

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

In the Matter of: )  
 )  
 )  
PUBLIC HEARING TO DETERMINE )  
WHETHER TO ADOPT A DRAFT CEASE )  
AND DESIST ORDER AGAINST )  
CALIFORNIA AMERICAN WATER. )  
 )  
~~~~~ )

JOE SERNA JR./CALEPA BUILDING  
1001 I STREET  
COASTAL HEARING ROOM  
SACRAMENTO, CALIFORNIA

HEARING PHASE I, VOLUME I  
THURSDAY, JUNE 19, 2008  
9:02 A.M.

LINDA KAY RIGEL, CSR  
CERTIFIED SHORTHAND REPORTER  
LICENSE NUMBER 13196

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

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CO-HEARING OFFICERS

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Dr. Gary Wolff

STAFF

Mr. Buck Taylor, Staff Counsel

Mr. Ernest Mona, Water Resource Control Engineer

Mr. Paul Murphey, Engineering Geologist

Mr. Buck Taylor, Staff Counsel

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PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

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ALSO PRESENT

Ms. Katherine Mrowka, State Water Resources Control Board

Mr. John W. Collins, State Water Resources Control Board

Mr. Mark Stretars, State Water Resources Control Board

Dr. John G. Williams, for Sierra Club

Mr. Roger Williams, Carmel River Steelhead Association

Dr. Roy Thomas, Carmel River Steelhead Association

Mr. Darby Fuerst, Interim General Manager, Monterey Peninsula Water Management District

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## 1 P R O C E E D I N G S

2 --o0o--

3 CO-HEARING OFFICER BAGGETT: Good morning.

4 This is the time and place for the hearing to receive  
5 evidence relative to determining whether to adopt the  
6 draft cease-and-desist order against California  
7 American Water Company for unauthorized diversion of  
8 water from the Carmel River.

9 This hearing is being held in accordance with  
10 the Notice of Public Hearing dated March 5th, 2008 and  
11 the revised hearing schedule included in the Hearing  
12 Officers' rulings dated May 13, 2008 and May 29, 2008.

13 I'm Art Baggett. I'm with the State Water  
14 Resources Control Board here with my colleague and  
15 fellow member, Gary Wolff.

16 Also present are staff assigned to this  
17 hearing: Staff attorney Buck Taylor, staff geologist  
18 Paul Murphey, staff engineer Ernie Mona, and  
19 environmental scientist Jane Farwell.

20 This hearing provides parties who have filed a  
21 Notice of Intent to Appear an opportunity to present  
22 relevant testimony and other evidence that addresses  
23 the two key issues contained in the hearing notice. As  
24 discussed in our ruling letter dated May 13, 2008, the  
25 issues upon which evidence will be received will be

1 taken in two phases.

2 In the first phase beginning today, evidence  
3 may be presented addressing the issue of whether Cal Am  
4 is diverting water in violation of Water Code Section  
5 1052, and whether Cal Am has complied with the  
6 requirements of Water Right Order 95-10 and amendments  
7 thereto.

8 During the second phase which will begin  
9 July 23rd, 2008, evidence may be presented as to what  
10 compliance measures and schedules of compliance should  
11 be included in any cease and desist order issued to Cal  
12 Am and how such an action may most effectively and  
13 equitably be implemented.

14 After the hearing record is closed, a proposed  
15 order will be prepared for consideration by the full  
16 Board. After the Board adopts an order, any person who  
17 believes the order is in error will have 30 days in  
18 which to submit a written petition for reconsideration  
19 by the Board.

20 At this time, I'll ask Buck Taylor to cover  
21 some procedural issues and introduce the staff  
22 exhibits.

23 Buck?

24 STAFF COUNSEL TAYLOR: The court reporter is  
25 preparing a transcript of today's proceeding. Any

1 party who wishes a copy of the transcript must make his  
2 or her own arrangements with the court reporter.

3 At this time, I will propose to enter into  
4 evidence staff exhibits 1 through 7. Are there any  
5 objections to staff exhibits 1 through 7?

6 CO-HEARING OFFICER BAGGETT: Any objection  
7 from any of the parties? If not, they are so entered.

8 (Staff Exhibits 1-7 were entered into  
9 evidence.)

10 CO-HEARING OFFICER BAGGETT: I would like to  
11 invite appearances by the parties who are participating  
12 in the evidentiary portion of this hearing. Will those  
13 making appearances please state your name, address, and  
14 who you represent so the court reporter can enter this  
15 information into the record; and if you have a business  
16 card, it will be appreciated by the court reporter.

17 First Division of Water Rights, prosecution  
18 team.

19 MR. SATO: Reed Sato for the --

20 CO-HEARING OFFICER BAGGETT: Will you come up  
21 to a mic because we are recording this.

22 MR. SATO: Good morning. Reed Sato, for the  
23 Water Rights prosecution team. The address is 1001 I  
24 Street. It's on my business card. Thank you.

25 CO-HEARING OFFICER BAGGETT: Sierra Club?

1           MR. SILVER: I am Larry Silver, California  
2 Environmental Law Project, representing the Sierra  
3 Club. The address is PO Box -- the address is 208  
4 Richardson Drive, Mill Valley, California.

5           CO-HEARING OFFICER BAGGETT: Carmel River  
6 Steelhead Association.

7           MR. JACKSON: Michael Jackson representing the  
8 Carmel River Steelhead Association. My mailing address  
9 for the record is Post Office Box 207 Quincy,  
10 California, 95971. And I will supply a card.

11           CO-HEARING OFFICER BAGGETT: Thank you.  
12 California Salmon Steelhead Association?

13           (No response)

14           CO-HEARING OFFICER BAGGETT: Monterey  
15 Peninsula Water Management District?

16           MR. LAREDO: Good morning. David C. Laredo  
17 L-a-r-e-d-o. My address is 606 Forest Avenue, Pacific  
18 Grove, California 93950. I'm here on behalf of the  
19 Monterey Peninsula Water Management District as its  
20 general counsel. Thank you.

21           CO-HEARING OFFICER BAGGETT: Thank you.  
22 California American Water?

23           MR. RUBIN: Good morning. My name is Jon  
24 Rubin, R-u-b-i-n. Associate of mine, Jason Rosenberg.  
25 From the law firm of Diepenbrock Harrison representing

1 California American Water. Our offices are located at  
2 400 Capitol Mall, 18th Floor, Sacramento, California.

3 CO-HEARING OFFICER BAGGETT: Thank you.  
4 Pebble Beach Company.

5 MR. JAMISON: Good morning. My name is Thomas  
6 Jamison. I'm representing the Pebble Beach Company.  
7 I'm with the law firm of Fenton and Keller, 2801  
8 Monterey Salinas Highway, Monterey, California 93940.

9 CO-HEARING OFFICER BAGGETT: Thank you. Are  
10 there any other parties wishing to record an  
11 appearance?

12 MR. FIFE: Mr. Baggett, Michael Fife, law firm  
13 of Brownstein Hyatt Farber Schreck. And I'll provide  
14 business cards for the address and spellings. We're  
15 here on behalf of City of Seaside and the Seaside Basin  
16 Watermaster.

17 And also appearing for the same party is  
18 Russell McGlothlin from the same office; and again,  
19 I'll provide a business card.

20 And on behalf of the Seaside Basin Watermaster  
21 also is Don Freeman.

22 MR. FREEMAN: Good morning. I'm Don Freeman.  
23 Again, I am appearing on behalf of the City of Seaside,  
24 also the Seaside Basin Watermaster, and also the City  
25 of Carmel-by-the-Sea, and I have a business card.

1           MR. MINTON: I'm Jonas Minton representing the  
2 Planning and Conservation League. 1107 Ninth Street,  
3 Sacramento.

4           MR. ETIENNE: Myron Etienne, Jr. representing  
5 Monterey County Hospitality Association, and I have a  
6 card.

7           MR. WARBURTON: Michael Warburton, Executive  
8 Director of the Public Trust Alliance, and I have a  
9 card here.

10          MR. GOMBERG: Good morning. Max Gomberg,  
11 representing the Division of Ratepayer Advocates of the  
12 Public Utilities Commission. I have a card.

13          MR. HEISINGER: Good morning, Mr. Baggett.  
14 James Heisinger, City Attorney for Sand City. I have a  
15 card.

16          CO-HEARING OFFICER BAGGETT: Any other parties  
17 who have opening statements or other comments? Okay.  
18 Thank you.

19          We will now move to the evidentiary portion of  
20 the hearing and the presentation of evidence and  
21 related cross-examination by the parties who have  
22 submitted Notices of Intent to Appear, and we'll hear  
23 the parties' case-in-chief in the following order. And  
24 then at that time we'll allow a number of parties who  
25 have come forward who just have an opening statement

1 they want to make for the record, then we'll just go  
2 forward and allow you to make that statement at that  
3 time.

4 MR. RUBIN: Hearing Officer Baggett, if you  
5 don't mind, I have a couple of questions of process  
6 before we get into opening statements and then start  
7 presenting evidence.

8 The first question I have relates to a  
9 statement that you made at the beginning of this  
10 proceeding today in terms of the scope.

11 And I apologize for pressing this issue, but  
12 when you characterize the second issue for this first  
13 phase, characterized it as a question of compliance  
14 with Order 95-10 as amended, in your May 29, 2008  
15 ruling, you articulated that second issue more  
16 narrowly, and specifically in regards to Condition 2.  
17 That's the understanding that we thought for this  
18 second question of this first phase of the hearing.

19 CO-HEARING OFFICER BAGGETT: I think the  
20 notice speaks for itself, so I mean this is the summary  
21 of that notice. So exactly what was in the notice  
22 refers to the exact section and so on.

23 MR. RUBIN: And there were a number of  
24 objections that were raised, requests to file revised  
25 testimony. Are you going to deal with those as

1 witnesses are called, or as parties present their  
2 case-in-chief, or do you want to address those now?

3 CO-HEARING OFFICER BAGGETT: I would prefer to  
4 deal with those as they come up and as the witness  
5 comes up. I realize there are a significant number of  
6 objections that have been filed in the responses, and I  
7 think it's more expeditious if we just deal with them  
8 when we get to them; otherwise, we'll spend all day  
9 today dealing with potential objections, arguing those  
10 objections.

11 So I'd rather just let the hearing flow, and  
12 if you object to a witness -- I know we've gotten a  
13 couple of written objections -- and we'll deal with  
14 that when the witness comes up.

15 MR. RUBIN: Again, I apologize, but for the  
16 record, we have raised due process issues. We believe  
17 that they are significant and substantially affect this  
18 hearing. Understand that you want to proceed, and  
19 we'll continue to raise those as we go.

20 CO-HEARING OFFICER BAGGETT: That's  
21 appropriate.

22 MR. RUBIN: Thank you.

23 CO-HEARING OFFICER WOLFF: Mr. Rubin, do you  
24 believe that any of your due process objections gain in  
25 gravity by handling them the way Mr. Baggett has



1 suggested? That is to say, do you think that some bias  
2 to your client will occur prior to them being resolved  
3 in the way Mr. Baggett is suggesting?

4 MR. RUBIN: The response I'll give to you is  
5 the due process objections that we raised raise  
6 fundamental concerns with the structure of this  
7 proceeding.

8 And ultimately, whether we go through this  
9 process, present evidence, cross-examine witnesses, and  
10 ultimately a decision is made, I think that we are  
11 prejudiced if the ruling is adverse to our objection.

12 But I guess that's the way we're proceeding,  
13 and ultimately we'll have to deal with it. The main  
14 point I want to raise is that we are proceeding at the  
15 direction of the Hearing Officers without waiving our  
16 due process objections.

17 CO-HEARING OFFICER BAGGETT: That's  
18 appropriate and understood. I think part of the  
19 challenge of this is the Water Code, but we can't make  
20 final rulings on motions until the full Board votes on  
21 the final order, as you are well aware. This has  
22 happened before us in this field.

23 So it's not quite like a court where we can  
24 make a substantive ruling and they're definitive and  
25 they're done. They're all going to be preliminary, all

1 going to be wrapped in the final order, and voted on by  
2 the full Board.

3 CO-HEARING OFFICER WOLFF: I concur. I just  
4 was wondering whether you were simply reserving your  
5 right to object to other things later or whether you're  
6 claiming there is some harm to your client by  
7 proceeding in the way Mr. Baggett has suggested.

8 MR. RUBIN: Well, I think that everyone is  
9 harmed because I believe my objections -- the  
10 objections of California American Water are valid  
11 objections; and therefore, because there is a defect in  
12 the structure of this hearing, we'll be going through a  
13 hearing ultimately for no purpose because of the defect  
14 in the proceeding.

15 CO-HEARING OFFICER WOLFF: Potential.

16 CO-HEARING OFFICER BAGGETT: Thank you. Let's  
17 proceed then.

18 At the beginning of each case-in-chief, a  
19 representative of the party may make an opening  
20 statement, briefly summarize the objectives of the  
21 case, the major points the proposed evidence is  
22 intended to establish, and the relationship between the  
23 major points and the key issues.

24 After any opening statement, we'll hear the  
25 testimony from the parties' witnesses.

1           Before testifying, witnesses should identify  
2 their written testimony as their own and affirm that it  
3 is true and correct.

4           Witnesses should summarize the key points in  
5 their written testimony and should not read their  
6 written testimony into the record. Direct testimony  
7 will be followed by cross-examination by the parties or  
8 staff, myself, and my colleague, Dr. Wolff.

9           In order to expedite the hearing, I would like  
10 to impanel witnesses for each party at one time for  
11 cross-examination. Redirect testimony may be permitted  
12 followed by recross-examination. Any redirect and  
13 recross is limited to the cross-examination -- the  
14 scope of the cross-examination and the redirect  
15 testimony respectively.

16           After all cases-in-chief are completed, the  
17 parties may present rebuttal evidence. Parties are  
18 encouraged to be efficient in presenting their case and  
19 their cross-examination.

20           Except where I approve a variation, we will  
21 follow the procedures set forth in the Board's  
22 regulations, the hearing notice, and subsequent ruling.

23           Parties' presentations are limited to the  
24 following: Opening statements, 20 minutes for each  
25 party; oral presentation of direct testimony limited to

1 20 minutes per witness; cross-examination will be  
2 limited to one hour per witness or panel of witnesses;  
3 and of course, as always, additional time may be  
4 allowed upon showing of good cause by a party.

5 We do not anticipate having oral closing  
6 arguments, but we'll see how the hearing proceeds.

7 All briefs will be due seven days following  
8 the date the transcript are released and are limited to  
9 ten pages double-spaced, 12 point Arial font. And the  
10 court reporter estimates the transcript will probably  
11 take two weeks assuming we finish this in two days.

12 With that, I will now administer the oath.  
13 Will those persons who plan to testify today during  
14 these proceedings please stand and raise your right  
15 hand.

16 (Potential witnesses complying)

17 CO-HEARING OFFICER BAGGETT: Do you promise to  
18 tell the truth in these proceedings?

19 THE WITNESSES (collectively): Yes.

20 CO-HEARING OFFICER BAGGETT: Thank you.

21 We should also note that we take -- parties  
22 can submit any exhibits into evidence, that they should  
23 do so after their case-in-chief and related cross and  
24 recross and redirect, so we won't do it till you're  
25 done with your entire proceeding in case you have other

1 documents entered in redirect.

2 So we'll start the testimony with the Division  
3 of Water Rights, the prosecution team and opening  
4 statement.

5 MR. SATO: Good morning, your Honors, members  
6 of the Hearing Team. Once again, I am Reed Sato. I am  
7 the attorney representing the Water Rights prosecution  
8 team.

9 The issue in this proceeding is very  
10 straightforward. At this phase of the proceeding, we  
11 address the issue of whether or not Cal Am is diverting  
12 water from the Carmel River or it's underflow in  
13 violation of Water Code Section 1052 or whether Cal Am  
14 is violating Condition 2 of the Order 95-10 as a result  
15 of its activities on the river.

16 Now when we started this proceeding, we didn't  
17 see the need for the bifurcation of this proceeding  
18 because we thought that resolution of this liability  
19 issue was relatively straightforward. We were not able  
20 to have a single proceeding, so now we're in a  
21 bifurcated phase.

22 As a result of the bifurcation, we had  
23 suggested that there be a stipulation of facts in order  
24 for the Board to be able to move forward on this issue.  
25 Unfortunately, we were not able as parties to get

1 together and present to you a set of stipulated facts  
2 that would allow you to address the legal issue that is  
3 posed by this first phase.

4           However, I think that when you look at the  
5 testimony that has been proffered so far by all of the  
6 parties, you will see that there are really not that  
7 many differences or factual material disputes about the  
8 underlying facts.

9           Let's review.

10           I mean it's really clear that the testimony  
11 presented, or the proposed testimony presented, shows  
12 that Cal Am is diverting from the Carmel River or its  
13 underflow in excess of 3,376 acre feet per annum.

14           3,376 acre feet per annum is the legal limit  
15 that was identified in Order 95-10 and is the amount  
16 that the Hearing Team has identified in numerous  
17 rulings on pretrial motions so, you know, that number  
18 has been fixed. That is the target. That is what we  
19 have to show Cal Am is taking in excess of that amount.

20           Secondly, I think that it's clear that with  
21 all the testimony that was presented, proffered for  
22 presentation, is that there is no alternative that has  
23 been developed by Cal Am to from this date substitute  
24 for its diversion in excess of 3,376 acre feet per  
25 annum.

1           So what's Cal Am's legal theory? I mean in  
2 light of all those very straightforward factual  
3 information, Cal Am has taken a different tact. What  
4 they now argue is that Order 95-10 is in fact an  
5 authorization for them to divert water up to 11,285  
6 acre feet per anum. It is basically an affirmative  
7 permission on the part of this Board to allow them to  
8 do that.

9           The reason why that's important is because  
10 they argue that as a result of 95-10 they are basically  
11 free or they are not subject to any action to impose a  
12 cease-and-desist order as long as they are making  
13 either good-faith efforts to comply with Order 95-10 or  
14 that they are diligently pursuing some kind of effort  
15 to get new water rights at some point in time from some  
16 other source in order to be able to go forward and make  
17 some effort in this regard.

18           However, that type of argument really doesn't  
19 withstand legal scrutiny.

20           The problem with this bald-faced assertion is  
21 that it is made notwithstanding the fact that liability  
22 for trespass under Section 1052 is determined by the  
23 absence of a valid right to divert water. If a  
24 diversion is not authorized pursuant to a valid right,  
25 then it is a trespass under Section 1052.

1           Now under California law since 1913, a valid  
2 water right by appropriation can only be required --  
3 only be acquired by filing an application with the  
4 State authority and pursuing it through the steps  
5 provided for by law.

6           A valid right or authorization within the  
7 meaning of Water Code Section 1052 for Cal Am to divert  
8 water from the Carmel River in excess of 3,376 acre  
9 feet does not exist. And there's no evidence that it  
10 exists. This is because Cal Am has not satisfied the  
11 statutory scheme in Division 2 of the Water Code.

12           So it's neither reasonable nor credible under  
13 the circumstances that Order 95-10 substitutes for this  
14 statutory established process.

15           In addition, Cal Am's interpretation or their  
16 attempt to bootstrap 95-10 into some kind of  
17 authorization is inconsistent with the language of  
18 95-10 itself.

19           Condition number 2 talks about activities that  
20 Cal Am has to undertake to diligently terminate its  
21 unlawful diversions from the Carmel River. I mean if  
22 Cal Am's legal theory was correct, there would be no  
23 unlawful diversions for it to diligently terminate.

24           So what does 95-10 do with regard to this  
25 proceeding? I mean in once sense 95-10 is very



1 important and also irrelevant.

2           It's important because what 95-10 did was  
3 establish the legal entitlement that Cal Am had to  
4 diverting water from the Carmel River. It established  
5 the limit, as I said before, at 3,376 acre feet per  
6 annum; and then it identified diversions in excess of  
7 that amount as unlawful.

8           It also established water conservation goals  
9 and other actions that Cal Am could take to reduce the  
10 effort of its illegal diversions as it sought to obtain  
11 an adequate water supply.

12           Now in no case does 95-10 state that a  
13 cease-and-desist order is precluded as long as someone  
14 complies with the terms of that order. I think that's  
15 a fundamental disagreement we have with Cal Am on that  
16 issue.

17           In summary, the evidence we're going to  
18 present will show very clearly that Cal Am is diverting  
19 water in excess of 3,376 acre feet per annum.

20           We'll also show that Cal Am has not diligently  
21 terminated its illegal diversions as required by  
22 Condition 2 of 95-10. We believe that we will be able  
23 to proceed very quickly into Phase II and are fully  
24 justified to do so.

25           Thank you.

1 CO-HEARING OFFICER BAGGETT: Thank you. Do  
2 you have any testimony you would like to present?

3 MR. SATO: Yes. Our first -- the prosecution  
4 team's first witness will be Kathy Mrowka.

5 CO-HEARING OFFICER BAGGETT: Are there any  
6 objections at this point? I think there was a written  
7 objection. I said we'd deal with these as they came  
8 up, and the first witness as I recall there was an  
9 objection.

10 MR. RUBIN: Thank you. Jon Rubin for  
11 California American Water.

12 We do raise an objection to this testimony,  
13 participation of Kathy Mrowka. We also have raised  
14 this more generally in terms of the involvement of Jim  
15 Kassel, raising this objection based upon due process.

16 We believe that the participation of some of  
17 the staff from the Division of Water Rights who have  
18 acted in an adjudicatory capacity in the past now  
19 assisting the prosecution team is inconsistent with the  
20 law.

21 CO-HEARING OFFICER BAGGETT: We haven't  
22 ruled -- we will rule on Mr. Kassel. Your objection is  
23 noted, but we'll overrule it.

24 In terms of Ms. Mrowka, the actual witness of  
25 the Hearing Team, you had an objection. So are you

1 requesting that Ms. Mrowka be precluded from this  
2 hearing? If so, on what grounds?

3 MR. RUBIN: Well, I think that involvement of  
4 Ms. Mrowka in this proceeding creates an appearance of  
5 bias. It's an important distinction. We're not  
6 asserting that there is bias, but the legal standard is  
7 an appearance of bias. That's what we're afforded  
8 under our due process protections.

9 There's numerous cases that discuss this  
10 issue. Nightlife Partners is one of the cases. Howitt  
11 is another. The Quintero case is a third. All of  
12 those cases support a proposition that a person who has  
13 acted in an adjudicatory capacity on a matter cannot  
14 switch roles and act in a prosecutorial role in the  
15 same matter.

16 CO-HEARING OFFICER BAGGETT: So --

17 MR. RUBIN: In terms of what we're asking for,  
18 Hearing Officer Baggett and Hearing Officer Wolff, the  
19 remedy for this is not simply disqualifying, not  
20 allowing Ms. Mrowka to participate. It's a flaw in the  
21 proceeding.

22 CO-HEARING OFFICER BAGGETT: So are you  
23 proposing different Board Members be involved in the  
24 hearing?

25 MR. RUBIN: To completely rectify this issue,

1 the hearing needs to be terminated and renoticed with a  
2 Hearing Team and a prosecution team that doesn't create  
3 the appearance of bias.

4 CO-HEARING OFFICER BAGGETT: Does Cal Am  
5 object to the Board taking official notice of the  
6 exhibits in Ms. Mrowka's testimony?

7 MR. RUBIN: No.

8 CO-HEARING OFFICER BAGGETT: Does the  
9 prosecution have any response?

10 MR. SATO: Well, I still think that the  
11 contention by Cal Am that Ms. Mrowka -- her presence in  
12 this proceeding somehow creates some kind of improper  
13 bias is just without foundation.

14 They talk about due -- they talk around the  
15 due process issue without giving us any specific  
16 instances, circumstances, situations whereby  
17 Ms. Mrowka's presence here in the proceeding will  
18 really cause any kind of real problem for either the  
19 Board or for the prosecution team -- or for Cal Am, for  
20 that matter.

21 I mean the argument that Cal Am has about this  
22 being the same proceeding, I think, is absolutely  
23 incorrect. Certainly the fact that -- it is true that  
24 Ms. Mrowka participated in the issuance of Order 95-10.  
25 We admit that.

1           But I mean this is a different proceeding.  
2   This is a proceeding to issue a potential  
3   cease-and-desist order with regard to the continued  
4   noncompliance with Cal Am, the continued illegal  
5   diversion by Cal Am of water from the Carmel River.

6           So it is in fact different, so any of the  
7   cases that Mr. Rubin would rely upon to talk about the  
8   same proceeding I think is inappropriate, and I think  
9   even if the worst were to occur, if there was  
10   potentially some bias, then -- and that could be  
11   determined as a result of this hearing. I mean I  
12   certainly would expect Mr. Rubin to cross-examine  
13   Ms. Mrowka for the purposes of trying to establish  
14   whatever actual or real bias may exist.

15           Then the Board can determine at that point in  
16   time whether or not they feel there is any basis, sound  
17   basis, for entertaining any more of Mr. Rubin's motion.

18           MR. RUBIN: Mr. Baggett, if I could respond  
19   just briefly to a couple of the points that were just  
20   raised by Mr. Sato.

21           The standard, the legal standard, is an  
22   appearance of bias. If there is a risk of bias, due  
23   process is not being served.

24           Second point I would like to raise is  
25   Ms. Mrowka's testimony. It's very clear from her

1 testimony that Ms. Mrowka participated not only in the  
2 proceeding that led up to Order 95-10 but also  
3 activities related to Cal Am's compliance with Order  
4 95-10.

5 She states that she has been responsible for  
6 evaluating the compliance submittals since the order  
7 was issued. That's a critical issue in this  
8 proceeding, and she did that in a quasi-judicial  
9 capacity. She was reviewing compliance reports and  
10 making the determination about Cal Am's compliance.

11 And now she's shifted roles from a  
12 quasi-judicial -- adjudicatory role to prosecutorial  
13 role.

14 CO-HEARING OFFICER BAGGETT: Let me -- you  
15 know, we've read at length the written submittals. Let  
16 me ask a couple questions of Ms. Mrowka.

17 I think the records indicate you have taken  
18 the oath.

19 MS. MROWKA: Yes, I have.

20 CO-HEARING OFFICER BAGGETT: The records  
21 indicate from what we've looked at that you last  
22 served, according to your testimony, June 4th, 2003. I  
23 went back and looked, since I have been on this Board  
24 since 1999, realized that there was one other case. I  
25 think the South Fork of the Feather River proceeding, a

1 cleanup hearing, I think you were involved in at the  
2 end of June 2004?

3 MS. MROWKA: Yes. That was a year 2000  
4 hearing. The final order was adopted in 2004.

5 CO-HEARING OFFICER BAGGETT: And currently are  
6 you a member of the enforcement section?

7 MS. MROWKA: No, I'm not.

8 CO-HEARING OFFICER BAGGETT: What section do  
9 you work in?

10 MS. MROWKA: I'm in the Permitting Unit.

11 CO-HEARING OFFICER BAGGETT: Does anyone in  
12 the enforcement section have any managerial or  
13 supervisor responsibility over the permitting section?

14 MS. MROWKA: No.

15 CO-HEARING OFFICER BAGGETT: Have you  
16 discussed -- make it real clear: Have you discussed  
17 any of your testimony or opinions on this pending CDO  
18 with any members of the Hearing Team?

19 MS. MROWKA: No.

20 CO-HEARING OFFICER BAGGETT: I'll just ask my  
21 colleagues here. Has Ms. Mrowka advised you on any  
22 order since you've been a member of this Board?

23 CO-HEARING OFFICER WOLFF: No. I don't  
24 believe before today I've even met Ms. Mrowka. You  
25 should ask her if she has a recollection different than

1 mine.

2 MS. MROWKA: I don't have a recollection  
3 different than yours.

4 CO-HEARING OFFICER WOLFF: We've never met, to  
5 the best of your knowledge.

6 MS. MROWKA: I might have shaken your hand in  
7 some public forum.

8 CO-HEARING OFFICER BAGGETT: I've thought  
9 about this at length, and it seems to me the real issue  
10 is all of my other Board Members have not -- were first  
11 appointed in 2005 or subsequent to that. I'm the only  
12 Board Member that has been present when Ms. Mrowka was  
13 in the hearing.

14 MR. RUBIN: Mr. Baggett, the two points again:  
15 We have correspondence which links Ms. Mrowka  
16 to people on the Hearing Team. There is correspondence  
17 where your attorney in this proceeding was provided a  
18 copy of correspondence with Ms. Mrowka's name on the  
19 correspondence. We have a January 31st, 2006 letter  
20 that was signed by the then-existing Executive Director  
21 that appears to have been at least reviewed by  
22 Ms. Mrowka and possibly prepared by Ms. Mrowka.

23 It is -- there is more to this than just  
24 communications that might have occurred since the time  
25 that California American Water requested a hearing in



1 this proceeding.

2           There are so many connections here. You have  
3 a connection between Ms. Mrowka, Mr. Kassel and  
4 Ms. Whitney who is apparently on the Hearing Team in  
5 this proceeding. We don't know what type of  
6 communications might have occurred between those two.

7           Clearly in terms of California American  
8 Water's compliance with Order 95-10, correspondence --  
9 there has been discussion at some point.

10           CO-HEARING OFFICER BAGGETT: Back to the  
11 proposed conflict in this proceeding, it seems to me  
12 that it really -- part of it squares on whether myself  
13 as Hearing Officer and Board Member who has been -- who  
14 was involved on the record, as I think most would  
15 realize, in the 2000 -- I wasn't involved in the 95-10,  
16 obviously. But the 2002 hearing, I conducted that on  
17 compliance with Section 6 on the 95-10 and was involved  
18 in preparing that order.

19           But this proceeding is clearly a different  
20 proceeding, I think, as counsel for the prosecution  
21 noted. The proposed CDO does not deal with Section 6.  
22 It has been six years since we dealt with any of these  
23 issues as a board, or since I have.

24           So I guess what I'm -- to be blunt, are you  
25 asking that I recuse myself from this proceeding since

1 I have an appearance of, I guess in your terms,  
2 Mr. Rubin, an appearance of bias?

3 MR. RUBIN: No, I don't think that your  
4 participation in this proceeding creates the appearance  
5 of bias.

6 Again, I think the appearance of bias is  
7 created by people who are on the prosecution team now  
8 who have previously served in an adjudicatory capacity.  
9 They were involved on your behalf, on the Division's  
10 behalf, making the determination of whether California  
11 American Water was in compliance with Order 95-10, at  
12 least in documents that we've seen as recently as  
13 periods in 2006, if not more recent.

14 CO-HEARING OFFICER BAGGETT: But the issue  
15 before us is whether or not a witness, a particular  
16 witness, is, one, qualified and is going to present  
17 further bias for the five Board Members and the two of  
18 us in the hearing, conducting this hearing.

19 We will be proposing an order. This isn't a  
20 staff order. This is a Board order. This is adopted  
21 by five Board Members, or theoretically -- at least the  
22 majority of five Board Members.

23 And I think this Board, as Board Members, we  
24 take that charge very, very seriously. And I think if  
25 one were to interview staff there has not always been

1 agreement between recommendations -- and you've maybe  
2 sat through the Yuba recently or that hearing. I think  
3 it's very clear that this is really aimed at the  
4 Hearing Officers.

5 MR. RUBIN: It's a difficult argument for me  
6 to raise because it is a purely legal argument. I'm  
7 not accusing --

8 CO-HEARING OFFICER BAGGETT: I agree.

9 MR. RUBIN: -- you or frankly anybody here of  
10 actual bias.

11 But what the law allows, what the law affords  
12 California American Water is a proceeding where there  
13 is no appearance of base. So the concern that we have  
14 is that you have before you a witness who has been  
15 working with the prosecution team who has, for the past  
16 13 years as she's -- or 12 years, 11 years, for a  
17 substantial period of time been acting as a  
18 representative of the Division of Water Rights, making  
19 determinations annually, quarterly about California  
20 American Water's compliance.

21 Therefore, when it comes down to your  
22 decision, there is an appearance of bias --

23 CO-HEARING OFFICER BAGGETT: I appreciate  
24 that. Let's take five minutes and go off the record  
25 five minutes. I'd like to --

1 CO-HEARING OFFICER WOLFF: I'd like to ask  
2 Mr. Rubin one further question before we do that.

3 Mr. Rubin, as I understand the law, the  
4 allegation of appearance of bias isn't sufficient.  
5 There has to be some support for the existence of an  
6 appearance of bias.

7 And I'm having a hard time understanding  
8 because the bias would have to be the bias of one of  
9 the decision-makers, meaning Mr. Baggett or myself or  
10 ultimately the Board, and I don't see how Ms. Mrowka's  
11 testimony creates that or even participation creates  
12 the appearance of bias on the part of Mr. Baggett or  
13 myself or other Board Members.

14 MR. RUBIN: And maybe there's a difference in  
15 perspective on what the law requires.

16 CO-HEARING OFFICER WOLFF: Well that's what  
17 I'm asking you.

18 MR. RUBIN: From my understanding, the law  
19 requires a showing of potential bias, that there is a  
20 risk of bias and undue risk of bias.

21 And in this circumstance, the courts have said  
22 when you have a person who's acted in an adjudicatory  
23 capacity -- and I don't agree that it has to be tied to  
24 this proceeding, but it's involving the subject matter,  
25 involving the order itself, the underlying order

1 here -- and now switches roles and acts in a  
2 prosecutorial capacity, there is an appearance of bias.

3 CO-HEARING OFFICER WOLFF: So the passing of  
4 time is not relevant in your opinion?

5 MR. RUBIN: Yeah, in this circumstance, I do  
6 not believe that's the case.

7 CO-HEARING OFFICER WOLFF: Okay. I'm just  
8 asking. I'm trying to understand your --

9 CO-HEARING OFFICER BAGGETT: Let me give  
10 Mr. Sato one more --

11 MR. SATO: Well, I think that Mr. Rubin has  
12 misapprehended Ms. Mrowka's role. I mean she is a  
13 witness that we have called, and so she is going to  
14 give testimony, unlike the other cases where I think we  
15 were talking about witnesses. We were talking about  
16 participants within a Hearing Team or bias as a result  
17 of certain participants in an advisory capacity.

18 Ms. Mrowka is here. She can testify, and  
19 Mr. Rubin can ask her questions that he wants to that  
20 might go to the issue of his concerns about the bias.  
21 Those things can be cleared up right now on the record,  
22 and there is really, you know, no impropriety.

23 He can explore whether or not there is any  
24 real issue here, not just a perceived issue, and also  
25 he will find out that there is no issue.

1 CO-HEARING OFFICER BAGGETT: Let's take -- off  
2 the record, five minutes.

3 (Recess)

4 CO-HEARING OFFICER BAGGETT: Okay, are we  
5 ready?

6 At this point, the objection is noted on the  
7 record, and we will continue with the proceeding. But  
8 just a couple quick comments.

9 One is that this clearly is a different set of  
10 issues and a different proceeding -- I think all  
11 involved will recognize that -- from the previous  
12 Carmel hearings before this Board. This is the  
13 proposed CDO hearing. It's not a hearing on 95-10, as  
14 I think we've already ruled.

15 Secondly, my personal involvement has been six  
16 years or close to that, a significant amount of time,  
17 especially since it has been a different proceeding.  
18 So I'm comfortable there exists no bias from my  
19 perspective.

20 I think Ms. Mrowka clearly is a witness. On  
21 the record, she is not a member of the Hearing Team.  
22 She does have some expertise in this area as I think  
23 all parties would recognize.

24 And by review of the evidence which Mr. Rubin  
25 didn't object to, and I don't think any other party

1 did, basically the Board's records, the memos signed,  
2 previous drafts or orders by this Board which I think  
3 is part of the issue here, whether that creates bias.  
4 But the fact is those are official documents of the  
5 Board.

6 And lastly, I think there will be a full and  
7 clear -- I think Mr. Sato stated also -- there is a  
8 clear opportunity for cross-examination and to get at  
9 any issues that there are any defects created by this  
10 for Cal Am and other parties.

11 So let's continue. The objection is noted for  
12 the record, and let's continue.

13 MR. SATO: The prosecution team is going to  
14 call Kathy Mrowka. We would also like Exhibit PT-3 to  
15 be displayed.

16 KATHERINE MROWKA

17 Called by the Prosecution Team

18 DIRECT EXAMINATION BY MR. SATO

19 MR. SATO: Ms. Mrowka, could you please state  
20 your full name for the record.

21 MS. MROWKA: My name is Katherine Mrowka.

22 MR. SATO: And could you state your current  
23 position with the State Water Resources Control Board.

24

25

1 MS. MROWKA: I'm the Senior Engineer in  
2 Permitting Unit number 3.

3 MR. SATO: How long have you held this  
4 position?

5 MS. MROWKA: I've held this position since  
6 approximately 2002.

7 MR. SATO: Have you reviewed your summary of  
8 testimony submitted in this proceeding for phase one?

9 MS. MROWKA: Yes, I have.

10 MR. SATO: And is that an accurate summary of  
11 your testimony?

12 MS. MROWKA: Yes, it is.

13 MR. SATO: Now, could you tell us what we're  
14 looking at here on the screen?

15 MS. MROWKA: If you go back to figure one, was  
16 the -- thank you.

17 MR. SATO: For the record, this is the  
18 prosecution team's Exhibit 3.

19 MS. MROWKA: Yes, this is figure 1 of the  
20 Carmel River Watershed. The figure was obtained from  
21 Order 95-10, and it's noted as figure 1 in that order.

22 This figure depicts the watershed area for the  
23 Carmel River, and it has a couple of other noteworthy  
24 features.

25 One of those features is shown by the two



1 black dots that are approximately in the center of the  
2 screen and slightly to the right, and they show the  
3 location of both the existing Los Padres Reservoir and  
4 the proposed New Los Padres Reservoir Project.

5 Continuing downstream to where you see the  
6 location of San Clemente Dam, that's river mile 18.5 as  
7 noted on the figure.

8 Then you continue downstream to where you see  
9 the shaded area on this drawing. Beginning in that  
10 shaded area is the location where California American  
11 Water Company has located its wells within the aquifer,  
12 and those are shown more clearly on the bigger drawing.

13 One other feature I would like to point out  
14 for you on this figure is there's a cross-hatched area  
15 with the City of Monterey depicted on that and that is  
16 in the upper left corner of the drawing.

17 As you can see from this drawing, the Monterey  
18 area is outside of the watershed of the Carmel River.

19 I'd like to proceed to the next drawing.

20 This is figure 2 from Order 95-10. Basically  
21 this is a US Geological Survey depiction of the Carmel  
22 Valley alluvial aquifer.

23 Next please.

24 This is figure 3 from Order 95-10. And this  
25 is a good depiction of the location of the California

1 American Water Company wells within the alluvial  
2 aquifer. Of importance on this drawing is the fact  
3 that these wells are located throughout the 15-mile  
4 reach of the aquifer.

5 Next drawing.

6 This is figure 4 from Order 95-10. It  
7 provides the mileage markers for the river miles. It  
8 also has a note down in the lower corner, off screen  
9 right now, that indicates that the San Clemente Dam is  
10 river mile 18.5 and Los Padres Dam is at river mile  
11 23.5.

12 The San Clemente Dam is the only surface water  
13 diversion location where Cal Am takes water directly  
14 over to customer service. The other surface diversion  
15 of this watershed is Los Padres Dam as noted on this  
16 drawing.

17 The remainder of the facilities Cal Am uses  
18 are all wells within the alluvial aquifer.

19 MR. SATO: Please state what you believe to be  
20 the intent of Order 95-10 as amended by 98-08.

21 MS. MROWKA: Order 95-10 is an order regarding  
22 unauthorized diversion and use of water.

23 MR. SATO: Do you recall what the amount of  
24 Cal Am's legal diversion as recognized by Order 95-10?

25 MS. MROWKA: Yes. It is 3,376 acre feet per

1 annum.

2 MR. SATO: After the issuance of Order 95-10,  
3 what actions did you take on behalf of the Division of  
4 Water Rights to inform Cal Am its diversion from the  
5 Carmel River were unauthorized?

6 MS. MROWKA: Well, I would like to refer to  
7 Prosecution Team Exhibit 6 regarding this item, and  
8 that's a letter to the Monterey Peninsula Water  
9 Management District which was copied to Cal Am --

10 We're done with the overhead for now.

11 -- stating that Order 95-10 is only an interim  
12 measure to provide some relief during development of a  
13 water supply project and does not provide a basis of  
14 right for continued diversion of water. Failure to  
15 quickly address the water supply situation could result  
16 in the need for further action by the State Water  
17 Board.

18 In Prosecution Team Exhibit 8, the State Water  
19 Board advised the Public Utilities Commission that Cal  
20 Am continues to divert substantial amounts of water  
21 each year without sufficient water rights.

22 The Division did not receive any reply from  
23 Cal Am regarding these assertions in this letter.

24 MR. SATO: Did the Division of Water Rights  
25 take any action to enforce Order 95-10 against Cal Am?

1 MS. MROWKA: Yes. The Division issued  
2 Administrative Civil Liability Complaint number  
3 262.0.10-03 and 262.5-6.

4 MR. SATO: What was the outcome of those  
5 enforcement actions?

6 MS. MROWKA: Those enforcement actions were  
7 not challenged by Cal Am. The initial enforcement  
8 action assessed a \$168,000 fine for 336 days of  
9 violation for diversion in excess of 3,376 acre feet  
10 per annum.

11 The second enforcement action allowed the  
12 monetary penalty to apply to specific items.

13 MR. SATO: Is it your testimony Cal Am did not  
14 contest those enforcement actions?

15 MS. MROWKA: No, Cal Am did not.

16 MR. SATO: Did you have any responsibility for  
17 addressing Cal Am's compliance with Condition 13 of  
18 Order 95-10?

19 MS. MROWKA: Yes, I have been responsible for  
20 monitoring compliance with Condition 13 from the date  
21 of issuance of the order in 1995 until the summer of  
22 2007.

23 MR. SATO: Does any of your correspondence or  
24 actions address Cal Am's compliance with Condition 2 of  
25 Order 95-10?

1 MS. MROWKA: No, it does not. I have not  
2 written letters specifically stating that Cal Am has  
3 complied with Condition 2 of the order because Cal Am  
4 has not yet obtained legal rights for all of its  
5 diversions.

6 MR. SATO: Since issuance of Order 95-10, are  
7 you aware of any appropriate permits obtained by Cal Am  
8 to replace water being diverted from the Carmel River?

9 MS. MROWKA: Yes, I am.

10 In 2007, the Division issued permit 20808A  
11 which authorizes storage of Carmel River water in the  
12 Seaside Groundwater Basin for eventual use by Cal Am's  
13 customers. This is known as the Aquifer Storage and  
14 Recovery Project.

15 Prior to this, the Division had issued a  
16 number of temporary permits for this project.

17 MR. SATO: Now, have any of the Cal Am  
18 submittals pursuant to Order 95-10 that you have  
19 reviewed indicated that Cal Am is using water from any  
20 source to offset its Carmel River diversions?

21 MS. MROWKA: The only new source that has been  
22 identified in the submittals has been the Aquifer  
23 Storage and Recovery Project which I just mentioned.

24 MR. SATO: Since the issuance of Order 95-10,  
25 are you aware of any contracts entered into by Cal Am

1 with any other agency or entity to use water from the  
2 Carmel River under that agency or entity's  
3 appropriative rights to divert and use water from the  
4 Carmel River?

5 MS. MROWKA: The only contractual arrangement  
6 that I am aware of is related to the joint development  
7 of the Aquifer Storage and Recovery Project by the  
8 Monterey Peninsula Water Management District and the  
9 California American Water Company.

10 MR. SATO: I have no further questions.

11 CO-HEARING OFFICER BAGGETT: Thank you. Any  
12 questions from staff?

13 Proceed with your other witnesses. How long  
14 do you anticipate, just trying -- we can go off the  
15 record for a minute.

16 (Discussion off the record)

17 CO-HEARING OFFICER BAGGETT: Back on the  
18 record. Proceed.

19 MR. SATO: The Prosecution Team's next witness  
20 is John Collins.

21 JOHN COLLINS

22 Called by the Prosecution Team

23 DIRECT EXAMINATION BY MR. SATO

24 MR. SATO: Please state your full name for the  
25 record.

1 MR. COLLINS: John W. Collins.

2 MR. SATO: And please state your position with  
3 the State Water Resources Control Board.

4 MR. COLLINS: I am an environmental scientist  
5 in the Compliance Unit of the Division of Water Rights.

6 MR. SATO: How long have you been in that  
7 position?

8 MR. COLLINS: At the end of June, it will be  
9 10 months.

10 MR. SATO: Have you reviewed your summary of  
11 testimony submitted in this proceeding for Phase I?

12 MR. COLLINS: Yes.

13 MR. SATO: And is that an accurate and correct  
14 summary of your testimony?

15 MR. COLLINS: Yes.

16 MR. SATO: We'd like to put Table 1 -- that  
17 would be PT-15.

18 STAFF COUNSEL TAYLOR: Mr. Sato, do you wish  
19 to bring up the subject of the corrections to  
20 Mr. Collins' testimony at this time?

21 MR. SATO: No, we just request that it be  
22 submitted.

23 STAFF COUNSEL TAYLOR: And when Mr. Collins  
24 affirms that his testimony is correct, that includes  
25 those corrections?

1 MR. SATO: Yes. Thank you, Mr. Taylor.

2 Mr. Collins, as you recall, we had submitted  
3 an amended testimony on your behalf, do you know that?

4 MR. COLLINS: Yes.

5 MR. SATO: And is that amended testimony a  
6 true and accurate summary of your testimony?

7 MR. COLLINS: Yes, it is.

8 MR. SATO: Thank you. All right.

9 Did you prepare this table?

10 MR. COLLINS: Yes.

11 MR. SATO: Does Table 1 accurately show Cal  
12 Am's reported annual diversion amount in acre feet per  
13 annum from the Carmel River in the noted time period?

