We have in place now
9 where the Department of Water Resources has agreed to
10 carry over a hundred thousand acre/feet of debt.

11 So we could do that as far as the Environmental
12 Water Account and carry that into the next year and then
13 try to -- possibly it could spill. If we have a wet year
14 and we're able to fill St. Luis full, then we could spill
15 that debt. Or we would have to pay it back in that
16 following year, along with running the program again.

17 So we try not to have too much debt because it is
18 a little risky.

19 SENIOR STAFF COUNSEL FRINK: Okay. I believe Mr.
20 Wilson has a few more questions on this area.

21 MS. GEIMER: Sure.

22 WATER RESOURCES CONTROL ENGINEER WILSON: A few
23 quick clarifying questions.

24 First off, will approval of the 2006 pilot
25 program result in either increased or changed pumping from

1 the Banks and/or Tracy plants -- pumping plants in the
2 Delta?

3 MS. GEIMER: Can you repeat that question again?

4 WATER RESOURCES CONTROL ENGINEER WILSON: Will
5 approval or implementation of the 2006 pilot project
6 result in increased or changed -- you just kind of
7 answered that -- but result increased pumping from the
8 Banks and/or Tracy pumping plants in the Delta?

9 MS. GEIMER: I wouldn't expect it to for the
10 reasons I said before. We'd be making up for cuts that
11 were done earlier. So it wasn't pumped at that time. And
12 it's going to be pumped later on to transfer the water.

13 WATER RESOURCES CONTROL ENGINEER WILSON: But it
14 may result in changes?

15 MS. GEIMER: It will result in the timing of when
16 water is pumped. So changed, yeah.

17 WATER RESOURCES CONTROL ENGINEER WILSON: And at
18 some point then there will be increases and some point
19 there'll be decreases?

20 MS. GEIMER: Right. And the idea behind the
21 Environmental Water Account -- and so far we've been able
22 to do it pretty well -- is to have those decreases in
23 pumping at times when fish are at risk and then try to
24 make up that pumping at times when fish are not as much at
25 risk. I don't know if there's any time that's perfect,

1 you know. But --

2 WATER RESOURCES CONTROL ENGINEER WILSON: So then
3 based on that, do you know when there are expected
4 increases or decreases? Or as you said previously, it
5 sounds like there may be expected increases in July,
6 August, September, and expected decreases in the spring
7 time.

8 MS. GEIMER: Right. And even in the winter in
9 this case. In fact, it's really done on time-sensitive
10 basis. We try to -- as soon as fishery agencies think
11 that there's going to be a problem with whatever fishery
12 in the Delta and they have a recommendation of what to do
13 about it as far as changing operations at either Banks or
14 Tracy pumping plant, we try to do that as soon as we can.
15 And so there's placeholders. But those -- the only thing
16 you can really say about the placeholders, that's not
17 what's going to happen, the fish aren't going to show up
18 at that time and -- So, for instance, we were going to
19 have a cut starting the 3rd of this month, and we got a
20 ton of rain and a lot of flows so we didn't need to do the
21 cuts. So It really depends on what's going on both with
22 hydrology and the fisheries.

23 WATER RESOURCES CONTROL ENGINEER WILSON: Okay.
24 So then similarly it might be difficult to know when the
25 expected quantity of the increase -- the increased

1 quantity of water exported from the Delta would be?

2 MS. GEIMER: It is -- it's not as difficult I
3 think to guess on that or to make an estimate. It will --
4 I mean I feel pretty confident, unless it's a wet year,
5 that July, August and September and a little bit into
6 October is when we would be doing the -- you know,
7 transferring water for Environmental Water Account
8 purposes.

9 WATER RESOURCES CONTROL ENGINEER WILSON: Okay.

10 Now, would any increase in pumping at Banks
11 and/or Tracy be subject to the requirements contained in
12 Decision 1641 for, say, joint point of diversion
13 operations, as transfers from Yuba have been conditioned
14 in the past?

15 So will additional pumping be subject to the
16 Water level Response Plan, for example?

17 MS. GEIMER: Yeah. And that would be on the
18 transfer part of it, and that's usually been the
19 requirement. And so --

20 WATER RESOURCES CONTROL ENGINEER WILSON: So It
21 would be to the Water Level Response Plan, the Water
22 Quality Response Plan and the Fishery Response Plan when
23 adopted?

24 MS. GEIMER: Right. What has occurred in the
25 past, at least in my recollection, is that that's been a

1 requirement from the Board for each of those. And I
2 expect it to be for '06 as well.

3 WATER RESOURCES CONTROL ENGINEER WILSON: Okay.
4 Will the increased pumping be administered by the Water
5 Operations Management Team?

6 MS. GEIMER: What you mean by increased pumping,
7 you mean at the transfer of the water?

8 WATER RESOURCES CONTROL ENGINEER WILSON: Any --
9 all pumping -- any pumping at the Delta is administered by
10 the Water Operations Management Team, correct?

11 MS. GEIMER: Yeah.

12 WATER RESOURCES CONTROL ENGINEER WILSON: Okay.
13 So then would this additional pumping be subject to
14 recommendations given to the Water Operations Management
15 Team such as if the Delta Smelt Working Group recommends
16 that they reduce the export inflow ratio or if the -- I
17 don't think I'm making sense here.

18 Would the additional pumping be subject to any
19 recommendations made to the Water Operations Management
20 Team with regard to protecting, say, in-Delta species with
21 regard to addressing the current pelagic organism decline?

22 MS. GEIMER: Okay. I think when you're saying
23 increased pumping, you're talking about the transfer of
24 water in the summer?