14 MR. COLLINS: Yes, it does.

15 MR. SATO: What did you calculate as Cal Am's  
16 annual average diversion?

17 MR. COLLINS: I calculated Cal Am's annual  
18 average diversions from the net production of pumping  
19 as reported in the four quarter reports that Cal Am is  
20 required to submit pursuant to Condition 2 as  
21 10,978 acre feet per annum.

22 MR. SATO: And what amount of diversion did  
23 you use as Cal Am's legal basis of right for diversion?

24 MR. COLLINS: 3,376 acre feet per annum which  
25 is referenced in Order 95-10 which consists of



1 60 feet -- or 60 acre feet per annum of riparian right,  
2 1,137 acre feet per annum of pre-1914 right, and 2,179  
3 acre feet per annum of post-1914 appropriative right  
4 under License 11866.

5 MR. SATO: And what is your source of  
6 information for these amounts?

7 MR. COLLINS: The fourth quarter reports Cal  
8 Am is required to submit.

9 MR. SATO: All right. And on average, how  
10 much water has Cal Am been illegally diverting from the  
11 Carmel River annually since 1995?

12 MR. COLLINS: On average, they've been  
13 diverting 7,632 acre feet per annum from the Carmel  
14 River.

15 MR. SATO: That's illegally?

16 MR. COLLINS: Illegally diverted.

17 MR. SATO: Are you familiar with the project  
18 known as the Aquifer Storage and Recovery Project?

19 MR. COLLINS: Yes.

20 MR. SATO: Do you know whether Cal Am diverted  
21 water from the Carmel River between '94-95 to 2006-2007  
22 under the ASR project?

23 MR. COLLINS: Yes.

24 MR. SATO: What was the average amount  
25 diverted?

1 MR. COLLINS: 145 acre feet.

2 MR. SATO: And how did you calculate that 145  
3 acre feet?

4 MR. COLLINS: The 145 acre feet was calculated  
5 from the total production minus the ASR amounts that  
6 are referenced in the monitoring reports that were  
7 submitted for the fourth quarter.

8 MR. SATO: In your opinion, can Cal Am solely  
9 rely on this project to offset the average unauthorized  
10 diversion shown in Table 1?

11 MR. COLLINS: No. Even if Cal Am were to  
12 divert the amount that they are authorized for, 2,426  
13 acre feet per annum, subtracting that from 7,632 acre  
14 feet per annum would leave Cal Am still being over  
15 5,206 acre feet per annum of annual unauthorized  
16 diversions from the Carmel River.

17 MR. SATO: In your opinion, is Cal Am  
18 violating Condition 2 of Order 95-10?

19 MR. COLLINS: Yes.

20 MR. SATO: Can you summarize your reasons for  
21 your testimony as to why you reached this conclusion?

22 MR. COLLINS: In Condition 2 of Order 95-10,  
23 there is a key word. That key word is terminate.

24 Since 1995, Cal Am has attempted supplemental  
25 projects to aid in reducing its annual diversions;

1 however, in the 12 years that have passed, the illegal  
2 diversions have not been terminated.

3 MR. SATO: I have no further questions.

4 Our next witness for the Prosecution Team is  
5 Mark Stretars.

6 MARK STRETARS

7 Called by the Prosecution Team

8 DIRECT EXAMINATION BY MR. SATO

9 MR. SATO: Mr. Stretars, can you state your  
10 full name for the record.

11 MR. STRETARS: Mark Stretars, S-t-r-e-t-a-r-s.

12 MR. SATO: Thank you. Can you please state  
13 your position with the State Water Resources Control  
14 Board.

15 MR. STRETARS: I'm Senior Water Resources  
16 Control Engineer. I am in charge of the Enforcement  
17 Unit for the State Board, Water Resources Control  
18 Board.

19 CO-HEARING OFFICER WOLFF: Have you reviewed  
20 your summary of testimony submitted in this proceeding  
21 for Phase I?

22 MR. STRETARS: Yes, I have.

23 MR. SATO: And is that summary an accurate and  
24 correct version of your testimony?

25 MR. STRETARS: Yes, it is a correct summary of

1 my testimony.

2 MR. SATO: I have no further questions. There  
3 are no further witnesses for the Prosecution Team.

4 CO-HEARING OFFICER BAGGETT: Thank you. Let's  
5 go off the record for just a minute.

6 (Discussion off the record)

7 CO-HEARING OFFICER BAGGETT: Back on the  
8 record.

9 MR. RUBIN: Just the order you went through,  
10 is that the intended order for cross?

11 CO-HEARING OFFICER BAGGETT: I think what  
12 makes sense to me, and I'm open to discussion on this,  
13 is to have the parties that I guess quote/unquote  
14 support the cease-and-desist to go, follow the  
15 Prosecution Team, then we can move to other parties,  
16 and then allow Cal Am to clean up since you're in  
17 essence the defendant in this case.

18 MR. LAREDO: It makes sense to me, not only  
19 for cross-examination but presentation of the  
20 case-in-chief.

21 CO-HEARING OFFICER BAGGETT: I think that's  
22 how I would determine to do it. I think it's cleaner  
23 that way. It isn't quite a normal prosecutorial court  
24 hearing. We've got all these other interested parties.  
25 But I think that would be best to give you the

1 opportunity to come last and you go, since you are  
2 defending the case.

3 Let's take ten minutes and come back.

4 (Recess)

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

7 I think unless there's -- again, as always, we  
8 could take discussion on this, but we would prefer to  
9 start tomorrow morning at 8:30. Does anybody have any  
10 real problems with that?

11 I know a lot of people are from out of town.  
12 It is a Friday. If we can start at 8:30, hopefully we  
13 can be done before rush hour. Especially with I-5  
14 closed, those who have to drive have a challenge.  
15 Okay. So tomorrow, just so you know, we'll start at  
16 8:30. Does that work for the court reporter?

17 THE REPORTER: Absolutely.

18 CO-HEARING OFFICER BAGGETT: Very good.

19 With that, we'll begin with cross-examination.  
20 Sierra Club is up first.

21 MR. SILVER: With respect to this panel,  
22 Sierra Club is not going to examine. Larry Silver for  
23 the Sierra Club.

24 CO-HEARING OFFICER BAGGETT: CRSA?

25 Mr. Jackson, you're up.

1           CROSS-EXAMINATION BY MR. JACKSON  
2           FOR CARMEL RIVER STEELHEAD ASSOCIATION

3           MR. JACKSON: This question is for the panel,  
4 whoever would like to answer it. To your knowledge,  
5 since Condition 2 of 95-10 being installed, has there  
6 been any attempt by Cal Am to obtain appropriative  
7 water rights for the amount of water which they were  
8 diverting over and above what you believe they had a  
9 legal right to divert?

10          MS. MROWKA: I'll answer that question.  
11 California American Water Company has on file some  
12 water right applications with the Division of Water  
13 Rights. But Cal Am has not perfected those rights.

14          MR. JACKSON: Have there been any hearings on  
15 those noticed?

16          MS. MROWKA: No. Those filings have not been  
17 noticed for hearing. I don't think they have been  
18 publicly noticed.

19          MR. JACKSON: Has -- again, for the panel, to  
20 your knowledge has Cal Am made plans for a one-to-one  
21 reduction in its unlawful diversion from the Carmel  
22 River?

23          MR. RUBIN: I'm going to object to the  
24 question. It calls for speculation. The question --

25          MR. JACKSON: I agree. I will change the

1 question.

2 To your knowledge, has Cal Am contacted the  
3 State Division of Water Rights and made any attempt to  
4 obtain water from other sources of supply to make  
5 one-to-one reductions?

6 MS. MROWKA: I believe my testimony was that  
7 they have obtained permit 20808A, and that would be an  
8 offset for current unlawful diversions to some limit.

9 MR. JACKSON: Now does that particular request  
10 or authorization for water allow them to take at the  
11 same time that they are pumping water over and above  
12 their water right, or is that limited to the winter  
13 flow?

14 MS. MROWKA: The Order 95-10 describes the  
15 water concentration goal of 11,285 acre feet per anum,  
16 and that is the operating limit at this time.

17 MR. JACKSON: Have there been any contracts  
18 submitted to the Division of Water Rights indicating  
19 that Cal Am has purchased other rights on the Carmel  
20 River that are authorized to divert water from the  
21 river?

22 MS. MROWKA: My involvement in this, as I --  
23 my testimony was that through the summer of 2007 I have  
24 been directly involved in this. And up until that  
25 period of time, I did not review contracts other than

1 the material I spoke of which is their joint operation  
2 of the Aquifer Storage and Recovery Project.

3 MR. JACKSON: There are other diversions on  
4 the Carmel River that are permitted, are there not?

5 MS. MROWKA: Yes.

6 MR. JACKSON: Individual landholders, for  
7 instance?

8 MS. MROWKA: Yes.

9 MR. JACKSON: To your knowledge, has Cal Am  
10 purchased any of those rights to -- contract rights in  
11 order to reduce the amount of illegal diversion?

12 MS. MROWKA: I have received no notification  
13 of change of ownership of existing permit homeowners.

14 MR. JACKSON: Thank you. I have no further  
15 questions.

16 (Discussion off the record)

17 CO-HEARING OFFICER BAGGETT: With that, back  
18 on the record. Mr. Laredo?

19 MR. LAREDO: Mr. Baggett, just a question  
20 first. You had indicated that you wanted to have  
21 those, if you will, lined in favor of the CDO as  
22 opposed to those that are opposed. My board has taken  
23 an official position opposed to the CDO.

24 CO-HEARING OFFICER BAGGETT: Right.

25 MR. LAREDO: I'm prepared to cross-examine at



1 this point, but I will defer.

2 CO-HEARING OFFICER BAGGETT: I could ask if  
3 any other parties -- those are the only parties I've  
4 got that wanted to -- filed Notice of Intent in  
5 support. Show of hands, any other parties,  
6 environmental parties, who wish to cross-examination  
7 this panel?

8 CROSS-EXAMINATION BY MR. LAREDO

9 FOR MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

10 MR. LAREDO: Good morning. Again, my name is  
11 David Laredo on behalf Monterey Peninsula Water  
12 Management District. I just have one line of  
13 questioning, and --

14 CO-HEARING OFFICER BAGGETT: Is your mic on?

15 MR. LAREDO: Again, David Laredo on behalf of  
16 Monterey Peninsula Water Management District. I have  
17 one line of questioning. It's for Ms. Mrowka. Good  
18 morning.

19 MS. MROWKA: Good morning.

20 MR. LAREDO: I believe that there is a letter  
21 that was issued by the State Water Resources Control  
22 Board on June 7, 2006 addressed to the California  
23 American Water Company and David A. Berger for the  
24 Monterey Peninsula Water Management District.

25 It's a seven-page letter, and Kathy Mrowka is

1 referenced in this letter as the senior staff presently  
2 assigned to this matter. Ms. Mrowka, are you familiar  
3 with that letter?

4 MS. MROWKA: Yes, I am.

5 MR. LAREDO: I believe that that's a matter  
6 for which the Board has taken official notice; is that  
7 accurate?

8 MS. MROWKA: I believe it is.

9 MR. LAREDO: Are you familiar also with a  
10 later letter dated August 6, 2007. This was issued to  
11 California American Water Company and David Berger,  
12 General Manager of the Monterey Peninsula Water  
13 Management District, signed by Victoria Whitney.

14 Again, you are referenced as the senior staff  
15 person presently assigned to this matter. Are you  
16 familiar with that letter?

17 MR. SATO: Objection. Do you think you could  
18 show Ms. Mrowka the document you are referring to?

19 MR. LAREDO: I will be happy to. I did show  
20 it to her at the break.

21 MS. MROWKA: Yes, I am familiar with this  
22 letter.

23 MR. LAREDO: May I ask you to read the  
24 highlighted portion of that letter on page 1?

25 MS. MROWKA: Yes. The highlighted portion

1 states:

2 During a June 21, 2006 meeting with  
3 District staff and Cal Am, the Division  
4 agreed to withdraw the letter. Cal Am's  
5 July 24th letter sought confirmation  
6 that the June 7th letter was withdrawn.  
7 The letter is withdrawn.

8 MR. LAREDO: Could you characterize what you  
9 think the effect of that -- this letter that you're  
10 holding in your hand has on the earlier June 7, 2006  
11 letter?

12 MS. MROWKA: I believe it withdrew it.

13 MR. LAREDO: Thank you. I have no further  
14 questions.

15 CO-HEARING OFFICER BAGGETT: Counsel, is that  
16 letter already in one of the exhibits?

17 MR. LAREDO: I do not believe that it is.

18 CO-HEARING OFFICER BAGGETT: Then we should  
19 give it a number. So it's Monterey Peninsula Water  
20 Management District number 9, Exhibit No. 9 from the  
21 Water Management District.

22 MR. LAREDO: That would be satisfactory.

23 (Exhibit MPWMD-9 was marked for  
24 identification.)

25 CO-HEARING OFFICER BAGGETT: We have Pebble

1 Beach Company, and then Mr. Rubin. And we will take  
2 all the other evidence, Exhibit 9, at the end of this  
3 panel and cross and redirect, and we will take all  
4 evidence into --

5 CROSS-EXAMINATION BY MR. JAMISON

6 FOR PEBBLE BEACH COMPANY

7 MR. JAMISON: Thank you. My name is Thomas  
8 Jamison representing Pebble Beach Company. I just want  
9 to say we just don't want you to forget us. And I have  
10 a couple of brief questions for Ms. Mrowka.

11 Good morning, Ms. Mrowka. I'm reading from --  
12 I want to read a portion of your testimony on -- it's  
13 from your exhibit. It's Prosecution Team Exhibit 2,  
14 pages 5 and 6, bottom of page 5 and top of page 6, a  
15 letter that you refer to and it says:

16 The State Water Board has already acted  
17 favorably regarding development of the  
18 Pebble Beach Company Wastewater  
19 Reclamation Project which sought  
20 approval to utilize 380 acre feet of  
21 Carmel River water made available as a  
22 result of developing the Wastewater  
23 Reclamation Project. Since the Pebble  
24 Beach Company interests use treated  
25 wastewater in lieu of potable water from

1           the Carmel River, the State Water Board  
2           found that the net diversion from the  
3           Carmel River to serve project lands  
4           would be less than the level that would  
5           have occurred if the wastewater  
6           reclamation project had not been  
7           developed. Thus, on March 27, 1998, the  
8           State Water Board determined that Order  
9           95-10 provided for development of this  
10          project.

11           And Ms. Mrowka, I gather that you're obviously  
12          familiar with Pebble Beach Wastewater Reclamation  
13          Project?

14           MS. MROWKA: Yes, I am.

15           MR. JAMISON: Thank you. In our parts, we  
16          call it the Carmel Area Wastewater District/Pebble  
17          Beach Community Services District Wastewater  
18          Reclamation Project, and that's the way we refer to it.  
19          But we understand your reference.

20           Then almost exactly the same language is used  
21          on page 3 of Prosecution Team Exhibit 6, which is a  
22          letter to Darby Fuerst from the Monterey Peninsula  
23          Water Management District dated June 5, 1998 from  
24          Edward C. Anton, Chief of the Division of Water Rights  
25          of the State Water Board.

1           And same language is used in Prosecution Team  
2 Exhibit 8, page 3, which is a prehearing conference  
3 statement of the State Water Resources Control Board  
4 filed with the Public Utilities Commission in July of  
5 1998 with slightly a different conclusion.

6           And I'll read that conclusion, it says:

7           This determination modified the  
8           11,285 acre feet annually water  
9           conservation goal by the amount Carmel  
10          River actually -- of Carmel River water  
11          actually used for the Pebble Beach  
12          project on a yearly basis.

13          And with your testimony in those exhibits,  
14 Ms. Mrowka, I'd just like to ask you again to confirm  
15 that that's your understanding of the facts in this  
16 proceeding.

17          MS. MROWKA: My understanding of the facts in  
18 this proceeding is consistent with the footnote in  
19 Order 95-10.

20          MR. JAMISON: Okay. And that footnote, are  
21 you familiar with what that footnote states?

22          MS. MROWKA: Yes, I am.

23          MR. JAMISON: If you could read it, please?

24          MS. MROWKA: Yes. It is footnote 2 in Order  
25 95-10, and it states:

1           In addition to supplies from the Carmel  
2           River and pumped groundwater in the area  
3           of Seaside, reclaimed wastewater is  
4           available to serve some Cal Am users  
5           from the Carmel Area Wastewater District  
6           /Pebble Beach Community Services  
7           District Wastewater Reclamation Project.  
8           The Project will provide 800 acre feet  
9           of reclaimed water for the irrigation of  
10          golf courses and open space in the Del  
11          Monte Forest. In return for financial  
12          guarantees, the Pebble Beach Company and  
13          other sponsors received a 380 acre foot  
14          potable water entitlement from the  
15          District based upon issuance of an  
16          appropriative right permit to the  
17          District for development within Del  
18          Monte Forest. As of the end of fiscal  
19          1993-1994, the District had not  
20          allocated the remaining 420 acre feet of  
21          project yield.

22           MR. JAMISON: Thank you. And just a couple of  
23          clarifications here.

24           In your testimony as I just read it, you  
25          mentioned that the State Water Board found that the net

1 diversion from the Carmel River to serve project lands  
2 would be less than the level that would have occurred  
3 if the wastewater reclamation project had not been  
4 developed.

5           Could you sort of explain -- I think I know  
6 what that means, but could you sort of explain what  
7 that means?

8           MS. MROWKA: Okay, I'm going to have to dredge  
9 up old memories.

10           MR. JAMISON: Well, let me put it this way:  
11 Would it be accurate to say what that means is that  
12 because of the use of reclaimed water for which potable  
13 water used to be used for irrigation which far exceeds  
14 the amount of potable water that will now be used for  
15 development, that that means there will be less  
16 diversion from the Carmel River?

17           MS. MROWKA: Because I simply don't recall the  
18 math from this particular issue, it's been too long,  
19 just -- I would go with the plan language.

20           MR. JAMISON: Okay. Well, I'm assuming that's  
21 what net diversions mean.

22           Then the other point that I have with the  
23 statement by Mr. Pettit in the submission to the  
24 state -- the Public Utilities Commission, and that  
25 statement was:



1           This determination modified the 11,285  
2           acre feet annually water conservation  
3           goal by the amount of Carmel River  
4           actually used for the Pebble Beach  
5           project on a yearly basis.

6           That would mean this is -- this amount of the  
7 Pebble Beach water entitlement, which is a total of 380  
8 acre feet, to the extent used is over and above -- is  
9 allowed to be diverted by Cal Am over and above the  
10 11,285 acre foot conservation goal.

11           MR. SATO: Objection. Before you -- what  
12 statement -- what are you referring to, the statement?

13           MR. JAMISON: Prosecution Team Exhibit 8, page  
14 3.

15           CO-HEARING OFFICER BAGGETT: Proceed.

16           MS. MROWKA: Again, I believe the language of  
17 that exhibit speaks for itself.

18           MR. JAMISON: Okay. And if that was modified,  
19 the determination modified the 11,285 acre feet  
20 annually of water conservation goal of Order 95-10 for  
21 the amount of Pebble Beach water entitlement actually  
22 used, that would mean, would it not, that the amount  
23 actually used for the Pebble Beach water entitlement  
24 over and above that conservation goal would not be a  
25 violation of Order 95-10?

1           MR. SATO:  Objection; calls for speculation,  
2 calls for a legal conclusion.

3           CO-HEARING OFFICER BAGGETT:  Is your mic on?

4           MR. SATO:  Oh.  Objection; calls for  
5 speculation, calls for a legal conclusion.

6           CO-HEARING OFFICER BAGGETT:  Can you restate  
7 the question.

8           MR. JAMISON:  Well, I can try to restate the  
9 question.

10           Would you consider, Ms. Mrowka, if Cal Am used  
11 the actual amount of the water used to serve the Pebble  
12 Beach water entitlement, if that did not exceed 380  
13 acre feet and Cal Am was otherwise exceeding the 11,285  
14 acre foot conservation goal, would you consider that to  
15 be a violation of Order 95-10?

16           MR. SATO:  It still calls for a legal  
17 conclusion.  I'm not exactly sure what you're trying to  
18 get at with this witness on this issue.

19           MR. JAMISON:  Well -- may I respond to that?

20           CO-HEARING OFFICER BAGGETT:  Respond, but  
21 you're running out of time.

22           MR. JAMISON:  Okay.  We'll let the statement  
23 speak for itself then.

24           Are you aware of how much water has actually  
25 been used to satisfy the Pebble Beach water entitlement

1 to date, Ms. Mrowka?

2 MS. MROWKA: No, I am not. I believe the --  
3 one of the other exhibits -- the number's not on the  
4 tip of my tongue -- that Monterey Peninsula Water  
5 Management District was charged with the task of  
6 reporting the diversions to the Division; and during  
7 the time that I was doing compliance monitoring, I  
8 don't recall having received any information regarding  
9 the topic.

10 MR. JAMISON: Okay. Thank you.

11 CO-HEARING OFFICER BAGGETT: Mr. Rubin.

12 MR. RUBIN: I do have an opening statement. I  
13 was thinking about making it from here.

14 CO-HEARING OFFICER BAGGETT: We just want to  
15 do cross-examination of this panel right now.

16 MR. RUBIN: I'm sorry. Thank you.

17 CO-HEARING OFFICER BAGGETT: Save the opening  
18 statement for tomorrow, the way we're going right now.

19 Cross-examination of three witnesses.

20 MR. RUBIN: We could either deal with the  
21 issue now or in an hour, but my expectation is it's  
22 going to take me much more than an hour to complete  
23 cross-examination on the three witnesses presented by  
24 the Prosecution Team.

25 CO-HEARING OFFICER BAGGETT: Why don't you

1 proceed, and then as we see how it goes we can decide  
2 whether it is, one, relevant to showing cause and make  
3 a decision then; but just -- we appreciate the gravity  
4 of the issue for your client, but let's try to be  
5 expeditious because we have all this in the record  
6 already, a lot of material.

7 MR. RUBIN: I will try to be.

8 CROSS-EXAMINATION BY MR. RUBIN

9 FOR CALIFORNIA AMERICAN WATER COMPANY

10 MR. RUBIN: If you don't mind, I'm going to  
11 start with some questions for Mr. Collins. My name is  
12 Jon Rubin, attorney for California American Water  
13 Company. Good morning.

14 MR. COLLINS: Good morning.

15 MR. RUBIN: Mr. Collins, in your written  
16 testimony which has been marked as Prosecution Team  
17 Exhibit 11, you indicate that you've reviewed  
18 California American Water's responsibilities under  
19 Order 95-10?

20 MR. COLLINS: Correct.

21 MR. RUBIN: When you completed your review  
22 related to -- excuse me. When did you complete your  
23 review related to California American Water's  
24 responsibilities under Order 95-10?

25 MR. SATO: I'm sorry, let me just interpose a

1 procedural issue.

2 I think, Jon, you refer to the Prosecution  
3 Team Exhibit 11, and I think we had requested -- his  
4 amended testimony was Exhibit 11A, so.

5 MR. RUBIN: I was referring to the revised  
6 testimony.

7 CO-HEARING OFFICER BAGGETT: Thank you for the  
8 clarification.

9 MR. COLLINS: Can you restate the question?

10 MR. RUBIN: Sure. When did you complete your  
11 review related to California American Water's  
12 responsibilities under Order 95-10?

13 MR. COLLINS: Early December.

14 MR. RUBIN: Do you have a specific date?

15 MR. COLLINS: No.

16 MR. RUBIN: As a result of this proceeding, do  
17 you believe that it is appropriate for the Hearing  
18 Officers for the State Water Resources Control Board to  
19 take an enforcement action against California American  
20 Water?

21 MR. SATO: Objection; vague and ambiguous.

22 CO-HEARING OFFICER BAGGETT: Sustained.  
23 Restate.

24 MR. RUBIN: As a result of this proceeding, do  
25 you believe it is appropriate for the Hearing Officers

1 for the State Water Resources Control Board to take an  
2 enforcement action against California American Water?

3 MR. SATO: Same objection. We're already in  
4 an enforcement proceeding, so I'm not exactly sure  
5 whether you're asking him about an outcome that he  
6 would favor or not?

7 CO-HEARING OFFICER BAGGETT: I would sustain.  
8 He's a witness. It calls for a legal conclusion.  
9 Restate it if you want. Try again.

10 STAFF COUNSEL TAYLOR: Perhaps by way of  
11 clarification: When you say appropriate for the  
12 Hearing Officers, do you mean the Board entire or just  
13 the Hearing Officers?

14 MR. RUBIN: The question that I asked was  
15 directed to Mr. Collins, and the question asked if it  
16 was appropriate for either the Hearing Officers or the  
17 State Water Resources Control Board to take an  
18 enforcement action against California American Water.

19 CO-HEARING OFFICER BAGGETT: It was objected  
20 to, and I sustained the objection. I don't see how it  
21 -- this is an engineer for the unit. You're asking him  
22 to make a policy and legal conclusion.

23 (Interruption by the reporter)

24 MR. SATO: Objection on relevance.

25 CO-HEARING OFFICER WOLFF: Yeah, I wonder if

1 you could speak into the mic a little better. Maybe  
2 I'm older than I thought I was, but I'm having a hard  
3 time hearing.

4 MR. SATO: I have a cold, sorry.

5 MR. RUBIN: Mr. Collins, as a result of your  
6 review of California American Water's responsibilities  
7 under Order 95-10, was it your decision to move forward  
8 with drafting a draft cease-and-desist order which is  
9 at issue in this proceeding?

10 MR. COLLINS: No, it was not.

11 MR. RUBIN: Do you believe that Condition 2 of  
12 Order 95-10 requires California American Water to  
13 terminate diversions in excess of 3,376 acre feet per  
14 year?

15 MR. COLLINS: Yes.

16 MR. RUBIN: Assuming your opinion is correct,  
17 does Order 95-10 establish a date by which California  
18 American Water must terminate diversions in excess of  
19 3,376 acre feet per year?

20 MR. SATO: Objection. The document speaks for  
21 itself.

22 CO-HEARING OFFICER BAGGETT: I would overrule.  
23 I mean, you've got the document, you're familiar with  
24 it.

25 MR. COLLINS: No.

1           MR. RUBIN: In any of the documents you read  
2 as part of your review of California American Water's  
3 responsibilities under Order 95-10, did you find any  
4 statement by the State Water Resources Control Board or  
5 its staff which established a date on which California  
6 American Water was required to terminate diversions in  
7 excess of 3,376 acre feet per year?

8           MR. SATO: Again, the document speaks for  
9 itself, but he can answer.

10          CO-HEARING OFFICER BAGGETT: Please answer.  
11 He was very clear: To your knowledge.

12          MR. COLLINS: To my knowledge, no.

13          MR. RUBIN: In fact, your written testimony  
14 and your testimony earlier today reflect the fact that  
15 you rendered your conclusion about California American  
16 Water's compliance with Condition 2 based upon the word  
17 terminate which appears in Condition 2 of Order 95-10;  
18 is that correct?

19          MR. COLLINS: Correct.

20          MR. RUBIN: You thought -- excuse me.

21          Your thought was that Order 95-10 requires  
22 California American Water to terminate diversions in  
23 excess of its water rights, that it has not done that,  
24 and therefore California American Water has violated  
25 Order 95-10; is that correct?



1           MR. SATO: Object. I think it actually  
2 mischaracterizes his testimony, but I'd like to have  
3 him respond.

4           MR. COLLINS: Can you restate it please?

5           MR. RUBIN: Is it your thought that Order  
6 95-10 requires California American Water to terminate  
7 its diversions in excess of its water rights, that  
8 California American Water has not done that, and  
9 therefore California American Water is in violation of  
10 Order 95-10?

11          MR. COLLINS: Yes.

12          MR. RUBIN: Do you have before you Exhibit  
13 PT-11A?

14          MR. COLLINS: Yes.

15          MR. RUBIN: I ask that you turn to page 2.  
16 Could you please read into the record the third  
17 sentence in the third paragraph under the heading:  
18 Issue 1, is California American Water Illegally  
19 Diverting Water From the Carmel River?

20          MR. COLLINS: From what paragraph?

21          MR. RUBIN: The third sentence in the third  
22 paragraph under the heading Issue 1. I believe it  
23 begins in order -- excuse me: The order.

24          MR. COLLINS: (Reading:)

25                 The Order directed Cal Am to reduce the

1           annual diversions by 15 percent in 1996  
2           and by 20 percent in every year  
3           thereafter.

4           MR. RUBIN: Can you read the next sentence as  
5 well?

6           MR. COLLINS: (Reading:)  
7           Since 1997, Cal Am has reduced its  
8           annual diversions by 20 percent from  
9           14,106 acre feet per anum to 11,285 acre  
10          feet per anum.

11          MR. RUBIN: Thank you.

12          In Exhibit PT-11A, you did not say that Order  
13 95-10 directs California American Water to reduce its  
14 annual diversion to a level below that allowed under  
15 its water rights, did you?

16          MR. SATO: Objection, in terms of by its water  
17 rights. I think it's vague and ambiguous.

18          CO-HEARING OFFICER BAGGETT: Restate.

19          MR. RUBIN: Sure.

20          In Exhibit PT-11A, you did not say that Order  
21 95-10 directs California American Water to reduce its  
22 annual diversion to a level below that permitted or  
23 licensed under its water rights?

24          MR. SATO: Same objection. I mean I think you  
25 should state what you think the numbers are, and then

1 ask him if, you know, his testimony is that it's below  
2 that. Otherwise --

3 CO-HEARING OFFICER BAGGETT: What is the  
4 objection? You're telling us the remedy. What is the  
5 objection?

6 MR. SATO: Vague and ambiguous, the question.  
7 By use of these legal terms as opposed to specific  
8 numbers, it's hard for the witness to know how to  
9 respond to those questions.

10 CO-HEARING OFFICER BAGGETT: Try again.  
11 Objection sustained. Lay a foundation.

12 MR. RUBIN: Mr. Collins, do you know the  
13 amount of water that California American Water holds  
14 water rights to from the Carmel River?

15 MR. COLLINS: I know that their legal right is  
16 3,376 acre feet per anum.

17 MR. RUBIN: Do you know if that is the extent  
18 of the water that may be appropriated under their water  
19 rights, or if that is the amount of water that they  
20 have the capability of diverting under their water  
21 rights?

22 MR. COLLINS: To my knowledge, that's what  
23 they are allowed to divert.

24 MR. RUBIN: So you don't know if the water  
25 rights that they hold allow for diversion in excess of

1 3,376 acre feet?

2 MR. COLLINS: To my knowledge, no.

3 MR. RUBIN: Assuming California American Water  
4 holds water rights that entitled it to divert 3,376  
5 acre feet, in Exhibit PT-11A you did not say that Order  
6 95-10 directs California American Water to reduce its  
7 annual diversions to a level below 3,376 acre feet per  
8 year, did you?

9 MR. SATO: Objection; incomplete hypothetical.

10 HEARING OFFICER WOLFF: Again, you need to  
11 speak louder.

12 MR. SATO: Incomplete hypothetical.

13 CO-HEARING OFFICER BAGGETT: Overruled. You  
14 can answer that. It's his testimony.

15 MR. COLLINS: No, I did not.

16 MR. RUBIN: Mr. Collins, I ask that you turn  
17 to page 3 of your testimony, PT-11A. On page 3 of  
18 Exhibit PT-11A there is a table which has been marked  
19 Table 1, correct?

20 MR. COLLINS: Correct.

21 MR. RUBIN: In the period reflected in Table 1  
22 on page 3 of PT-11A, is there any year in which  
23 California American Water diverted less than 3,376 acre  
24 feet of water from the Carmel River?

25 MR. COLLINS: No.

1           MR. RUBIN: In the period reflected in Table  
2 1, the State Water Resources Control Board had only  
3 taken one enforcement action against California  
4 American Water; is that correct?

5           MR. COLLINS: Correct.

6           MR. RUBIN: The action was taken in a year  
7 when California American Water diverted water from the  
8 Carmel River in excess of 11,285 acre feet, correct?

9           MR. SATO: Objection. I don't think he's  
10 established any foundation that he actually knows that.  
11 And as Mr. Collins has testified, he's only been with  
12 the Division for the last ten months.

13           MR. RUBIN: Mr. Collins to my question earlier  
14 indicated that he was aware of only one enforcement  
15 action. I could explore that with other questions if  
16 necessary.

17           CO-HEARING OFFICER BAGGETT: Overruled. The  
18 witness can answer within your knowledge or scope of  
19 testimony. Restate the question please.

20           MR. RUBIN: The action -- again, referring to  
21 the one action, enforcement action, taken against  
22 California American Water -- was taken in a year when  
23 California American Water diverted from the Carmel  
24 River in excess of 11,285 acre feet; is that correct?

25           MR. COLLINS: I don't know.

1           MR. RUBIN: The initial action that led to  
2 this proceeding was Mr. Mark Stretars directing you to  
3 evaluate the responsibilities of California American  
4 under Water Order 95-10, correct?

5           MR. COLLINS: Correct.

6           MR. RUBIN: When did Mr. Stretars provide you  
7 with that direction?

8           MR. COLLINS: Mid October of 2007.

9           MR. RUBIN: Did Mr. Stretars provide specific  
10 direction to you?

11          MR. SATO: Objection; vague and ambiguous.

12          MR. RUBIN: When Mr. Stretars --

13          CO-HEARING OFFICER BAGGETT: Let me --  
14 overruled. Pretty clear, just asking whether he  
15 provided direction.

16          MR. COLLINS: Yes, he did.

17          MR. RUBIN: Did Mr. Stretars ask you to  
18 respond to specific questions related to the  
19 responsibility of California American Water under Order  
20 95-10?

21          MR. COLLINS: I was told to review Order 95-10  
22 and to glean from it what I was able to, and that's  
23 when I found the term terminate and we discussed it  
24 with Mark and moved forward from there.

25          MR. RUBIN: The question that I asked -- I

1 appreciate your response; I don't know if it was  
2 responsive.

3 The question that I asked was: Did  
4 Mr. Stretars ask you to respond to any specific  
5 questions related to the responsibilities of California  
6 American Water under Order 95-10?

7 MR. COLLINS: I don't recall.

8 MR. RUBIN: Do you recall if Mr. Stretars  
9 asked that you consider if California American Water  
10 was illegally diverting water from the Carmel River?

11 MR. COLLINS: No, I do not.

12 MR. RUBIN: And do you recall if Mr. Stretars  
13 asked you to assess whether California American Water  
14 was violating Condition 2 of Order 95-10?

15 MR. COLLINS: I don't recall.

16 MR. RUBIN: After Mr. Stretars directed you to  
17 evaluate the responsibilities of California American  
18 Water under Order 95-10, did you evaluate the quarterly  
19 compliance reports filed by California American Water  
20 pursuant to Order 95-10?

21 MR. COLLINS: Yes, the fourth quarter reports  
22 that had the tallies for the year.

23 MR. RUBIN: Did you refer -- did you review  
24 any of the quarterly reports that were filed prior to  
25 the fourth quarter reports?

1 MR. COLLINS: In general, yes.

2 MR. RUBIN: After Mr. Stretars directed you to  
3 evaluate the responsibilities of California American  
4 Water under Order 95-10, did you evaluate the responses  
5 provided by the Division of Water Rights to California  
6 American Water's compliance reports?

7 MR. COLLINS: At the time I was reviewing  
8 those, no.

9 MR. RUBIN: At any time, have you reviewed the  
10 responses provided by the Division of Water Rights to  
11 the compliance report filed by California American  
12 Water?

13 MR. COLLINS: I did see them maybe a month  
14 ago.

15 MR. RUBIN: So at no time prior to California  
16 American Water requesting the hearing in this  
17 proceeding did you review the responses provided by the  
18 Division of Water Rights to the compliance reports  
19 filed by California American Water?

20 MR. COLLINS: No, not to my knowledge.

21 MR. RUBIN: At this point, though, you are  
22 aware that the Division of Water Rights provided a  
23 response to quarterly reports filed by California  
24 American Water; is that correct?

25 MR. COLLINS: Yes.



1           MR. RUBIN:  And you're aware that the  
2 responses provided by the Division of Water Rights were  
3 sent to California American Water for a period roughly  
4 from 1995 to 2007?

5           MR. COLLINS:  To the best of my knowledge.

6           MR. RUBIN:  Are you familiar with a response  
7 provided by the Division of Water Rights to a quarterly  
8 report filed by California American Water for the  
9 1999-2000 water year?

10          MR. COLLINS:  No.

11          MR. RUBIN:  Are you familiar with a response  
12 provided by the Division of Water Rights to a quarterly  
13 report filed by California American Water for the  
14 2001-2002 water year?

15          MR. SATO:  Objection.  It's vague and  
16 ambiguous.  Are you talking about oral, written, any  
17 type of response?

18          CO-HEARING OFFICER BAGGETT:  Sustained.  
19 Clarify.

20          MR. RUBIN:  Did you review any written  
21 response provided by the Division of Water Rights to a  
22 quarterly report filed by California American Water for  
23 the 2001-2002 water year?

24          MR. COLLINS:  No.

25          MR. RUBIN:  Did you review any written

1 response provided by the Division of Water Rights to  
2 quarterly reports filed by California American Water  
3 for the 2002-2003 water year?

4 MR. COLLINS: Can you restate, please.

5 MR. RUBIN: Did you review a written response  
6 provided by the Division of Water Rights to quarterly  
7 reports filed by California American Water for the  
8 2002-2003 water year?

9 MR. COLLINS: No.

10 MR. RUBIN: Are you familiar with the  
11 January 14, 2004 letter that was sent by Ms. Victoria  
12 Whitney to Fran Farina of the Monterey Peninsula Water  
13 Management District?

14 MR. COLLINS: I have seen that, but I'm not  
15 familiar with the details.

16 MR. RUBIN: Are you -- do you recall if you  
17 referred to the letter dated January 14, 2004 that I  
18 previously referred to prior to February 4th, 2008, the  
19 date on which California American Water requested the  
20 hearing for this proceeding?

21 MR. COLLINS: No.

22 MR. RUBIN: Are you familiar with a January 4,  
23 2005 letter from Ms. Kathy -- Katherine Mrowka to  
24 Mr. Steven Leonard?

25 MR. COLLINS: No.

1           MR. RUBIN: Are you aware that not a single  
2 response -- excuse me; strike that.

3           Are you aware that not a single written  
4 response provided by the Division of Water Rights to  
5 the quarterly compliance reports filed by California  
6 American Water warned California American Water that it  
7 might be out of compliance with Order 95-10?

8           MR. COLLINS: No, I did not.

9           MR. RUBIN: Are you aware that not a single  
10 written response provided by the Division of Water  
11 Rights to the quarterly reports filed by California  
12 American Water warned California American Water that  
13 even if it was in compliance with Order 95-10 it could  
14 still be subject to an enforcement action if it diverts  
15 more than 3,376 acre feet of water from the Carmel  
16 River?

17           MR. COLLINS: No.

18           MR. RUBIN: After Mr. Stretars directed you to  
19 evaluate the responsibilities of California American  
20 Water under Order 95-10, did you evaluate any  
21 memorandum prepared by the State Water Resources  
22 Control Board staff related to Order 95-10?

23           MR. COLLINS: No, not to my knowledge.

24           MR. RUBIN: Are you aware that after the 1997  
25 water year not a single memorandum prepared by the

1 Division of Water Rights explained that California  
2 American Water might be out of compliance with  
3 Condition 2 of Order 95-10?

4 MR. SATO: I've kind of been letting Mr. Rubin  
5 go on here, but I think I will object to the way that  
6 he's asking these questions as if he -- he's providing  
7 testimony, and he seems to be asking Mr. Collins to  
8 verify that testimony. I think that those kind of  
9 questions are improper.

10 CO-HEARING OFFICER BAGGETT: I would, I guess,  
11 overrule in part. I would just ask counsel to get to  
12 the point. I think you made your point. I think we  
13 understand, and you've got a lot on the record.

14 Can you summarize? I know you're going to ask  
15 for an extension of time; your ten minutes are up. So  
16 can you give us some reason to keep going with this  
17 witness on a similar line of questioning?

18 MR. RUBIN: I think it's important to  
19 understand what was evaluated and the history of this  
20 case over the 13 years since Order 95-10 was issued. A  
21 principal point that we're --

22 CO-HEARING OFFICER WOLFF: That's certainly  
23 true, but why can't you present that in your case  
24 rather than doing it through cross-examination?

25 MR. RUBIN: Our case is founded on the

1 principal that Order 95-10 -- excuse me.

2           The issue in this case is whether California  
3 American Water has violated Condition 2 of Order 95-10.  
4 Our evidence is directed towards that issue.

5           The Prosecution Team has taken a different  
6 perspective on this case that's very much beyond our  
7 position; and therefore, the evidence that I'm trying  
8 to elicit through cross-examination gets to the  
9 foundation of the Prosecution Team's case, not  
10 California American Water's case.

11           CO-HEARING OFFICER WOLFF: Well, I think where  
12 I'm losing you slightly -- I do understand your point  
13 in general but I'm losing you slightly.

14           There's a difference between noting that, you  
15 know, no letter said something or other, which you can  
16 introduce yourself, and getting the witness to state he  
17 didn't review such letters.

18           So if you want to get on the record that the  
19 witness didn't review this evidence and et cetera, of  
20 course you need to do that through cross-examination.  
21 But you don't need to present the existence of the  
22 letters through the cross-examination.

23           MR. RUBIN: Unfortunately, we're put in the  
24 position where the Prosecution Team has asserted a  
25 claim, and relative to that claim is all of the

1 documents that are part of this record.

2 And what I'm trying to establish, or determine  
3 whether it's valid or not, is whether there's documents  
4 in the record that were prepared that address  
5 California American Water's compliance or lack of  
6 compliance with Condition 2.

7 CO-HEARING OFFICER WOLFF: I understand, but  
8 can't you submit those documents?

9 MR. RUBIN: If they're not there, I can't.

10 I've been asking in terms of his review of  
11 documents, letters, memorandum, et cetera, and whether  
12 in his review of the files if he found anything that  
13 suggested California American Water's out of compliance  
14 with Condition 2; and I assume that he hasn't because  
15 if he did the Prosecution Team would advance that as  
16 part of their case.

17 CO-HEARING OFFICER WOLFF: Perhaps you could  
18 just ask the general question, has he found anything to  
19 indicate --

20 CO-HEARING OFFICER BAGGETT: I appreciate that  
21 also, but I'm just asking if you could be a little more  
22 expeditious in getting there.

23 MR. SATO: I would suggest, so I don't have to  
24 keep objecting, then, Mr. Rubin doesn't need to  
25 characterize the letters in any specific way because

1 that's what I object to.

2 If he wants to ask about the date of the  
3 letter or some other -- some neutral identifying  
4 feature as to whether Mr. Collins has reviewed it,  
5 that's fine. But I will object to the characterization  
6 Mr. Rubin has been making.

7 CO-HEARING OFFICER BAGGETT: Sustained.

8 MR. SATO: Especially since the document is in  
9 front of us.

10 CO-HEARING OFFICER BAGGETT: I would sustain,  
11 so you can --

12 MR. RUBIN: After Mr. Stretars directed you to  
13 evaluate the responsibilities of California American  
14 Water under Order 95-10, did you consider the legal  
15 mandates California American Water must comply with as  
16 an entity that's regulated by the California Public  
17 Utilities Commission?

18 MR. JACKSON: For the record, Michael Jackson  
19 for Carmel River Steelhead Association.

20 This is -- I can understand the line of  
21 questioning. But the question is whether or not this  
22 has anything to do with the Condition 2. If everything  
23 in the record, everything in 95-10, is going to be  
24 relevant to Condition 2, then all of us are going to be  
25 asking questions about, for instance, the findings in

1 95-10 and whether or not they have been updated in  
2 terms of this review.

3 Or are we limited to Condition 2 in 95-10?

4 CO-HEARING OFFICER BAGGETT: Clearly he's just  
5 asking what in the record this particular witness  
6 relied upon in making his conclusions in his testimony.  
7 It's very narrow. I am just requesting that, for the  
8 last time, that we get to the point.

9 I think we understand your line of  
10 questioning. I understand why you're asking that line  
11 of questioning. But can you --

12 MR. RUBIN: I have three more questions  
13 remaining for Mr. Collins.

14 CO-HEARING OFFICER BAGGETT: All right. Thank  
15 you.

16 MR. RUBIN: Do you want me to repeat the  
17 question I just asked?

18 MR. COLLINS: Yes, please.

19 MR. RUBIN: Mr. Collins, after Mr. Stretars  
20 directed you to evaluate the responsibilities of  
21 California American Water under Order 95-10, did you  
22 consider the legal mandates California American Water  
23 must comply with as an entity regulated by the  
24 California Public Utilities Commission?

25 MR. SATO: Objection; lack of foundation. I



1 don't think this witness knows necessarily what  
2 would --

3 CO-HEARING OFFICER BAGGETT: Sustained.  
4 You're asking him for a legal conclusion.

5 MR. RUBIN: Mr. Collins, are you aware that  
6 California American Water is an entity that's regulated  
7 by the California Public Utilities Commission?

8 MR. COLLINS: Yes.

9 MR. JACKSON: Again, Mr. Baggett, I'm going to  
10 this line of questioning. If the relevance of the  
11 Public Utilities Commission in regard to Condition 2 is  
12 going to be allowed, then basically the Public Trust,  
13 the 5937, all of the other actions that would be  
14 relevant to some sort of balancing are opened up.