25 WATER RESOURCES CONTROL ENGINEER WILSON:

1 Correct.

2 MS. GEIMER: Okay. Yes, basically the Water
3 Operation Management Team does not -- they're informed of
4 what we're doing and what we plan to do, and there's
5 usually not much discussion on that part of it because
6 it's pretty benign. And that's one reason why too that
7 we're not able to pump water until really July, because
8 there's -- there hasn't been any Delta smelt showing up at
9 our pumps since EWA has been in place in June. But
10 there -- you know, history before that there was a
11 potential for that.

12 So, that's one reason why transfers don't occur
13 in June or just the last few days of June.

14 I'm trying to think when there was really a lot
15 of discussion about that. There isn't -- if there was a
16 problem with -- you know, we certainly wouldn't be pumping
17 if they had a problem with us doing that.

18 WATER RESOURCES CONTROL ENGINEER WILSON: That's
19 all.

20 BOARD MEMBER KATZ: Thank you.

21 Ms. Crothers, redirect?

22 MS. CROTHERS: No, I have none.

23 BOARD MEMBER KATZ: All right. Thank you.

24 In that case, that completes DWR's testimony?

25 MS. CROTHERS: Yes. And I would like to then

1 enter our testimony into evidence.

2 BOARD MEMBER KATZ: Any objections?

3 We shall do that.

4 MS. CROTHERS: Yeah, I'd like to enter DWR 1, a
5 statement of qualification Teresa Geimer; and DWR 2, our
6 testimony by Teresa Geimer.

7 BOARD MEMBER KATZ: Okay. Without objection,
8 that will be entered.

9 MS. CROTHERS: And with that, then I think that
10 concludes our case in chief.

11 BOARD MEMBER KATZ: Okay. Thank you very much.

12 MS. CROTHERS: You know, I just wanted to say
13 this -- I have a cleaner copy than was submitted by the
14 E-mail. I can give you extra copies. Our E-mail had kind
15 of a blind through it unfortunately. So I have a few
16 extra copies for you if you would like.

17 BOARD MEMBER KATZ: All right. Thank you.

18 All right. Mr. Jackson, case in chief please.

19 Mr. Odenweller and Mr. Mensch, were you present
20 earlier when we swore the witnesses?

21 MR. ODENWELLER: Yes, I was.

22 MR. MENSCH: Yes.

23 MR. JACKSON: And you gave the oath at that
24 point?

25 MR. ODENWELLER: Yes, I did.

1 MR. MENSCH: Yes.

2 DIRECT EXAMINATION

3 OF THE CALIFORNIA SPORTFISHING PROTECTION ALLIANCE PANEL
4 BY MR. MICHAEL JACKSON, ESQ., representing the California
5 Sportfishing Protection Alliance as follows:

6 MR. JACKSON: I'll start with Mr. Odenweller.

7 Mr. Odenweller, would you recount for the Board
8 and staff your experience with fish and wildlife on the
9 Yuba River.

10 MR. ODENWELLER: Well, specifically with fish and
11 wildlife on the Yuba River I was a senior biologist for
12 the California Department of Fish and Game. And I
13 presented testimony during 1990, what I call, Yuba 1
14 hearing and subsequently in the year 2000 Yuba 2 hearings,
15 and was chief expert on fish facilities and impacts
16 associated with unscreened and poorly screened diversions
17 on the system.

18 MR. JACKSON: Have you had occasion to review the
19 documentation and testimony for this hearing of all
20 parties?

21 MR. ODENWELLER: Yes.

22 MR. JACKSON: Do you have an opinion from the
23 basis of that testimony as to whether or not the delay of
24 the April 21st, 2006, long-term flow of D-1644 would have
25 a potential to have a negative effect on fish and wildlife

1 on the Yuba River?

2 MR. ODENWELLER: Well, as we established in Yuba
3 1, the entrainment at the Hallwood Cordura fish screen as
4 an example was in part affected by the outflow occurring.
5 And I recall that at some rather large level of flow, on
6 the order of 3 or 4,000 CFS, there wasn't any entrainment
7 into the diversions at Hallwood, but that below that the
8 entrainment increased as the flow became lower. So, yes,
9 any change in flow that -- a change in the timing of the
10 flow that moved it from the spring into another time of
11 the year could affect the entrainment rates at the
12 unscreened or poorly screened diversions.

13 MR. JACKSON: Did you write testimony for this
14 hearing?

15 MR. ODENWELLER: Yes, I did.

16 MR. JACKSON: Would you summarize that testimony
17 please.

18 MR. ODENWELLER: Certainly.

19 Basically I had two points of concern. One dealt
20 with the unscreened diversions and the fact that despite
21 what looked like some promising discussion in the 2000
22 hearings about moving ahead with fish screens and
23 screening on the Yuba, very little has happened in that
24 regard in terms of actual implementation of solutions.

25 The second point that I'm concerned about is the

1 effect of the pumping of the transfer water at the Delta
2 pumping plant, because it has to occur at some point in
3 time and it varies from year to year. I tried to capture
4 the concern with the figure on page 4 of my testimony,
5 which basically shows that you have two ways of dealing
6 with that extra water that's moving down: Either to
7 increase the pumping level during a fixed window or to
8 extend the pumping window, or some combination of the two.

9 The constraints on the Delta pumping plant
10 operation are such that -- as you've heard already from
11 other witnesses, DWR is not interested in paying for water
12 which is uncontrolled and coming down the rivers anyway.
13 So that when the Delta goes out of control, the water is
14 essentially free, and they're not interested in purchasing
15 it.

16 On the other hand, if they start pumping water
17 for sales to other entities, it pushes the contract
18 water -- or the project water pumping later in the season
19 or pushes the pumping level up higher.