15 The Public Utilities Commission is not  
16 mentioned in Condition 2, nor is it part of the -- part  
17 of 95-10.

18 CO-HEARING OFFICER BAGGETT: I would overrule.  
19 It's an exhibit. A letter to the PUC is an exhibit by  
20 the Prosecution Team, so I think it's fair for counsel  
21 to ask questions regarding why that exhibit's in there.  
22 They considered it relevant and responded to that  
23 letter from Mr. Pettit, as I recall, so I think it's a  
24 fair line of questioning.

25 MR. JACKSON: So we can cross-examine on every

1 letter in the exhibits?

2 CO-HEARING OFFICER BAGGETT: If it's relevant.

3 MR. JACKSON: Okay.

4 MR. RUBIN: After Mr. Stretars directed you to  
5 evaluate the responsibilities of California American  
6 Water under 95-10, did you consider any mandate that  
7 California American Water must comply with as an entity  
8 regulated by the Public Utilities Commission?

9 MR. SATO: Same objection; vague and ambiguous  
10 as to mandate.

11 CO-HEARING OFFICER BAGGETT: Sustained.

12 MR. RUBIN: After Mr. Stretars directed you to  
13 evaluate the responsibilities of California American  
14 Water under Order 95-10, did you consider any actions  
15 California American Water must take as an entity  
16 regulated by the California Public Utilities  
17 Commission?

18 MR. SATO: Lack of foundation; if he knows?

19 CO-HEARING OFFICER BAGGETT: Can you lay a  
20 foundation?

21 MR. RUBIN: Mr. Collins indicated that he  
22 understood that California American Water was an entity  
23 that is regulated by the California Public Utilities  
24 Commission. I'm asking him -- the foundation has  
25 already been laid.

1 CO-HEARING OFFICER BAGGETT: Can you restate  
2 the question?

3 MR. RUBIN: After Mr. Stretars directed you to  
4 evaluate the responsibilities of California American  
5 Water under Order 95-10, did you consider any action  
6 California American Water must comply with as an entity  
7 regulated by the California Public Utilities  
8 Commission?

9 MR. SATO: If you know.

10 MR. COLLINS: No.

11 MR. RUBIN: After Mr. Stretars directed you to  
12 evaluate the responsibilities of California American  
13 Water under Order 95-10, did you consider any actions  
14 state or federal agencies must take in order to process  
15 an application filed by California American Water for a  
16 project that would provide people with an alternative  
17 water supply?

18 MR. COLLINS: No.

19 CO-HEARING OFFICER BAGGETT: That is your  
20 third question.

21 MR. RUBIN: Well, I had to repeat my question  
22 four times.

23 CO-HEARING OFFICER BAGGETT: Okay.

24 (Laughter)

25 MR. RUBIN: I have one more question.

1 CO-HEARING OFFICER BAGGETT: Okay.

2 MR. RUBIN: After Mr. Stretars directed you to  
3 evaluate the responsibilities of California American  
4 Water, did you discuss Order 95-10 with any State Water  
5 Resources Control Board staff members?

6 MR. COLLINS: None that were on the  
7 Prosecution Team, no.

8 MR. RUBIN: Did you -- my question was: After  
9 Mr. Stretars directed you to evaluate the  
10 responsibilities of California American Water under  
11 Order 95-10, did you discuss Order 95-10 with any State  
12 Water Resources Control Board staff?

13 MR. COLLINS: No.

14 MR. RUBIN: Thank you.

15 CO-HEARING OFFICER WOLFF: Thank you for  
16 ending with a highly relevant question. Appreciate it.

17 MR. RUBIN: Turning to --

18 STAFF COUNSEL TAYLOR: The answer confuses me.  
19 I'd like to clarify. Did you discuss this with your  
20 supervision management in the Division of Water Rights?

21 MR. COLLINS: Yes. That I did. I didn't  
22 fully understand the question, thank you.

23 MR. RUBIN: Can you tell me who you discussed  
24 responsibilities of California American Water under  
25 Order 95-10?

1 MR. SATO: Objection in terms of vague as to  
2 time.

3 CO-HEARING OFFICER BAGGETT: Sustain. Can you  
4 put it in a time frame?

5 MR. RUBIN: After Mr. Stretars directed you to  
6 evaluate the responsibilities of California American  
7 Water under Order 95-10, with whom within the State  
8 Water Resources Control Board staff did you discuss  
9 your assignment?

10 MR. COLLINS: My supervisor, Mark Stretars;  
11 the unit supervisor, John O'Hagan; and Jim Kassel.

12 MR. RUBIN: That's everybody?

13 MR. COLLINS: Yes.

14 MR. RUBIN: Thank you.

15 I'm going to turn now to Mr. Mark Stretars. I  
16 have just a few questions for him.

17 CO-HEARING OFFICER BAGGETT: If there's some  
18 way you can -- if it's a similar line of questioning,  
19 if you can summarize that, it would be great.

20 MR. RUBIN: I apologize. I'm trying to go as  
21 quickly as I can. I also need to balance between  
22 getting some -- trying to elicit testimony on  
23 substantive issues as well as addressing some of the  
24 due process issues that we're concerned with.

25 CO-HEARING OFFICER BAGGETT: I appreciate

1 that.

2 MR. RUBIN: You directed Mr. John Collins to  
3 review the diversion and use of water made by  
4 California American Water from the Carmel River; is  
5 that correct?

6 MR. STRETARS: Yes, I did.

7 MR. RUBIN: When did you provide Mr. Collins  
8 with that direction?

9 MR. STRETARS: Mid October 2007.

10 MR. RUBIN: You provided direction to  
11 Mr. Collins to review the diversion and use of water  
12 made by California American Water from the Carmel River  
13 after you had some communications with management from  
14 the Division of Water Rights, correct?

15 MR. STRETARS: That's correct.

16 MR. RUBIN: Prior to providing direction to  
17 Mr. Collins, with whom from the management at the  
18 Division of Water Rights did you discuss the diversion  
19 and use of water made by California American Water from  
20 the Carmel River?

21 MR. STRETARS: My supervisor, Mr. John  
22 O'Hagan.

23 MR. RUBIN: Did you discuss the issues with  
24 anyone else?

25 MR. STRETARS: Not to my knowledge.

1           MR. RUBIN:  When you directed Mr. Collins to  
2 review the diversion and use of water made by  
3 California American Water from the Carmel River, did  
4 you ask him to do anything other than review the water  
5 rights files associated with license application 1167A,  
6 complaint file 27-01, permit application 27614, and  
7 State Water Resources Control Board decision 1632?

8           MR. STRETARS:  Those are the primary files  
9 that I asked him to review.  If there were others  
10 associated with them also, but those are the primaries.

11          MR. RUBIN:  In PT-24, your written  
12 testimony --

13          MR. STRETARS:  Yes.

14          MR. RUBIN:  -- you explain the purpose of  
15 Mr. Collins' review was to answer two specific  
16 questions.  Do you recall that?

17          MR. STRETARS:  No, I don't, I'm sorry.  I got  
18 up this morning and walked out without my own copy of  
19 my testimony, so I don't have that; but I did ask him  
20 two specific questions which are on the record.

21          MR. RUBIN:  Mr. Sato, do you have a copy?  If  
22 not, my associate -- let me ask my question again.

23          MR. STRETARS:  Yes.

24          MR. RUBIN:  In Exhibit PT-24, you explain that  
25 the purpose of Mr. Collins' review is to answer two

1 specific issues; is that correct?

2 MR. STRETARS: That's correct.

3 MR. RUBIN: The issues you identified in  
4 Exhibit PT-24 that Mr. Collins was to answer are: Is  
5 California American Water illegally diverting water  
6 from the Carmel River, and is California American Water  
7 violating Condition 2 of Order 95-10. Is that correct?

8 MR. STRETARS: That's correct.

9 MR. RUBIN: When did you present those issues  
10 to Mr. Collins?

11 MR. STRETARS: Mid October, as I reported  
12 earlier.

13 MR. RUBIN: And you explain that under your  
14 guidance Mr. Collins prepared a proposal of enforcement  
15 action for management consideration; is that correct?

16 MR. STRETARS: That's correct.

17 MR. RUBIN: Who in management reviewed that  
18 proposal?

19 MR. STRETARS: Mr. John O'Hagan and Mr. Jim  
20 Kassel.

21 MR. RUBIN: Did any staff from the Division of  
22 Water Rights review the proposal that was prepared by  
23 Mr. Collins?

24 MR. STRETARS: No. Those are the only ones  
25 other than -- no other than Mr. John Collins who



1 prepared it. No other staff.

2 MR. RUBIN: You explain in Exhibit PT-24 that  
3 a decision was made to proceed with an enforcement  
4 action; is that correct?

5 MR. STRETARS: That is correct.

6 MR. RUBIN: Who made that decision?

7 MR. STRETARS: That was made by the  
8 Prosecution Team which was made up of John Collins,  
9 myself, Mr. John O'Hagan and Mr. Jim Kassel. And  
10 Ms. Yvonne West who was at the time the attorney, now  
11 on maternity leave.

12 MR. RUBIN: And do you know when that decision  
13 was made?

14 MR. STRETARS: That decision was made mid  
15 November of 2007.

16 MR. RUBIN: Thank you. I have no further  
17 questions.

18 Good morning, Ms. Mrowka. I do have some  
19 questions for you. In your written testimony, Exhibit  
20 PT-2, you provide a background and history leading up  
21 to Order 95-10; is that correct?

22 MS. MROWKA: That is correct.

23 MR. RUBIN: Your written testimony, Exhibit  
24 PT-2, also provides a description of Order 95-10; is  
25 that correct?

1 MS. MROWKA: It provides some materials  
2 regarding the order.

3 MR. RUBIN: You also explain that you were  
4 responsible for assisting the State Water Resources  
5 Control Board during the proceeding that led to the  
6 issuance of Order 95-10, correct?

7 MS. MROWKA: Correct.

8 MR. RUBIN: As a result of the proceeding that  
9 led to the issuance of 95-10, the State Water Resources  
10 Control Board first issued a draft order, correct?

11 MS. MROWKA: Standard procedure is to  
12 circulate a draft order for consideration at a State  
13 Water Board meeting for adoption purposes.

14 MR. RUBIN: Do you recall if the State Water  
15 Resources Control Board issued a draft order prior to  
16 issuing Order 95-10?

17 MS. MROWKA: At that time period, that was  
18 standard procedure. I don't recall specifically,  
19 though.

20 MR. RUBIN: I've asked my associate, Jason  
21 Rosenberg, to provide you with a copy of a draft order.  
22 Let's see if that refreshes your recollection.

23 MS. MROWKA: This does have a sidebar  
24 indicating draft.

25 MR. RUBIN: Does that refresh your

1 recollection on whether the State Water Resources  
2 Control Board issued a draft order prior to issuing  
3 Order 95-10?

4 MS. MROWKA: It appears that it did issue one  
5 on June 22nd, 1995.

6 MR. RUBIN: And do you recall that happening  
7 at this point?

8 MS. MROWKA: It was sent at that time.

9 MR. RUBIN: I'd like to have the draft order  
10 marked for identification purposes as exhibit CAW next  
11 in order which I believe is 33.

12 CO-HEARING OFFICER BAGGETT: Thank you.

13 (Exhibit CAW-33 was marked for  
14 identification.)

15 MR. RUBIN: Ms. Mrowka, were you responsible  
16 for assisting with the preparation of the final order,  
17 Order 95-10?

18 MS. MROWKA: Yes, I was.

19 MR. RUBIN: In fact, Ms. Mrowka, you have been  
20 the principal staff person within the Division of Water  
21 Rights responsible for evaluating California American  
22 Water's compliance with Order 95-10, correct?

23 MS. MROWKA: Yes.

24 MR. RUBIN: Did any of the staff from the  
25 Division of Water Rights consult with you prior to

1 issuance of the draft cease-and-desist order against  
2 California American Water that's at issue in this  
3 proceeding?

4 MS. MROWKA: No.

5 MR. RUBIN: Ms. Mrowka, were you aware prior  
6 to January 15, 2008 that the Division was considering  
7 the issuance of the draft cease-and-desist order  
8 against California American Water?

9 MS. MROWKA: I'm sorry. I'm very poor on  
10 remembering dates unless they're in written documents.  
11 I was not involved in any fashion in the drafting of  
12 that order; that I do know.

13 MR. RUBIN: You don't recall?

14 MS. MROWKA: I couldn't say with any  
15 certainty.

16 MR. RUBIN: Ms. Mrowka, do you recall having a  
17 meeting with California American Water on December 13,  
18 2007?

19 MS. MROWKA: I believe I did, yes.

20 MR. RUBIN: And at that meeting you were not  
21 aware -- I'm sorry?

22 MS. MROWKA: Okay. Thank you. I had to  
23 put -- I'm sorry.

24 MR. RUBIN: You have no changes to your  
25 answer?

1 MS. MROWKA: No, I do not.

2 MR. RUBIN: At the December 13, 2007, you  
3 don't recall being aware that the Division of Water  
4 Rights was considering the issuance of a draft  
5 cease-and-desist order against California American  
6 Water?

7 MS. MROWKA: Now that -- now I recall that I  
8 believe there was a discussion by the Division Chief  
9 regarding that topic.

10 MR. RUBIN: And the Division Chief at that  
11 time was Ms. Victoria Whitney?

12 MS. MROWKA: Yes.

13 MR. RUBIN: Who else was in attendance at that  
14 meeting?

15 MS. MROWKA: Do you happen to have an extra  
16 itinerary that I could refresh my memory with?

17 MR. RUBIN: No.

18 MS. MROWKA: Okay. Boy. Do you have happen  
19 to have a list of --

20 MR. RUBIN: Ms. Mrowka, if you don't recall --

21 MS. MROWKA: I don't recall. I'm sorry. I  
22 just don't.

23 CO-HEARING OFFICER BAGGETT: You've answered  
24 the question.

25 MR. RUBIN: Do you recall if an attorney for

1 the Division of Water Rights was present at the meeting  
2 December 13th, 2007?

3 MS. MROWKA: Since I'm having difficulty  
4 recalling who was there, I just don't recall.

5 MR. RUBIN: Thank you. Did any of the staff  
6 from the Office of Enforcement consult with you after  
7 the issuance of the draft cease-and-desist order  
8 against California American Water that's at issue in  
9 this proceeding?

10 MR. SATO: Objection, use of the term consult.  
11 Vague and ambiguous.

12 CO-HEARING OFFICER WOLFF: Could you --

13 STAFF COUNSEL TAYLOR: Vague and ambiguous as  
14 to the term consult.

15 CO-HEARING OFFICER BAGGETT: Clarify.

16 MR. RUBIN: Did anyone from the staff of the  
17 Office of Enforcement discuss with you the draft of  
18 the -- excuse me; strike that.

19 Did anyone from the staff of the Office of  
20 Enforcement discuss with you the draft cease-and-desist  
21 order that was issued against California American Water  
22 that's at issue in this proceeding?

23 MS. MROWKA: They discussed the draft  
24 cease-and-desist order only after they asked if I would  
25 appear as a witness.

1           MR. RUBIN: And when did they ask that you  
2 appear as a witness?

3           MS. MROWKA: Shortly before the Notices of  
4 Intent to Appear were due.

5           MR. RUBIN: Sometime after February 4th, 2008  
6 is when the Office of Enforcement discussed with you  
7 the draft cease-and-desist order that's at issue in  
8 this proceeding; is that correct?

9           MS. MROWKA: I'm sorry. Again, I don't know  
10 the specific date.

11           MR. RUBIN: The staff from the Office of  
12 Enforcement discussed with you the draft  
13 cease-and-desist order against California American  
14 Water that's at issue in this proceeding after it was  
15 issued to California American Water?

16           MS. MROWKA: That's correct.

17           MR. RUBIN: Did you discuss with the Office of  
18 Enforcement your testimony that's been submitted as  
19 PT-2?

20           MS. MROWKA: Yes, I did.

21           MR. RUBIN: Did anyone from the Office of  
22 Enforcement assist you with preparation of your written  
23 testimony, Exhibit PT-2?

24           MS. MROWKA: Standard editing.

25           MR. RUBIN: Did anyone from the staff of the

1 Office of Enforcement provide you direction on the  
2 subjects that should be covered in your written  
3 testimony, Exhibit PT-2?

4 MS. MROWKA: I submitted my proposed draft  
5 testimony to them for review and received standard  
6 editorial comments.

7 MR. RUBIN: Prior to you submitting to the  
8 Office of Enforcement a draft written testimony for  
9 this proceeding, did anyone from the Office of  
10 Enforcement give you direction on the subject matters  
11 that should be covered in your written testimony?

12 MS. MROWKA: I don't recall having received  
13 such direction.

14 MR. RUBIN: Thank you.

15 Turning to some specific questions regarding  
16 Order 95-10, is it your opinion that Order 95-10  
17 prohibits California American Water from diverting more  
18 than 3,376 acre feet of water from the Carmel River?

19 MS. MROWKA: Yes.

20 MR. RUBIN: Is your opinion based upon the  
21 language in Order 95-10?

22 MS. MROWKA: Yes.

23 MR. RUBIN: Order 95-10 finds that California  
24 American Water holds water rights which entitle it to  
25 divert 3,376 acre feet of water from the Carmel River;



1 is that correct?

2 MS. MROWKA: Yes.

3 MR. RUBIN: The water rights of California  
4 American Water are based in part on rights under  
5 license 11866; is that correct?

6 MS. MROWKA: Yes.

7 MR. RUBIN: In Order 95-10, the State Water  
8 Resources Control Board found that the maximum  
9 withdrawal available under license 11866 was 2,950 acre  
10 feet, correct?

11 MS. MROWKA: Correct.

12 MR. RUBIN: The rights under license 11866 are  
13 for 3,030 acre feet per year, correct?

14 MS. MROWKA: Correct.

15 MR. RUBIN: Thank you. Order --

16 MS. MROWKA: I believe there is a footnote in  
17 the order regarding siltation, though, in that  
18 facility.

19 MR. RUBIN: Thank you.

20 Order 95-10 finds that California American  
21 Water was diverting in excess of the quantity available  
22 under its water rights, correct?

23 MS. MROWKA: Correct.

24 MR. RUBIN: In part as a result of those  
25 findings, the State Water Resources Control Board

1 ordered California American Water to cease and desist  
2 from diverting water from the Carmel River; is that  
3 correct?

4 MR. JACKSON: Mr. Baggett, I'm going to  
5 interpose an objection to this line of questioning.  
6 This is not about Condition 2. This is about 95-10 and  
7 what it orders and what it finds.

8 And if the findings are open for the purpose  
9 of the hearing, and if the other conditions are open  
10 for the purpose of the hearing, then we've got -- I  
11 mean I think they should be, actually, but we ought to  
12 have rules that fit with both sides.

13 CO-HEARING OFFICER BAGGETT: Your response?

14 MR. RUBIN: I'm raising these questions  
15 leading to issues -- I think they are relevant -- to  
16 how the Board should interpret Condition 2. So they  
17 are relevant to the issue that is before this -- the  
18 Hearing Officers.

19 CO-HEARING OFFICER BAGGETT: I would agree.  
20 We have the prosecution's witness who is the expert on  
21 Condition 2 from staff perspective, which I think you  
22 would agree with also.

23 MR. JACKSON: I certainly agree that that --

24 CO-HEARING OFFICER BAGGETT: So I think the  
25 foundation and the line of questions is appropriate if

1 we are talking about whether there is a violation, how  
2 many acre feet. I mean, it's laying a foundation. I  
3 wish we could proceed quicker with the foundation, but  
4 I'll overrule. Try to expedite it.

5 MR. JACKSON: Before any further  
6 interruptions, is it clear that as foundational items  
7 we can use the findings and the rest of the conditions  
8 in order to prove that there's been a violation of  
9 Condition 2?

10 CO-HEARING OFFICER BAGGETT: The issue he's  
11 laying here is not all the findings and at all  
12 conditions. He's going to, I think, a much narrower  
13 issue than that.

14 And we will deal with objections which will  
15 come up, I'm sure, under your case-in-chief when we get  
16 there.

17 CO-HEARING OFFICER WOLFF: So it's clear,  
18 Mr. Rubin, are your questions directed at establishing  
19 the various quantities involved ultimately above and  
20 below various thresholds that are relevant under  
21 Condition 2?

22 MR. RUBIN: I think it's important to  
23 understand what the order says, what has occurred over  
24 the 13 years when you are interpreting what Condition 2  
25 requires.

1           And I direct the Hearing Officers and  
2 Mr. Jackson to a May 29, 2008 ruling in this case which  
3 does indicate that the provisions of Order 95-10 other  
4 than Condition 2 may be relevant to prove whether  
5 California American Water is violating Condition 2.  
6 That's exactly what my questions are getting at.

7           CO-HEARING OFFICER BAGGETT: Very narrow.  
8 They're not expanding the conditions. Let's continue.

9           MR. RUBIN: Thank you.

10           Ms. Mrowka you concede, do you not, that Order  
11 95-10 ordered California American Water to cease and  
12 desist from diverting in excess of 14,106 acre feet per  
13 year?

14           MS. MROWKA: Yes.

15           MR. RUBIN: Order 95-10 also establishes a  
16 diversion goal for California American Water, correct?

17           MS. MROWKA: Correct.

18           MR. RUBIN: For example, in the 1996 water  
19 year, Order 95-10 imposed a diversion goal on  
20 California American Water of 11,990 acre feet, correct?

21           MS. MROWKA: I believe so.

22           MR. RUBIN: As another example, in the 1997  
23 water year, Order 95-10 imposed a diversion goal on  
24 California American Water of 11,285 acre feet, correct?

25           MS. MROWKA: Yes.

1           MR. RUBIN: Ms. Mrowka, do you recall in 1997  
2 a request made by California American Water that  
3 certain losses it experienced not be accounted for  
4 towards the total water diverted from the Carmel River?

5           MS. MROWKA: Yes.

6           MR. RUBIN: The request made by California  
7 American Water asked that the State Water Resources  
8 Control Board not count towards the 11,285 diversion  
9 goal 23 acre feet of California American Water  
10 diversions, correct?

11           MS. MROWKA: Yes. I believe, if I remember  
12 correctly, there was some emergency situation.

13           MR. RUBIN: Thank you. Do you recall if the  
14 State Water Resources Control Board responded to the  
15 request made by California American Water?

16           MS. MROWKA: I believe we did.

17           MR. RUBIN: Did Mr. Anton on behalf of the  
18 Division of Water Rights provide that response?

19           MS. MROWKA: I believe so.

20           MR. RUBIN: In the response, did the Division  
21 of Water Rights explain to California American Water  
22 that it does not have the authority to divert more than  
23 3,376 acre feet?

24           MS. MROWKA: I don't recall without seeing the  
25 relevant correspondence.

1           MR. RUBIN: I ask my associate, Mr. Rosenberg,  
2 to provide Ms. Mrowka with the March 25, 1998 letter.  
3 I also ask that the letter be marked as Exhibit CAW-34,  
4 which I believe is next in order.

5           (Exhibit CAW-34 was marked for  
6 identification.)

7           MR. RUBIN: Ms. Mrowka, I'll ask you please to  
8 review the letter.

9           MS. MROWKA: Okay.

10          MR. RUBIN: Let me know when you've finished  
11 reviewing the letter.

12          MS. MROWKA: I have done so.

13          MR. RUBIN: Let me ask my question again now,  
14 Ms. Mrowka.

15          MR. JACKSON: Excuse me, Mr. Baggett. Can the  
16 rest of us have a copy of that exhibit?

17          MR. RUBIN: We have prepared copies of the  
18 document. I believe we made 25 copies. I hope that's  
19 sufficient.

20          Ms. Mrowka, what we've marked as Exhibit  
21 CAW-34 is a March 25, 1998 letter; is that correct?

22          MS. MROWKA: Yes.

23          MR. RUBIN: And Exhibit CAW-34 is the response  
24 that we were referring to; is that correct?

25

1 MS. MROWKA: Yes, it is.

2 MR. RUBIN: And in that response, Exhibit  
3 CAW-34, did the Division of Water Rights explain to  
4 California American Water that it does not have the  
5 authority to divert more than 3,376 acre feet?

6 MS. MROWKA: That number is not mentioned in  
7 this correspondence.

8 MR. RUBIN: In the response, did the Division  
9 of Water Rights explain that the 23-acre-foot loss at  
10 issue in the request represented .2 percent of the  
11 total annual diversion allowed by the State Water  
12 Resources Control Board pursuant to Order 95-10?

13 MS. MROWKA: That is the --

14 MR. SATO: Wait a minute. We're spending a  
15 lot of time here. The document speaks for itself. So  
16 it either is or isn't in the document. We're having  
17 Ms. Mrowka look at it and --

18 CO-HEARING OFFICER BAGGETT: Sustained.  
19 Sustained. Continue, counsel. How many more  
20 questions?

21 MR. RUBIN: A lot.

22 CO-HEARING OFFICER WOLFF: Mr. Rubin, if there  
23 are documents in the record, the documents are in the  
24 record; and Ms. Mrowka's opinions about them or whether  
25 she's read them may or may not be relevant, but simply

1 dredging through has she read them, I don't see the  
2 relevance of that. They're in the record.

3 MR. RUBIN: Ms. Mrowka, did Mr. Harry  
4 Schueller serve as the Division Chief after Mr. Anton  
5 served that capacity?

6 MS. MROWKA: Yes, he did.

7 MR. RUBIN: At the time Mr. Schueller was  
8 Division Chief, did the Division hold the position that  
9 Order 95-10 requires California American Water to cease  
10 and desist diverting more than 14,106 acre feet from  
11 the Carmel River?

12 MS. MROWKA: On --

13 MR. SATO: Asking her to testify as to the  
14 Division's position or just her understanding? Point  
15 of clarification.

16 CO-HEARING OFFICER BAGGETT: Can you clarify?

17 MR. RUBIN: Ms. Mrowka, is it your  
18 understanding -- do you -- excuse me; I'll restate the  
19 question.

20 Ms. Mrowka, at the time Mr. Schueller was  
21 Division Chief, are you aware of a position held by the  
22 Division regarding Order 95-10's requirements?

23 MS. MROWKA: I am aware of the order  
24 requirements, and that was the State Board's position.

25 MR. RUBIN: Are you aware of any



1 correspondence that the State Water Resources Control  
2 Board, Division of Water Rights issued during the time  
3 Mr. Schueller was Division Chief which expressed a view  
4 on the requirements of Order 95-10?

5 MS. MROWKA: It would help if you would  
6 provide information regarding the specific  
7 correspondence.

8 MR. RUBIN: At the time Mr. Schueller was  
9 Division Chief, were you aware that the Division held a  
10 position that Order 95-10 requires California American  
11 Water to cease and desist diverting more than  
12 14,106 acre feet from the Carmel River?

13 MR. SATO: I guess I'll just object the way  
14 the question is phrased, stating as fact and asking  
15 Ms. Mrowka whether she knows --

16 CO-HEARING OFFICER BAGGETT: Sustained.

17 MR. SATO: -- it's true.

18 MR. RUBIN: Ms. Mrowka, do you know if the  
19 Division held a position that Order 95-10 requires  
20 California American Water to cease and desist diverting  
21 more than 14,106 acre feet from the Carmel River at the  
22 time Mr. Schueller was Division Chief?

23 MS. MROWKA: At the time Mr. Schueller was  
24 Division Chief, the water conservation goals of the  
25 order were already in place, and that would have

1 lowered the number.

2 MR. RUBIN: I could re-ask my question, or if  
3 we could instruct the witness to respond to the  
4 question that I asked?

5 CO-HEARING OFFICER BAGGETT: Re-ask the  
6 question.

7 MR. RUBIN: Ms. Mrowka, are you aware of  
8 whether the Division held the position that Order 95-10  
9 requires California American Water to cease and desist  
10 diverting more than 14,106 acre feet from the Carmel  
11 River at the time Mr. Schueller was the Division Chief?

12 MS. MROWKA: I am aware that the Division  
13 issued the administrative liability order that went to  
14 the 3,376 acre foot number. The 14,106 number, I don't  
15 know about that number.

16 MR. RUBIN: I've asked my associate to provide  
17 you with a copy of an October 29, 1999 memorandum  
18 prepared by Mr. Schueller. Ms. Mrowka -- I'd like to  
19 have this memorandum marked as Exhibit CAW-35.

20 (Exhibit CAW-35 was marked for  
21 identification.)

22 Ms. Mrowka, in Exhibit CAW-35 which is an  
23 October 26, 19 --

24 MR. SATO: Just before you answer the  
25 question: The Prosecution Team is reserving the right

1 to object to all of the exhibits that are being  
2 introduced right now by Mr. Rubin.

3 CO-HEARING OFFICER BAGGETT: You'll have an  
4 opportunity to object when the --

5 MR. SATO: I just want to make it clear we're  
6 reserving our objection.

7 CO-HEARING OFFICER BAGGETT: Noted.

8 MR. RUBIN: Ms. Mrowka, Exhibit CAW-35 is an  
9 October 29, 1999 memorandum prepared by Mr. Schueller;  
10 is that correct?

11 MS. MROWKA: Yes.

12 MR. RUBIN: I ask that you look six lines down  
13 in the first paragraph. Is it correct that  
14 Mr. Schueller wrote:

15 The order also requires California  
16 American Water to cease and desist from  
17 diverting more than 14,106 acre feet per  
18 annum from the Carmel River until  
19 unlawful diversions have ended.

20 MR. SATO: Objection; the document speaks for  
21 itself.

22 MR. RUBIN: I'm asking her these questions to  
23 see if I can refresh her recollection. My foundational  
24 question -- I was not going to use this document -- but  
25 was asking her what the perspective of the Division was

1 at this time, and I think Mr. Schueller has articulated  
2 that in this memorandum.

3 CO-HEARING OFFICER BAGGETT: Well, that speaks  
4 for itself. She stated she doesn't recall this  
5 document.

6 MR. RUBIN: Thank you.

7 CO-HEARING OFFICER BAGGETT: It's difficult to  
8 object to its admission, but we'll deal with that  
9 later.

10 MR. SATO: I'd still object to its admission  
11 since she doesn't recall the document.

12 MR. RUBIN: Ms. Mrowka, Condition 3(b) of  
13 Order 95-10 is a provision imposed on California  
14 American Water a conservation goal of 20 percent; is  
15 that correct?

16 MS. MROWKA: Yes.

17 MR. RUBIN: Ms. Mrowka, is it your testimony  
18 today that you believe that the Division of Water  
19 Rights has continued to inform California American  
20 Water that its diversions in excess of its legal rights  
21 have not been authorized by the State Water Resources  
22 Control Board?

23 MS. MROWKA: I'm not sure what you mean by  
24 continued to, what kind of frequency.

25 MR. RUBIN: Ms. Mrowka, I ask you turn to page

1 4 of Exhibit PT-2, which is your written testimony. In  
2 the second complete paragraph, you indicate that the  
3 Division has continued to inform Cal Am that its  
4 diversions in excess of its legal rights are  
5 unauthorized; is that correct?

6 MS. MROWKA: That's correct.

7 MR. RUBIN: And to support that statement, you  
8 have cited six documents; is that correct?

9 MS. MROWKA: Yes.

10 MR. RUBIN: And you indicate that you were the  
11 author of those six documents which have been marked as  
12 Exhibits PT-4 through PT-9?

13 MS. MROWKA: Yes.

14 MR. RUBIN: Ms. Mrowka, Exhibit PT-4 is a  
15 October 20th, 1997 letter that informs California  
16 American Water that the State Water Resources Control  
17 Board is issuing an administrative civil liability  
18 complaint; is that correct?

19 MS. MROWKA: Yes.

20 MR. RUBIN: In Exhibit PT-4, the State Water  
21 Resources Control Board explained that it was issuing  
22 the administrative civil liability complaint because  
23 California American Water had not complied with the  
24 intent of Order 95-10; is that correct?

25 MS. MROWKA: Yes.

1           MR. RUBIN: Exhibit PT-5 is an August 19, 1998  
2 letter that informs California American Water State  
3 Water Resources Control Board was issuing a new  
4 administrative civil liability complaint, correct?

5           MS. MROWKA: Yes.

6           MR. RUBIN: And on the first page of Exhibit  
7 PT-5, the State Water Resources Control Board explained  
8 again that it was issuing an administrative civil  
9 liability complaint because California American Water  
10 had not complied with the intent of Order 95-10,  
11 correct?

12          MS. MROWKA: Yes.

13          MR. RUBIN: Ms. Mrowka, I now have some  
14 questions about Exhibit PT-6. Is that a letter  
15 prepared by the Division of Water Rights that responds  
16 to a request by the Monterey Peninsula Water Management  
17 District?

18          MS. MROWKA: Yes.

19          MR. RUBIN: And in PT -- excuse me. In  
20 Exhibit PT-6, the request made by the Monterey  
21 Peninsula Water Management District asks for relief  
22 from the water conservation goal of 11,285 acre feet of  
23 diversions from the Carmel River system established by  
24 the State Water Resources Control Board Order 95-10,  
25 correct?

1 MS. MROWKA: Correct.

2 MR. RUBIN: In Exhibit PT-6, the Division of  
3 Water Rights explained that under the provisions of  
4 Order 95-10, California American Water could utilize  
5 11,285 acre feet of water from the Carmel River,  
6 correct?

7 MS. MROWKA: I'm reviewing the exhibit.  
8 That's correct.

9 MR. RUBIN: In Exhibit PT-6, there is a  
10 reference to a concern by the Monterey Peninsula Water  
11 Management District that the Public Utilities  
12 Commission may act upon a request by California  
13 American Water to institute mandatory rationing; is  
14 that correct?

15 MS. MROWKA: Yes.

16 MR. RUBIN: Do you know if a request was made  
17 by California American Water to institute mandatory  
18 rationing?

19 MS. MROWKA: I am uncertain if it was simply a  
20 question about mandatory rationing or to institute the  
21 rationing program.

22 MR. RUBIN: But a request was made related to  
23 mandatory rationing?

24 MS. MROWKA: Of something -- of some nature,  
25 yes.

1 MR. RUBIN: And do you know if the request was  
2 granted by the Public Utilities Commission?

3 MS. MROWKA: I don't know. I was not in  
4 attendance at the Public Utilities Commission meeting.

5 MR. RUBIN: To the best of your knowledge, in  
6 order for the mandatory rationing to occur, would the  
7 Public Utilities Commission have to grant the request?

8 MS. MROWKA: I believe so.

9 MR. RUBIN: Exhibit PT-7 is a June 29, 1998  
10 letter from the Division of Water Rights to California  
11 American Water, correct?

12 MS. MROWKA: I'm sorry; I missed the number.

13 MR. RUBIN: Exhibit PT-7 is the --

14 MS. MROWKA: Thank you. Could you ask the  
15 question again, please?

16 MR. RUBIN: It's a foundational question.  
17 Exhibit PT-7 is a June 29, 1998 letter from the  
18 Division of Water Rights to California American Water?

19 MS. MROWKA: Yes.

20 MR. RUBIN: There is no reference in Exhibit  
21 PT-7 to the word "unauthorized," is there?

22 MR. SATO: Objection; the document speaks for  
23 itself. Are you going to have her just read the entire  
24 document while we're sitting here, counsel?

25 CO-HEARING OFFICER BAGGETT: Sustained.



1           MR. RUBIN: Ms. Mrowka, in Exhibit PT-7, there  
2 are references to 11,285 acre feet diversions that are  
3 the goal of conservation measures, correct?

4           MS. MROWKA: True.

5           MR. RUBIN: There are also statements that  
6 appear to the Division -- excuse me.

7           There is also a statement that it appeared to  
8 the Division that California American Water was taking  
9 the necessary steps to comply with Order 95-10,  
10 correct?

11          MS. MROWKA: Correct.

12          MR. RUBIN: There is also a reference to a  
13 planned filing by California American Water that would  
14 seek authorization to impose a moratorium and  
15 rationing, correct?

16          MS. MROWKA: Yes.

17          MR. RUBIN: Do you know if California American  
18 Water submitted that filing?

19          MS. MROWKA: Even if I received a copy of it,  
20 I wouldn't know if they filed it with the PUC.

21          MR. RUBIN: Exhibit PT-8 is a prehearing  
22 conference statement --

23          MS. MROWKA: Yes.

24          MR. RUBIN: -- of the State Water Resources  
25 Control Board prepared for a California Public

1 Utilities Commission meeting, correct?

2 MS. MROWKA: Correct.

3 MR. RUBIN: Exhibit PT-8 states that the State  
4 Water Resources Control Board withheld action -- excuse  
5 me -- withheld enforcement action provided California  
6 American Water adhered to the terms of Order 95-10 and  
7 was diligently pursuing water rights for its  
8 diversions, correct?

9 MR. SATO: Objection; the document speaks for  
10 itself.

11 MR. RUBIN: Mr. Baggett, this is a line of  
12 questioning that I have a similar form later on in my  
13 questioning and particularly important in this  
14 circumstance because the written testimony and the oral  
15 testimony that Ms. Mrowka provided highlighted sections  
16 of these exhibits; and if -- I'm simply trying to  
17 provide the context in which some of her statements  
18 made either in her written testimony or in oral direct  
19 testimony were provided.

20 CO-HEARING OFFICER BAGGETT: I appreciate  
21 that. But if the document says so on its face, you can  
22 just refer to the document and move on. I think that's  
23 sufficient. So you have the document in the record and  
24 the response she's familiar with it.

25 I don't think we have to debate whether she

1 recalls the document states that. It states that.

2 MR. RUBIN: Ms. Mrowka, I have a series of  
3 questions regarding the quarterly reports that were  
4 filed by California American Water. Are you familiar  
5 with them?

6 MS. MROWKA: Yes.

7 MR. RUBIN: California American Water has an  
8 obligation under Order 95-10 to file quarterly reports  
9 with the State Water Resources Control Board; is that  
10 correct?

11 MS. MROWKA: Yes.

12 MR. RUBIN: I ask my associate to hand you  
13 copies of documents that have been marked CAW-30B  
14 through 30WW.

15 CO-HEARING OFFICER BAGGETT: Are these  
16 documents in your case?

17 MR. RUBIN: Yes.

18 Ms. Mrowka, you discuss Exhibit CAW-30B  
19 through 30WW, the quarterly compliance reports, in your  
20 testimony, Exhibit PT-2; do you not?

21 MS. MROWKA: Could you refresh my memory to  
22 which page? Oh, I see it now. Yes. Page 6, yes.

23 MR. RUBIN: You were responsible for reviewing  
24 the quarterly reports, Exhibit CAW-30B through 30WW, at  
25 the time California American Water filed them with

1 State Water Resources Control Board?

2 MS. MROWKA: Yes. Through to summer of 2007.

3 MR. RUBIN: Thank you.

4 You were responsible for preparing for the  
5 State Water Resources Control Board responses to  
6 California American Water's quarterly compliance  
7 reports, Exhibits CAW-30B through 30WW, correct?

8 MS. MROWKA: Yes.

9 MR. RUBIN: Ms. Mrowka, in your written  
10 testimony, you state that upon receipt of the final  
11 quarterly compliance reports for each water year except  
12 for 2007 you routinely wrote California American Water  
13 regarding its compliance?

14 MS. MROWKA: Yes.

15 MR. RUBIN: Did you ever write compliance  
16 response letters more frequently than once per year?

17 MS. MROWKA: I don't recall.

18 MR. RUBIN: Did you write every compliance  
19 letter prepared for the State Water Resources Control  
20 Board in response to the quarterly filing reports by  
21 California American Water?

22 MS. MROWKA: Until summer of 2007, yes, I did.

23 MR. RUBIN: Thank you.

24 Ms. Mrowka, I believe in your written  
25 testimony, Exhibit PT-2, you say that the response

1 letters address compliance with the quarterly report  
2 submissions; is that correct?

3 MS. MROWKA: Yes.

4 MR. RUBIN: But you are of the opinion that  
5 when the State Water Resources Control Board sent  
6 California American Water a response to a quarterly  
7 report it did not respond to the substantive  
8 requirements under Order 95-10; is that correct?

9 MS. MROWKA: I'm uncertain what you mean by  
10 substantive requirement. Could you rephrase?

11 MR. RUBIN: Ms. Mrowka, I ask that you look at  
12 page 6 of your written testimony which has been marked  
13 Exhibit PT-2 and specifically at the second paragraph  
14 under the section titled Compliance with Order 95-10.

15 MS. MROWKA: Mm-hmm.

16 MR. RUBIN: Is it not true that in the second  
17 to the last sentence in that paragraph you write:

18 The letters address compliance with the  
19 quarterly report submissions and not  
20 necessarily the substantive requirements  
21 specified in Condition 2 of the Order.

22 MS. MROWKA: In that context, yes, that's  
23 true.

24 MR. RUBIN: As you use the word substantive  
25 requirements on page 6 of Exhibit PT-2, are you of the

1 opinion that when the State Water Resources Control  
2 Board sent to California American Water a response to a  
3 quarterly report it did not respond to the substantive  
4 requirements under Order 95-10?

5 MS. MROWKA: I am of the opinion that the  
6 responses address the submittal requirements of  
7 Condition 13 of the Order, and Condition 13 has  
8 specific items that are considered.

9 MR. RUBIN: Ms. Mrowka, let me ask my question  
10 again: Are you of the opinion that when the State  
11 Water Resources Control Board sent to California  
12 American Water a response to a quarterly report, it did  
13 not respond to the substantive requirements under  
14 Condition 2 of Order 95-10?

15 MR. SATO: Objection; asked and answered.

16 CO-HEARING OFFICER BAGGETT: Sustained.  
17 Sustained.

18 MR. RUBIN: Ms. Mrowka, I ask you to turn to  
19 Exhibit CAW-30D. Exhibit CAW-30D is a quarterly  
20 compliance report prepared by California American Water  
21 for the period of May 30th, 1996 through July 31st,  
22 1996; is that correct?

23 MS. MROWKA: That's what the document states.

24 MR. RUBIN: Ms. Mrowka, I ask you to take a  
25 few minutes to review that quarterly report. Let me

1 know when you're done reviewing it.

2 CO-HEARING OFFICER BAGGETT: While she's  
3 reviewing that, how many more questions do you have?

4 MR. RUBIN: Depending how quickly we're able  
5 to go through these, my --

6 MS. MROWKA: Did you need me to review the  
7 entirety of this or simply with respect to Condition 2?

8 MR. RUBIN: My -- I believe I probably have  
9 approximately one hour more.

10 CO-HEARING OFFICER BAGGETT: Well, answer this  
11 question, then we'll discuss it. Continue with the  
12 question first.

13 MS. MROWKA: I have looked at this.

14 MR. RUBIN: Ms. Mrowka, Exhibit CAW-30D  
15 reflects the actions California American Water has  
16 taken -- or had taken; excuse me -- or was pursuing in  
17 order to comply with Order 95-10; is that correct?

18 MS. MROWKA: It's a listing.

19 MR. RUBIN: Included in Exhibit CAW-30D is a  
20 description of the actions that California American  
21 Water was taking to comply with Condition 2, correct?

22 MS. MROWKA: There is a list of items. Yes,  
23 there's a list of items.

24 MR. RUBIN: Ms. Mrowka, Exhibit CAW-30D  
25 includes a list of items that describes actions

1 including actions taken to comply with Condition 2 of  
2 Order 95-10, correct?

3 MS. MROWKA: There is a list of projects Cal  
4 Am was investigating.

5 MR. RUBIN: Mr. Baggett, I could continue to  
6 ask my questions, but the witness is not being  
7 responsive. And so it's just going to take longer if  
8 the answer is not provided to the question that's been  
9 asked.

10 CO-HEARING OFFICER BAGGETT: I think I  
11 understand where you're going with these questions. I  
12 just -- there has got to be way to expedite it. I mean  
13 they're all fairly along the same general lines of  
14 different documents.

15 Any suggestions for making this a little more  
16 efficient?

17 MR. RUBIN: Mr. Baggett, if the Prosecution  
18 Team wants to stipulate to the fact that California  
19 American Water submitted quarterly reports over  
20 13 years which demonstrated actions that California  
21 American Water was taking to comply with Condition 2;  
22 and in response to those quarterly reports, the State  
23 Water Resources Control Board informed California  
24 American Water that it was in compliance with the order  
25 on a substantive basis, then I think we can pass



1 through this very quickly.

2 MR. SATO: You know, we had invited Cal Am to  
3 have a Stipulation of Facts, but that was not  
4 forthcoming, so we didn't address all these types of  
5 issues a long time ago as we tried to do that.

6 MR. RUBIN: Well --

7 MR. SATO: Let me just finish.

8 Ms. Mrowka has testified very clearly, I think  
9 in her testimony, about what she did with regard to the  
10 review of these documents that Mr. Rubin is showing  
11 her. She said what she looked at, what she meant by,  
12 you know, that -- what she looked at, what she  
13 reviewed, what she didn't address. I think it's very  
14 clear already in her testimony.

15 And, you know, I can consider -- I mean we can  
16 take a break and I can talk to Mr. Rubin about such a  
17 stipulation, you know --

18 MR. RUBIN: Mr. Baggett, let me respond to two  
19 things. I do not want to get this hearing to a level  
20 that's where it shouldn't be.

21 But we did discuss with the Prosecution Team a  
22 potential of Stipulation of Facts. The order that  
23 raised that issue came out very shortly before written  
24 testimony was due.

25 We approached the Prosecution Team and asked

1 if they would be willing to proceed with an effort to  
2 stipulate to facts. We informed them that to do so we  
3 would need more time than we had. We informed them  
4 that we would be requesting additional time, and no  
5 position was articulated by the Prosecution Team.

6 Putting that aside, these questions respond to  
7 testimony that Ms. Mrowka has written in PT-2.  
8 Specifically, I could refer you to page 7 where she  
9 says:

10 I have not specifically responded  
11 regarding compliance on Condition 2 in  
12 my letters.

13 That's her statement, and my questions go to  
14 that issue. And unfortunately -- or fortunately, for  
15 my client -- we have 13 years of records. And I did  
16 not intend to go through all of them, but having an  
17 opportunity to go through a few of them I think is  
18 something that I'm entitled to do.

19 CO-HEARING OFFICER BAGGETT: I think you've  
20 already gone through a few of them. And -- well,  
21 assuming there is no objection to the evidence  
22 submitted which is the reports to this Board which I  
23 find very unlikely this Board would not put in the  
24 record when we get to that point.

25 I don't know what else you could stipulate to

1 other than this is part of the factual record.

2 MR. RUBIN: Mr. Baggett, maybe a way to do  
3 this is I could highlight a couple of particular  
4 responses that California American Water received if --  
5 provided there is no objection to us being -- having  
6 the opportunity to present all of the documents that we  
7 do have, or referencing all the documents that we do  
8 have, in a closing brief.

9 My concern is we're going to be put in a  
10 position where we have a ten page limit. We have three  
11 binders of quarterly reports. We have probably dozens  
12 of letters that were sent by the State Water Resources  
13 Control Board to the Division of Water Rights in  
14 response to those quarterly reports. And from my  
15 perspective -- offer of proof -- I don't believe any of  
16 them are supporting Ms. Mrowka's testimony.

17 CO-HEARING OFFICER BAGGETT: Is it worth  
18 taking a lunch break and seeing if you can -- two  
19 parties can resolve some stipulations and save some of  
20 this?

21 It's already information in the record. These  
22 are in fact letters written on letterhead by staff of  
23 this Board.

24 If you can just work out a stipulation, then  
25 maybe can talk about having a longer addendum to a

1 closing brief to highlight this issue of -- why don't  
2 we take a lunch break, come back at ten till, ten till  
3 1:00, just do one hour. Will that give you enough  
4 time?

5 We'll come back at 1 o'clock. The prosecution  
6 and Cal Am will get together and talk about what  
7 documents because those are the only two parties I  
8 think this is relevant.

9 Thank you. We will resume at 1:00.

10 (Lunch recess)

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1                                   AFTERNOON SESSION

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3                   CO-HEARING OFFICER BAGGETT:  Let's go back on  
4 the record.  Mr. Rubin.

5                   MR. RUBIN:  I did have the opportunity to  
6 speak with the Prosecution Team.  I believe we've  
7 reached a potential resolution here that will  
8 substantially expedite my cross-examination.

9                   CO-HEARING OFFICER BAGGETT:  That will be  
10 appreciated.

11                  MR. RUBIN:  Mr. Sato, do you want to  
12 summarize?

13                  MR. SATO:  Go ahead.

14                  MR. RUBIN:  We reached an agreement on a  
15 proposal whereby the quarterly reports, all of the  
16 quarterly reports, that have been prepared by  
17 California American Water would be conditionally  
18 accepted into evidence, what we're proposing, as well  
19 as documents that have been prepared by the State Water  
20 Resources Control Board.

21                  That would -- all of those documents would be  
22 admitted into evidence with conditions.  And the  
23 principal condition would be relevance, and the  
24 Prosecution Team and others could object to the  
25 documents on relevance grounds.

1           The other issue, and maybe Reed would be  
2 better articulating this, but there was some concern  
3 about some of the documents that might be advanced by  
4 California American Water that are not in the State  
5 Board files.

6           And I think if I understood your position  
7 correctly, Mr. Sato, the documents that are prepared by  
8 the State Water Resources Control Board are either in  
9 the file, but if we have them and they're final  
10 documents then it falls within this stipulation, and  
11 that's a document that's prepared by a third party,  
12 obviously if it's not in the State Board files it's not  
13 subject to what we're talking about.

14           With all this said, and I'll give Mr. Sato an  
15 opportunity to clarify or expand on what I've said, we  
16 had a little bit of a discussion about whether some of  
17 these might already be part of the Staff Exhibits.

18           And frankly, we did -- my firm spent some time  
19 going through State Board files, and probably for --  
20 because of our process, it wasn't abundantly clear if  
21 all of these things were in the file, weren't, were  
22 part of the exhibits that were identified either by  
23 staff or by reference by the Prosecution Team. So this  
24 is a -- maybe just a clarification or something a  
25 little bit more than that.

1           The other point I should make is we would like  
2 to take Hearing Officer Baggett up on a suggestion in  
3 terms of our closing brief. I don't think we have an  
4 issue with the -- we do not have an issue with the  
5 ten-page limit, but we would like to have some leniency  
6 here to file with our closing brief maybe an appendix  
7 so that we can clearly make our arguments in the brief  
8 but have the ability to kind of reference documents to  
9 the extent we think it is necessary.

10           CO-HEARING OFFICER BAGGETT: That would be  
11 fine. I think the only challenge here is it sounds  
12 like we have a vague agreement -- or at least it's not  
13 specific in terms of exactly what documents are.

14           So I guess prior to close of this hearing, the  
15 close of the record, maybe you could get together and  
16 actually put them in as an exhibit. So you have the  
17 opportunity over the next month or so to go through and  
18 have this so we're going to have the agreement on  
19 whether it's a relevant document so we have that before  
20 we close the record.

21           And not spend time today on it, but prior to  
22 the close of this record the last exhibit we could just  
23 deal with that exhibit as to what is or is not in. It  
24 gives you ample time so you don't have to deal with it  
25 today.

1           Does that make sense? That way we won't have  
2 to argue it --

3           MR. RUBIN: The way I foresee this happening  
4 is that we would identify documents that -- the  
5 quarterly reports, I think, are finite documents.

6           CO-HEARING OFFICER BAGGETT: They're already  
7 there.

8           MR. RUBIN: And then any of the  
9 correspondence, other documents that are within the  
10 files that the State Board prepared, we would be citing  
11 those in our brief. And at that point, we could kind  
12 of work through the issue, if there is one, on  
13 relevance.

14           So I think that fits what you are saying.

15           STAFF COUNSEL TAYLOR: For the convenience of  
16 everybody, it would help if you would also, either the  
17 Prosecution Team or Cal Am, would identify this as one  
18 of the exhibits for one party or other and give it a  
19 number. Because I think that would save you a lot of  
20 time when it comes to providing your briefs.

21           MR. RUBIN: We can do that as part of our  
22 filing.

23           CO-HEARING OFFICER BAGGETT: Okay. Very good.

24           CO-HEARING OFFICER WOLFF: My point on that,  
25 Exhibit 35 that you submitted during cross-examination,



1 the memo from Harry Schueller lists an attachment. The  
2 attachment is at present not part of the exhibit. So  
3 would you clarify as to whether you want to include  
4 that and whether it's acceptable to Mr. Sato when you  
5 work out the other details?

6 MR. SATO: It's my anticipation that when we  
7 use this -- this kind of stipulation applies to  
8 documents that either have been prepared by the State  
9 Board or documents that appear in the State Board's  
10 files. So however those documents appear or have been  
11 prepared would be covered by the stipulation.

12 CO-HEARING OFFICER WOLFF: I understand. I'm  
13 simply saying pay attention to the missing attachment  
14 please.

15 CO-HEARING OFFICER BAGGETT: I would assume  
16 the attachment is with the document in the files.

17 CO-HEARING OFFICER WOLFF: Correct.

18 MR. SILVER: Larry Silver here. I have a  
19 question to clarify. I don't have the original order  
20 here with me today, but I just want to be clear: When  
21 we address the issue of closing briefs, is that a brief  
22 that would be done at the end of Phase II covering both  
23 Phases I and II?

24 CO-HEARING OFFICER BAGGETT: That's what -- we  
25 haven't discussed that, but that's what I would assume.

1 That's normally how we do it. We can talk about that  
2 after we finish Phase I. If you feel we need to have a  
3 bifurcated closing brief, I guess we could.

4 MR. SILVER: In that connection, if there were  
5 to be a brief at the end of this Phase, we would want  
6 to be sure that these additional exhibits would appear  
7 on the website so that they would be available to all  
8 parties.

9 CO-HEARING OFFICER BAGGETT: Right. And  
10 normally we do a closing brief after the court  
11 reporter's delivered the transcript, which I -- I don't  
12 know that we can get that done between now and --

13 CO-HEARING OFFICER WOLFF: Exactly, I agree.  
14 I think, unless anyone objects, let's just say it will  
15 be closing briefs at the end.

16 CO-HEARING OFFICER BAGGETT: One closing brief  
17 at the end.

18 MR. RUBIN: Can we just get some clarification  
19 on the agreement that the Prosecution Team and  
20 California American Water have reached? I'm almost  
21 afraid to ask this, but: The agreement was reached by  
22 the Prosecution Team and California American Water.  
23 There are other participants in this proceeding, and  
24 what happens if one of these other participants raises  
25 an issue?

1           CO-HEARING OFFICER BAGGETT: We can take  
2 other -- especially if you -- I would suggest you just  
3 write a simple stipulation, agreement between the  
4 parties and submit it to us for the record, and we can  
5 accept it.

6           I don't know if any parties have any -- well,  
7 we could ask right now if anyone has any objection to  
8 the stipulation between the Prosecution Team and --  
9 we're talking about records that are already in the  
10 State files. Should be if they aren't.

11           MR. JACKSON: Have no objection to a  
12 stipulation in theory. Don't know what it says yet.  
13 So it's kind of hard to agree to a stipulation that  
14 isn't in writing.

15           MR. RUBIN: Hearing Officer Baggett, what I  
16 would propose is that you've heard an articulation of  
17 the stipulation by me and Mr. Sato. If there's need  
18 for clarification, we can provide that.

19           But what we'd be doing is memorializing what  
20 we said on the record here today. So if there is an  
21 objection --

22           STAFF COUNSEL TAYLOR: Get that in writing,  
23 identify the exhibits each of you wish to have  
24 specifically identified and make reference to at some  
25 point in this proceeding or in your briefs, circulate

1 that to the other parties. That can be done before  
2 Phase II starts up, then those parties can address it  
3 at that time.

4 MR. RUBIN: That's fine, again, but my concern  
5 is if we do go down this path and -- and the Hearing  
6 Officers decide this stipulation is not going to work,  
7 what I will be asking is that we reconvene the first  
8 phase to give me the opportunity --

9 CO-HEARING OFFICER BAGGETT: That's fair.  
10 That's what I was going to say. That would be a fair  
11 remedy, and I think we would agree to do that.

12 MR. JACKSON: And both sides have that same  
13 benefit? We find out we don't agree with the  
14 stipulation or some document, we can bring it up at the  
15 start of Phase II? Fine?

16 CO-HEARING OFFICER BAGGETT: Fine.

17 CO-HEARING OFFICER WOLFF: Is it also clear  
18 what the contents of this appendix would be? It's not  
19 clear to me. Mr. Baggett made a suggestion what you're  
20 taking up, and I need a little clarification on it.

21 MR. RUBIN: It might not be needed. Excuse  
22 me. California American Water might not need to use an  
23 appendix if we follow the recommendations of the staff  
24 attorney of the Hearing Team and we identify the  
25 exhibit and we submit all of the exhibits, then we can

1 just refer to them in our closing brief.

2 CO-HEARING OFFICER WOLFF: Absolutely.

3 CO-HEARING OFFICER BAGGETT: Okay. With that,  
4 I think we're clear. You will send a submission with  
5 the documents and we'll let the parties review it. If  
6 there is no objection, we'll accept it.

7 MR. FIFE: Mr. Baggett, just a comment to go  
8 back a couple steps --

9 (Interruption by the reporter)

10 MR. FIFE: Oh, I'm sorry. Michael Fife.

11 Our understanding of the phasing approach was  
12 that the reason we broke this into phases was that if  
13 the Board found in Phase I that a cease-and-desist  
14 order should not issue, then Phase II would become  
15 irrelevant and we wouldn't need to do it.

16 If that's incorrect --

17 CO-HEARING OFFICER WOLFF: That's incorrect.  
18 That was a request that was made; but we simply phased  
19 the hearing, and there will be a single decision at the  
20 end.

21 MR. FIFE: Fair enough.

22 CO-HEARING OFFICER BAGGETT: With that --

23 MR. RUBIN: Before we start, I just wanted to  
24 say that I will be trying to go through these questions  
25 very quickly. And as a result of that, I might be

1 asking questions that are hopefully clear but  
2 potentially compound, and I can break them up and take  
3 more time if I need to.

4 CO-HEARING OFFICER BAGGETT: Let's see how it  
5 goes.

6 CROSS-EXAMINATION BY MR. RUBIN (continued)

7 FOR CALIFORNIA AMERICAN WATER COMPANY

8 MR. RUBIN: Jon Rubin, California American  
9 Water. Ms. Mrowka, good afternoon.

10 MS. MROWKA: Good afternoon.

11 MR. RUBIN: A few more questions. Referring  
12 to Exhibits CAW-30LL, 30MM, 30NN, and 3000, which my  
13 associate, Mr. Rosenberg, is going to provide to you?

14 MS. MROWKA: Okay.

15 MR. RUBIN: Again, those are 30LL, 30MM, 30NN,  
16 and 3000.

17 MS. MROWKA: Yes.

18 MR. RUBIN: Are those quarterly reports filed  
19 by California American Water pursuant to Order 95-10  
20 for the period of time October 1, 2004 through  
21 September 30, 2005?

22 MS. MROWKA: Yes.

23 MR. RUBIN: My associate, Mr. Rosenberg, will  
24 be providing you with a February 4, 2005 letter.

25 I'd like to have that marked Exhibit CAW-36.

1           (Exhibit CAW-36 was marked for  
2           identification.)

3           MR. RUBIN: Is that a February 4, 2005 letter  
4           that you prepared?

5           MS. MROWKA: Yes, it is.

6           MR. RUBIN: Ms. Mrowka, can you please read  
7           into the record the last sentence in Exhibit CAW-36?

8           MS. MROWKA: It says that:

9           If there had been a violation noted, the  
10          Division would have promptly advised Cal  
11          Am in order to ensure that the violation  
12          was timely addressed.

13          MR. RUBIN: Thank you.

14          Ms. Mrowka, turning back to your written  
15          testimony, is it your opinion that Condition 2 of Order  
16          95-10 directs California American Water to take three  
17          specific actions?

18          MS. MROWKA: Yes.

19          MR. RUBIN: And you maintain that belief  
20          because Condition 2 of Order 95-10 sets forth those  
21          three actions; is that correct?

22          MS. MROWKA: That's correct.

23          MR. RUBIN: Okay. The three actions set forth  
24          in Condition 2 of Order 95-10 are one, obtain  
25          appropriative rights to Carmel River water; two, obtain

1 water from sources other than the Carmel River; and  
2 three, contract with other agencies having rights to  
3 water. Is that correct?

4 MS. MROWKA: That is correct.

5 MR. RUBIN: In Order 95-10, are those actions  
6 preceded with the word "diligently"?

7 MS. MROWKA: Diligently implement.

8 MR. RUBIN: Thank you.

9 The State Board explained Condition 2 in Order  
10 95-10 as a requirement that California American Water  
11 develops and diligently pursues a plan for obtaining  
12 water from the Carmel River or from other sources  
13 consistent with California water law; is that correct?

14 MS. MROWKA: Yes.

15 MR. RUBIN: In fact -- strike that.

16 Are you aware that after the issuance of Order  
17 95-10 but prior to the pendency of this proceeding the  
18 Division of Water Rights expressed a similar position?

19 MR. SATO: Objection; vague and ambiguous as  
20 to time?

21 CO-HEARING OFFICER BAGGETT: Clarify the time.

22 MR. RUBIN: Are you aware of any time after  
23 the issuance of Order 95-10 but prior to pendency of  
24 this proceeding whether the Division of Water Rights  
25 expressed a similar position?



1 MS. MROWKA: I'm sorry. I have forgotten the  
2 first part of the question. The position of what?

3 MR. RUBIN: Ms. Mrowka, I asked you a question  
4 about an explanation provided by the State Water  
5 Resources Control Board on Condition 2 in Order 95-10.  
6 Do you recall that question?

7 MS. MROWKA: Could you repeat it?

8 MR. RUBIN: I can repeat the question, Hearing  
9 Officer Baggett. She also provided an answer. I think  
10 it's important to get the answer repeated as well. I  
11 don't know if it's easier at this point to have the  
12 court reporter read it back?

13 (Record read as follows:

14 Question: The State Board explained  
15 Condition 2 in Order 95-10 as a  
16 requirement that California American  
17 Water develops and diligently pursues a  
18 plan for obtaining water from the Carmel  
19 River or from other sources consistent  
20 with California water law; is that  
21 correct?

22 Answer: Yes.)

23 MR. RUBIN: Then the question I asked is:  
24 After the issuance of Order 95-10 but prior to this --  
25 prior to the pendency of this proceeding, did the

1 Division of Water Rights express similar positions?

2 MS. MROWKA: That's a large time window. I'm  
3 having a hard time saying with certainty. Certainly, I  
4 provided exhibits related to what was stated.

5 MR. RUBIN: Are you aware of whether the  
6 Division of Water Rights has taken a position that to  
7 comply with Condition 2 of Order 95-10 California  
8 American Water must seek other supplies so that it  
9 could offset the current Carmel River diversion on a  
10 one-to-one basis?

11 MS. MROWKA: I believe we expressed that.

12 MR. RUBIN: Are you aware that the Division of  
13 Water Rights has also expressed the position that in  
14 order to comply with Condition 2 of Order 95-10  
15 California American Water is to diligently pursue a  
16 legal water supply?

17 MS. MROWKA: Yes.

18 MR. RUBIN: Ms. Mrowka, in your written  
19 testimony, do you express a belief that Order 95-10  
20 allows the State Water Resources Control Board to take  
21 an enforcement action if California American Water  
22 diverts more than 3,376 acre feet of water from the  
23 Carmel River?

24 MS. MROWKA: I believe that the State Board  
25 could do so.

1           MR. RUBIN: Is it your belief that the State  
2 Water Resources Control Board has the authority to take  
3 an enforcement action, even if California American  
4 Water is in compliance with Order 95-10, so long as  
5 California American Water is diverting more than 3,376  
6 acre feet of water from the Carmel River?

7           MS. MROWKA: I believe that the State Board  
8 can do so.

9           MR. RUBIN: Ms. Mrowka, I have a couple  
10 questions regarding Exhibits PT-4 and PT-5.

11           Exhibit PT-4 and Exhibit PT-5 relate to an  
12 administrative civil liability complaint brought  
13 against the California American Water Company; is that  
14 correct?

15           MS. MROWKA: Yes.

16           MR. RUBIN: The proposed civil liability was  
17 based upon an assertion that California American Water  
18 demonstrated a continuous pattern of increased water  
19 use; is that correct?

20           MS. MROWKA: I believe that complaint itself  
21 was issued for diversions in excess of 3,376 acre feet  
22 per annum.

23           MR. RUBIN: Ms. Mrowka, my question to you  
24 was: The proposed civil liability was based on an  
25 assertion that California American Water demonstrated a

1 continuous pattern of increased water use. Is that  
2 correct?

3 MR. SATO: Objection; the document speaks for  
4 itself.

5 CO-HEARING OFFICER BAGGETT: Mr. Baggett, I  
6 asked the question. I didn't refer to a specific  
7 document. My question -- I could repeat my question.

8 CO-HEARING OFFICER BAGGETT: Repeat your  
9 question.

10 MR. RUBIN: The proposed civil liability was  
11 based on an assertion that California American Water  
12 demonstrated a continuous pattern of increased water  
13 use; is that correct?

14 MS. MROWKA: The administrative civil  
15 liability is one exhibit that does state that.

16 MR. RUBIN: At the time that the  
17 administrative civil liability complaint issued, the  
18 asserted continuous pattern of increased water use  
19 allegedly shown -- showed that California American  
20 Water had not implemented a conservation plan; is that  
21 correct?

22 MS. MROWKA: I believe the documents say so.

23 MR. RUBIN: Specifically, at the time the  
24 administrative civil liability complaint issued, the  
25 State Water Resources Control Board expressed concern

1 that California American Water diverted more than  
2 11,385 acre feet in that water year; is that correct?

3 MR. SATO: Objection. Again, I think this  
4 time he is referring to documents. Those documents  
5 speak for themselves.

6 CO-HEARING OFFICER BAGGETT: Are these  
7 documents that are going to be submitted as part of the  
8 record?

9 MR. RUBIN: I assume -- well, PT -- Exhibit  
10 PT-4 and Exhibit PT-5 are exhibits that the Prosecution  
11 Team has advanced.

12 I'm asking questions about Ms. Mrowka's  
13 understanding of the circumstances that occurred when  
14 the administrative civil liability complaint issued.  
15 There's reference to this in her testimony, and I'm  
16 exploring the issue.

17 I think it is -- frankly, regardless of  
18 whether it's in her written testimony, I think it's  
19 relevant; and I think I'm entitled to explore the  
20 actions that the Division of Water Rights of the State  
21 Board took at the time the ACL issued.

22 CO-HEARING OFFICER BAGGETT: Mr. Sato?

23 MR. SATO: I think it's probably true that  
24 Mr. Rubin may be able to do that, but the way that he's  
25 framing the questions are not soliciting those kinds of

1 responses.

2 CO-HEARING OFFICER BAGGETT: Can you reframe  
3 the question.

4 MR. RUBIN: Ms. Mrowka, do you know if the  
5 State Water Resources Control Board Division of Water  
6 Rights expressed concern that California American Water  
7 was diverting more than 11,285 acre feet of water in  
8 the water year prior to the issuance of the  
9 administrative civil liability complaint?

10 MS. MROWKA: I believe there was concern about  
11 that.

12 MR. RUBIN: Are you aware of any written  
13 material that was prepared by the State Water Resources  
14 Control Board that explained the State Water Resources  
15 Control Board was issuing an administrative civil  
16 liability complaint because California American Water  
17 diverted more than 3,376 acre feet of water?

18 MS. MROWKA: Are you referring to something  
19 other than the administrative civil liability action?  
20 Because the action certainly does state that.

21 MR. RUBIN: Ms. Mrowka, I ask that you turn to  
22 Exhibit PT-4. In Exhibit PT-4, isn't it true that  
23 Mr. Anton wrote California American Water and explained  
24 that California American Water had not complied with  
25 the intent of Order 95-10, and therefore the State

1 Water Resources Control Board is issuing the enclosed  
2 administrative civil liability complaint?

3 MS. MROWKA: I believe that's in the document.

4 MR. RUBIN: Ms. Mrowka, is there anything in  
5 the first two pages of PT-4 which references a  
6 diversion of more than 3,376 acre feet of water?

7 MS. MROWKA: Right after item C on page 2,  
8 there is discussion about the sum total of Cal Am's  
9 legal rights to divert water.

10 MR. RUBIN: Ms. Mrowka, I'm asking a question  
11 on PT -- Exhibit PT-2, the first two pages of that  
12 exhibit is an October 1997 letter.

13 MS. MROWKA: I thought you --

14 MR. RUBIN: -- appears to be a cover letter to  
15 the administrative civil liability complaint; is that  
16 correct?

17 MR. SATO: I think you've misstated your  
18 exhibit.

19 MR. STRETARS: Is it PT-2 or PT-4?

20 MR. RUBIN: I'm sorry. PT-4, excuse me. Let  
21 me make sure that the record's clear on this.

22 Exhibit PT-4, contains two pages at the  
23 beginning that appear to be a cover letter; is that  
24 correct?

25 MS. MROWKA: That's correct.

1           MR. RUBIN: In that cover letter, the first  
2 two pages of Exhibit PT-4, is there a reference to  
3 3,376 acre feet of water?

4           MS. MROWKA: No.

5           MR. RUBIN: The reference on the first two  
6 pages of Exhibit PT-4 -- excuse me; strike that.

7           There is a reference on the first -- in the  
8 first two pages of Exhibit PT-4 to Order 95-10; is that  
9 correct?

10          MS. MROWKA: Yes.

11          MR. RUBIN: And Ms. Mrowka, in Exhibit PT-5,  
12 there is a similar structure. For the first page,  
13 there's a cover letter, and what follows the cover  
14 letter is an administrative civil liability complaint;  
15 is that correct?

16          MS. MROWKA: Yes.

17          MR. RUBIN: And in the Exhibit PT-5, on the  
18 first page, does it not say that:

19               California American Water has not  
20               complied with Order 95-10. Therefore,  
21               the State Water Resources Control Board  
22               is issuing an enclosed administrative  
23               civil liability complaint.

24          MS. MROWKA: Yes.

25          CO-HEARING OFFICER WOLFF: Mr. Rubin, could



1 you get to the point? I appreciate you're trying to  
2 get to a point that's important to your client's  
3 rights.

4 But to ask the witness whether a cover letter  
5 appears to be a cover letter and whether the cover  
6 letter says what the cover letter says doesn't seem to  
7 me to be getting to the point.

8 So if you could get to the point more quickly,  
9 I would appreciate it.

10 MR. RUBIN: I am and I will.

11 One of the things that I think is intended by  
12 cross-examination is to understand what somebody's  
13 testimony is and exploring the validity of the  
14 position.

15 And if Ms. Mrowka is here to testify -- which  
16 I believe she is -- as the person within the Division  
17 of Water Rights who's been responsible for enforcement  
18 and is reflecting her position in her written  
19 testimony, and we have documents that, at least from my  
20 perspective, suggest that her testimony is not  
21 credible, I think it's important to highlight that to  
22 you.

23 And if -- I am being brief. I could have gone  
24 through a lot of documents, and we're going to do that  
25 in our closing brief instead. But I think I owe this

1 to my client to raise some examples of the  
2 inconsistencies.

3 CO-HEARING OFFICER WOLFF: I understand the  
4 point, but I fail to see how asking whether a  
5 document -- asking whether a cover letter appears to be  
6 a cover letter goes to the issue of her credibility or  
7 whether, you know, documents state what the documents  
8 state goes to her credibility. That's all.

9 But I'll allow you to continue this as long as  
10 you like or till Mr. Baggett cuts you off because I'm  
11 new to this game, but.

12 MR. RUBIN: Ms. Mrowka, are there any  
13 provisions of Order 95-10 that deal with a circumstance  
14 where an enforcement action might be appropriate?

15 MS. MROWKA: Condition 14 states that:  
16 The Chief, Division of Water Rights is  
17 authorized to refer any violation of  
18 these conditions to the Attorney General  
19 for action under Section 1052 or to  
20 initiate such other enforcement action  
21 as may be appropriate under the Water  
22 Code.

23 MR. RUBIN: If I understand that correctly, a  
24 condition precedent referencing Condition 14 is a  
25 violation of conditions?

1 MS. MROWKA: It might also be to read  
2 violation of Section 1052 of the Water Code.

3 MR. RUBIN: Thank you. Only a few more  
4 questions.

5 Ms. Mrowka, are you familiar with Order 98-04,  
6 Order 2001-04, and Order 2002-02?

7 MS. MROWKA: Yes.

8 MR. RUBIN: Do each of those orders relate to  
9 California American Water?

10 MS. MROWKA: Yes.

11 MR. RUBIN: Can I assume that the initial four  
12 numbers referenced in the order are the date or the  
13 year in which the order issued?

14 MS. MROWKA: Yes.

15 MR. RUBIN: Is there anywhere in Order 98-04,  
16 Order 2001-04 or Order 2002-02 where the State Water  
17 Resources Control Board finds California American Water  
18 to be in violation of Order 95-10?

19 MS. MROWKA: Not that I am aware of.

20 MR. SILVER: I'll make a belated objection in  
21 that those orders were specifically an amendment --  
22 were amendments to 95-10. The question, I think,  
23 tended to imply that there was a need for some further  
24 finding with regard to compliance, that finding had  
25 been made in 95-10. So I was going to object to the

1 tenor of that question.

2 I don't know what the relevance would be,  
3 whether or not the Board had made additional findings  
4 or even referred to a finding in that it had already  
5 been made. These were amendments to an existing order.

6 That's my only point.

7 MR. RUBIN: The question is asked and  
8 answered. I didn't intend to infer anything except for  
9 asking a question about what was within the order.

10 CO-HEARING OFFICER BAGGETT: Overruled. Keep  
11 going.

12 MR. RUBIN: My last question.

13 Is there anywhere in Order 98-04, Order  
14 2001-04, or Order 2002-02 where the State Water  
15 Resources Control Board informs California American  
16 Water that even if it is in compliance with Order 95-10  
17 California American Water can still be subject to an  
18 enforcement action if it diverts more than 3,376 acre  
19 feet of water from the Carmel River in a particular  
20 year?

21 MS. MROWKA: I believe that Order 95-10 spoke  
22 to the issue of Condition 14, and none of the other  
23 orders refer to that matter.

24 MR. RUBIN: Thank you. I have no further  
25 questions.

1 CO-HEARING OFFICER BAGGETT: Thank you. Any  
2 questions from staff?

3 STAFF COUNSEL TAYLOR: I have one question for  
4 Mr. Stretars.

5 CROSS-EXAMINATION BY MR. TAYLOR  
6 FOR STATE WATER RESOURCES CONTROL BOARD

7 STAFF COUNSEL TAYLOR: Mr. Stretars, on the  
8 last page of your written testimony, you have a  
9 paragraph that begins:

10 Under my guidance, John drafted a  
11 proposal for management consideration of  
12 an enforcement action.

13 What management -- can you identify the  
14 management you are referring to in this document.

15 MR. STRETARS: The management I was referring  
16 to was the Prosecution Team. We developed -- John did  
17 the initial evaluation of it, I went through my review,  
18 I asked him to go back and at that point in time  
19 develop a proposal basically of what we would proceed  
20 under, just this type action or whatever else, which we  
21 then presented to the Prosecution Team. From that  
22 document then was the final development.

23 STAFF COUNSEL TAYLOR: Can you identify the  
24 specific persons that you consulted when you went  
25 forward with this matter?

1 MR. STRETARS: It would have been John O'Hagan  
2 and Jim Kassel and Yvonne West who was the head  
3 attorney -- was the attorney at that point in time.

4 STAFF COUNSEL TAYLOR: Thank you.

5 CO-HEARING OFFICER BAGGETT: If there's no  
6 other questions, do you have any redirect?

7 MR. SATO: I do not.

8 CO-HEARING OFFICER BAGGETT: Do not. Very  
9 good. And we will save the rebuttal when we're done  
10 with all the cases in chief. Okay.

11 MR. SATO: Do we need to move all our  
12 documents now?

13 CO-HEARING OFFICER BAGGETT: Into evidence.

14 MR. SATO: We will move all of our exhibits  
15 and testimony into evidence.

16 MR. RUBIN: I do have an objection.

17 Hearing Officer Baggett, I object to  
18 Prosecution Team Exhibit 8. I don't think an adequate  
19 foundation was provided, particularly since the  
20 document is undated and unsigned.

21 CO-HEARING OFFICER BAGGETT: PUC -- I guess  
22 the question is was this already in the files? Cal Am.  
23 Do we have those handy? Is this in the Board exhibits  
24 already in the official notice?

25 MS. MROWKA: Mr. Baggett, I believe this

1 document is in the Board's.

2 CO-HEARING OFFICER BAGGETT: This is unsigned  
3 and undated, so I guess the question is was there a  
4 date it was signed and copied already?

5 STAFF COUNSEL TAYLOR: Staff can't answer that  
6 question without actually going over the file, and we  
7 don't have those files with us at this point.

8 CO-HEARING OFFICER WOLFF: Prosecution Team?

9 MS. MROWKA: This is the file copy. It is as  
10 it is.

11 MR. RUBIN: I also do have an objection to  
12 Prosecution Team Exhibit 7.

13 CO-HEARING OFFICER BAGGETT: Let's resolve 8.  
14 8 is already in the file. So I guess we can strike it  
15 as a Prosecution Exhibit if it's in exhibits we've  
16 already accepted. It's on the record.

17 MR. SATO: I think Ms. Mrowka said that she  
18 had looked at this exhibit and it was in the files she  
19 looked at. I mean Mr. Rubin can object to how valuable  
20 or the weight of this document, but I mean --

21 MR. RUBIN: Well, it's -- if the exhibit that  
22 has been marked for identification purposes as  
23 Prosecution Team 8 is the document that's in the files  
24 and part of the Staff Exhibits, then that's fine. But  
25 what we're talking about is the document that has been

1 marked, an unsigned, undated letter.

2 CO-HEARING OFFICER BAGGETT: Testimony it was  
3 pulled from the files and is an exhibit.

4 CO-HEARING OFFICER WOLFF: I have a question,  
5 Ms. Mrowka, about the document, if I may. Do you  
6 believe that there is a dated -- that there was issued  
7 a dated and signed version of this letter and it's  
8 simply missing from the files?

9 MS. MROWKA: Yes. This one is our survey copy  
10 that shows the chain of command that saw this document.  
11 I believe the Executive Office would have had the copy  
12 of the original signed document because it issued --  
13 was signed by Walt Pettit, the Executive Director. So  
14 it was -- the signed version was not in Division  
15 records but would be in the Executive Director records.

16 CO-HEARING OFFICER WOLFF: So you believe  
17 there is a signed, dated version somewhere.

18 Mr. Rubin, would you object to the inclusion  
19 of the signed, dated version should it be found? Or  
20 will you simply object to the inclusion of the  
21 unsigned, undated version?

22 MR. RUBIN: Well, it raises the issue of  
23 whether the signed one is any different than the one we  
24 have before us.

25 CO-HEARING OFFICER WOLFF: Absolutely.



1           MR. RUBIN: And I would object at this point,  
2 without having the ability to compare the two and have  
3 the opportunity to question the witnesses on the signed  
4 document we haven't been provided.

5           CO-HEARING OFFICER WOLFF: Right. Could we  
6 include this in the documents to be worked on through  
7 the stipulation?

8           CO-HEARING OFFICER BAGGETT: Here's what my  
9 suggestion is: This document -- we'll allow this  
10 document as submitted, unsigned, into the record.  
11 Overrule the objection.

12           Secondly, could we suggest that on rebuttal if  
13 the Prosecution Team finds the original signed document  
14 and feels it's relevant and necessary for their  
15 rebuttal testimony, you can submit it then.

16           MR. SATO: Okay.

17           MR. RUBIN: Similar objection to Prosecution  
18 Team Exhibit 7. As far as I could tell from what I was  
19 able to obtain from the documents that were served as  
20 well as the documents we were able to print off the  
21 State Water Resources Control Board website for this  
22 proceeding, there's only one page. It does not include  
23 a signature page.

24           CO-HEARING OFFICER BAGGETT: I would overrule  
25 the objection. This letter speaks to the credibility

1 which it is an unsigned letter at this point. Again, I  
2 would suggest if it's critical to the case that on  
3 rebuttal Prosecution provide the full letter. That way  
4 you'll have notice to all parties and you can discuss  
5 whether it's the same document, and we can have this  
6 discussion when we've actually got the facts before us.

7 So we'll allow this in. Speak to the weight  
8 of what it says, and it is an unsigned document.

9 Okay. Anything else? Okay. So anybody else  
10 have an objection to the Prosecution Team's evidence?

11 They'll be admitted.

12 (The Prosecution Team (PT) Exhibits were  
13 admitted into evidence.)

14 CO-HEARING OFFICER BAGGETT: Mr. Rubin, you  
15 had some exhibits for cross? I think we should just  
16 put those in now and be down with them.

17 MR. RUBIN: We've identified Exhibits CAW-33  
18 through 36, and I move them into evidence.

19 CO-HEARING OFFICER BAGGETT: Is there any  
20 objection?

21 MR. SATO: I would object to CAW-35 because,  
22 as I recall, Ms. Mrowka was not able to identify it.  
23 But in light of our other stipulation --

24 STAFF COUNSEL TAYLOR: Mr. Sato, I'm having  
25 difficulty hearing you.

1           MR. SATO: As a result of, you know, our  
2 stipulation to allow into the record documents authored  
3 by the State Board or from the State Board's files, and  
4 this appears to be either authored by the State Board  
5 or in its files, I will remove my objection.

6           CO-HEARING OFFICER BAGGETT: You remove your  
7 objection?

8           MR. SATO: Yes.

9           CO-HEARING OFFICER BAGGETT: Okay. If there  
10 is no other objection, they're admitted.

11                   (Exhibits CAW-33 to CAW36 were admitted  
12 into evidence.)

13           CO-HEARING OFFICER BAGGETT: Thank you.  
14 Finished, Prosecution Team.

15           Up next, the Sierra Club. Opening statement,  
16 then I notice you have two witnesses. Do you have an  
17 opening statement or --

18           MR. SILVER: Just very briefly.

19           The second witness, when we listed the  
20 witnesses, the second witness was intended to  
21 participate in the Phase II of the hearing.

22           CO-HEARING OFFICER BAGGETT: Very good.

23           MR. SILVER: And likewise, just to be clear  
24 that Dr. Williams who is going to testify in this first  
25 phase will also be testifying in the second phase with

1 regard to damage to the public trust resources and  
2 generally with regard to the impacts that Cal Am's  
3 diversion have had on steelhead.

4 His testimony here is limited to just one  
5 issue, so we'll be brief.

6 CO-HEARING OFFICER BAGGETT: Very good. I was  
7 hoping so before the objections started flying.

8 JOHN G. WILLIAMS, PhD

9 Called by the Sierra Club

10 DIRECT EXAMINATION BY MR. SILVER

11 CO-HEARING OFFICER BAGGETT: Dr. Williams,  
12 could you state your name and address for the record.

13 DR. WILLIAMS: My name is John G. Williams,  
14 and I live at 875 Linden Lane in Davis, California.

15 MR. SILVER: And could you just give a very  
16 brief summary of your curriculum vitae that you have --  
17 that's part of your statement that's been -- that will  
18 be introduced into evidence in this --

19 STAFF COUNSEL TAYLOR: Mr. Williams, before  
20 you do that, would you indicate whether you took the  
21 oath earlier today?

22 DR. WILLIAMS: I did take the oath. Yes, I  
23 did.

24 STAFF COUNSEL TAYLOR: Thank you.

25 MR. RUBIN: I apologize. I was still getting

1 myself organized after doing the cross-examination.

2 We have raised some objections to Sierra  
3 Club's witnesses, and we could raise those now or after  
4 he presents his statement.

5 CO-HEARING OFFICER BAGGETT: Well, I think the  
6 Sierra Club's comment was, one, their second witness  
7 won't be here till the next phase, so we've taken care  
8 of half the problem.

9 The second was that Dr. Williams would be -- a  
10 very narrow portion of his testimony is for this phase.  
11 So I assume from your comments it was the breadth of  
12 his testimony?

13 MR. RUBIN: I guess we could wait and see what  
14 he speaks of orally today, but I would want to have a  
15 redaction for this first phase of the written testimony  
16 that's already been submitted.

17 CO-HEARING OFFICER BAGGETT: Well, it sounds  
18 like the testimony -- I'm jumping ahead here, but if in  
19 fact part of his testimony is for the second phase, we  
20 could wait and admit the testimony in the second phase.

21 MR. SILVER: Let me be clear. This testimony  
22 was submitted for purposes of Phase I and was not  
23 intended -- he will be submitting separate testimony,  
24 or additional testimony, with regard to Phase II  
25 dealing with impacts of biological resources which is

1 not the subject of this hearing.

2 The testimony today, for purposes of  
3 clarifying, Mr. Rubin, will be primarily whether or not  
4 Cal Am is in compliance with Water Code Section 1052  
5 and will address specifically the issue of whether or  
6 not Cal Am's rights to divert water have in fact -- are  
7 less than those which were established in 95-10.

8 MR. RUBIN: And we did raise some objections  
9 on the grounds of the witness being able to testify to  
10 those issues. I don't think he has an expertise on the  
11 issue, and maybe this falls within the category of a  
12 layperson offering testimony, but I don't think the  
13 proper foundation has been laid.

14 MR. SILVER: We'll lay that foundation,  
15 Mr. Rubin, if you give us a chance.

16 CO-HEARING OFFICER BAGGETT: Let's proceed.  
17 And granted, to the extent he is speaking outside his  
18 expertise in hydrology and as a fishes biologist, I  
19 mean this Board will clearly take those under the  
20 weight of his expertise in that area.

21 MR. RUBIN: And I understand that is generally  
22 the approach here.

23 What we hear from the Sierra Club both in its  
24 written submittal as well as today is that the witness  
25 will be speaking on legal conclusion and I believe

1 information that is outside of the witness's expertise.

2 So we raise those objections at this time.

3 CO-HEARING OFFICER BAGGETT: Very good. They  
4 are noted for the record.

5 CO-HEARING OFFICER WOLFF: Before we continue,  
6 Mr. Rubin, you also object to their testimony on the  
7 ground it was submitted late. Have we addressed that  
8 issue? What does staff have to say about that?

9 CO-HEARING OFFICER BAGGETT: It was served to  
10 parties prior to being served here, as I recall? Is  
11 that right? Or the other way around?

12 STAFF COUNSEL TAYLOR: I'm sorry; I didn't  
13 hear the question.

14 CO-HEARING OFFICER BAGGETT: The question was:  
15 Was it served late?

16 MR. RUBIN: The objection that we raised was  
17 based upon the best available information we had, and  
18 that information indicated that it was both filed late  
19 and served late.

20 CO-HEARING OFFICER WOLFF: I'm asking the  
21 staff, is it a valid objection? Was it filed late?  
22 Was it served late?

23 ENGINEERING GEOLOGIST MURPHEY: We received it  
24 about a little over three and a half hours late from  
25 the noon deadline.

1 CO-HEARING OFFICER WOLFF: The written and --  
2 it was served to us and it was served late also, as  
3 well, to the other parties?

4 ENGINEERING GEOLOGIST MURPHEY: I'm not sure  
5 if the other parties got it late; but we had a noon  
6 deadline, and they submitted it about 3:45 on the due  
7 date.

8 CO-HEARING OFFICER WOLFF: Again, I defer to  
9 those more experienced, but is that a substantial  
10 violation? Should it be disqualified?

11 STAFF COUNSEL TAYLOR: I think the test here  
12 is whether there's one of prejudice to the other  
13 parties.

14 The testimony was submitted in writing close  
15 to ten days before this hearing. They've had an  
16 opportunity to review it, to prepare for it. There's  
17 hardly any surprise here to act to prejudice the other  
18 parties, in my view.

19 CO-HEARING OFFICER BAGGETT: I would allow it  
20 in. It's not volumes of testimony. It's not something  
21 that -- obviously, the parties have all read it because  
22 we have lots of objections over it. So I think there  
23 is -- let's continue.

24 STAFF COUNSEL TAYLOR: Thank you. I take  
25 responsibility for that. I had gone out of town, and



1 my assistant, I think, was not fully aware of the noon  
2 deadline and thought it was just June 6th.

3 Mr. Williams, before addressing your  
4 curriculum vitae, can you describe your previous  
5 involvement in -- let's discuss first your involvement  
6 with -- that led to the entry and issuance of Order  
7 95-10, if you could describe that briefly.

8 DR. WILLIAMS: In sometime around 1980, I  
9 forget the exact date, the issue was raised whether Cal  
10 Am was diverting -- Cal Am's diversion from the Carmel  
11 Valley Aquifer required a permit from the State Board.

12 And at that time, a kind of deal was brokered.  
13 Sam Farr, who was the assemblyman here, got \$50,000 in  
14 the State budget to pay for the Water Management  
15 District to prepare a Carmel River watershed management  
16 plan. And part of that was to investigate the status  
17 of the groundwater in the Carmel Valley.

18 And I went to work for the Water Management  
19 District for about a year preparing that watershed  
20 management plan. In the course of that, I did fairly  
21 extensive research into the law regarding water flowing  
22 through the known and definite channels.

23 I wrote those up in Working Paper 6 for the  
24 Carmel Watershed Management Plan which I believe is in  
25 the State -- in the files here somewhere from the 1992

1 hearing.

2           And subsequently, I was on the Water  
3 Management District again, and I had been previously on  
4 the Board from 1978 to 1981. In the course of that, I  
5 became fairly conversant with water law.

6           After I went off the Board, the Steelhead  
7 Association approached me in 1987. I wrote the  
8 original complaint for them and then also for the  
9 Ventana Chapter of the Sierra Club, the water committee  
10 that eventually led to the issuance of Order 95-10.

11           Subsequently, the Board has held various  
12 proceedings about water collection, flowing through the  
13 definite channels and what that means, and I've  
14 submitted fairly extensive remarks on that topic.

15           So I have some basis for speaking about water  
16 law.

17           MR. SILVER: Specifically with regard to water  
18 supply issues, and with respect to then also to, I  
19 suppose, Cal Am's water rights, then you have had  
20 occasion to consider that, and you have also had  
21 experience with regard to some of these allocation  
22 issues in the Peninsula during the course of your time  
23 when you were on the board of directors of the Monterey  
24 Peninsula Water Management District?

25           DR. WILLIAMS: That is correct.

1 CO-HEARING OFFICER WOLFF: Is that your  
2 testimony?

3 DR. WILLIAMS: (Witness nodding head)

4 MR. SILVER: And can you describe just very  
5 briefly your professional background?

6 DR. WILLIAMS: I have a PhD in geography.  
7 About the time I finished the degree, I went on the  
8 Board of the Water Management District, and I had  
9 specialized earlier in climatology.

10 And because of the getting on the water  
11 district board doing hydrology again -- instead,  
12 rather, and issues of fluvial geomorphology were very  
13 important because of the problems with channel  
14 instability on the Carmel River.