20 The next two figures in my written testimony show
21 you -- give you a picture of when -- on page 5, Figure 2,
22 when there are voids, if you will, in the pumping capacity
23 in the south Delta. And then Figure 3 shows the shift in
24 plant pumping from the 1990s to the 2000s, with a
25 substantial increase in the winter, which I define as

1 January, February, March, that has occurred over the last
2 ten years or so -- or over these last ten years between
3 the 2000s and the 1990s. And that in turn is significant,
4 at least some folks believe at the Pelagic Organism
5 Decline Committee, because it -- that shift in pumping
6 coincides with the very low levels of Delta smelt and
7 other pelagic organisms that have been recorded in the
8 last few years.

9 Figure 4 shows the trends in Delta smelt indices
10 for the tow net survey and the mid-water trawl. And both
11 lines are significant at the 99 percent confidence level,
12 despite there being quite a substantial amount of scatter
13 evident in the figures.

14 And then I included the table of the tabular
15 information so that you'd have it available to you.

16 And that was the bulk of the testimony.

17 MR. JACKSON: Thank you, sir.

18 Mr. Mensch, would you briefly outline your
19 qualifications and your experience on the Yuba River.

20 MR. MENSCH: My first efforts on the Yuba River
21 began around 1980 with the application by YWCA for a --
22 what's called a PL 984 loan application from the Bureau of
23 Reclamation for a small watershed project, which was
24 their -- at that time their South Yuba Canal.

25 Since that time, I've worked on many projects. I

1 was the project manager lead for the Department of Fish
2 and Game's study that led to the report as the basis for
3 the 1990-91 Yuba River hearings. I participated in the
4 negotiations for CSPA as a member of the technical team.
5 And I attended during I think approximately a two-year
6 period I believe every one expect one meeting of that
7 technical team.

8 I've worked on water rights, worked on hydro
9 projects on the Yuba from basically, like I said, 1980.

10 MR. JACKSON: Could you briefly outline the
11 species that you believe could be affected by the change
12 in flows as a result of the pilot project that we're
13 talking about here.

14 MR. MENSCH: I believe it could affect both the
15 attraction, spawning and angling, which is a beneficial
16 use of water, of American shad on the lower Yuba River,
17 potentially affecting the steelhead attraction, spawning
18 and out-migration, and potentially some -- there are a
19 number of questions relating to attraction and integration
20 of spring run versus the fall run and a potential of
21 straying from the Feather River's hatchery strain.

22 All of these things are concerns. Some of them
23 much more specific than others.

24 MR. JACKSON: Would you at this time summarize
25 your written testimony for the Board members please.

1 MR. MENSCH: My testimony basically revolves
2 around the changes between long-term and interim D-1644,
3 which I believe are Key Issues 1 and 2 in the notice of
4 the hearing.

5 The continuation of interim flows under the
6 specific conditions can reduce a -- cause a significant
7 reduction in habitat for basically all the species of
8 anadromous fish, depending upon the water year conditions
9 and the operating conditions within the Yuba River.

10 The low flows such as those incorporated in the
11 drier year conditions of D-1644 interim would cause and
12 have been recorded as causing increased predation and
13 diversion at the various screens on the Yuba River, and
14 significant potential for temperature impacts with the
15 maintenance of interim D-1644 in specific year conditions.

16 MR. JACKSON: Calling your attention to the
17 individual species.

18 Do you see an effect on shad?

19 MR. MENSCH: Yes. The lower spring flows and
20 the -- now, maybe I should back up.

21 Are you asking a question between the proposed
22 accord flows, quote, pilot project or between long-term
23 1644 or RD-1644 interim and long term?

24 MR. JACKSON: I'm asking the question about the
25 distinction that is here in front of us. If the Board

1 defers the beginning of the long-term flows of RD-1644, do
2 you see an effect on shad?

3 MR. MENSCH: Yes, there is a very definite
4 potential in the drier year conditions for very severe
5 impacts on shad attraction and angling.

6 MR. JACKSON: Calling your attention to the same
7 circumstance, the Board determining to defer the beginning
8 of the long-term flows and going forward with the pilot
9 project. Do you see potential effects on steelhead?

10 MR. MENSCH: Yes, because of the variation in
11 flows. In some cases the accord flows are even less than
12 the interim flows in certain years. That could cause
13 reduction in both salmon and steelhead juvenile rearing
14 and out-migration.

15 MR. JACKSON: Do you believe that the deferral --
16 and after all these years working on the Yuba river, do
17 you believe that the deferral of the long-term flows in
18 D-1644 is in the public interest?

19 MR. MENSCH: In my opinion and based upon
20 experience and preparation of the reports, analysis of
21 many projects, no, I do not believe it's in the public
22 interest. I believe the previous testimony would document
23 what the public interest is.

24 MR. JACKSON: Thank you.

25 No further questions.

1 BOARD MEMBER KATZ: Thank you, Mr. Jackson.

2 Yuba County for cross.

3 MR. LILLY: Mr. Katz, we've decided not to ask
4 these witnesses any cross examination questions. We
5 certainly don't agree with everything they've said, but we
6 think it will be much more efficient if we bring it up
7 through rebuttal testimony of our own witnesses.

8 BOARD MEMBER KATZ: All right. Thank you.

9 DWR.

10 MS. CROTHERS: No, we have no cross.

11 BOARD MEMBER KATZ: Fish and Game?

12 MS. MURRAY: We have no cross.

13 BOARD MEMBER KATZ: All right.

14 SENIOR STAFF COUNSEL FRINK: Mr. Katz, just a
15 couple.

16 BOARD MEMBER KATZ: Okay. I think Mr. Baggett --

17 BOARD MEMBER BAGGETT: I have a quick question.

18 I don't know, for either of you.

19 It appeared in the answer to the questions about
20 flows you were talking about the effect on steelhead and
21 shad would be during dry years; is that correct?

22 MR. MENSCH: Yeah, that's the primary --

23 BOARD MEMBER BAGGETT: If it's a normal-to-wet
24 year, would it --

25 MR. MENSCH: That's the primary difference

1 between the long term and the interim.

2 BOARD MEMBER BAGGETT: Okay. Thank you.

3 SENIOR STAFF COUNSEL FRINK: Yeah, essentially I
4 was just going to ask a clarifying question along the same
5 lines.

6 Is it accurate to say that the adverse effects on
7 fishery resources that you've described would only occur
8 in dry or critical years if the Board were to extend the
9 interim flow requirements for 2006?

10 MR. MENSCH: Well, part of the basis -- it
11 becomes a little difficult to answer that in that: Are
12 there additional conditions as to what may be substituted
13 for D-1644 interim? Does it include the accord? The
14 answers could be very different.

15 If all you did in a wet year was go from one to
16 the other, no, there are no effects. If you start adding
17 the accord into it, there could be very significant
18 impacts.

19 SENIOR STAFF COUNSEL FRINK: Okay. The petition
20 here is to extend the interim flow. So those will apply
21 regardless of what they do with regard to a transfer of
22 water.

23 MR. MENSCH: Yeah, in the upper years, wetter
24 years they're basically the same.

25 SENIOR STAFF COUNSEL FRINK: And it's only in the

1 dry and critical years that there's a difference as far as
2 fishery impacts on the Yuba River; is that correct?

3 MR. MENSCH: Correct.

4 MR. ODENWELLER: If I may.

5 I think the analysis would be the same as for the
6 water users in basin and the risk of 2007 being a dry
7 condition and going into it short of water from storage.
8 So that you might not see a change until 2007. But the
9 change would be the result of actions that were taken in
10 2006.

11 SENIOR STAFF COUNSEL FRINK: Okay. But those
12 changes would only occur if in fact 2006 were a dry or
13 critical year, is that your understanding?

14 MR. ODENWELLER: 2006 -- if we started into
15 2000 -- ended 2006 in a dry or critical condition, yeah.

16 SENIOR STAFF COUNSEL FRINK: Yes, okay.

17 That's all of staff's questions.

18 Thank you.

19 BOARD MEMBER KATZ: All right. Thank you, Mr.
20 Jackson. Thank you very much.

21 We'll now go to rebuttal and we'll start with
22 Yuba.

23 Excuse me, Ms. Crothers. You have no rebuttal?
24 You guys are --

25 MS. CROTHERS: Correct.

1 BOARD MEMBER KATZ: Okay. I just want to make
2 sure.

3 All right. Thank you.

4 Anybody else that wants to can go with them.

5 But --

6 (Laughter.)

7 BOARD MEMBER KATZ: Just kidding. Just kidding.

8 Mr. Lilly.

9 MR. LILLY: Thank you, Mr. Katz.

10 REBUTTAL DIRECT EXAMINATION

11 OF THE YUBA COUNTY WATER AGENCY PANEL

12 BY MR. ALAN B. LILLY, ESQ., representing the Yuba County
13 Water Agency as follows:

14 MR. LILLY: What we have done is we took the
15 written testimony from CSPA, and I asked our witnesses to
16 basically number it and provide rebuttal responses as we
17 normally would for an EIR. So I have those in writing,
18 which I will circulate now and ask them briefly to
19 summarize. And we could have them read the whole thing.
20 But based on where you're coming from, I think a summary
21 is what you would prefer.

22 BOARD MEMBER KATZ: I appreciate the summary
23 because -- it may surprise some people, but we actually
24 can read and will. But -- So I appreciate the summary,
25 Mr. Lilly.

1 MR. LILLY: Okay. Mr. Bratovich, let me remind
2 you that you are still under oath. And I forgot to ask
3 you ahead of time. Which one would you prefer to start
4 with? We have written rebuttal testimony to Mr.
5 Odenweller and to Mr. Mensch.

6 MR. BRATOVICH: Starting with Mr. Odenweller's
7 testimony would be fine.

8 MR. LILLY: All right. And what we will do is
9 we'll ask that -- the document at the top that's headed
10 "Rebuttal Testimony of Paul Bratovich and Tom Johnson to
11 Dan B. Odenweller's Testimony on Yuba County Water
12 Agency's Extension Petition," we'll ask that that be
13 numbered as Exhibit YCWA 13.

14 BOARD MEMBER KATZ: We shall do that.

15 MR. LILLY: And, Mr. Bratovich, you are still
16 under oath. And please briefly summarize what you did to
17 prepare this rebuttal testimony, and then summarize the
18 rebuttal testimony.

19 MR. BRATOVICH: Yes. We received copies of Mr.
20 Odenweller's and Mensch's testimony. And over the course
21 of the two days that we had available, Tom Johnson and
22 myself, prepared written rebuttal testimony. And as you
23 noted, the rebuttal testimony to Mr. Odenweller's
24 testimony is YCWA Exhibit No. 13.

25 We reviewed the testimony and submitted written

1 rebuttal testimony regarding those submitted testimonies.

2 Would you like me to proceed with a brief
3 summary --

4 MR. LILLY: Yeah, please just summarize your
5 rebuttal to Mr. Odenweller's testimony.

6 MR. BRATOVICH: And, again, I would like to
7 reemphasize that Mr. Johnson and I did this
8 collaboratively, given the short time frame.

9 Mr. Odenweller, as he points out in his testimony
10 today, indicated that he had a couple of major points, the
11 first being the south fish screen by Daguerre Point Dam.

12 Our rebuttal testimony, Mr. Johnson and I
13 illustrate that the fish screening issues associated with
14 the south fish screen are not directly part of this
15 proposed project or the proposed Yuba Accord, that YCWA
16 has embarked upon a separate independent process. There's
17 a letter agreement with the California Department of Fish
18 and Game to resolve the issues associated with not meeting
19 the specified criteria at the south fish screen. And in
20 fact a feasibility study is currently underway regarding
21 the modification, alteration or replacement of the south
22 fish screen.