15 So I learned a good deal about fluvial  
16 geomorphology and helped organize a couple of  
17 conferences on that topic. From my graduate training,  
18 I was familiar with riparian vegetation.

19 And after I left the Board of the Water  
20 Management District in 1990, I was appointed special  
21 master for the continuing jurisdiction on the case of  
22 EBMUD dealing with the American River. That also  
23 involved water law as well as riparian vegetation and  
24 issues of hydrology.

25 I did the initial conceptual modeling for

1 the -- what grew into the CVSIM model that the Water  
2 Management District now uses. A graduate student, Todd  
3 Strike, did the actual original coding, but then I  
4 supervised in an informal way while he was developing  
5 that groundwater model. So I'm -- and I'm quite  
6 familiar with the geology of the Carmel River and  
7 associated things.

8 CO-HEARING OFFICER BAGGETT: The Board's aware  
9 of your vitae. Could you proceed with the questions.

10 MR. SILVER: Yes.

11 So Dr. Williams, I take it then you had  
12 occasion to review the Monterey Peninsula Water  
13 Management District figures with regard to diversions  
14 in 2006.

15 And could you tell us then what your  
16 conclusions were with respect to that after having  
17 reviewed that data?

18 MR. RUBIN: I'm going to object again, the  
19 objections that I raised previously.

20 The statement of qualifications that was  
21 submitted by the Sierra Club as well as the  
22 articulation of qualifications of the witness today I  
23 don't think supports much of the written testimony and  
24 I presume much of the oral testimony that will be  
25 provided today.

1           If you take a look at the written testimony,  
2 page 1 through line 18 on page 2 is apparently a legal  
3 conclusion. And the legal conclusion is supported by  
4 information that was obtained from the Monterey  
5 Peninsula Water Management District.

6           I don't think that the foundation has been  
7 laid that this witness has the expertise to provide  
8 this Board with a local opinion.

9           There is also sections of the testimony,  
10 particularly on page 2, line 11 through 18, in which  
11 the witness is providing testimony on an issue that's  
12 outside of his apparent expertise.

13           The witness has indicated a level of -- a  
14 potential level of expertise in biology, maybe  
15 geography. I don't think that the expertise extends to  
16 an issue like this, whether it's geomorphology, but I  
17 didn't hear anything that would suggest he has the  
18 ability to testify on sedimentation rates and the  
19 effects of sediment on reservoir storage capacity.

20           In terms of the last section of the testimony  
21 starting on page 2, line 20 through the end, much of  
22 this, I believe, is irrelevant. It talks about other  
23 provisions of Order 95-10. And I don't think there is  
24 a showing of how that discussion is relevant to  
25 California American Water's compliance with Condition 2

1 of Order 95-10.

2 CO-HEARING OFFICER BAGGETT: I'll start at the  
3 beginning and take these in order.

4 In terms of expertise, I think that the  
5 foundation has been laid that he -- that Dr. Williams  
6 clearly has some expertise in policy and water policy  
7 issues.

8 As to whether he can draw a conclusion, well  
9 obviously he's not an attorney, and I don't think he  
10 can draw a legal conclusion. So we'll take those  
11 comments -- I think the Board has the ability to take  
12 those comments within the context of that expertise,  
13 and it is clear he is not an attorney.

14 Second, the other issue, I think clearly  
15 geomorphology, geology, geography, his expertise --  
16 he's been an expert witness in other proceedings before  
17 this Board, I know, on issues related to hydrology and  
18 geomorphology in other proceedings.

19 And I think it is clear that, again, like any  
20 expert, you'll have an opportunity to cross-examine and  
21 to bring a rebuttal if you feel you need.

22 I would move, unless there's an objection by  
23 my colleague, that we accept the testimony and get on  
24 with it and with the proviso that any legal conclusions  
25 are just that, policy, as someone involved in water

1 policy, his opinion. They can't be a legal conclusion  
2 because he's not an attorney, and they would be taken  
3 in that light.

4 But your objections are noted for the record.

5 CO-HEARING OFFICER WOLFF: I'm comfortable  
6 with that so long as Mr. Williams is also efficient in  
7 his use of time as I was asking for with the previous  
8 panel.

9 MR. SILVER: We do intend to be.

10 CO-HEARING OFFICER WOLFF: You know, but the  
11 legal opinions are not relevant. He's not an attorney.  
12 We're interested, though, in the other statements you  
13 have to make.

14 MR. SILVER: So can you summarize your  
15 observations based on the data and including your  
16 observations based on the siltation data from the  
17 reservoirs and dams.

18 DR. WILLIAMS: Yes, I have data from the Water  
19 Management District which is given in my Attachment  
20 B -- and I forget which exhibit number that is, 3 or 4;  
21 I guess it would be 4 -- showing the loss of capacity  
22 in Los Padres Reservoir due to sediment transport into  
23 the reservoir.

24 Using those figures, it appears that the  
25 capacity of the reservoir is decreased by roughly

1 350 acre feet since 1995.

2 Looking at Water Rights Order 95-10, footnote  
3 16, I believe, that gives an accounting of how the  
4 Board determined Cal Am's water rights.

5 It's apparent that they took account of  
6 siltation in the reservoir up to that time when they  
7 calculated the Cal Am water right. Using the same  
8 logic, if they went through the same process again  
9 today, they would find they had about 350 acre foot  
10 less of right.

11 MR. SILVER: So basically then, and I think  
12 you just stated, that it is your conclusion that Cal  
13 Am's so to speak legal entitlement may be somewhat less  
14 than the 3,376 acre feet which are set out in Order  
15 95-10?

16 DR. WILLIAMS: Correct. And I understand that  
17 Cal Am has contracted to have another survey done of  
18 the reservoir that would provide an actual -- some  
19 actual data. The numbers I used were based, I believe,  
20 on a survey in 1998. They're a bit out of date.

21 And sediment transport varies a great deal  
22 from year to year depending on the flow so the numbers  
23 I gave are approximate.

24 MR. SILVER: So by that token, it would be  
25 your conclusion that may well be the case that



1 currently, obviously in the future in increasing  
2 amounts, that Cal Am's exceedance over the amount that  
3 the Board has determined is its lawful right may be  
4 increased by some factor --

5 MR. RUBIN: I'm going to --

6 MR. SILVER: By 373 acres more or less --

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

8 MR. SILVER: Acre feet.

9 MR. RUBIN: I'm going to object to the  
10 question. Apologize for interrupting.

11 CO-HEARING OFFICER BAGGETT: I would sustain  
12 the objection before you get there.

13 MR. RUBIN: And part of my objection is it  
14 sounds as though the witness is being led through these  
15 questions. It's appropriate for cross-examination. I  
16 don't know if it --

17 MR. SILVER: I'll rephrase the question.

18 Do you have any conclusion with regard to what  
19 your conclusion means with regard to exceedance by Cal  
20 Am of those limits imposed under Order 95-10?

21 MR. RUBIN: I object on the same grounds.  
22 It's a leading question. I understand that some  
23 questions might need to be asked kind of to facilitate,  
24 but we've heard a number of leading questions.

25 MR. SILVER: Well, then I --

1 CO-HEARING OFFICER BAGGETT: Just rephrase the  
2 question. This is direct testimony. The idea is to  
3 summarize it.

4 MR. SILVER: Well, I'll, I guess, follow the  
5 course of previous counsel and just ask Dr. Williams.  
6 I take it then -- you stated in your written statement  
7 that quote:

8 Applying this average to the 13 years  
9 since 1995, it appears that Cal Am's  
10 rights under license 11866 should now be  
11 reduced by 373 acre feet to 1804 acre  
12 feet.

13 By this logic, in 2006 Cal Am's right in 2006  
14 was only 3,058.4 acre feet, so its illegal diversions  
15 were plus -- were 7889.3 acre feet rather than 7571.7?

16 DR. WILLIAMS: That's in the written  
17 testimony. Let me summarize it by saying simply that  
18 the reservoir has continued to fill with the sediment.  
19 If the Board went through the same exercise that it did  
20 for 95-10, it would come to a slightly different  
21 conclusion because the capacity of the reservoir is now  
22 less.

23 CO-HEARING OFFICER BAGGETT: All right. Okay.

24 MR. SILVER: That concludes the direct.

25 CO-HEARING OFFICER BAGGETT: Thank you.

1 Does the Prosecution Team have any cross?

2 Mr. Jackson, do you?

3 MR. JACKSON: No question.

4 CO-HEARING OFFICER BAGGETT: Mr. Laredo?

5 MR. LAREDO: Thank you. No questions of this  
6 witness.

7 CO-HEARING OFFICER BAGGETT: Pebble Beach?

8 MR. JAMISON: Thank you, no questions.

9 CO-HEARING OFFICER BAGGETT: Anyone else  
10 before Mr. Rubin comes up? Okay. All right.

11 Try to be brief.

12 MR. RUBIN: Always.

13 CROSS-EXAMINATION BY MR. RUBIN

14 FOR CALIFORNIA AMERICAN WATER COMPANY

15 MR. RUBIN: Good afternoon, Mr. Williams.

16 DR. WILLIAMS: Good afternoon.

17 MR. RUBIN: Mr. Williams, are you familiar  
18 with the process required to change the terms in a  
19 water right license?

20 DR. WILLIAMS: In a water right license?

21 MR. RUBIN: Yes or no?

22 DR. WILLIAMS: No.

23 MR. RUBIN: So you're not aware if that  
24 process was followed in a proceeding that led to the  
25 issuance of Order 95-10, are you?

1 DR. WILLIAMS: I only know the conclusion  
2 stated in Order 95-10, footnote 16 in particular.

3 MR. RUBIN: Okay, thank you.

4 On page 1 of your written testimony, you  
5 present a question which reads: Is Cal Am in  
6 compliance with Water Code Section 1052; is that  
7 correct?

8 DR. WILLIAMS: That's correct. That's the  
9 direct question stated in Hearing Notice.

10 MR. RUBIN: Do you know what Water Code  
11 Section 1052 states?

12 DR. WILLIAMS: Water Code Section 1052, if my  
13 memory is correct, has to do with the establishment of  
14 the -- says that taking water without a permit is a  
15 trespass. And I don't recall whether it relates back  
16 in language to the section to -- is applicable to the  
17 water commission or not.

18 MR. RUBIN: Mr. Williams, in your written  
19 testimony, in several places you refer to the word  
20 "we."

21 DR. WILLIAMS: Oh, that's just an editorial  
22 we. I'm testifying for the Sierra Club, so it's we in  
23 that sense.

24 MR. RUBIN: So when you refer to "we," you  
25 mean the Sierra Club?

1 DR. WILLIAMS: That's correct.

2 MR. RUBIN: Likewise, there's a couple  
3 references to "our." Is that the same?

4 DR. WILLIAMS: Sierra Club.

5 MR. RUBIN: On page 2 of your written  
6 testimony, you discuss accumulation of sediment in the  
7 Los Padres Reservoir; is that correct? I do.

8 MR. RUBIN: You argue that California American  
9 Water -- excuse me; let me restate.

10 You argue that California American Water's  
11 rights under license 11866 should be reduced as a  
12 result of the accumulation of sediment since the  
13 issuance of Order 95-10; is that correct?

14 DR. WILLIAMS: That's correct.

15 MR. RUBIN: Your argument is based upon the  
16 assumption that sedimentation has continued to occur  
17 since the issuance of Order 95-10?

18 DR. WILLIAMS: That's more than an assumption.

19 MR. RUBIN: That --

20 DR. WILLIAMS: But you can state it that way.

21 MR. RUBIN: Thank you.

22 Your argument is also based on the assumption  
23 that the loss of storage capacity during the 13 years  
24 since the issuance of Order 95-10 would be the same as  
25 the average annual loss from 1947 through 1998; is that

1 correct?

2 DR. WILLIAMS: I think I just stated a few  
3 minutes ago that the actual amount varies a great deal  
4 from year to year, so these are approximate numbers.

5 One thing to do would be to wait till the  
6 survey is done, I understand going to be done, and  
7 you'd have a more definite answer.

8 MR. RUBIN: Mr. Williams, in your written  
9 testimony which is on behalf of the Sierra Club, do you  
10 not state on page 2 that applying this average to the  
11 13 years since 1995 it appears that Cal Am's rights  
12 under license 11866 should now be reduced by  
13 approximately 375 acre feet?

14 DR. WILLIAMS: That's correct.

15 MR. RUBIN: Have you done any analysis to  
16 determine if your assumption that the average annual  
17 loss from 1947 to 1998 is correct?

18 DR. WILLIAMS: I -- when I did the arithmetic  
19 using the Water District's numbers, I came out with a  
20 slightly different average than they did; but I just  
21 used their average because, as I said, these are  
22 approximate numbers.

23 MR. RUBIN: My question was have you done any  
24 analysis to determine if your assumptions are correct?

25 DR. WILLIAMS: Which assumption here?

1           MR. RUBIN: The assumption that I'm referring  
2 to -- let me restate the question to make sure the  
3 record's proper.

4           Have you done any analysis to determine if  
5 your assumption that the average annual loss from 1947  
6 to 1998 occurred during the 13 years since Order 95-10  
7 was issued?

8           DR. WILLIAMS: I did not inquire into the --

9           MR. RUBIN: Thank you.

10          DR. WILLIAMS: -- validity of the Water  
11 Management District's data. I understand they're based  
12 on a survey taken around 1998.

13          MR. RUBIN: Mr. Williams, are you aware of the  
14 involvement of the Sierra Club in the proceedings  
15 before the State Water Resources Control Board which  
16 led to the issuance of Order 95-10?

17          DR. WILLIAMS: I represented the Club then, so  
18 yes, I am aware of them.

19          MR. RUBIN: In fact, the Sierra Club was one  
20 of the entities that filed the complaint which caused  
21 the proceeding before the State Water Resources Control  
22 Board.

23          DR. WILLIAMS: I wrote the complaint, yes.

24          MR. RUBIN: In the complaint, did the Sierra  
25 Club allege California American Water was diverting

1 without authorization?

2 DR. WILLIAMS: That would have been the basis  
3 for the complaint. I don't remember exactly what it  
4 says.

5 MR. RUBIN: In the complaint, do you recall if  
6 the Sierra Club alleged California American Water's  
7 diversion were harming public trust resources?

8 DR. WILLIAMS: I think we did.

9 MR. RUBIN: Did Order 95-10 address the  
10 allegations raised by the Sierra Club.

11 MR. SILVER: I don't know --

12 CO-HEARING OFFICER BAGGETT: Sit next to the  
13 witness, if you'd like.

14 MR. SILVER: I don't know what the relevance  
15 of these --

16 CO-HEARING OFFICER BAGGETT: Your mic.

17 MR. SILVER: Is it on?

18 CO-HEARING OFFICER BAGGETT: There's a button.

19 MR. SILVER: I don't know what the relevance  
20 of these -- we have Order 95-10. I don't know what  
21 difference it makes what Sierra Club alleged or did not  
22 allege in 1992.

23 MR. RUBIN: I think particularly relevant to  
24 the issue, understanding what Condition 2 said what the  
25 Board can do in terms of an enforcement action with



1 95-10 in place is extremely relevant.

2 And what the complaints were, how those  
3 complaints were resolved. And frankly some more  
4 questions that I have, litigation that followed, how  
5 that litigation was resolved.

6 MR. SILVER: This is well beyond the scope of  
7 direct. I don't understand how this can be pertinent,  
8 an appropriate line of questioning with regard to  
9 cross-examination.

10 MR. RUBIN: Hearing Officer Baggett, I  
11 believe -- I explained why I believe it's relevant.  
12 And as I understand the State Board rules,  
13 cross-examination is not limited to information  
14 testimony provided on direct, and it's permissible to  
15 ask questions as long as it's relevant.

16 CO-HEARING OFFICER BAGGETT: As long as it's  
17 relevant and within the scope of the expertise of the  
18 witness before you. And you do have, you know, the  
19 witness that did raise the complaint and started the  
20 proceeding.

21 If you can make a showing those are relevant  
22 questions, you do have the appropriate witness, just  
23 like Ms. Mrowka was the appropriate witness.

24 So go ahead. Proceed.

25 MR. RUBIN: The question I asked that was

1 objected to is: Order 95-10 addressed the allegations  
2 raised by the Sierra Club; is that correct?

3 DR. WILLIAMS: It would depend on what you  
4 mean by addressed. It spoke to them. I don't believe  
5 it resolved them.

6 MR. RUBIN: Are you aware of the involvement  
7 of the Sierra Club in litigation that challenged Order  
8 95-10?

9 DR. WILLIAMS: Yes.

10 MR. RUBIN: Are you aware of the parties to  
11 the litigation settling their dispute?

12 DR. WILLIAMS: I am.

13 MR. RUBIN: To the best of your knowledge, has  
14 the Sierra Club supported an effort by California  
15 American Water to acquire additional water rights to  
16 Carmel River water?

17 DR. WILLIAMS: We were never asked to do so.  
18 I was kind of surprised we weren't.

19 MR. RUBIN: My question was: Has the Sierra  
20 Club supported an effort by California American Water  
21 to acquire additional water rights?

22 DR. WILLIAMS: In a sense, yes. During the  
23 Plan B process, we did present our Plan B which would  
24 have involved more water rights for Cal Am from the  
25 Carmel River, and we would have been prepared to

1 support those at the time.

2 MR. RUBIN: Thank you.

3 To the best of your knowledge, has the Sierra  
4 Club supported an effort by the Monterey Peninsula  
5 Water Management District to construct a dam on the  
6 Carmel River?

7 DR. WILLIAMS: To the contrary.

8 MR. RUBIN: So it's your understanding the  
9 club opposes the construction of a dam on the Carmel  
10 River?

11 DR. WILLIAMS: That's correct.

12 MR. RUBIN: I ask my associate, Mr. Rosenberg,  
13 to provide you with a copy of a document that has been  
14 marked Exhibit DF-2. I'd like for you to review  
15 Exhibit DF-2, please.

16 Mr. Williams based upon Exhibit DF-2, how much  
17 water did California American Water divert from the  
18 Carmel River during the October 1, 2005 through  
19 September 30, 2006 water year?

20 DR. WILLIAMS: If I'm reading that chart  
21 right, 10,675 acre feet.

22 CO-HEARING OFFICER BAGGETT: Prior to  
23 continuing, could you describe DF-2?

24 MR. RUBIN: I apologize. DF-2 is an exhibit  
25 that was submitted by the Monterey Peninsula Water

1 Management District.

2 CO-HEARING OFFICER WOLFF: Their Exhibit 2.

3 Thank you.

4 DR. WILLIAMS: It's a table titled California  
5 American Water Annual Production From Carmel River  
6 Sources Compared to Diversion Limits Set By State Water  
7 Resources Control Board Order 95-10.

8 And for 2006, I think the question was, the  
9 number here given is 10,542.

10 MR. RUBIN: Thank you. Now I'd ask my  
11 associate, Mr. Rosenberg, to hand you a copy, if you  
12 don't have it before you, of Attachment A to your  
13 written testimony. Do you have a copy of that?

14 DR. WILLIAMS: I have a copy.

15 MR. RUBIN: How much water does Attachment A  
16 show California American Water diverted from the Carmel  
17 River during the October 1, 2005 through September 30,  
18 2006 water year?

19 DR. WILLIAMS: Have to look at different --  
20 Cal Am wells. The number given here on the chart is  
21 14663.4 but that includes some wells that are -- that  
22 are included in the alluvium. I'd have to -- the  
23 Laguna Seca wells, the Seaside Coastal wells, that sort  
24 of thing in the listing. So I did some arithmetic  
25 myself and came up with the numbers in my testimony.

1 MR. RUBIN: Can you point to me where in your  
2 testimony you identified the amount of water that was  
3 diverted by California American Water during the  
4 October 1, 2005 through September 30, 2006 period?

5 DR. WILLIAMS: Page 1 -- 1, line 25, it says  
6 10947.7.

7 MR. RUBIN: And that number is different than  
8 what was identified in DF-2?

9 DR. WILLIAMS: That's correct.

10 MR. RUBIN: Can you explain why the  
11 difference?

12 DR. WILLIAMS: No.

13 MR. RUBIN: Is it possible that the difference  
14 occurs because Attachment A is a draft as identified at  
15 the top of the exhibit?

16 DR. WILLIAMS: That's certainly possible.

17 MR. RUBIN: Do you know if the Monterey  
18 Peninsula Water Management District ever finalized the  
19 table that's reflected as a draft in Attachment A to  
20 examine DF-2?

21 DR. WILLIAMS: I don't know. I got it off the  
22 website. So that's what I got off the website.

23 MR. RUBIN: I have no further questions.

24 CO-HEARING OFFICER BAGGETT: Thank you. Is  
25 there any redirect?

1 MR. SILVER: I have no further questions.

2 CO-HEARING OFFICER BAGGETT: Very good.

3 Evidence?

4 MR. SILVER: I would like to tender, then, the  
5 written testimony together with the attachments as  
6 evidence in this proceeding.

7 CO-HEARING OFFICER BAGGETT: Dr. William, not  
8 the other witness.

9 MR. SILVER: Yeah, we don't have anything from  
10 any other witnesses. That will be in Phase II.

11 CO-HEARING OFFICER BAGGETT: Okay.

12 MR. RUBIN: I renew my objection as well as  
13 raise just a procedural issue. I don't believe that  
14 written testimony has been marked as an Exhibit. I  
15 think we need to do that. With that said, I do  
16 maintain my objection that I voiced earlier.

17 CO-HEARING OFFICER BAGGETT: Okay.

18 MR. LAREDO: I'd voice my objection to the  
19 acceptance of Attachment A in evidence at this point.  
20 I believe that is -- references a Water Management  
21 District document and would like to have a  
22 representative from the District be able to comment on  
23 that before the Board considers whether or not it would  
24 accept that in evidence.

25 CO-HEARING OFFICER BAGGETT: Is it in your

1 files already, your exhibits?

2 MR. LAREDO: We believe that is a partial  
3 exhibit and is not complete.

4 CO-HEARING OFFICER WOLFF: Is not today your  
5 opportunity to comment?

6 MR. LAREDO: Yes, we -- I'm objecting. At  
7 this time, I don't have the foundation to complete the  
8 objection. I believe it's a partial document. Our  
9 witness will be able to testify to that.

10 CO-HEARING OFFICER BAGGETT: I would suggest  
11 you'll have a chance when your witness comes up to  
12 expand on that document.

13 But I will take the objection into submission.  
14 I think -- have we got a number first?

15 WATER RESOURCE CONTROL ENGINEER MONA: We've  
16 identified as Sierra Club exhibits: John Williams'  
17 written testimony as SC-1, Attachment A as SC-2,  
18 Attachment B SC-3, and the c.v. as SC-4.

19 (Exhibits SC-1 to SC-4 were marked for  
20 identification.)

21 CO-HEARING OFFICER BAGGETT: Thank you. And  
22 again, Monterey Water District will have an opportunity  
23 when they bring their case to expand on that.

24 In terms of Mr. Rubin's objections, they are  
25 overruled with the notations we made earlier that in

1 terms of the legal conclusions drawn they will be held  
2 within -- taken under consideration not as expert  
3 witness by any means but as someone who has a policy  
4 background and has been involved in this proceeding  
5 long before it was a proceeding.

6 So I think the comments are relevant; but they  
7 will be taken with that, as a lay expert, if you will,  
8 as opposed to an attorney, not to argue the legal  
9 conclusions in closing briefs.

10 With that, thank you. Let's take a ten-minute  
11 break, and we'll come back with Mr. Jackson.

12 (Recess)

13 CO-HEARING OFFICER BAGGETT: We're ready to  
14 reconvene with Mr. Jackson and Carmel River Steelhead  
15 Association.

16 We'll proceed with the opening statement and  
17 then witnesses.

18 MR. JACKSON: The Carmel River Steelhead  
19 Association, represented by Roy Thomas, one of the  
20 witnesses today, was the original complainant in the  
21 action that later turned into 95-10.

22 We are here with two witnesses, Roger Williams  
23 and Roy Thomas, from the Carmel River Steelhead  
24 Association in order to put on some evidence which we  
25 believe is important in regard to the two issues which



1 have been noticed in round one of the hearing.

2           The first is the due diligence carried out  
3 since 95-10 by the California American Water Company  
4 and their sidekicks, the Monterey Peninsula Water  
5 Management District.

6           The second issue which our testimony is to  
7 provide facts for is whether or not there is an ongoing  
8 1052 violation that is causing damage on the Carmel  
9 River.

10           We believe that the Prosecution Team is right  
11 on point in regard to the violation, and we believe  
12 that it is absolutely critical if we're going to save  
13 the Carmel River steelhead, that something be done  
14 along the lines of the proposed CDO.

15           Our evidence will indicate to you what's  
16 happening in the last four or five years on the river  
17 in -- and it is designed to show you that whatever the  
18 paper looks like in this room, conditions on the ground  
19 are terrible, and that the lack of due diligence is  
20 likely to bring these fish to extinction.

21           The testimony will be relatively simple. Its  
22 purpose is to establish facts from which we can draw  
23 legal inferences later in the case.

24           And so with that as the opening statement, I  
25 will now ask my witnesses to summarize their testimony.

1           MR. RUBIN: Before the summary begins, timing  
2 of objections, we did file written objections; and  
3 despite what Mr. Jackson has said today, I don't think  
4 it changes anything.

5           I think the written testimony does speak for  
6 itself, and the written testimony demonstrates what the  
7 Carmel River Steelhead Association is intending to  
8 present today is not relevant to the two issues the  
9 Hearing Officers have identified for this first phase.

10           There's nothing in those two documents that  
11 address the two issues identified.

12           MR. JACKSON: The response to that is that if  
13 one looks at 95-10 there are two sections that are  
14 critical.

15           One is 9.0, Summary and Conclusion. And the  
16 other is the order which indicates -- which has in it a  
17 number of conditions, 14 conditions. And as you have  
18 already seen in the scope of this particular hearing,  
19 the Prosecution Team has relied on Condition number 14  
20 to try to establish a violation of the 1052 and the  
21 conditions of Condition 2 in regard to diligence.

22           The testimony basically is to establish what  
23 the conditions are at the present time in order for you  
24 to review whether or not, given those factual  
25 conditions, you believe that there has been appropriate

1 diligence as required by the Order.

2 I don't know how you can do that without  
3 knowing what takes place on the river.

4 CO-HEARING OFFICER BAGGETT: So the two  
5 witnesses are strictly here to establish the current  
6 condition on the river for which we can determine  
7 whether due diligence has actually been applied over  
8 the last 13 years; and your argument is, of course,  
9 since the river is not restored to its full pre-project  
10 health or whatever baseline you use, that it -- I  
11 understand the argument.

12 Mr. Rubin, do you have any --

13 MR. RUBIN: I --

14 CO-HEARING OFFICER BAGGETT: It's a narrow  
15 scope.

16 MR. RUBIN: There's a very narrow scope, but  
17 it's outside of the scope of Phase I of this  
18 proceeding.

19 The use of the word "diligence" is being used  
20 to describe the basis for the testimony and apparently  
21 trying to be linked to Condition 2 of Order 95-10.

22 But that's the extent of the link. The Order  
23 95-10, specifically Condition 2, has no bearing on the  
24 effect of California American Water's operations on the  
25 Carmel River.

1           It's -- if this was a proceeding where things  
2 were opened up and we were talking about mitigation  
3 measures in there or revisiting the issues, maybe this  
4 would be appropriate, but it has no place in this first  
5 phase clearly.

6           CO-HEARING OFFICER BAGGETT: It seems to me  
7 clearly in the remedy phase. I mean it clearly goes to  
8 what's an appropriate remedy, what the timing of that  
9 remedy is, and you've got to understand the health of  
10 the system to understand how quickly it should be  
11 remedied. If there is some type of a phased remedy  
12 this would be clearly relevant, I assume both counsel  
13 would agree with that.

14           MR. JACKSON: Well, I certainly agree with  
15 that. Mr. Rubin might want to spend a couple days with  
16 a book before he decides that.

17           But I would like to get back to my -- to the  
18 original point. First of all, the conditions were a  
19 result of the findings in 95-10.

20           CO-HEARING OFFICER BAGGETT: Right.

21           MR. JACKSON: The findings in 95-10, Finding  
22 4, is that the State Water Resources Control Board can  
23 request the Attorney General to take action under the  
24 Section 1052.

25           Alternatively the State Board can suspend such

1 a referral, which you did. I assume you were taking  
2 this -- they were taking this alternative, the previous  
3 board -- to mitigate the effects of its diversions on  
4 the environment and develop and diligently pursue a  
5 plan for obtaining water from the Carmel River or other  
6 course consistent with California water law.

7 The primary concern should be the adoption of  
8 an order requiring Cal Am to prepare a plan setting  
9 forth specific actions to be taken to develop and  
10 maintain a legal water supply and to minimize its  
11 diversions from the Carmel River and to mitigate the  
12 environmental effects of its diversions.

13 There was a plan set out which has never been  
14 followed. That plan was the alternative to 1052, and  
15 it's our position that the facts on the ground lead to  
16 the inference that they have not followed a plan to  
17 diligently save anything on that river.

18 They have simply continued to deliver water to  
19 existing customers and old customers because nobody's  
20 enforced the Order.

21 CO-HEARING OFFICER WOLFF: You claim that  
22 diligence, the diligence standard, would vary depending  
23 on the circumstances. And if the circumstances are  
24 more severe, then the standard for having acted  
25 diligently would be higher. Is that correct? Am I

1 understanding --

2 MR. JACKSON: Yes, sir. The diligence is a  
3 word that is abstract until you apply it to a set of  
4 facts, and we're trying to give you a set of facts.

5 CO-HEARING OFFICER WOLFF: I understand. Now  
6 is there any case law in support of your interpretation  
7 the diligence standard varies depending on the  
8 circumstances?

9 MR. JACKSON: I am sure there is and would be  
10 very glad to put it in the brief.

11 CO-HEARING OFFICER BAGGETT: That will  
12 definitely be in your closing briefs.

13 MR. JACKSON: I understand.

14 MR. RUBIN: I do need to clarify here. Again,  
15 this -- the Hearing Officers issued a ruling on May 29  
16 and made it very clear that this proceeding was not  
17 intended to question compliance with any other  
18 provision of Order 95-10 except for Condition 2.

19 We've spent a lot of time briefing this issue,  
20 making sure we were clear so that we could be prepared  
21 for this hearing.

22 Condition 2 does not require diligent  
23 activities to mitigate for impacts, does not require  
24 Cal Am to do anything except what it says.

25 And witnesses that are being advanced right

1 now by the Carmel River Steelhead Association present  
2 no evidence on the issue.

3 Mr. Jackson cleverly described how these  
4 witnesses relate to the 1052 issue, but the end of his  
5 sentence referred to causing damage. And that's what  
6 these witnesses are trying to present evidence on.

7 And whether we clearly -- excuse me. You  
8 clearly bifurcated this hearing. The first phase was  
9 on liability, and ultimately the second phase you would  
10 be relying on that evidence if you find the company  
11 liable.

12 And again, that's what Mr. Jackson is seeking  
13 from his witnesses is information on the remedy.

14 CO-HEARING OFFICER WOLFF: No, I think he's  
15 seeking from the witnesses information that would  
16 suggest that we interpret diligence at the highest  
17 level because he claims that the damage is very, very  
18 severe.

19 And so I ask the same question to you. Do you  
20 believe that the diligence standard depends on the  
21 circumstances on the ground or not?

22 And whatever your opinion is, do you believe  
23 there's case law that explicates, you know, how the  
24 diligence is to be interpreted in a certain situation?

25 MR. RUBIN: I have -- all -- my response to

1 your question gets back to Condition 2, and the  
2 reference is diligence in context with implementing one  
3 or more of the following actions. So the question has  
4 to be, regardless of how you define diligence, it gets  
5 to relating to these actions. And the testimony that's  
6 being advanced doesn't address the issue.

7 It's a way of -- frankly, it's a way of  
8 bootstrapping an issue on remedy into the Phase I.

9 MR. JACKSON: So I thank Mr. Silver for  
10 bringing the ruling on the clarification of issues  
11 which has on it on page 4 the italicized statement:

12 During the first phase, evidence may be  
13 presented addressing the issues of  
14 whether Cal Am is diverting water in  
15 violation of Water Code Section 1052 and  
16 whether Cal Am has complied with the  
17 requirements of Order 95-10 and  
18 amendments thereto.

19 MR. RUBIN: Which ruling have you just  
20 referred to?

21 MR. JACKSON: The May 29, 2008 ruling.

22 CO-HEARING OFFICER BAGGETT: We will allow the  
23 testimony for the narrow -- I think the second phrase  
24 of the sentence was -- read what we wrote: And whether  
25 Cal Am's complied with the requirements of Order 95-10



1 and amendments thereto.

2           There was a mitigate section. I guess the  
3 only proviso is that to the extent this testimony goes  
4 to remedies, we won't accept it twice. So you won't  
5 come back with the same witnesses and same argument for  
6 remedies.

7           If you're going to lay it now, lay the  
8 foundation now, which should expedite your second  
9 portion. You're going to talk about the state of the  
10 river which is the same issue as the remedy, one would  
11 assume.

12           MR. JACKSON: I do understand that I'd like to  
13 sort of clarify that little, Mr. Baggett, if it's all  
14 right.

15           The -- we do not propose remedies in this  
16 testimony. We are trying to show that since 95-10 and  
17 since Condition 2 and we believe that Conditions 3 and  
18 4 and 14, among others, basically lay out what the  
19 State Board expected in 95-10 in regard to diligence.  
20 And we're simply trying to show that the result has not  
21 been what they expected.

22

23

24

25

1 CO-HEARING OFFICER BAGGETT: Overruled.  
2 Proceed, and the objection's noted for the record.  
3 Summarize the testimony.

4 ROY THOMAS, DDS

5 AND

6 ROGER WILLIAMS

7 Called by Carmel River Steelhead Association

8 DIRECT EXAMINATION BY MR. JACKSON

9 MR. JACKSON: Mr. Williams, is the testimony  
10 listed as CRSA Exhibit 2 your true and correct  
11 testimony?

12 MR. WILLIAMS: It's my true and correct  
13 testimony with some exceptions. In proofreading it  
14 last night, I found a few errors -- or not errors,  
15 areas that I think adding an additional word or two  
16 would improve the clarity of that.

17 STAFF COUNSEL TAYLOR: Briefly, I would like  
18 to have each of you affirm that you took the oath  
19 earlier today.

20 DR. THOMAS: Yes, we did.

21 STAFF COUNSEL TAYLOR: Thank you.

22 MR. JACKSON: And did you so affirm,  
23 Mr. Williams?

24 MR. WILLIAMS: Yes.

25 MR. JACKSON: Would you add your errata?

1 MR. WILLIAMS: Yes. In my written testimony  
2 in statement one, it reads:

3 In the 1950s, as I saw in summer visits,  
4 the Carmel River ran to the coastal  
5 lagoon all summer in all years.

6 That should be changed at the tail end of that  
7 to say "all summer in years when visits occurred." I  
8 wasn't there every year.

9 The second is in statement two where I would  
10 insert the word -- words "visitor and" in the start of  
11 that, saying:

12 I am a long-time visitor and resident of  
13 the Carmel River area and continuing on.

14 And finally on statement 21:

15 For these reasons I believe that Cal Am  
16 is violating Order 95-10.

17 I would include that I believe that Cal Am is  
18 violating Water Code Section 1052 and/or 95-10.

19 And then the rest of it would be as submitted.

20 MR. JACKSON: With those changes, is your  
21 testimony true and correct?

22 MR. WILLIAMS: Yes, sir.

23 MR. JACKSON: With the Hearing Officers'  
24 approval, this will go faster if I can simply ask a  
25 number of questions and get -- and elicit answers. If

1 it's -- we will be done within our time period.

2 CO-HEARING OFFICER BAGGETT: Proceed.

3 MR. JACKSON: Mr. Williams, how often do you  
4 go to the river now?

5 MR. WILLIAMS: Well, at least once a week.  
6 Usually more often than that with exceptions of when  
7 I'm out of town on vacation.

8 MR. JACKSON: What are your purposes in going  
9 to the river?

10 MR. WILLIAMS: I love the river. I like to  
11 look at it. I start out at Rosie's Bridge, and I stop  
12 at every place the road intersects with the river, and  
13 I look at it. I enjoy it. And I specifically look to  
14 see how the water is flowing and how the steelhead are  
15 doing.

16 MR. JACKSON: Have you noticed a difference in  
17 the river since the 1950s?

18 MR. RUBIN: I'm going to object. I understand  
19 the need to move things forward. But I'm having --  
20 because of the leading questions, it's very difficult  
21 to following where in the written testimony this is  
22 presented.

23 And as far as I'm aware, no new testimony is  
24 intended to be presented. This is intended to be a  
25 summary of the written testimony.

1 CO-HEARING OFFICER BAGGETT: I would sustain  
2 the objection. Can you ask the witness to summarize to  
3 the best of his ability?

4 MR. JACKSON: Mr. Williams, can you summarize  
5 your testimony to the best of your ability.

6 CO-HEARING OFFICER BAGGETT: We read it.

7 MR. WILLIAMS: I understand. Rather than  
8 having me read it, do you prefer a more concise  
9 statement?

10 CO-HEARING OFFICER WOLFF: Please.

11 CO-HEARING OFFICER BAGGETT: Because we've  
12 read it.

13 MR. WILLIAMS: In brief, I noticed that the  
14 Carmel River dries up every summer. The drying up  
15 tends to correlate with which pumps are in operation  
16 extracting water from the aquifer.

17 The result of the river drying means that the  
18 Steelhead Society and the Monterey Peninsula Water  
19 District have to go out and perform rescues of stranded  
20 steelhead.

21 The steelhead are not all rescued because the  
22 people doing rescues can only cover a small portion of  
23 river. And when we go back we find many of the  
24 steelhead we tried to rescue have escaped. A lot of  
25 the steelhead, we notice, are in fact dead, those that

1 haven't been eaten by scavengers.

2 An important phase is the lagoon water level  
3 drops. When the lagoon water level drops, birds have a  
4 very good opportunity to eat the juvenile steelhead.

5 In addition, when the lagoon level drops,  
6 there's infiltration of saltwater through the dunes or  
7 with overtopping waves it forms a layer of dense salty  
8 water at the bottom of the lagoon that's an unpleasant  
9 habitat for steelhead.

10 The steelhead, again, migrate close to the  
11 surface to escape the salty water. Again, they're  
12 vulnerable to predators. My observations show from  
13 watching the lagoon that the number of fish rising to  
14 hatching insects diminishes as the summer prolongs into  
15 fall.

16 And let's see if there's anything else I need  
17 to comment.

18 And for these reasons, I believe that the  
19 failure of Cal Am Water to adequately provide adequate  
20 water to the lagoon and to the river results in  
21 unnecessary death of large numbers of steelhead.

22 MR. JACKSON: Thank you, sir.

23 Mr. Thomas, your testimony is CRSA Exhibit 1.  
24 Is that the true and correct testimony which you have  
25 to give today?

1 DR. THOMAS: Yes. It's part of my 35 years of  
2 experience on the river. I'd like to summarize to some  
3 extent the initial phases of this so that everybody  
4 here can understand why 95-10 is the way it is.

5 In '87, as it says in my testimony, we were  
6 the ones that saw the fish dying in the river and said  
7 this has to stop, and John Williams helped us put  
8 together a formal complaint.

9 We were told in '87 that, oh, no, we can't do  
10 anything for you now. There is a big EIR done by the  
11 Water Management District for a new dam. And we waited  
12 until 1995 after our formal complaint to have our  
13 complaint heard.

14 Now in the environment in 1995, the Board said  
15 listen, there's going to be a new dam. All the  
16 problems are going to be solved. And on the way in,  
17 there's an interim relief plan which I helped create.

18 And then in '95 there was the allocation EIR  
19 which is another mitigate plan, supposed to help the  
20 fish.

21 Well, the problem was, 95-10 was designed only  
22 to be in effect for a year or two, until the dam was  
23 built. But the dam was never built.

24 So 95-10 is flawed, and from the standpoint --  
25 it was only supposed to last for a couple of years. It

1 never was perfected. So diligence -- and they  
2 emphasize the diligence. You will do this, and you  
3 will have reports sent every month about how quickly  
4 you're finding a new water source.

5 Now, I've been involved with the politics of  
6 water on the Carmel River, and I've read every EIR for  
7 every dam on every project, ASR included. There's  
8 never been any diligence. There's just been we'll get  
9 to it sometime next summer or whatever.

10 So I'm very concerned that the -- Cal Am is  
11 extracting more water than it has a legal right to now,  
12 and not just the 3,000 acre feet which isn't 3,000 acre  
13 feet. The San Clemente Dam is full. Los Padres dam is  
14 filling. And they have a 10 percent to 12 percent  
15 leakage in the plumbing system which they don't fix.  
16 They're not trying very hard.

17 They own neighboring water companies, but they  
18 don't use any of that water to mitigate to the  
19 overextraction of the Carmel River.

20 MR. RUBIN: I'm going to object again. Maybe  
21 I'm tired at this hour, but I can't follow where this  
22 is in the written testimony.

23 DR. THOMAS: Well, I think diligence, as I've  
24 tried to say, a background of how 95-10 started. I was  
25 there. I spent two weeks in Sacramento.



1           And I -- the diligence that brought to my mind  
2 the failure of Cal Am to respond like the public water  
3 agency in Santa Barbara did to get water for their  
4 people -- it's in my testimony, prepared -- proves to  
5 me that Cal Am didn't care.

6           The people in Santa Barbara got -- within  
7 three years, they got a desal plant. Within five years  
8 they got a connection to the state water project.

9           Cal Am has not delivered one acre foot of  
10 water to compensate for their illegal production. They  
11 think it's a joke. They think you gave them a water  
12 right, and they can make a profit from it forever.

13           CO-HEARING OFFICER WOLFF: I appreciate your  
14 opinion in your summary, but I don't think it's  
15 appropriate for you to tell us what they think.

16           DR. THOMAS: Well, it's my opinion. I'm  
17 sorry.

18           CO-HEARING OFFICER WOLFF: I understand.

19           DR. THOMAS: But I have an educated opinion.

20           CO-HEARING OFFICER WOLFF: I understand. I  
21 understand.

22           CO-HEARING OFFICER BAGGETT: Any other?

23           DR. THOMAS: I confused the summary.

24           MR. JACKSON: Yes. Has the Carmel River  
25 Steelhead Association attempted to bring the situation

1 with the steelhead to the attention of California  
2 American Water company?

3 DR. THOMAS: Yes. We communicate with them  
4 frequently on failures in the reservoirs where there  
5 are killed fish. We write them letters. We talk to  
6 NOAA Fisheries, and they write them letters.

7 And as Larry Foy always used to say, we'll  
8 send it to the people back east and see if they'll  
9 approve it and maybe sometime next summer we'll do  
10 something about it.

11 That's basically the condition of Cal Am  
12 facilities and their motivation to satisfy 95-10 and  
13 the provision involved in it.

14 MR. RUBIN: I'm going to object to the  
15 testimony. Again, it's well beyond what was in the  
16 written testimony. It's argumentative. It's  
17 offensive.

18 CO-HEARING OFFICER BAGGETT: I would ask we  
19 strike the last testimony from Dr. Thomas. You want to  
20 rephrase it, go ahead.

21 MR. JACKSON: May I -- that was one of the  
22 reasons that I was interested in asking questions so  
23 that I could limit the scope, but if I could do that  
24 for them.

25 In your testimony, Dr. Thomas, you indicate

1 that you requested that the -- that you recently wrote  
2 a letter to the California American Water Company  
3 asking them to reduce the pumping and provide surface  
4 flows into the river for the lagoon to prevent damage  
5 this year. What was the response?

6 DR. THOMAS: Well, there was no response for  
7 increased pumping. And as it says in the allocation  
8 EIR, somebody has the responsibility to try and get  
9 water for the lagoon. It's either the Water Management  
10 District, Cal Am, or both. And there is no new water  
11 supply for the lagoon.

12 And the lagoon has been considered one of the  
13 most important survival zones for the steelhead. It's  
14 where they grow the fastest. And it's been ignored by  
15 both Water Management District and Cal Am.

16 MR. JACKSON: I'll save most of the rest of  
17 the questions about the interaction between the  
18 Steelhead Association and Cal Am for cross on Cal Am.

19 We would ask that our testimony be moved into  
20 evidence.

21 CO-HEARING OFFICER BAGGETT: Is there any  
22 cross-examination by any party? Start with Sierra  
23 Club, go down the list. Monterey, cross-examination?

24 MR. LAREDO: We're passing on this, thank you.

25 STAFF COUNSEL TAYLOR: Pebble Beach?

1 MR. JAMISON: We're passing.

2 CO-HEARING OFFICER BAGGETT: Cal Am?

3 Mr. Rubin, you're up.

4 CROSS-EXAMINATION BY MR. RUBIN

5 FOR CALIFORNIA AMERICAN WATER COMPANY

6 MR. RUBIN: I just have a few questions.

7 Questions are directed to Dr. Roy Thomas.

8 Dr. Thomas, you've been a member of the Carmel  
9 River Steelhead Association for about 30 years; is that  
10 correct?

11 DR. THOMAS: Closer to 35.

12 MR. RUBIN: You currently serve as the  
13 president of the Carmel River Steelhead Association?

14 DR. THOMAS: Yes.

15 MR. RUBIN: How long have you been president  
16 of the Carmel River Steelhead Association?

17 DR. THOMAS: Seems that no one else wants to  
18 be president. I've been president probably 20 years.

19 MR. RUBIN: Are you aware of the involvement  
20 of the Carmel River Steelhead Association in the  
21 proceedings before the State Water Resources Control  
22 Board which led to the issuance of Order 95-10.

23 DR. THOMAS: I was here.

24 MR. RUBIN: In fact, the Carmel River  
25 Steelhead Association was one of the entities that

1 filed the complaint which caused the proceeding before  
2 the State Water Resources Control Board to take place;  
3 is that correct?

4 DR. THOMAS: We were the first of three or  
5 four.

6 MR. RUBIN: In the complaint, did the Carmel  
7 River Steelhead Association allege California American  
8 Water was diverting without authorization?

9 DR. THOMAS: Yes.

10 MR. RUBIN: In the complaint, did the Carmel  
11 River Steelhead Association allege California American  
12 Water's diversions were harming public trust resources  
13 including steelhead?

14 DR. THOMAS: Yes, we did.

15 MR. RUBIN: Order 95-10 addressed the  
16 allegations raised by the Carmel River Steelhead  
17 Association; is that correct?

18 DR. THOMAS: Say that again?

19 MR. RUBIN: Order 95-10 addressed the  
20 allegations raised by the Carmel River Steelhead  
21 Association.

22 DR. THOMAS: Addressed. If you mean they  
23 dealt with them, no. But they talked about them.

24 MR. RUBIN: Were you aware of the involvement  
25 of the Carmel River Steelhead Association in litigation

1 challenging Order 95-10?

2 DR. THOMAS: Yes.

3 MR. RUBIN: I believe in response to questions  
4 asked of you during direct examination, you expressed  
5 the belief that Order 95-10 was only to be in effect --  
6 I believe you said for a year or two; is that correct?

7 DR. THOMAS: 95-10 was designed to hold us off  
8 until there was a solution to the problem, and the  
9 State Water Board considered Monterey Peninsula Water  
10 Management District's New Los Padres Dam would solve  
11 all the problems that Cal Am was causing on the river.

12 MR. RUBIN: Did I mishear your answer to a  
13 question on direct testimony where you said that, in  
14 your view, Order 95-10 was only supposed to be in  
15 effect for a year or two?

16 DR. THOMAS: It was explained to me in the  
17 hallways of this -- it wasn't this hearing room, but it  
18 was another hearing room -- that the reason that they  
19 took so long to have the hearing was they wanted to  
20 make sure that a solution to the overextraction,  
21 illegal overextraction of water from the Carmel River  
22 would be at hand.

23 And they came up with 95-10 to say yep, it's  
24 true. They are taking the water illegally. They are  
25 damaging the resources. But there is a solution, and

1 it's this -- in fact, the EIR was explained at the same  
2 hearing. The Water Management District spent a lot of  
3 time talking about how good the dam was going to be.

4 But the dam was destined to fail because of  
5 the drought and flood area we have and the fact that it  
6 wouldn't pass the steelhead in live form. So we  
7 opposed the dam because of --

8 MR. RUBIN: Dr. Thomas, I apologize for  
9 interrupting you. I asked a specific question.

10 I'm trying to understand your testimony today.  
11 And again, I understood you to testify that it was your  
12 belief that Order 95-10 was only to be in effect for a  
13 year or two.

14 DR. THOMAS: It's my belief that the weakness  
15 of 95-10, the fact that they have allowed it to go on  
16 for 13 years, it was intended to be an interim between  
17 the time the EIR was approved, which it was, and the  
18 time the dam was built, which it wasn't because the  
19 public wouldn't pay for it and wouldn't vote for it.

20 MR. RUBIN: And again, and your expectation  
21 was that the Order would be in effect for a year or two  
22 after it was issued?

23 DR. THOMAS: We felt that it was a very poor  
24 order, it wouldn't do much for the fish, and we didn't  
25 know whether the dam was going to be approved or not,

1 but it wasn't approved.

2 So my understanding from people that were at  
3 the hearing is that it was -- 95-10 was just a short  
4 interim, not expected to be around for 13 years.

5 CO-HEARING OFFICER BAGGETT: I think he's  
6 answered it.

7 DR. THOMAS: Did I answer it?

8 MR. RUBIN: I don't believe so, but we can  
9 move on.

10 Are you aware that the parties to the  
11 litigation involving Order 95-10 settled their  
12 disputes?

13 DR. THOMAS: There was --

14 MR. SILVER: I have an objection to that  
15 question. There's no foundation that's been laid as to  
16 what that litigation involved.

17 Sierra Club was involved in that litigation,  
18 and to just characterize it -- I think the challenge to  
19 95-10 by the Carmel River Steelhead Association and  
20 Sierra Club is quite limited. So I don't think there  
21 should be an inference on the part of this Board  
22 that --

23 MR. RUBIN: Well, the testimony --

24 CO-HEARING OFFICER BAGGETT: I would sustain  
25 the objection and ask that the question be directed not



1 to Sierra Club, not to the parties, but to the witness  
2 before you who was involved in that litigation and  
3 should be able to answer your questions on behalf of  
4 the Carmel Steelhead Association.

5 DR. THOMAS: Larry Silver was the attorney  
6 that was there.

7 MR. RUBIN: Let me rephrase my question.

8 DR. THOMAS: He probably knows more about it  
9 than I do.

10 MR. RUBIN: I understand you're --

11 CO-HEARING OFFICER BAGGETT: The question is  
12 to this panel. He's already had his chance with the  
13 other panel.

14 MR. RUBIN: Are you aware that the Carmel  
15 River Steelhead Association settled litigation  
16 involving disputes over Order 95-10?

17 DR. THOMAS: As I understand it, Judge Silver  
18 retained jurisdiction because we weren't happy with  
19 what was proposed, and we wanted to make sure it  
20 worked. And that's my understanding.

21 So we may -- we -- as far as I am concerned,  
22 we didn't settle. We weren't happy with it. But we  
23 were told that the judge would watch over what actually  
24 happened after that, and he retained jurisdiction and  
25 we could go to him without starting all over again, and

1 he could make a ruling on that.

2 And Cal Am was also suing --

3 MR. RUBIN: Are you familiar with an order  
4 that was issued in litigation involving Carmel River  
5 Steelhead Association?

6 MR. SILVER: I object to this line of  
7 questioning. It calls for a legal construction of the  
8 order.

9 And I can tell you that, whatever inferences  
10 there are with respect to this, that the order was  
11 extremely limited, the challenge was limited, and I --  
12 I -- I strenuously object.

13 CO-HEARING OFFICER BAGGETT: I'll sustain the  
14 objection. Ask you to rephrase so it doesn't involve a  
15 legal conclusion.

16 MR. RUBIN: Do you know if the Carmel River  
17 Steelhead Association signed a stipulation in the  
18 litigation involving the litigation over Order 95-10?

19 CO-HEARING OFFICER BAGGETT: Yes or no.

20 DR. THOMAS: No, I don't know that.

21 MR. RUBIN: Do you know if the court that  
22 presided over the litigation involving Order 95-10 in  
23 which the Carmel River Steelhead Association was  
24 involved ever issued an order? Yes or no?

25 DR. THOMAS: I'll say no at this point. I

1 don't know what the order would be because I don't have  
2 it in front of me.

3 STAFF COUNSEL TAYLOR: Mr. Rubin, could you  
4 identify the case number please and any special order?

5 MR. RUBIN: And I'll provide the witness what  
6 has been marked as California American Water  
7 Exhibit 17, it's a pleading that's relevant to case  
8 number M as in Michael, 33519, a pleading that's  
9 relevant to a case Monterey Peninsula Water Management  
10 District, California American America Water Company,  
11 Petitioners, v State Water Resources Control Board and  
12 another related case.

13 Dr. Thomas, do you recognize the order I  
14 provided to you? California American Water Exhibit 17,  
15 I believe?

16 DR. THOMAS: No, I don't recognize it. And I  
17 don't see any signature anywhere.

18 MR. RUBIN: Thank you. I do have one  
19 question. Can you tell me if the order was signed?

20 DR. THOMAS: I didn't sign it.

21 MR. RUBIN: Was it signed by a judge?

22 DR. THOMAS: I see somebody named Silver on  
23 it.

24 MR. RUBIN: Can you tell me what the date is  
25 on which it was signed?

1 DR. THOMAS: Says 6-3-98.

2 MR. RUBIN: 6-3-98, I presume stands for  
3 June 3rd, 1998. At that time, were you the president  
4 of the Carmel River Steelhead Association?

5 DR. THOMAS: I don't remember.

6 MR. RUBIN: But you were involved in the  
7 organization?

8 DR. THOMAS: Yes.

9 MR. RUBIN: And order 95-10 was issued in  
10 July 1995; is that correct?

11 DR. THOMAS: Yes.

12 MR. RUBIN: Thank you.

13 Dr. Thomas, to the best of your knowledge, has  
14 the Carmel River Steelhead Association ever supported  
15 an effort by California American Water to acquire  
16 additional water rights to Carmel River water?

17 DR. THOMAS: Not to Carmel River water.

18 MR. RUBIN: Thank you.

19 To the best of your knowledge, has the Carmel  
20 River Steelhead Association ever supported an effort by  
21 the Monterey Peninsula Water Management District to  
22 construct a dam on the Carmel River?

23 DR. THOMAS: We did till we found out how poor  
24 it was.

25 MR. RUBIN: Dr. Thomas, do you have a

1     doctorate degree in dentistry?

2             DR. THOMAS:   Yes.

3             MR. RUBIN:    You're not a geologist?

4             DR. THOMAS:   No, but I'm an amateur  
5     geomorphologist.

6             MR. RUBIN:    And you're not a biologist either,  
7     are you?

8             DR. THOMAS:   I have a degree in biology.

9             MR. RUBIN:    You do.

10            THE WITNESS:   Yes.

11            MR. RUBIN:    Are you an ichthyologist?

12            DR. THOMAS:   I am member of the American  
13     Fisheries Society, and I've written articles for their  
14     professional journal.

15            MR. RUBIN:    Thank you.

16            CO-HEARING OFFICER BAGGETT:   Any redirect?

17            MR. JACKSON:   Yes.    Might I do it from here?

18            CO-HEARING OFFICER BAGGETT:   Surely.

19            REDIRECT EXAMINATION BY MR. JACKSON

20            FOR CARMEL RIVER STEELHEAD ASSOCIATION

21            MR. JACKSON:   Dr. Thomas, is your testimony  
22     related to anything that has to do with the time period  
23     before 1998?

24            DR. THOMAS:   It extends before and after '98,  
25     yes.

1           MR. JACKSON: Are the conditions that you  
2 describe in your testimony conditions that exist today  
3 in 2008?

4           DR. THOMAS: Many of them are, yes.

5           MR. JACKSON: No further questions.

6           CO-HEARING OFFICER BAGGETT: Any recross from  
7 any other party on that very narrow line?

8           RECCROSS-EXAMINATION BY MR. RUBIN  
9           FOR CALIFORNIA AMERICAN WATER COMPANY

10          MR. RUBIN: Dr. Thomas, you just indicated  
11 that your testimony relates to factors both before and  
12 after 1998; is that correct?

13          DR. THOMAS: Yes. I think I referenced 1987  
14 to start with.

15          MR. RUBIN: Did you have concerns with the  
16 Carmel River lagoon prior to 1995?

17          DR. THOMAS: Yes.

18          MR. RUBIN: Thank you.

19          CO-HEARING OFFICER BAGGETT: Okay. Evidence?

20          MR. JACKSON: We offer Carmel River Steelhead  
21 Association Exhibits 1 and 2 in evidence.

22          MR. RUBIN: Again, I renew my objections on  
23 the bases stated earlier.

24          CO-HEARING OFFICER BAGGETT: And again, we  
25 will overrule that and note the objection for the

1 record and allow the testimony in with the -- as it  
2 relates to diligence and the current condition.

3 (Exhibits CRSA-1 and CRSA-2 were  
4 admitted into evidence.)

5 CO-HEARING OFFICER BAGGETT: Do you have any  
6 exhibits as part of your case-in-chief?

7 MR. RUBIN: We move California American Water  
8 Exhibit 17, which was identified initially -- it was  
9 admitted into evidence, but only for limited purposes.  
10 At this point, I would move for admission as part of  
11 this first phase.

12 MR. JACKSON: We would think it would be more  
13 appropriate to enter the voluminous evidence after  
14 their case-in-chief.

15 There are portions of that document that I'm  
16 going to have some questions about.

17 CO-HEARING OFFICER BAGGETT: You will have  
18 that opportunity later. Counsel's asked it be admitted  
19 now since he's crossed, and I overruled the objection  
20 and allow it to be admitted at this point.

21 (Exhibit CAW-17 was admitted into evidence.)

22 CO-HEARING OFFICER BAGGETT: Anything else?  
23 If not, thank you.

24 CO-HEARING OFFICER WOLFF: I have a comment.  
25 This issue of diligence is of central

1 importance to the liability issue, of course. So I  
2 would request that all of the parties in your closing  
3 briefs address the case law related to the  
4 interpretation of diligence.

5           It's relevant not just to this case that was  
6 presented, but also to the Pebble Beach Company. It  
7 wasn't clear to me in reading their evidence why they  
8 appear today or tomorrow rather than coming in during  
9 the remedy time period, though no doubt they have some  
10 reason to believe that their testimony is relevant to  
11 the liability.

12           So I ask that all parties brief it in their  
13 closing briefs. And if you need additional page count  
14 for that we can discuss it at the end of the series of  
15 hearings.

16           CO-HEARING OFFICER BAGGETT: Thank you.

17           The next party is the California Salmon  
18 Steelhead Association. No one is here. We do have a  
19 written opening statement which we received timely and  
20 is accepted for the record.

21           MR. RUBIN: Can I ask for some clarification  
22 relating to the California Salmon Steelhead  
23 Association?

24           As I understand it, California Salmon  
25 Steelhead Association submitted opening statement,



1 testimony, closing statement; and subsequent to doing  
2 that, the Hearing Officers issued a ruling on their  
3 participation.

4 After that ruling, the California Salmon  
5 Steelhead Association submitted a policy statement.

6 CO-HEARING OFFICER BAGGETT: Right.

7 MR. RUBIN: And the policy statement -- so I  
8 would like some clarification on the --

9 CO-HEARING OFFICER BAGGETT: Fair enough.  
10 That's limited. I think it's already been posted on  
11 the web, on the website. So that is the scope of their  
12 testimony. So it's already on the website in the  
13 policy statement. Obviously, you can't take testimony  
14 without a witness.

15 With that, let's keep moving. Monterey  
16 Peninsula. You have one witness and opening statement?

17 CO-HEARING OFFICER BAGGETT: Mr. Laredo, while  
18 you're coming up, how long do you -- trying to get some  
19 timing issues, timekeeping. Do you expect a lengthy?

20 MR. LAREDO: I believe I have about ten  
21 minutes for an opening statement, and I believe  
22 Mr. Fuerst will take approximately 15 minutes with his  
23 direct testimony.

24 CO-HEARING OFFICER BAGGETT: Mr. Rubin already  
25 relayed he's going to be very short. Trying to see

1 whether. . . Depends on the cross-examination. So  
2 let's proceed.

3 MR. LAREDO: Thank you.

4 Again, my name is David Laredo. I'm general  
5 counsel for the Monterey Peninsula Water Management  
6 District.

7 The Water Management District is legislatively  
8 created as the integrated manager of the local ground  
9 and surface waters of the Monterey Peninsula. The  
10 District was created by a special act of the  
11 Legislature in the Statutes of 1977, Chapter 527.

12 It is a dependent district. It has an elected  
13 set of board members. Five are directly elected. Two  
14 additional board members are appointed; a seated member  
15 of the board of supervisors and a seated mayor from a  
16 local city serve on the board for a total board of  
17 seven.

18 The District is an active manager of water  
19 resources. It manages community water demand and is a  
20 key participant in water supply planning.

21 The District holds water rights issued by this  
22 Board. It was a party to Decision 1632 and to WR 95-10  
23 as well as other water proceedings.

24 The District has an active mitigation program  
25 to minimize impacts caused by present water supply

1 activities. The District has a regulatory function  
2 with respect to California American Water Company and  
3 every other water distribution system deriving water  
4 supply from the Monterey Peninsula water resources  
5 systems. That includes not only the Carmel River water  
6 system but also the Seaside Groundwater Basin.

7 The District has an extensive monitoring  
8 network and based thereon maintains the definitive  
9 database for water resource production and water use.

10 The District also maintains the sole computer  
11 simulation program that assesses Carmel River water  
12 use.

13 The District board has adopted an official  
14 position respecting the draft CDO as will be presented  
15 by its General Manager, Darby Fuerst. Our role in this  
16 proceeding is to ensure to the greatest extent possible  
17 that the evidence presented to the State Board will  
18 allow for an accurate decision, that the evidence is  
19 objective and is used in an appropriate and relevant  
20 manner.

21 And at this point, I'd like to call Mr. Fuerst  
22 as our sole witness in Phase I.

23 DARBY FUERST

24 Called by Monterey Peninsula Water Management District

25 DIRECT EXAMINATION BY MR. LAREDO

1           MR. LAREDO:   And Mr. Fuerst, would you please  
2   state your name and address?

3           MR. FUERST:   My name is Darby Fuerst,  
4   D-a-r-b-y, F-u-e-r-s-t, and I reside in Pacific Grove.

5           MR. LAREDO:   That's within the Monterey  
6   Peninsula Water Management District?

7           MR. FUERST:   Correct.

8           MR. LAREDO:   Were you previously present at  
9   the time that an oath was given?

10          MR. FUERST:   Yes, I was.

11          MR. LAREDO:   Did you take that oath?

12          MR. FUERST:   Yes, I did.

13          MR. LAREDO:   Could you please state for the  
14   Board what your personal qualifications are in this  
15   matter?

16          MR. FUERST:   My education includes a master's  
17   in water resources administration and bachelor's  
18   degrees in geological sciences and English literature  
19   and an associate of arts degree in mathematics.

20          I am a certified professional hydrologist with  
21   the American Institute of Hydrology and have over  
22   26 years of professional experience in surface water  
23   hydrology and water resources administration.

24          MR. LAREDO:   And how long have you had  
25   experience with respect to the water resources of

1 Monterey Peninsula?

2 MR. FUERST: With the exception of one year,  
3 I've worked for the Water Management District for the  
4 last 23 years.

5 MR. LAREDO: Did you provide testimony  
6 previously in the '92 and '94 hearings leading up to  
7 95-10?

8 MR. FUERST: Yes, I did.

9 MR. LAREDO: Could you please provide an  
10 overview of the Water Management District and its  
11 legislative functions?

12 MR. FUERST: The District -- very briefly, the  
13 District is a special direction created by the  
14 California Legislature and ratified by the vote of the  
15 electorate in the Monterey Peninsula area in 1978.

16 The District was formed to provide integrated  
17 management of the surface and groundwater resources  
18 within the Monterey Peninsula area. And as part of  
19 that authority, that mission, the District manages all  
20 water distribution systems within the District  
21 boundaries including California American Water, its  
22 main system as well as some of its -- as all of its  
23 satellite systems.

24 And in that regard, we develop a quarterly  
25 budget with Cal Am. We assist in the negotiation of

1 the low flow memorandum regarding the operations of the  
2 reservoirs and flow releases on the Carmel river, and  
3 we also have a conservation standby rationing plan  
4 which during shortages imposes water use restriction.

5 MR. LAREDO: I believe that one of the  
6 representatives earlier characterized the District as  
7 the sidekick for Cal Am. Could you characterize please  
8 the District's relationship with California American  
9 Water Company?

10 MR. FUERST: Again, the District is a local  
11 regulator of Cal Am's water distribution system. It  
12 does cooperate with California American Water on water  
13 conservation programs in the area.

14 And as was alluded to in earlier testimony,  
15 the District provides programs to mitigate for the  
16 environmental -- the adverse impacts from Cal Am's  
17 pumping along the Carmel River which is its mitigation  
18 program.

19 In addition, Cal Am has -- we -- in addition,  
20 the District has worked with Cal Am on new water supply  
21 alternatives such as the Aquifer Storage and Recovery  
22 Project in the Seaside Basin, and we have provided  
23 input on the proposed Coastal Water Project.

24 MR. LAREDO: I believe that you brought some  
25 overheads or slides in PowerPoint format. If we could

1 have slide number two projected?

2 I draw your attention to this slide, and if  
3 you could please describe your understanding California  
4 American Water Company's diversions from the Carmel  
5 River since the adoption of Order 95-10?

6 CO-HEARING OFFICER BAGGETT: Could you  
7 identify what exhibit this is?

8 MR. FUERST: This is Exhibit DF-2, and it is  
9 just for presentation purposes only. The figure does  
10 not include the footnotes. But it is entered in my  
11 testimony as DF-2.

12 CO-HEARING OFFICER BAGGETT: Just to make the  
13 record clear for someone to identify this.

14 MR. FUERST: As shown, this is a table that  
15 summarizes Cal Am's annual diversions from the Carmel  
16 River for water years 1996 through water year 2007. It  
17 shows for each water year what was the limit assumed  
18 for operational purpose which you can see in 1996 was  
19 11,990 acre feet for that year. And each year after  
20 that, it's set at 11,285 acre feet.

21 And then Cal Am's actual production is shown  
22 in the third column and begins with 11,701 acre feet  
23 and goes down to 10,443 for an average of 10,967.

24 I want to at this time say -- explain the  
25 differences between this exhibit and the earlier

1 exhibit that was shown.

2 This is, as described in the footnote in my  
3 testimony, this is -- these are diversions that Cal Am  
4 made for customer service. So in water year 2006, Cal  
5 Am diverted 10,542 acre feet for delivery to customers  
6 in its main system in the Monterey Peninsula area.

7 In addition, under a temporary emergency right  
8 that the District held, Cal Am diverted an additional  
9 411 acre feet during the winter period. So their total  
10 diversion as shown in the previous table was 10,953.

11 STAFF COUNSEL TAYLOR: For purpose of  
12 clarification, the previous table you're referring to  
13 was the table introduced during John Williams'  
14 testimony; is that correct?

15 MR. FUERST: Yes.

16 MR. LAREDO: Correct.

17 MR. FUERST: Right.

18 MR. LAREDO: Looking at this slide, the  
19 right-hand column that's labeled Water Year Class,  
20 could you comment on the different characterizations  
21 under that column?

22 MR. FUERST: Yes. The Water Year Class refers  
23 to the unimpaired runoff that's estimated in the upper  
24 watershed to classify the water year as either -- there  
25 are seven categories where you could see 1998 which was



1 an El Nino year, considered an extremely wet year.  
2 Last year, 2007, was considered a critically dry year,  
3 and there are a number of normal years, below normal.

4 But these are based on flow, estimated  
5 unimpaired flow at the San Clemente Dam site and based  
6 on a frequency analysis.

7 MR. LAREDO: I'd like to draw your attention  
8 to the District's quarterly budget strategy -- I'm  
9 sorry -- the water supply strategy and budget process.  
10 And with reference to slides 3, 4, and 5 and in  
11 particular your Exhibit DF-4, could you please  
12 characterize that process?

13 MR. FUERST: Right. This is taken directly  
14 from a staff note that was presented to the Board. We  
15 actually just this month adopted the quarterly budget  
16 for the next quarter, July August and September, but  
17 this was in effect when I prepared any testimony.

18 Again, we in managing Cal Am and helping Cal  
19 Am manage the community water demand, we develop a  
20 quarterly budget. We don't wait for the end of the  
21 year and then in the eleventh month determine how we're  
22 doing and try to correct it.

23 So every quarter, we meet with Cal Am in  
24 consultation with staff from the California Department  
25 of Fish and Game and National Marine Fisheries Service

1 and develop a quarterly budget for Cal Am's main  
2 systems.

3 As you can see on the left side, we look at  
4 the sources of water that Cal Am has available. The  
5 time step is every month. And this again is for April,  
6 May, and June.

7 The top source is San Clemente Reservoir.  
8 That refers to surface water diversions, and it's zero  
9 because Cal Am has ceased to make diversions at that  
10 site because of constraints imposed by the California  
11 Division of Safety of Dams.

12 So there are no surface water diversions  
13 projected nor have there been any surface water  
14 diversions from San Clemente Reservoir since 2003.

15 Then we address what can be diverted over this  
16 three-month period from the Carmel Valley aquifer, and  
17 it's shown there, and then we also do the Seaside.

18 I would direct your attention to the bottom,  
19 the second -- third line from the bottom under the word  
20 "use" where the water that's being produced is going  
21 to. And the top line is customer service, and you can  
22 see that in April we're projecting that Cal Am will  
23 need to produce or divert from all sources 1,144 acre  
24 feet.

25 MR. LAREDO: I'm sorry. I have a question on

1 this slide. If you have other --

2 MR. FUERST: I just was going to say that that  
3 number as well as the other numbers for customer  
4 service, the 1388, the 1491, are based on Cal Am  
5 producing up to 11,285 acre feet in a water year from  
6 the Carmel River sources and producing no more than  
7 3,504 acre feet from their coastal subarea sources in  
8 the Seaside Groundwater Basin which is limited by a  
9 court order, an adjudication.

10 MR. LAREDO: Can you comment on the second to  
11 the last line that's labeled Phase 1 ASR Storage. What  
12 is that production amount?

13 MR. FUERST: That production was what we were  
14 hoping for that under -- this year is the first year  
15 that the District and Cal Am acquired a permanent water  
16 right for the Phase I ASR project. These are amounts  
17 that Cal Am would produce, and that's reflected in  
18 the -- under the source rows, but would be injected.

19 So in April, we were hoping that there would  
20 be sufficient rainfall and runoff in the Carmel River  
21 to allow diversions to be made for the ASR. There were  
22 not, let me say that. There were no diversions made.  
23 This was a projection.

24 Similarly to that, you can see above that  
25 under the Source heading and then the Seaside

1 Groundwater Basin, the Phase 1 ASR recovery. Here it's  
2 shown in these months as zero because this is the last  
3 three months of the injection season.

4 For the current quarter, we are projecting  
5 amounts that -- there that will -- Cal Am will recover  
6 from the Seaside Basin and thereby reduce their  
7 production from the Carmel River diversion during the  
8 July, August, September period.

9 MR. LAREDO: So what's shown here is a  
10 planning tool. This is your plan for how water will be  
11 produced in the future?

12 MR. FUERST: On a quarterly basis, yes.

13 MR. LAREDO: How do you track the production  
14 that has in fact occurred?

15 MR. FUERST: The next slide is taken directly  
16 from a monthly presentation that is made to the  
17 Monterey Peninsula Water Management District Board each  
18 month where we show the directors Cal Am's compliance  
19 with both 95-10 and the Seaside Basin adjudication.

20 What I've shown here is only the daily chart  
21 of production for the water year 2008 through May 15th  
22 of 2008.

23 MR. LAREDO: If I may, this is an overhead of  
24 Exhibit DF-5?

25 MR. FUERST: Correct.

1           And as shown in the boxed area, for the year  
2 to date when we take the 11,285 conservation goal and  
3 prorate that based on historical use by month -- that's  
4 represented by the red symbols -- the year-to-date  
5 production that we set with Cal Am is 6,362 acre feet  
6 through May 15th.

7           Cal Am's actual production during this water  
8 year, through May 15th, was 6,258 acre feet. So they  
9 were 104 acre feet under the target. And we would  
10 report that to the board and then show where areas  
11 where, because of the weather or because of Cal Am's  
12 operation they were either above the target or below  
13 the target.

14           But this is the tool that we use on a monthly  
15 basis tracking daily production to determine if there  
16 are any emerging problems in terms of overall  
17 compliance with 95-10 in that water usage.

18           MR. LAREDO: Just so I understand, the  
19 horizontal red line is the monthly standard, and the  
20 blue squares, those are the daily actual values that  
21 are plotted on that?

22           MR. FUERST: Correct. For example, in May at  
23 the right side of the chart, the red diamonds are the  
24 daily production target which on this chart represent  
25 approximately 30 acre feet per day.

1           The blue squares are what Cal Am actually  
2 produced on any one of those days.

3           MR. LAREDO: And if I could have you take a  
4 look at the next slide, which I believe is a  
5 representation of DF-6, and characterize what is  
6 represented on this slide?

7           MR. FUERST: This table is taken directly from  
8 the District rules. These are monthly targets that on  
9 the right column shown under the heading Year-to-Date  
10 at Month-End Target, these are cumulative totals that  
11 we look to see if Cal Am is staying under and to  
12 determine whether we need to advise Cal Am and the  
13 community to go to a higher level of conservation.

14           Because the first time that -- in a year that  
15 a year-to-date at month-end target is exceeded, we  
16 increase the conservation level.

17           We're always at Phase 1 on the -- Stage 1 on  
18 the Peninsula. We would go to Stage 2 if Cal Am was  
19 over a year-to-date at month-end target the first time.  
20 The second time it occurs, we would go to Stage 3.

21           MR. LAREDO: Now, these totals amount to more  
22 than 11,285. Can you explain why that is?

23           MR. FUERST: Right. Again, in the actual  
24 exhibit, there is a footnote. The total 14,789 is the  
25 production target for Cal Am from all sources within

1 the Monterey Peninsula water resource system which  
2 includes not just Carmel River sources, the river and  
3 underlying aquifer, but also production from Cal Am  
4 wells in the coastal subarea of the Seaside Basin.

5 As I mentioned earlier, the 14,789 acre feet  
6 per year is made up of 11,285 acre feet as a  
7 conservation goal in the Carmel River Basin, and then  
8 for water year 2008 3,504 which Cal Am is allowed to  
9 produce under the Seaside adjudication decision.

10 MR. LAREDO: Could you characterize that  
11 adjudication decision just for the record.

12 MR. FUERST: The adjudication was initiated in  
13 2003. Cal Am requested that the courts adjudicate  
14 their water rights which included prescriptive,  
15 appropriative, and overlying relative to the other  
16 users in the Basin in terms of priority and amount and  
17 also asked that a Watermaster Board be created to  
18 administer that decision.

19 There was a trial in December of 2005 which  
20 determined that the groundwater of the Seaside Basin,  
21 which is percolating groundwater and outside the  
22 jurisdiction of the State Water Resources Control  
23 Board, that the Basin was in overdraft; and the court  
24 set up a schedule by which the users would address  
25 their use over time to bring the production into

1 balance with the safe yield.

2 And as part of that, Cal Am as an overliar in  
3 the coastal subarea of the Seaside Groundwater Basin  
4 was given an initial allocation for water years 2005,  
5 2006 -- excuse me -- 2006, 7, and 8 of 3,504. That is  
6 scheduled to be reduced by ten percent approximately in  
7 January of 2009.

8 MR. LAREDO: And that portion of the water  
9 resources system is subject to the active management of  
10 the Watermaster Board; is that correct?

11 MR. FUERST: That's correct.

12 MR. LAREDO: And the Watermaster Board is a  
13 party to this proceeding?

14 MR. FUERST: Yes. It is a nine-member board.  
15 The District has one of the nine members.

16 MR. LAREDO: I believe we have three more  
17 slides.

18 If I could ask you to focus for a moment on  
19 actions that California American Water has taken to  
20 reduce its unlawful diversions from the Carmel River?

21 MR. FUERST: Right. Very quickly, this is in  
22 my testimony. This is just a distillation of what's in  
23 the testimony.

24 With respect to the actions that were required  
25 under Condition 2 of 95-10, it's my understanding that



1 Cal Am has, since the Order 95-10 was issued, has  
2 submitted four applications to obtain appropriate  
3 permits to divert water from the Carmel River.

4 In addition, as has been mentioned, Cal Am has  
5 cooperated with the Water Management District on  
6 development and implementation of the Seaside Basin  
7 Phase 1 Aquifer Storage and Recovery Project, the ASR  
8 project. That project began its operation this year.

9 In addition, Cal Am agreed to purchase water  
10 through -- by contract from the City of Sand City from  
11 their brackish water desalination project which is  
12 under construction at this time and scheduled to begin  
13 delivering water in 2009.

14 In addition, Cal Am did from late 1996 up  
15 until 2003 pursue development of the Carmel River Dam  
16 and Reservoir Project which was physically identical to  
17 the District's New Los Padres project but differed in  
18 terms of project alternative, project purpose, and no  
19 water was being -- going to be provided for growth. It  
20 was to legalize all of Cal Am's diversions, provide  
21 drought protection, and flows for environmental  
22 protection.

23 That project -- Cal Am -- that project was  
24 denied. That application for that project before the  
25 Water Management District Board was denied in, I

1 believe, August of 2003 following Cal Am's indication  
2 that they were now pursuing development of the Coastal  
3 Water Project which includes a seawater desalination  
4 project at the Moss Landing site as well as an ASR  
5 component which overlaps the District's work.

6 And lastly, with regard to that, Cal Am has  
7 signed a management and operations agreement with the  
8 District to share water rights for the Phase 1 ASR  
9 project, and that water right has been issued by the  
10 State Board, and to negotiate joint ownership of  
11 present and future water rights for municipal supply.

12 MR. LAREDO: And Mr. Fuerst, has the Monterey  
13 Peninsula Water Management District board of directors  
14 taken an official position with respect to the draft  
15 cease-and-desist disorder?

16 MR. FUERST: Yes. The District board has  
17 adopted Resolution 2008-08 --

18 MR. LAREDO: And I'll just interrupt for one  
19 moment. If I could have Heidi Quinn from my office, an  
20 associate attorney distribute -- we have a corrected  
21 version.

22 This Resolution 2008-08 had been submitted in  
23 evidence as DF-8. And it inadvertently had an error,  
24 and therefore this is a revised version of that  
25 resolution. If we could have this substituted for that

1 as DF-8A as in alpha as the replacement for that.

2           Could you characterize please both what is the  
3 correction in this document and what is the position of  
4 the District?

5           MR. FUERST: Well, Resolution 2008-08 is a  
6 resolution by the Board of the Monterey Peninsula Water  
7 Management District opposing the draft cease-and-desist  
8 order WR 2008-XX-DWR issued by the State Water  
9 Resources Control Board against Cal Am as drafted.

10           And the District is particularly concerned  
11 that any reductions that could result would be  
12 achievable, realistic, and would not jeopardize public  
13 health and safety.

14           The change from what was originally entered in  
15 my testimony is in -- relates to the directors that  
16 voted on this. Originally, I had all seven voters  
17 showing aye. One of the directors, Director Potter,  
18 had left the meeting at that point, so he is shown as  
19 absent.

20           MR. JACKSON: I'm going to object to the  
21 introduction of this document and move to strike this  
22 testimony on the grounds that it's far outside the  
23 scope of what was noticed for the first part of the  
24 hearing.

25           This is a remedy. They're objecting to the

1 CDO order before we have had a chance to put on  
2 evidence in regard to the CDO order, except in the area  
3 of diligence, and it doesn't have anything to do with  
4 diligence.

5 CO-HEARING OFFICER BAGGETT: Well, let counsel  
6 respond first. You're objecting to all the testimony  
7 or just this resolution?

8 MR. JACKSON: I'm objecting to the resolution.

9 MR. LAREDO: This is an official act of our  
10 Water Management District. We've been directed to  
11 present this to you. I believe that any objection  
12 would go rather to its weight rather than to its being  
13 accepted into evidence.

14 CO-HEARING OFFICER WOLFF: What is its  
15 relevance to liability?

16 MR. LAREDO: I'm sorry?

17 CO-HEARING OFFICER WOLFF: What is its  
18 relevance to liability?

19 MR. LAREDO: That this cease-and-desist  
20 disorder should not issue; therefore, there's no  
21 liability.

22 CO-HEARING OFFICER WOLFF: Well, that's . . .

23 CO-HEARING OFFICER BAGGETT: I think it  
24 actually is. I mean it's relevant. It says whereas  
25 the programs have successfully reduced water use,

1 conservation.

2 I mean you're going to, seems to me -- it's  
3 not exactly weighty testimony, but the conclusions are  
4 relevant. It is a resolution --

5 CO-HEARING OFFICER WOLFF: It's a testimonial  
6 as to diligence.

7 MR. JACKSON: Which is --

8 CO-HEARING OFFICER WOLFF: Whereas the Water  
9 Management District has worked diligently to develop  
10 new water. But it's not about Cal Am's diligence; it's  
11 about Monterey Peninsula Water Management District.

12 MR. JACKSON: And it's about an ASR project,  
13 not the CDO order.

14 CO-HEARING OFFICER BAGGETT: But I would argue  
15 the ASR is quit relevant if you're talking about how  
16 they diligently pursued. I mean that's diligent  
17 pursuant. That is a project trying to come up with new  
18 water, so I think that's their argument. I think it's  
19 very relevant to --

20 CO-HEARING OFFICER WOLFF: It's not Cal Am's  
21 diligence. I mean I don't care. We can introduce it  
22 now or introduce it later. What difference does it  
23 make? I'm not sure how relevant is it, but I  
24 understand the objection. I don't see what the harm  
25 would be to allowing now, really.

1           MR. JACKSON: Well, the harm is that there's  
2 certainly going to be cross on this document, and the  
3 question is: Do you want a substantial amount of  
4 cross? And with the breadth of the whereases in  
5 this thing --

6           CO-HEARING OFFICER WOLFF: I see.

7           MR. JACKSON: All right.

8           CO-HEARING OFFICER WOLFF: So a time  
9 management issue, really.

10          MR. LAREDO: If I may, this is being presented  
11 for the position of the District, not the truth of the  
12 matters stated.

13                 But we have not yet moved its introduction.  
14 We've only identified it at this point.

15          CO-HEARING OFFICER BAGGETT: That's true.

16          MR. LAREDO: I have one last area of direct  
17 examination.

18          CO-HEARING OFFICER BAGGETT: You'll have the  
19 opportunity to object to it when he asks to admit it.

20          MR. LAREDO: I'd like to draw your attention,  
21 Mr. Fuerst, to the document that was identified for the  
22 Sierra Club as SC-2 which was also labeled as  
23 Attachment A. Did you recognize that document?

24          MR. FUERST: Yes, I did. It was a summary of  
25 the production within the District.

1           MR. LAREDO: Did your district prepare the  
2 original of that document?

3           MR. FUERST: Yes, we did.

4           MR. LAREDO: Is the document as presented in  
5 that exhibit a complete version of your -- the document  
6 prepared by your office?

7           MR. FUERST: That was a table in a staff note  
8 that was presented to the District Board which was  
9 accepted as a total report, the staff note as well as  
10 the accompanying tables.

11          MR. LAREDO: And there are explanatory notes  
12 on the original document?

13          MR. FUERST: Yes, there are.

14          MR. LAREDO: Are you able to provide a  
15 substitute of the full original document for  
16 presentation?

17          MR. FUERST: Yes, we can.

18          MR. LAREDO: Okay. Then I would make an offer  
19 to present tomorrow the full version of that document  
20 in place of this, I believe, as stated. And I would  
21 voice my objection to the document as presented because  
22 it's a partial document and lacks the explanatory  
23 notes. But we certainly do not object to the full  
24 document being presented.

25          CO-HEARING OFFICER BAGGETT: Well, we've

1 already allowed that document in.

2 MR. LAREDO: No, I believe --

3 CO-HEARING OFFICER BAGGETT: On the full  
4 document, I don't know that there would be an  
5 objection. I mean I can ask the -- I guess the Sierra  
6 Club if they have an objection to the full document  
7 being put in since part of it is in.

8 MR. LAREDO: I believe you did reserve that  
9 question because I did voice an objection.

10 MR. SILVER: There's no objection.

11 CO-HEARING OFFICER BAGGETT: Okay. Thank you.  
12 So why don't you bring the document in tomorrow and  
13 submit it.

14 MR. LAREDO: We will do so.

15 Then my last line of questioning: Mr. Fuerst,  
16 your testimony in its entirety is labeled as MPWMD-1.  
17 Did you prepare that?

18 MR. FUERST: Yes, I did.

19 MR. LAREDO: If you were asked each and every  
20 question, would your answers be as set forth?

21 MR. FUERST: Yes, they would.

22 MR. LAREDO: And they are true and correct of  
23 your own knowledge?

24 MR. FUERST: Yes.

25 MR. LAREDO: And you have personally prepared



1 the Exhibits DF-1 through 8A; is that accurate?

2 MR. FUERST: Yes, that's accurate.

3 MR. LAREDO: That concludes my direct  
4 examination.

5 CO-HEARING OFFICER BAGGETT: Thank you.

6 Cross-examination. Prosecution, do you have  
7 any cross?

8 MR. SATO: I'm going to let Cal Am go first.

9 CO-HEARING OFFICER BAGGETT: Shall we go  
10 backwards through order? I mean it doesn't matter to  
11 me. I can open it up if anybody has any  
12 cross-examination.

13 Does anyone have cross-examination questions?  
14 Start at the top and go down.

15 CROSS-EXAMINATION BY MR. SATO

16 FOR THE PROSECUTION TEAM

17 MR. SATO: Good afternoon, Mr. Fuerst. My  
18 name is Reed Sato. I'm the attorney representing the  
19 Prosecution Team.

20 MR. FUERST: Good afternoon.

21 MR. SATO: Now, on page 4, section 5 of your  
22 testimony you testified that the Association of  
23 Monterey Bay Area Governments estimates approximately  
24 111,500 people resided in the District boundaries in  
25 2007; is that correct?

1 MR. FUERST: That's correct.

2 MR. SATO: Now do you know what population was  
3 estimated by Order 95-10?

4 MR. FUERST: When we -- when the District  
5 requested from AMBAG this estimate, we also requested  
6 that they provide what the population was in 1995, and  
7 at that time they estimated it was 103,000.

8 MR. SATO: So would you agree the population  
9 has increased by about 8,500 people since Order 95-10?

10 MR. FUERST: Yes.

11 MR. SATO: Now on page 5 of your testimony,  
12 you also testified that Cal Am serves approximately  
13 38,500 connections; is that correct?

14 MR. FUERST: Yes, within their main system.

15 MR. SATO: And how -- about how many people  
16 are outside of the main system?

17 MR. FUERST: I believe 1,000.

18 MR. SATO: Now, of those connections in the  
19 main system, do you know how many of those connections  
20 are metered?

21 MR. FUERST: I believe they all are metered  
22 connections.

23 MR. SATO: And do you know how many  
24 connections are for domestic use?

25 MR. FUERST: We have that information, but I

1 don't know it offhand. But I believe that the  
2 combination of residential and multiresidential is  
3 about two-thirds of the connections.

4 MR. SATO: And what would you estimate for  
5 commercial or industrial connections?

6 MR. FUERST: Industrials are minimal. The  
7 remainder is mostly commercial or public authority.

8 MR. SATO: So would you say that one-third are  
9 either commercial or public authority?

10 MR. FUERST: Nonresidential.

11 MR. SATO: Well, I'm just wondering how about  
12 irrigation? Do you have any connection for irrigation?

13 MR. FUERST: No. There is a category of golf  
14 course. And again, this is golf course use that is not  
15 in the Del Monte Forest because all that water -- those  
16 courses are served with recycled water.

17 There's two other courses, I believe, which  
18 receive Cal Am water, and they have a separate  
19 category. And they're on the order of two to three  
20 percent of Cal Am's total production.

21 MR. SATO: All right. Directing your  
22 attention to page 6 of your testimony, you testified  
23 that:

24 The District's multifaceted water  
25 conservation regulations and incentive

1           programs have resulted in average  
2           residential water usage of 170 gallons  
3           per day.

4           You see that?

5           MR. FUERST: Right. Per connection.

6           MR. SATO: Okay. Do you have an idea what the  
7           average number of persons per connection is in the  
8           Monterey area?

9           MR. FUERST: Yes. Again, based on AMBAG the  
10          Association of Monterey Bay Area Governments  
11          organization, that the weighted average for all Cal  
12          Am's residential connections is 2.54 persons per  
13          residential connection.

14          MR. SATO: Would you agree that an increase in  
15          the population of the Monterey area since Order 95-10  
16          would have a proportional increase in the demand for  
17          water?

18          MR. FUERST: Not necessarily. There are a  
19          number of factors that since 1995 that the data  
20          actually shows that the water use has gone down,  
21          despite the increase in the population as presented by  
22          AMBAG.

23          MR. SATO: Now on page 5, Section 8 of your  
24          testimony, you state that:

25                 The District manages water demand by

1           setting a maximum number of connections  
2           and quantity of annual production for  
3           each water distribution system.

4           Is that correct?

5           MR. FUERST: That's correct.

6           MR. SATO: Now, does this authority extend  
7 over Cal Am?

8           MR. FUERST: Yes, it does.

9           MR. SATO: Has the District restricted Cal Am  
10 from adding any new connections?

11           MR. FUERST: Cal Am -- the District  
12 established a water allocation program, and within that  
13 water allocation program has set limits for the amount  
14 of water available to each of the jurisdictions. And  
15 the last allocation of water that was made available  
16 was in 1993 to each -- to the eight member  
17 jurisdictions.

18           And that water, some jurisdictions have  
19 exhausted their allocations so it's a de facto  
20 moratorium. Other jurisdictions have reserved water so  
21 there is approximately 50 acre feet left that can be  
22 released for new connections under the Cal Am's -- for  
23 customers in Cal Am's main system.

24           MR. SATO: Has there been an application to  
25 release those 50 acre feet?

1 MR. FUERST: Periodically, yes.

2 MR. SATO: Now page 6, lines 4 through 6, you  
3 state that the District's:

4 . . . regulatory function is of critical  
5 importance to the community as the  
6 Peninsula area suffers from both  
7 physical shortage of potable water and a  
8 limited quantity of water from both of  
9 its principal resources for which legal  
10 rights have been secured.