23 Mr. Odenweller addresses his second point, really
24 which we identified two major points as subpoints within
25 his major issue. The first point being that he states

1 that the proposed action will shift flow from the spring
2 to the fall. Again, we have to provide some
3 clarification, that the proposed project relative to
4 interim 1644 cannot shift flows from the spring to the
5 fall or it will never -- the flows will never be less than
6 those which are under 1644 interim. But there are some
7 differences in the flows that would be provided under the
8 proposed project relative to long-term 1644 specifically.

9 And those differences I don't think I would
10 characterize as shifting. I would more appropriately
11 characterize them as the results of the two-year stressor
12 analysis undertaken by a team of biologists that examined
13 all of the species that were considered in developing the
14 flow schedules, which were numerous species, all of the
15 life stages, and provided an allocation -- a flow
16 allocation schedule over a range of hydrologic conditions
17 to maximize beneficial effects to the fish resources of
18 the lower Yuba River. And we do have an approximately
19 86-slide PowerPoint show that can clearly demonstrate
20 that, if so desired to be given that today. But in the
21 interests of an expedited process, I won't suggest that we
22 have it. But we have it available. Or I won't suggest
23 that we do it. We do have it available if asked.

24 Mr. Odenweller does go on to discuss Delta export
25 pumping. And in my testimony I did state that we did no

1 independent analysis, but we relied upon the EWA
2 short-term environmental documentation, which again
3 included an EIS and EIR and action-specific implementation
4 plan. Therefore, with respect to the testimony of Mr.
5 Odenweller that the proposed project would shift the
6 timing of export pumping from the south Delta, it is not
7 consistent with that which was evaluated in the EWA
8 short-term environmental documentation which analyzed
9 pumping from the -- before the EWA program from July
10 through September. So we don't believe that this
11 potential shifting into the January, February, March, or
12 the winter months as indicated, is correct in this
13 instance. Certainly not with this proposed project, which
14 is of a one-year duration.

15 Second, the increase in rates as an issue in
16 pumping from Delta export facilities, again doesn't appear
17 to be correct, because reliance upon the EWA short-term
18 environmental documentation. In that document there was
19 an assumption of 185,000 acre/feet from the lower Yuba
20 River. And the proposed action is proposing to transfer
21 amounts significantly less than that. Therefore, we don't
22 understand the concept of increased rates associated with
23 this proposed project relative to that which was evaluated
24 in the EWA short-term program.

25 That concludes our summary on Mr. Odenweller's

1 rebuttal testimony.

2 MR. LILLY: Okay. And just so we're clear, the
3 last pages of this Exhibit 13 have numbers in the
4 right-hand margin that correspond to your -- the response
5 numbers in your narrative?

6 MR. BRATOVICH: Yes.

7 MR. LILLY: All right. And did you follow the
8 same format for your rebuttal testimony to Mr. Mensch?

9 MR. BRATOVICH: Yes, we did. We went --

10 MR. LILLY: All right. Let me just go through
11 the housekeeping. Excuse me.

12 We will ask that the document called "Rebuttal
13 Testimony of Paul Bratovich and Tom Johnson to Jerry
14 Mensch's Testimony on Yuba County Water Agency's Extension
15 Petition" be marked as Exhibit YCWA 14.

16 BOARD MEMBER KATZ: Thank you.

17 MR. LILLY: And, Mr. Bratovich, please go ahead
18 and summarize your rebuttal testimony to Mr. Mensch.

19 MR. BRATOVICH: I'll try to make this even more
20 brief.

21 Examination of Mr. Mensch's testimony indicates
22 that there was a tremendous amount of discussion of
23 comparisons, although not quantitative, but subjective
24 comparisons between interim and long-term 1644. In my
25 testimony and our rebuttal testimony the appropriate basis

1 of comparison is this proposed project relative to interim
2 1644. And we also made comparisons to long-term 1644. So
3 we failed to see some of the relevancy associated with Mr.
4 Mensch's conclusions regarding interim versus long term.
5 That was not what was analyzed in the initial study.

6 Second of all, there are statements that the
7 flows under this proposed project would operate to minimum
8 interim 1644 levels or less. And that is not true as
9 indicated by Mr. Grinnell's testimony earlier.

10 And then perhaps most importantly, that -- again,
11 besides neglecting to address the entirety of the proposed
12 project, which includes incorporation of the 2006
13 fisheries agreement which includes the accord flow
14 schedules and the resultant flows that would be expected
15 to occur, we found that Mr. Mensch's testimony essentially
16 was comprised of conclusionary statements that were not
17 supported by scientific evaluation, documentation or
18 rationale.

19 And we'll submit our written rebuttal testimony
20 to further explain that testimony that I just gave.

21 MR. LILLY: Thank you.

22 I have no further questions.

23 BOARD MEMBER KATZ: Gentlemen, thank you.

24 For rebuttal cross, obviously not DWR.

25 Fish and Game?

1 MS. MURRAY: No questions.

2 BOARD MEMBER KATZ: Mr. Jackson.

3 REBUTTAL CROSS EXAMINATION

4 OF THE YUBA COUNTY WATER AGENCY PANEL

5 BY MR. MICHAEL JACKSON, ESQ., representing the California
6 Sportfishing Protection Alliance as follows:

7 MR. JACKSON: Mr. Bratovich, were you part of the
8 team that put together the fisheries flow document, the
9 accord document?

10 MR. BRATOVICH: Which document?

11 MR. JACKSON: The fisheries agreement.

12 MR. BRATOVICH: The fisheries agreement?

13 MR. JACKSON: Yeah.

14 MR. BRATOVICH: I was the technical fisheries
15 biologist on the YCWA team, and as part of the river
16 management team that is developed the flow schedules over
17 the past several years.

18 MR. JACKSON: How does the -- well, let's go back
19 to your testimony here.

20 You indicate that Mr. Mensch has not accurately
21 described the 2006 pilot program. Is it the addition of
22 your group's accord that is the difference between what
23 Mr. Mensch says about interim D-1644 and the long-term
24 D-1644?

25 MR. BRATOVICH: I believe the answer to your

1 question is yes. I would put it in terms that there was
2 comparisons that did not include the resultant flows in
3 Mr. Mensch's testimony that would result from implementing
4 the entirety of the proposed project. If that's what you
5 mean, then yes.

6 MR. JACKSON: And then the part that you do not
7 believe was included is the modifications of D-1644
8 interim that are made as part of the accord, fisheries
9 agreement?

10 MR. BRATOVICH: I'm not sure I would call it
11 modifications of the 1644 interim. I would say
12 implementing the accord flow schedules and the resultant
13 flows.

14 MR. JACKSON: In other words, as you understand
15 what you're doing here, you are implementing the accord
16 flows early?

17 MR. BRATOVICH: No.

18 MR. JACKSON: All right. How are they different?

19 MR. BRATOVICH: The proposed project includes
20 incorporation of the 2006 fisheries agreement, which
21 specifies the flow schedules that would be implemented for
22 the duration of this one-year project.

23 MR. JACKSON: Has there been -- has there been an
24 environmental document done other than the mitigated
25 negative declaration dealing with the accord, fisheries

1 agreement flows?

2 MR. BRATOVICH: With the exception of the CEQA
3 document prepared for this issue and for this hearing
4 process, no. But the environmental impact statement
5 report and environmental -- Endangered Species Act
6 consultations for the long-term accord are underway.

7 MR. JACKSON: But they're not finished?

8 MR. BRATOVICH: No, they're not.

9 MR. JACKSON: You have no BO for the accord,
10 correct, for these species?

11 MR. BRATOVICH: We are not discussing the accord
12 here in front of the Board today. We're discussing this
13 proposed project. But you are correct. Does the accord
14 exist yet? In the sense of a biological opinion or
15 completed environmental documentation, no, it does not.

16 MR. JACKSON: Okay. Excuse me for a minute. I
17 just got this and I need to --

18 BOARD MEMBER KATZ: Okay.

19 MR. JACKSON: Okay. In your response to Mr.
20 Mensch's Comment 4, Mr. Bratovich, you indicate that any
21 analysis of the storage refill or carry-over storage
22 effects is highly speculated -- highly speculative because
23 these potential impacts are directly related to future
24 water conditions that cannot be accurately predicted.

25 Are you saying in this regard that both you and

1 Mr. Mensch are sort of speculating about what's going to
2 be the condition in 2007?

3 MR. BRATOVICH: Would you repeat that last part
4 please?

5 MR. JACKSON: Well, in your Comment 7 you
6 describe the storage refill carry-over effects is highly
7 speculative. Yet -- I mean do you believe that to be
8 true?

9 MR. BRATOVICH: I think Mr. Johnson would be
10 better qualified to answer that.

11 MR. JACKSON: Mr. Johnson, do you believe that
12 it's highly speculative?

13 MR. JOHNSON: I think -- let me answer in this
14 way, and then we'll allow everyone to draw their own
15 conclusions: I believe in the direct testimony earlier,
16 and particularly the testimony of Mr. Grinnell. We walked
17 through the different probabilities of various occurrences
18 in both 2006 and 2007. And I think as a result of a
19 number of questions from staff and others, that we all
20 were pretty clear on the idea that without a firm
21 knowledge of hydrologic conditions going forward through
22 2006 and 2007, that what we're left with is a spectrum of
23 possibilities of different outcomes as a result of
24 implementing the proposed project.

25 And that spectrum of outcomes includes: We don't

1 know exactly which flow schedule that we will be applying
2 in 2006; we don't know exactly what hydrologic conditions
3 in inflows we'll see; we don't know exactly what reservoir
4 carry-over that we will have at the end of 2006; and we
5 don't know what hydrologic conditions and at the moment
6 we're not quite sure what regulatory flow requirements
7 we'll have in 2006 as well.

8 As a result, I don't know if "speculative" is the
9 right word -- is necessarily the word that I would choose.
10 But clearly it is not a -- there is not exact knowledge of
11 what these conditions are going to be.

12 As a result, all of the analysis that's been done
13 was done on the basis of exceedance probabilities and the
14 greatest likelihood of effects.

15 MR. JACKSON: All right. So this is your
16 testimony, correct, that we're talking about here on
17 rebuttal?

18 MR. JOHNSON: We --

19 MR. JACKSON: And the "highly speculative" is
20 your words? I mean I'm reading them here.

21 MR. BRATOVICH: Actually those are probably my
22 editorial words that Mr. Johnson said he wouldn't have
23 used; he probably would have said "uncertain".

24 MR. JACKSON: Okay. Let's talk a little about
25 the uncertainty.

1 Mr. Johnson, do you -- you heard the testimony
2 earlier from a Yuba County Water Agency witness that
3 basically there was about 7 percent chance that there
4 would be a dry year effect on carry-over storage that
5 could cause supply problems for your people next year?

6 MR. JOHNSON: I believe the exact quote -- and
7 Steve can chime in if I'm wrong -- is 1 percent chance of
8 an extreme critical year class as based, not on the north
9 Yuba index, but on the current index that's in place for
10 the river, and about a 7 percent chance of a dry year
11 class.

12 MR. JACKSON: All right. And the risk is to your
13 supply folks, I mean the folks that you supply water to,
14 correct?

15 MR. JOHNSON: That is correct. The 2007 impacts
16 would be -- the impacts of lower storage and a higher
17 regulatory requirement would be realized in 2007.