11 Do you see that testimony?

12 MR. FUERST: What was the page again?

13 MR. SATO: Page 6, lines 4 through 6.

14 MR. FUERST: Page six.

15 MR. SATO: Lines 4 thorough 6.

16 MR. FUERST: Correct.

17 MR. SATO: So you agree with that statement?

18 MR. FUERST: Yes.

19 MR. SATO: And I direct your attention to the  
20 phrase: For which legal rights have been secured.

21 What legal rights are you referring to there?

22 MR. FUERST: Those are rights that I  
23 understand, as a nonlawyer but as the water manager,  
24 that Cal Am has secured from their Carmel River sources  
25 as well as their Seaside Groundwater Basin coastal

1 areas sources that were -- that are regulated by the  
2 State Water Resources Control Board as well as the  
3 court in the Seaside adjudication decision.

4 MR. SATO: Any other sources?

5 MR. FUERST: No. Those are the only two  
6 sources.

7 MR. SATO: Now you also identify the upper  
8 four stages of the Expanded Water Conservation and  
9 Standby Rationing Program adopted by the District are  
10 intended to respond to a drought-driven or other  
11 emergency need for water rationing. Does that sound  
12 familiar?

13 MR. FUERST: Yes.

14 MR. SATO: What are the examples of an  
15 emergency need for water rationing?

16 MR. FUERST: That would be if -- let me just  
17 begin by saying that the upper stages, stages 4 through  
18 7, are primarily driven by having available carry-over  
19 storage which would reflect the rainfall runoff and  
20 storage conditions.

21 The other conditions would be if there were  
22 some type of interruption in Cal Am's ability to  
23 reserve water because there was a contamination of the  
24 source, an earthquake interrupted service for a long  
25 extended period, something of that order, something

1 that's unforeseen.

2           Otherwise, the trigger to go to mandatory  
3 water rationing is based on usable storage available in  
4 the spring of each year.

5           MR. SATO: All right. So could a lack of  
6 legal right to divert water be an emergency need for  
7 water rationing?

8           MR. FUERST: That wasn't envisioned when we  
9 developed this stand-by plan in 1998 and implemented in  
10 1999, but it could be under the emergency provision  
11 allowed.

12           MR. SATO: And it could be. Exactly under  
13 what circumstance would you see that being allowed?

14           MR. FUERST: I think it would go back to the  
15 District board and would be -- there would be a public  
16 hearing similar to this where there would be evidence,  
17 you know, provided to the Board to make a decision to  
18 see if there was -- the need warranted the declaration  
19 of an emergency to go to a higher stage of rationing.

20           MR. SATO: Does Cal Am's diversion for  
21 customer service include or exclude unaccountable  
22 system losses?

23           MR. FUERST: It -- what I show as diversions  
24 are production meter readings, so that's water that's  
25 essentially measured at the wellhead. So that includes



1 the water that is -- becomes unaccounted for water.

2 MR. SATO: Let me direct your attention now to  
3 page 7, line 8 through 10. And I think actually I have  
4 part of this able to be highlighted on the screen.

5 Now, I don't know if you can see that very  
6 well. Maybe you can refer to your testimony. Can you  
7 see that it says that:

8 The MPWMD also works closely with CAW to  
9 develop new sources of supply to (1)  
10 replace existing supplies that are being  
11 diverted without valid water rights  
12 (Carmel River supplies).

13 Do you see that?

14 MR. FUERST: I see that.

15 MR. SATO: What existing supplies are you  
16 referring to in that statement?

17 MR. FUERST: Those are existing diversions  
18 from the Carmel River that exceed Cal Am's rights that  
19 were quantified in Order 95-10, the 3,376 acre feet per  
20 year.

21 MR. SATO: Okay. So when you talk about water  
22 rights -- well, diverting without valid water rights,  
23 you mean water that is being diverted in excess of  
24 3,376 acre feet per annum, correct?

25 MR. FUERST: Correct. And that draws upon the

1 language in 95-10 which I think refers to a valid basis  
2 of right.

3 MR. SATO: Do you know how -- I'm sorry -- how  
4 the District works with Cal Am to develop new sources  
5 of supply to address the existing supplies that are  
6 taking -- diverted without valid water rights?

7 MR. FUERST: I think the prime example is the  
8 Phase 1 ASR project. There was an extensive test  
9 program that led to the implementation of the full  
10 Phase 1 this year.

11 What that does is takes excess water from the  
12 Carmel River in the December through May period. And  
13 excess water is defined as water that is in the stream  
14 flow of the Carmel River that exceeds bypass flow  
15 requirements recommended by the National Marine  
16 Fisheries Service.

17 So it takes water during that December through  
18 May injection season, Cal Am diverts it through their  
19 existing system, treats the water, transmits that water  
20 to the District's ASR well site in Seaside, and the  
21 District injects that water into the Seaside Basin with  
22 its dual-purpose ASR wells.

23 It temporarily stores that water during the  
24 wintertime, and then in the summertime that water that  
25 was injected is pumped or recovered from the Seaside

1 Basin thereby allowing Cal Am to reduce its diversions  
2 from the Carmel River by that amount during the summer  
3 period, the June through November period.

4 And there is an agreement -- there was a water  
5 right, 20 -- permit 20808A issued to the District and  
6 Cal Am for those wintertime diversions, and there is a  
7 side agreement, Memorandum of Understanding, with the  
8 California Department of Fish and Game and NOAA  
9 Fisheries which govern the recovery of that water and  
10 require that whatever is recovered in any one water  
11 year is deducted from the 11,285 -- or whatever the  
12 conservation goal is at that time as specified under  
13 Order 95-10 as amended.

14 MR. SATO: Going back to the existing supplies  
15 that are being diverted without valid water rights,  
16 have you had discussions with Cal Am about, you know,  
17 what they can do besides the ASR project to address or  
18 replace these existing supplies that are being diverted  
19 without valid water rights?

20 MR. FUERST: We have had extensive discussions  
21 with Cal Am on an additional phase of the ASR.

22 We have been part of their planning process on  
23 their Coastal Water Project.

24 Earlier, we were the Lead Agency on their  
25 proposal to move forward on the Carmel River Dam

1 project.

2           So those are three examples of where they've  
3 looked to get replacement water. It's my understanding  
4 that they're talking to the Marina Water -- excuse  
5 me -- the Monterey Regional Water Pollution Control  
6 Agency regarding development of a groundwater  
7 replenishment program which we cooperate with that  
8 agency on.

9           MR. SATO: Have you had any discussions with  
10 any representatives of Cal Am regarding your  
11 characterization of the existing water supplies that  
12 are being diverted without valid water rights?

13           MR. FUERST: No.

14           MR. SATO: You don't know whether Cal Am would  
15 agree with you that existing supplies that are being  
16 diverted without valid water rights are those  
17 diversions in excess of 3,376 acre feet per annum?

18           MR. FUERST: Only through my reading of their  
19 briefs.

20           MR. SATO: That they would agree with you?

21           MR. FUERST: I think that they would --

22           MR. LAREDO: I would object to the question.  
23 It calls for speculation.

24           CO-HEARING OFFICER WOLFF: Sustained. Could  
25 you rephrase?

1 MR. SATO: I'll withdraw.

2 Now I'd like to go back to your Exhibit DF-2  
3 which I believe that we have on our disc the entire  
4 exhibit, not the truncated version Mr. Fuerst put up.

5 Keep going. There we go. Would you be able  
6 to bring up the whole document?

7 Mr. Fuerst, it's your testimony that you  
8 prepared this exhibit; is that correct?

9 MR. FUERST: Yes.

10 MR. SATO: Okay. Now directing your attention  
11 to footnote number 2, these annual unlawful diversions  
12 that are referenced in footnote 2, those are the 3,376  
13 acre feet per year?

14 MR. FUERST: Unlawful diversions would be  
15 calculated as the difference between Cal Am's actual  
16 production minus Cal Am's recognized rights and which  
17 would be, i.e., 3,376 acre feet per water year.

18 MR. SATO: So --

19 MR. FUERST: My understanding.

20 MR. SATO: I misspoke there.

21 So in your view, the recognized rights to  
22 divert are 3,376 acre feet per year; is that correct?

23 MR. FUERST: Right, that's my understanding.

24 MR. SATO: Then the unlawful diversions are  
25 those diversions by Cal Am in excess of 3,376 acre feet

1 per year, correct?

2 MR. FUERST: That's my understanding.

3 MR. SATO: Now, are you -- did you have a  
4 chance to look at the table that John Collins, Table 1  
5 that he put up during his testimony?

6 MR. FUERST: I recall seeing it.

7 MR. SATO: Okay. Let me -- I'm going to  
8 switch back and forth. Let me see if I have any other  
9 questions about this exhibit. Yeah.

10 Let me go now to the table that was put up by  
11 the Prosecution Team that covers, I believe, the same  
12 time period set forth in your Exhibit DF-2. That's it.

13 You see the reported annual diversion numbers  
14 that are in this exhibit, and the first one for 95-96  
15 is 11,755?

16 MR. FUERST: Yes, I do.

17 MR. SATO: Do you see that? And do you recall  
18 that in your table, in DF-2, that you had a different  
19 number?

20 MR. FUERST: Correct.

21 MR. SATO: Can you explain to me why you think  
22 there may be a difference between the numbers on Table  
23 1 for the Prosecution Team and your table?

24 MR. FUERST: I can explain why you would have  
25 differences in one a year -- I mean year to year. But

1 in that particular number, I don't have -- I don't know  
2 exactly what might have happened.

3 But what could happen is it's my understanding  
4 that Mr. Collins got his values from their annual --  
5 their fourth quarter reports for each year.

6 MR. LAREDO: Could you define who "their" is.

7 MR. FUERST: The Prosecution Team for the  
8 State Water Resources Control Board.

9 What happens with the Cal Am data at times is  
10 that Cal Am will find there was an error in a meter  
11 read or estimated -- this happened this year where they  
12 had to correct data.

13 I don't know if they would -- I don't think  
14 they would submit revised tables from a -- if they find  
15 a mistake a year later to the State Water Resources  
16 Control Board.

17 We get monthly reports, and when there is a  
18 revision, we go back -- and if you look at my Exhibit  
19 DF-3 which has very detailed spreadsheet, that's where  
20 we track what Cal Am's production from all their  
21 sources are month by month and which we try to keep up  
22 to date once they give us any revision. So that's one  
23 possibility, they do come across meter error or  
24 something in the system that caused them to have a  
25 misread, and there's a retroactive correction. That

1 might not show up there.

2           In addition, depending on the value you pull  
3 off their report, it may include water for backwash.  
4 And water for backwash in the Carmel River setting is  
5 water that is produced from the well and then made --  
6 they may produce 1000 gallons but 100 gallons are used  
7 to backflush filters, to clean filters.

8           They discharge that back into a percolation  
9 pit that goes back into the river. At times, they  
10 don't count that as production. They take the net  
11 amount.

12           So some small differences of, you know, 5 to  
13 10 acre feet over a year period make my values with the  
14 backwash excluded. And these may -- that's one reason  
15 why there may be a difference of 5 to 10 acre feet if  
16 these values include that.

17           The third possibility for a -- for the values  
18 not to harmonize is that, depending on the  
19 production -- and we went over this for water year  
20 2006 -- my values show only the values that -- Cal Am's  
21 diversions that went for customer service and excluded,  
22 the footnote does say, water that was diverted in the  
23 wintertime for the injection through the ASR project.

24           For example, that year there was 411 acre feet  
25 that was diverted and injected in the winter period for



1 storage in the Seaside Basin.

2 So those are three possible ways other than  
3 the fourth just having rounding errors as you go from  
4 acre feet to cubic feet to different units. But in  
5 general, I think there's fairly good correspondence  
6 between the values reported.

7 MR. SATO: All right. Just directing your  
8 attention to the number there for '97-98, 10,152. I  
9 believe that your number was different. Would the same  
10 reasons apply that you just testified to? That -- your  
11 number was 10,133.

12 MR. FUERST: Which year are you referring to?

13 MR. SATO: I'm sorry. 1998.

14 MR. FUERST: 1998? Right, I had 10,133 as  
15 opposed to 10,152. I think that difference probably is  
16 explainable by backwash.

17 MR. SATO: All right. I guess I'll ask you  
18 also about 1999. Our number, Prosecution Team, 10,383.  
19 Your number was 10,384.

20 MR. FUERST: That one acre feet may be  
21 rounding.

22 MR. SATO: Same question as to year 2000. The  
23 Prosecution Team number is one thousand one hundred  
24 eleven seventy-eight. Yours was one thousand one  
25 hundred --

1 MR. FUERST: 79.

2 MR. SATO: 79.

3 MR. FUERST: I would say rounding.

4 MR. LAREDO: I believe you meant 11,000.

5 MR. SATO: Yes.

6 The next, for 2001, there's 100 -- 10,738 for  
7 the Prosecution Team. You've indicated 10,721.

8 MR. FUERST: Right. I think that difference,  
9 the 17 acre feet, would be due to backwash and  
10 rounding.

11 MR. RUBIN: Hearing Officer Woolf, I think  
12 that this whole line of questioning, the response the  
13 witness provided to this line of questioning was: I  
14 don't really know, but here's what I think it could be.  
15 And we can continue to go through this --

16 CO-HEARING OFFICER WOLFF: No, I was about to  
17 interrupt.

18 MR. SATO: Well, he -- he -- let me just say  
19 that what I believe that the witness testified was that  
20 the first one, he thought that that might have been the  
21 reasons for why the discrepancies were such, and he  
22 speculated as to there were three or four different  
23 possibilities.

24 I was just curious as to whether there was a  
25 different reason for some of the other discrepancies --

1 CO-HEARING OFFICER WOLFF: So you can ask him  
2 directly is he aware of any specific reasons for any  
3 specific year rather than walking us through every  
4 year.

5 MR. SATO: Okay, I'll try that. I'll try  
6 that.

7 So looking at this document that we have in  
8 front of you now, the Prosecution Team Exhibit 15, are  
9 there any numbers there that you can see up there that  
10 differ from the numbers that you have for the same year  
11 in your exhibit that you can explain from -- for  
12 reasons other than you've already testified to.

13 MR. FUERST: No. I believe all of the numbers  
14 are within the range that could be explained by either  
15 rounding errors or for the larger amounts the inclusion  
16 of backwash.

17 MR. SATO: So for like a larger amount, that  
18 would be say for year 2006, 2007 the 10,485?

19 MR. FUERST: Yes, either -- or that year there  
20 may have been a correction made in the data that wasn't  
21 forwarded to the State Water Resources Control Board  
22 staff.

23 CO-HEARING OFFICER WOLFF. Let's move on.  
24 This is all speculative.

25 The witness has given generic reasons for

1 those differences. The differences are not huge.

2 MR. SATO: I know. I'm ready to move on.

3 CO-HEARING OFFICER WOLFF: Let's move on.

4 It's getting late. No doubt you'll be asking Cal Am  
5 similar questions. Let's get to that tomorrow.

6 MR. SATO: Drawing your attention back to  
7 DF-2. So the -- in this situation, it's your testimony  
8 that the average production amount from the Carmel  
9 River is what number please?

10 MR. FUERST: Between 1996 and 2007 that's been  
11 10,967 acre feet.

12 MR. SATO: Okay. And do you notice any --  
13 were you able to evaluate any trend in terms of the  
14 amount of production Cal Am has undertaken over the  
15 period of time?

16 MR. FUERST: There definitely is a correlation  
17 between the water year type. During wet years, the  
18 demand is depressed so it's easier to -- you're able --  
19 Cal Am's able to produce less.

20 But that's not always true. In recent  
21 experience, with water year 2007 where Cal Am started  
22 to go over their targets. And again, we saw this  
23 through the reporting budget process and in particular  
24 the monthly tracking.

25 So the Cal Am and within the Water Management

1 District began to meet regularly and, you know, we  
2 began an extensive outreach program. And that was  
3 successful and resulted in a, you know, a reduction in  
4 demand which resulted in less need for Cal Am to  
5 produce the water such that they were seven and a half  
6 percent below their target.

7 I think that was largely due to the successful  
8 public outreach program coupled with a very high  
9 pricing structure for water on the Peninsula.

10 MR. SATO: Okay. And drawing your attention,  
11 do you see the number for 1998? Cal Am's production is  
12 indicated there at 10,133. Do you see that?

13 MR. FUERST: Yes, I do.

14 MR. SATO: And seems like that -- that since  
15 1998, all of the production numbers are higher. Is  
16 that correct?

17 MR. FUERST: Well, 1998 would be your low  
18 number in this year just because of the extreme wetness  
19 of that year.

20 CO-HEARING OFFICER WOLFF: It's a very direct  
21 question. Can you just answer the direct question?  
22 Are all the numbers below 10,133 higher than --

23 MR. FUERST: Yes, they are.

24 MR. SATO: Do you know why they are higher?

25 MR. FUERST: The weather -- the hydrologic

1 conditions in those other years were not as wet as in  
2 1998.

3 MR. SATO: Directing your attention to page  
4 12, section 27 of your testimony, you see that you say  
5 it is necessary to move to stage 3 water --

6 MR. LAREDO: Excuse me. If the witness could  
7 get to page 12, and then which line numbers are you  
8 referring to?

9 MR. SATO: Pardon me?

10 MR. LAREDO: Which line numbers are you  
11 referring to?

12 MR. SATO: I don't have that written down in  
13 my notes.

14 CO-HEARING OFFICER WOLFF: I didn't hear the  
15 question.

16 MR. SATO: I don't have the line numbers  
17 written down, so if you could take a look at section 27  
18 of your testimony?

19 MR. FUERST: I'm there.

20 MR. SATO: I believe that you testified that  
21 it was necessary to move to Stage 3 Water Conservation  
22 and impose emergency rates for excessive use; is that  
23 correct?

24 MR. FUERST: In water year 2004, that was  
25 correct.

1           MR. SATO: Are you aware of any other times in  
2 which you've been able to impose emergency rates for an  
3 excessive use?

4           MR. FUERST: That was the only time. We got  
5 very close in water year 2007.

6           MR. SATO: I don't think I have any other  
7 questions.

8           CO-HEARING OFFICER WOLFF: Thank you.

9           We're going to let the court reporter take a  
10 break.

11           (Recess)

12           CO-HEARING OFFICER WOLFF: All right. Back on  
13 the record. We're going to have cross-examination by  
14 Mr. Jackson, Mr. Silver, Mr. Jamison, then Mr. Rubin.  
15 I believe that's the order we've been following.

16           We are going to accept as an exhibit at a  
17 later time, the appropriate time, Resolution 2008-08  
18 because it does speak to the diligence of the Monterey  
19 Peninsula Water Management District projects; and at  
20 least one of those projects was done in partnership  
21 with Cal Am, so it is relevant to the issue of  
22 diligence which we're hearing today.

23           So Mr. Jackson, if you want to ask questions  
24 on that, you can. You have a challenge ahead of you to  
25 be at least as efficient as Mr. Rubin.

1           MR. JACKSON: That's a hard task. He's very  
2 good. So you'll take care of that.

3           CO-HEARING OFFICER WOLFF: Here we go. I'm  
4 going to work on you the same way I did on him.

5           MR. JACKSON: Thank you.

6           CROSS-EXAMINATION BY MR. JACKSON  
7 FOR CARMEL RIVER STEELHEAD ASSOCIATION

8           MR. JACKSON: Mr. Fuerst, were you the -- what  
9 is your title?

10          MR. FUERST: I am presently the Interim  
11 General Manager with the District.

12          MR. JACKSON: All right. And were you present  
13 during 95-10?

14          MR. FUERST: Yes. I participated in the 1992  
15 and 1994 hearings.

16          MR. JACKSON: So you've been there a long time  
17 and pretty much know the district as well as anybody?

18          MR. FUERST: I've been there a long time.

19          MR. JACKSON: Okay. What is the relationship  
20 between the District and Cal Am in terms of authority  
21 over water diversions?

22          MR. FUERST: I think the ultimate authority  
23 over water diversion lies -- for surface drains and  
24 subdrainage drains lies with the State Water Resources  
25 Control Board.



1           We regulate. We regulate Cal Am's operations.  
2   And as shown in that quarterly budget, we specify on a  
3   monthly time step how much water Cal Am will produce,  
4   surface water, and then groundwater from the upper  
5   Carmel Valley and the lower Carmel Valley aquifer, and  
6   then also the Seaside.

7           So we cooperatively with Cal Am, with resource  
8   agencies including the Department of Fish and Game  
9   National Marine Fisheries Service, develop the  
10   quarterly budget.

11           MR. JACKSON: Would you have the authority to  
12   make them cease diverting anything over 3376 if you  
13   chose to do so?

14           MR. LAREDO: I'm going to object to this. I  
15   believe it actually calls for a legal conclusion. This  
16   witness can testify to --

17           CO-HEARING OFFICER BAGGETT: Sustained.

18           MR. LAREDO: -- what the actions are.

19           CO-HEARING OFFICER WOLFF: Sustained.

20           MR. JACKSON: Have you ever attempted -- has  
21   your district ever attempted to exercise authority over  
22   Cal Am's diversions?

23           MR. FUERST: Yes, within what we understand to  
24   be their -- the limits as defined in Order 95-10 and  
25   the Seaside Basin adjudication.

1           MR. JACKSON: So you do attempt to enforce the  
2 standards of 95-10 in certain areas?

3           MR. FUERST: Correct.

4           MR. JACKSON: And what are those areas?

5           MR. FUERST: Well, the one we just were  
6 discussing in terms of the annual amount. We devise a  
7 strategy so that Cal Am -- Cal Am in its production to  
8 meet the community need stays within the 11,285 acre  
9 feet per year.

10           Then the other conditions, which I don't know  
11 if we want to go into, but the operation -- the  
12 quarterly budget also specifies that Cal Am will take  
13 that water, say from the lower Carmel Valley, from  
14 their downstream-most well and work their way upstream  
15 until the order -- till the demand is met.

16           That was part of Order 98-04 and also was part  
17 of Order 2002-02.

18           So we try to incorporate all of the conditions  
19 in 95-10 in the quarterly budget that we develop as  
20 well as the low flow memorandum that we negotiated with  
21 Cal Am and the Department of Fish and Game.

22           MR. JACKSON: Have you ever made an attempt,  
23 given your express view that their water rights are  
24 limited to 3376, have you ever made any attempt at the  
25 Monterey Peninsula Water Management District to lower

1 their pumping below the present number that seems  
2 consistent for the last 12 years?

3 MR. RUBIN: I'm going to object to the  
4 question on relevance.

5 MR. JACKSON: It goes to diligence. The idea  
6 is if this is an agency that is working either with Cal  
7 Am or has regulatory authority on trying to determine  
8 whether or not that District has done anything to try  
9 to reduce the pumping.

10 CO-HEARING OFFICER WOLFF: Fair enough. I'll  
11 accept the question. Oh, Mr. Rubin, you have  
12 a response?

13 MR. RUBIN: Yeah, I don't understand the issue  
14 of diligence. That's not an issue here. It's  
15 Condition 2. And if you want to read diligence, you  
16 have to read it in context with the actions in  
17 Condition 2. And if --

18 CO-HEARING OFFICER WOLFF: Well, since we  
19 accepted Resolution 2008-08, it does have to be  
20 relevant to Condition 2, but we have wide boundaries of  
21 relevance.

22 MR. RUBIN: Condition 2 requires diligence on  
23 implementation of certain actions that are articulated.  
24 The question that was asked has nothing to do with the  
25 diligence of any one of the three actions that are

1 articulated in Condition 2.

2 CO-HEARING OFFICER WOLFF: Can you tie it to  
3 one of the three --

4 MR. JACKSON: I certainly can. And in fact, I  
5 would argue that it has been, but I'll do it again.

6 Are you familiar with Condition 2 in 95-10?

7 MR. FUERST: Yes, I am.

8 MR. JACKSON: Would you take a look at  
9 Condition 2?

10 MR. LAREDO: I don't believe we have a copy  
11 right here.

12 CO-HEARING OFFICER WOLFF: You don't need to  
13 go through all of this. How are you relating it to  
14 Condition 2?

15 MR. JACKSON: I'm relating it to Condition 2  
16 by saying that they should diligently implement one or  
17 more of the following actions to terminate the unlawful  
18 diversions.

19 This is an organization that claims regulatory  
20 authority over them, and I want to know whether they  
21 have carried out any of the remaining actions in number  
22 2.

23 CO-HEARING OFFICER WOLFF: Yeah, but which of  
24 the three actions is relevant to their regulatory  
25 authority? Or put it in reverse: How is their

1 regulatory authority relevant to one of those three  
2 actions?

3 MR. JACKSON: Obtain water from other sources  
4 of supply and make a one-for-one reduction in unlawful  
5 diversions from the Carmel River.

6 MR. RUBIN: Not only does it have to address  
7 the issue that you just raised, Hearing Officer Wolff,  
8 but it also has to relate to California American  
9 Water's effort.

10 CO-HEARING OFFICER WOLFF: Yes, it certainly  
11 does.

12 If you can get to a relationship to California  
13 American diligence or nondiligence very shortly, I'll  
14 allow you to proceed.

15 MR. JACKSON: Great.

16 CO-HEARING OFFICER WOLFF: You need to connect  
17 it quickly.

18 MR. JACKSON: Yes, sir.

19 Has the Monterey Peninsula Water District in  
20 its regulatory authority in regard to Cal Am since  
21 95-10 taken any activity, any actions at all, to find  
22 other sources of water supply to make one-for-one  
23 reductions in these unlawful diversions by Cal Am?

24 MR. FUERST: Yes. As I explained, Seaside  
25 Basin Phase 1 ASR project does and is required to make

1 a one-for-one reduction in the conservation goal as  
2 described in Order 95-10.

3 MR. JACKSON: Now in 95-10 you had an -- I  
4 believe your agency testified that they had a dam  
5 project; is that correct?

6 MR. FUERST: That's correct.

7 MR. JACKSON: Do you still have a dam project?

8 MR. FUERST: No, we do not.

9 MR. JACKSON: What happened to it?

10 MR. FUERST: In November 1995, there was a  
11 public vote. The voters voted to not allow the  
12 District to fund that project, and essentially that  
13 project has not been pursued by the District since  
14 November of 1995.

15 MR. JACKSON: So your voters voted it down?

16 MR. FUERST: They voted the funding down.

17 MR. JACKSON: That includes what cities in the  
18 Monterey Peninsula?

19 MR. FUERST: The -- it's in my testimony, but  
20 it's Carmel-by-the-Sea, Monterey, Pacific Grove,  
21 Seaside, City of Sand City, Del Rey Oaks.

22 MR. JACKSON: And --

23 MR. FUERST: And the unincorporated areas of  
24 the Monterey Peninsula.

25 MR. JACKSON: So pretty much everybody decided

1 they didn't like that project?

2 MR. FUERST: The vote was against the -- it  
3 was 57 percent against the project.

4 MR. JACKSON: Okay. Now you also have  
5 authority over people's well permits, don't you?

6 MR. FUERST: Yes.

7 MR. JACKSON: Within your district?

8 MR. FUERST: Correct.

9 MR. JACKSON: You take care of surface and  
10 subsurface water?

11 MR. FUERST: Right. We have a well  
12 registration and reporting program.

13 MR. JACKSON: Okay. And I'll just ask it  
14 blatantly because we're trying to move along: Are you  
15 aware that people have gone off Cal Am's system and  
16 applied for well permits with your agency, thereby  
17 lessening the amount of the existing -- the preexisting  
18 water demand in the area?

19 MR. FUERST: Yes. The district, as I started  
20 to say, has a well registration reporting program.

21 In addition, in the last five, six years, the  
22 district has expanded its regulation of water  
23 distribution systems so that any well is considered to  
24 be a water distribution system.

25 So if anyone is to -- comes to the district to

1 develop a well to serve their needs, they're allowed to  
2 do that if they go through a process. And part of that  
3 process is that they prove that they have a valid basis  
4 of right, either an appropriative right or riparian  
5 right.

6 Also, they need to, you know, ensure the water  
7 quality is sufficient to meet the needs of the system.

8 MR. JACKSON: As these people apply for well  
9 permits from your district and go off the Cal Am  
10 system, is the illegal diversions on the Cal Am system  
11 reduced by that amount?

12 MR. FUERST: It does not affect Cal Am's water  
13 rights.

14 MR. JACKSON: So in other words, the  
15 combination means that we are appropriating more water  
16 from the Carmel Valley and the Carmel River system?

17 MR. LAREDO: Objection; calls for a  
18 conclusion, speculative.

19 CO-HEARING OFFICER WOLFF: It's a question  
20 about the hydrogeology of the system, and the witness  
21 is an expert in this area, so I think it's a fair  
22 question.

23 MR. FUERST: Could you repeat the question?

24 MR. JACKSON: Yes. As people apply for well  
25 permits within the Carmel Valley system, and you grant



1 those well permits from that system, are you deducting  
2 from Cal Am's water supply the amount of the  
3 difference?

4 MR. RUBIN: I'm going to object. I don't  
5 understand the relevance of the question.

6 CO-HEARING OFFICER WOLFF: Yeah, I don't  
7 either.

8 Mr. Jackson, can you get to your point pretty  
9 quickly here?

10 MR. JACKSON: The point is that their -- this  
11 joint operation of the groundwater and surface water,  
12 far from terminating the unlawful diversions, is  
13 actually increasing diversions in the area. And I just  
14 want to establish that as a fact.

15 CO-HEARING OFFICER WOLFF: And how does that  
16 relate to the actions of Cal Am that are diligent or  
17 not diligent?

18 MR. JACKSON: Because it shows an intent not  
19 to reduce the amount of the illegal diversion. I  
20 believe the next questions for Cal Am, when they come  
21 up, will establish the fact that Cal Am is staying  
22 constant under the Order while the -- while there's an  
23 increasing amount of water being taken out of the river  
24 which is killing the fish.

25 MR. LAREDO: I would object; it assumes facts

1 not in evidence. The questioner has postulated that by  
2 exercising a lawful water right that a property owner  
3 might have, riparian or appropriative, that they are  
4 disconnecting from Cal Am rather than exercising that  
5 right and developing a water distribution system -- a  
6 well -- and property that is their right to do so.

7 There is no evidence that they -- that  
8 individuals are disconnecting from Cal Am to connect to  
9 their private water right.

10 MR. RUBIN: I would object as well. The  
11 California -- excuse me. The Carmel River Steelhead  
12 Association had the opportunity to present its  
13 case-in-chief. It did so.

14 If it believed there was an issue that  
15 Mr. Jackson is now alleging, asserting, they should  
16 have presented that as part of their case-in-chief.

17 MR. JACKSON: The members of the Carmel Valley  
18 Steelhead Association don't have control, don't have  
19 legislative authority. We've tried everything humanly  
20 possible --

21 CO-HEARING OFFICER WOLFF: But you're trying  
22 to make the argument through the witness that you could  
23 have made directly. It's the same concern I had  
24 earlier today.

25 So if you have another question or two of the

1 witness that are factual about the hydrology of the  
2 river basin or something, you can continue with those.  
3 That's evidence. But you can make your arguments later  
4 in your brief.

5 MR. JACKSON: Have there been new wells placed  
6 in the Carmel Valley aquifer since 1995 and the  
7 issuance of 95-10?

8 MR. RUBIN: I'm going to object again.

9 CO-HEARING OFFICER WOLFF: I'm going to allow  
10 the question. Overruled.

11 MR. FUERST: Yes. There have been new wells  
12 permitted by the county health department and the  
13 Monterey Peninsula Water Management District in the  
14 Carmel Valley alluvial aquifer since 1995.

15 MR. JACKSON: Can you -- was there any  
16 deduction whatsoever in the amount of Cal Am's  
17 diversions because of the new wells on the aquifer?

18 MR. FUERST: Not that I can think of.

19 MR. JACKSON: Thank you.

20 Now, the Monterey Peninsula Water District,  
21 according to your resolution, is not only charged with  
22 integrated management of the water resources but also  
23 charged with protecting the environment in the Monterey  
24 Peninsula area?

25 MR. FUERST: That's correct.

1           MR. JACKSON: Does that include the Carmel  
2 River?

3           MR. FUERST: Yes, it does.

4           MR. JACKSON: Has there been an effect of the  
5 illegal diversions on the environment of the Carmel  
6 River since 1995?

7           MR. RUBIN: I object again on relevance  
8 grounds.

9           CO-HEARING OFFICER WOLFF: You believe that  
10 the -- well --

11           MR. RUBIN: The question went to the -- the  
12 question asked has there been an effect. And again,  
13 whether there is an effect or not is an issue that  
14 might be relevant to a Phase II but --

15           CO-HEARING OFFICER WOLFF: Well, my  
16 difficulty, an objection was made earlier and  
17 overruled. We allowed information about the condition  
18 of the river potentially relevant to the issue of  
19 diligence.

20           So I'll allow you to continue. Can you repeat  
21 the question?

22           MR. JACKSON: I hope so. Maybe I should have  
23 the court reporter repeat the question.

24           (Record read)

25           MR. FUERST: The diversions have had an

1 effect. The management of those diversions, we try  
2 to -- we have tried to manage those diversions to  
3 minimize that impact.

4 MR. JACKSON: Are there -- has -- in  
5 your opinion, has your management eliminated the  
6 effects on the environment from the illegal diversions?

7 MR. FUERST: Not eliminated, but lessened.

8 MR. JACKSON: Are there more fish than there  
9 were in 1995?

10 MR. FUERST: I can say that this year is --  
11 there will be a record number of fish rescued. It's  
12 hard to -- there are many parameters for the steelhead  
13 in terms of the number of adults.

14 I believe that the number of adults counted  
15 migrating up over San Clemente Dam is higher this year  
16 than it was in 1995, but I don't have the data with me.  
17 We do have that available.

18 MR. JACKSON: All right. Now, the -- you're  
19 familiar with the resolution that you put into  
20 evidence?

21 MR. FUERST: Yes.

22 MR. JACKSON: The third whereas says that  
23 Monterey Peninsula Water Management District's programs  
24 have successfully reduced water use. Is that different  
25 than the illegal diversion?

1           MR. FUERST: What this refers to is that pre  
2 Order 95-10 Cal Am was diverting 14,106 as has been  
3 noted. With the imposition of Order 95-10, Cal Am  
4 shifted some of the pumping from Carmel River to  
5 Seaside, but they also reduced the overall community  
6 demand through conservation programs, largely headed by  
7 the District.

8           And again, I should note there were pricing  
9 increases that went along with all of the public  
10 outreach and conservation measures and mandatory  
11 retrofit requirements, things like that.

12           MR. JACKSON: In regard to the conservation  
13 efforts as you -- as the water was conserved, was it  
14 restored to the river?

15           MR. RUBIN: Again, I'm going to object to the  
16 question. I'm not sure what the relevance of this is  
17 to compliance with Order -- Condition 2 of Order 95-10  
18 or the issue of compliance with 1052 of the Water Code.

19           CO-HEARING OFFICER WOLFF: Mr. Jackson?

20           MR. JACKSON: Again, I am reading directly  
21 from the resolution.

22           CO-HEARING OFFICER WOLFF: Yeah. Objection  
23 overruled.

24           The issue here is that Resolution 2008-08 has  
25 been accepted. I did that after consultation with

1 Mr. Baggett. It is marginally relevant, I think; but  
2 we nonetheless determined it to be relevant, and this  
3 allows Mr. Jackson to ask some questions about it.

4 Again, if any of this information in your  
5 opinion is prejudicial to your client, you can argue  
6 that it is outside the bounds of the meaning of the  
7 word diligence in your closing briefs.

8 MR. FUERST: As described in my testimony,  
9 through a combination of efforts, Cal Am's diversions  
10 from the Carmel River have been reduced an average of  
11 about 3100 acre feet compared to the pre Order 95-10  
12 average.

13 That represents a 22 percent decrease in the  
14 annual diversions from the Carmel River from the Order.  
15 And that water, when it's not diverted, stays in the  
16 aquifer and is available. Some of it stays in the  
17 stream flows; some of it becomes groundwater.

18 MR. JACKSON: And then is approved by your  
19 organization for new diversions?

20 MR. LAREDO: Objection; that's speculative,  
21 and there's no foundation for that. There is no  
22 evidence as to what quantity of water has been  
23 permitted pursuant to valid riparian or appropriative  
24 rights.

25 CO-HEARING OFFICER WOLFF: Sustained.

1           MR. JACKSON: What quantity of water has been  
2 approved since 95-10 by the Monterey Peninsula Water  
3 Management District from the Carmel aquifer?

4           MR. FUERST: I don't know the answer to that  
5 question.

6           MR. JACKSON: Now your Resolution number  
7 2008-08 says that the Monterey Peninsula Water  
8 Management District's programs have reduced  
9 environmental consequences from the water use, and you  
10 highlight stream flow, riparian vegetation, and  
11 fisheries management.

12           What stream flow programs have you instigated  
13 as part of the attempt to regulate Cal Am that has  
14 increased stream flow in the Carmel River?

15           MR. FUERST: Through the combination of the  
16 quarterly budget process, which I mentioned earlier in  
17 my testimony, and also the low flow Memorandum of  
18 Understanding that I also mentioned but which is  
19 developed each year with the California Department of  
20 Fish and Game and Cal Am.

21           By the combination of those two programs, we  
22 maximize the reduce -- we maximize the releases from  
23 the reservoirs in the summertime so that the maximum  
24 amount of water that can be sustained is released from  
25 the upper watershed, and we minimize Cal Am's



1 production in the upper aquifer so that that flow has  
2 the best chance to continue going downstream.

3 And we require, as is required in Order 98-04,  
4 that Cal Am produce as much water as possible from as  
5 far downstream in their system as possible.

6 So what this has done is allowed perennial  
7 flow to exist from dams farther downstream than existed  
8 at the time of Order 95-10.

9 MR. JACKSON: And what evidence do you have  
10 that that has in any way changed the environmental  
11 consequences of the illegal diversions on riparian  
12 vegetation and fisheries management?

13 MR. FUERST: As reported in our mitigation  
14 report which summarizes the different efforts that we  
15 make, what we've shown is that by having the stream  
16 stay wet an additional two miles and doing population  
17 surveys in there that we quantified the number of fish  
18 that now have permanent rearing facilities post Order  
19 95-10 as opposed to pre Order 95-10.

20 I don't have that information with me. That  
21 will be provided in the Phase II hearing, I'm certain.

22 This was a request by the Carmel River  
23 Steelhead Association to make that change in operations  
24 so that Cal Am would start their production at their  
25 most downstream well and only go as far as needed to

1 protect that middle and upper sections of the river as  
2 sensitive and valuable stream steelhead habitat.

3 MR. JACKSON: And it was also a requirement of  
4 95-10, wasn't it?

5 MR. FUERST: As a result of the evidence that  
6 was provided in the '92 and '94 hearings.

7 CO-HEARING OFFICER WOLFF: Mr. Jackson, how  
8 are you doing on time?

9 MR. JACKSON: Doing okay.

10 CO-HEARING OFFICER WOLFF: You're about 25  
11 minutes in. How much more do you have?

12 MR. JACKSON: Probably about the same amount.

13 CO-HEARING OFFICER WOLFF: Move it along more  
14 quickly if you can.

15 MR. JACKSON: Yes, sir.

16 Your Resolution number 2008-08 indicates the  
17 Monterey Peninsula Water Management District has  
18 worked -- here's the word -- diligently to develop new  
19 water supply projects.

20 Do any of those new water supply projects  
21 reduce the amount of illegal diversions by Cal Am?

22 MR. FUERST: Well, the first one, recycled  
23 waters, is -- refers to our role in the Carmel Area  
24 Wastewater District, Pebble Beach Community Service  
25 District Wastewater Reclamation Project. And that has

1 reduced diversions -- Cal Am's diversions from the  
2 Carmel River by approximately 500 acre feet since 1994.

3 MR. JACKSON: And has any of that water been  
4 allocated to new growth?

5 MR. FUERST: Pardon me. 500 acre feet per  
6 year. Could you repeat the question?

7 MR. JACKSON: Has any of the water that you  
8 have -- that Cal Am has reduced as a result of your  
9 program been applied to new growth within your  
10 district?

11 MR. FUERST: No.

12 MR. JACKSON: Has there been an increase in  
13 water use in your district since 95-10?

14 MR. FUERST: No. There's been a reduction  
15 because of 95-10.

16 MR. JACKSON: But since 95-10, has there been  
17 any reduction?

18 MR. FUERST: Going to my exhibit, DF-2 -- and  
19 again, I'm presuming you're focusing on the Carmel  
20 River diversions.

21 MR. JACKSON: Absolutely.

22 MR. FUERST: Yes. Since in 1996, the  
23 diversion was 11,701 acre feet from the Carmel River to  
24 meet customer needs in the same systems, and it was  
25 10,443. So based on '96 to 2007, there was a

1 reduction. But it will vary by year, and by --  
2 depending on which base year.

3 MR. JACKSON: So if we could -- it would be  
4 fair then to calculate it out that you've done that in  
5 12 years, and that in order to get down to 3376 --

6 MR. LAREDO: Objection; argumentive.

7 CO-HEARING OFFICER WOLFF: I'm sorry?

8 MR. LAREDO: It's argumentive.

9 CO-HEARING OFFICER WOLFF: Sustained.

10 MR. JACKSON: What amount of one-for-one  
11 reductions in the unlawful diversions have happened by  
12 the obtaining of water from other sources of supply?

13 MR. LAREDO: Are you asking that of the Water  
14 Management District or of --

15 MR. JACKSON: Yes, of the Water Management  
16 District.

17 MR. RUBIN: Again, I would object on the  
18 grounds of relevance.

19 CO-HEARING OFFICER WOLFF: Well, it's clearly  
20 relevant to Condition 2 of the Order.

21 MR. RUBIN: Condition 2 applies to California  
22 American Water; it does not apply to the Monterey  
23 Peninsula Water Management District.

24 CO-HEARING OFFICER WOLFF: But he's asking him  
25 for evidence on one of the specific provisions of

1 Condition 2. It's an evidentiary hearing. Isn't that  
2 a fair question?

3 MR. LAREDO: This question was addressed to  
4 the Water District as to its activities for the  
5 one-to-one, and there is not a one-to-one requirement  
6 on the District.

7 CO-HEARING OFFICER WOLFF: Perhaps I  
8 misunderstood the question. Can we read it back?

9 (Record read)

10 MR. JACKSON: 3376, which is the --

11 CO-HEARING OFFICER WOLFF: You're asking them  
12 about what they have done?

13 MR. JACKSON: Right.

14 CO-HEARING OFFICER WOLFF: Objection  
15 sustained.

16 MR. JACKSON: What has Cal Am done, to your  
17 knowledge, to reduce the water diversions to get to  
18 3376 on a one-for-one reduction in these unlawful  
19 diversions?

20 MR. FUERST: To my knowledge, Cal Am in  
21 cooperation with the District has worked to secure all  
22 the permits, improve the infrastructure to implement  
23 the Phase 1 ASR project; and as designed, that project  
24 will allow Cal Am to reduce its summertime diversions  
25 from the Carmel River by up to 1500 acre feet a year.

1 Actual diversions will depend on what is diverted and  
2 injected in any single year.

3 MR. LAREDO: One moment.

4 MR. FUERST: Other efforts, which I did note  
5 in my earlier, my direct testimony: Cal Am, if you are  
6 asking to my knowledge, Cal Am has pursued the Carmel  
7 River Dam project. They are no longer.

8 Cal Am is pursuing the Coastal Water Project  
9 at this time.

10 Cal Am has executed a purchase agreement to  
11 lease water for, I think, 15 years from the City of  
12 Sand City for their brackish water.

13 I'm aware of those other activities that Cal  
14 Am has done to develop new supplies that would serve as  
15 replacement supplies and allow them to reduce their  
16 diversions from the Carmel River on a one-to-one basis.

17 MR. JACKSON: Have any of those taken effect;  
18 and if so, why aren't they shown on those charts?

19 MR. RUBIN: I'm going to object to the  
20 compound question.

21 CO-HEARING OFFICER WOLFF: Break it into  
22 pieces.

23 MR. JACKSON: I'm trying to --

24 CO-HEARING OFFICER WOLFF: I know you are.

25 MR. JACKSON: Have any of those projects

1 resulted in a decrease in the unlawful diversions by  
2 Cal Am?

3 MR. FUERST: The ASR project will this year,  
4 starting in July. As I mentioned, in the proposed  
5 quarterly budget, Cal Am will be recovering 60 acre  
6 feet over that three-month period. That's all that we  
7 were able to inject this year. So that will be a  
8 one-to-one reduction.

9 Other than that, the work is in progress, some  
10 further along than others. It's my understanding that  
11 the Sand City project will come online in 2009 and will  
12 allow Cal Am to reduce its diversions from the Carmel  
13 River by 300 acre feet per year.

14 MR. JACKSON: So that would lower it down to  
15 approximately 10,000 acre feet of illegal diversions?

16 MR. FUERST: Less than that. Again, the --  
17 for the Seaside Basin Phase 1 project, the average  
18 yield over a -- simulated over a 50-year period is just  
19 over 900 acre feet. The Sand City would be 300, so  
20 1200. It would be something less than 10,000.  
21 Certainly not the entire amount.

22 MR. JACKSON: Does any new water user or any  
23 agency within your District get any of that water for  
24 their own use? Or does it all reduce illegal  
25 diversion?

1           MR. FUERST: Of the examples that I discussed,  
2 by the Memorandum of Agreement, Memorandum of  
3 Understanding with the resource agencies, it has to be  
4 subtracted on a one-to-one basis from the current limit  
5 specified in Order 95-10.

6           The Sand City water will be an immediate 300  
7 acre foot reduction, but that will over time for new  
8 uses in Sand City, that -- the water -- the reduction  
9 that would initially occur will decrease as that water  
10 that's produced from desal will go for new growth.