18 MR. JACKSON: Now, if you get your way and the
19 rules -- the long-term RD-1644 instream flow requirement
20 is delayed, and we operate under the interim RD-1644 and
21 whatever pieces of your accord are in your pilot project,
22 the risk of having enough cold water the next year simply
23 shifts to the fish, doesn't it?

24 MR. JOHNSON: I'm not sure that -- I'm not quite
25 sure I follow what you're asking and the chain that you're

1 putting together. If I may, let me see if I can take a
2 stab at this.

3 If we get our way, so to speak, and there is not
4 an extension of 1644 interim, then I think we've already
5 established that for 92 percent of year classes there is
6 no difference in regulatory baseline. In other words,
7 there is no improvement or detriment or any other
8 situation because of interim versus long term.

9 We've also -- I believe, if I'm answering this
10 correctly, that we've established that the reservoir
11 carry-over under the proposed project, which includes both
12 the 1644 interim and the accord flow schedules, will be
13 lower at the end of 2006 than would 1644 long term. So
14 there will be less water in the reservoir because more
15 water flowed down the river during the course of 2006.

16 If there is 1644 long term in addition to the
17 pilot program, as I think is one of the considerations,
18 then I believe Steve Grinnell's testimony showed that
19 there's an 8 percent chance of there being still less
20 water in the reservoir, still -- and I think 40 to 70,000
21 acre/feet lower still and, therefore, it would seem if
22 simple reservoir elevations were a criteria, that the
23 possibility of a cold water pool impact -- negative impact
24 would be greater if 1644 long term was imposed as a
25 regulatory baseline than if 1644 interim was imposed.

1 Now, I think that's a very simplified analysis, and I
2 think it would take more modeling than was necessarily
3 done; but if I followed your question, I believe that's
4 the answer.

5 MR. JACKSON: Have you done that analysis at any
6 level of this process?

7 MR. JOHNSON: I would have to ask Mr. Grinnell to
8 come back up and respond to the -- in detail to the
9 temperature modeling and to what extent we've gone into
10 upstream effects. We've done temperature modeling as part
11 of the ISND that is pretty well documented I think both in
12 the CEQA document and Mr. Grinnell's testimony,
13 particularly with regards to the lower Yuba River. I do
14 believe there was some analysis in the ISND that spoke to
15 reservoir cold water pool, but I did not prepare that and
16 I am not prepared to speak to that specifically. So --

17 MR. JACKSON: All right. Calling your attention
18 back -- so you don't have any information on that at this
19 point?

20 MR. JOHNSON: That's correct.

21 MR. JACKSON: Calling your attention to -- again
22 to Item 7 in your response to Comment No. 4 of Mr.
23 Mensch's testimony. You talk about the mitigated negative
24 declaration which has -- which did some analysis of the
25 potential carry-over reservoir storage impacts. And you

1 found the impact to be less than significant.

2 MR. JOHNSON: That was a biological conclusion.

3 And I would defer to Mr. Bratovich to answer.

4 MR. JACKSON: I guess my question is: If the
5 potential carry-over reservoir storage impact is less than
6 significant for the fish, why is it significant for the
7 water supply that causes us to have to change long-term
8 D-1644?

9 MR. JOHNSON: I'm going to start on the answer.
10 And then I may look to Paul for some additional input on
11 the biological considerations.

12 I think the concept of biological impact versus
13 quantity of water available are very different. That's an
14 apple and an orange if I've ever found one. And I'm not
15 sure that equating those or comparing them is necessarily
16 germane. For example, you know, looking at weighted
17 usable area figures in the lower Yuba River, we see the
18 weighted usable area curve rises to a peak and then
19 declines. That tells you that sometimes more water
20 provides less weighted usable area than less water. That
21 doesn't necessarily --

22 MR. JACKSON: If you pick juveniles is what
23 you're looking at?

24 MR. JOHNSON: Sure. For whatever -- every year
25 class and every -- everyone has a different ideal weighted

1 usable area curve. But that doesn't necessarily mean that
2 that more or less water has a positive or negative impact
3 on your water supply. And in fact lower water quantity in
4 the river equals high -- if it happened to equal high
5 weighted usable average -- or weighted usable area, it may
6 have either positive or negative impacts on your water
7 supply.

8 So I'm not trying to avoid your question. What
9 I'm trying to point out is I'm not sure that the concept
10 of your question of comparing water supply -- whether or
11 not there's impacts to fish from a certain reservoir
12 elevation and impacts to water supply from that same
13 reservoir elevation is necessarily an appropriate
14 comparison. We could have happy fish and unhappy farmers
15 at the same water --

16 MR. JACKSON: We could. And we could have happy
17 farmers and unhappy fish?

18 MR. JOHNSON: -- at the same reservoir elevation.

19 MR. JACKSON: All right. Calling your attention
20 to number 19 in your rebuttal testimony.

21 You agree, Mr. Bratovich -- this is probably
22 yours -- that the proposed project may result in lower
23 flows than RD-1644 long term in certain months under
24 certain conditions, is that correct? That's your
25 testimony?

1 MR. BRATOVICH: You know, let me go ahead -- I'm
2 sorry. I believe you said do I agree that the proposed
3 project will have lower flows than long-term 1644
4 simulated actual flows during certain conditions in
5 certain months?

6 MR. JACKSON: Yes.

7 MR. BRATOVICH: Yes, that is true.

8 MR. JACKSON: And those months would be December,
9 January, May and July?

10 MR. BRATOVICH: If you'll give me a moment. If
11 you would like me to go through each with the months
12 associated with the attachments to my testimony, I could
13 confirm if those are the months appropriate in your
14 question.

15 MR. JACKSON: Well, I'm taking the question
16 directly out of your testimony. You'll find it in section
17 19 of your rebuttal testimony.