11           The other projects such as the Coastal Water  
12 Project, which would fully satisfy 95-10 and hopefully  
13 the Seaside Basin adjudication, all of that water would  
14 go as a replacement source.

15           MR. JACKSON: All right. Let's talk a little  
16 about that. First of all, there is nobody proposing a  
17 dam anymore, right?

18           MR. FUERST: That's correct.

19           MR. JACKSON: And there is nobody proposing to  
20 bring state water from Pajaro or anything like that?

21           MR. FUERST: Correct.

22           MR. JACKSON: To your knowledge, are there any  
23 contracts being looked at with any other agency that  
24 have rights to divert and use water in the Carmel  
25 River?



1           MR. RUBIN: I'm going to object to the  
2 question. I think it's ambiguous at the very least.

3           MR. JACKSON: It's Item 3. I just read it --

4           CO-HEARING OFFICER WOLFF: I didn't find the  
5 question ambiguous.

6           MR. RUBIN: I'm not sure who he's talking  
7 about.

8           CO-HEARING OFFICER WOLFF: He's asking a  
9 general question: Is the witness aware of any such  
10 efforts?

11           MR. FUERST: Specific to -- well, I know that  
12 Cal Am is in negotiations, discussions with the  
13 Monterey Regional Water Pollution Control Agency to  
14 fund and further their groundwater replenishment  
15 program.

16           That would take recycled water, highly  
17 purified recycled wastewater, put it in the Seaside  
18 Basin so that it could be recovered by Cal Am and  
19 thereby allow them to reduce their Carmel River  
20 diversions.

21           So that -- the Regional Water Pollution  
22 Control Agency does not have water rights, per se, to  
23 the Carmel River, but they are working on a replacement  
24 project.

25           And there are other efforts that the DR -- the

1 Division of Ratepayers' Advocate has sponsored as an  
2 alternative to Cal Am's Coastal Water Project that  
3 have -- that has the possibility of providing a  
4 replacement source for Cal Am's current level of  
5 diversions from the Carmel River.

6 MR. JACKSON: Thank you, sir.

7 In Resolution number 2008-08, it indicates  
8 that the Monterey Peninsula Water Management District  
9 has worked diligently to develop new water supply  
10 projects. Do you have a water supply project proposed?

11 MR. FUERST: Yes.

12 MR. JACKSON: And what is it?

13 MR. FUERST: As we were hoping to complete the  
14 implementation of Phase 1, we're beginning discussions  
15 with Phase 2. We met with staff of the State Water  
16 Resources Control Board to see how we apply for water  
17 rights to serve that Phase 2 component that we looked  
18 at and had earlier identified.

19 MR. LAREDO: Excuse me. Is that Phase 2 of  
20 ASR?

21 MR. FUERST: Yes. Seaside ASR.

22 And in addition, the board, the Monterey  
23 Peninsula Water Management District board of directors  
24 in March -- no, in April -- directed as their highest  
25 priority that the district revisit its proposed

1 seawater desalination project in the Sand City area.

2           This was a project that was designed to  
3 produce 8400 acre feet a year. And it was worked on in  
4 2002 and 2003, and essentially an administrative draft  
5 was completed. It was never released as a public  
6 draft. The District chose to discontinue work on it  
7 while Cal Am went forward with the Coastal Water  
8 Project.

9           MR. LAREDO: And just for clarification,  
10 administrative draft of an Environmental Impact Report?

11           MR. FUERST: Thank you. So that project is  
12 going forward. Our board of directors has directed  
13 staff to retain consultants to do a constraint analysis  
14 to see if any of the current new conditions would  
15 preclude the feasibility of that seawater desalination  
16 project in the Sand City or former Fort Ord area.

17           CO-HEARING OFFICER WOLFF: Mr. Jackson, if you  
18 have any further questions about these options, I  
19 suggest you constrain them to the past, not the future.  
20 The future can't be relevant to past diligence of Cal  
21 Am.

22           MR. JACKSON: I'm not sure my question was  
23 going where that answer went, but I get the drift.

24           Mr. Fuerst, I understand that the District has  
25 a program that I believe you described on direct as a

1 Coastal Water Project?

2 MR. FUERST: No. The District does not have a  
3 Coastal Water Project.

4 MR. JACKSON: So you don't have anything to do  
5 with that project?

6 MR. FUERST: No.

7 MR. JACKSON: That's Cal Am's project?

8 MR. FUERST: Correct.

9 MR. JACKSON: Okay. Now going back to the ASR  
10 project, you've talked about two stages. And I believe  
11 in your testimony, to get -- to cut to the chase you  
12 said that the ASR project authorizes excess water over  
13 the NOAA fish flow. Is that right?

14 MR. FUERST: Right. Diversions from the  
15 Carmel River during the December through May period  
16 only when stream flows exceed the bypass flow  
17 requirements recommended by the National Marine  
18 Fisheries Service in June of 2002.

19 MR. JACKSON: And if the National Marine  
20 Fisheries Service changes their flow requirement, then  
21 that project disappears?

22 MR. FUERST: No, it would not disappear. I  
23 believe there is the ability to come back and revise  
24 the permit conditions in the water rights that the  
25 District and Cal Am jointly hold for that project.

1           MR. JACKSON: And you would come back to the  
2 State Water Resources Control Board to do that?

3           MR. FUERST: Yes.

4           MR. JACKSON: Okay. I'm done.

5           CO-HEARING OFFICER WOLFF: Thank, you sir.  
6 There before the expect's time. Congratulate you on  
7 that.

8           Mr. Silver.

9           MR. MCGLOTHLIN: Point?

10          CO-HEARING OFFICER WOLFF: Yes?

11          MR. MCGLOTHLIN: Hearing Officer Wolff,  
12 Russell McGlothlin on behalf of the City of Seaside.

13                 When you asked if there was other people  
14 who -- anybody who had other cross-examination of the  
15 witness. City of Seaside, based on some of the  
16 testimony, has about five minutes or less, if that's  
17 acceptable.

18          CO-HEARING OFFICER WOLFF: All right.

19          MR. MCGLOTHLIN: Thank you.

20          CO-HEARING OFFICER WOLFF: Mr. Silver.

21          CO-HEARING OFFICER WOLFF: How is the witness  
22 doing, and counsel?

23          MR. LAREDO: The witness is doing great.

24          CO-HEARING OFFICER WOLFF: Mr. Laredo, if you  
25 feel unable to perform, please tell us.

1           MR. LAREDO: We'll make it to 6:00, if we do  
2 not go past.

3           CROSS-EXAMINATION BY MR. SILVER  
4                           FOR SIERRA CLUB

5           MR. SILVER: Mr. Fuerst, I'd like to get some  
6 idea here. I think we're sort of missing the  
7 chronology and time that has elapsed regarding some of  
8 these projects.

9           I wanted to address the Aquifer Recovery  
10 Project. To the best of your knowledge, when was such  
11 a project first conceived?

12          MR. FUERST: That's a good question. I mean  
13 it was conceived many years ago, but it was for the --  
14 the project that's now been developed, it began in late  
15 1997 early 1998.

16          MR. SILVER: I see. And I take it in some  
17 sense it grew out of the notion that existed in 95-10  
18 relating to conjunctive use as between the Seaside  
19 aquifer and the Carmel River where the Board ordered,  
20 if I recall correctly, ordered production from the  
21 Seaside aquifer be maximized; is that correct?

22          MR. FUERST: Well, the Board ordered  
23 production -- maximum production of the natural  
24 recharge of the basin. The conjunctive use provides  
25 artificial recharge which would, you know, augment the

1 yield available.

2 MR. SILVER: So you just testified that the  
3 Aquifer Recovery Project was in a sense conceived of in  
4 1997. Now, it's --

5 MR. LAREDO: I believe that mischaracterizes  
6 his testimony.

7 MR. SILVER: I'm sorry.

8 MR. LAREDO: You said that the current project  
9 originated in '97.

10 MR. SILVER: Okay.

11 MR. LAREDO: He said that the prior concept  
12 actually developed before that.

13 MR. SILVER: Okay. I'm sorry.

14 So to the extent that this project originated  
15 in 1997, I take it it is also your testimony that the  
16 project is really just being implemented for the first  
17 time in substantial quantity, if you will, this year?  
18 Is that correct, this water year?

19 MR. FUERST: Not exactly. I think that it has  
20 been almost a ten-year test program that's involved  
21 developing wells in two of the aquifer units in the  
22 Seaside Basin to test their appropriateness for the  
23 aquifer recovery.

24 But during that time, the District did secure  
25 temporary water permits and did inject almost

1 2,000 acre feet into the Seaside Basin as part of that  
2 test program and has recovered about 1500 acre feet of  
3 that.

4 And part of those tests was to -- was not only  
5 to develop the quantities that could be injected and  
6 recovered but also do extensive water quality testing  
7 because of the introduction of Cal Am's treated water  
8 into the Seaside Groundwater Basin.

9 MR. SILVER: When did that testing program  
10 basically commence?

11 MR. FUERST: It began in 1998, either 1997 or  
12 1998.

13 MR. SILVER: And so was that a cooperative  
14 venture with Cal Am?

15 MR. FUERST: Certainly in the extent that Cal  
16 Am has provided the water for injection, yes.

17 MR. SILVER: And to the extent -- so to the  
18 extent it has provided water for the injection, it's  
19 been cooperative. Has there been any sense in which it  
20 has not been a cooperative project over the years  
21 between Cal Am and the District?

22 MR. FUERST: No, I think there has always  
23 been, you know, a cooperative -- meaning that there was  
24 a mutual consent agreement that that project should go  
25 forward.



1           Cal Am early on provided the water at no  
2 charge to the District. They have -- we worked with  
3 them to utilize portions of their system so that they  
4 could get the water to the ASR site while they were  
5 meeting customer needs and while they were complying  
6 with the quarterly budget.

7           So they, you know, we worked with them in  
8 terms of getting the water, testing the water quality.  
9 They do some of that for us. And then we -- working  
10 very extensively with modifications to their system so  
11 that we can have a reliable amount that -- ability to  
12 convey the amount that we're able to divert under our  
13 water right.

14           MR. SILVER: Did there come a time when there  
15 were disputes between Cal Am and the District with  
16 regard to who was to hold the water rights or  
17 assignment of water rights?

18           MR. FUERST: There was always a concern  
19 whether it would be in the public sector versus the  
20 private sector.

21           And it was agreed, as reflected in the  
22 agreement that is in my testimony as Exhibit DF-7, the  
23 Management & Operations Agreement that the district  
24 needed Cal Am and its existing system that could  
25 divert, treat, and transmit the water; and Cal Am could

1 utilize the District's existing dual-purpose ASR wells  
2 and that two together would make a successful project;  
3 and that based on that, the District and Cal Am agreed  
4 to move forward and jointly hold the water right for  
5 the Phase 1 ASR and work to acquire and exercise  
6 additional joint rights to meet the needs of the  
7 community and environment.

8 MR. LAREDO: If I could confer one moment.

9 (Discussion off the record)

10 MR. FUERST: Yeah, there were in -- I was not  
11 directly involved in all the water right matters, but  
12 it is my understanding that Cal Am did protest some of  
13 the early water right applications that the District  
14 submitted for this project. But those were resolved  
15 through that Management & Operations Agreement that was  
16 signed in 2006.

17 MR. SILVER: And to the extent that it seems  
18 to have taken almost 11 years to implement this  
19 project, in your judgment, did any of those protests  
20 have the effect of delaying the implementation of this  
21 project and/or testing?

22 MR. FUERST: No. I do not think so.

23 MR. SILVER: And to the best of your  
24 knowledge, did any of those protests go to a hearing  
25 before the Board?

1 MR. FUERST: No.

2 MR. SILVER: And I take it it was your  
3 testimony that basically the maximum that you would  
4 expect in terms of the yield from the Aquifer Recovery  
5 Project is 1500 acre feet per year; is that correct?

6 MR. FUERST: In any one year, right.

7 Again, I would note that the District's -- the  
8 water right for the Phase 1 allows, as was noted in  
9 testimony earlier today, the maximum amount that can be  
10 deferred is 2,426 acre feet. But under the operation  
11 scheme that was developed, only 1500 -- a maximum of  
12 1500 would be taken out in any one year.

13 The remainder would be left in storage to  
14 hedge against future consecutive dry years as part of  
15 the Phase 1, Aquifer Storage and Recovery.

16 MR. SILVER: And just for purposes of  
17 clarification, you did mention with regard to the  
18 Aquifer Recovery Project that the water is only taken  
19 during the winter months and would be in compliance  
20 with certain minimum flow standards that have been  
21 developed by National Marine Fisheries Service?

22 MR. FUERST: Correct, and those --

23 MR. SILVER: So with respect to the summer  
24 months when flows are lower in the river, there are no  
25 established minimum bypass flows; is that correct?

1           MR. RUBIN: I object to the question; I'm not  
2 sure of the relevance.

3           CO-HEARING OFFICER WOLFF: The relevance of  
4 the ASR project?

5           MR. RUBIN: No, he asked a general question  
6 about flows, standards during the summer --

7           MR. SILVER: I'm trying to clarify that the  
8 Aquifer Recovery Project has nothing to do with the  
9 establishment of minimum flows during critical periods  
10 during the summer when water is low, that it actually  
11 only has a, if you will, a minimum flow requirement  
12 only in the winter months with regard to -- it's only  
13 triggered by diversions from the river for purpose of  
14 aquifer recovery.

15           CO-HEARING OFFICER WOLFF: Why is that  
16 relevant?

17           MR. SILVER: I want the record to be clear  
18 that the District has not regulated minimum flows.  
19 Just so there's no misunderstanding. That basically  
20 the regulatory --

21           CO-HEARING OFFICER WOLFF: Would you like to  
22 rephrase your question to ask whether the District has  
23 regulated minimum flows?

24           MR. SILVER: I'll be happy to do that.  
25 Has the District imposed minimum flow

1 requirements with respect to its management of the --  
2 Cal Am on the Carmel River?

3 MR. RUBIN: Again, I'll object to the question  
4 on relevance. I don't know how that relates to the  
5 issues --

6 CO-HEARING OFFICER WOLFF: I'll overrule  
7 because earlier today we determined the condition of  
8 the river is potentially relevant to the issue of  
9 diligence, although that argument is going to have to  
10 be sustained in the closing briefs. That's where we  
11 are.

12 Go ahead.

13 MR. FUERST: Yes. Again, through the  
14 combination of the District's quarterly water supply  
15 and strategy budget process that I described as well as  
16 the annual low flow Memorandum of Agreement between the  
17 District, Department of Fish and Game, and Cal Am, we  
18 incorporate the conditions of the State Board orders as  
19 well as the conservation agreement that Cal Am has with  
20 the National Marine Fisheries Service as well as  
21 former -- as well as permit conditions in Cal Am's  
22 license for Los Padres Reservoir.

23 For example, under that license, Cal Am has to  
24 always maintain a release of 5 CFS below Los Padres  
25 Reservoir. That's a 1948 condition, but it's included

1 in our agreement.

2 The low flow agreement looks to, as I tried to  
3 explain earlier, with Department of Fish and Game and  
4 Cal Am cooperatively decide how to maximize the storage  
5 that exists at the end of the rainy season going into  
6 the low-flow season.

7 For example, this year the MOA calls for Cal  
8 Am to maintain a minimum release below San Clemente  
9 Reservoir of 11 CFS in -- throughout the month of June,  
10 9 cubic feet per second in July, 5 in August, and going  
11 down until I think 4 CFS in December.

12 So the group does come up with the maximum  
13 diversions that can be sustained from May essentially  
14 through December.

15 MR. SILVER: And that's on an annual basis?

16 MR. FUERST: That's done each year for the  
17 low-flow season, essentially May through December.

18 MR. SILVER: And who are the consulting  
19 agencies?

20 MR. FUERST: The agreement is between the  
21 Department of Fish and Game and the California -- and  
22 California American Water, and we're also a signatory.  
23 The representatives from the National Marine Fisheries  
24 Service do not sign the agreement, but they are part of  
25 the negotiations.

1 MR. SILVER: And do you recall what standards  
2 were established for the previous water hearing?

3 MR. FUERST: From this -- in 2007?

4 MR. SILVER: You were just addressing, I  
5 think, what the standards would be for this year. What  
6 about last year?

7 MR. RUBIN: I'm going to object; again.

8 CO-HEARING OFFICER WOLFF: On different  
9 grounds?

10 MR. RUBIN: Well, again, it's on relevance.  
11 The question, what standards were set last year. I'm  
12 not sure how that relates to California American  
13 Water's compliance with Order 95-10.

14 CO-HEARING OFFICER WOLFF: Overruled.

15 But Mr. Silver, you need to get to the point  
16 and wrap this up.

17 MR. SILVER: Yes.

18 MR. FUERST: Very briefly, because of the  
19 critically dry water year, we didn't have an  
20 opportunity to provide a high flow. So I think we  
21 started in -- at about 7 CFS, and for October,  
22 November, December the minimum release that Cal Am was  
23 required to make below San Clemente Dam was 3 cubic  
24 feet per second.

25 And again, note that Cal Am operates their Los

1 Padres and San Clemente Dams, reservoirs, in tandem so  
2 that the measuring point for releases into the lower  
3 valley is a weir immediately below San Clemente Dam.

4 MR. SILVER: You have addressed an effort  
5 by -- or an agreement between Cal Am and Sand City with  
6 respect to possible future use of water from the desal  
7 plant. When will that desal plant come into being?

8 MR. FUERST: In 2009. I'm not sure of the  
9 month.

10 MR. SILVER: And how long has that plant been  
11 in the planning stage, to the best of your knowledge?

12 MR. FUERST: I would say at least five years.  
13 Since 2002, 2001.

14 MR. SILVER: With regard to, generally,  
15 desalinization in the Peninsula, has the District ever  
16 espoused an official policy with respect to a need for  
17 that as a modality of producing water for this area?

18 MR. FUERST: Well, the District in the early  
19 '90s developed a proposal, a 3,000 acre foot per year  
20 seawater desalination project that was fully permitted,  
21 and the CEQA documentation was completed; and it went  
22 to a vote of the populace in the Peninsula which they  
23 chose not to approve that project, seawater  
24 desalination project in Sand City.

25 And as I mentioned, as recently as April of



1 this year, the District Board took the position that  
2 their highest priority would be to revisit a project in  
3 that area. So that project is being investigated on a  
4 fast track by the District at this time.

5 MR. SILVER: By in that area, you mean the  
6 Sand City area?

7 MR. FUERST: Correct. The City of Sand City  
8 or, again, because of Sand City developing their --

9 CO-HEARING OFFICER WOLFF: Mr. Fuerst, I don't  
10 in any way want to constrain your giving a full answer  
11 if you feel you need to; but at this late hour, short  
12 answers are perfectly adequate, I think.

13 MR. FUERST: I understand.

14 MR. SILVER: I'm sorry.

15 CO-HEARING OFFICER WOLFF: I believe the  
16 answer to your question --

17 MR. FUERST: In the Sand City area; you are  
18 correct.

19 MR. SILVER: Okay. Now with regard to the --  
20 and I'm sorry; it's late in the day, so I lost the  
21 name. It's called the -- is the CWP the Cal Am desal  
22 project that's pending before the PUC?

23 MR. FUERST: Their project is the Coastal  
24 Water Project.

25 MR. SILVER: Coastal Water Project.

1           MR. FUERST: And it does include a seawater  
2 desalination plant and an ASR component.

3           MR. SILVER: And with respect to that, when is  
4 that anticipated that that would come into operation?

5           MR. FUERST: It's my understanding that  
6 project would begin delivering water in 2015.

7           MR. SILVER: And so at the present time the  
8 current status of that so far as you understand is the  
9 PUC is preparing an environmental document in  
10 connection with that?

11           MR. FUERST: That's correct. That is  
12 scheduled -- the draft EIR is scheduled to be released  
13 by December of 2008.

14           MR. SILVER: Okay. And I just wanted to ask a  
15 few questions concerning the Los Padres Dam proposals.

16           There's been some testimony earlier that  
17 Decision 1632 and Water Rights Order 95-10 basically  
18 came out on the same day, that -- I take it shortly  
19 after that the proposal that was before the Board by  
20 the District, namely the New Los Padres Dam was  
21 rejected by the voters who declined to approve funds  
22 for that.

23           Can you indicate the history then thereafter  
24 once that project was rejected? I take it there was an  
25 application by Cal Am to --

1 CO-HEARING OFFICER WOLFF: Mr. Silver, can you  
2 make the question to the point? Are you specifically  
3 asking about an application on a day or something?

4 MR. SILVER: Can you describe what happened  
5 after the project was rejected by the voters?

6 MR. FUERST: The District project was rejected  
7 in November of '95. Cal Am applied for a similar  
8 project in November of 1996. We began reviewing their  
9 application.

10 So much of '97 was deeming their application  
11 complete. They became the project component for the  
12 project that was renamed the Carmel River Dam and  
13 Reservoir Project which was physically the same, a  
14 24,000 acre foot reservoir on the main stem.

15 And we began and completed a draft  
16 supplemental EIR on that project in November of 1998.

17 MR. SILVER: And when did it come -- when did  
18 the District reject that project?

19 MR. LAREDO: Objection. It assumes the  
20 District rejected the project.

21 MR. SILVER: Well, when did the -- did the  
22 District proceed to take some other action after the  
23 production of the S --

24 MR. FUERST: Supplemental EIR.

25 MR. SILVER: -- SEIR in -- draft SEIR, and you

1 said that was in 1998.

2 MR. FUERST: Well, in August of 2003, the  
3 District denied Cal Am's application based on that --  
4 the Carmel River Dam project as amended to their  
5 distribution system.

6 MR. SILVER: And what took place between 1998  
7 and 2003?

8 MR. LAREDO: What took place?

9 CO-HEARING OFFICER WOLFF: With respect to  
10 what?

11 MR. SILVER: With respect to the District's  
12 action. There was a draft supplemental EIR in '98, and  
13 then 2003 described some subsequent action. What took  
14 place during those intervening years?

15 MR. LAREDO: Objection; vague and ambiguous.

16 CO-HEARING OFFICER WOLFF: I agree, sustained.

17 Mr. Silver, wrap it up. It's getting late.  
18 Ask specific questions please.

19 MR. SILVER: All right.

20 CO-HEARING OFFICER WOLFF: Couple more  
21 questions.

22 MR. SILVER: Why did the disposition of the  
23 project take place in 2003 rather than earlier?

24 MR. FUERST: Between 1998 and 2003, there was  
25 a process initiated by the State Legislature which

1 required the California Public Utilities Commission to  
2 develop what was referred to as a Plan B, an  
3 alternative to a dam, an alternative that could be  
4 pursued if a dam could not be developed.

5 That Plan B was taken over by Cal Am as their  
6 Coastal Water Project.

7 In February of 2003, Cal Am applied to PUC to  
8 obtain a Certificate of Public Convenience and  
9 Necessity to recover the cost to develop the Coastal  
10 Water Project. So at that point, they effectively had  
11 two projects.

12 And that's when the District contacted Cal Am,  
13 and there was a public hearing in which the District  
14 denied Cal Am's application for the Carmel River Dam.

15 CO-HEARING OFFICER WOLFF: Mr. Fuerst, that  
16 was in your testimony, was it not?

17 MR. FUERST: Yes.

18 CO-HEARING OFFICER WOLFF: Mr. Silver, would  
19 you ask some questions about the testimony rather than  
20 asking Mr. Fuerst to repeat the testimony?

21 STAFF COUNSEL TAYLOR: Pardon me, Mr. Wolff.  
22 This is something that really interested me in the  
23 record, and I'd like to get a little clarification  
24 here.

25 One might almost infer, in reading from your

1 exhibits and some of those from Cal Am, that the  
2 District literally got in the way of Cal Am proceeding  
3 with the dam here and which was -- would have been a  
4 workable solution for getting Cal Am legal rights on  
5 the Carmel River.

6           And I'd like to know to what extent the  
7 District facilitated or blocked Cal Am going forward  
8 with the modified Los Padres project.

9           MR. FUERST: In November of 1998, the  
10 supplemental -- the draft supplemental EIR was  
11 completed, and there were extensive comments on that.  
12 So that alone, it was -- that was going to be an effort  
13 to respond to.

14           At the same time, that's right with when the  
15 PUC's Plan B process started. That was outside the  
16 District's control.

17           In fact, that's one of the reasons why the EIR  
18 never was completed. Because we were in a catch-22:  
19 As long as we were developing the dam and alternatives  
20 to it and there was this Plan B alternative being  
21 developed, that would always represent new and  
22 significant information. It would be difficult for us  
23 to complete the process.

24           In the meantime, the District received a  
25 communication from the National Marine Fisheries

1 Service advising us that we should no longer pursue the  
2 Carmel River Dam and Reservoir project because of  
3 impacts to the then-threatened steelhead population.

4 We indicated we are no longer in the project.  
5 We contacted Cal Am -- well, we contacted NOAA  
6 Fisheries in response and said we aren't the project  
7 proponent any longer. We were, but now we're not;  
8 we're the Lead Agency. It's not within our authority  
9 to rescind this application. We'll pass your letter  
10 along to Cal Am.

11 So Cal Am received that letter, and they made  
12 their own decision whether the project could eventually  
13 be approved or not, given National Marine Fisheries  
14 Service indication that they would probably issue a  
15 jeopardy decision.

16 You know, given that, there was -- and the  
17 development of Plan B, which when that process was over  
18 Cal Am embraced it and named it the Coastal Water  
19 Project which again is that large desal facility at  
20 Moss Landing and the smaller ASR component.

21 So the District was proceeding -- and I guess  
22 in fairness I would say that the District Board, when  
23 it was looking at Cal Am's original proposal which was  
24 for the New Los Padres project renamed the Carmel River  
25 Dam as a no-growth project, that was Cal Am's proposal.

1           Then there were elements in the community that  
2 wanted to see a larger project. If you're going to put  
3 that effort into developing a project, not only  
4 legalize the supply, make it reliable, but have water  
5 for growth. So the Board did, at that time, look at  
6 Plan B, Plan B-plus, Plan A-minus. Different  
7 variations that had other levels of demand that could  
8 be met.

9           And so that was a decision by the District  
10 Board to enlarge the scope of Cal Am's proposal. But  
11 all that came to a head in February when Cal Am  
12 announced they were now actively pursuing the Coastal  
13 Water Project.

14           STAFF COUNSEL TAYLOR: Thank you.

15           MR. SILVER: When you say February, of what  
16 year?

17           MR. FUERST: 2003.

18           MR. SILVER: And do you have any recollection  
19 as to when the steelhead was listed as a threatened  
20 species?

21           MR. FUERST: I believe it was in August of  
22 1997.

23           MR. SILVER: And did you have any knowledge or  
24 information concerning any policy pronouncement by  
25 National Marine Fisheries Service that they would not



1 favor dams on rivers that were occupied by steelhead?

2 MR. FUERST: Not in general. I know that we  
3 received a letter that they were concerned about  
4 development of a main stem dam on the Carmel River.

5 MR. SILVER: I have no other questions.

6 CO-HEARING OFFICER WOLFF: Thank you very  
7 much. Mr. Jamison?

8 CROSS-EXAMINATION BY MR. JAMISON

9 FOR PEBBLE BEACH COMPANY

10 MR. JAMISON: Good afternoon, Mr. Fuerst. I'm  
11 Thomas Jamison. I represent the Pebble Beach Company.

12 Mr. Fuerst, you are familiar with the Carmel  
13 Area Wastewater District/Pebble Beach Community  
14 Services District Wastewater Reclamation Project?

15 MR. FUERST: Yes, I am.

16 MR. JAMISON: I'll refer to it just as the  
17 Reclamation Project from here on out.

18 And in fact, the Water Management District,  
19 Monterey Peninsula Water Management District, was a  
20 major proponent of this project; is that correct?

21 MR. FUERST: That's correct.

22 MR. JAMISON: And back in the 1980s, the Water  
23 Management District determined that golf courses in Del  
24 Monte Forest -- well, it determined that golf courses  
25 in Del Monte Forest and other open spaces were being

1 irrigated with potable water, correct?

2 MR. FUERST: That's correct.

3 MR. JAMISON: And if those golf courses and  
4 open spaces were converted to reclaimed water, it would  
5 save roughly 800 acre feet of potable water; is that  
6 correct?

7 MR. FUERST: Per year.

8 MR. JAMISON: Per year.

9 And in order to achieve that savings, the  
10 Water Management District put out a proposal adopting  
11 an ordinance to the effect that it would select a  
12 fiscal sponsor who would guarantee the funding for  
13 converting -- building a system and facilities to  
14 convert the Del Monte Forest golf courses and open  
15 spaces to reclaim water from potable water, and that in  
16 that connection that that fiscal sponsor would be  
17 granted no more than half of the water savings in  
18 potable water service by Cal Am in order to serve new  
19 development of that fiscal sponsor. Is that an  
20 accurate description?

21 MR. FUERST: That's correct.

22 MR. JAMISON: Thank you.

23 And the Water Management District in fact,  
24 pursuant to the application of Pebble Beach Company,  
25 selected Pebble Beach Company as the fiscal sponsor,

1 correct?

2 MR. FUERST: And it's my understanding that  
3 the Pebble Beach Company had two other fiscal sponsors  
4 for smaller amounts, the Griffin estate and Macomber  
5 estate.

6 MR. JAMISON: Yes, thank you for that  
7 correction.

8 And in connection with selecting the fiscal  
9 sponsors which you just named, the Water Management  
10 District entered into agreements with the Pebble Beach  
11 Company which granted to the Pebble Beach Company  
12 365 acre feet of a water entitlement; and the Lohr  
13 interest, 10 acre feet of water entitlement; and the  
14 Griffin interest, 5 acre feet in return for Pebble  
15 Beach Company's guarantee of the cost of the  
16 Reclamation Project?

17 MR. FUERST: Correct. 380 acre feet of the  
18 800.

19 MR. JAMISON: Yeah, 380 acre feet of 800  
20 total.

21 The Reclamation Project indeed went forward  
22 and was completed in September of 1994; is that  
23 correct?

24 MR. FUERST: That is correct.

25 MR. JAMISON: And it began delivering

1 reclaimed water and has continuously delivered  
2 reclaimed water to the golf course and other open  
3 spaces in the Del Monte Forest since that time?

4 MR. FUERST: That's my understanding.

5 MR. JAMISON: I have two items which I would  
6 like to have Mr. Fuerst look at.

7 And one -- and for the benefit of the Board  
8 and the hearing staff as well as the audience, these  
9 are exhibits to Pebble Beach Company's -- it's  
10 identified as Pebble Beach Company. It's Exhibit MS-1  
11 and MS-5. Those have not been offered into evidence  
12 yet, but I would like Mr. Fuerst to review them.

13 Mr. Fuerst, first of all, I will give you a  
14 letter. It's identified, again, Mark Stilwell's  
15 testimony. And in the exhibits identified Pebble Beach  
16 Company MS-5, it's a letter dated March 27, 1998,  
17 that's addressed to you and to Mr. Larry Foy, and it's  
18 signed by Edward C. Anton, Chief, Division of Water  
19 Rights.

20 Mr. Fuerst, in that letter on the first page  
21 at the bottom of the page, last paragraph at the bottom  
22 of the page it states that:

23 Use of treated wastewater has reduced  
24 the potable water deliveries of  
25 California American Water Company

1           (Cal-Am) for this irrigation project by  
2           at least 500 acre feet annually.

3           Is that your understanding as of 1998?

4           MR. FUERST: Yes.

5           MR. JAMISON: Thank you.

6           And the Reclamation Project was originally  
7           designed to produce 800 acre feet or actually to  
8           produce 800 acre feet and supply 800 acre feet without  
9           supplementation by potable water. And was it necessary  
10          once the Reclamation Project was in operation to  
11          supplement the reclaimed water with potable water?

12          MR. FUERST: Yes. Once what's now been  
13          considered to be Phase 1 of the Reclamation Project was  
14          under way, it was recognized that Cal Am was using --  
15          excuse me -- that the Reclamation Project was using  
16          approximately 300 acre feet a year of -- continuing to  
17          use 300 acre feet a year, per year, of Cal Am water for  
18          make-up water in summertime and flushing purposes  
19          during the irrigation season.

20          MR. JAMISON: Okay. And just to expound on  
21          that a little bit, why was the flushing necessary?

22          MR. FUERST: The water was very high quality,  
23          but it had high levels of sodium which was detrimental  
24          to particular grasses on the courses in the Del Monte  
25          Forest.

1           MR. JAMISON:  And why was the supplementation  
2 necessary for -- I forget how you described it, but --

3           MR. FUERST:  There were two types.

4           One, it was necessary to use Cal Am water  
5 approximately once every five to six weeks to flush the  
6 sodium through the root zone so that the grass would  
7 not be harmed.  That totalled about 150 acre feet per  
8 year.

9           Then in addition, the Reclamation Project had  
10 a limit to the amount of water it could produce on any  
11 one day, and there were periods during the summertime  
12 when more water was needed than the Reclamation Project  
13 could provide, so Cal Am water was used to augment  
14 that.

15          MR. JAMISON:  Okay.

16          MR. FUERST:  That was about 150 acre feet per  
17 year.

18          MR. JACKSON:  Mr. Wolff, I didn't want to  
19 interrupt till he was done, but I've got a relevance  
20 question, which is:  This project as I just heard this  
21 was done before 95-10?  And so it would have been  
22 included in 95-10's calculation?

23          CO-HEARING OFFICER WOLFF:  Are you registering  
24 an objection?

25          MR. JACKSON:  Yeah, I'm objecting to its

1 relevance if I heard that correctly.

2 CO-HEARING OFFICER WOLFF: Mr. Jamison, what's  
3 the relevance?

4 MR. JAMISON: It's relevant for a number of  
5 reasons, Hearing Officer Wolff.

6 First of all, the Reclamation Project did not  
7 commence operation until September of 1994. I can't  
8 find -- the facts that are being recited now I can't  
9 find anywhere in Order 95-10 or I haven't looked at the  
10 documents leading up to it.

11 In addition, I have not finished the question  
12 yet, and there were definitely actions taken after  
13 95-10 was adopted that are relevant.

14 CO-HEARING OFFICER WOLFF: I understand the  
15 concerns expressed in the testimony you submitted about  
16 sustaining the water supply in the future. It's  
17 clearly relevant to remedy phase. I don't see how it's  
18 relevant to the liability phase, so if you could  
19 elucidate that.

20 MR. JAMISON: Okay. Let me elucidate that.

21 One of the issues under 95-10 is that Cal Am  
22 was ordered to take certain conservation measures. And  
23 in fact, reclamation was mentioned as one conservation  
24 measure.

25 To the extent that Cal Am has participated and

1 cooperated in the Reclamation Project, it has carried  
2 out at least in that respect its obligation under 95-10  
3 to participate in the conservation effort.

4 In addition, Mr. Fuerst's testimony has, both  
5 written and oral, has indicated that the Water  
6 Management District has employed, with the cooperation  
7 of Cal Am, a number of water conservation measures and  
8 programs and so forth; and this is a major portion of  
9 it, whether you consider it conservation or new water,  
10 and you could consider it either way because it's  
11 contributed a tremendous savings in withdrawals from  
12 the Carmel River.

13 And there's one other thing. I want to lay  
14 the foundation, at least the background, for what I  
15 think -- it's not necessarily a misconception, but  
16 things aren't being necessarily accurately portrayed in  
17 this respect, in terms of a number.

18 And that is the conservation goal has been  
19 described as an 11,285 acre feet. And in the letter  
20 I'm going to question Mr. Fuerst on in a second, that  
21 is not correct. The conservation goal is 11,285 acre  
22 feet plus the amount of water supplied to Pebble Beach  
23 Company under its water entitlement.

24 CO-HEARING OFFICER WOLFF: Again, as I  
25 commented earlier in the day, these are issues you can



1 bring up when you present your case-in-chief.

2 So if you could stay focused on the knowledge  
3 of this witness and question him to his testimony or  
4 on, you know, issues clearly relevant to Condition 2 of  
5 the Order.

6 MR. JAMISON: Yeah.

7 CO-HEARING OFFICER WOLFF: I do see a loose  
8 relationship to Condition 2 of the Order, but it's  
9 loose so if you could get along, move along.

10 MR. JAMISON: Thank you, Mr. Wolff, and I  
11 will. But I think it is relevant, however tenuously  
12 you may see that it is relevant. Thank you.

13 All right. And just to pick up the  
14 questioning: And the inability to supply water during  
15 what we might call peak demand was because of the lack  
16 of storage; is that correct?

17 MR. FUERST: That is correct. Storage of the  
18 reclaimed water.

19 MR. JAMISON: Storage of the reclaimed water.  
20 Now, I am going to show you, give you a -- well, let me  
21 ask you first: What -- you've identified two problems.  
22 What actions have been taken to address those problems  
23 with the Reclamation Project?

24 MR. FUERST: With respect to the quantity, the  
25 need to have make-up water during the summertime, one

1 of the project's sponsors, the Pebble Beach Community  
2 Service District, acquired a former reservoir site in  
3 the Del Monte Forest area from California American  
4 Water.

5 They have upgraded that site, made it  
6 seismically -- made it consistent with current seismic  
7 criteria so that now can act as a storage site for up  
8 to 400 acre feet per year of reclaimed water.

9 So they can continue to produce water outside  
10 the irrigation season to fill this reservoir and then  
11 during the irrigation season draw on that reservoir for  
12 peak daily demands rather than go to the Cal Am system.

13 MR. JAMISON: Okay. And has that project been  
14 completed, Mr. Fuerst?

15 MR. FUERST: Yes. That project has been  
16 completed for approximately two years.

17 MR. JAMISON: Okay. And the second issue that  
18 you mentioned, the salinity problem?

19 MR. FUERST: The second issue as opposed to  
20 water quantity is water quality. And to improve the  
21 quality so that it does not adversely affect the turf,  
22 the grass, one other project sponsor, the Carmel Area  
23 Wastewater District, which presently does tertiary  
24 treatment for the water that goes through the golf  
25 courses, has added microfiltration reverse osmosis so

1 they're basically distilling the water that will be  
2 made available to the golf course.

3 And that project has been under construction  
4 and is in the test mode as we speak. They were  
5 delivering water from the Carmel Area Wastewater  
6 District plant last week.

7 MR. JAMISON: Okay. So does that mean that  
8 that project is expected to come online and be  
9 producing soon?

10 MR. FUERST: Right. Within the year. It's a  
11 matter of turning over some of the water in the  
12 reservoir that was produced before that, but definitely  
13 by the next irrigation season.

14 MR. JAMISON: Okay. Now you testified that  
15 before the project was using approximately 300 acre  
16 feet of potable water for irrigation.

17 When these two projects are completed, how  
18 much would you expect -- potable water would you expect  
19 to be used in the project for irrigation?

20 MR. FUERST: I think it would be on the order  
21 of 10 to 20 acre feet in case there is some down time,  
22 unexpected down time, between the different components.

23 MR. JAMISON: Okay. And with that, one would  
24 expect that that would be 300 acre feet of potable  
25 water that Cal Am doesn't need to deliver anymore to

1 the project?

2 MR. FUERST: That's correct.

3 MR. JAMISON: Okay. And just -- what -- the  
4 original project, what was the cost of the original  
5 project, Mr. Fuerst?

6 MR. FUERST: The original project cost just  
7 under \$34 million.

8 MR. JAMISON: Okay. And the improvements that  
9 we've just mentioned, Forest Lake Reservoir and the  
10 desal facilities, the cod plant: Do you know what the  
11 cost of those are?

12 MR. FUERST: It's my understanding that the  
13 improvements for the water quantity and water quality  
14 problems will cost \$34 million also.

15 MR. JAMISON: Okay. And is it correct that  
16 the \$34 million for the original project was financed  
17 by certificates of participation which have been  
18 guaranteed by Pebble Beach Company?

19 MR. FUERST: Correct.

20 MR. JAMISON: And that the 34 million for the  
21 two components of improvement have been essentially  
22 paid for by Pebble Beach Company with proceeds from  
23 sales of this water entitlement as well as a guarantee  
24 by Pebble Beach Company?

25 MR. FUERST: Yes.

1 CO-HEARING OFFICER WOLFF: Mr. Jamison, you've  
2 asked for ten minutes. Are you -- you are past ten  
3 minutes.

4 Mr. JAMISON: I have simply one more issue  
5 very quickly.

6 CO-HEARING OFFICER WOLFF: All right.

7 MR. JAMISON: Thank you, Mr. Wolff.

8 I'm now referring to the letter that I just  
9 handed you, Mr. Fuerst, the letter to you from  
10 Mr. Anton -- Mr. Anton. And I am on the second page  
11 and third full paragraph, and I'm just going to read  
12 from this and it says:

13 Thus the state SWRCB will use its  
14 enforcement discretion and not penalize  
15 Cal Am for excess diversions from the  
16 Carmel River as long as those diversions  
17 do not exceed 11,285 acre feet annually  
18 plus the quantity of potable water  
19 provided to Pebble Beach Company and  
20 other sponsors under this entitlement  
21 for the use of these lands.

22 I'm trying to think how to phrase this  
23 question.

24 Would you conclude, Mr. Fuerst, from that  
25 statement that Cal Am -- well -- that order 95-10, in

1 terms of its conservation goal is 11,285 acre feet  
2 annually plus the amount of water actually delivered,  
3 potable water actually delivered, under the water  
4 entitlement granted by the Water Management District?

5 MR. JACKSON: I'm going to object to this  
6 question. It calls for this gentleman to make a legal  
7 determination as to what --

8 CO-HEARING OFFICER WOLFF: Sustained.

9 MR. JAMISON: May I respond to that Mr. Wolff,  
10 briefly?

11 CO-HEARING OFFICER WOLFF: You may rephrase  
12 your question, but don't ask this witness to express a  
13 legal opinion.

14 MR. JAMISON: May I comment on the question,  
15 whether it's a legal question or not?

16 CO-HEARING OFFICER WOLFF: All right.

17 MR. JAMISON: Mr. Fuerst is the general  
18 manager of the Monterey Peninsula Water Management  
19 District. He is the one who is responsible for  
20 reporting quantities of use to Cal Am as well as  
21 quantities of use under the water entitlement and  
22 determining whether things are exceeded, whether limits  
23 are exceeded.

24 I think he's qualified to answer this  
25 question. It's not a legal conclusion. He's the one

1 who has to carry this out.

2 CO-HEARING OFFICER WOLFF: Repeat the  
3 question? Can the reporter repeat the question?

4 (Record read)

5 MR. JACKSON: Mr. Wolff, I have two problems  
6 with that question.

7 CO-HEARING OFFICER WOLFF: The objection is  
8 sustained.

9 Mr. JAMISON: One last question.

10 CO-HEARING OFFICER WOLFF: We're still working  
11 on it.

12 MR. JAMISON: Yeah.

13 Mr. Fuerst, would you as general manager of  
14 the Monterey Peninsula Water Management District and  
15 presumably responsible for implementing this letter of  
16 Mr. Anton consider Cal Am to be in violation of Order  
17 95-10 if Cal Am delivered 11,285 acre feet and in  
18 addition delivered additional water up to 380 acre feet  
19 for the Pebble Beach water entitlement?

20 MR. JACKSON: And I'm going to object to that  
21 on the grounds that it completely misconstrues 95-10.  
22 He's used the term conservation goal for the number  
23 11,000-whatever, and he's also used the word  
24 entitlement. And --

25 CO-HEARING OFFICER WOLFF: Sustained.

1 I'll give you one more opportunity to rephrase  
2 the question.

3 Mr. JAMISON: Mr. Wolff, may I point out I did  
4 not use the word conservation goal in that question.

5 CO-HEARING OFFICER WOLFF: They're going to  
6 kick us out soon.

7 You did ask the witness to express his opinion  
8 about whether -- about compliance with 95-10; and his  
9 opinion with respect to 95-10 is some sort of legal  
10 conclusion. He's not qualified to make and express an  
11 opinion on that.

12 Mr. JAMISON: Okay. Well, we won't take up  
13 any more time then. We'll let the letter speak for  
14 itself.

15 CO-HEARING OFFICER WOLFF: The letter does  
16 speak for itself.

17 Mr. JAMISON: Thank you.

18 CO-HEARING OFFICER BAGGETT: Thank you.

19 MR. JAMISON: Thank you, Mr. Fuerst.

20 MR. LAREDO: Mr. Wolff, I do have one item, if  
21 I could. While we've been waiting here, I did as -- I  
22 do have the full text of what was identified as SC-2,  
23 and what I'd like to do -- I only have one copy. If I  
24 could lodge this with your staff for review and then we  
25 would move this tomorrow?



1 CO-HEARING OFFICER WOLFF: That's fine. And  
2 due to the hour, I think with Mr. Rubin's permission  
3 we'll commence in the morning with Mr. McGlothlin, and  
4 then you'll follow him, finish your cross-examination  
5 in the morning.

6 MR. RUBIN: I don't think you need my  
7 permission to set the schedule.

8 CO-HEARING OFFICER WOLFF: Well, I was putting  
9 Mr. McGlothlin ahead of you, actually. Are you fine  
10 with that?

11 MR. RUBIN: Of course.

12 CO-HEARING OFFICER WOLFF: So we'll start at  
13 8:30 with Mr. McGlothlin.

14 Are there any final essential items we need to  
15 handle today? If not, we will start at 8:30. Thank  
16 you all.

17 \* \* \*

18 (Thereupon the hearing recessed at 6:00  
p.m.)

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10 I further certify that I am not of counsel or  
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12 any way interested in the outcome of said meeting.

13 IN WITNESS WHEREOF, I have hereunto set my  
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