18 MR. BRATOVICH: Oh, I see. Okay.

19 Okay. December, January, May and July.

20 MR. JACKSON: Okay. Are there salmonids in the
21 Yuba River in December and January?

22 MR. BRATOVICH: Yes, there are.

23 MR. JACKSON: Are there salmonids in the Yuba
24 River in May and July?

25 MR. BRATOVICH: Yes, there are.

1 MR. JACKSON: How much lower would the flows be
2 under your proposed project in May and July?

3 MR. BRATOVICH: Yeah. Brian, would you please
4 pull up the cumulative exceedance plots for May and July.

5 WATER RESOURCES CONTROL ENGINEER MONA: It's
6 warming up.

7 MR. BRATOVICH: And your question, Mr. Jackson,
8 was: How much lower would they be?

9 MR. JACKSON: Yeah, how much in terms of CFS,
10 first, and then in terms of duration through the month?

11 MR. BRATOVICH: Are you referring to -- in this
12 one slide I have both Smartville and Marysville. Which
13 would you prefer?

14 MR. JACKSON: Well, let's try Marysville.

15 MR. BRATOVICH: All right. As discussed many
16 times today, these are cumulative probability distribution
17 functions. These are exceedance probabilities. So what
18 we have is an 83-year simulation period for each of the
19 three alternative scenarios in flows associated with each
20 of these months.

21 So, for example, in May at Marysville there are
22 83 May average monthly flows indicated in this cumulative
23 distribution as well as 83 monthly flows for long-term
24 1644 and interim 1644.

25 As you can see by examination of this flow

1 exceedance probability chart, the flows can be, oh, up to
2 500 CFS lowered to very high flow levels, which is
3 represented by the 50 percent of the left-hand
4 distribution, flows essentially ranging above, and well
5 above, 2000 cubic feet per second. And flows are actually
6 higher under the proposed project relative to either long
7 term or 1644 from roughly the 50 to 60 percent of the
8 cumulative probability distribution function. And they
9 are intermediate to long term and interim flows that would
10 be expected to occur during the lowest 25 percent flow
11 conditions and, again, roughly in the neighborhood of 500
12 CFS higher maximum than interim and 500 CFS lower maximum
13 than long term during the lowest 25 percent flow
14 conditions.

15 MR. JACKSON: Now, this period of time in which
16 the flow is lower under your project than it is under
17 RD-1644 is -- basically May and July are relatively
18 important times for salmonids in the Yuba River, are they
19 not?

20 MR. BRATOVICH: As I testified earlier, every
21 life stage is important and every month associated with
22 that life stage needs to be evaluated and is important for
23 consideration in the lower Yuba River. May is one of
24 those months, as July, as are the other ten months.

25 MR. JACKSON: Thank you.

1 I have no further questions.

2 BOARD MEMBER BAGGETT: Any recross?

3 MR. LILLY: No questions.

4 BOARD MEMBER BAGGETT: Thank you. No questions.

5 Would you like to submit exhibits into

6 evidence --

7 MR. LILLY: Yeah, we'd like to just submit

8 Exhibits YCWA 13 and 14 into evidence.

9 BOARD MEMBER BAGGETT: If there are no
10 objections, they'll be submitted.

11 And I think we take CSPA's evidence in -- do we
12 accept that?

13 SENIOR STAFF COUNSEL FRINK: We haven't had their
14 rebuttal yet.

15 BOARD MEMBER BAGGETT: No, but I mean their case
16 in chief. That would require that we did.

17 Well, we'll go through rebuttal, then we'll do it
18 all at once.

19 Do you have rebuttal?

20 MR. JACKSON: No, I think we're all right. We'll
21 stay right here.

22 BOARD MEMBER BAGGETT: Okay. Would you like to
23 move your exhibits --

24 MR. JACKSON: I'd like to move my evidence into
25 the record.

1 BOARD MEMBER BAGGETT: Okay. Is there any
2 objection?

3 If not, so moved.

4 Anything else?

5 No recross, no redirect?

6 MR. LILLY: When you get to closing briefs I
7 think it would be good if we all have a clear schedule on
8 exactly what happens when --

9 BOARD MEMBER BAGGETT: We're at closing briefs
10 now. We said two weeks, as I recall; ten-page limit.

11 Two weeks from today -- close of business, five
12 o'clock, two weeks from today, which would be --

13 SENIOR STAFF COUNSEL FRINK: -- The 24th of
14 January.

15 BOARD MEMBER BAGGETT: -- the 24th.

16 And we have given CSPA a week -- five business
17 days, a week from today to do a five-page comments on the
18 response to comments on the CEQA document.

19 I don't think there's anything else.

20 BOARD MEMBER KATZ: No need to review it for my
21 part.

22 (Laughter.)

23 BOARD MEMBER BAGGETT: All right. Are there any
24 other questions?

25 BOARD MEMBER KATZ: No. I mean if that

1 completes -- Dan, have you got anything else?

2 SENIOR STAFF COUNSEL FRINK: No. We just wanted
3 to mention that you all will receive notice of the
4 proposed order before a Board meeting at which that order
5 would be considered. And that would be it.

6 BOARD MEMBER BAGGETT: Okay.

7 BOARD MEMBER KATZ: All right. Let me also thank
8 everybody, thank the staff and all the participants. I
9 appreciate -- Art and I both appreciate your
10 understanding, your brevity and the completeness of what
11 you submitted in writing.

12 So thank you all very much.

13 (Thereupon the California State Water
14 Resources Control Board, Division of
15 Water Rights hearing adjourned at 3:20 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, JAMES F. PETERS, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing California State Water Resources Control Board,
7 Division of Water Rights, Yuba County Water Agency public
8 hearing was reported in shorthand by me, James F. Peters,
9 a Certified Shorthand Reporter of the State of California,
10 and thereafter transcribed into 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 20th day of January, 2006.

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JAMES F. PETERS, CSR, RPR

24

Certified Shorthand Reporter

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